FEDERAL COURT OF AUSTRALIA

Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd [2015] FCA 1453

Citation:	Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd [2015] FCA 1453
Parties:	**JASMIN SOLAR PTY LTD ACN 158 644 225 v TRINA SOLAR AUSTRALIA PTY LTD ACN 150 695 524 and TRINA SOLAR (US) INC**
File number:	QUD 905 of 2015
Judge:	**EDELMAN J**
Date of judgment:	17 December 2015
Catchwords:	**PRIVATE INTERNATIONAL LAW** – service of process outside the jurisdiction – residual discretion to refuse leave if the proceeding would be stayed – proper law to apply where there is a dispute concerning whether a person is a party to agreement containing a proper law clause **ARBITRATION** – meaning of a "party to an arbitration agreement" in 7(2) of the *International Arbitration Act* – whether claims under Australian Consumer Law are capable of arbitration – whether claims are connected with the contract **CONTRACT** – agency – unnamed principal – whether principal undisclosed – doctrine of undisclosed principal – whether undisclosed principal is a party to an agent's contract
Legislation:	*Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010* (Cth)) ss 18 , 29(1)(a), 236, 237, 243 *International Arbitration Act 1974* (Cth) ss 3, 7, 7(1), 7(1)(a), 7(1)(b), 7(1)(d), 7(2), 7(2)(b), 7(4), 8(5)(b) *Federal Court Rules 2011* (Cth) rr 1.33, 10.42 10.43, 10.43(2), 10.43(4)
Cases cited:	*Allergan Pharmaceuticals Inc & Anor v Bausch & Lomb Inc & Anor* (1985) ATPR 40-636 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] 1 AC 50 *Armstrong v Stokes* (1872) LR 7 QB 598 *BEST Australia Ltd v Aquagas Marketing Pty Ltd* [1988]

FCA 242; (1988) 83 ALR 217
Bray v F Hoffman-La Roche [2003] FCAFC 153; (2003) 130 FCR 317
Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd [2013] WASCA 66; (2013) 298 ALR 666
Casaceli v Natuzzi SpA [2012] FCA 691; (2012) 292 ALR 143
Cell Tech Communications Pty Ltd v Nokia Mobile Phones (United Kingdom) Ltd [1995] FCA 1211; (1995) 58 FCR 365
Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; (2006) 157 FCR 45
Commonwealth Bank of Australia v White [1999] VSA 262; [1999] 2 VR 681
Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] AC 572
Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd [2013] FCAFC 107; (2013) 216 FCR 469
Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847
Epps v Rothnie [1945] KB 562
F Drughorn Ltd v Rederiaktiebolaget Transatlantic [1919] AC 203
Ferris v Plaister (1994) 34 NSWLR 474
Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40; [2007] 4 All ER 951
Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480
Gardiner v Heading [1928] 2 KB 284
Hargood v OHTL Public Company Ltd [2015] NSWSC 446
Ho v Akai Pty Ltd (in liquidation) [2006] FCAFC 159; (2006) 24 ACLC 1,526
Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2006] FCAFC 116; (2006) 154 FCR 425
Humble v Hunter (1842) 12 QB 310
IBM Australia v National Distribution Services Ltd (1991) 22 NSWLR 466
IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248; (2011) 38 VR 303
Integrated Asset Management Pty Ltd v Trans Communications Pty Ltd [2015] NSWSC 984
Keighley, Maxsted & Co v Durant [1901] AC 240
Mackender v Feldia AG [1967] 2 QB 590
Norden A/S v Beach Building and Civil Group Pty Ltd [2012] FCA 696; (2012) 292 ALR 161
Oceanic Sun Line Special Shipping Company Inc v Fay [1988] HCA 32; (1988) 165 CLR 197
Perdaman Chemicals and Fertilisers Pty Ltd v ICICI Bank Ltd [2013] FCA 175
Perpetual Trustee Co Ltd v Bligh (1940) 41 SR (NSW) 33

Peterson Farms Inc v C & M Farming Ltd [2004] EWHC 121
QH Tours v Ship Design & Management (Aust) Pty Ltd (1991) 105 ALR 371
Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Limited (In Liq) [2013] FCAFC 5; (2013) 209 FCR 368
Quinlan v Safe International Forsakrings AB [2005] FCA 1362
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Voth v Manildra Flour Mills Pty Ltd [1990] HCA 55; (1990) 171 CLR 538
Webster Computer Systems Pty Ltd v Fujitsu Ltd [2007] FCA 825
Western Australia v Vetter Trittler Pty Ltd (in liq) (1993) 30 FCR 102
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Date of hearing:	16 December 2015
Place:	Brisbane
Division:	GENERAL DIVISION
Category:	Catchwords

Number of paragraphs:	169
Counsel for the Applicant:	Mr HM Heuzenroeder
Solicitor for the Applicant:	Fitzpatrick Legal
Counsel for the Respondents:	Dr DB O'Sullivan QC with Ms F Lubett
Solicitor for the Respondents:	King & Wood Mallesons

Table of Corrections

5 January 2016	The word Mackender has been removed from paragraph 77

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 905 of 2015**

BETWEEN:	**JASMIN SOLAR PTY LTD ACN 158 644 225** **Applicant**
AND:	**TRINA SOLAR AUSTRALIA PTY LTD ACN 150 695 524** **First Respondent**
	TRINA SOLAR (US) INC **Second Respondent**

JUDGE:	**EDELMAN J**
DATE OF ORDER:	**17 DECEMBER 2015**
WHERE MADE:	**BRISBANE**

THE COURT ORDERS THAT:

1. The applicant be granted leave to serve upon the second respondent in the United States of America the Originating Motion, Statement of Claim, Application for Leave to Serve Out, and supporting affidavits.
2. By 4 pm on 18 December 2015 the parties to provide a minute of proposed orders to effect service.
3. Costs reserved.

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

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AND:	**TRINA SOLAR AUSTRALIA PTY LTD ACN 150 695 524** **First Respondent**
	TRINA SOLAR (US) INC **Second Respondent**
JUDGE:	**EDELMAN J**
DATE:	**17 DECEMBER 2015**
PLACE:	**BRISBANE**

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Introduction

1 This is an application by **Jasmin** for leave to serve in the United States of America its application and statement of claim upon the proposed second respondent, **Trina (US)**.

2 Trina US is a related company to **Trina Australia**, the first respondent. Trina Australia conducts the business of Trina US in Australia, involving the wholesale supply of solar photo voltaic power cells (ie solar panels).

3 Jasmin wanted to obtain supply of solar panels from Trina US. It needed to do so in a short time frame to support a business model that it had developed and upon which it had entered contracts with more than 2,000 customers. But there were substantial delays before Jasmin obtained some solar panels from Trina US. Jasmin alleges in these proceedings that Trina US made misrepresentations that induced it to seek to obtain supply from Trina US, and to continue to seek supply from Trina US. In very broad terms, the misrepresentations alleged include (i) that Trina US would supply the panels in a timely manner, (ii) that the panels would be suitable for Australian homes, and (iii) that the panels would comply with Australian regulations.

4 Jasmin sought the supply of the panels through an intermediary United States company related to Jasmin called JRC Services LLC (**JRC**). Trina US commenced arbitration in the United States against Jasmin and JRC for a failure to pay invoices that Trina US had issued. Jasmin objected to the jurisdiction of the arbitrator saying that it was not a party to the contract which contained the arbitration clause. The arbitrator rejected this objection but Jasmin took no further part in the arbitration. Jasmin has now brought these proceedings. Trina US submits that Jasmin should be refused leave to serve the documents relating to these proceedings in the United States.

