FEDERAL COURT OF AUSTRALIA

Trina Solar (US), Inc v Jasmin Solar Pty Ltd [2017] FCAFC 6

Appeal from:	*Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2015] FCA 1453
File number:	QUD 1160 of 2015
Judges:	**DOWSETT, GREENWOOD AND BEACH JJ**
Date of judgment:	25 January 2017
Catchwords:	**PRIVATE INTERNATIONAL LAW** – service of process outside the jurisdiction – residual discretion to refuse leave if the proceeding would be stayed – choice of law to apply where there is a dispute concerning whether a person is a party to an agreement containing a proper law clause – whether law of the forum applies – interaction between ss 7 and 8 of the *International Arbitration Act 1974* (Cth) – no error in exercise of discretion – appeal dismissed
Legislation:	*Federal Court Rules 2011* (Cth) r 10.43 *International Arbitration Act 1974* (Cth) ss 2D, 3, 7, 8 and 39
Cases cited:	*Albeko Schuhmaschinen AG v The Kamborian Shoe Machine Co Ltd* (1961) 111 LJ 519 *BEST Australia Ltd v Aquagas Marketing Pty Ltd* (1988) 83 ALR 217 *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317 *Cell Tech Communications Pty Ltd v Nokia Mobile Phones (UK) Ltd* (1995) 58 FCR 365 *Chevron International Oil Co Ltd v A/S Sea Team (The "T.S. Havprins")* [1983] 2 Lloyd's Rep 356 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 *Compagnie d'Armement Maritime S.A. v Compagnie Tunisienne de Navigation S.A.* [1971] AC 572 *Compania Naviera Micro S.A. v Shipley International Inc. (The "Parouth")* [1982] 2 Lloyd's Rep 351 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2009] EWCA Civ 755; [2011] 1 AC 763 *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161

	Dardana Ltd v Yukos Oil Co. [2002] 2 Lloyd's Rep 326 *Habas Sinai Ve Tibbi Gazlar Istihsal v VSC Steel Co Ltd* [2014] 1 Lloyd's Rep 479 *Hargood v OHTL Public Company Ltd* [2015] NSWSC 446 *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67 *House v The King* (1936) 55 CLR 499 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 38 VR 303 *Mackender v Feldia A.G.* [1967] 2 Q.B. 590 *Marc Rich & Co. A.G. v Societa Italiana Impianti P.A. (The "Atlantic Emperor")* [1989] 1 Lloyd's Rep 548 *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66 *National Navigation Co v Endesa Generacion SA (The "Wadi Sudr")* [2009] 1 Lloyd's Rep 666 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 *Perdaman Chemicals & Fertilisers v Griffin Coal Mining Company Pty Ltd* [2011] FCA 1425 *Quinlan v Safe International Försäkrings AB* [2005] FCA 1362 *Spiliada Maritime Corp. v Cansulex Ltd* [1987] A.C. 460 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 *Timberwest Forest Ltd v Gearbulk Pool Ltd* [2001] BCSC 882 *Union de Remorquage et de Sauvetage S.A. v Lake Avery Inc. (The "Lake Avery")* [1997] 1 Lloyd's Rep 540 *Union Transport PLC v Continental Lines S.A.* [1992] 1 WLR 15 *Venter v Ilona MY Ltd* [2012] NSWSC 1029 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 *White Cliffs Opal Mines Ltd v Miller* (1904) 4 SR (NSW) 150
	Born, GB, *International Commercial Arbitration* (2nd ed, Kluwer Law International, 2014)
Date of hearing:	24 May 2016
Date of last submissions:	24 May 2016
Registry:	Queensland
Division:	General Division

National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Category:	Catchwords
Number of paragraphs:	189
Counsel for the Appellant:	Mr S Doyle QC with Ms F Lubett
Solicitor for the Appellant:	King & Wood Mallesons
Counsel for the Respondent:	Mr N J O'Bryan SC with Mr H M Heuzenroeder
Solicitor for the Respondent:	Fitzpatrick Legal Pty Ltd

ORDERS

QUD 1160 of 2015

BETWEEN:	**TRINA SOLAR (US), INC** Appellant
AND:	**JASMIN SOLAR PTY LTD ACN 158 644 225** Respondent

JUDGES: **DOWSETT, GREENWOOD AND BEACH JJ**

DATE OF ORDER: **25 JANUARY 2017**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of and incidental to the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DOWSETT J:

1 I generally concur in the reasons of Beach J and in the orders which his Honour proposes. I wish only to add a comment concerning the second "error" which, as the appellant asserts, was made by the primary judge.

2 I accept that for the purposes of s 7, an "agreement" need not be an agreement as understood according to the lex fori. However an "agreement" necessarily involves the proposition that the parties are of one mind concerning the matter in question. The primary judge addressed this proposition at [85] and [86]. The last sentence at [86] makes it clear that his Honour was addressing only the question as to whether the parties were ad idem.

3 I should also say that I see no support for the proposition (if it be advanced) that the references to proper law in s 8 should be imported into s 7.

I certify that the preceding three (3) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate:

Dated: 25 January 2017

REASONS FOR JUDGMENT

GREENWOOD J:

Introduction

4 In these proceedings, the appellant, *Trina Solar (US), Inc* ("Trina (US)") contends that the exercise by the primary judge of a discretion (described as a "residual discretion") to refuse, or not refuse, the grant of leave to the respondent, *Jasmin Solar Pty Ltd* ("Jasmin"), to serve an originating application and statement of claim (and other documents) filed in this Court, upon Trina (US) in the United States, *miscarried*, in the sense contemplated in the well-known passages in *House v The King* (1936) 55 CLR 499 at 504-505.

5 The primary judge, on Jasmin's application for leave to serve out of the forum, was satisfied that Jasmin had established a prima facie case in respect of the causes of action framed by the statement of claim; that "jurisdiction" was engaged; and that the elements of rr 10.43(3) and 10.43(4) of the *Federal Court Rules 2011* (Cth) had been made good.

6 The question that arose before the primary judge, relevant to this appeal, was whether, as a matter of residual discretion, leave ought to be refused because the primary judge ought to have been satisfied that no utility arose in granting leave to serve out as the "proceedings" would be stayed upon an application by Trina (US) under s 7(2) of the *International Arbitration Act 1974* (Cth) (the "IA Act").

7 That was said to follow because *first*, Trina (US) and Jasmin were said to be parties to an "arbitration agreement" of the kind referred to in Article II, sub-article I of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in 1958 by the *United Nations Conference on International Commercial Arbitration* at its 24th meeting (otherwise known as the *New York Convention*), and thus, parties to an arbitration agreement for the purposes of the IA Act and, in particular, ss 3, 7, 8 and 39 of that Act; *second*, s 7 of the IA Act was engaged; and *third*, on an application by Trina (US), the Court would be required, by force of the mandatory language of s 7(2), to stay the proceedings as the proceedings involve the determination of a *matter* which was capable of resolution pursuant to the arbitration agreement.

8 The "only real issue" on the application before the primary judge was whether "a residual discretion" should be exercised to refuse leave to serve out: primary judge ("PJ") at [65]. I will return later in these reasons to the notion of a subsisting residual discretion.

9 The primary judge refused to exercise a residual discretion in favour of Trina (US) to refuse Jasmin the grant of leave to serve out, on the footing that *first*, on the facts before his Honour a controversy arose as to whether an arbitration agreement for the purposes of the IA Act had been made and whether Jasmin was (and is) a party to it; *second*, the answer to the question of whether Jasmin was (and is) a party to an arbitration agreement for the purposes of the IA Act is to be determined by the Court applying the law of the forum rather than the proper law of the contract *said* to have been entered into between Trina (US) and Jasmin (that is, the proper law of the *putative* contract which, in that case, would be the law of the State of New York in the United States); and *third*, by applying the law of the forum (that is to say, by applying the *municipal law* of Queensland) to determine whether the parties had reached a *consensus ad idem* at all and potentially the content of the consensus, the primary judge could not be satisfied that a stay would be granted should an application be made by Trina (US) under s 7(2) of the IA Act.

10 Accordingly, the primary judge granted Jasmin leave to serve the relevant documents out of the forum and upon Trina (US) in the United States.

Background facts

11 It is not necessary in these reasons to descend into the precise content of the controversy on the question of whether Jasmin is a party to an arbitration agreement for the purposes of the IA Act. It is sufficient to note these matters, in summary. Trina (US) (together, relevantly in the Australian context, with Trina Solar Australia Pty Ltd) is involved in the business of the wholesale supply of solar photovoltaic power cells ("solar panels"). Jasmin sought to obtain a supply of solar panels from Trina (US). Jasmin had entered into contracts with more than 2,000 customers and, for a number of reasons, time to supply those customers was critical and thus, the time for wholesale supply to Jasmin was also critical, as Trina (US) knew. In Jasmin's proceedings, it asserts that it was induced to obtain supply of solar panels from Trina (US) in reliance upon a sequence of misrepresentations by Trina (US) as to: the supply of the solar panels in a timely manner; the suitability of the panels for Australian homes; and the compliance of the panels with Australian regulations. Jasmin says that a sequence of negotiations took place with Trina (US) which concerned the question of whether the panels

would be acquired by an intermediary United States entity related to Jasmin called "JRC Services LLC" ("JRC") or whether Jasmin might be the buyer itself. There were many exchanges of emails concerning the supply arrangements. A *Supply Agreement* was proposed between Trina (US) and JRC. Jasmin says that in the end result, this sequence of negotiations brought about a position in which Trina (US) and Jasmin knew and understood that Jasmin could not be the buyer because doing so would give rise to GST consequences in Australia.

12 The primary judge observes, on the factual controversy, that the parties knew, immediately prior to entering into the Supply Agreement, that Jasmin could not be a party to the contract because of the GST issue. The primary judge concluded that on the face of the factual controversy, Jasmin was not a party to the Supply Agreement because: it was not named as a party; it was named as a guarantor of the buyer, JRC; the contract contained a provision that nothing was intended to confer any right to enforce any term of the contract on any person who was not a party to the contract; and, the parties understood the GST difficulty which made it necessary for JRC to be the buyer: PJ at [8].

13 Trina (US) contended that JRC was merely an intermediary interposed to facilitate supply of the panels; JRC would never take possession of the panels; and, the arrangements were negotiated and put in place between Trina (US), Jasmin and JRC with the result that Jasmin was a party, as a matter of substance as a disclosed principle of JRC, to the Supply Agreement.

14 Trina (US) says that a sequence of exchanges occurred including on 1 November 2012 and 7 November 2012 which resulted in the Supply Agreement coming into force (on 13 November 2012) in terms of the document of 7 November 2012. The Supply Agreement recites JRC as the *buyer* and Trina (US) as the *supplier* and contains a clause in these terms:

> **11. <u>Dispute Resolution; Arbitration.</u>**
>
> 11.1. Any dispute or controversy or difference arising out of or in connection with this Contract including its existence, validity or termination, between the parties hereto shall be submitted to a meeting of senior management within fifteen (15) days of written notice of a dispute. If the meeting is unsuccessful, the dispute shall be submitted to binding arbitration. Such arbitration shall be administered by the American Arbitration Association in accordance with its commercial arbitration rules in effect at the time of the arbitration. The place of arbitration shall be New York, New York. The Parties shall arrange for the arbitration to commence no later than ninety (90) days after the date of the demand for arbitration.
>
> 11.2. All documents, records, information, and other materials submitted in the arbitration shall be confidential, and shall not be disclosed to any other

> parties than the arbitrators without the written consent of the other party. The written decision of the arbitrators is binding upon the parties hereto and their successors and assigns, and judgment on the award may be entered in any court having jurisdiction. …

15 By cl 10, the "Governing Law" clause is in these terms:

> **10.** **Governing Law.** The substantive laws of the State of New York, USA (irrespective of its choice of law principles) will govern the validity of the Contract, the interpretation of its terms, and the interpretation and enforcement of the rights and duties of the parties hereto. The Parties hereby waive any objection or defence it may have to the laying of venue of New York as an inconvenient forum.

16 Trina (US) supplied certain solar panels under the Supply Agreement. It issued invoices to and made demand for payment of $1,826,264.00 upon JRC *and Jasmin*. On 25 April 2014, Trina (US) issued a notice of dispute to each of JRC and Jasmin pursuant to the Supply Agreement. No resolution was reached pursuant to the cl 11.1 meeting protocol. On 13 May 2014, Trina (US) filed and served a demand for arbitration under cl 11.1 against JRC and Jasmin. Trina (US) named Jasmin, as JRC's parent company, guarantor *and* principal.

