FEDERAL COURT OF AUSTRALIA

Pan Australia Shipping Pty Ltd v The Ship 'Comandate' (No 2)

[2006] FCA 1112

ARBITRATION – **ELECTION** - stay of proceedings – anti-anti-suit injunction – where arbitral proceedings brought in England and in rem proceedings brought in Federal Court of Australia by same party - whether action in rem constituted election to litigate rather than arbitrate – abandonment of right to arbitrate – whether right to arbitrate waived - whether arbitration agreement rendered inoperative

ARBITRATION – definition of agreement in writing under *International Arbitration Act 1974* (Cth) – interpretation of Art II r 2 of the New York Convention – meaning of 'contained in an exchange of letters or telegrams'- agreement formed by provision of bank guarantee

ARBITRATION - scope of arbitration clause – whether trade practices claim falls within scope of arbitration clause – where arbitration clause governed claims 'arising out of this contract'

PRACTICE & PROCEDURE – stay of proceedings – continuation of anti-anti-suit injunction – continuation of injunction to restrain the defendant from obtaining an injunction in a foreign court which would restrain the continuation of proceedings in the Federal Court of Australia – where defendant threatening to take steps in English High Court of Justice to restrain proceedings in the Federal Court of Australia

ADMIRALTY & MARITIME JURISDICTION – arrest of vessel – in personam claim

WORDS & PHRASES - 'agreement in writing' 'arbitration agreement' 'contained in an exchange of letters or telegrams' 'dispute arising out of this contract'

Held – that Marine Comandate's action in rem constituted an election to litigate rather than arbitrate and the arbitration agreement is therefore inoperative; that there was no 'agreement in writing' for the purposes of the *International Arbitration Act 1974* (Cth); the application for a stay and referral to arbitration be refused; that the trade practices claim by Pan falls outside the scope of the arbitration agreement; that the Federal Court has jurisdiction to hear and determine Pan's claim; and the interim injunction should continue to restrain the defendant from taking any steps in any court seeking to restrain the continuation of the current proceeding.

The Constitution s 75 s 76 (ii) s 76 (iii) s 51(i)
Admiralty Act 1988 (Cth) s 29 s 31
Commercial Arbitration Act 1984 (NSW) s (53) s (4)(1)
International Arbitration Act 1974 (Cth) s 7(2) s 7(5)
Trade Practices Act 1974 (Cth)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (as adopted on June 10 1958, New York) ('the New York Convention')
UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985) ('the Model Law')

ACD Tridon v Tridon Australia [2002] NSWSC 896 followed
Allergan Pharmaceuticals Inc v Bausch & Lomb Inc (1985) 7 ATPR §40-636 discussed
Allonah Pty Limited v The Ship 'Amanda N' (1989) 21 FCR 60 cited
Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-ing Burkhardt GmbH [2001] 1 Qd R 461 cited
Batistatos v Roads and Traffic Authority [2006] HCA 27 cited
Berowra Holdings Pty Ltd v Gordon [2006] HCA 32 cited
Butt v M'Donald (1896) 7 QLJ 68 followed
Caltex Oil (Australia) Pty Limited v The Dredge 'Willemstad' (1976) 136 CLR 529 followed
Campomar Sociedad Limitada v Nike International Ltd (2000) 202 CLR 45 applied
Coventry v Charter Pacific Corporation Ltd (2005) 222 ALR 202 discussed and applied
Craine v Colonial Mutual Fire Insurance Co Ltd (1920) 28 CLR 305 followed
D'Orta Ekenaike v Victorian Legal Aid (2005) 79 ALJR 755 cited
Elbe Shipping SA v The Ship 'Global Peace' [2006] FCA 954 cited
Empirnall Holdings Pty Limited v Machon Paull Partners Pty Limited (1988) 14 NSWLR 532 applied
Ethiopian Oil Seed & Pulses Export Corporation v Rio del Mar Foods Inc [1990] 1 Lloyd's Rep 86 considered
Francis Travel Marketing Pty Limited v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160 discussed
H Smal Limited v Goldroyce Garment Limited [1994] 2 HKC 526 discussed
Immer (No 145) Pty Limited v Uniting Church in Australia Property Trust (NSW) (1993) 182 CLR 26 followed
Incitec Ltd v Alkimos Shipping Corporation (2004) 138 FCR 496 considered
James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1978] AC 141 cited
Katagum Wholesale Commodities v The MV Paz 1984 (3) SAf LR 261 cited
Khoury v Government Insurance Office (NSW) (1984) 165 CLR 622 applied
Hi-Fert Pty Limited v Kiukiang Maritime Carriers Inc (No 5) (1998) 90 FCR 1 discussed
Mansfield v Director of Public Prosecutions for Western Australia [2006] HCA 38 followed
Marlborough Harbour Board v Charter Travel Co Ltd (1989) 18 NSWLR 223 followed
Masters v Cameron (1954) 91 CLR 353 cited
Matthews v Smallwood [1910] 1 Ch 777 applied
Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc 473 US 614, 638 (1985) cited
Murphy v Overton Investments Pty Limited (2004) 216 CLR 388 cited
Nanisivik Mines Ltd v F.C.R.S. Shipping Ltd (1994) 113 DLR (4^{th}) 536 cited
National Commercial Bank v Wimbourne (1979) 11 NSWLR 156 followed
Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc (1994) 181 CLR 404 followed
Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1983] 1 AC 854 discussed
Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd (1993) 43 FCR 439 applied
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191 applied
PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service (1995) 184 CLR 301 cited
Proctor v Schellenberg [2003] 2 WWR 621 cited

Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd [1916] 1 AC 314 followed
Re Wakim; Ex parte McNally (1999) 198 CLR 511 followed
Republic of India v India Steamship Co Ltd (No 2) [1998] AC 878 applied
Robobar Limited v Finncold SaS (1995) Year Book Comm. Arb'n XX 739 cited
Sargent v ASL Developments Ltd (1974) 131 CLR 634 followed
Scherk v Alberto-Culver Co 417 US 506, 516 (1974) cited
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Limited (1979) 144 CLR 596 followed
Shipping Corporation of India Ltd v Gamlen Chemical Co Australasia Pty Ltd (1980) 147 CLR 142 cited
Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd (1996) 68 FCR 539 followed
Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332 followed
The 'Andria' now renamed 'Vasso' [1984] QB 477 considered
The 'Bazias 3' [1993] QB 673 cited
The 'Cap Bon' [1967] 1 Lloyd's Rep 543 considered
The 'Epsilon Rosa' [2003] 2 Lloyd's Rep 509 at 514 cited
The 'Jalamatsya' [1987] 2 Lloyd's Rep 164 discussed
The 'Playa Laga' [1983] 2 Lloyd's Rep 171 discussed
The 'Tuyuti' [1984] QB 838 cited
Tisand v The 'Cape Morton' (2004) 141 FCR 29 followed
Travel Compensation Fund v Tambree (2005) 80 ALJR 183 applied
Tropical Traders Ltd v Gonnan (1964) 111 CLR 41 followed
Union of India v EB Abby's Rederi AS (the 'Evje') [1975] AC 797 considered
Vimar Seguros y Reaseguros SA v M/V Sky Reefer 515 US 528 at 537 (1995) cited
Voth v Manildra Flour Mills Pty Limited (1990) 171 CLR 538 followed
Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102 discussed
Wool International v Sedgwick Ltd (No 4) (unreported FCA 2 October 1997 followed
Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd [1986] 2 Lloyd's Rep 225 considered
Zhang v Shanghai Wool and Jute Textile Co Ltd [2006] VSCA 133 cited

Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report No 33, 1986) ALRC
A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Interpretation*, Kluwer Law and Taxation Publishers, Boston, 1994 (1981)
N Kaplan QC, 'Is the need for writing as expressed in the New York Convention and the model law out of step with commercial practice?' (1996) *International Arbitration*, vol 12, no 1, p 27
Russell on Arbitration (22nd ed), D Sutton & J Gill, Sweet & Maxwell, London, 2003

PAN AUSTRALIA SHIPPING PTY LTD v THE SHIP 'COMANDATE' (NO 2)
NSD 1330 OF 2006

RARES J
22 AUGUST 2006
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1330 OF 2006**

BETWEEN:	**PAN AUSTRALIA SHIPPING PTY LTD** **Plaintiff**
AND:	**THE SHIP 'COMANDATE'** **Defendant**

JUDGE: **RARES J**

DATE OF ORDER: **22 AUGUST 2006**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The further amended notice of motion filed by the defendant be dismissed with costs.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1330 OF 2006**

BETWEEN:	**PAN AUSTRALIA SHIPPING PTY LTD** **Plaintiff**
AND:	**THE SHIP 'COMANDATE'** **Defendant**

JUDGE:	**RARES J**
DATE:	**22 AUGUST 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 On 9 June 2006 Pan Australia Shipping Pty Limited commenced these proceedings in rem and caused the arrest of the ship *Comandate*, a Liberian flagged vessel owned by Comandate Marine Corp. I have set out some of the factual background in the judgment I delivered on 22 June 2006: *Pan Australia Shipping Pty Ltd v The Ship 'Comandate'* [2006] FCA 881. I will not repeat that background here.

2 On the day after I granted an injunction restraining Comandate Marine from applying to the English Courts for an order restraining Pan from bringing claims under the *Trade Practices Act 1974* (Cth), Comandate Marine commenced new proceedings in rem in this Court and arrested the *Boomerang I*, a vessel which Pan had chartered. Later, on Pan's application, the Court set aside the arrest.

3 In the meantime Comandate Marine applied for a stay of these proceedings and for an order that Pan arbitrate the issues in the arbitration which has begun in London. Pan resists the stay on the following bases:

- Comandate Marine, by bringing its in rem proceeding to arrest the *Boomerang I* elected to litigate, and not arbitrate, the whole dispute;
- even though it had a charter party with Comandate Marine with a provision requiring disputes arising under it to be arbitrated in London, that was not an 'agreement in writing' within the meaning of s 7(2) of the *International*

Arbitration Act 1974 (Cth) because Pan accepted Comandate Marine's written offer by having its bank provide a guarantee;

- Pan's claims, that Comandate Marine engaged in misleading and deceptive conduct in negotiating the charter party, do not fall within the scope of the arbitration agreement.