5 Trina US had one central submission. Its submission was that this court should refuse Jasmin leave in the exercise of a residual discretion because it would be futile to serve Trina US because the proceedings would subsequently be stayed by application of s 7(2) of the

International Arbitration Act 1974 (Cth). The reason why Trina US submitted that the proceedings would be subsequently stayed was because it was said that Jasmin was a "party to an arbitration agreement" within s 7(2) and, if leave were granted, it would commence proceedings which "involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration".

6 Jasmin had a number of responses. Its central submission was that it is not a party to any arbitration agreement. Jasmin relied on Australian law to establish that proposition. In contrast, Trina US said that the relevant law to apply in order to determine whether Jasmin was a party to the arbitration agreement was the law that the agreement provided as the governing law. That is the law of the State of New York in the United States. Trina US filed evidence concerning New York law which apparently supported its claim that Jasmin was a party by application of New York law. The arbitrator in New York also reached that conclusion.

7 The proper law to apply to the question of whether Jasmin is a party to an arbitration agreement is the law of the forum. The proper law contained in an agreement is a bootstraps provision which usually governs all matters connected with that agreement because that is what the parties had agreed. But when the very question is whether a person has agreed at all, a party cannot pick itself up by the bootstraps provision when there has been no determination that it binds the other party. In the absence of a legislative solution, neither principle, nor authority, supports the application of the proper law contained in such a contractual provision. Neither party contended that an intermediate approach should apply by which the parties would be governed by the proper law that governed their relationship independently of the contract. Absent such an argument the proper approach in this case is to apply the law of the forum.

8 Applying the law of the forum in Queensland, and in the absence of full argument and evidence on all the issues involved, my conclusion for the purposes of this application is that Jasmin was not a party to the relevant contract which contained the arbitration clause. Hence, Jasmin was not a party to an arbitration agreement. In very broad terms, some of the reasons why I currently consider that Jasmin was not a party to the relevant agreement are because (i) Jasmin was not named as a party; rather it was named as a guarantor of the buyer, (ii) the contract contained a provision that nothing was "intended to confer on any person who is not a party hereto any right to enforce any term of this contract", and (iii) as the parties knew

immediately prior to entering the agreement, the reason why JRC was substituted as the buyer in place of Jasmin on 2 November 2012 was that GST would be payable if the supply were made directly to Jasmin. In other words, Jasmin could not be a party to the contract.

9 For the reasons below, Jasmin should be granted leave to serve its application in the United States of America.

Jasmin's statement of claim

10 In very broad summary outline, Jasmin's statement of claim pleads the following case.

11 Jasmin conducts a business installing solar photo voltaic power generation. In May and June 2012, Jasmin devised a business model for the installation of solar systems for retail customers. The business model involved Jasmin receiving a feed in tariff from the customer and a rebate from electricity supplier, Diamond Energy, for electricity supplied to the grid.

12 On 25 June 2012, the government of the State of Queensland announced a change in policy which would reduce the feed in tariff by more than 80%. The change was subsequently enacted by legislation. The change exempted persons who (i) have been approved by Energex before 10 July 2012 for connection to the grid, and (ii) had a solar system installed by 30 June 2013.

13 Between 25 June 2012 and 10 July 2012, Jasmin signed up, and obtained approval from Energex for, 2,167 customers. Jasmin's business model therefore required it to obtain and install solar systems in 2,167 residential premises by 30 June 2013.

14 By mid-June 2012, Jasmin identified ET Solar as the preferred supplier of its solar panels. However, in mid-July, **Mr Parkins**, an independent consultant of Jasmin had a conversation with an employee of Trina US called **Mr Dallapiazza**. In the conversation, Mr Dallapiazza made the following representations to Mr Parkins:

(1) Trinamount solar panels included ZEP mounting technology;

(2) installations with Trinamount solar panels could increase installation speed for an installer from one installation per day to three per day, with savings in time and cost; and

(3) Trina US was a large and established company and it, and its affiliates, could supply 250W Trinamount panels in large volume in a timely manner to Queensland.

15 As a result of these representations, and other matters, Jasmin instructed Mr Parkins to negotiate the supply of solar panels and mounts from Trina US. Following the negotiations between Mr Parkins and Mr Dallapiazza, Jasmin and Trina US concluded an agreement for Trina US to supply 10MW of 250W panels (the **July agreement**). The cost of the panels exceeded the cost from ET Solar but Jasmin was prepared to pay the extra cost because of the increased speed of installation and Trina US's position as a large, established, and reliable supplier. On 25 July 2012, Jasmin issued a purchase order to Trina US under the July agreement for an amount of approximately $7.5 million.

16 From 25 July 2012, negotiations ensued "to formalise" the July agreement by a **Supply Agreement** and a line of credit of $1 million. Negotiations were primarily conducted by persons including Mr Parkins (a United States based consultant for Jasmin) and **Dr Starr** (the managing director of Jasmin) for Jasmin and Mr Dallapiazza for Trina US. In various teleconferences between 25 July 2012 and 7 September 2012, Mr Dallapiazza (Trina US) was told that Jasmin had retained installation contractors ready to be trained in the installation of solar panels with ZEP mounting technology. Jasmin agreed to order an initial consignment of Trinamount 250W solar panels prepaid for delivery "Delivered Duty Paid" (**DDP**) while terms for a line of credit were established.

17 From 14 August 2012, Trina Australia acted as the agent of Trina US in the negotiations.

18 On 21 August 2012, Mr Parkins (for Jasmin) emailed Mr Dallapiazza (for Trina US) with a draft of a formal Supply Agreement (originally drafted by Trina US) for the supply of 10MW of panels. Jasmin had made minor comments and suggestions and Mr Parkins said that Jasmin was "prepared to immediately make advance payment for Trina Mounts for receipt in Brisbane as soon as possible".

19 In the context of various of the matters described above Trina US was said to have made the following representations to Jasmin (pleaded as the **First Trina US Representations**):

(1) an express representation to the effect that Trina US or Trina Australia would supply to Jasmin 10MW of 250W solar panels with Trinamount roof mountings in a timely manner, so as to permit Jasmin to complete its installations for contracted customers by 30 June 2013;

(2) an express representation to the effect that delivery of the panels and mountings would commence approximately four weeks from the date of signing a formal Supply Agreement, and that the logistics of delivery were being contemporaneously arranged;

(3) an express representation that supply would be "Delivered at Place" (**DAP**) or DDP (INCOTERMS2010), to Jasmin's warehouse in Queensland;

(4) an implied representation that Trina US and Trina Australia were capable of the supply of solar panels in accordance with the representations above;

(5) an implied representation that the panels to be supplied would carry appropriate Australian certifications, so as to permit installation in Australia; and

(6) an implied representation that the panels with Trinamount roof mountains would be capable of installation in the manner by which it was designed to be installed on all common types of residential roofs in Australia (including tiled roofs).

20 Around 21 August 2012, Mr Dallapiazza, for Trina US, informed Jasmin that 250W Trinamount panels were not available but that 245W Trinamount panels could be supplied as an alternative. Jasmin pleads, as the **Second Trina US Representations**, the same representations for the 245W panels as the First Trina Representations for the 250W panels.

21 By early September 2012, Jasmin was very concerned about delay in supply of the panels by Trina US. Mr Dallapiazza, for Trina US, gave assurances in terms of the Second Trina US Representations and also gave assurances that Jasmin would receive exemplary service after the supply commenced (the **Trina US Assurances**). Jasmin relied on the Trina US Assurances and trained installers to install ZEP mountings on roofs.

