CATCHWORDS

CONSTITUTIONAL LAW - judicial power of the Commonwealth - constitutional validity of s 7 of the *International Arbitration Act* 1974 (Cth) - federal jurisdiction - whether section operates to oust jurisdiction of the Court - common law principle of non-ouster of jurisdiction - common law principle does not delimit the power of the legislature - judicial power of the Commonwealth - whether section amounts to a usurpation by the legislature of judicial power - whether Court must act at the direction of the legislature - section enables the agreement of the parties to be implemented - whether section confers judicial power on arbitrators - nature of final act of arbitrators - arbitrators have no power to enforce determination - arbitrators performing contractual function

ARBITRATION - jurisdiction - whether trade practices claim capable of settlement by arbitration - whether trade practices claim is in respect of "defined legal relationship" - "defined legal relationship" may be a statutory relationship

Commonwealth of Australia Constitution Act
International Arbitration Act 1974 (Cth), s 7
Trade Practices Act 1974 (Cth), ss 52, 82
Admiralty Act 1988 (Cth)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art II(1)

Scott v Avery(1856) 5 HL Cas 811, applied
Queen v Davison (1954) 90 CLR 353, applied
Prentis v Atlantic Coast Line Co (1908) 211 US 210, applied
Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197, cited
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, cited
Kable v Director of Public Prosecutions (1996) 138 ALR 577, discussed
Liyanage v The Queen [1967] 1 AC 259, distinguished
Polyukhovich v The Commonwealth (1991) 172 CLR 501, considered
QH Tours Ltd v Ship Design and Management (Aust) Pty Ltd (1991) 105 ALR 371, cited
Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160, cited
Allergan Pharmaceuticals Inc v Bausch & Lomb Inc (1985) ATPR ¶ 40-636, distinguished

HI-FERT PTY LIMITED, CARGILL FERTILIZER INC - v -KIUKIANG MARITIME CARRIERS & WESTERN BULK CARRIERS (AUSTRALIA) LTD
No NG 778 of 1996
Tamberlin J
Sydney, 30 June 1997

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. NG 778 of 1996
)
GENERAL DIVISION)
)
IN ADMIRALTY)

BETWEEN: **HI-FERT PTY LIMITED**
First Plaintiff

CARGILL FERTILIZER INC.
Second Plaintiff

AND: **KIUKIANG MARITIME CARRIERS INC.**
First Defendant

WESTERN BULK CARRIERS (AUSTRALIA) LTD
Second Defendant

CORAM: TAMBERLIN J
PLACE: SYDNEY
DATED: 30 JUNE 1997

REASONS FOR JUDGMENT

TAMBERLIN J:

On 4 December 1996 I delivered judgment in relation to the construction of the arbitration clause in a Time Charter made between Hi-Fert Pty Ltd ("Hi-Fert") and Western Bulk Carriers (Australia) Ltd ("WBC") dated 11 November 1993.

The arbitration clause is cl 34 of the Time Charter which reads:

"Clause 34
ARBITRATION

> *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."*

I decided that, on its true construction the disputes raised in the Statement of Claim were within cl 34. The nature of these disputes is discussed in the earlier judgment. One important consideration taken into account in that decision was the fragmentation of the proceedings and the unlikelihood of the parties having intended such a result if only part of the proceedings were heard in Australia.

The present reasons are concerned, in substance, with three questions raised by the plaintiffs as to the constitutional validity of s 7 of the *International Arbitration Act* 1974 (Cth) ("the IA Act") pursuant to which the stay application was made.

That section provides:

7.(1) *Where:*

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

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

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

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

this section applies to the agreement.

(2) *Subject to this Part,* ***where:***

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

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

on the application of a party *to the agreement,* ***the court shall, by order****, upon such conditions (if any) as it thinks fit,* ***stay the proceedings or so much of the proceedings as involves the***

determination of that matter, *as the case may be,* ***and refer the parties to arbitration in respect of that matter****.*

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

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

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

It will be noted that where the Court finds that the preliminary requirements are satisfied the Court **must** grant a stay and refer the parties to arbitration.