4 Pan also seeks a continuation of the anti-anti-suit injunction I granted earlier to enable it to litigate its claims under the *Trade Practices Act 1974* (Cth).

5 Comandate Marine disputes Pan's arguments and additionally:

- argues that Pan cannot litigate its claim under the *Trade Practices Act 1974* (Cth) in these in personam proceedings because the *Admiralty Act 1988* (Cth) does not allow this to be done;
- has offered an undertaking to enable the arbitrators in London to decide the *Trade Practices Act 1974* (Cth) claims if it is entitled to a stay;
- says that if Pan is correct that there is no 'agreement in writing', it is entitled to a stay under s 53 of the *Commercial Arbitration Act 1984* (NSW).

6 The facts relevant to the determination of these issues are relatively undisputed, but the legal consequences which flow from them have some complexity.

PAN'S CLAIM

7 Following the orders that I made on 22 June 2006, Pan filed an amended statement of claim in personam. In it Pan alleges that Comandate Marine engaged in conduct made representations in contravention of ss 51A, 52 and 55A of the *Trade Practices Act 1974* (Cth) to Pan that:

- capable of performing their respective obligations under the contemplated charter in the Australian coastal trade;
- the Master, officers and crew were and would be lawfully able to enter and work in Australia and Australian waters and to discharge their respective obligations under the contemplated charter;
- the vessel would be kept in a thoroughly efficient state in hull, machinery and equipment for and during the proposed service in the coastal trade;

- the vessel would have a full complement of officers and crew for that purpose;
- the vessel was and would be seaworthy in all respects; and
- the vessel its Master and crew were and would be fit for service in the Australian coastal trade.

8 Pan also pleaded that the following terms and conditions were implied into the contract of hire for the vessel:

- the vessel is seaworthy;
- the vessel is in all respects fit for service in the Australian coastal trade;
- the vessel complies with flag and class requirements;
- the Master, officers and crew are lawfully able to enter Australia so as to command and crew the vessel in accordance with the express terms of the charter;
- the Master, officers and crew are capable of performing their respective obligations under the charter.

FORMATION OF CHARTER PARTY CONTRACT

9 It is now common ground that there was a contractual relationship between Pan and Comandate Marine for the charter by Pan of the vessel *Comandate*. However, while the terms of that contract are not in doubt, the manner of its formation is relevant for the purposes of determining whether there is an agreement in writing within the meaning s 7 of the *International Arbitration Act 1974* (Cth).

10 The contract was negotiated between Mr Ivan Colaco of Trans World Chartering Pty Limited who was based in Queensland, acting on behalf of Pan, with his counterpart, Mr Dimitris Athanassiou, who was the Managing Director of Prime Maritime Inc, a Greek brokerage firm. Mr Athanassiou was based in Greece. He took instructions from Capt John Piperakis of Alon Maritime Pty Limited, the owner's manager of the vessel, *Comandate*.

11 It was common ground that it is an accepted practice within the ship broking industry for brokers to communicate mostly by telex or email messages, and even where there are voice communications, it is usual to confirm those by a telex or an email. Mr Colaco was

present in Australia between 7 and 21 April 2006. The evidence discloses that the negotiations between Mr Athanassiou and Mr Colaco commenced on 7 April 2006.

12 On 8 April 2006 Mr Athanassiou sent Mr Colaco a pro forma charter that had been used by Comandate Marine and another charterer in respect of the vessel, the *Asiatic*. That contained a clause, which is central to this matter, cl 45(b). Throughout the negotiations the terms of cl 45(b) did not change. It provided relevantly as follows:

> *'45* ***Arbitration***
> …
> *(b)* *LONDON*
> *All disputes arising out of this contract shall be arbitrated at London …. Any dispute arising hereunder shall be governed by English Law ….'*

13 There was a deal of toing and froing in telexes and emails. The parties adopted a convention of sending telexes and also emails in exactly the same form, as confirmation. The parties are agreed that for the purposes of determining these proceedings an email may be treated as if it were a telex and that both forms of communication amount to a letter or telegram within the meaning of Article II r 2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention') which is in schedule 1 of the *International Arbitration Act 1974* (Cth).

14 On 19 April 2006 Prime sent to Pan care of Mr Colaco a telex and email stating that the owners were glad to confirm their agreement to the charterer's alterations as provided in the message which was set out thereunder. It continued:

> *'We therefore are fully fixed subject to Bank Guarantee. Kindly advise urgently within today the Bank's full style … so that our Bankers can contact them tomorrow.'*

A request was made to have Pan's bankers send the bank guarantee to the Royal Bank of Scotland at Piraeus.

15 On 20 April 2006 Prime sent a telex/email to Mr Colaco headed 'FINAL RECAP' which commenced:

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

At the conclusion of a lengthy recitation of the vessel's details and certain clauses and amendments, Mr Athanassiou wrote:

> *'Both Parties, are kindly requested to confirm abv recap is in line with negos agreed far.'*
>
> *B. Rgds/DA'*

I infer that 'DA' stands for Mr Athanassiou's initials.

16 Later on 20 April 2006 Prime sent Mr Colaco an email which noted that the bank guarantee had been received with thanks. The *Comandate* was delivered to and accepted by Pan on 21 April 2006 at Singapore.

17 Mr Athanassiou said that it was an accepted practice in the ship building industry that responsibility for the preparation of the written charter party rests with the charterer's broker but that on this occasion cl 8 of the recap provided that Prime would be responsible for the preparation of the written charter. He said that the preparation of the written charter party invariably occurred after the vessel had been delivered to charters.

DISPUTE AS TO PAN PROVIDING SECURITY

18 On 10 June 2006, following the arrest of the vessel, Comandate Marine's London solicitor, Mr O'Neill of Stephenson Harwood, wrote to Pan's Australian solicitor, Ms Wilmshurst, asking that Pan take steps to provide security for an amount in the region of USD 2.5 million. Mr O'Neill wrote again on 11 June requiring Ms Wilmshurst to take Pan's instructions on putting up security of USD 4 million and threatened that unless he received confirmation that a first class bank guarantee would be provided for that amount, Comandate Marine would be taking immediate steps to obtain this security 'by other means. You will know the options open to us as well as we do'. Ms Wilmshurst responded saying that the owner's claim for security appeared to be strategic and intended as a threat and indicated that she assumed Comandate Marine might apply for a maritime attachment order. Mr O'Neill responded that a claim would be substantiated shortly and indicated that Pan was being given sufficient time to provide security. Mr O'Neill persisted in making demands and threats that whatever steps were necessary would be taken if security were not provided.

19 At the time of appointing Comandate Marine's arbitrator in the arbitration it

commenced in London on 14 June 2006, Mr O'Neill wrote to Ms Wilmshurst seeking confirmation that Pan would provide security 'failing which our clients will take immediate steps to secure their claim in full'. On 16 June 2006 Comandate Marine obtained the maritime attachment orders in New York. Subsequently, on 5 July 2006, Pan appointed an arbitrator.

COMANDATE MARINE OBTAINS ARREST OF A VESSEL

20 On 23 June 2006 Comandate Marine, arrested a vessel, the *Boomerang I*, in proceedings which it commenced in rem in this Court by writ claiming the following relief: the arrest of the ship *Boomerang I*, damages, interest and costs. The particulars of that claim were set out in the writ as follows:

> *'1. [Comandate Marine's] claim is for damages for a breach of a time charter entered into between [Comandate Marine] and [Pan] on or about 19 April 2006 in respect of the ship 'Comandate'. In breach of the time charter [Pan] has:*
>
> *(a) failed to obtain valid crew visas for the intended trade of the ship 'Comandate';*
>
> *(b) wrongfully terminated the charter in respect of the ship 'Comandate'; and*
>
> *(c) failed to make hire payments due under the time charter.*
>
> *The Court's jurisdiction in respect of this claim arises under ss 10, 17 and 4(3)(d), (f), (o) and (w) of the Admiralty Act.'*

21 The relevant person named in the writ was Pan as 'the demise or bare boat charterer of the vessel "*Boomerang I*"'. The affidavit in support of the application for the arrest warrant was sworn by the solicitor for Comandate Marine, Mr Wilson. He swore that Comadate Marine's claim concerned breaches by Pan of a charter party with it in relation to the vessel *Comandate* 'including but not limited to the failure by Pan to obtain valid crew visas, wrongful termination of a charter party and failure to pay other expenses'. He said that Comandate Marine had earlier in June 2006 commenced arbitration proceedings against Pan in London in accordance with the charter party. He also disclosed that on 16 June 2006, Comandate Marine had moved the United States District Court for the Southern District of New York for Part B attachment of property of Pan and had obtained from that Court an

order for issuance of process of marine attachment. Mr Wilson noted that Comandate Marine had sought security from Pan in respect of its claim which had not been provided and the claim had not been satisfied. He also said:

> *'The aid of this Honourable Court is necessary to enable [Comandate Marine's] claims to be satisfied.' (see Form 13 and r 39(2) of the Admiralty Rules 1988)*

22 On 27 June 2006 Emmett, Allsop and Siopis JJ set aside Comandate Marine's writ in rem and ordered the *Boomerang I* to be released from arrest subject to a short stay. Heydon J, in the High Court of Australia, refused Comandate Marine's application for a stay of the Full Court's orders setting aside the writ in rem and refused to order a rearrest of the vessel *Boomerang I*, but granted expedition of the application for special leave to appeal which Comandate Marine had filed. On 28 June 2006 Mr Wilson swore an affidavit in support of the motion for rearrest in the High Court saying that by way of its in rem proceedings, Comandate Marine had sought security in respect of its claims pursuant to, inter alia, s 19 of the *Admiralty Act 1988* (Cth) by arresting a sister ship or surrogate ship of the *Comandate* in respect of which '… Pan is the person who would be liable on [Comandate Marine's] claims in a proceeding commenced as an action in personam'.

LOCATION OF WITNESS AND EVIDENCE

23 Pan relies, as an important part of its case, on the reasons for which the Maritime Safety Authority detained the *Comandate* twice during May 2006 for three and eleven days respectively. The validity of those reasons may in due course have to be established by witnesses including those officers of the Authority who inspected the *Comandate* or made decisions. I merely recite some of the reasons given by the Authority in documents so as to illustrate issues which will be raised for any hearing. (Of course, in what follows, I am not making any finding as to whether what the Authority said was well founded.) The first detention in Sydney finished on 10 May 2006 and occurred because a number of defects were identified by the Authority. The tank air pipes were not in satisfactory condition. There were problems with the ceiling plates and screws had been corroded, emergency preparedness had not been properly addressed, fire dampers were unable to be closed, the fire line was leaking in a number of places. The Authority required temporary repairs to the air pipes to be made as per condition of class and the conditions of the flag state were required to be met.