22 On 7 September 2012, Mr Dallapiazza (for Trina US) emailed Mr Parkins (for Jasmin) with the Supply Agreement in a form for execution. Mr Dallapiazza said that he was still trying to confirm available inventory for Australia and if there was no inventory then the "lead time from China is 6-8 weeks". Mr Parkins replied explaining the urgency for delivery and saying that a wait of 6-8 weeks would cause excessive pressure on Jasmin's installers. He referred to the delays already and asked for confirmation that there would be delivery of the Australian stock for at least the first batch. Trina US did not reply.

23 Between 9 and 12 September 2012, Jasmin discovered:

(1) the models which included the 245W panels that Trina US had represented would be supplied were not certified for Australia;

(2) there was no stock of Trinimount in Australia at all and it would take 8-10 weeks to order them from China;

(3) there were three types of Trinimount for different types of roofs; Trinimount for tiled roofs was not ready for release and no training for it was available (a significant portion of Australian residential houses have tiled roofs and 54% of Jasmin's 2,167 customers have tiled roofs); and

(4) stocks of non-Trinimount panels could be supplied, but on terms that were not DAP or DDP.

24 Jasmin pleads that the First Trina US Representations and the Second Trina US Representations were misrepresentations which contravened s 18 and s 29(1)(a) of the *Australian Consumer Law.* Jasmin pleads its loss or damage in some detail, including a series of requirements that Trina US or Trina Australia imposed upon Jasmin between mid-September 2012 and March 2013. It is not necessary to set out the litany of matters involving alleged conduct by Trina US and Trina Australia which delayed the supply of panels.

25 The first shipment of 195W panels (which were *not* Trinimount panels) were received by Jasmin at the end of December 2012. Jasmin was only able to obtain suitable mountings to commence installations by mid-January 2013. In contrast, Jasmin says that if Trina US had not contravened the *Australian Consumer Law,* Jasmin would have obtained its supply from ET Solar and commenced installations at a rate of 150 per month from late September 2012.

26 Jasmin lost around 800 of its customers and was unable to install solar panels for 250 of its customers. Jasmin also received supply by Trina Australia of unusable product.

27 Jasmin pleads that its total losses were $33,407,880.

28 Jasmin also says that Trina Australia is liable under the *Australian Consumer Law* for its involvement in the contraventions in Australia by Trina US.

29 Jasmin seeks relief including the following:

(1) damages under s 236 of the *Australian Consumer Law* against Trina US and Trina Australia (as a person "involved in the contraventions");

(2) declarations that Jasmin is entitled to be indemnified against any liability to JRC Services LLC in arbitral proceedings in the United States for non-payment for the supply of solar panels;

(3) an order that the Supply Agreement is *void ab initio*; and

(4) an order pursuant to ss 237 and 243 that Trina Australia repossess the unusable product delivered to Jasmin.

The negotiations and agency agreement between Jasmin and JRC Services LLC

30 In oral submissions, counsel for both parties focused in some detail upon the pre-contractual negotiations which led to the Supply Agreement. Neither party submitted that the pre-contractual negotiations should be disregarded as inadmissible. The key elements of that background from the affidavit evidence, particularly the evidence from Mr Dallapiazza, are as follows.

31 On 1 August 2012, Mr Parkins (for Jasmin) emailed Mr Dallapiazza. Mr Parkins said that he had spoken to "the partners" (Messrs Carson, Starr, and Spielman) and they had agreed various matters in relation to the proposed Supply Agreement. One of those matters was that Jasmin "will use one of our other US companies as the buyer-agent for the PO [purchase order]".

32 After this 1 August 2012 email, there was further correspondence between Mr Parkins and Mr Dallapiazza, including a request by Mr Dallapiazza for the details of the Jasmin US LLC that will be submitting the Purchase Orders. Mr Dallapiazza also requested a completed credit application and a parent guarantee. Mr Parkins responded with an email to Messrs Carson, Starr, and Spielman (from Jasmin) copying Mr Dallapiazza with a draft "parent guarantee" with blanks to be completed. The proposed parent guarantee was as follows:

> **Arrangement of rights and obligations**
>
> Dear Sir or Madam:
>
> We, __, hereby certify that __ act as our agent for dealing with all the business between our company and Trina solar.
>
> We authorize __ as our agent, to purchase solar modules products for our company from Trina solar. __ is the agent of __, all their rights and obligations to sign any agreement with Trina solar is authorized by our company.
>
> We guarantee that __ will effect payment according to agreements; otherwise we will

> take the full responsibility of payment, whether the PO/contract is signed in name of our company or __.
>
> This assignment is valid from __ (Date) to __ (Date), but this term of validity did not affect execution of agreements which signed in this term of validity.
>
> Sincerely,
>
> Signature:
> Date:

33 In early August there was further correspondence between Mr Parkins and Mr Dallapiazza which was copied to, and involved some communication from, Messrs Carson, Starr, and Spielman (from Jasmin). Mr Carson expressed a concern that Jasmin was not "hit with any taxes" as a result of using a US company as the purchasing entity. Mr Parkins explained to Mr Dalapiazza(copying communication to Messrs Carson, Starr, and Spielman) that:

(1) a US LLC subsidiary to Jasmin Australia will be listed on the [Purchase Order] and invoice as the buyer;

(2) Jasmin would issue a "parent guarantee";

(3) actual payment would come from Australia with delivery of product to Australia; and

(4) the US LLC would only be an agent and would not pay any money which would mean that there would be no United States tax.

34 On 8 August 2012, Mr Parkins emailed Mr Dallapiazza as well as Messrs Carson, Starr, and Spielman (from Jasmin) attaching the credit application from Jasmin, two signed Purchase Orders with JRC as Buyer and a parent guarantee. The parent guarantee was signed by Mr Carson and dated 6 August 2012. It was expressed as follows:

> **Arrangement of rights and obligations**
>
> Dear Sir or Madam:
>
> We, Jasmin Solar, hereby certify that *JRC-Services LLC, 2301 Plaza Del Grande, Las Vegas, NV 89102*, will act as our agent for dealing with all the business between our company and Trina solar.
>
> We authorize *JRC-Services LLC* as our agent, to purchase solar modules products for our company from Trina solar. *JRC-Services LLC* is the agent of Jasmin Solar, all their rights and obligations to sign any agreement with Trina solar is authorized by our company.
>
> We guarantee that *JRC-Services LLC* will effect payment according to agreements; otherwise we will take the full responsibility of payment, whether the PO/contract is signed in name of our company or *JRC-Services LLC*.

> The assignment is valid from 30 July 2012 to 30 July 2015, but this term of validity did not affect execution of agreements which signed in this term of validity.
>
> Sincerely
>
> Signature: Richard Carson
> Date: 08/06/2012 [United States dating convention: 6 August 2012]

35 Although there is a dispute about whether Mr Carson had authority to guarantee that JRC would "effect payment according to the agreements", there was no dispute that Jasmin authorised JRC to enter an agreement with Trina US. Mr Carson accepts in his affidavit that "JRC was given an agency to enter into a supply agreement" with Trina US. Of course, as counsel for Jasmin submitted, simply because JRC had authority to enter an agreement with Trina US on behalf of Jasmin does not necessarily mean that any agreement entered by JRC was entered in the *exercise* of that authority.

36 On 21 August 2012, Mr Parkins emailed Mr Dallapiazza as well as Messrs Carson, Starr, and Spielman (from Jasmin). He attached the Supply Agreement with Jasmin's comments. The parties to the proposed contract were JRC as Buyer and Trina US as Seller.