17 On 15 May 2015, Jasmin filed a motion in the arbitration seeking orders that it be removed from the arbitration on the footing that it was not a party to the Supply Agreement. The application was opposed by Trina (US). On 16 June 2015, the arbitrator denied Jasmin's application. The arbitrator determined that Jasmin was a party to the Supply Agreement of 7 November 2012 and was bound by the arbitration clause. Jasmin did not challenge the preliminary award. The final arbitration hearing took place between 27 October 2015 and 29 October 2015 in New York City. Jasmin did not file any material in the final hearing and did not directly participate in the final hearing. An award was made on 21 January 2016: see affidavit, Ms Costello, sworn 18 March 2016. The award finds Jasmin and JRC jointly and severally liable to Trina (US) for the relevant sum for failure to pay for delivery of solar panels delivered pursuant to the Supply Agreement. It also records the rejection of Jasmin's contention that *first*, it was not a party to the Supply Agreement and *second*, it could not be compelled to arbitrate.

The residual discretion

18 As to the question of a residual discretion in the context of r 10.43 of the *Federal Court Rules 2011*, O 8, r 2(2) of the former *Federal Court Rules* provided that where the Court was satisfied of three identified matters, "the Court may, by order, grant leave to serve the originating process outside the Commonwealth". The conferral of the power in those terms,

by reference to the words "the Court may, by order, grant leave" conferred a *discretionary power* which gave rise to a "residual discretion" to refuse the grant of leave in the relevant circumstances notwithstanding that a party had demonstrated a basis upon which the Court could be satisfied of the relevant three integers, namely, jurisdiction; a proceeding of the kind otherwise described in the Rules; and a prima facie case: *Cell Tech Communications Pty Ltd v Nokia Mobile Phones (UK) Ltd* (1995) 58 FCR 365 at 371D, Lindgren J.

19 That position was adopted by Wilcox J in *BEST Australia Ltd v Aquagas Marketing Pty Ltd* (1988) 83 ALR 217 at 222-223; and by Branson J in *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317 at [186]; and by Nicholson J in *Quinlan v Safe International Försäkrings AB* [2005] FCA 1362 at [26].

20 Rule 10.43 of the *Federal Court Rules 2011* is expressed in slightly different terms. Rather than conferring a discretionary power on the Court to grant leave (in terms), the rule provides at 10.43(2) that a party "may apply to the Court for leave to serve an originating application on a person in a foreign country …". The rule is to be understood on the footing that a party may apply for, and the Court may grant, leave to serve out. On that basis, the continuing rule confers a discretionary power which carries with it a *residual discretion*. Siopis J accepted that r 10.43 confers a discretion: *Perdaman Chemicals & Fertilisers v Griffin Coal Mining Company Pty Ltd* [2011] FCA 1425 at [17].

21 The appellant contends that the primary judge fell into error in the following "two (related) ways":

> *First*, it was wrong to conclude that the Australian choice of law rules would select the law of the forum and not the proper law of the (putative) contract (in this case New York law) to determine the question of whether an arbitration agreement had been made (and its validity) including whether [Jasmin] was a party to it;
>
> *Secondly*, the issue arises under or in the consideration of whether a stay would be granted under the [IA Act]. That Act requires the court to recognise and give effect to an arbitration agreement (and Award) made in and under the law of other Contracting States. That required, in this case, applying New York law to determine the question of whether an arbitration agreement had been made including whether the respondent was a party to it.

22 As to the *second* ground of contended error relating to the intersection with the IA Act, the appellant's reference to the *requirement* to apply *New York law* to determine the question of whether an arbitration agreement had been made including whether Jasmin was a party to it, I take to be a requirement said to derive from statutory construction of the relevant provisions of the IA Act.

The first ground of contended error

23 Leaving aside for the moment the question of the particular operation and application of the provisions of the IA Act (and looking at discretionary considerations more broadly), applications to *set aside* orders granting leave to serve out and applications for a *stay* of such proceedings often raise the same question of whether the forum selected by the plaintiff (applicant under this Court's Rules) is a "clearly inappropriate forum": *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 ("*Voth*"). The same principles apply to the resolution of each such application: *Voth* at 563. When the question concerns whether to grant leave to serve out, leave should not be granted unless the Court is satisfied that the "case is of the relevant category" (that is, the relevant integers for leave are made good) and the Court is satisfied ("positively persuaded") that the proceedings "would not be subsequently stayed as an abuse of process on forum non conveniens grounds *or for some other reason*" [emphasis added]: *Voth* at 564.

24 Thus, the question of the exercise of the residual discretion on an application for leave to serve out requires the primary judge to consider whether the proceedings would, or would not, be subsequently stayed. The state or *degree* of satisfaction on that question might well vary from "positively persuaded" (*Voth* at 564) to "fairly arguable" (*Voth* at 566) depending upon whether the ground of the contended stay is an abuse of process on forum non conveniens grounds or an abuse of process for some other reason, or some other ground is asserted. Lord Templeman in *Spiliada Maritime Corp. v Cansulex Ltd* [1987] A.C. 460 at 465 observed that submissions going to these questions ought to be measured in "hours and not days". Their Honours Mason CJ, Deane, Dawson and Gaudron JJ observed that oral submissions on these questions ought to be measured in "minutes rather than hours": *Voth* at 565.

25 Their Honours also observed in *Voth* at 566 that in deciding whether the chosen forum is "clearly inappropriate", the *extent* to which the law of the forum is applicable in resolving the rights and liabilities of the parties is "a material consideration" and further observed that the selected forum should not be seen as an inappropriate forum if it is "fairly arguable" that "the substantive law of the forum is applicable in the determination of the rights and liabilities of the parties". Their Honours also observed that the substantive law of the forum is "a very significant factor" in the "exercise of the court's discretion", but the Court should not focus upon that factor to the exclusion of all others: *Voth* at 566.

26 In *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 ("*Oceanic*"), Dr Fay engaged the services of a travel agent in New South Wales to make a booking through another Sydney travel agent, J.M.A. Tours (the agent for Sun Line Cruises which included the Oceanic entity) for Dr and Mrs Fay to "cruise Greek waters" on a ship operated by Oceanic called the *Stella Oceanis*. Dr and Mrs Fay, through their agent, paid J.M.A. Tours in Sydney the fares they were required to pay. J.M.A. Tours issued a document described as an "exchange order" to Dr and Mrs Fay's travel agent. The exchange order, containing all the relevant details of the passenger, the ship and the cruise was to be exchanged for tickets in due course. The exchange order was exchanged for a ticket in favour of Dr and Mrs Fay in Athens. The ticket contained a condition which required any action against the carrier to be brought only before the courts of Athens Greece with the ticketholder *submitting* to the jurisdiction of those courts to the exclusion of the jurisdiction of all other courts of any country in which a relevant court would have had jurisdiction to entertain an action.

27 Unfortunately for Dr Fay, a shotgun exploded during a shipboard entertainment of trapshooting and Dr Fay was severely injured. He brought proceedings in New South Wales against Oceanic. He obtained an order for service out. Oceanic brought an application for a stay. The stay was refused and that decision was upheld on appeal. The question in issue before those courts was "when and where" the contract was made, with a view to determining whether Dr Fay was bound by the exclusive jurisdiction clause or whether the action ought to be stayed otherwise on forum non conveniens grounds. If the contract was made in Sydney as a result of a sequence of steps taken there, the exclusive jurisdiction condition did not form a term of the contract as all of the elements and contents of the contract had been concluded prior to receipt of the ticket.

28 In *Oceanic*, there was no doubt that a contract had been made between A and B. The question did not involve whether C was also a party to the contract. In the context of the questions in issue, Brennan J said this at 223-224:

> The substantial question on this appeal is, as it was in the courts below, whether the Supreme Court should order that the action be stayed or dismissed on the ground *either* that the plaintiff is bound by an agreement that "any action against the Carrier must be brought only before the courts of Athens Greece" or that, having regard to all the circumstances of the case, Greece is the appropriate forum for the litigation of the plaintiff's claim and the [Supreme Court of NSW] should dismiss or stay the action in that Court in the exercise of a discretion ...
>
> Where the parties to a contract *agree* that the courts of a foreign country shall have exclusive jurisdiction to decide disputes arising under the contract or out of its

> performance, the courts of this country regard that agreement as a submission of such disputes to arbitration and will, in the absence of countervailing reasons, stay proceedings brought here to decide those disputes.
>
> [emphasis added]

29 Brennan J observed that when, for example, the exclusive jurisdiction clause is contained in a ticket, a preliminary question arises in these terms (at 224):

> …: is the clause a term of the contract of carriage? To answer that question, it is necessary to decide *when* the contract of carriage is made and by reference to what *system of law* are its terms to be ascertained. The payment of the fare is not necessarily the making of the contract.
>
> [emphasis added]

30 His Honour then set out a number of possibilities on the facts: pre-payment under a contract to be made; payment under a contract made; or payment of the price of an option to require the carrier to carry the passenger under certain conditions. His Honour then said this at 224:

> It may be thought that the terms of a contract should be ascertained by reference to its *proper law*, i.e., the system of law by reference to which the contract is *made* or the system of law with which the transaction has its *closest and most real connexion*: *Bonython v The Commonwealth*. A submission to the exclusive jurisdiction of the tribunals of a particular country is an indicium of the parties' intention that the law of that country is to be the proper law of the contract: *Compagnie d'Armement Maritime S.A. v Compagnie Tunisienne de Navigation S.A.*
>
> [citations excluded]
> [emphasis added]

31 His Honour observed that if submission to the exclusive jurisdiction of the Athenian courts is *truly* a term of the contract governing the liability of Oceanic, that circumstance reflects a significant indication that Greek law is the *proper law* of the contract. Other considerations would inform that decision. His Honour then said this at 225:

> But, for the purpose of determining *whether* the contract of carriage was *made* when the fares were paid to J.M.A. Tours in New South Wales and *whether* that contract *contained* the exclusive foreign jurisdiction clause set out in cl 13 of the ticket, the system of law by reference to which those questions *must* be answered cannot be identified by *assuming* that the contract contained the clause. The question *whether* a contract has been made depends on whether there has been a *consensus ad idem* and *the terms* of the contract, if made, are the subject of that consensus. At all events, those are the issues which an Australian court necessarily addresses when it seeks to determine the existence of what the *municipal law* of this country classifies as a contract. Classification is, of course, a matter for the law of the *forum*. In deciding whether a contract has been made, the court has regard to all the circumstances of the case including any foreign system of law which the parties have incorporated into their communications, but it refers to the municipal law to determine whether, in those circumstances, the parties *reached* a consensus ad idem and *what* the consensus was: [compare with] *Mackender v Feldia A.G.*, per Diplock L.J. There is no system *other than* the municipal law to which reference can be made for the purposes of

> answering the *preliminary questions* whether a contract has been made and its terms. Mr. D.F. Libling, "Formation of International Contracts" *Modern Law Review*, vol. 42 (1979), p. 169 (an article to which Gaudron J has drawn my attention) discusses the reasons why it is inappropriate to determine those questions by reference to the so-called *putative proper law of a supposed contract*.
>
> [emphasis added]
> [citations excluded]

32 In *Oceanic*, Gaudron J also observed that the circumstances of the case raised a preliminary question of "by what law" is the existence of the submission to Athenian jurisdiction to be decided? Her Honour said this at 260:

> If the question whether the parties intended to be bound by cl 13 were to be asked *in the course of* ascertaining the proper law of the contract, it would in my view fall for answer in accordance with the *lex fori*, although this is not a matter which appears to have been authoritatively decided.
>
> [emphasis added]

33 Her Honour identified observations of Lord Diplock in *Compagnie d'Armement Maritime S.A. v Compagnie Tunisienne de Navigation S.A.* [1971] AC 572 at 603 and 605 in support of the proposition that "the lex fori determines (inter alia) questions as to the *existence*, *construction* and *validity* of terms bearing upon determination of the parties' agreement as to the proper law" [emphasis added]. Her Honour then said this at 261:

> Indeed I think *that must be so*. If the question of what is the proper law is one to be answered by application of the lex fori, *until* the lex fori provides the answer to that question there is no scope for the operation of any other law. In other words, *all questions* which are *necessarily antecedent* to a determination of the proper law of a contract must fall for answer in accordance with the lex fori: see also *Mackender v Feldia A.G.*; Cheshire and North, *Private International Law*, 11th Ed. (1987) p 477 ...
>
> Accordingly, it seems to me to invite unnecessary complexity in proceedings for a stay based on the parties' submission to a foreign jurisdiction to allow questions as to the *existence*, *construction* or *validity* of a foreign jurisdiction clause to be determined by application of any law *other than* the lex fori. However, as, in my view, it is the lex fori which provides the answer to the same question when asked in the process of determining the proper law, it follows that it must also provide the answer when it is necessary to determine whether or not a stay should be granted on the basis of submission to a foreign jurisdiction.
>
> The principles of New South Wales law relevant to a determination of whether the appellant and the respondent agreed in terms of cl 13 of the passenger ticket are set out in the judgment of Brennan J. I respectfully *adopt* his Honour's statement of applicable principle and his Honour's conclusion that the foreign jurisdiction clause was not incorporated in the contract of carriage between the appellant and the respondent.
>
> [emphasis added]
> [citations excluded]

34 The observations of Lord Diplock in *Compagnie d'Armement Maritime S.A.* at 603 and 605 which Gaudron J accepted as giving force to the notion that the law of the forum determines questions as to the *existence*, *construction* and *validity* of terms bearing upon the determination of the parties' agreement (as to the proper law) involved an English court answering two questions.