24 The second detention was at Fremantle and finished on 9 June 2006. The Authority reported that there had been a crack in the port ship's hull steel plating, the CO2 piping in the cargo hulls was wasted away in several areas with no CO2 protection afforded to cargo holds. The Master was said to have failed to report the hull damage to the relevant authorities and the procedures for maintenance and inspection of the ship were not functional as was evidenced by numerous hardware deficiencies. There was also reported to be a problem with the watertightness of certain doors and the ability to secure the cargo hold access hatch in a watertight manner. Temporary repairs were carried out under the supervision of the class society and permanent repairs were required to be carried out at the next port, Singapore, as per the condition of release.

25 An email from Melbourne General Stevedoring asserted that while the vessel was in Melbourne, the cranes of the vessel were causing problems during stevedoring operations and all the crane cabins were in 'terrible condition'. They were said to be too rusty and that the crane chairs were in poor condition and visibility was limited due to age and lack of maintenance and scratching of windscreens. The ladders leading to the crane's cabins were said to be covered in oil and extremely slippery.

26 When the vessel was in Perth on 25 May 2006 the Department of Immigration noted that the crew were not carrying properly endorsed visa documents for foreign crews working in Australia and the Master's passport apparently had expired.

27 It is plain that there is a lively dispute between the parties as to who was responsible for the crews' immigration status and requirements, each side blaming the other for the deficiencies.

ISSUES

28 The following principal issues arise in the present application:

(1) Did Comandate Marine elect to litigate its claim this Court and to abandon the right to insist on arbitration in London? There is a subsidiary issue of waiver by Comandate Marine of its right to insist on the arbitration.

(2) Is there an agreement in writing for the purposes of Article II r 2 of the New York Convention?

(3) Does the arbitration clause give the arbitrators power to determine Pan's

claims under the *Trade Practices Act 1974* (Cth) should the proceedings in this Court brought by Pan be stayed and, if so, what conditions should apply?

(4) Should the anti-anti-suit injunction which I granted be continued and, if so, on what terms?

ELECTION

29 Comandate Marine initiated its claim for security prior to commencing the arbitration on 14 June 2006. After that it also pursued that claim. However, in its writ in rem against the *Boomerang I*, Comandate Marine sought no relief either in respect of its claim for security for the purposes of the arbitration or for a stay under the *International Arbitration Act 1974* (Cth). Rather, it only sought damages for breach of the charter party and sought no relief at all in respect of the arbitration.

30 When Pan appeared unconditionally as defendant in those proceedings on 24 June, it submitted to the jurisdiction of the Court and waived any irregularity. As Gibbs J noted in *Caltex Oil (Australia) Pty Limited v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 539, only a defendant can enter an appearance. He said that in an action in rem, the persons who may become defendants, if they choose to appear, are the owners and others interested in the ship, including charterers (see too: *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878 at 908B-909A, 909F-910F per Lord Steyn with whom Lords Browne-Wilkinson, Hoffmann, Cooke of Thorndon and Hope of Craighead agreed and s 31 of the *Admiralty Act 1988* (Cth)).

31 The effect of Comandate Marine commencing the *Boomerang 1* proceedings in rem was to put before the Court all elements of the justiciable controversy between the parties to, initially, the in rem proceedings, and, later, the in personam proceedings. Once Pan had appeared, the single controversy between it and Comandate Marine could be litigated in those proceedings, or indeed, in both proceedings as Gummow and Hayne JJ made clear in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585 [140] (see too at 586 [142], 587-588 [147]). They said (198 CLR at 585 [140]):

> *'What is a single controversy "depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationship" (*Fencott *(1983) 152 CLR 570 at 608, per Mason, Murphy, Brennan and Deane JJ). There is but a single matter if different claims arise out of "common transactions and facts" or "a*

> *common substratum of facts" (*Philip Morris *(1981) 148 CLR 457 at 512, per Mason J), notwithstanding that the facts upon which the claims depend "do not wholly coincide" (*Fencott *(1983) 152 CLR 570 at 607, per Mason J, Murphy, Brennan and Deane JJ) .'*

32 In addition, it is a principle of private international law that a foreign plaintiff, not otherwise subject to the jurisdiction of the Court, who brings proceedings in the Court submits itself, by necessary implication, to any counterclaim which would operate as a defence to the proceeding or could be relied on as a set off or a cross claim arising out of the same subject matter which would reduce or extinguish the plaintiff's claim. That submission to jurisdiction extends to a cross claim founded on or arising directly out of the same subject matter, even if it may result in a judgment against the plaintiff on the cross claim, where that ought be tried to do justice between the parties (*Marlborough Harbour Board v Charter Travel Co Ltd* (1989) 18 NSWLR 223 at 232B-233A per Hope JA, Clarke and Meagher JJA agreeing applying *National Commercial Bank v Wimbourne* (1979) 11 NSWLR 156 at 174E-G per Holland J; see too *Wool International v Sedgwick Ltd (No 4)* (unreported FCA 1172 October 1997 per Beaumont J at 10-11)).

33 It is clear that when the matter came before the Full Court on 27 June 2006, Pan was the defendant to Comandate Marine's proceedings. The only claims in Comandate Marine's proceedings at that time were those in the writ it had issued and pursuant to which the *Boomerang I* had been arrested.

34 The question arises as to whether by seeking the particular relief which it did and pursuing the arrest of the *Boomerang I* for the purposes of the claim for that relief made in the writ, Comandate Marine made an election not to arbitrate at London the dispute it had brought to this Court.

35 The consequences of an election may well be serious to the party electing, and in particular, election involves the abandoning of a right that is available: *Immer (No 145) Pty Limited v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 at 39 per Deane, Toohey, Gaudron and McHugh JJ. Their Honours held that a party can be only held to have elected if it had so communicated its election to the other party in clear and unequivocal terms. An election arises when a party is confronted with and makes a choice between the exercise of alternative and inconsistent rights. The party is not obliged to elect at once, but when it takes a step which is consistent only with one of those rights the law

attributes to it an election to abandon the other right (182 CLR at pp 38-39). It is necessary, however, for the party alleged to have elected, to have been aware at least of the facts giving rise to the two courses of action (182 CLR at 40). As their Honours pointed out (182 CLR at 41):

> *'The true nature of election is brought out in this sentence from the seminal work of Spencer Bower and Turner,* The Law Relating to Estoppel by Representation *(3rd ed (1977) p 313): "It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice."'*

36 Their Honours said that the confrontation which, in turn, produces the necessity of making a choice can also involve the concept that one affirms an agreement and abandons the right to rescind. Abandonment can be more readily inferred in certain circumstances than others (182 CLR at 42). And, as Kitto J commented in *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41 at 55:

> *'Not that election is a matter of intention. It is an effect which the law annexes to conduct which would be justifiable only if an election had been made one way or the other.'* (see too at 182 CLR at 42)

37 Comandate Marine argued that the making of a choice between having disputes determined by arbitration or curially was not an election by a party to an arbitration agreement. It relied on what Austin J had said in *ACD Tridon v Tridon Australia* [2002] NSWSC 896 at [58], [68]-[69]. He held that mere delay in invoking a reference to arbitration by a party to an arbitration agreement, who had been sued by the other party in curial proceedings, was not an election or waiver: see too *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-ing Burkhardt GmbH* [2001] 1 Qd R 461 at 469 [25]. But that is quite distinct from the position, here, where the party asserting the binding obligation to arbitrate later initiated the *Boomerang I*'s arrest without, at that time, seeking or foreshadowing a claim for curial assistance in *those* proceedings in enforcing the arbitration agreement.

38 Ordinarily, an arbitration agreement will give rise to the Court holding the parties to an exclusive procedure to be followed by both parties for the resolution of any dispute to which the agreement applies: *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 312-313 per Brennan CJ, Gaudron and McHugh JJ.

There is no reason why the parties cannot agree afterwards to use litigation, rather than follow the arbitration agreement in which case the agreement, becomes 'inoperative' within the meaning of s 7(5) of the *International Arbitration Act 1974* (Cth)*: Australian Granites Ltd v Eisenwerk Hensel Bayreuth Depl.-ing Burkhardt GmbH* [2001] 1 Qd R 461 at 466-467 [15]-[16] per Pincus JA with whom Thomas JA and Shepherdson J agreed; *Zhang v Shanghai Wool and Jute Textile Co Ltd* [2006] VSCA 133 at [12]-[13] per Chernov JA with whom Ashley JA and Bongiorno AJA agreed.

39 Comandate Marine also relied on what Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ said concerning 'waiver' in *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32 of [38]-[39]. In particular they said:

> *'It is one thing to speak of the waiver of a legal, equitable or statutory right or privilege. However, once it is appreciated that the court has jurisdiction and that its procedural rules have been engaged, concepts such as "waiver" (and acquiescence and estoppel) are confusing and imprecise. This was pointed out by Dawson J in* Verwayen *(1990) 170 CLR 394 at 456) and Lord Browne-Wilkinson in* Roebuck v Mungovin *([1994] 2 AC 224 at 235-236. See also* Giumelli v Giumelli *(1999) 196 CLR 101 at 122 [38]).* ***The conduct of pending proceedings by a party*** *is relevant upon an application by that party for the exercise in its favour of a power of the court. The outcome of such an application depends not upon the exercise of the right of a litigant or upon its denial, but upon the exercise of a discretionary power given to the court. The decision of the court often will depend upon many different factors (see* Ketteman v Hansel Properties *[1987] AC 189 at 220 per Lord Griffiths). An outcome favourable to one party cannot be described adequately in terms of the waiver of the legal, equitable or statutory rights of the unsuccessful party.'* (emphasis added)

40 Again, their Honours were dealing an argument about waiver by a defendant to proceedings which, at the first opportunity, had not taken a point open to it to say that the proceedings were incompetent. As the words emphasised show, the issue there was as to the legal consequence of conduct of a party in proceedings which were already pending, as distinct from the consequences which might result the conduct of from a person who exercises a choice by commencing curial proceedings.