37 On 16 October 2012, a further Supply Agreement was sent from Mr Dallapiazza to Mr Parkins. The buyer was still JRC.

38 On 26 October 2012, an issue arose. This issue was communicated in correspondence between Mr Parkins and Mr Dallapiazza (again communicated to Messrs Carson, Starr, and Spielman). The issue was that the Trina group wanted another credit application, this time from JRC. Mr Parkins vehemently resisted this, describing it as "unnecessary and disruptive". He explained that "the only reason JRC was in the picture at all was because Trina said they needed an American parent company to sell via the US office". A compromise was reached by which the Purchase Orders and Supply Agreement were "modified under the name of Jasmin Solar".

39 On 30 October 2012, a Supply Agreement was sent which contained Jasmin Solar as the Buyer. Mr Carson (previously the contact person when JRC was the buyer) and his United States address for JRC had been replaced by Dr Starr as contact person for Jasmin Solar with Australian details.

40 On 1 November 2012, matters changed again. Dr Starr emailed a number of people including Mr Dallapiazza, Messrs Carson and Spielman. He explained that a GST issue had been brought to his attention. He said that this could seriously impact Jasmin's pricing. He asked Trina US for a 24 hour indulgence before signing the Purchase Order and Supply Agreement.

41 On 2 November 2012, Dr Starr emailed Mr Dallapiazza and others and explained that the GST would be payable in Australia unless "the panels were supplied to us by our sister company, JRC Inc in USA". If the panels were supplied by Trina US to Jasmin then GST would be payable. He explained that this was "why we can't have the Australian entity purchasing anything directly from Trina". He said that if Jasmin were to proceed it had to be under the previous documents where JRC was the purchaser and Jasmin issued the parent guarantee.

42 On 13 November 2012, Mr Dallapiazza agreed. He "changed over the 2 Purchase Orders and Supply Agreement" to JRC as buyer.

The arbitration of the dispute

43 On 13 May 2014, Trina US commenced arbitral proceedings in New York against both JRC and Jasmin. Trina US relied upon an arbitration clause contained in the Supply Agreement.

44 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 named party to the Supply Agreement.

45 After a hearing on 5 June 2015, the arbitrator handed down her preliminary award on this issue. The arbitrator determined that Jasmin was a party to the Supply Agreement and was therefore bound by the arbitration clause. Jasmin did not challenge that preliminary award.

46 The final hearings for the arbitration took place between 27 October and 29 October 2015 in New York City. Jasmin did not file any materials in advance of the hearing, but JRC's pre-hearing memorandum asserted that JRC was entitled to, among other relief, rescission of the Supply Agreement on the basis of alleged fraudulent misrepresentations made by Trina US, which JRC allege caused JRC and Jasmin to pursue the deal, and caused JRC to enter into the Supply Agreement. The arbitrator has requested further submissions before handing down her award, including from JRC identifying what representations it asserts are the basis for its claims of fraudulent misrepresentations.

Preconditions for leave to serve out under *Federal Court Rules 2011*

47 Rule 10.43(2) of the *Federal Court Rules* 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 a convention, the Hague Convention, or the law of the foreign country.

48 Rule 10.43(4) provides for the jurisdictional conditions before leave to serve out can be given (including subject to conditions - see rule 1.33). The party seeking to serve out must satisfy the Court that:

(a) the Court has jurisdiction in the proceeding; and
(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.

49 Each of these conditions is considered below. Condition (a) is considered last because this is closely related to the real issue between the Jasmin and Trina US.

Is there a prima facie case?

50 The test for a *prima facie* case is well established. As McKerracher J explained in *Perdaman Chemicals and Fertilisers Pty Ltd v ICICI Bank Ltd* [2013] FCA 175 [58], it is satisfied if, on the material before the Court, inferences are open which, if translated into findings of fact, would support the relief claimed: see also *Western Australia v Vetter Trittler Pty Ltd (in liq)* (1993) 30 FCR 102, 110 (French J); *Ho v Akai Pty Ltd (in liquidation)* [2006] FCAFC 159; (2006) 24 ACLC 1,526, 1,529 [10] (the Court).

51 It is also well accepted that a consideration of whether there is a prima facie case "should not call for a substantial inquiry": *Ho v Akai Pty Ltd (in liquidation)* [2006] FCAFC 159; (2006) 24 ACLC 1,526, 1,529 [10] (the Court); *WSGAL Pty Ltd v Trade Practices Commission* [1992] FCA 510; (1992) 39 FCR 472, 476 (Beaumont J); *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* [1996] FCA 1224; (1996) 68 FCR 539, 549 (the Court).

52 The necessary inferences which would support the relief claimed will be found to be open more regularly than in circumstances such as a no-case application at the conclusion of proceedings because the applicant will not have had the advantage of discovery and other procedural aids: *Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153; (2003) 130 FCR 317, 340 [97] (Carr J); *Perdaman Chemicals and Fertilisers Pty Ltd v ICICI Bank Ltd* [2013] FCA 175 [59] (McKerracher J).

53 A vast amount of affidavit material was filed by Jasmin to prove that it had a prima facie case. This material included affidavits from:

(1) Mr Fitzpatrick, the solicitor for Jasmin, who filed four affidavits concerning communication between his firm and the solicitors acting for the respondents.

(2) Dr Starr, who filed two affidavits concerning matters including Jasmin's business model as well as Jasmin's business relationship with Trina US and the matters underlying the alleged breaches by Jasmin.

(3) Mr Parkins, who filed an affidavit concerning Jasmin's business model, Jasmin's relationship with Trina US and the matters underlying the alleged breaches by Jasmin.

54 Ultimately, it is unnecessary to descend into any detail about all of this evidence. It was not in dispute that Jasmin's evidence established that its pleaded case was a prima facie case. I am satisfied that this is the case.

Is this proceeding of a kind mentioned in rule 10.42?

55 Jasmin submitted that the proceeding is of a kind that falls within the jurisdictional pigeonhole in rule 10.42, items 1, 4, 5, 12, 13, and 15.

56 Rule 10.42 requires that one of or more of the matters in the table be established. Jasmin says the following items from the table are established:

(1) Item 1 – proceedings based on a cause of action arising in Australia;

(2) Item 4 – proceeding based on a tort committed in Australia;

(3) Item 5 – proceedings based on, or seeking recovery of, damage suffered wholly or partly in Australia caused by a tortious act or omission (wherever occurring);

(4) Item 12 – proceedings based upon contravention of an Act committed in Australia;

(5) Item 13 – proceedings based on contravention of an Act wherever committed, with damage occurring in Australia; and

(6) Item 15 – proceedings seeking any relief or remedy under an Act.

57 It was not in dispute that one or more of these items was satisfied.

58 As to Item 1, Jasmin says that the conduct constituting the cause of action is based on facts in Australia, and that contravention is under Commonwealth legislation (here the *Australian*

Consumer Law). Therefore, Jasmin says, the cause of action "in substance" arose in Australia (*Webster Computer Systems Pty Ltd v Fujitsu Ltd* [2007] FCA 825 [13]).

59 As to Item 4, Jasmin pointed to authority that contravention of s 18 of the *Australian Consumer Law* is considered to be a tort for the purposes of the characterisation exercise: *Commonwealth Bank of Australia v White* [1999] VSA 262; [1999] 2 VR 681, 698-699 [63] (Byrne J).

60 As to Item 5, Jasmin said that the damage has occurred at least partly in Australia, in that the losses pleaded from failures to install solar panels by the 30 June 2013 deadline led to the failure to receive payments including under the Australian feed in tariff.

61 Jasmin also says that the conduct contravening the *Australian Consumer Law* is pleaded in a manner that specifically limits it to conduct in Australia (Item 12), or led to damage in Australia (Item 13), so that these items are also established: *Webster Computer Systems Pty Ltd v Fujitsu Ltd* [2007] FCA 825 [13].

62 Finally, Jasmin says that as relief is sought under the ACL, Item 15 is satisfied.

63 It is unnecessary to descend into the detail of any of these submissions which were not in dispute. I am satisfied that there exists at least one item which is satisfied.