The questions

The specific questions, as formulated by the plaintiffs, for consideration on the present aspect of the case, are:

1. *Is the International Arbitration Act 1974 s 7 invalid, or should it be read down so as not to oust the exercise by the Federal Court of Australia sitting in admiralty of the judicial power of the Commonwealth in respect of the several causes of action in the proceedings?*

2. *Are the commercial arbitrators in London incapable, by reason of the forum, the procedures applicable to the arbitration, the nature of their appointment, qualification and tenure and lack of any appeal process, of accepting the nomination or appointment of the First Plaintiff and Second Defendant to*

determine any question requiring in substance or at all, the exercise of the judicial power of the Commonwealth?

3. *Is the appointment or nomination of arbitrators under clause 34 of the Charterparty by the First Plaintiff and Second Defendant effective with respect to the causes of action in par 14-19 of the Statement of Claim?*

The Attorneys-General were duly notified of the challenge to the constitutional validity of s 7 as required by s 78B of the *Judiciary Act* 1903 (Cth) but no submissions were made by any of them to the Court.

I now turn to the specific issues raised.

Question One

Ouster of Federal Court Jurisdiction

The plaintiffs submit that because s 7 provides for a mandatory stay in respect of any matter before any Australian court, which falls within the terms of cl 34, it invalidly ousts the jurisdiction of the court. The effect of s 7 is to deny access to the Court by an Australian citizen or entity wishing to litigate a justiciable cause of action which falls within the provision.

The Statement of Claim in this matter includes claims falling within the *Trade Practices Act* 1974 (Cth) ("TP Act"), ss 52 and 82, and the *Admiralty Act* 1988 (Cth), s 4(3), which arise in relation to the carriage of fertilizer by sea from Tampa, Florida, to Newcastle by

the vessel "Kiukiang Career" in March and April 1996. The carriage was subject to the provisions of the contract of affreightment between Hi-Fert and WBC dated 11 November 1993. The claims are assumed for the purposes of this aspect of the case, to come within cl 34 and s 7 of the Act.

Section 7 does not, in any way, mandate any particular result on the **substantive** merits of the plaintiffs' claims themselves as set out in the Statement of Claim. Rather it prescribes the role which the court must perform in relation to the question whether the dispute, or part of it, should be decided pursuant to the terms of the arbitration clause.

The plaintiffs say that cl 34 has two objects. The first is a promise to submit disputes falling within its terms to arbitrators. The second, is a promise not to submit them to any body, court or tribunal. The second result flows from the submission to arbitration.

The plaintiffs also submit that insofar as the arbitration clause purports to oust, or has the effect of ousting, the jurisdiction of this Court to determine the claims it is void as against public policy. It is said that the application of s 7(2) leads to this result. The principle of non-ouster is referred to in C*ompagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577 at 585-586 per Fullagar J; *Scott v Avery* (1856) 5 HL Cas 811 at

845-6 per Lord Cranworth LC; *Anderson v G H Mitchell & Sons Ltd* (1941) 65 CLR 543 at 548-550 and *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502 at 509-510. The effect of s 7(2) is said to be to give legislative effect to a contractual ouster of the jurisdiction, without qualification. This is said to contravene the longstanding policy of the common law: *The Amazonia* [1989] 1 Lloyd's Rep 403 at 406; see *The Blooming Orchard* (1993) 22 NSWLR 273; *Bulk Chartering & Consultants Australia Pty Ltd v T & T Metal Trading Pty Ltd* (1993) 114 ALR 189 at 211.