35 *First*, when deciding a contest between the parties *to* a contract as to the applicable proper law, did the parties intend, by their contract, to make a choice at all and if so, what system of law did they choose? Lord Diplock observed that in answering that question an English court applies the ordinary rules of English law relating to the construction of contracts (as the method of determining the intention of the parties to the contract by the language they have chosen). In answering that question in the context of an agreement containing an arbitration clause, an Australian court would give the words chosen by the parties "liberal width" and "flexibility" as to the submission to arbitration: *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 ("*Comandate Marine*") at [164] and [165], Allsop J; Finn J at [1] and Finkelstein J at [9] agreeing; *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 ("*TCL Air Conditioner*") at [8]-[12], French CJ and Gageler J.

36 *Second*, if no choice has been made (or cannot be identified) an English court must decide itself the applicable proper law and in doing so an English court applies its own choice of law rules relating to the proper law of the contract.

37 When the question is an anterior question of whether a person, B, is a party *at all* to a contended contract containing a choice of law clause, and thus the dispute is not about seeking to construe a possible choice made by parties *to* a contract, the first question the court or the forum must decide is whether the contended contract was made: does it *exist* as the source of rights, duties and obligations between A and B? If it does, the court must decide the construction question of the *system of law* the parties have chosen, by their agreement, to determine the *scope* and *content* of those rights, duties and obligations. The court will seek to give effect to the choices made by the parties as the expression of their intention. If that choice cannot be determined, the court applies its own choice of law rules to determine the proper law.

38 In deciding that threshold anterior question of whether a contract was made at all, it is perfectly plain (although obiter) that both Brennan J and Gaudron J find the answer to that

question by applying the lex fori. On *that view*, the question of whether Jasmin is a party to the arbitration agreement by reason of being a disclosed principal of JRC; or an undisclosed principal of its agent JRC (on the footing that JRC was acting within the authority conferred upon it); or not a party to any agreement by reason of the various exchanges between the participants and the possibility of an express understanding between them that only JRC would be the contracting party due to GST issues in Australia of concern to Jasmin (or for any other reason), is a matter to be determined according to the law of the forum.

39 Both Brennan J and Gaudron J make reference to the observations of Diplock LJ in *Mackender v Feldia A.G.* [1967] 2 Q.B. 590 at 602 and 603. That case concerned a contract (a jeweller's block policy of insurance) made in London between Lloyd's underwriters and the defendant entities which contained a governing law clause exclusively applying Belgian law with submission of any disputes arising under the policy exclusively to "Belgian jurisdiction". A diamond loss arose in Naples. The insurer denied the claim on grounds that the defendants had engaged in smuggling diamonds into Italy, and non-disclosure of the practice. The defendants commenced proceedings in Belgium. The insurer commenced proceedings in England seeking a declaration as to illegality and sought and obtained leave to serve out. Diplock LJ said this at 602 in the Court of Appeal which allowed the appeal:

> The prima facie rule of English conflict of laws - … is that the proper law of a contract is that system of law which the parties themselves have agreed shall regulate the legally enforceable rights and duties to which their agreement gives rise. In the present case the parties have expressly agreed that the proper law of the policy shall be Belgian law. … What is in dispute in this claim is whether their undoubted agreement, embodied in the policy, which includes their choice of Belgian as its proper law, does give rise to any legally enforceable rights and duties under Belgian law. That in my view is a dispute arising under the agreement, i.e., policy. And that dispute, according to the terms of the policy, must be decided according to Belgian law.
>
> A claim that a contract is void for illegality does not raise any issue as to whether or not the parties *in fact agreed* to the terms of the policy, including those in the foreign jurisdiction clause. It concedes that they did, but asserts that their agreement gave rise to no legally enforceable rights or duties. It thus raises no dispute about the *consensus ad idem* of the parties as to the exclusive jurisdiction of the Belgian courts.
>
> [emphasis added]

40 Diplock LJ observed that the alternative claim of the underwriters to avoid the contract for non-disclosure of a material fact had been said to raise the question of whether there was a contract at all and therefore whether there was any agreement that Belgian law should be the proper law of the contract. As to that contention, Diplock LJ at 602 and 603 said this:

> This question, it is argued, is to be determined not by Belgian law but by *a putative objective proper law*, a concept which I find confusing, but which is said in this case to be English law. Furthermore, it is contended that such a question, by whatever law it is to be determined, is not a dispute arising under the policy within the meaning of the foreign jurisdiction clause.
>
> This argument, I think, is misconceived. It is based upon an imprecise use of the phrase "avoid the contract". Where acts done in England, in this case the oral negotiations between the assured's broker and the underwriters, the initialling of the slip and the signing of the policy, are alleged not to have resulted in an agreement at all (i.e., where there is a plea of non est factum) and the question is whether there was *any real consensus ad idem*, it *may well be* that this question has to be determined by English law and not by the law which *would have been* agreed by them as the proper law of the contract *if they had reached an agreement*. But that is not the position when underwriters seek to repudiate a contract upon discovering that material facts were not disclosed to them by their assured before the policy was entered into.
>
> [emphasis added]

41 An election to avoid the policy on the ground of non-disclosure did not mean that the contract of insurance "never existed" and thus no question of whether there was an agreement at all arose. That being so, the question of whether the underwriters were entitled to avoid the contract for non-disclosure of particular facts was required to be determined according to the proper law (Belgian law) and the Belgian court, to which the parties had submitted, was found to be a forum conveniens.

42 In *Oceanic*, Deane J at 255 observed that the first question to be determined in the proceeding was whether certain "actions and transactions" (*all* of which were relevant to the first question, his Honour observed), "resulted in a contract" between Oceanic and Dr Fay before Dr Fay arrived in Greece. Whether a "binding contract" arose was to be decided "by reference to the law of New South Wales" which his Honour described as "the locus contractus". However, the very question was whether, in the place or locus of New South Wales, a binding contract arose and so the notion of the locus contractus, that is, the law of the place where the contract was made, could not be analytically deployed, without circularity, to determine *whether* a contract was made in *that place*. By the use of the term, the locus contractus, to answer the question of whether the relevant "actions and transactions" in New South Wales amounted to a binding contract by reference to the law of New South Wales, Deane J seems to have been electing to apply the law of the forum to the resolution of that factual controversy. His Honour observed that if the contract arose in New South Wales, the courts of Greece and the Supreme Court of New South Wales would then have competing claims to be considered the most appropriate forum. His Honour concluded that the Supreme Court of New South Wales could not be characterised as a "clearly inappropriate forum".

43 I mention these matters in some detail because although the observations of Brennan J and Gaudron J in *Oceanic* in 1988 might be obiter (and some doubt attends whether Deane J was in truth applying the law of the forum), these observations of two Justices of the High Court cannot simply be put to one side. The observations of these Justices must inform the answer to the present question. The appellant says that the academic writing supports the notion that the putative proper law applies to questions of whether the parties have reached consensus ad idem. The authors of *Nygh's Conflict of Laws*, 9th Ed., 2014 at [19.64] assert that there has been a series of decisions in England which "definitely support the proposition that the putative proper law of the contract determines whether the parties have reached agreement". Those cases are: *Albeko Schuhmaschinen AG v The Kamborian Shoe Machine Co Ltd* (1961) 111 LJ 519, per Salmon J; *Compania Naviera Micro S.A. v Shipley International Inc. (*the *"Parouth")* [1982] 2 Lloyd's Rep 351 (a decision of the Court of Appeal) per Ackner LJ with Waller LJ and May LJ agreeing; and *Union Transport PLC v Continental Lines S.A.* [1992] 1 WLR 15 (a decision of the House of Lords). The authors of *Dicey, Morris & Collins on the Conflict of Laws*, 15th Ed, 2016 at [32-110] to [32-112] assert: "[the three English decisions mentioned above] which have touched on the question of the governing law in the case of problems of formation [are] to varying degrees, authority for the view that the question whether a concluded contract came into existence depended on the putative governing law". It is correct to say that Salmon J at 519 took that view in *Albeko Schuhmaschinen AG*. Ackner LJ in *The Parouth* at 353 observes: "It is now accepted in this court … that … the probabilities are that the putative proper law, namely English law, will be applied to resolve the issue [of whether there is a binding contract between the parties]". A similar approach was adopted by Lord Goff of Chieveley at 23 in *Union Transport PLC*.

44 The appellant says that this approach has been applied in a number of recent English cases: *Marc Rich & Co. A.G. v Societa Italiana Impianti P.A. (*the *"Atlantic Emperor")* [1989] 1 Lloyd's Rep 548 (a decision of the Court of Appeal); with particular reference to the judgment of Lloyd LJ at 554 (Sir Roger Ormrod agreeing); *Habas Sinai Ve Tibbi Gazlar Istihsal v VSC Steel Co Ltd* [2014] 1 Lloyd's Rep 479, per Hamblen J at 489 and following; *National Navigation Co v Endesa Generacion SA (*the *"Wadi Sudr")* [2009] 1 Lloyd's Rep 666 per Gloster J at [105] to [108]; and *Union de Remorquage et de Sauvetage S.A. v Lake Avery Inc. (*the *"Lake Avery")* [1997] 1 Lloyd's Rep 540 per Clarke J at 550. I accept that these authorities suggest that when the question arises of whether an agreement was

made by the parties, the English courts are likely to apply the putative proper law of the contract to determine that question.

45 The question is whether those authorities are to be applied in determining whether an agreement was reached between Trina (US) and Jasmin by examining and applying the putative proper law under the contended contract or whether the question should be determined by applying the observations of Brennan J and Gaudron J (and to the extent that Deane J might be taken to be applying the law of the forum, Deane J) with the result that the question is to be determined by applying the law of the forum.

46 Having regard to *Oceanic* and the discussion in these reasons, it seems to me that the lex fori ought to be applied when determining that question.

The second ground of contended error

47 The appellant says that a second question relevant to an exercise of the discretion to grant a stay (and thus informing the exercise of the *residual discretion* to refuse (or not) the grant of leave to serve out of the forum), intersects with the issue of whether the lex fori or the putative proper law applies to determine whether an arbitration agreement was made with Jasmin. That issue concerns the construction and application of the IA Act. The appellant asserts these three propositions.

48 *First*, s 7 of the IA Act is engaged in such a way that an "arbitration agreement" for the purposes of the IA Act refers to a foreign arbitration agreement between the parties (to it) whether or not the agreement is recognised by the law of the forum as a contract at all.

49 *Second*, the choice of law rules set out in s 8(5) of the IA Act also apply to the operation of s 7(2) and s 7(5) of the IA Act.

50 *Third*, the foreign award is binding "for all purposes" on the parties to the arbitration agreement "in pursuance of which it was made" (s 8(1)) which is to be understood (construed) as referring to the parties to the arbitration agreement to which the Award "purports to relate", subject to s 8(5) of the IA Act.

51 An "arbitration agreement" is defined to mean an agreement in writing of the kind referred to in Article II, sub-article 1 of the New York Convention which obliges each Contracting State to recognise "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in

respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration". Apart from the question of whether Jasmin is a party to it, the parties to this proceeding accept that cl 11.1 (see [14] of these reasons) constitutes an arbitration agreement within that definition. The definition does not require that the agreement, otherwise meeting the integers of that definition, be characterised by the domestic law of a Contracting State as a "contract" (a term undefined by the IA Act or the Convention). It must, however, be "an agreement in writing" (which might be simply the "arbitral clause" or a sequence of exchanges between the parties such as letters, emails attaching letters, etc; Article II, sub-article 1; s 3(1) IA Act) under which the parties (to the agreement) submit the relevant differences between them, in respect of a defined legal relationship, to arbitration concerning a subject matter capable of settlement by arbitration.