Does this Court have jurisdiction?

64 In written submissions, the objections by Trina US to leave to serve out were sometimes characterised as jurisdictional. But there was no real dispute that the *Australian Consumer Law* could be engaged. Strictly, the question is not therefore one of whether there is jurisdiction in the sense of authority to decide. Instead, the question is whether this court should exercise a discretionary power to refuse leave for the application to be served out of the jurisdiction. This requires consideration of whether, as Trina US claimed, the proceeding would be stayed after service.

Should a residual discretion be exercised to refuse leave to serve out?

65 The question of whether a residual discretion should be exercised to refuse leave to serve out became the only real issue on this application.

66 It was not controversial that there remains a residual discretion to refuse leave to serve out even if the preconditions in rule 10.43(4) are satisfied. This is because rule 10.43(2) speaks of

a party who "*may apply* to the Court for leave to serve an originating application on a person in a foreign country in accordance with a convention, the Hague Convention, or the law of the foreign country". There is authority supporting the existence of this residual discretion: *BEST Australia Ltd v Aquagas Marketing Pty Ltd* [1988] FCA 242; (1988) 83 ALR 217, 222 (Wilcox J); *Cell Tech Communications Pty Ltd v Nokia Mobile Phones (United Kingdom) Ltd* [1995] FCA 1211; (1995) 58 FCR 365, 371 (Lindgren J); *Bray v F Hoffman-La Roche* [2003] FCAFC 153; (2003) 130 FCR 317, 356 [186] (Branson J); *Quinlan v Safe International Forsakrings AB* [2005] FCA 1362 [26]-[27] (Nicholson J); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116; (2006) 154 FCR 425, 433-434 [30]-[31] (Moore J). See also Davies M, AS Bell and Brereton PLG, *Nygh's Conflict of Laws in Australia* (9th ed, LexisNexis Butterworths, 2014) 49.

67 In *Perdaman Chemicals*, [18], McKerracher J said that one of the grounds on which a court may, in the exercise of its discretion, decline to grant leave to serve a proceeding out of the jurisdiction, is where the proceeding is liable to be stayed (see also *Quinlan v Safe International Forsakrings AB* at [26]-[27] (Nicholson J)). The reason why Trina US submitted that the proceeding would be stayed is because Jasmin is a party to the Supply Agreement and has therefore submitted to arbitration.

68 Section 7(1) of the *International Arbitration Act* provides for the circumstances in which s 7 applies. One of those circumstances, in s 7(1)(d), is where "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". Jasmin is domiciled in Australia. Trina US is domiciled in the United States of America. Both countries are "Convention countries under the Act. In addition, and as an aside, s 7(1)(a) would also apply in this case.

69 Section 7(2) of the *International Arbitration Act* provides:

> 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.

70 Section 7(4) provides that for the purposes of subsection (2), a reference to a party includes a reference to a person claiming through or under a party.

71 The *International Arbitration Act* defines an "arbitration agreement" in s 3 as "an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention". That Article defines an arbitration agreement as follows:

> an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

72 It is uncontroversial that cl 11.1 of the Supply Agreement is an **Arbitration Agreement** within this definition.

73 Five issues arose as a result of the oral and written submissions. As I explain later some of these issues were properly abandoned by counsel for Jasmin in the course of his submissions:

(1) What is the proper law to apply to determine whether Jasmin is a party to the Supply Agreement (and therefore the Arbitration Agreement)?

(2) Is Jasmin a party to the Supply Agreement in the application of that proper law?

(3) Do the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration?

(4) Is the power to set aside a contract under the *Australian Consumer Law* a "sovereign act vested explicitly in Australian courts"?

(5) Is it appropriate to decide this issue as part of the residual discretion or should this issue be agitated properly after service of the process in the United States?

ISSUE 1: WHAT IS THE PROPER LAW TO APPLY TO DETERMINE WHETHER JASMIN IS A PARTY TO THE SUPPLY AGREEMENT?

74 The first question is as follows: what is the governing law for the question of whether Jasmin is a party to the Supply Agreement? Professor Briggs has described this question as "[o]ne of

the more notoriously intractable problems of the modern conflict of laws": Briggs A, "The formation of International Contracts" [1990] LMCLQ 192.

75 The editors of *Dicey, Morris and Collins on The Conflict of Laws* (15th ed, Sweet & Maxwell, 2012, vol 2) 1814 [32-066] observe that there are three possible choices (Professor Briggs observes that a fourth might be either of (2) or (3) depending upon characterisation of the circumstances):

(1) the lex fori;

(2) the law which the parties purport to choose (ie the law which would apply if the parties had contracted); or

(3) the law which would be the proper law in the absence of express choice.

76 Dicey, Morris and Collins observe that it appeared to have been accepted in English law, following the decision of Diplock LJ in *Mackender v Feldia AG* [1967] 2 QB 590, that the question of whether there is a consensus ad idem between the parties is governed by English law as the *lex fori*. That case concerned a claim in England to rescind an insurance contract which contained a Belgian jurisdiction clause. The question was whether leave to serve out should be given. Leave to serve out would be given if the contract was valid. Diplock LJ said (at 602) that the alternative claim of the underwriters to avoid the contract for non-disclosure of a material fact,

> does raise the question as to whether there was a contract at all, and thus the question whether there was any agreement that Belgian law should be the proper law of the contract. 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.

77 His Lordship then continued, observing that it "may well" be that the question should be resolved by the *lex fori* (English law):

> This argument [ie putative objective proper law], 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.

78 In oral submissions, senior counsel for Trina US submitted that Lord Diplock (as his Lordship had become) subsequently decided this point in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] 1 AC 50, 60. That case concerned the proper law of a contract of marine insurance. There was no dispute that the contract had been formed so any observations concerning the proper law for the question of contract formation would necessarily have been obiter dicta. In the passage relied upon by senior counsel for Trina US, Lord Diplock said:

> The applicable English conflict rules are those for determining what is the "proper law" of a contract, i.e., the law that governs the interpretation and the validity of the contract and the mode of performance and the consequences of breaches of the contract: *Compagnie Tunisienne de Navigation S.A. v Compagnie d'Armement Maritime S.A.* [1971] AC 572, 603. To identify a particular system of law as being that in accordance with which the parties to it intended a contract to be interpreted, identifies that system of law as the "proper law" of the contract. The reason for this is plain; the purpose of entering into a contract being to create legal rights and obligations between the parties to it, interpretation of the contract involves determining what are the legal rights and obligations to which the words used in it give rise. This is not possible except by reference to the system of law by which the legal consequences that follow from the use of those words is to be ascertained.

79 Senior counsel for Trina US submitted that questions concerning the "validity" of a contract include whether a contract has been formed by consensus ad idem so that Lord Diplock (contrary to his earlier suggestions in *Mackender*) had adopted, obiter dicta, a test that the law of a disputed contract would govern the question of whether the contract had been formed. I do not accept this submission for two reasons.

80 First, I do not accept that questions concerning whether the parties have reached consensus ad idem are the same as questions of validity of a contract. The former concerns whether a contract has been *formed.* The latter concerns whether a contract which has been formed is *valid.* The concept of "validity" is a slippery term but it would include contracts that are unenforceable, voidable and probably also contracts which are void such as for reasons of illegality.