The public policy considerations which underlie the principles applied by the courts in setting aside certain arbitration clauses on the basis they oust the jurisdiction of the Court to determine disputes between citizens were considered by the House of Lords in *Scott v Avery* (supra). That case concerned an arbitration clause in a charter party which provided that in case any difference should arise between the parties touching the agreement, that difference should be determined by arbitration. Their Lordships affirmed the principle that the parties could not by contractual provision oust the courts of their jurisdiction. However, their Lordships held that a contract could lawfully provide that a right of action would not accrue until such time as a third person, appointed under an agreement, had decided the dispute. At 829-830 Baron Martin observed that:

> *"It has been said that parties best understand their own affairs, and ought to be permitted to make their own contracts; and the less courts of law and equity interfere, except merely to enforce them, the better. There can be no doubt of the truth of this as a general rule ..."*

At 830, his Lordship said in the course of considering the principle that parties cannot by agreement oust the courts of jurisdiction:

> *"... The true ground I believe to be, that a prospective agreement not to have recourse to the courts of law or equity of the country in respect of future causes of action to arise, is against the liberty of the law, which secures to every one the right of submitting to the courts any matters in respect of which he claims redress..."*

Coleridge J at 841 formulated the common law principle in the following way:

> *"If two parties enter into a contract for the breach of which in any particular an action lies, they cannot make it a binding term, that in such event no action shall be maintainable, but that the only remedy shall be by reference to arbitration.... The courts will not enforce or sanction an agreement which deprives the subject of that recourse to their jurisdiction, which has been considered a right inalienable even by the concurrent will of the parties. But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject matter of decision by the courts. Covenanting parties may agree that in cases of an alleged breach the damages to be recovered shall be a sum fixed, or a sum to be ascertained by [a specified person], or by arbitrators to be chosen in such or such a manner; and until this be done, or the non-feasance be satisfactorily accounted for, that no action shall be maintainable for the breach."*

The above public policy considerations applied by the courts, as to non-ouster, impose a constraint which limits the nature and the terms of arbitration provisions which can be lawfully inserted in private contracts. Because the principle of non-ouster is a common law principle it is subject to limitation, extinguishment or modification by legislation. The policy of non-ouster is not directed to restrict the exercise of legislative power but rather to constrain the power of contracting parties.

A threshold question arises as to whether it is correct to say that s 7(2) is intended to oust, or has the effect of ousting, the jurisdiction of the courts to decide the issues raised by the Statement of Claim.

In relation to this question two initial observations can be made in relation to the application of s 7. First, that the provision does not apply automatically; it applies only where one of the parties makes an application to the court for a stay of the proceedings.

Second, that s 7 is closely delimited and the Court when deciding as to its application must determine whether the section is attracted and, if so, the manner of its application. Some of these matters which the court must decide when exercising jurisdiction under s 7 include determinations as to whether:

there is an arbitration agreement;

the procedure is governed by the law of a Convention country;

a party is domiciled or ordinarily resident in Australia or in a Convention country;

a party is a government of a Convention country;

proceedings are pending in a court;

the proceedings involve the determination of a matter that is capable of settlement by arbitration in accordance with the agreement;

the court should upon granting a stay impose terms and, if so, what those terms should be;

all or part of the proceeding should be stayed;

any supplementary orders should be made;

any interim orders should be made with respect to any property that is the subject of the matter;

the arbitration agreement is null and void or is inoperative or incapable of being performed.

Each of these determinations which may arise under s 7 of the Act calls for the exercise by the court of judicial power. In relation to these questions it cannot be said that s 7(2) precludes the court from exercising judicial power or that s 7(2) ousts, in a plenary sense, the jurisdiction of the court.

The common law doctrine that the jurisdiction of the court should not be ousted is based on public policy that

the access of citizens to the courts should be preserved. This public policy as applied by the courts overrides the intentions of the contracting parties who insist on such a provision in their contract. However, the principle is **not** one which is concerned to delimit the power of the **legislature**. The principle does not, and indeed cannot, prevent the legislature from permitting specified types of dispute or differences to be referred to and determined by arbitration where certain conditions are satisfied. The public policy embodied in the common law contractual principle of non-ouster is subject to, and must give way to, express contrary provisions such as s 7.