41 'Waiver' is commonly a term used to describe 'election': *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 633 per Mason, Brennan, Deane and Dawson JJ, but, as their Honours say 'election' or 'waiver' in the sense of a choice between inconsistent rights is different to the concept of estoppel. 'An election, unlike estoppel is

concerned with what a party does and not what he causes the other party to do' (165 CLR 622 at 633). No prejudice need be shown by the party seeking to hold the other to an election.

42 Comanate Marine argues that by bringing its in rem proceedings it invoked the Admiralty jurisdiction of the Court, including all its powers under s 29 of the *Admiralty Act 1988* (Cth). It says that the arrest of the *Boomerang I* has been set aside, and so no question now arises about an order under s 29 in the proceedings which it commenced. But it says that had the vessel remained under arrest, the court could have granted a stay and made orders for security under s 29.

43 There can be no doubt that Comandate Marine knew of the provisions of cl 45(b) requiring all disputes arising out of the contract to be arbitrated at the time of the issue of its writ in rem. By seeking only the relief which it did in the writ in rem, Comandate Marine communicated, unequivocally, in my opinion, a choice that it was litigating in this Court an action for damages for breach of the charter party. Of course, the Court could give relief in that action. No relief was sought in aid of the arbitration. In the classic judgment of Parker J in *Matthews v Smallwood* [1910] 1 Ch 777 at 786-787 (in a passage approved by Knox CJ, Isaacs and Starke JJ in *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 325 (their Honours' emphasis)) said:

> *'It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a* waiver is a question which the law decides, *and therefore it is not open to a lessor* who has knowledge of the breach *to say 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve.' That is a position which he is not entitled to take up. If,* knowing of the breach, *he does distrain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything.'*

44 Although both his Lordship and the High Court used the term 'waiver', the concept to which they were referring has been treated in later cases as an election, as was made clear in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 642, 646 per Stephen J (with whom McTiernan ACJ agreed), per Mason J at 656-657.

45 Comandate Marine's answer to this was to say that the presence of s 29 in the *Admiralty Act 1988* (Cth) forms part of the jurisdiction of the Court which it had invoked by

commencing its writ in rem. That is so. However, at that time it did not seek relief under s 29 and, quite contrary to its contractual promise that it would arbitrate all disputes arising under the charter party in London, it sought relief from this Court by way of the award of damages.

46 Comandate Marine relied upon two authorities, one English and one in this Court in support of its position. In *The 'Jalamatsya'* [1987] 2 Lloyd's Rep 164, Sheen J held that a party to arbitration proceedings which had already been commenced could apply to the Court for the arrest of a vessel in order to obtain security for the arbitration. His Lordship noted that s 26 of the *Civil Jurisdiction and Judgments Act 1982* (UK), which is in relevantly similar terms to s 29 of the *Admiralty Act 1988* (Cth) for present purposes, envisaged just such a course. He relied on obiter dicta by Robert Goff LJ, giving the judgment of himself, Waller and Slade LJJ in *The 'Andria' now renamed 'Vasso'* [1984] QB 477; [1984] 1 Lloyd's Rep 235 to that effect. Sheen J said that s 26 had been enacted:

> *'… to enable claimants (I use a neutral expression) to obtain security if they proceeded by way of arbitration rather than by action. In my judgment s 26 applies whether or not an arbitration has already been commenced. It follows that if an arbitration has been commenced, and if the claimants in the arbitration have not obtained security for any possible award, then they can quite properly issue a writ in rem if they know that a ship belonging to the respondents in the arbitration is coming within the jurisdiction, and they may arrest that ship in order to obtain security.' ([1987] 2 Lloyd's Rep at 165)*

47 Accordingly his Lordship held that there had been no abuse of the process of the Court in arresting the ship. Significantly, his Lordship said that the claim endorsed on the writ in that case was a claim which was within the Admiralty jurisdiction of the High Court of Justice in England which could be invoked by serving a writ in rem upon the ship and accordingly it could be arrested. Regrettably, the report is silent as to what the claim was or whether it sought security for the arbitration.

48 In *Allonah Pty Limited v The Ship 'Amanda N'* (1989) 21 FCR 60, Sheppard J followed Sheen J's decision. In that case, similarly, a consent arbitration was proceeding at the time the vessel was arrested. Again, there is no indication in the report of the claims made in the writ in consequence of which the vessel was arrested. However, his Honour set out what Sheen J had said and concluded that the same approach should be adopted in the construction of s 29 of the *Admiralty Act 1988* (Cth) (21 FCR at 64). He continued:

> *'In my opinion the use of the words, "should be determined by arbitration", has nothing to say on the question whether the arbitration has already commenced or is to commence in the future.'*

49 In *The 'Bazias 3'* [1993] QB 673, Lloyd LJ (with whom Ralph Gibson and Butler-Sloss LJJ agreed) granted a stay of proceedings brought in admiralty in order to enable arbitration to proceed but continued the arrest of two vessels under s 26 in order to provide security for any award in the arbitration. Significantly, his Lordship recited that the proceedings in rem sought security for the plaintiff's counterclaim in the arbitration proceedings (see [1993] QB at 678G-H and see also the recital of facts at 675C-D).

50 What s 29 is referring to is the question whether the dispute should be determined by arbitration in the sense that that is the appropriate method whereby the dispute between the parties is to be resolved. There is an issue about that in this case. In *The 'Andria' now renamed 'Vasso'* [1984] QB 477 at 490, Waller, Slade and Robert Goff LJJ said, that in English law as it stood prior to the enactment of s 26:

> *'… the Court's jurisdiction to arrest a ship in an action in rem should not be exercised for the purposes of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings, for example, arbitration proceedings. The time may well come when the law on this point may be changed: see s 26 of the Civil Jurisdiction and Judgments Act 1982, which has however not be brought into force. But that is not yet the law. It follows that, if a plaintiff invokes the jurisdiction of the Court to obtain the arrest of a ship as security for an award in arbitration proceedings, the Court should not issue a warrant of arrest.'*

51 Earlier, their Lordships identified the issue as arising in the context of an argument about jurisdiction and abuse of process. They rejected the contention that if the purpose of a plaintiff in seeking the arrest of a ship in an action in rem was simply to obtain security for an award in arbitration proceedings, the court had no jurisdiction ([1984] QB at 488E-G). Rather they held that in such a case, before s 26 came into force, the plaintiff's conduct was an abuse of process ([1984] QB at 490E-G), but said, *obiter dicta*, that once s 26 came into force it would be a permissible course. They also cited ([1984] QB at 490B) Brandon J's decision in *The 'Cap Bon'* [1967] 1 Lloyd's Rep 543 (see at 548) as authority for the proposition that a party who actively pursued proceedings in respect of the same claim both in the Court and in arbitration, could be required by the Court, in the exercise of its inherent

power, to elect in which forum it would pursue its claim because the Court proceedings could be regarded as vexatious or an abuse of process. Brandon J observed that the plaintiff had a right to do either ([1967] 1 Lloyd's Rep at 548: see too: *The 'Tuyuti'* [1984] QB 838 at 850 where Robert Goff LJ referred to this approach as a principle of law). Neither the Lords Justices, nor Brandon J, considered the question of whether the party by so acting may have elected between or waived its right to pursue one rather than the other course.

52 Here, the Court had jurisdiction to grant Comandate Marine all the relief it sought in the writ in rem when it issued the warrant of arrest.

53 Pan argues that a general maritime claim for security for the arbitration proceedings pursuant to s 29 could have been available to Comandate Marine under s 4(3)(f) of the *Admiralty Act 1988* (Cth) as a claim arising out of the charter party. By s 4(3)(u), a claim for the enforcement of or arising out of an arbital award made in respect of a claim within s 4(3)(f) is also a general maritime claim.

54 As Sheen J and Sheppard J reasoned, the enactment of s 29 of the *Admiralty Act 1988* (Cth) and its analogue permit the arrest of a vessel so that security will be available to satisfy any award made in an arbitration proceeding which the parties to the writ, when the defendant appears, are contractually bound to submit to arbitration or have already begun to arbitrate. But such an arrest, in my opinion can only be justified if the relief sought from the Court is not inconsistent with the obligation to arbitrate. Comandate Marine submitted that its dominant, but not sole, purpose in bringing the proceedings in rem was to seek security for the arbitration. It said that if the Court did not stay the proceedings or refer them to arbitration, the proceedings would continue. Thus, the Court could grant the actual and only relief sought in the writ, namely the arrest which was made and damages, interest and costs.

55 It would not be inconsistent for a party to an arbitration agreement seeking to enforce its rights in an arbitration to commence in rem proceedings in which it claimed relief under s 29 of the *Admiralty Act 1988* (Cth) so as to have security available to satisfy any arbitral award. And, as Allsop J has remarked, it is important to recognize that impediments should not be placed in the path of the free use of the in rem procedure under the *Admiralty Act 1988* (Cth): *Tisand v The 'Cape Moreton'* (2004) 141 FCR 29 at 38 [44].

56 In the present case, where the arbitration has commenced and Comandate Marine wishes to enforce the obligations of the parties to arbitrate, it could have commenced in rem

proceedings seeking an order under s 29 that they be stayed or dismissed on the ground that Pan was bound to arbitrate in London after Pan provided security. Comandate Marine invoked the jurisdiction of the Court to hear and determine a case for damages for breach of the charter party by seeking in its writ in rem only the arrest and damages and made no claim for security or to enforce the obligation to arbitrate. Indeed, Comandate Marine submitted that while its dominant purpose in commencing its proceedings in rem was to obtain security for the arbitration, it also intended to pursue the relief it claimed in that writ of stay of Pan's proceedings were refused. That submission sought to keep all Comandate Marine's options open without prejudice.

57 Comandate Marine also pointed to Art 9 of the UNCITRAL Model Law on International Commercial Arbitration which by force of s 16(1) and the *International Arbitration Act 1974* (Cth) has the force of law in Australia. The Model Law is set out in Sch 2 of that Act. Article 9 of the Model Law provides:

> *'It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.'*

58 As noted above, Comandate Marine's proceedings in rem contained no such request. And, Art 8(1) of the Model Law, relevantly requires a court in which an action is brought in a matter which is the subject of an arbitration agreement to refer the parties to arbitration, if a party so requests no later than when submitting its first statement on the substance of the dispute.