81 Secondly, the authority relied upon by Lord Diplock, *Compagnie Tunisienne de Navigation S.A. v Compagnie d'Armement Maritime S.A.* [1971] AC 572, illustrates that his Lordship was not concerned with questions of contract formation. That case involved a dispute between the parties as to what system of law was the proper law of the contract in an arbitration. At 603, Lord Diplock said (my emphasis added in bold):

> **When parties enter into an agreement** which they intend to give rise to legally

> enforceable rights and liabilities, they must ex necessitate contemplate that there will be some system of law by reference to which their mutual rights and liabilities will be determined, i.e., the substantive or "proper" law of their agreement; and also that the procedure by which dispute about their rights and liabilities will be resolved will also be regulated by some system of law, i.e., the curial law of their agreement.
>
> By "proper law" in this context is meant the system of law which governs the interpretation and the validity of the contract and the mode of performance and the consequences of breaches of the contract.

82 Lord Diplock's remarks were premised upon the assumption that the parties had entered into an agreement.

83 The position in English law, albeit supported by slim authority, therefore appeared to be that the proper law for the question of whether there was consensus ad idem was the law of the forum. But this changed in 1991 in circumstances where the EEC Convention on the Law Applicable to Contractual Obligations (the Rome Convention) applies, and from, 17 December, 2009, in cases involving the Rome I Regulation (which replaced the Rome Convention). The choice made in the Rome Convention and the Rome I Regulation the law which the parties purport to choose in the contract which would bind them if it were valid. In other words, the Regulation applies approach (2) of the three approaches described above at [75]. Of course, that rule only applies to a defendant who falls within the Rome I Regulation.

84 In 1992, the Australian Law Reform Commission, Report No 58, also recommended this solution (again drawing a distinction between questions of contract formation and questions of contract validity) saying (at [8.59]):

> The formation of contract – offer and acceptance, consideration, the reality of consent are as much part of the substance of the law of contract as are questions of material validity and it is illogical to submit them to a different law, especially the law of the forum, merely because they are dealt with before issues of material validity arise.

85 In the article to which I referred above, Professor Briggs, in his typically lucid style, took a contrary view and expressed alarm at the proposed rule shortly before the Rome Convention. He rejected a suggestion that the law governing the question of whether the parties reached contractual agreement is "a matter for the putative proper law". He argued that there is a need for the *lex fori*, rather than a rule that "assumes what it sets out to prove" or "some pretended quasi-proper law" (202). Briggs argued that the *lex fori* must be applied for the question of whether the parties have reached agreement. By definition, the *lex fori* must also identify those factors by which that question is to be answered.

86 There may be understandable pragmatic reasons why a legislature would instead adopt rule (2) and apply the proper law of a contract to determine whether the parties had entered into that contract. But as a matter of principle in a case where there is an allegation that there was no consensus between the putative parties, the conclusion of Professor Briggs is unassailable. Contrary to the view of the Australian Law Reform Commission, the absurdity lies instead in applying the proper law of a disputed contract to determine whether a person is bound by that contract. The basal reason why a person is bound by the proper law contained in a contract is because that person has manifested a consent to be bound. The question of whether a person has manifested consent to be bound cannot be governed by matters contained within the very contract about which the person disputes having manifested agreement. It is arguable, and I put it no higher than that, that there could be different issues involved where the question concerns whether there was consideration for the agreement. It is not necessary to decide that point in this case.

87 Consider the application of a putative proper law to an Australian who claimed not to be a party to, and never to have seen, a contract with another Australian containing a Ruritanian proper law clause. Assuming that the choice of Ruritanian law is accepted as the proper law of the contract, if the law of the asserted contract were applied then this would mean that the Ruritanian laws of contract formation would determine whether he was bound. Senior counsel for Trina US submitted that this was the correct result because it would mean that Ruritanian law would apply consistently wherever a defendant was sued. Absent a legislative solution, for pragmatic reasons, I do not accept that the common law could reach this result as a matter of principle.

88 Trina US submitted that a distinction should be drawn between (i) a circumstance where there *is* a contract in existence and the only question is the persons who are parties to the contract, and (ii) a circumstance where there is no contract in existence but the question is whether the parties formed a consensus ad idem. No such distinction exists. If a person disputes whether he or she is a party to a contract in existence with someone else then that person is disputing that he or she has reached consensus ad idem with the other contracting party or parties. There is no difference in principle between asking whether person X has manifested consent to agree with Y (ie displayed a consensus ad idem with Y) or asking whether person X has manifested consent to agree with Y and Z (who had previous agreed). The question in both cases is whether there is a consensus ad idem with the party sought to be bound, ie X.

89 The Australian authority on the point is limited. The issue was considered by Brennan J, Gaudron J, and Deane J in the majority in *Oceanic Sun Line Special Shipping Company Inc v Fay* [1988] HCA 32; (1988) 165 CLR 197. In that case, a passenger on a cruise of the Greek islands was injured on the cruise. The passenger sued in New South Wales. The Greek cruise company pointed to an exclusive jurisdiction clause for the courts of Greece which was printed on the passenger's ticket when he boarded the vessel. The passenger argued that the contract had been concluded earlier in New South Wales when he paid the fare and was handed an "exchange order" to be exchanged for a ticket upon boarding. The Greek cruise company relied upon the exclusive jurisdiction clause only as one factor when seeking a stay on the basis of *forum non conveniens.*

90 The whole of the court held, applying New South Wales law as the law of the forum, that the contract had been concluded in New South Wales (see Wilson and Toohey JJ at 206-207; Brennan J at 226-228; Deane J at 255-256; Gaudron J at 261). Hence, in considering the application for a stay all of the court disregarded the terms on the Greek ticket given to the passenger.

91 Two members of the court, Brennan and Gaudron JJ, also considered, obiter dicta, the law which would apply to the question of whether the parties had formed a contract at all.

92 At 225, Brennan J said:

> 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: cf *Mackender v Feldia AG* [1967] 2 QB 590, per Diplock L.J. at pp 602-603. 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 DF Libling "Formation of International Contracts" (1979) 42 Modern Law Review 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.

93 Similarly, Gaudron J relied upon the decision of Lord Diplock in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572, 603 and 605, and said (at 260-261) 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. 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 AG* [1967] 2 QB 590, at p 603; Cheshire and North, Private International Law, 11th ed. (1987), p 477.

94 A different view was expressed by Deane J, although his Honour did not need to engage in any analysis of the position because he considered that the applicable law was the law of New South Wales. At 255, his Honour said that the 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".

95 The *lex fori* approach of Brennan J and Gaudron J was followed by Rein J in *Venter v Ilona MY Ltd* [2012] NSWSC 1029 [25]-[26] on the question of whether terms had been incorporated into a contract. It was also followed by Davies J in *Hargood v OHTL Public Company Ltd* [2015] NSWSC 446 [23] in relation to where the contract was made and the terms contained in the contract.

96 Trina US relied upon a number of authorities which were said to reject the application of the law of the forum as the proper law.

97 The first of those is the decision of Langley J in *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121; [2004] 1 Lloyd's Rep 603.

98 The decision in *Peterson Farms* was concerned with whether an arbitral tribunal had made findings without jurisdiction. Peterson Farms, an Arkansas company, had entered an agreement with C&M, an Indian company, for the sale of poultry to other C&M entities. The poultry was infected with avian flu. The sale agreement contained an ICC, United Kingdom, jurisdiction clause and an Arkansas choice of law clause. The arbitral tribunal held that it had jurisdiction to consider claims by other C&M entities. This was based upon application of an autonomous "group of companies" doctrine and agency reasoning. The jurisdiction in relation to the other C&M entities was set aside. The group of companies doctrine was not part of

English or Arkansas law. And there was no basis for a finding of agency in English or Arkansas law. However, Langley J said, at 610 [43], that the "identification of the parties to an agreement is a question of substantive not procedural law".