So much was made clear by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 241 where his Honour said:

> *"A party who has regularly invoked the jurisdiction of a competent court has a prima facie right to insist upon its exercise and to have his claim heard and determined.* ***That prima facie right to the exercise of competent jurisdiction which has been regularly invoked can be displaced by statute but 'the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension'****: per Scrutton J, In re The Vexatious Actions Act, 1896. In re Bernard Boaler [1915] 1 KB 21 at 36. The common law itself has traditionally recognised certain special categories of case in which the exercise of jurisdiction must or may be refused in circumstances where diplomatic custom, international comity, public policy or considerations of justice require or may support that course. In this country, those*

> *special categories of case have not traditionally encompassed a general judicial discretion to dismiss or stay proceedings in a case within jurisdiction merely on the ground that the local court is persuaded that some other tribunal in another country would be a more appropriate forum." (Emphasis added)*

The terms of s 7 are clear and specific. They have the effect of requiring the court to grant a stay and refer the matter. That legislative mandate must override the claims, where the section applies, to have the questions decided by the court.

Moreover, determination by arbitration can hardly be said to be contrary to public policy as submitted by the plaintiffs. A statutory provision such as s 7, which clearly and expressly mandates such a result is of itself the clearest and most precise manifestation of the relevant public policy as to the way in which such disputes must be resolved.

Usurpation of judicial power.

The principle sought to be invoked by the plaintiffs in relation to the usurpation of judicial power was stated in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 by Brennan, Deane and Dawson JJ at 36-37 in this way:

> *"It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction.* ***It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of***

> ***their jurisdiction***. *The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the Courts which it designates." (Emphasis added)*

The plaintiffs submit that s 7(2) is invalid because it directs the Federal Court as to the conclusion it must reach when exercising its jurisdiction with respect to an application for a stay under the Act in circumstances where justiciable issues otherwise calling for the exercise of the judicial power of the Commonwealth have been instituted in the Court. Therefore, it is submitted, the Court is required by s 7(2) to participate in a process whereby it must act in accordance with the direction of the legislature. Such a role, it is said, is incompatible with the proper exercise of judicial power because it directs the result in judicial proceedings and denies to the Court the judicial power to consider the matter on its merits namely: whether to grant or refuse the stay of proceedings. Reliance for this proposition is placed on *Kable v Director of Public Prosecutions* (1996) 138 ALR 577; *Voth* v *Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 550 and *Oceanic Sun Line (supra* at 241).

The plaintiffs point out that this specific question raised for consideration, as to the validity of s 7, has not previously arisen. In *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* (1979) 25 ALR 605 at 611,

where the validity of s 7 was mentioned, McLelland J simply noted that no challenge had been made to its validity.

It is submitted for the plaintiffs that there is no relevant distinction between *Kable* and the present case.

I cannot accept this submission.

Kable concerned a challenge to the validity of the *Community Protection Act* 1994 (NSW). Two of the principal provisions under consideration were ss 3 and 5 which relevantly provided:

> *"3(1) The object of this Act is to protect the community by providing for the preventive detention (by order of the Supreme Court made on the application of the Director of Pubic Prosecutions) of Gregory Wayne Kable.*
>
> *....*
>
> *(3) This Act ... does not authorise the making of a detention order against any other person...*
>
> *5(1) On application made in accordance with this Act, the Court may order that a specified person be detained in prison for a specified period if it is satisfied, on reasonable grounds:*
>
> *(a) that the person is more likely than not to commit a serious act of violence; and*
>
> *(b) that it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.*
>
> *...."*

The High Court decided by majority (Brennan CJ and Dawson J dissenting) that the Act was invalid because it was incompatible with the judicial system set in place by Ch III of the Commonwealth Constitution.

In reaching the conclusion that the Act was incompatible with the exercise by the Supreme Court of New South Wales of the judicial power of the Commonwealth, and therefore could not consistently with Ch III be conferred on the Supreme Court, which formed part of the Ch III judicial system, the majority referred to the following considerations:

> The Act was directed to a particular specified person. Notwithstanding that on its face it purported to apply to a class of persons, in reality it was directed specifically at Kable.
>
> The Act deprived Kable of his liberty on the basis that the court formed an opinion as to his likely future behaviour.
>
> Kable was deprived of the protection afforded by the criminal onus which would normally apply in cases of deprivation of personal liberty.
>
> The evidentiary material to form the opinion need not satisfy the normally applicable strict rules of evidence as to admissibility.
>
> There was no necessity for any breach of the law to have been committed by Kable.