59 *Russell on Arbitration* (22nd ed) at 610 [A5-018] refers to Art 8(1) having the same effect as English law; i.e. the party seeking to enforce the arbitration agreement must apply to the court without delay for a stay of the proceedings (op cit at 296 [7-005]). The position is similar under s 53(2) of the *Commercial Arbitration Act 1984* (NSW) which applies here by force of s 79 of the *Judiciary Act 1903* (Cth).

60 Comandate Marine did not apply to have its proceedings referred to arbitration when they were before this Court or the High Court. I am of opinion that Comandate Marine's conduct in bringing its proceedings in rem was incompatible with the arbitration agreement, and that Art 8(1) and Art 9 of the Model Law do not avail it.

61 Comandate Marine is in a similar position to that of the landlord in the example given

by Parker J in *Matthews v Smallwood* [1910] 1 Ch at 786-787. By pleading the writ in the way which it did, Comandate Marine exercised a right of action given by the *Admiralty Act 1988* (Cth) to litigate the breach of the charter party as a general maritime claim under s 4(3)(f) of the *Admiralty Act 1988* (Cth) in this Court. I am of opinion that in choosing to claim only that relief when it invoked the jurisdiction of the Court, Comandate Marine could not do that without prejudice to any right it might otherwise have had to seek security for the arbitration under s 29 at a later stage. It made no such claim in the writ and it procured the arrest of the vessel for the purposes of the particular relief which it claimed in the writ. The way in which Comandate Marine framed its claim in the writ nailed its colours to the mast as much as the warrant for arrest later was nailed (notionally or actually) to the mast of the *Boomerang I*. Having invoked the jurisdiction of the Court to procure the arrest of the vessel in order to pursue the only claims it pleaded, it is not open to Comandate Marine now to say that it did so without prejudice to any right later to apply for security under s 29 of the *Admiralty Act 1988* (Cth).

62 In its report: *Civil Admiralty Jurisdiction* (Report No 33, 1986) Law Reform Commission (Australia), the Commission recommended the introduction of what has become s 29 so as to enable the Admiralty jurisdiction to be used to obtain and retain security even though the merits of the dispute are to be determined elsewhere, if the subject matter of the dispute lies within Admiralty jurisdiction. The Commission noted that such a solution would do most to ensure that the award of the tribunal that decides upon the merits is satisfied, and hence that a just result would be obtained. It noted that the law had a strong interest in compliance with arbitral awards duly made, and in achieving co-operation between courts and arbitrators to this end. However, the Commission desired, in the solution it proposed, that the Court should retain a discretion to stay or to exercise jurisdiction to decide the merits (ALRC 33 [189]). That discretion was to arise in the Court being able to take into account all relevant circumstances although the Commission noted that, as at 1986, English and South African courts required the plaintiff to demonstrate why the assistance of a court was required in retaining security, although there were shades of difference between the readiness of the respective jurisdictions to assist in respect of claims otherwise unconnected with the forum: *The Tuyuti* [1984] QB 838 at 851; *Katagum Wholesale Commodities v The MV Paz* 1984 (3) SAf LR 261 at 268, 270 (Natal Provincial Division of the Supreme Court of South Africa).

63 Neither party argued that the analysis of the present question should be approached on

the basis that there had been a contract of abandonment such as in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 915-916. There, Lord Diplock considered that abandonment of a contract, which was still executory, involved the formation of a contract of abandonment in which each party promised to release the other from performance of all further obligations, including the obligation to pay damages for past breaches, arising under the executory, and now abandoned, contract. Lord Brandon of Oakbrook, who gave the leading speech (see [1983] 1 AC 900C per Lord Diplock) said that the question of whether a contract has been abandoned or not is one of fact ([1983] 1 AC at 913F). He continued ([1983] 1 AC at 914A-C):

> *'The concept of the implied abandonment of a contract as a result of the conduct of the parties to it is well established in law : see* Chitty on Contracts*, 23rd ed. (1968), vol 1, p 577, para 1231, and cases there cited. Where A seeks to prove that he and B have abandoned a contract in this way, there are two ways in which A can put his case. The first way is by showing that the conduct of each party, as evinced to the other party and acted on by him, leads necessarily to the inference of an implied agreement between them to abandon the contract. The second method is by showing that the conduct of B, as evinced towards A, has been such as to lead A reasonably to believe that B has abandoned the contract, even though it has not in fact been B's intention to do so, and that A has significantly altered his position in reliance on that belief. The first method involves actual abandonment by both A and B. The second method involves the creation by B of a situation in which he is estopped from asserting, as against A, that he, B, has not abandoned the contract :* Pearl Mill Co v Ivy Tannery Co Ltd *[1919] 1 KB 78.'*

64 This contractual analysis is inapposite here, but their Lordships' approach shows that, notwithstanding that arbitration proceedings have been regularly commenced and that both parties are bound to their pursuit, the conduct of one party or both parties can bring about the legal consequence that the parties' obligations to arbitrate in the arbitration proceedings have become abandoned or inoperative or incapable of being performed.

65 In international trade and commerce, it is critical that the courts respect and enforce arbitration agreements where they exist in accordance with, in particular, the New York Convention and legislation designed to give effect to it such as the *International Arbitration Act 1974* (Cth). This is because in international trade and commerce, the parties generally will not wish to be subject to serendipity of where a ship may be arrested, an action begun or damage occur to determine a forum of any litigation between them or the substantive law to be applied to their dispute. The parties will be conscious that an accident or fortuity may

occur at any point in a voyage or flight and very different legal results may flow depending on which law and which forum determine their dispute. It is for this reason that arbitration clauses such as cl 45(b) invoking arbitration in London under English law have been a popular recourse for parties in international trade for over a century. Nowadays other centres of commercial arbitration, including Australia, are recognized as providing sound and fair fora and laws for the resolution of disputes in international trade or commerce.

66 However, the Court should be astute to uphold and enforce agreements such as those in cl 45(b) rather than to display a form of judicial prejudice or xenophobia against the parties' chosen method or place of dispute resolution. Refusal to enforce agreements to arbitrate in international transactions is capable of undermining the reasonable but significant expectations of the international commercial community and the confidence which it and, indeed, local business people place in the readiness of courts to hold people to their bargains: see e.g.: *Vimar Seguros y Reaseguros SA v M/V Sky Reefer* 515 US 528 at 538 (1995); *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614, 638 (1985); *Scherk v Alberto-Culver Co* 417 US 506, 516 (1974); *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 343 per Brennan and Dawson JJ, 354 per Toohey J agreeing (cf: *Nanisivik Mines Ltd v F.C.R.S. Shipping Ltd* (1994) 113 DLR (4^{th}) 536 at 541-542 (Federal Court of Appeal).

67 But, just as parties may choose to invoke arbitration as the method by which their disputes will be resolved by use of an arbitration agreement such as in cl 45(b), so they may also choose to give up their rights to use that method or they may so conduct themselves that the choice will be attributed to them by the doctrine of election.

68 When Comandate Marine chose to begin its in rem proceedings in the form which it utilized, it brought about the consequence that it was taken to have elected not to pursue its arbitration proceedings. It may have chosen another method to seek security by framing the relief it sought in its writ in a different way, but it did not do so. The English authorities on which Comandate Marine relied, and to which Sheppard J referred, did not consider the question of whether the party seeking security had made an election. For that reason I think those authorities are distinguishable.

69 Because Comandate Marine elected to litigate the dispute and Pan has too, the arbitration agreement in cl 45(b) has been, in substance, abandoned or for the purposes of

s 7(5) of the *International Arbitration Act 1974* (Cth) rendered inoperative or incapable of being performed.

WAS THERE AN AGREEMENT IN WRITING?

70 Pan argues that Art II r 2 of the New York Convention requires there to be either an arbitral clause in a contract or an arbitration agreement which is either signed by the parties or contained in an exchange of letters or telegrams.

71 Pan says that where the contract was formed, as it argues the charter party was in this case, either by acts or conduct, Art II r 2 is not satisfied. Pan says that each of the provision of the bank guarantee or the delivery of the vessel was an act or amounted to conduct which brought the contract into existence. In support of the argument it relies on decision of the Supreme Court of Italy in *Robobar Limited v Finncold SaS* (1995) Year Book Comm. Arb'n XX 739 at 740. The Court held that where a purchase confirmation had been sent by the party seeking to rely on the arbitration clause to which the other party had not responded, there was no doubt that none of the formalities in Art II in the New York Convention had been met because the clause was only contained in the confirmation to which the other party had not agreed by letter or telegram.

72 Pan also relied on a decision of the Court of Appeal of the Federal Republic of Germany in a case between a Dutch seller and a German buyer ((1997) Year Book Comm. Arb'n Vol II, 237 at 238). The Court of Appeal held that a declaration in writing of both sides to the contract was required. A one sided confirmation did not suffice and the lack of declaration in writing by the other party could not be cured by that party's appearance in the arbitration.

73 In this matter, however, the critical telex of 20 April 2006 commenced by being in form a confirmation, but ended with a request being made to both parties to confirm that the above recap was in line with the negotiations agreed so far.

74 The next relevant correspondence was the telex later that day noting that the bank guarantee had been received and indicating when delivery would occur. I think this does fall within the positions contemplated by the Supreme Court of Italy and the German Court of Appeal, as being ones in which the contract was not *formed* or *contained* in an exchange of letters or telegrams.

75 And, In *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225 at 234, Ralph Gibson LJ said:

> *'It is clear to me that the [New York] Convention by Art II par 2 did not impose upon the contracting state an obligation to recognise an agreement in writing to submit to arbitration unless it is signed by the parties or unless the agreement is contained in an exchange of letters or telegrams in the sense that the assent to be bound by both parties is given in writing by such document.'*

76 The Manitoba Court of Appeal noted in *Proctor v Schellenberg* [2003] 2 WWR 621 at 628 [18] that Art IV r 1(b) of the New York Convention requires a party seeking to obtain recognition and enforcement of an award, to provide '[t]he original agreement referred to in article II or a duly certified copy thereof'. They said that '… there had to be a record to evidence the agreement of the parties to resolve the dispute by arbitral process', in concluding that facsimile transmissions were sufficient to be or form part of an 'agreement in writing'.