52 The question for the Court of the forum is whether there is an arbitration agreement, so defined, between the parties *said* to be parties to it whether or not a "contract" according to the municipal law of the forum (does an agreement exist at all between the parties said to be parties to it?) and by what system of law might that question be decided; and, does the IA Act provide a statutory answer to those questions.

53 The New York Convention also provides for the recognition, "as binding", and enforcement, in a State, of arbitral awards of a (foreign) Contracting State whether or not the award is considered or characterised as an "Award" according to the domestic law of the State in which the award is sought to be enforced: Articles I and III.

54 Article V provides that recognition and enforcement of an award may be refused at the request of a party against whom it is invoked *only if* that party makes good one of five identified matters set out in Article V: (a) to (e). Item (a) contemplates refusal of recognition and enforcement where the "parties to the [Article II] agreement were, under the law applicable to them, under some incapacity" or the agreement is not "valid under the law to which the parties [to the agreement] have subjected it" or failing a choice of governing law, "under the law of the country where the award was made".

55 As to the IA Act and its adoption of the Convention, s 3(1) adopts, as mentioned, the Convention definition of "arbitration agreement". The objects, at s 2D of the IA Act are these:

> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and

> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
>
> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
>
> (d) to give effect to Australia's obligations under [the New York Convention as defined]; and
>
> (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
>
> (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

56 For the purposes of Part II of the IA Act, *enforcement*, where the context so admits, in relation to a foreign award, includes the recognition of the award "as binding for any purpose", and *enforce* and *enforced* have corresponding meanings: s 3(2).

57 Section 7 falls within Part II which is concerned with "enforcement of foreign arbitration agreements and awards". Part II addresses the adoption into domestic law of Australia's obligations under the New York Convention (Sch 1). Section 7, by s 7(1) *applies* to an arbitration agreement (among other grounds) if a party to an arbitration agreement (Trina (US)) is a person who was, at a time when the agreement was made, domiciled or ordinarily resident in a Convention country: s 7(1)(d). The primary judge found that s 7 was engaged by reason of s 7(1)(a) and s 7(1)(d). Section 7(2) provides that, subject to Part II, where:

> (a) proceedings instituted by *a party to an arbitration agreement* to which this section applies against *another party to the agreement* are pending in a court; and
>
> (b) the proceedings involve the determination of *a matter* that, in pursuance of the agreement, *is capable* of settlement by arbitration;
>
> on the application of a party to the agreement, *the court shall*, by order, upon such conditions (if any) as it thinks fit, *stay* the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, *and refer the parties to* arbitration in respect of that matter.
>
> [emphasis added]

58 Section 7(2) gives expression to (at least) the objects recited at s 2D(a)(b) and (d) and Articles I and II of the New York Convention by providing for a stay of proceedings (in the circumstances of s 7(2)(a) and (b)) so as to give recognition to an arbitration agreement (so defined) as the agreed means of determining the relevant matter by staying the pending

proceedings and referring the parties to arbitration in respect of the relevant matter. Section 7(2) upholds the integrity of the agreement between the parties to it and operates in a forward-looking way to a determination of the relevant matter by and through the agreed arbitration protocols. At the time of the hearing before the primary judge (and the giving of judgment), the arbitration of the relevant matter had been conducted (although Jasmin was not a participant in the arbitration). The arbitration had not reached finality. The arbitrator had concluded the hearing and was in the process of considering the questions to be determined. An award was published in 2016. The appellant's contention before the primary judge was that the residual discretion ought to be exercised to refuse the grant of leave because a stay would issue (upon an application by the appellant under s 7(2)) and the arbitrator was already seized of the matter.

59 For the purposes of s 7(2), a reference to "a party" includes "a reference to a person claiming through or under a party": s 7(4). Sections 7(2) and 7(4) seem to contemplate proceedings and an application for a stay not just by a party to the arbitration agreement. Sections 7(2) and 7(4) seem to recognise that s 7(2) is intended to operate more broadly than upon steps by a party to the arbitration agreement instituting proceedings and more broadly than an application for a stay by a party to the agreement, so long as the claimant in the proceedings or the applicant for a stay assert relief "through or under a party".

60 Section 7(5) provides that a court shall not make an order under s 7(2) if the court finds that the arbitration agreement is "null and void", "inoperative" or "incapable of being performed". The system of law to be applied in determining whether any one of those three concepts is engaged in relation to the arbitration agreement or whether the party commencing the s 7(2)(a) proceedings is a party to an arbitration agreement, is not addressed by s 7.

61 Section 8 provides for the "recognition of foreign awards". A foreign award is "an arbitral award made in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award to which the [New York] Convention applies": s 3(1).

62 Section 8(1) is in these terms:

> Subject to this part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

63 Section 8(3A) provides that the court may *only* refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).

64 Section 8(5) provides that (subject to s 8(6)), in proceedings in which the enforcement (as to which see s 3(2); [56] of these reasons) of a foreign award is sought (by virtue of Part II of the IA Act), the court may, at the request of the party against whom it is invoked, refuse to enforce the award (that is, refuse to recognise the award as binding for any purpose: s 3(2)) if the party proves to the satisfaction of the court any one of six identified factors at (a) to (f). The first two of those factors are these:

> (a) a party *to* the arbitration agreement in pursuance of which the award was made was, *under* the law applicable to him or her, under *some incapacity* at the time when the agreement was *made*;
>
> (b) the arbitration agreement is *not valid under* the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, *under* the law of the country where the award was made;
>
> …
>
> [emphasis added]

65 The first factor concerns a question of "some incapacity" of a party to the arbitration agreement and the second concerns the notion that the arbitration agreement is "not valid". Each factor also identifies the system of law to be applied to determine the relevant question. As to incapacity, the statute selects "the law applicable to [the party]" and as to whether the arbitration agreement is "not valid" the statute selects "the law expressed" in the arbitration agreement, or where no choice of law is expressed, "the law of the country" (place) where the award was made. The remaining four factors are these:

> (c) [the] party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;
>
> (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
>
> (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the *agreement of the parties* or, failing such agreement, was not in accordance with *the law of the country* where the arbitration took place; or
>
> (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.
>
> [emphasis added]

66 The appellant says that s 8(5)(b) makes plain that the IA Act does not contemplate any test for "validity or otherwise" of an arbitration agreement *other than* by reference to "the law

expressed in the agreement to be applicable to it" or where no choice of law is expressed, the law of the country where the award was made and no selection is made by the statute, it is said, of the *law of the forum* as the system of law for determining "validity or otherwise".

67 Sections 7 and 8, of course, have an entirely different operation. Section 8(5) confers power on the court (notwithstanding that s 8(1) renders a foreign award binding on the parties to the arbitration agreement for all purposes) to refuse *to enforce* a foreign award (i.e. refuse to recognise the foreign award as binding upon the parties to the agreement for all purposes: s 3(2)) if, and only if, the party to the agreement against whom the foreign award is invoked discharges an onus of proving on the balance of probabilities one of the factors at s 8(5) or s 8(7). Section 8(5) is subject to s 8(6). Section 8(6) operates in conjunction with s 8(5)(d) so as to provide for severance in the relevant circumstances. Section 8(3A) refers to the circumstances in s 8(7) as one of the grounds upon which a court may refuse to enforce a foreign award. Section 8(7) is in these terms:

> In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:
>
> (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the *laws* in force in the *State or Territories in which the court is sitting*; or
>
> (b) to enforce the award would be contrary to *public policy*.
>
> [emphasis added]

68 Sections 8(5) and 8(7) thus address the only circumstances in which the court may refuse to enforce a foreign award. Questions going to the *capacity* of a party to the agreement when the agreement was made and *invalidity* of the agreement are resolved by the court according to the system of law selected by the statute in which the answer to the question in issue is to be found: s 8(5). Questions in issue contemplated by s 8(7) are to be determined according to the laws in force in the place where the court is sitting.

69 Like s 8(5)(b), s 7 also addresses questions going to the *arbitration agreement* between the parties. As already noted, the court shall not make an order under s 7(2) if the arbitration agreement is null and void, inoperative or incapable of being performed: s 7(5). Unlike s 8, no system of law is selected by the statute for determining how those concepts, if raised in relation to the agreement, are to be resolved. One of those concepts might (although probably not) also engage a question of whether the arbitration agreement is rendered "not valid" according to the content or consequences of any one of those three concepts.

70 The primary judge concluded at [105] that s 8(5)(b) and the choice of law regime it selects is to be applied to answer questions of *validity*, but not whether an arbitration agreement *was made* by the parties said to have so agreed (the issue of *formation*).

71 The following propositions seem to be reasonably clear.

72 *First*, if a party against whom a foreign award is asserted (an "award debtor") seeks to resist an order for the enforcement of a foreign arbitral award by an award creditor, he or she can *only* do so by proving to the court's satisfaction one of the matters set out in s 8(5) or s 8(7) of the IA Act: ss 8(3A), 8(5), 8(7); *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 38 VR 303 ("*IMC*") at [145] and [169], Hansen JA and Kyrou AJA; *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161 at [92]; *Dardana Ltd v Yukos Oil Co.* [2002] 2 Lloyd's Rep 326 (a decision of the Court of Appeal), Mance LJ at [10] (Neuberger J and Thorpe LJ agreeing).

73 *Second*, notwithstanding that s 8(5)(b) deals *expressly* only with a circumstance where the arbitration agreement is "not valid", Lord Collins JSC in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2009] EWCA Civ 755; [2011] 1 AC 763 said of Article V(1)(a) of the Convention and s 103(2)(b) of the *Arbitration Act 1996* (of England and Wales and Northern Ireland) (a provision equivalent to s 8(5)(b) of the IA Act), at [2011] 1 AC at 828 and 829, at [77] of the judgment of Lord Collins JSC, that "the consistent international practice shows that there is *no doubt* that it also covers the case where a party claims that the agreement is *not binding* on it because the party was *never a party* to the arbitration agreement" [emphasis added]. Lord Saville JSC at [155] observed that it was common ground between the parties that the question of *whether* the Ministry of Religious Affairs (a party against whom the arbitral award was invoked) was a party to the arbitration agreement in question was to be determined under the equivalent of s 8(5)(b) and that the section [s 103(2)(b)] required the application of French law being the law of the place where the arbitral award was made (as no choice of law was expressed) thus enlivening the second limb of the choice of law rule in s 103(2)(b) [s 8(5)(b)]: Lord Saville JSC at [155] to [162]. In *Dardana Ltd v Yukos Oil Co.*, Mance LJ (Neuberger J and Thorpe LJ agreeing), observed at [8]:

> It is *clear*, and was effectively common ground before us, that s 103(2)(b) is one *vehicle* enabling the present appellants to challenge the recognition and enforcement of the Swedish award by maintaining that they *never became party to the contract* dated Jan. 17, 1995 [the arbitration agreement].

[emphasis added]

74 Mance LJ also made this observation at [10]:

> Any challenge to the *existence* or *validity* of any arbitration agreement on the terms of the document on which the arbitrators have acted falls to be pursued *simply* and *solely* under s 103(2)(b).

[emphasis added]

75 The Victorian Court of Appeal, by majority, took the same position in *IMC*, per Hansen JA and Kyrou AJA at [169] to [173].

76 It follows, in the case of an arbitration agreement for the purposes of the IA Act, that if the question in issue is whether the court should refuse to enforce a foreign award because the arbitration agreement is *not binding* upon a party to the proceedings (against whom it is asserted) because the party never was a party to the arbitration agreement, s 8(5)(b) is the vehicle for determining that question and the law to be applied to answer the question is not the law of the forum but the choice of law made by the statute: either the law *expressed* in the agreement (in this case New York law) or, where no choice of law is expressed, the law of the place where the award was made.

77 The appellant says that it also follows that *although* s 7 contains no choice of law rules, the same choice of law rules selected by Article V of the New York Convention and adopted at s 8(5)(b) of the IA Act governing validity of the arbitration agreement in the context of enforcing a foreign award (and, by judicial authority, extending to formation), should apply to selecting the laws governing validity and formation at the stage of enforcing the arbitration agreement itself. Adopting that approach is said to serve the objects of the IA Act; the objectives of the Convention; and give consistency to the selection of the choice of law regime applying to the issue of formation for the purposes of the Convention and the IA Act.