The Act did not determine any controversy or dispute as to existing rights or obligations.

The restriction conferred on the Supreme Court was executive in character.

It is readily apparent that *Kable* was an entirely different case from the present. Ultimately, the majority decision in *Kable* turned on the consideration that unless the Act was declared invalid there must be a loss of public confidence in the impartiality of all courts exercising the judicial power of the Commonwealth. This is because the courts would be perceived as carrying out executive functions inconsistent with the exercise of the judicial power of the Commonwealth.

None of the above considerations apply to the present case. There can be no lack of public confidence in the Federal Court engendered as a result of a provision which simply permits contracting parties to give effect to their previously agreed intentions concerning the determination of their contractual disputes. As is apparent from *Scott v Avery* itself (supra at 829-830) there is considerable force in the principle that contracting parties should be held to their bargain.

The effect of s 7 is that a general common law discretion, which the Court might otherwise have exercised in relation to the grant or refusal of the stay, is not available. This does not constitute an

intrusion by the legislature into the area of judicial power, nor can it properly be said to be an assumption of judicial power. The section simply enables the agreement of the parties as to resolution of their potential disputes to be implemented. Furthermore, the determinations that the Court must make as to the application of s 7 involve the exercise of judicial power.

The plaintiffs also relied on the decisions of the Privy Council in *Liyanage v The Queen* [1967] 1 AC 259 and of the High Court in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 625 per Deane J. These references were in support of a submission that the legislature is not entitled to usurp the powers of the courts to decide disputes.

The circumstances under consideration in those cases bear no resemblance to the present case. The principles there applied cannot be transposed to the circumstances of the present case.

In *Liyanage*, an appeal to the Privy Council, their Lordships were concerned with a Sri Lankan statute which purported to compel the courts to sentence offenders to no less than 10 years imprisonment. The statute also required the Court to order confiscation of the possessions of offenders regardless of the extent of their involvement in an abortive political coup. The

decision, perhaps not surprisingly, was that the statute was a clear usurpation of judicial power by the legislature and was therefore ultra vires and void.

Polyukhovich, a decision of the High Court, was concerned with the question whether the *War Crimes Act* 1945 (Cth) as amended, usurped the exercise of the judicial power of the Commonwealth insofar as it retrospectively declared past conduct to be criminal and to constitute an offence. The High Court, by majority, held that it did not do so.

These authorities cannot support the plaintiffs' contentions in this case because there is here no suggestion of criminal conduct, *ex post facto* laws, compulsory minimum sentencing or confiscation of property.

For the above reasons, I consider that s 7 is not invalid nor should it be read down in any way.

Question Two

London arbitrators and judicial power

The second issue raised is whether arbitrators in London are incapable by reason of the forum, the procedures applicable to the arbitration, the nature of their appointment, qualification and tenure and lack of any appeal, of accepting the nomination or appointment to determine any question requiring in substance the exercise of the judicial power of the Commonwealth.

The plaintiffs submit that s 7 purports to confer upon arbitrators in London judicial power to determine conclusively matters in the proceeding without regard to the qualifications, experience, expertise or independence of the arbitrators, or access to the Australian judicial structure.

The plaintiffs contend that English arbitrators when applying English law will not be able to apply the provisions of the TP Act, nor will they necessarily have the requisite legal experience to deal with the legal questions which may be raised in the course of hearing or when determining the issues in dispute.

The determination of the claims made in the Statement of Claim, in the present case, if they were decided by the Federal Court, would involve an exercise by the Court of the judicial power of the Commonwealth. However, it does not follow that arbitrators determining the same will be exercising the judicial power of the Commonwealth.