77 In A.J. van den Berg's *The New York Arbitration Convention of 1958* (1981) at 196-198, 206, 277 the learned author notes that Art II r 2 excludes oral or tacit acceptance and concluded (at 197, 227) that, as at 1981 there had been only one '… exception to the unanimous judicial affirmation that tacit acceptance does not comply with Art II r 2', that being a decision of the Court of First Instance of Rotterdam. The learned author said that this decision was not in conformity with either the text of Art II r 2 or the intent of its drafters, and noted that the decision had been rightly criticised. Significantly, he referred to the history of Art II r 2 which confirmed that the drafters of the New York Convention wished to exclude from its scope oral or tacit acceptance of a written proposal to arbitrate.

78 In his article 'Is the need for writing as expressed in the New York Convention and the Model Law out of step with commercial practice*?*' (1996) *International Arbitration* vol 12, no 1, p 27 at 32 Neil Kaplan QC affirmed Prof van den Berg's interpretation. Mr Kaplan referred to discussions that he had had with Prof Pieter Sanders, the Dutch delegate in the drafting of the Convention, who had given him the actual minutes of the delegate's consideration of Prof Sanders' proposal to add to the draft of Art II r 2 the following words:

> *'Confirmation in writing by one of the parties (which is kept) without contestation by the party.'* (UN DOC E/CONF. 26L.54)

79 The English and USSR delegates at the drafting session objected to that proposal and it was rejected (van den Berg: op cit at 196; Kaplan: op cit 32-33). Earlier, as Kaplan J, he had held in the High Court of Hong Kong in *H Smal Limited v Goldroyce Garment Limited* [1994] 2 HKC 526 (HCMP000 908/1994) that there was no basis for arguing that an arbitration agreement could be established by a course of dealing or the conduct of the parties under Art VII of the Model Law (see Schedule 2 to the *International Arbitration Act 1974* (Cth)). Kaplan J said that he had looked at the UNCITRAL reports in relation to Art VII and was quite satisfied that it could not be complied with unless there was a record in which the defendant, in writing, assented to the agreement to arbitrate (see at [12]).

80 It has been recognized that a national courts, in the interest of uniformity, should construe rules formulated by an international convention, especially rules formulated for the purpose of governing international transactions such as the hire of vessels or the carriage of goods, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English or domestic law, or by English or domestic legal precedent, but on broad principles of general acceptation: *Shipping Corporation of India Ltd v Gamlen Chemical Co Australasia Pty Ltd* (1980) 147 CLR 142 at 159 per Mason and Wilson JJ adopting Lord Wilberforce's speech in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141 at 152 and see too: *Vimar Seguros y Reaseguros SA v M/V Sky Reefer* 515 US 528 at 537 (1995) per Kennedy J (Renquist CJ, Scalia, Souter, Thomas and Ginsberg JJ agreeing). Mason and Wilson JJ went on to say (147 CLR at 159):

> *'It is important that we should adhere to this approach when we are interpreting rules which have been formulated for the purpose of regulating the rights and liabilities of parties to international mercantile transactions where great store is set upon certainty and uniformity of application.'* (see too *Great China Metal Industries Ltd v Malayasian International Shipping Corporation Berhad* (1988) 196 CLR 161 at 186 [71] per McHugh J)

81 It is also important in construing international conventions, that the views taken by courts, particularly the Supreme Courts of nations, are kept in mind so that there can be consistency in interpretation. And, I am conscious that in s 3(1) of the *International Arbitration Act 1974* (Cth) the definition of 'arbitration agreement' is that it is an agreement of the kind referred to in Art II r 2.

82 As a matter of construction under Australian law, I would have no hesitation in

concluding that the definition was inclusive one. However, I think that the drafting of the definition in Art II r 2 invokes a concept of certainty that the arbitration clause or arbitration agreement is itself signed or contained in an exchange of letters or telegrams. The pre-contractual exchanges of telexes and emails cannot themselves convert into separate or free-standing agreements in the present case unless and until the vessel was actually agreed to be fixed. It was only upon the agreement to fix the vessel that it could be said to be under charter. And as Capt Piperakis said, he had imposed an absolute condition that a bank guarantee be provided. The owners were not prepared to deliver the vessel, on the evidence before me, unless and until the bank guarantee had been received and it was at that point that they agreed that they were contractually bound. That agreement, which thus brought cl 45(b) into existence as an agreement to arbitrate, was manifested by Comandate Marine's conduct either in accepting the bank guarantee or later delivering the vessel.

83 At common law a recap telex can be found to contain a charter party, including an arbitration clause which is incorporated by reference to an earlier telex or other communication, even though both parties have not executed it: *The Epsilon Rosa* [2003] 2 Lloyd's Rep 509 at 514 [21] per Tuckey LJ (May and Brooke LJJ agreeing). But as Tuckey LJ pointed out ([2003] 2 Lloyd's Rep at 515 [29]) one cannot generalize in these cases.

84 The act of acceptance, which formed the contract, was the provision of the bank guarantee. And, it is common ground that a formal charter party incorporating all of the agreed terms was to be prepared later by Prime on behalf of Comandate Marine. Both parties were under a duty to co-operate to bring about the final form of their agreement in writing (*Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Limited* (1979) 144 CLR 596 at 607 per Mason J applying *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71 per Griffith CJ).

85 No doubt cl 45(b) was part of the agreement between Pan and Comandate Marine. But that does not, of itself, comply with Art II r 2. Rather, the critical part of the conduct by which the contract was formed was the provision by a third party of the bank guarantee which brought the contract into existence. So, the contract (being or including the arbitration agreement) was not made by being signed by the parties or contained in an exchange of telexes or emails. The contract included the conduct of the provision of the bank guarantee which fell outside the scope of Art II r 2. And, because there is no evidence of any further

written communication relied on as amounting to a document capable of being part of an exchange of 'letters or telegrams' including telexes or emails, then this series of communications does not satisfy the requirements of Art II r 2.

86 A contract can be made by conduct evidencing a manifestation of assent to an offer: *Empirnall Holdings Pty Limited v Machon Paull Partners Pty Limited* (1988) 14 NSWLR 523 at 534-535 per McHugh JA (Samuels JA agreeing at 531). Accordingly, I am of opinion that the telex from Prime to Mr Colaco headed 'FINAL RECAP' was an offer by Comandate Marine to charter the vessel on the terms there set out and incorporated by reference which was capable of acceptance only by the provision of the bank guarantee.

87 For the reasons I have given, based on the fairly settled interpretation of Art II r 2 that tacit acceptance is insufficient, on the evidence I find that at the present time there is no 'agreement in writing' for the purposes of Art II r 2 of the New York Convention.

COMANDATE MARINE'S ALTERNATIVE CLAIM FOR STAY UNDER S 53 OF THE COMMERCIAL ARBITRATION ACT 1984 (NSW)

88 Comandate Marine argued, that if an agreement in writing for the purposes of s 7(2) of the *International Arbitration Act 1974* (Cth) were not found, I should grant a stay pursuant to s 53 of the *Commercial Arbitration Act 1984* (NSW). The *Commercial Arbitration Act 1984* (NSW) provides that an arbitration agreement '… means an agreement in writing to refer present or future disputes to arbitration' (see s 4(1)). By s 53(1) the Court may stay the proceedings if it is satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.

89 Having regard to the fact that Comandate Marine commenced its proceedings in rem, as I have found, without seeking to enforce any claim to arbitrate in those proceedings, I am of opinion that the evidence establishes that Comandate Marine was not then ready and willing to do all things necessary for the proper conduct of the arbitration. However, its application for stay is made in Pan's proceedings. At the time when Pan's proceedings were commenced, Comandate Marine was pursuing the arbitration proceedings and still seeks to do so now. I do not think that makes the commencement of the proceedings in rem irrelevant. By s 53(2), the leave of the Court is required in the proceedings which have been

commenced where the applicant for stay has delivered pleadings or taken any other steps in the proceedings other than the entry of an appearance. Although Comandate Marine's proceedings in rem were in separate proceedings, they form, as I have held, part of the same 'matter' for the purposes of ss 75 and 76 of the Constitution, and I am not minded to exercise any discretion in favour of Comandate Marine having regard to its conduct in taking the in rem proceedings in the circumstances which I have found.

SCOPE OF THE ARBITRATION CLAUSE

90 Comandate Marine argued that the claims brought under ss 51A, 52 and 55A of the *Trade Practices Act 1974* (Cth) and seeking relief under ss 82 and 87, including relief setting aside *ab initio* the charter party and preventing Comandate Marine from enforcing against the plaintiff any arbitral award were 'colourable'. It was not put that the claims were an abuse of the process of the Court. Rather, it was put in oral argument that there had been a misuse of s 12 of the *Admiralty Act 1988* (Cth) because the very complaints the subject of the claims under the *Trade Practices Act 1974* (Cth) were, in essence, the same as the breaches of contract relied on by Pan. Comandate Marine, in written submissions asserted that the *Trade Practices Act 1974* (Cth) claims had been made for the improper purpose of fabricating jurisdiction. I do not think this argument has any substance.

91 Part V of the *Trade Practices Act 1974* (Cth), in which s 52 is found, sets out a statutory norm of conduct to which corporations must conform in trade or commerce. The task of the Court is to apply such norms where they arise in litigation even where the outcome is not materially different to applying the common law of negligence as in *Travel Compensation Fund v Tambree* (2005) 80 ALJR 183 at 191 [29] per Gleeson CJ or of passing off as in *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 83 [97]. In the latter case, the whole court approved what Mason J had said in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 205 (see 202 CLR at 83 [97]), in the following terms:

> *'Likewise, the operation of s 52 is not restricted by the common law principles relating to passing-off. If, as I consider, the section provides the public with wider protection from deception than the common law, it does not follow that there is a conflict between the section and the common law*. The statute provides an additional remedy.' (emphasis added)

92 I am of opinion that the statutory remedy relied on by Pan is additional to whatever

contractual remedies may be available to it and that there is no basis for the attribution to Pan of any improper purpose to fabricate jurisdiction. The Parliament of the Commonwealth has enacted the *Trade Practices Act 1974* (Cth) under the trade and commerce power in s 51(i) of the Constitution. There is nothing in the evidence to suggest that Pan has not properly and regularly invoked the Court's jurisdiction. Pan's pleading raises an issue of substance as to whether or not Comandate Marine engaged in misleading or deceptive conduct. I am satisfied that this is truly part of the one controversy which the Court has been asked to quell (cf: *D'Orta Ekenaike v Victorian Legal Aid* (2005) 79 ALJR 755 at 761 [32]).