99 In the context of the point in issue in *Peterson Farms*, the comments by Langley J that the identification of the parties to an agreement is a question of substantive not procedural law did not involve an assertion that Arkansas law as the proper law of the contract, rather than English law, must govern the question of the persons who are parties to that contract. That point was not argued. No authority was cited. None, such as *Mackender,* was discussed. No issue of principle, such as the matters discussed in this section of my reasons, was mentioned.

100 Senior counsel for Trina US also relied upon remarks made by Warren CJ in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 38 VR 303, 315 [41]. In that paragraph the Chief Justice said:

> since an award is only binding on the parties to the arbitration agreement pursuant to which it was made, it must be possible for the award debtor to resist enforcement on the ground that it is not a party to that agreement. Sections 8(5) and 8(7) make no express provision for raising such a defence. Section 8(5)(b) allows an award debtor to resist enforcement on the grounds that the arbitration agreement is "not valid" under the relevant law. Yet an arbitration agreement pursuant to which the award was made may be perfectly valid without the award debtor being a party to it. The question of whether a contract is valid and the question of whether a person is a party to that contract are treated as distinct issues by the common law. It is artificial to frame an argument that a person is not a party to an agreement as an argument that the agreement is not valid vis-à-vis that person. In my opinion, Altain's construction of s 8(5)(b) does violence to the words of s 8(5)(b).

101 Senior counsel for Trina US emphasised the words by her Honour that "[i]t is artificial to frame an argument that a person is not a party to an agreement as an argument that the agreement is not valid vis-à-vis that person". But this comment does not support the submission by Trina US. It detracts from it. The point being made by Warren CJ is that there is a basic difference between issues of *validity* of an existing contract and issues concerning whether a contract has been *formed* (ie whether a person is a party to the contract).

102 In any event, her Honour's remarks were concerned with s 8(5)(b) of the *International Arbitration Act.* That subsection is concerned with a circumstance in which a court may refuse to enforce a foreign arbitral award because "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".

Section 8(5)(b) is a legislative imposition of a contractual choice of law clause as the proper law for determining questions of validity of the contract in the context of enforcement of an award. This is the same rule as that which Lord Diplock contemplated in *Amin Rasheed Shipping Corporation.* It is not a rule for contract *formation*, as Warren CJ observed.

103 Senior counsel for Trina US also relied upon the decision of Foster J in *Norden A/S v Beach Building and Civil Group Pty Ltd* [2012] FCA 696; (2012) 292 ALR 161, 182 [99]. That decision was overturned by the Full Court, although no submission was made concerning the effect of the Full Court decision on the passage relied upon by Trina US: see *Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd* [2013] FCAFC 107; (2013) 216 FCR 469.

104 In the paragraph relied upon by Trina US, Foster J said:

> The law expressed in the arbitration agreement as applicable to it was English law. But, in my view, English law should not be held to be the law under which the question of the validity of the arbitration agreement is to be determined for that reason, given that Beach Civil argues that it is not a party to and therefore not bound by the charterparty. However, English law is the law of the country where both awards were made. England is the seat of the arbitration. It is for these latter reasons that I think that the question of whether Beach Civil was a party to the charterparty should be decided according to English law.

105 As senior counsel acknowledged, these remarks were made in the context of s 8(5)(b) of the *International Arbitration Act.* They concern questions of validity of a contract, not questions of contract formation. And they concern a proper law imposed by legislation, not one which is to be determined by application of the common law.

106 For these reasons, the proper law to apply to the question of whether Jasmin is a party to the Arbitration Agreement is the law of the forum.

ISSUE 2: IS JASMIN A PARTY TO THE SUPPLY AGREEMENT OR A PERSON CLAIMING "THROUGH OR UNDER A PARTY"?

107 The approach taken to this issue by both parties was considerably abbreviated. Some extremely difficult issues were considered only briefly, and some were not considered at all. This is not said as criticism of any counsel. To the contrary, the submissions of counsel for the parties were exemplary and, if anything, erred on the side of providing more detail than an application of this nature would usually require. Questions such as those concerning leave to serve process out of the jurisdiction were described by Lord Templeman in *Spiliada Maritime Corp Ltd v Cansulex Ltd* [1987] AC 460, 465 as matters that should be dealt with in

submissions "measured in hours and not days". In *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55; (1990) 171 CLR 538, 565 Mason CJ, Deane, Dawson and Gaudron JJ reduced this to "minutes rather than hours".

108 It suffices in this section of my reasons to explain why although the issue has not been thoroughly explored, and hence although my opinion is only preliminary, I do not presently accept that Australian law would treat Jasmin as a party to the Arbitration Agreement within the meaning of s 7(2) of the *International Arbitration Act.* My present view, albeit only very tentatively, includes the extension of s 7(2) to "a person claiming through or under a party" although the operation of this extension was not the subject of any submissions.

109 There are three reasons why I do not presently consider that Jasmin is a party to the Arbitration Agreement.

110 **First**, Jasmin is not named as a party to the Supply Agreement. The concluding page contains signatures for "Seller: Trina Solar (US) Inc" and "Buyer: JRC-Services LLC". There are signatures from the Finance Director and President of Trina US as seller and the CEO of JRC-Services LLC as buyer.

111 The argument by Trina US is that Jasmin became a party to the Supply Agreement (and therefore the Arbitration Agreement) because JRC acted as its agent when entering the agreement.

112 The parties made few submissions about the manner in which this agency operated in the circumstances of a written agreement which did not mention any principal and did not acknowledge that it had been entered pursuant to an agency. It was not suggested that the Supply Agreement was partly written and partly oral. Nor was it suggested that the Supply Agreement was contained in documents other than the single written Supply Agreement.

113 One concern which I raised during the hearing was that the effect of the parol evidence rule is that no extrinsic evidence is admissible to add to or to contradict the Supply Agreement. An exception to the parol evidence rule is the doctrine of agency. As to agency, a principal may be a disclosed principal or an undisclosed principal. The distinction between the two concepts is not always clear, particularly because there is a distinction between disclosure that an agent is *authorised* to act and disclosure that the agent *has acted* in accordance with that authorisation. It is the latter that is required for the purpose of a disclosed agency. In this

case, there are two possibilities which might be asserted by Trina US. One possibility is that JRC entered the Supply Agreement as a disclosed agent for Jasmin although that disclosure was not contained within the Supply Agreement. An alternative possibility is that JRC entered the Supply Agreement as an undisclosed agent for Jasmin.

114 In relation to the former possibility (ie that JRC entered the Supply Agreement as a disclosed agent for Jasmin) the question is one of fact. It is the subject of my consideration in the third point below. The central difficulty for Trina US is that there is no express statement, and certainly no contemporaneous statement, by JRC that it was entering the Supply Agreement as an agent for Jasmin in the sense that it would assume all of the obligations of the Supply Agreement. Another difficulty is that the case put by Trina US seemed to assume that JRC was a *principal* and was liable on the Supply Agreement as principal. Indeed, Trina US brought the arbitration proceedings against JRC on that very basis. It seems that Trina US's case, if based on disclosed agency, must be that JRC was acting as *both* principal and agent in relation to the very same obligations.

115 The alternative, the doctrine of undisclosed principal, raises other difficult conceptual problems. That doctrine is a well-accepted doctrine but its basis in principle is very difficult to understand. Justice Blackburn once doubted whether the doctrine was correct but said that "doubts of this kind come now too late": *Armstrong v Stokes* (1872) LR 7 QB 598, 604.

116 In *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 502-3, Diplock LJ described the doctrine of agency for an undisclosed principal as follows:

> An "actual" authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the "actual" authority, it does create contractual rights and liabilities between the principal and the contractor. It may be that this rule relating to "undisclosed principals," which is peculiar to English law, can be rationalised as avoiding circuity of action, for the principal could in equity compel the agent to lend his name in an action to enforce the contract against the contractor, and would at common law be liable to indemnify the agent in respect of the performance of the obligations assumed by the agent under the contract.