78 Plainly enough, the IA Act does not select the choice of law regime selected by s 8(5)(b) as the system of law to be applied in answering whether a party to s 7 proceedings is a party to an arbitration agreement at all, *or* select any system of law. That follows because s 7 adopts and gives effect to Article II of the New York Convention. Article II operates on the footing that the court of a Contracting State is seized of an action in a matter in respect of which the parties *have made* an arbitration agreement within the meaning of Article II. The question of whether there is or might be a contest in such an action as to *whether* a party to the action is a party to the arbitration agreement is not contemplated or addressed. The question of whether

an arbitration agreement made by the parties might be found by the court of a Contracting State to be null and void, inoperative or incapable of being performed is addressed by Article II, sub-article 3 (which is reflected in s 7(5)) and in those circumstances the court is not obliged to refer the parties to arbitration and by s 7(5), the court shall not order a stay.

79 Neither Article II nor s 7 (adopting it) provides for a choice of law regime.

80 Although s 7 might apply (by reason of s 7(1)), s 7(2) is only engaged where, *first*, the proceedings are commenced by a party to an arbitration agreement against another party to that agreement and, *second*, the proceedings, put simply, overlap or partly overlap an arbitration process (or proposed arbitration process) because the proceedings involve the determination, *by litigation*, of a matter that, in pursuance of the agreement, is capable of settlement *by arbitration*.

81 Section 8 identifies by s 8(3A) the only grounds for refusing the enforcement of a foreign award in the context of s 8(1) rendering that award "binding for all purposes on the parties to the arbitration agreement". The award is not binding on anyone who is not "a party to the arbitration agreement" (s 8(1)), and s 8(5)(b), by judicial construction, addresses formation as an aspect of validity. In that context, the statute applies the choice of law rule set out in s 8(5)(b) in determining a challenge to "formation".

Conclusions

82 It seems to me, having regard to each of the objects of the IA Act recited at s 2D and its relation to the New York Convention, the UNCITRAL Model Law and the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*; the observations of the Full Court in *Comandate Marine* per Allsop J (as the Chief Justice then was) at [191] to [196], Finn J and Finkelstein J agreeing, concerning the context of these international instruments, their formation and adoption and the structured integrated coherence they bring about as reflected in the objects of the IA Act; the observations of French CJ and Gageler J in *TCL Air Conditioner* (see [35] of these reasons) concerning the essential common "conception" of the New York Convention and the UNCITRAL Model Law of the "nature" of an arbitral award and (at [9]) "the relationship of an arbitral award to an arbitration agreement": [6] and following (and the observations of Hayne, Crennan, Kiefel and Bell JJ at [47] and following); and the observations in *International Commercial Arbitration*, 2nd Ed., 2014, Gary Born, Kluwer Law International, Vol. 1 at 497; *Dicey, Morris and Collins on the Conflict of Laws* at [16-014] and *Comparative International*

Commercial Arbitration, 2003, Dr Lew QC, Dr Mistelis and Dr Kröll at [6-32] and [6-55], that even though the IA Act does not select, for the purposes of recognition of an arbitration agreement (by means of the stay and referral order contemplated by s 7(2)), the same choice of law rule selected at s 8(5)(b), the question of whether a party to a proceeding contemplated by s 7(2) is a "party to an arbitration agreement" for the purposes of the IA Act, ought to be governed by the same choice of law rules that govern the very same question when it arises in the context of whether the court will refuse to enforce a foreign award on the proven ground of invalidity due to the relevant party *never having been* a "party to the arbitration agreement" (albeit that the question arises in a different context).

83 So, it follows that although, as a general proposition, the question of whether a contract was made (i.e. whether the parties have reached a consensus ad idem and the content of the consensus), is to be determined having regard to the municipal law of the forum (see [23] to [46] of these reasons), when the *statutory question* is whether a foreign award made in pursuance of an arbitration agreement for the purposes of the IA Act is to be refused enforcement on the ground of proven invalidity going to formation, the choice of law regime is that contained in s 8(5)(b), not the lex fori.

84 It also follows that when the *statutory question* of formation arises in the context of whether the court is *required* to make the orders contemplated by s 7(2), the same choice of law regime ought to apply as that contemplated by s 8(5)(b) for the reasons identified at [82], having regard to [47] to [82] of these reasons.

85 In this appeal, the appellant says that the primary judge fell into error in granting leave to serve out because the exercise of the residual discretion miscarried. It is said to have miscarried because the primary judge ought to have been satisfied that should Trina (US) make an application for a stay under s 7(2) that order would be made because the parties to the proceeding were parties to an arbitration agreement. Jasmin contested that proposition and said that it never was a party to the cl 11.1 arbitration agreement and should Trina (US) make an application for a stay under s 7(2) it would contest that question on the merits. That contest would be resolved, in my view, by applying the law expressed in the arbitration agreement, the law of New York for the reasons already identified.

86 The exercise of the residual discretion miscarried to the extent that the primary judge concluded that that question would be answered by applying the law of the forum with the result that the primary judge found, by applying the law of the forum, that he could not be

satisfied that on an application for a stay, a stay order would be made and thus no basis was made good for refusing leave in the exercise of the residual discretion.

87 The primary judge was required to consider whether a stay would be granted by applying the law of New York. The only evidence on that topic before the primary judge was the evidence put on by Trina (US). However, that arose, no doubt, because the questions arose in the context of an application for leave to serve out and not in the context of a fully developed merits-based determination of an application under s 7(2). The primary judge could not be satisfied in the context of *leave to serve out* that according to New York law a stay would be granted and thus the residual discretion should be exercised against granting leave. That matter required properly developed material and argument on the content of New York law.

88 The proper sequence ought to have been the granting of leave because the exercise of the residual discretion did not call for refusing leave. That, no doubt, would have resulted in an application under s 7(2) being brought which would have been contested and determined, according to all the relevant material, on the merits.

89 Now, the matter is further complicated by the intervention of the two arbitral awards and particularly the final award, the latter one having been made in 2016 after the exercise of discretion by the primary judge, centred around the role and operation of s 7(2) in the statutory scheme. The final award might be refused enforcement under s 8(5)(b) if Jasmin proves to the satisfaction of the court of the forum that the arbitration agreement is "not valid" by proving that it never was a party to it according to New York law.

90 The appellant says that the "binding nature" of the arbitral award "subsists" for all purposes by operation of s 8(1) without the need for the award creditor to proceed to the enforcement and registration stage and thus, in effect, the Full Court ought to now be satisfied that the award is binding upon Jasmin unless and until Jasmin proves it is not a party to an arbitration agreement in pursuance of which the award is made.

91 In *TCL Air Conditioner*, French CJ and Gageler J said this at [22] and [23]:

> 22 The manner in which s 8 of the [IA Act] implements Art III of the New York Convention assists in the translation and application of Art 35 of the Model Law. That is probably so having regard to the intention, revealed by the UNCITRAL analytical commentary, that the UNCITRAL Model Law should operate in *harmony with the New York Convention* and that the operation of Art 35 with respect to recognition of an arbitral award should be distinct from the operation of Art 35 with respect to enforcement of an arbitral award.

> 23 First, s 8(1) of the [IA Act] demonstrates that the requirement of Art 35 of the Model Law that an arbitral award "shall be recognised as binding" is appropriately and succinctly translated as part of the law of Australia to mean that an arbitral award is binding by force of the Model Law on the parties to the arbitration agreement for all purposes, on and from the date the arbitral award is made. The purposes for which an arbitral award is recognised as binding *include* reliance on the award in legal proceedings *in ways that do not involve enforcement*, such as founding a plea of former recovery or as giving rise to res judicata or issue estoppel.
>
> [citations excluded]
> [emphasis added]

92 There can be no doubt, as their Honours observe, that an arbitral award is binding for all purposes on the parties to the arbitration agreement in pursuance of which the award was made, on and from the date the foreign award is made. Those purposes include ways that do not involve enforcement. When it comes to enforcement, however, the IA Act recognises that the court might refuse to enforce the award if the party against whom it is invoked proves that the arbitration agreement is not valid in a way going to consensus ad idem.

93 The Full Court is now called upon to exercise the residual discretion as the discretion of the primary judge miscarried for the reasons identified.

94 The Full Court cannot be satisfied that the court of the forum would conclude that the arbitration agreement is valid in the face of an apprehended contest in which it is said that Jasmin seeks to assert the right to prove before the court of the forum that the arbitration agreement is not valid because it never was a party to the agreement according to New York law.

95 In the exercise of the residual discretion as to service out, the Full Court cannot be satisfied that leave should be refused.

96 Accordingly, the appeal should be dismissed.

I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood.

Associate:

Date: 25 January 2017

REASONS FOR JUDGMENT

BEACH J:

97 The respondent to the present appeal, Jasmin Solar Pty Ltd (Jasmin) made an application to the primary judge for leave to serve its originating process upon the appellant, Trina Solar (US) Inc (Trina US), in the United States of America. That application, which was successful, was made under rule 10.43(2) of the *Federal Court Rules 2011*, which provides that a party may apply to the Court for leave to serve an originating application on a person in a foreign country in accordance with, inter alia, the Hague Convention or the law of a foreign country.

98 The three conditions that must be satisfied before leave to serve out can be given are that:

(a) the Court has jurisdiction in the proceeding;

(b) the proceeding is of a kind mentioned in rule 10.42; and

(c) the party has a *prima facie* case for all or any of the relief claimed in the proceeding.

99 Nevertheless, even if these conditions are satisfied the Court has a residual discretion to refuse such leave to serve out.

100 The primary judge granted leave to serve out. He found that the three conditions had been satisfied and that his discretion had been enlivened to grant leave. There has been no challenge to his findings as to the satisfaction of these three conditions. But his Honour declined to exercise his residual discretion to refuse leave. Trina US has challenged that part of his Honour's decision addressing the residual discretion pursuant to leave granted by Greenwood J on 26 February 2016.

101 Trina US asserts that his Honour should have refused leave to serve out on the basis that, applying New York law, Jasmin was a party to an arbitration agreement which provided for arbitration in New York of disputes arising out of or connected with a contract governed by the law of New York between Jasmin, JRC Services LLC (JRC) and Trina US. Accordingly, so it was said by Trina US, service out was futile because a stay of the proceeding against Trina US would inevitably be granted under s 7(2) of the *International Arbitration Act 1974* (Cth) (IA Act). But the primary judge, applying Australian law, was not satisfied that Jasmin was a party to the alleged arbitration agreement and therefore declined to refuse leave. I

would note at this point that in the context his Honour was considering, he did not need to finally decide whether Jasmin was bound by an arbitration agreement or to finally decide whether New York law or Australian law applied in determining that question. More generally, in the context of the application before him, his Honour did not need to finally decide whether a stay of the proceeding against Trina US would be granted under s 7(2) of the IA Act. As the primary judge made clear, he did not determine the issue of whether a stay under s 7(2) of the IA Act would be granted or otherwise (at [163], [165] and [166]), but merely identified that "there [were] serious obstacles to any application for a stay". Now I accept that the residual discretion is one to be exercised taking into account whether the proceedings might be stayed, but the prospects of a stay is only one factor. Moreover, if it is not inevitable or highly likely that a stay would be granted, the discretion to refuse leave would only rarely be exercised on the basis of the anticipated operation of s 7(2).

102 As his Honour was exercising a discretion, it is common ground that the principles in *House v The King* (1936) 55 CLR 499 apply. Further, the burden on Trina US is a heavy one in establishing a miscarriage of the exercise of discretion in relation to a matter of practice and procedure. For the reasons that follow, I am not satisfied that his Honour made any operative error in considering or exercising the relevant residual discretion. Accordingly, the appeal should be dismissed.

BACKGROUND

103 The essential background facts are not in issue.

104 Jasmin, an Australian entity, wanted to purchase solar panels from Trina US. Jasmin conducts a business installing solar photovoltaic power generation systems. Jasmin alleges that in July 2012, Jasmin and Trina US entered into an arrangement for Trina US to supply solar panels to Jasmin. It is alleged that on 25 July 2012, Jasmin issued a purchase order to Trina US under that arrangement. Subsequently, negotiations took place to formalise a written agreement.

105 Apparently, in August 2012 discussions took place between Jasmin and Trina US that a US-related entity of Jasmin, namely JRC, would be the purchaser of the panels and would place any relevant purchase orders with Trina US.

106 The course of the relevant communications and negotiations has been set out at [30] to [42] of the primary judge's reasons. There has been no challenge to the accuracy of his Honour's recitation.