In *The Queen v Davison* (1954) 90 CLR 353. The Court considered the meaning of the judicial power of the Commonwealth. In their joint judgment Dixon CJ and McTiernan J adopted the analysis of judicial power formulated by Holmes J in *Prentis v Atlantic Coast Line Co* (1908) 211 U.S. 210 at 226-227 namely:

> *"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. ... But the effect of the inquiry, and of the decision upon it is determined by the nature of the act to which the inquiry and decision lead up ...* ***The nature of the final act determines the nature of the previous inquiry."*** *(Emphasis added)*

If one applies the above description to the present case it is apparent that the "final act" done by the arbitrators is the making of an award pursuant to the contract. It is not the making of an enforceable judicial determination pursuant to any investiture of state or federal jurisdiction. The arbitrators do not have power to enforce any award or determination made by them. These features support the characterisation of the arbitrator's decision as non-judicial in character. They also support the conclusion that the statutory requirements, that a stay be granted and the matter be referred to arbitration, do not involve any conferral of judicial power on the arbitrators or the exercise by the arbitrators of such power.

The arbitrators are not exercising the judicial power of the Commonwealth but are performing a contractual function specifically conferred on them by the parties in the Time Charter. The arbitrators' jurisdiction is conferred not by the IA Act but pursuant to cl 34 of the agreement. Although the questions and issues may be

identical to those which might otherwise be determined if the matter were decided by a Court, the proper characterisation of the power being exercised is that it is contractual. The circumstance that s 7(2) may require the stay so as to permit the arbitration to proceed does not alter the contractual nature of the power being exercised by the arbitrators.

In my earlier judgment I referred to the decision of Foster J in *QH Tours Ltd v Ship Design and Management (Aust) Pty Ltd* (1991) 105 ALR 371 at 386-387, where his Honour, after a comprehensive review of the authorities concluded:

> *"... **I am satisfied that there is no constitutional impediment to the parties giving an arbitrator, pursuant to cl 16 of the purchaser agreement, the power to make determinations of issues raised between them under the provisions of s 52 of the Act (Trade Practices Act 1974 (Cth))and to make orders** which would be **contractually** binding between the parties. If enforcement of such orders is sought outside the contract, then recourse may be had to the court under s 33 [Commercial Arbitration Act 1984 (NSW)] when such enforcement may occur **as a result of the court's authority and not the authority of the arbitrator.**" (Emphasis added)*

A similar conclusion as to the power of arbitrators to decide claims under the TP Act was reached by the New South Wales Court of Appeal in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR

160. At 166 Gleeson CJ (with whom Meagher and Sheller JJA agreed) said:

> *"It was decided by this Court in the case of IBM Australia, first, that it is possible and lawful for parties to agree to refer to arbitration a dispute under the Trade Practices Act 1974 (Cth), secondly, that* ***an arbitrator to whom such a dispute has been referred may, in general, exercise the discretionary powers which the Act confers upon the Supreme Court or the Federal Court****, and, thirdly, that there is no reason to read down an otherwise comprehensive arbitration agreement in order to avoid a conclusion that this is what the parties have agreed to do: ..." (Emphasis added)*

For these reasons I do not accept the submission made by the plaintiffs in respect of this question. I answer the second question in the negative.

Tender of Legal Opinion

During the hearing counsel for the plaintiffs sought to tender an affidavit by London Senior Counsel. This was marked "MFI 1". The tender was opposed. I rejected the tender. The opinion was said to be directed to the question whether the arbitration clause in the instant case would give power or jurisdiction to a London arbitrator to hear a dispute under the TP Act.

I indicated that I would give my reasons in this judgment.

My reason for refusal of the tender is that the opinion is not relevant to the legal or constitutional issues

presently before me. The issue to which the opinion is directed has been decided in my earlier judgment in this matter where I decided that cl 34 is sufficiently comprehensive to include the trade practices claims.

Question Three

The Convention argument

Section 3(1) of the IA Act defines "arbitration agreement" to mean:

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

"Convention" means *the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of which is set out in Schedule 1 of the IA Act.