93 The only arguable limitation in the *Admiralty Act 1988* (Cth) which might be seen as restricting the jurisdiction or powers any court invested with jurisdiction under that Act is to be found in s 13. But, on examination, s 13 does not affect the jurisdiction which a court, including this Court, has from sources other than the *Admiralty Act 1988* (Cth) itself. Rather, s 13 provides that the Act does not confer on or invest jurisdiction on or in a court in a matter which is not of a kind mentioned in ss 76(ii) or (iii) of the Constitution.

94 In ascertaining the scope of jurisdiction which the Federal Court may exercise, s 13 thus provides some guidance. It contemplates that matters of a kind mentioned in ss 76(ii) and (iii) of the Constitution can be within the jurisdiction of the Court. Section 76(iii) ('of Admiralty and maritime jurisdiction') is a clear source of power to enact the *Admiralty Act 1988* (Cth) itself and define maritime claims as well as associated matters of Admiralty and marine jurisdiction in ss 4 and 12. And s 76(ii) provides that the judicial power of the Commonwealth is invoked in any matter 'arising under any laws made by the Parliament'. The purpose of s 13 is to limit, in the construction of the Act, the conferral of jurisdiction by the Act to matters within the power of the Parliament and the judicial power of the Commonwealth. It is not to limit the other powers of a court on or in which the Act confers or invests jurisdiction.

95 Clearly enough, s 86 of the *Trade Practices Act 1974* (Cth) is a law made by the Parliament which confers jurisdiction on this Court independently of the jurisdiction conferred on it by the *Admiralty Act 1988* (Cth).

96 It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words: *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421;

see too *Mansfield v Director of Public Prosecutions for Western Australia* [2006] HCA 38 at [7]-[10] per Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ. Once the jurisdiction of this Court has been invoked, the Court should exercise it (*Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 588 [149]), even if it be to protect itself and its processes against their abuse: cf: *Batistatos v Roads and Traffic Authority* [2006] HCA 27 [3]-[15] per Gleeson CJ, Gummow, Hayne and Crennan JJ: see too: *Elbe Shipping SA v The Ship 'Global Peace'* [2006] FCA 954 at [138] per Allsop J, see too at [62]-[76].

97 Comandate Marine also argued that a limitation was imposed on courts exercising jurisdiction conferred by the *Admiralty Act 1988* (Cth) by s 31. But s 31(1) provides that the liability on a judgment of a relevant person (defined by s 3(1) as a person who would be liable were the proceedings in personam brought against that person) who has entered an appearance in a proceeding on a maritime claim commenced as an action in rem against a ship or property is not limited to the value of the ship or other property. The section confirms the amplitude of the jurisdiction rather than restricts it.

98 Next, Comandate Marine argued that a relevant person who appears in proceedings commenced by a writ in rem cannot be sued in proceedings in personam in this Court in respect of matters outside the relief claimed in the writ in rem on a cause of action other than a maritime claim within the meaning of s 4 of the *Admiralty Act 1988* (Cth) or on associated matters of admiralty and marine jurisdiction within the meaning of s 12 of that Act. Here, part of the 'matter', within the meaning of ss 76(ii) and (iii) of the Constitution, is the controversy between the parties under the *Trade Practices Act 1974* (Cth) which Pan has pleaded. The judicial power of the Commonwealth is exercised in resolving such 'matters'. Here, the controversy involves claims under two Acts of the Parliament each of which specifically and independently, one of the other, confers jurisdiction on this Court. Accordingly, I am of opinion that this Court does have jurisdiction to hear and determine such an in personam proceeding as this. That is not to say, however, that the ship or property the subject of the writ in rem will be available, necessarily, to answer any judgment for any in personam claim against a relevant person, such as one under the *Trade Practices Act 1974* (Cth), which is neither a maritime claim or an associated matter within the meaning of ss 4 or 12.

99 I am of opinion that the *Admiralty Act 1988* (Cth) cannot be construed as in any way limiting the jurisdiction of this Court to hear and determine any matter within its jurisdiction.

Rather, appositely to the present proceedings, there may be a question at the trial as to the availability of the bank guarantee which Comandate Marine provided as security in lieu of the ship *Comandate* to satisfy a claim made by Pan which is not within ss 4 or 12 of the Act. Pan's claim in personam for relief under the *Trade Practices Act 1974* (Cth) is not invalid and its proceedings in personam are not invalidated by that claim: s 51 of the *Federal Court of Australia Act 1976* (Cth). The Court, at the final hearing, can address any injustice which might arise if Comandate Marine wishes then to agitate such matters, including whether the security provided should be available to satisfy any claim under the *Trade Practices Act 1974* (Cth).

100 The *Trade Practices Act 1974* (Cth) provides Pan with remedies different to any remedy that could be awarded in pursuance of its contract claims. Indeed, one of the remedies it seeks is the avoidance of the contract, not pursuant to contractual principles, but by force of an order under s 87 of the Act: *Murphy v Overton Investments Pty Limited* (2004) 216 CLR 388 at 409 [52].

101 And, the High Court has emphasized that the remedies under the *Trade Practices Act 1974* (Cth) are designed to give effect, in cases of contravention of s 52, to the prescribed standards of conduct which are embodied in that section where activities occur in trade or commerce: *Campomar Sociedad Limitada v Nike International Limited* (2000) 202 CLR 45 at 83 [97]; *Travel Compensation Fund v Tambree* (2005) 80 ALJR 183. International trade including the entry into charter parties for vessels, is quintessentially within the trade and commerce clause of the Constitution (s 51(i)). And, par 15 of the amended statement of claim pleads specifically that the relevant conduct occurred in Australia because the communications and representations were received by Mr Colaco in Australia (see *Voth v Manildra Flour Mills Pty Limited* (1990) 171 CLR 538 at 568 per Mason CJ, Deane, Dawson and Gaudron JJ; *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539 at 547A-548D per Beaumont, Drummond and Sundberg JJ).

102 Next, Comandate Marine argued that I should not follow the decision of the Full Court in *The 'Kiukiang Career'* (*Hi-Fert Pty Limited v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1). In that case the relevant clause provided that 'any dispute arising from this charter' would be settled in a London arbitration. Obviously, it is important to recognize that in every contract the proper construction of that contract depends upon the words which the parties used having regard to contractual matrix within which the contract was entered or

made. Emmett J who delivered the leading judgment (with whom Branson J expressly agreed) considered a number of authorities including some which dealt with the words used in this arbitration clause (cl 45(b)): viz: 'arising out of'.

103 Emmett J said that a claim arising out of a contravention of the *Trade Practices Act 1974* (Cth) *during* the performance of an agreement could be a claim arising out of the agreement (90 FCR at 21G). But, he made the critical distinction that where there was a dispute in respect of conduct which was antecedent to the contract such a dispute could not be said to arise *from* the contract in question (90 FCR at 22A-B) and he observed that it did not arise out of the charter party (90 FCR at 22B-C). In *Francis Travel Marketing Pty Limited v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 Gleeson CJ (Meagher and Sheller JJA agreeing) held that conduct claimed to be in breach of s 52 of the *Trade Practices Act 1974* (Cth) which occurred wholly during the currency of an agreement arose out of the agreement, notwithstanding that statutory remedies were invoked, so that the whole matter was capable of settlement under the arbitration clause.

104 Where it is claimed that a misrepresentation induced entry into an agreement, the fact that during the performance of an agreement it emerges that the pre-contractual conduct was misleading or deceptive or otherwise in contravention of s 52 of the *Trade Practices Act 1974* (Cth) does not bring a statutory claim within the expression 'arising out of this contract'.

105 Gleeson CJ had distinguished the reasoning of Beaumont J in *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* (1985) 7 ATPR §40-636 on the basis that in that case the agreement to the parties was merely part of the background to the alleged contraventions of the Act and therefore the dispute did not arise out of the agreement. In the case before the Court of Appeal of New South Wales, the alleged contravention of the Act arose out of a representation that occurred during the currency of the agreement, as did the subsequent conduct relied on to establish the contravention (39 NSWLR at 166F-G). As Brennan and Dawson JJ noted in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 344 (with whom Toohey J agreed at p 354) in respect of an arbitration clause that related to disputes 'arising out of' or relating to the agreement or the breach thereof (169 CLR at 337) '… the matter to be referred to arbitration cannot extend to issues which could not arise in proceedings between [the parties] or which are unrelated to the contract containing the arbitration clause: *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* (1985) 7 ATPR §40-636 at 47,173'.

106 In *Union of India v EB Abby's Rederi AS ('The Evje')* [1975] AC 797 Lord Morris of Borth-y-Gest, reasoned that a dispute was one 'arising out of' a charter party where the charter party contained a clause providing that general average was to be payable according to the York/Antwerp Rules 1950 and to be settled in London. He said that a disputed claim for general average contribution which might involve disputes concerning matters and questions referred to in that clause would essentially and clearly arise out of the charter party because the claim related to events during its operation ([1975] AC 807H-808B, 808G, Lord Reid at 804E, and Lord Simon of Glaisdale agreed at 816C). Lord Salmon reasoned to similar effect ([1975] AC at 816F-8).

107 In *Ethiopian Oil Seed & Pulses Export Corporation v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep 86 at 97, Hirst J took the view that the words 'arising out of' covered every dispute except a dispute as to whether there was ever a contract at all. He held that the words should be given a wide interpretation of that kind so as to give effect to the parties' presumed intention not to have two sets of proceedings. And, in *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496 at 503-504 [32]-[37] Allsop J held that the clear tide of judicial opinion as to arbitration clauses, where the fair reading of them is not confined, was to give width, flexibility and amplitude to them (see 138 FCR 496 at 504 [36]). Allsop J agreed with what French J had said about the construction issue in *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 43 FCR 439. There, French J said of a clause providing for disputes 'arising *under* this agreement' that neither a trade practices claim nor claims for breach of warranty and negligent misstatement:

> *'… can be said to arise out of the agreement. They all arise out of matters which are antecedent to the contract even though they may involve questions which also go to its performance. No authority has been cited to me which would support the wide construction of the clause contended for by Tomlinsons and certainly the natural meaning of the words does not support their extension to disputes arising out of matters antecedent to the agreement.'* (43 FCR at 448)

In my opinion French J's reasoning, although directed to a different form of words, is apposite here in respect of the *Trade Practices Act 1974* (Cth) claims.