107 On 12 November 2012, a written agreement was executed by Trina US and JRC, but not Jasmin (the Supply Agreement). Salient features of the Supply Agreement are the following:

(a) First, the parties to the Supply Agreement were described as JRC (the Buyer) and Trina US (the Seller); see also, for example, cl 3.1. Jasmin was not described as a buyer. Moreover, on the face of the document there was no reference to JRC acting as an agent for Jasmin. As I have said, Jasmin did not execute the document.

(b) Second, cl 5.5.1 provided:

> Concurrently with the Effective Date, Buyer's parent company (Jasmin Solar Pty. Ltd.) shall guarantee payment for each shipment that the Buyer has issued an official Purchase Order and which has been delivered and received in good order by Buyer.

I note at this point that it might be said that the guarantee obligation is in tension with any suggestion that JRC was acting as an agent for Jasmin.

(c) Third, the Supply Agreement also distinguished between a party and its affiliates (see for example, cl 8.2 and cl 14.2).

(d) Fourth, cl 10 set out a governing law provision stipulating the laws of the State of New York as "govern[ing] the validity of this Contract, the interpretation of its terms, and the interpretation and enforcement of the rights and duties of the parties hereto".

(e) Fifth, cl 11.1 contained an arbitration clause in the following terms:

> Any dispute or controversy or difference arising out of or in connection with this Contract including its existence, validity or termination, between the parties hereto shall be submitted to a meeting of senior management within fifteen (15) days of written notice of a dispute. If the meeting is unsuccessful, the dispute shall be submitted to binding arbitration. Such arbitration shall be administered by the American Arbitration Association in accordance with its commercial arbitration rules in effect at the time of the arbitration. The place of the arbitration shall be New York, New York [sic]. The Parties shall arrange for the arbitration to commence no later than ninety (90) days after the date of the demand for arbitration.

(f) Sixth, cl 14.4 also provided:

> Third Party. Nothing in this Contract is intended to confer on any person who is not a party hereto any right to enforce any term of this Contract.

Again, it might be thought that this clause was in tension with any agency between JRC and Jasmin.

108 On 13 May 2014, Trina US, relying upon the arbitration clause in the Supply Agreement, commenced arbitral proceedings in New York against both JRC and Jasmin asserting breaches of the Supply Agreement.

109 On 15 May 2015, Jasmin filed a motion in the arbitration seeking orders that it be removed from the arbitration on the basis that it was not a party to the Supply Agreement and accordingly not a party to the arbitration agreement constituted by cl 11.1.

110 After a hearing on 5 June 2015, the arbitrator on 16 June 2015 handed down her preliminary award on that issue, determining that Jasmin was a party to the Supply Agreement and that, accordingly, it was bound by the arbitration clause (Interim Award).

111 The final hearing of the arbitration took place between 27 October and 29 October 2015. Apparently, Jasmin took no steps and did not participate therein.

112 Subsequently, on 30 September 2015 Jasmin commenced proceedings in this Court against Trina US and Trina Solar Australia Pty Ltd (Trina Australia). Trina US and Trina Australia are related, with Trina Australia conducting the business of Trina US in Australia. The allegations made by Jasmin have been summarised by the primary judge at [10] to [29] of his reasons, which I do not need to repeat. The principal claims made against Trina US and Trina Australia are for contraventions of the *Australian Consumer Law* for misrepresentation and misleading or deceptive conduct, with Trina US as the alleged principal contravener and Trina Australia as an entity "involved in" the contraventions.

113 It is in this context that Jasmin sought leave to serve the originating process in the US on Trina US. Trina US objected to such leave being granted on the basis that to do so would be an exercise in futility by reason that the proceeding against it would be inevitably stayed under s 7(2) of the IA Act by reason of the arbitration provision in the Supply Agreement which constituted an arbitration agreement to which Jasmin was a party. In essence the primary judge rejected that argument.

114 Subsequent to his Honour's decision, I would also note that the arbitrator handed down her Final Award on 21 January 2016.

RESIDUAL DISCRETION – GENERAL

115 The only issue that has been challenged is his Honour's consideration of the exercise of the residual discretion as to whether to refuse leave. His Honour's determination as to the satisfaction of the three conditions stipulated in rule 10.43(4), namely, first, that there was a prima facie case (see [50] to [54]), second, that the proceeding was of kind mentioned in rule 10.42 (see [55] to [63]) and, third, that the Court has jurisdiction (see at [64]), has not been challenged.

116 The existence of the residual discretion was not in doubt (see [66]). Nor was it in doubt that one matter relevant to the residual discretion was whether, if leave to serve out was granted, the proceeding might be stayed (see *Quinlan v Safe International Försäkrings AB* [2005] FCA 1362 at [26] and [27] per Nicholson J), in this case by operation of s 7(2) of the IA Act.

117 Now the residual discretion to refuse leave is not at large in the sense that if the three necessary conditions for leave have been satisfied, there must be a good if not compelling reason why nevertheless leave should be refused in the face of such satisfaction.

118 If a stay of the proceeding would be granted or this was inevitable, then that could provide a compelling reason for the exercise of the residual discretion to refuse leave. Before his Honour, Trina US recognised as much. Trina US couched its submissions before his Honour in terms that "it would be futile to serve Trina US because the proceedings would subsequently be stayed by application of s 7(2)". But if all that could be established was that a stay *might* be granted or that it was reasonably arguable, but all of this below the threshold of inevitability or a strong case for a stay, then it may not be appropriate to exercise the residual discretion to refuse leave. Rather, the appropriate course may be to grant leave to serve out, and to then allow the respondent to apply for a stay of the proceeding under s 7(2) of the IA Act on proper material. It is inappropriate to be definitive on such questions given that a discretion is being exercised and each case will turn on its own circumstances. But the context of the application that his Honour was dealing with is not unimportant.

119 Generally, questions of leave to serve out are to be dealt with expeditiously, as his Honour did in the present case. A mini trial of whether a stay would be granted ought not to be carried out under the umbrella of the availability and exercise of any residual discretion

associated with an application to serve out of the jurisdiction an originating process, except in the clearest case. And that is all the more so if such a mini trial entails the consideration and resolution of intricate issues relating to private international law. Unless a case for a stay is inevitable or strongly made out, alternatively expressed it is not reasonably arguable that no stay would be granted, the better course is to grant leave to serve out and to deal with the stay question at a later stage by application at the behest of the respondent.

120 The primary judge rightly held that in considering the question of the residual discretion he was not finally determining the stay question (see at [163], [165] and [166]). Indeed, at [165] his Honour said that "[t]his is not a final determination of *any issue* concerning whether Trina US is entitled to a stay of the proceedings" (my emphasis). I take that reference, in its breadth, to apply to the choice of law questions that his Honour discussed, although at times his Honour in other parts of his reasons did express himself in more definitive terms. But in the context of dealing with the exercise of the residual discretion, his Honour could not finally determine the stay question or the associated question of whether Jasmin was a party to the relevant arbitration agreement including the related choice of law question.

121 The primary judge found that the appropriate law to apply to the question of whether Jasmin was a party to the arbitration agreement was the law of the forum (see at [106]). I agree with his Honour for the reasons that I will later elaborate on. But in the context of considering the exercise of the residual discretion, in my view his Honour strictly only needed to go so far as to find that it was reasonably arguable that the law of the forum was to be applied. And on any view of the authorities that choice of law was reasonably arguable.

122 Trina US asserts that his Honour was in error in the conclusion expressed as to choice of law (see at [106]). I disagree. But as I have said, his Honour needed only to have gone so far as to say that the law of the forum was reasonably or strongly arguable as the appropriate choice of law to justify the refusal to exercise the residual discretion to refuse leave. But even if one was to conclude that his Honour expressed himself too definitively and one could not be so definitive, then I would not in any event exercise the residual discretion any differently to his Honour.

123 On the basis that the appropriate law to apply to the question of whether Jasmin was a party to the arbitration agreement was the law of the forum (ie Australian law), his Honour then turned to the question of whether Jasmin was a party. As to this, his Honour only dealt with the issue in a preliminary way and, in that context, said (see at [108] et seq) that he did not

"presently accept that Australian law would treat Jasmin as a party to the Arbitration Agreement" and that he was "not presently satisfied that JRC entered the Supply Agreement as agent for Jasmin" (see at [141]). Apart from the choice of law question, there has been no substantive challenge to such a preliminary analysis or determination, assuming that the law of the forum applies. I note that ground 1(b) of the notice of appeal asserts that the primary judge "erred in deciding that Jasmin was not bound by the arbitration agreement". His Honour did not finally determine that question; moreover, nothing was advanced beyond the lex fori question.

124 His Honour dealt with two other issues (described by him as issues 3 and 4) which are not the subject of appeal and on which it is not necessary to say anything further.

125 It is appropriate to now turn to the choice of law question considering both common law principles and their intersection with relevant provisions of the IA Act. But as I have said, it is not necessary to reach definitive conclusions on these questions in considering whether his Honour appropriately considered and chose not to exercise the residual discretion in favour of refusing leave.

CHOICE OF LAW – COMMON LAW

126 Trina US contended that Jasmin was a party to the arbitration agreement constituted by cl 11.1 of the Supply Agreement. His Honour identified cl 11.1 as the "arbitration agreement" for the purposes of s 7(2) of the IA Act. The question was whether Jasmin was a party thereto.

127 For present purposes, I will put to one side s 7(2) of the IA Act and consider the question of what law applied to determine the question of whether Jasmin was a party to the arbitration agreement, applying common law choice of law principles. His Honour identified the answer to that question as being the law of the forum.

128 Like his Honour, I consider there to be a distinction between two types of scenarios: (a) the choice of law to determine whether there is a consensus ad idem between the parties; and (b) the choice of law to apply where one is dealing with the validity and interpretation of the contract, mode of performance and consequences of breach. As to the second scenario, it is not in doubt that the law to apply is that which the parties have chosen or purported to choose, alternatively the law which would be the putative proper law in the absence of

express choice. As to the first scenario, I consider that the appropriate choice of law is the law of the forum.

129 First, questions concerning whether the parties have reached consensus ad idem are different to questions of validity. The latter concept assumes that an agreement has been made and looks at issues as to whether the same is, inter alia, enforceable, voidable or void.

130 Second, it is counter-intuitive to suggest that the choice of law to assess consensus ad idem should be that set out in an agreement that an entity says it is not a party to because there was no consensus ad idem. That would be to assume what was to be proved. As his Honour described it: "a party cannot pick itself up by the bootstraps provision when there has been no determination that it binds the other party" (see at [7]).

131 Third, and by analogy, it is counter-intuitive to apply a putative proper law, ie the proper law of the contract that the parties would have chosen if there had been a consensus ad idem, where one entity says that there has been no consensus ad idem.

132 Fourth, no relevant distinction is to be made between, on the one hand, asking whether person X has manifested consent to agree with person Y (ie displayed a consensus ad idem with person Y) and, on the other hand, asking whether person X has manifested consent to agree with persons Y and Z, where persons Y and Z had previously agreed with each other. In the present case, X is Jasmin, Y is Trina US and Z is JRC.

133 In essence, the primary judge applied the lex fori. In my opinion, this was consistent with the preponderance of precedent in Australia.

134 In *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 (*Oceanic*), Brennan J (at 225) and Gaudron J (at 260 and 261) both stated (obiter) that the issue of consensus ad idem was to be governed by the lex fori. Contrastingly, Deane J (at 255) stated that "[t]he question whether those transactions and actions resulted in a binding contract between the parties must, in my view, be determined by reference to the law of New South Wales — the locus contractus". But arguably this statement in the context of *Oceanic* may be seen as consistent with the position adopted by Brennan and Gaudron JJ that the lex fori applies to questions of consensus. But irrespective of whether Deane J's statement can be reconciled with the observations of Brennan and Gaudron JJ, I see no good reason not to follow their obiter observations.

135 Further I note that the lex fori has been applied in *Venter v Ilona MY Ltd* [2012] NSWSC 1029 at [25] to [27] per Rein J and in *Hargood v OHTL Public Company Ltd* [2015] NSWSC 446 at [23] per Davies J.

136 Trina US has not identified any binding Australian authority that supports its proposition that the putative proper law (as distinct from applying the law of the forum) ought to apply at the first step in establishing consensus ad idem. Indeed, Trina US's arguments would appear to conflate the issue of consensus ad idem with the formation of a legally binding contract. The former element is a necessary but not sufficient condition to establishing the latter element. Let me linger briefly on two Australian authorities referred to in the course of argument by Trina US.