Article II(1) of the Convention provides:

> *"1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."*

The plaintiff's contention is that while a claim under the TP Act can give rise to a "matter" it is not "in

respect of a defined legal relationship". The claim arises from conduct in trade and commerce which describes "an activity not a legal relationship". Accordingly, the trade practices claims are not within Article II. They are, therefore, not capable of settlement by arbitration. Any appointment of arbitrators would be ineffective because such disputes are not covered by the Act.

This line of reasoning in my view should not be accepted. It assigns too narrow a meaning to the expression "defined legal relationship". The expression "defined legal relationship" is followed by the words "whether contractual or not". These words indicate that the expression reaches beyond a relationship established by an agreement. The extensive expression "in respect of" also indicates that a broad approach should be taken to the nature and extent of the relationship. The "legal relationship" can, on this approach, be defined by statute.

In the present case the relevant claims are made pursuant to ss 51A and 52 of the TP Act. They allege that the plaintiffs suffered loss and damage as a result of the contraventions of those sections. Section 82 of the TP Act confers a right of recovery on an applicant against any person who contravenes or is involved in any contravention of Part V of the Act. The relevant relationship in the present case is statutory and is defined by the above provisions of the TP Act. The trade

practices claims effectively arise from proscribed conduct by one of the parties. That conduct, by reason of s 82, has the effect of entitling the applicant to recover damages if the case is made out. The relationship is between the person who engages in misleading conduct and the person who suffers loss and damage as a result of such conduct. This statutory relationship between a party engaging in misleading conduct and the person who suffers loss as a result of such conduct has been selected by the Act as the basis for conferring a right of recovery. It is both a relevant and sufficiently defined legal relationship to satisfy Article II of the Convention.

The plaintiffs also referred to the decision of Beaumont J in *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* (1985) ATPR ¶40-636. In that case Beaumont J held **as a matter of construction** that an arbitration clause did not cover a dispute under the TP Act. However, in relation to the disputes in the present case I have reached a contrary conclusion for the reasons given in my earlier judgment. Essentially, *Allergan* is distinguishable from the present case because, here, the trade practices claims arise from the provisions of the Time Charter. This is because the trade practices disputes concern the performance of obligations under the charter and are therefore closely linked to the charter. They cannot be characterised as separate or discrete claims.

Accordingly, the trade practices claims, in my view, arise in respect of, and as the result of, a relationship defined under the TP Act. The third question should be answered in the affirmative.

Summary of conclusions

The questions raised should be answered as follows:

> **Question 1**: *Is the International Arbitration Act 1974 s 7 invalid, or should it be read down so as not to oust the exercise by the Federal Court of Australia sitting in admiralty of the judicial power of the Commonwealth in respect of the several causes of action in the proceedings?*
>
> **Answer**: No
>
> **Question 2**: *Are the commercial arbitrators in London incapable, by reason of the forum, the procedures applicable to the arbitration, the nature of their appointment, qualification and tenure and lack of any appeal process, of accepting the nomination or appointment of the First Plaintiff and Second Defendant to determine any question requiring in substance or at all, the exercise of the judicial power of the Commonwealth?*
>
> **Answer**: No
>
> **Question 3**: Is *the appointment or nomination of arbitrators under clause 34 of the Charterparty by the First Plaintiff and Second Defendant effective with respect to the causes of action in paragraphs 14-19 of the Statement of Claim?*
>
> **Answer:** Yes

I direct the defendant to bring in short minutes of proposed orders to give effect to the reasons set out in my earlier judgment and in this judgment. These short minutes should also deal with the question of costs.

I certify that this and
the preceding twenty-five (25) pages
are a true copy of the

Reasons for Judgment herein of
his Honour Justice Tamberlin

Associate:

Date:	30 June 1997
Counsel for the Plaintiffs:	Mr P E King
Solicitor for the Plaintiffs:	Withnell & Co
Counsel for the First Defendant:	Mr G J Nell
Solicitor for the First Defendant:	Mr James Neill
Counsel for the Second Defendant:	Mr N C Hutley SC Dr A S Bell
Solicitor for the Second Defendant:	Ebsworth & Ebsworth
Date of Hearing:	4 April 1997
Date Judgment Delivered:	30 June 1997