108 In the *The 'Playa Laga'* [1983] 2 Lloyd's Rep 171 at 183, Stephenson and Ackner LJJ and Sir Sebag Shaw said that the words 'all disputes arising out of this contract' are less precise than they looked. They pointed out that in strictness disputes arise not out of a

contract but out of conflicting views taken by the parties to the contract as Lord Sumner had said in *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314 at 328. The English Court of Appeal said that there were two stages which must be gone through in order to achieve a solution, first consideration of what was the nature of the dispute and secondly whether that dispute was within the scope of the arbitration clause. Their Lordships, obiter, observed that where contractual and tortious disputes were so closely knitted together on the facts, that the agreement to arbitrate on one can probably be construed as covering the other, the dispute falls within the arbitration clause ([1983] 2 Lloyd's Rep at 183).

109 And, in *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* (1985) 7 ATPR §40-636 at 47,173-47,174 Beaumont J held that it was not enough to point to the contract as part of the background to allegations of contraventions of Pt V of the *Trade Practices Act 1974* (Cth). The latter causes of action arose pursuant to statute and existed independently of contract. He said that they were consumer protection provisions which in no way depended upon any private agreement for their source. And, conduct for the purposes of Pt V of that Act would be established, if at all, irrespective of the contractual relations with the immediate parties. Beaumont J said:

> *'In short, an alleged contravention of Pt V of the Trade Practices Act 1974 is not, as a matter of characterization, a "controversy or claim arising out of or relating to (the) Agreement" for the purposes of … that contract.'*

110 I agree with Beaumont J's analysis. However, in *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 at [56] Allsop J suggested that the phrase 'arising out of' in an arbitration agreement reflected the practical, rather than theoretical, meaning to be given to the word 'contract' out of which disputes may arise. He said this could involve practical commercial considerations such as formation, extent and scope. Allsop J recognized that this wider construction was contrary to that of the Full Court in *The 'Kuikang Career'* (1998) 90 FCR 1 (see [2005] FCA 1102 [68]). I am of opinion that the Full Court's construction is correct for the reasons given above and in any event, like Allsop J, I am bound by it.

111 Comandate Marine argued that the decision of the majority of the High Court in *Coventry v Charter Pacific Corporation Ltd* (2005) 222 ALR 202 indicated that *The 'Kiukiang Career'* 90 FCR 1 was no longer good law and it should not be followed. I do not

accept that argument.

112 The construction of the operation of ss 82 and 86 of the *Bankruptcy Act 1966* (Cth) with which *Coventry v Charter Pacific Corporation Ltd* (2005) 222 ALR 202 was concerned involved the rules for set off in bankruptcy and the statutory construction of the expression 'arising by reason of a contract'. Thus Gleeson CJ, Gummow, Hayne and Callinan JJ held that a claim for damages for fraudulent misrepresentation brought by one contracting party against another or a claim for misleading or deceptive conduct which induced the party misled to make a contract with the other were, for the purposes of the *Bankruptcy Act 1966* (Cth), claims 'arising by reason of a contract' (222 ALR at 219 [71]). The claim that misleading and deceptive conduct induced the entry into a contract necessarily was a claim which arose 'by reason of the contract', because if the thing complained of, namely the entry into the contract, had not occurred there would be no contract which could then be proved under s 82(2) of the *Bankruptcy Act 1966* (Cth).

113 Here, the claim under the *Trade Practices Act 1974* (Cth) however, did not 'arise out of the contract', because that expression necessarily suggests that the contract was the source of the claim. Rather most of the essential elements of the cause of action under that Act existed before the contract came into existence, although elements of the performance of the contract, or non performance of the contract will have become relevant.

114 Next Comandate Marine argued that a grant of the anti-anti-suit injunction to enable Pan to litigate its claims under the *Trade Practices Act 1974* (Cth) amounted 'to the court aiding a party to commit a breach of contract'. The exercise by the Court of its jurisdiction to make orders pursuant to statutory powers where a party has engaged in conduct which is misleading or deceptive in breach of the statutory norms provided by the Parliament, is simply an instance of the Court enforcing the law. If Comandate Marine were found to have engaged in any misleading or deceptive conduct in contravention of the *Trade Practices Act 1974* (Cth), it would not be entitled to rely upon its strict contractual rights to defeat the statutory power of the Court to grant remedies to Pan flowing from that contravention.

ESTOPPEL

115 Comandate Marine argued that somehow an estoppel arose preventing Pan from denying that there was an agreement in writing for the purposes of Art II r 2 of the New York Convention. I do not understand how that could be. The facts are objective. The evidence of

Mr Athanassiou and Capt Piperakis is perfectly clear that each of them recognized that there was no actual charter party document in final form in existence at the time contractual relations commenced between the parties and that such a document was to be brought into existence later (cf *Masters v Cameron* (1954) 91 CLR 353 at 360). No conduct of Pan induced some other state of mind. There was nothing misleading and nothing unconscionable in Pan taking the stance it did about the matter. I see no substance in the argument.

ANTI-ANTI-SUIT INJUNCTION

116 Comandate Marine argued that I should not grant an injunction because it was in the public interest to hold parties to their contracts to arbitrate. I am of opinion that this argument ignores the fact that the Court's jurisdiction to give relief under the *Trade Practices Act 1974* (Cth) is of considerable importance and reflects the public interest expressed in the enactment of statutes by the Parliament of the Commonwealth of Australia as laws that are to govern commercial behaviour in this country. I remain of the opinion I expressed in my earlier judgment (*Pan Australia Shipping Pty Ltd v The Ship 'Comandate'* [2006] FCA 881).

117 However, Comandate Marine, by its counsel, offered an undertaking to the Court that if it were found that s 7(2) of the *International Arbitration Act 1974* (Cth) did not require a stay of the *Trade Practices Act 1974* (Cth) claims, to consent to the London arbitration determining all issues raised between the parties under the latter Act in respect of any conduct of the parties to which that Act would apply as a matter of Australian law relating to formation and/or entry into of the charter and/or relating to the conduct of the parties in connection with the performance of the charter as being disputes within cl 45(b) and as part of the existing dispute referred to the London arbitration.

118 Comandate Marine, by its counsel, also proffered an undertaking to the Court to agree that the arbitrators would have such jurisdiction, and it undertook not to prevent the arbitrators exercising that jurisdiction in determining the whole of the dispute between the parties.

119 Pan does not want London arbitrators to determine its claim under the *Trade Practices Act 1974* (Cth). Comandate's undertaking cannot extend the jurisdiction of the arbitrators. There is no power in s 7(2) to refer to arbitration or to stay claims under the *Trade Practices Act 1974* (Cth) that do not otherwise fall within the agreement to arbitrate. The Court has power only to stay the proceedings to the extent that they relate to what is

properly within the arbitration clause (*Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 344). While it may be convenient for the parties to have their whole dispute litigated in one forum, they cannot be forced to do so in a case like the present where the whole dispute does not arise out of the charter party.

120 Given that there is now no dispute that Comandate Marine would seek to obtain against Pan an injunction from the High Court of Justice in England restraining its prosecution of these proceedings, if the whole dispute were not arbitrated in London, it seems to me that for the reasons that I gave on 22 June 2006 the injunction must be continued.

BALANCE OF CONVENIENCE RE WITNESSES

121 Capt Piperakis said that there was a number of potential witnesses for the owners who were in Greece or elsewhere than in Australia. The Master and crew, when not at sea, might be located at various places in the northern hemisphere. The vessel's classification society representatives were in Greece, Singapore and Sri Lanka. The vessel had dry docked in Sri Lanka in December 2005 and there were also the ship's agent and surveyor located there. The owners' and charterers' Singapore agents may be needed together with the repairers in Singapore who repaired the vessel following a collision it had in Melbourne in June 2006. Capt Piperakis said that it would cause him personal and financial inconvenience to have to travel to Australia to attend a hearing in the matter whereas it would be relatively simple for him to travel to London.

122 It is likely that quite a number of witnesses who will be required to be called are persons from Australia who will give evidence as to the observations by the Australian Maritime Safety Authority Officers and others in the Australian ports as to the condition of the *Comandate* at various times together with Australian surveyors. It will also be likely that evidence will be called from witnesses based in Singapore and Sri Lanka as to the dry docking in Sri Lanka in 2005, the delivery and later repairs in Singapore this year. There may be some need for persons to come from Greece although I think that Capt Piperakis' evidence indicated that he was proceeding on an assumption that the existence of a contract at all may be in dispute. I do not think that that assumption is any longer correct, although it was certainly a matter that had been flagged by Pan in the interlocutory hearing on 22 June 2006.

123 While the Master and crew are likely to be witnesses as to the vessel's condition, it

will not make much difference where the hearing is so far as convenience to them is concerned. Wherever they are in the world either they will have to come away from whatever vessel they are on at the time or use electronic communication to give evidence at any hearing. The critical aspects of the claims of unseaworthiness and defective condition of the vessel together with the evidence as to the incurring of the damage to the hull are likely to be given by Australian witnesses and members of the ship's company. Pan had identified from the documents produced on subpoena at this early stage at least 12 different witnesses, 10 from the Authority, who may be required to give evidence. Of course, certain parts of the evidence may become uncontroversial as the case progresses but the impression I have is that leaving aside witnesses who will need to come from Sri Lanka and Singapore, on the material before me the likelihood is that most of the material witnesses other than the ship's company will be from Australia. There does not appear to be any relevant connection to London other than the requirement in cl 45(b) that the seat of the arbitration be there.

CONCLUSION

124 I order that Comandate Marine's motion be dismissed with costs.

125 It follows that the interim injunction which I granted on 13 July 2006 until further order will continue undisturbed.

I certify that the preceding one hundred and twenty-five (125) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 22 August 2006

Counsel for the Plaintiff: Dr AS Bell with Mr S Free

Solicitor for the Plaintiff: Ebsworth & Ebsworth

Counsel for the Defendant:	Mr AW Street SC with Mr NJ Owens
Solicitor for the Defendant:	Norton White
Date of Hearing:	13 and 14 July 2006
Date of Judgment:	22 August 2006