137 *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67 concerned whether, where it was accepted that there was consensus ad idem, guardians could bind a minor. But the observations of Young J (at 75) do not address the choice of law for determining the consensus ad idem. *White Cliffs Opal Mines Ltd v Miller* (1904) 4 SR (NSW) 150 did not address the choice of law question dealing with consensus ad idem in terms, but rather proceeded on the narrow factual ground (at 154) that the correspondence exchanged between the putative parties implied that the law of New South Wales "was to be taken as the law governing the contract" and that "the directors could not, by their cablegram, alter the basis on which the correspondence was conducted". In any event, such cases do not justify putting to one side the observations of Brennan and Gaudron JJ in *Oceanic*.

138 Further, the overseas authorities identified by Trina US, most of which I note were not drawn to the attention of the primary judge, are not expressly inconsistent in their ratios with the proposition that the determination of consensus ad idem (as distinct from the broader question of the formation of a legally binding contract) can proceed by applying the lex fori.

139 Trina US contended that there have been various English decisions which establish that at common law the putative proper law of the contract determines whether the parties, and which parties, have reached agreement. In my view these cases do not significantly assist Trina US. The discussion of the choice of law in those cases has usually been obiter or unclear. In any event, I would not refrain from applying the observations of Brennan and Gaudron JJ in *Oceanic*.

140 *Albeko Schuhmaschinen AG v The Kamborian Shoe Machine Co Ltd* (1961) 111 LJ 519 (*Albeko*) turned purely on the factual question that posting of the letter of acceptance was not established. The finding by Salmon J that the proper law of the contract was Swiss Law was obiter.

141 *Compania Naviera Micro SA v Shipley International Inc (The "Parouth")* [1982] 2 Lloyd's Rep 351 concerned whether there was an arguable case that there was a binding contract between the parties to which English law applied for the purposes of Order 11 r 1(1)(f) (the English rule dealing with leave to serve out of the jurisdiction). The contract documents relied upon provided for arbitration with London as the arbitral seat. It was conceded that there was a good arguable case that there was a binding contract. There was also a good arguable case that that contract had English law as its proper law. That sufficed to bring the matter within Order 11 r 1(1)(f). Accordingly, references to Dicey & Morris on the *Conflict of Laws* were obiter and *Mackender v Feldia AG* [1967] 2 QB 590 was not referred to. Whether Compania Naviera Micro SA was ultimately a party to the contract remained to be determined at trial. In any event the lex fori and the putative law of the contract were both English. Further, in *Chevron International Oil Co Ltd v A/S Sea Team (The "T.S. Havprins")* [1983] 2 Lloyd's Rep 356, Staughton J applied, for the purposes of Order 11, the lex fori to determine whether there was a contract.

142 As against Trina US' contention, *Mackender v Feldia AG* [1967] 2 QB 590 at 603 per Diplock LJ provides some support for the proposition that in determining whether there is a consensus ad idem, the lex fori should be applied rather than the putative proper law; but I accept that his observations only provide qualified support.

143 *Union Transport plc v Continental Lines SA* [1992] 1 WLR 15 concerned the application of the Brussels Convention, which generally provided that persons domiciled in convention States were to be sued in their state of domicile. Lord Goff of Chieveley (at 23) made reference to the putative proper law of the contract, but it is not clear that his observations relate to the consensus ad idem issue.

144 In *Marc Rich & Co AG v Societa Italiana Impianti PA (The "Atlantic Emperor")* [1989] 1 Lloyd's Rep 548, there was no doubt that the parties had entered into a contract.

145 In *Habas Sinai Ve Tibbi Gazlar Istihsal v VSC Steel Co Ltd* [2014] 1 Lloyd's Rep 479, the question was whether an agent had authority to enter into a contract that extended to one with

the arbitration clauses. There was no dispute that a contract had been entered into between the parties. Similar considerations apply to *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66. There was no dispute that a contract had been entered into; the issue was whether it contained an arbitration clause. Likewise, *National Navigation Co v Endesa Generacion SA (The "Wadi Sudr")* [2009] 1 Lloyd's Rep 666 is of little assistance.

146 More generally, many English decisions after 1 April 1991, when the Rome Convention (Convention on the Law Applicable to Contractual Obligations 1980) came into operation in the United Kingdom, are of limited assistance as they have been influenced by that Convention. The Rome Convention requires the application of the putative proper law even to the question of consensus ad idem although this is not absolute (cf articles 4 and 8 with the rider in sub-article 2 of article 8). Accordingly, any further excursion through the English jurisprudence is of limited assistance.

147 Trina US has also referred to the Canadian decision of *Timberwest Forest Ltd v Gearbulk Pool Ltd* [2001] BCSC 882 for support that the putative proper law applied. Now it may be accepted that this case provides some limited support. But Cullen J stated that the determination of the issues in that case was not affected by the choice of law (at [24]). Moreover, the issue in that case was not purely a consensus ad idem question but rather *which* bills of lading applied to govern the relationship.

148 In relation to the United States of America, Trina US referred to the *Restatement (Second) of Conflict of Laws* §187 (1971) but it is of little assistance. It states that the "law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue". "Comment a." to that section states that the "rule of this Section is applicable only in situations where it is established to the satisfaction of the forum that the parties have chosen the state of the applicable law". Then in dealing with "impropriety or mistake" at "Comment b." it is stated "[w]hether such consent was in fact obtained by improper means or by mistake will be determined by the forum in accordance with its own legal principles". These passages of the Restatement do not substantially assist Trina US.

149 Generally, I have difficulty with Trina US' contention that the putative proper law of the contract applies to determining whether there is consensus ad idem. The rationale for

applying the putative proper law of the contract is that it accords with the intent of the parties, but that is the very matter in issue in the present context.

150 Trina US has said that the approach taken by the primary judge is apt to produce illogical outcomes. First, it refers to a factual situation not unlike that in *Albeko* but with the roles reversed. It posits that the English or Australian party posts an acceptance of an offer which is never received. Assume it contains a Swiss choice of law term. Also assume that under Swiss law, acceptance is complete upon receipt only. It is said that the approach taken by the primary judge leads to the English or Australian court concluding there is a contract between the parties by which they have selected Swiss law to govern that contract, but when applied means there is no such contract. It is said that the outcome of this international commercial arrangement would depend entirely on the place where proceedings were commenced. Contrastingly, it is said that if the putative proper law was applied, the Australian or English court would form a view consonant with the view of the Swiss law. Second, Trina US also submits that the same kind of difficulty arises when, by the law of the forum (English or Australian), consideration is required to make a promise binding but that is not a requirement of the putative proper law.

151 These perceived anomalies are interesting but not definitive. As to the so-called first anomaly, that does not overcome the paradoxical position identified by his Honour. Moreover, the dicta in *Oceanic* should be followed. As to the so-called second anomaly, that is moving beyond consensus ad idem. What I have said is not inconsistent with applying the putative proper law to questions of consideration.

152 More generally, Trina US would have us engage in questions of characterisation such that any contractual question should be dealt with either under the proper law of the contract or the putative proper law. But I consider such a generalisation to be unhelpful. It conceals relevant distinctions concerning various aspects of contract formation and validity. Moreover, it is inconsistent with the dicta in *Oceanic*.

153 Finally on this aspect, part of the grounds of appeal asserts that his Honour "should have given greater recognition to the Interim Award". But I do not see how the fact of the Interim Award or its content directly affects either the choice of law or the proper construction of the IA Act.

INTERNATIONAL ARBITRATION ACT

154 Trina US contends that the primary judge's selection of the lex fori is misplaced when one takes into account relevant provisions of the IA Act. First, it says that s 7 operates where a litigant is a party to an "arbitration agreement". It says that that expression is defined in such a way as to refer to foreign arbitration agreements between the parties, whether or not they are recognised by the law of the forum as agreements at all. It says that on the approach taken by the primary judge, such a foreign arbitration agreement is only recognised as being an arbitration agreement between the parties if it qualifies according to the domestic law. It says that the IA Act cannot be construed in that way. Second and relatedly, Trina US says that there are sound reasons for construing the choice of law rules set out in s 8(5) of the IA Act as also applicable to the operation of s 7(2) and (5).

155 Sections 7 and 8 of the IA Act provide as follows:

> **7 Enforcement of foreign arbitration agreements**
>
> (1) Where:
>
> > (a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;
> >
> > (b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;
> >
> > (c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or
> >
> > (d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;
>
> this section applies to the agreement.
>
> (2) Subject to this Part, where:
>
> > (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
> >
> > (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;
>
> on the application of a party to the agreement, the court shall, by order, upon such

conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

[…]

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

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

8 Recognition of foreign awards

(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

[…]

(3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.

(3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).

(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:

> (a) a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;
>
> (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
>
> (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;
>
> (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
>
> (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

[…]

> (7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:
>
> > (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
> >
> > (b) to enforce the award would be contrary to public policy.
>
> […]

156 Section 3(1) of the IA Act defines the expression "arbitration agreement" to mean "an agreement in writing of the kind referred to in sub-article 1 of Article II of the [New York] Convention". That sub-article provides as follows:

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

(a) Trina US' contentions

157 Trina US contends that both the IA Act and the New York Convention (United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards) (the Convention) point in favour of an expansive description of arbitration agreement as such an agreement, whether or not it is recognised by the law of the forum as a contract at all.

158 Now I accept that the Convention has been ratified by over 150 Contracting States and that it is directed to encouraging a level of uniformity in the international legal standards for recognition and enforcement of international arbitration agreements and arbitral awards (*TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [46] per Hayne, Crennan, Kiefel and Bell JJ). But whether Trina US' contention is a necessary consequence of that general position is another question.

159 Sub-article 1 of Article II provides that each Contracting State agrees to "recognize an agreement in writing under which the parties undertake to submit to arbitration …". Trina US contends that this commitment to recognise that agreement would be meaningless if it was construed as limited to agreements which the domestic law of the recognising Contracting State would itself treat as a contract. Further, it says that the uniformity which it is clear the Convention seeks, would be compromised if each recognising Contracting State applied its own idiosyncratic domestic law to determine the scope of the recognition obligation.

160 The Convention is also directed to the recognition and enforcement of arbitral awards made in a foreign country including awards which would not be recognised as awards by domestic law. Recognition and enforcement is only to be withheld if inter alia "[t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made" (sub-article 1(a) of Article V). Trina US says that the Convention is using here the language of "agreement" and the identification of parties to it in a broad sense, such that it is an appropriate description even though an agreement could be null and void or inoperative. It is said that the Convention does not contemplate any other test of validity in the forum of the recognising Contracting State.

161 The IA Act adopts the Convention definition of "arbitration agreement". Trina US says that given the purposes of the Convention and the IA Act, that expression cannot be construed in a "parochial way" as referring to agreements which domestic law recognises as arbitration agreements. It is said that this is supported by reference to other provisions of the IA Act including the objects in s 2D and the matters to which the Court must have regard as set out in s 39.

162 Trina US refers to the fact that provision is made in the IA Act for the enforcement of arbitration agreements (s 7) and for foreign awards (s 8). It is said that the latter (s 8) is premised on there being an arbitration agreement pursuant to which the award was or was purported to be made. It is said to be clear that Parliament had in mind something which may not be a contract which, by domestic law, is binding.

163 Trina US places significant reliance upon s 8(5). One circumstance which may justify refusal of enforcement (s 8(5)(b)) is where "the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made". It is said that the IA Act does not contemplate any test for validity or otherwise under the law of the forum. I accept that this is so for s 8(5), but where that takes Trina US is another question.

164 Trina US asserts that the primary judge took the view (at [105]) that s 8(5), and the choice of law regime it provides, was a legislative imposition of a choice of law rule for determining questions of contract validity but was not a rule for contract formation. It is said that that view of s 8(5) represents a significant departure from settled law. In *IMC Aviation Solutions*

Pty Ltd v Altain Khuder LLC (2011) 38 VR 303, it was held at [171] that s 8(5)(b) "extends to the ground that the award debtor was not a party to the arbitration agreement". In so holding, *IMC Aviation* followed the approach of Lord Collins of Mapesbury JSC in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 and Mance LJ in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326. In *Dallah*, Lord Collins of Mapesbury JSC at [77] said of sub-article 1 of Art V of the Convention and the UK statutory equivalent of s 8(5) that "the consistent international practice shows that there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement".

165 Trina US contends that the correct approach is to acknowledge that the IA Act imposes obligations to recognise as "arbitration agreements" arrangements different from those which necessarily conform to the domestic law view of contracts and to afford them recognition and enforcement (even as purported or apparent agreements) except when the requirements (relevantly) of s 8(5) are satisfied. It is said that that process requires the application of New York law in the present case.

166 Trina US had to accept that s 7 of the IA Act does not contain an explicit choice of law rule. However, the IA Act (by s 8(5)) and the Convention (by Art V) do express choice of law rules. Trina US says that the same choice-of-law rules should apply under the Convention to selecting the law governing an arbitration agreement's formation and substantive validity at both the stage of enforcing the agreement and the stage of enforcing an arbitral award. Reference was made to Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International, 2014) at 497.

167 Trina US submits that there is no sensible basis for concluding that the Convention contemplated the application of two different substantive laws of contractual validity to the same arbitration agreement, potentially with the result varying depending on the point in time at which the issue is considered. It is said that to do so would produce the highly undesirable result that an arbitration agreement may be found valid (or invalid) at one stage of a dispute, and then treated in the opposite manner at a later stage; that will inevitably result in delays and wasted expense, as well as the possibilities of inconsistent decisions about the validity of the same arbitration agreement.

168 Trina US says that the IA Act should be construed in a similar way. It is said that to do so advances the objects of the IA Act. Now there is no cross-referencing between s 7 and s 8(5). Nevertheless, Trina US says that the reference in both sections to the "arbitration agreement", and the definition of that by reference to the Convention, effects the same outcome. Trina US says that when that expression is used in s 8 it applies so as to include reference to an arbitration agreement even if a party contends it was not a party to the agreement. Further, the resultant award made in purported pursuance of it is binding unless (relevantly) it is established that the agreement is not valid applying the choice of law rules in s 8(5). Further, the language of s 8(1) does not enable a challenge to the recognition of the award on any basis other than as set out in ss 8(5) and (7); see s 8(3A). Accordingly, it must necessarily follow that invalidity by the law of the forum is no basis for concluding that the arbitration agreement is not valid and relevantly no basis for concluding that the award debtor is not a party to the arbitration agreement.

169 Leveraging off its analysis concerning s 8, Trina US submits that it is unlikely that Parliament intended to refer to the content of a foreign arrangement (to use a neutral phrase) by the use of the same expression ("arbitration agreement") in both s 7 and s 8 but with varying content in each.

170 Further, Trina US says that the circumstances of the present case are unusual. There is now both the Final Award and the possible application of s 7 to stay proceedings to enable a dispute to be arbitrated.

171 Trina US submits that the binding nature of a foreign award under s 8(1) subsists without the need for the award creditor to proceed to the enforcement and registration stage in order to rely on the binding nature of the award. The award is binding "for all purposes" which, so Trina US contends, must extend to the operation of s 7. There are two awards in this case: the Interim Award and the Final Award. The Final Award found that Jasmin and JRC were jointly and severally liable to Trina US for a stated sum "for failure to pay for delivery of certain PV panels delivered pursuant to the [Supply Agreement] effective date November 7, 2012 …". It also records the rejection of Jasmin's contention that it was not a party to the Supply Agreement and could not be compelled to arbitrate.

172 Trina US asserts that the primary judge's approach requires giving the IA Act the unattractive construction that by virtue of the IA Act the Final Award is binding, with an obligation (subject to establishing invalidity under New York law) that it be enforced against Jasmin,

while at the same time permitting Jasmin to bring proceedings contending that it was not liable to Trina US as a party to the Supply Agreement, and in the present domestic proceedings to seek relief inconsistent with the Final Award.

(b) Analysis

173 I would begin with the following preliminary observations.

174 First, many of Trina US' arguments put to us do not seem to have been as well developed before the primary judge, if put at all.

175 His Honour referred to the IA Act at various places in his reasons, but only in a limited way reflecting the arguments then put to him. For example, he accepted that cl 11.1 of the Supply Agreement was an "arbitration agreement" within the meaning of s 3(1) of the IA Act and sub-article 1 of Article II of the Convention (see at [68] to [72]). Indeed, so much seems to have been uncontroversial. Further, at [100] to [105], his Honour discusses s 8(5)(b) of the IA Act, which I will return to later, but it does not appear that the full sweep of arguments now advanced by Trina US with regard to s 7 and s 8 were put to his Honour. Nevertheless I am content to deal with them.

176 Second, Trina US now points to the fact that a Final Award has been made and points to anomalies that are said to arise by the primary judge applying the law of the forum. These are of course new matters given that the Final Award was handed down after his Honour's decision. In any event, the fact that the Final Award has now been published cannot in and of itself dictate the appropriate choice of law principle to apply, let alone the correct construction of the IA Act.

177 It is appropriate to now turn to the IA Act itself.

178 First, given that the IA Act picks up the Convention reference, the expression "agreement in writing under which the parties undertake to submit …" (as set out in sub-article 1 of Article II) should be given a broad interpretation consistent with its context and with international authorities. But I am not dealing with the construction of "agreement in writing" or "arbitration agreement" per se, but rather with the issue of whether Jasmin is a party to the arbitration agreement, which requires consideration as to the choice of law. The structure of the IA Act makes it plain (see for example s 8(5)(b)) that the concept of what is meant by "arbitration agreement" is separate to the question of choice of law. The present case also involves an agency question as between JRC and Jasmin. The Convention and the IA Act are

silent, save as to s 8(5)(b), on the choice of law to apply to determine whether an agreement exists or any agency question.

179 Second, I am construing s 3(1) of the IA Act, and s 7 and s 8 thereof in terms of what a Commonwealth statute means by "arbitration agreement". But as I have said, its meaning is affected by the Convention. One can accept that the concept of "agreement" requires mutual consensus and that this is the universal meaning under the Convention. It may be accepted that "agreement" should be so construed unconstrained by domestic law notions. But that is to say nothing about *how* that mutual consensus is to be determined and the choice of law to be made relevant to that determination. Moreover, if principles of agency need to be considered, that adds even further complexity. Where principles of agency are involved there are a number of choice of law options (see Born at 1423 to 1424). Moreover, for some countries those principles are affected by the Hague Convention on the Law Applicable to Agency (1978), although I note that Australia is not a party thereto. I need say nothing further on this subject as no submissions were made to the primary judge or us on the choice of law principles applicable to how agency is to be determined. I would also note for completeness that the reference in s 7(4) to "a person claiming through or under a party" leaves open the question of how this is to be assessed and the choice of law to apply.

180 Third, s 8 is not directly relevant to the context that I am dealing with, although I accept that "arbitration agreement" in both s 7 and s 8 should be given a consistent interpretation.

181 Fourth, I accept that s 8(5)(b) does apply to the situation where an entity seeks to assert that it is not a party to an arbitration agreement. I also accept that s 8(5)(b) contains its own choice of law provision, which refers other than to the law of the forum that I am considering. As to the breadth of s 8(5)(b), I see no compelling reason not to follow *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303 at [171] and [172], *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [77] and [155] and *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 at 330 and 331. But to so accept such matters does not carry the day for Trina US.

182 The fact that s 8(5)(b) provides for a choice of law different to the law of the forum in relation to whether an "arbitration agreement" exists to which a party is bound, does not entail that the same choice of law needs to be made for s 7(2). There are a number of reasons for this. The first reason is that s 7(2) is silent on choice of law. If the IA Act and the Convention were concerned to achieve the uniformity that Trina US contends for, one may

have expected some indication. None was given. No stipulation of the choice of law was made. Relatedly, the express statutory language of s 7(5), which makes no reference to choice of law, is not strictly co-extensive with the s 8(5)(b) ground, further pointing away from the uniformity on choice of law contended for by Trina US. Indeed, some of the heads of s 7(5) better resonate with the application of the law of the forum. Trina US had to contend for the unattractive proposition that some aspects of s 7(5) required different choice of law considerations than other aspects of s 7(5). The second reason is that to apply a different choice of law for s 7(2) as compared with s 8(5)(b) to assess whether there is an arbitration agreement to which a party is bound does not detract from the uniform meaning of "agreement" (in Article II of the Convention) entailing a mutual consensus. The concept of a mutual consensus does not change as such, but how such mutual consensus is ascertained may change based on the relevant choice of law. The third reason is that one should not confuse the two different contexts. Once an award has been made, one can understand the reason for the stipulation of the choice of law in s 8(5)(b), which is pro- recognition and enforcement of *awards* without further debate as to the choice of law. Indeed s 2D(c) and s 39(2)(b)(ii) entail or at least support such a position. Section 8(5)(b) recognises the reality of the existence of a foreign award and on that foundation circumscribes challenges to the enforcement of an award and the applicable choice of law. But before a final award is rendered, which is usually the s 7(2) context, there is not the same policy rationale for that choice of law. There is no policy requiring enforcement of a putative arbitration agreement as distinct from an actual arbitration agreement; s 7(2) contains no provision requiring the creation of a legal fiction purportedly justified only by some perceived consistency with s 8(5)(b). Notably, Trina US has not cited any compelling international authority that supports its position concerning analogues for s 7(2) and sub-articles 1 and 3 of Article II. In summary, s 7(2) leaves it to the forum to apply its own choice of law principles which may then involve choosing the law of the forum as the substantive law. Indeed, this is mirrored in the Convention. Article II contains no choice of law provision. Contrastingly, Article V does contain choice of law provisions. Both the IA Act and the Convention are consistent in this respect. Uniformity on choice of law is not enshrined.

183 Fifth and relatedly, both the Convention and the UNCITRAL Model Law on International Commercial Arbitration allow some flexibility on choice of law depending upon the context, including to the parties in choosing the proper law of the arbitration agreement. Moreover, even within the IA Act there is variation, depending upon the question, as to the choice of

law. Given such flexibility, Trina US' rigid submission that in the present context the putative proper law must be applied to achieve uniformity lacks allure. Undoubtedly, the Convention and the IA Act should be construed to achieve a degree of uniformity in relation to relevant expressions, concepts and their application. But that does not entail Trina US' conclusion.

184 Finally, if there are anomalies that now arise because the Final Award has been handed down, they should properly be assessed and dealt with in any stay application under s 7(2). But the idiosyncratic circumstances of the present case arising because the Final Award has now been handed down, cannot drive the proper analysis concerning s 7(2) and the choice of law question in the context that the primary judge had to address, ie in the scenario where there was no s 7(2) application and no Final Award.

CONCLUSION

185 For the foregoing reasons, I am not satisfied that his Honour made any *House v The King* error or that if he did any different result should have followed.

186 Trina US is free to pursue any stay application as it sees fit and to reinvigorate its arguments on the scope of "arbitration agreement" and choice of law as it may consider appropriate. Moreover, such a stay application may be affected by whether Trina US seeks enforcement of the Final Award under s 8 and, further, whether Jasmin establishes the elements of, inter alia, s 8(5)(b) or otherwise. Further, there may also be questions as to whether any stay should apply to statutory claims in the primary Federal Court proceeding.

187 I would make two other points concerning any perceived anomalies relating to choice of law that might now arise because the Final Award has been handed down. First, on some scenarios such anomalies may only be of hypothetical interest and may not require resolution. If the Final Award is sought to be enforced by Trina US and Jasmin fails to resist enforcement on the s 8(5)(b) ground, then it is conceivable that any stay application (and *not* necessarily confined to s 7(2)) may be granted in whole or in part on the basis simply that the Final Award is, as a matter of statutory operation under s 8, binding on Jasmin; considerations of res judicata and issue estoppel may also come into play (cf *TCL Air Conditioning* at [23] per French CJ and Gageler J). In that scenario, no further choice of law question may then arise. Conversely, if Jasmin successfully resists enforcement of the Final Award on the s 8(5)(b) ground, then any application for a stay may be refused, without the need for further considering choice of law. After all, if Jasmin succeeded under s 8(5)(b),

there would be a finding that the arbitration agreement was not valid under New York law. Further, in the unlikely event that Trina US still wanted to persist with a stay application and in saying nevertheless that there was an arbitration agreement, it could at most only argue this applying the law of the forum it having, on this hypothesis, lost the argument applying New York law. On these scenarios, which are not exhaustive of the possibilities, the perceived anomalies either may not arise or may not require resolution. Second, if the perceived anomalies arise and nevertheless still require resolution, consideration may *then* need to be given as to whether the statutory policy of choice of law in the peculiar circumstances of the case overrides any otherwise available choice. But that scenario was not one that the primary judge had to resolve or that we need to resolve at this stage.

188 All of these questions and outcomes are matters that are best left to a formal stay application and any enforcement proceedings involving the Final Award.

189 The appeal should be dismissed with costs.

I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate:

Dated: 25 January 2017