117 This passage was cited with approval in *Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Limited (In Liq)* [2013] FCAFC 5; (2013) 209 FCR 368, 383-384 [70] (Foster, Barker and Griffiths JJ).

118 Assuming that JRC acted as an agent in entering the Supply Agreement for a principal (Jasmin) who was undisclosed, the question that would arise is whether it has the effect that Jasmin is a "party" to the Supply Agreement within the meaning of s 7(2) of the *International Arbitration Act.*

119 In *Keighley, Maxsted & Co v Durant* [1901] AC 240, 261, Lord Lindley said:

> The explanation of the doctrine that an undisclosed principal can sue and be sued on a contract made in the name of another person with his authority is, that the contract is in truth, although not in form, that of the undisclosed principal himself.

120 Again, in *Gardiner v Heading* [1928] 2 KB 284, 290, Scrutton LJ said:

> If a party makes a contract in his own name and the other party, the promise, finds that the promisor has an undisclosed principal, although he never knew of him and therefore could never have given credit to him, yet he may sue him, because he has in fact made a contract with him.

121 These comments are, however, controversial. If the principal is truly the person who has concluded the contract then why is the agent entitled to sue, and liable to be sued personally, on the contract? The exception to privity has alternatively been described as a matter arising "in the interests of commercial convenience": *Siu Yin Kwan v Eastern Ins Co Ltd* [1994] 2 AC 199, 207 (Lord Lloyd). But those interests of commercial convenience may not necessarily extend to treating the principal as a "party" for the purposes of s 7(2) of the *International Arbitration Act.*

122 **Secondly**, and related to the first point, there is the question whether evidence of agency is admissible to contradict express terms in the Supply Agreement. Clause 14.4 of the Supply Agreement provides that:

> 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.

123 As I have mentioned, JRC signed the Supply Agreement as Buyer. There was no mention of Jasmin as a party and no mention of any agency. Rather, cl 3.1 described the Supply Agreement as "the exclusive agreement between the Parties with respect to the Goods". Further, cl 5.5.1 describes Jasmin as a guarantor, not a party. There is, at least, serious tension

between Jasmin's role as a guarantor of the payment obligation of JRC (and Jasmin's description as such) and the submission that Jasmin contracted as principal.

124 No submissions were made by counsel for either party on the authorities concerning this issue. The discussion below illustrates the difficulty of the issue involved and the undesirability that this issue be resolved in the absence of submissions.

125 In *Humble v Hunter* (1842) 12 QB 310; 116 ER 887, a person signed a charterparty as "owner". The plaintiff claimed that the owner was acting as his agent. The court held that the terms of the contract were conclusive. At 316 (ER 887) Lord Denman CJ refused to apply the doctrine that "a principal may come in and take the benefit of a contract made by his agent". The doctrine did not apply because the agent had contracted as principal by describing himself as "owner".

126 That decision contrasts with *F Drughorn Ltd v Rederiaktiebolaget Transatlantic* [1919] AC 203. In that case, an agent signed a charterparty as "charterer" but this did not exclude the right of an undisclosed principal to enforce the contract. Viscount Haldane said at 206:

> by the law of England if B contracts with C prima facie that is a contract between these two only, but if at the time B entered into the contact he was really acting as agent for A, then evidence is generally admissible to show that A was the principal, and A can take advantage of the contract as if it had been actually made between himself and C.

127 Viscount Haldane described the principle from *Humble* as being that "evidence of authority of an outside principal is not admissible, if to give such evidence would be to contradict the term in the contract itself". However, he concluded that the circumstances of *F Drughorn Ltd* were different because they did not involve a contradiction such as asserting that a different person is the "owner" from the person described in the contract.

128 Although the inadmissibility principle in *Humble* has been doubted (see *Epps v Rothnie* [1945] KB 562, 565 (Scott LJ)) it has been applied on many occasions. It is also consistent with the objective theory of contract which the parol evidence rule supports.

129 More recently, in *Siu Yin Kwan v Eastern Ins Co Ltd* [1994] 2 AC 199 the plaintiffs were successful in a claim against Axelson Co Ltd, the owner of a vessel which capsized and caused injury and death. Axelson was wound up and the judgments in favour of the plaintiffs were never satisfied. So the plaintiffs then brought a claim against the insurer of Axelson. The insurer relied on the named party to the insurance contract being Richstone. Axelson had

appointed Richstone to act as their general agents worldwide. The insurer knew that Richstone were agents not owners, and that Richstone had acted as agents for Axelson in relation to a hull policy. But the insurance contract was signed by Richstone, without any suggestion that they were acting as agent for Axelson and the insurers did not know whether Richstone were the employers of the crew. One of the issues in the case was whether Richstone had entered the contract as agent for Axelson as an undisclosed principal. Lord Lloyd held that the doctrine applied. The key point was that the actual identity of the employer was a matter of indifference to the other contracting party. After adopting the approach in *F Drughorn*, said that "[i]f courts are too ready to construe written contracts as contradicting the rights of an undisclosed principal to intervene, it would go far to destroy the beneficial assumption in commercial cases" (208-209).

130 In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 864, Lord Parmoor tried to reconcile the authorities in this way:

> parol evidence is admissible to prove that the plaintiff in an action is the real principal to a contract; but it is also well established that a person cannot claim to be a principal to a contract, if this would be inconsistent with the terms of the contract itself.

131 In *White v Baycorp Advantage Business Information Services Ltd* [2006] NSWSC 441; (2006) 200 FLR 125, 146 [80], Campbell J distinguished *Humble v Hunter* but endorsed the principle which he described as accurately stated by Jordan CJ in *Perpetual Trustee Co Ltd v Bligh* (1940) 41 SR (NSW) 33. In that case Jordan CJ said at 40:

> if the written terms are such as to hold out the actual parties as the real and only principals, evidence is not admissible to show that there are other persons who are also liable as principals: *Humble v Hunter*; *Formby Bros v Formby*; *Fred Drughorn v Rederiaktiebolaget Transatlantic* [1919] AC 203.

132 The same point was made by Jordan CJ in *Carberry v Gardiner* (1936) 36 SR (NSW) 559, 574. The same reasoning in *White* was followed in *Integrated Asset Management Pty Ltd v Trans Communications Pty Ltd* [2015] NSWSC 984 [132] (Schmidt J).

133 This brief survey indicates that the question of whether a written agreement contradicts the alleged terms of an agency is one which often requires a very close examination of the written terms of the contract as well as the terms of the agency. Different cases have reached different results on similar facts. Context is very important. It is far from clear in this case that the terms of the Supply Agreement are consistent with an agency agreement.

134 **Thirdly**, even if evidence were admissible which could contradict the terms of the Supply Agreement so as to make Jasmin a party to the Supply Agreement, there remains the question whether the evidence does have that effect.

135 The evidence was, quite properly, not the subject of any cross-examination. Unless it can clearly establish the proposition that Jasmin was intended to be a principal, and a party to the Supply Agreement, then leave to serve out should be granted. At its highest, I am not satisfied that on the state of the evidence before me the result is clear. My present view is that JRC was not acting as an agent for Jasmin when it entered the Supply Agreement, although JRC was authorised to act as agent.

136 One reason why the evidence does not clearly establish a relationship of agency is because there are internal tensions within the key document upon which Trina US relies for its central submission concerning agency. In that document (described as a "parent guarantee" and set out above at [34]) Jasmin authorised JRC to "act as our agent for dealing with all the business between our company and Trina", "to purchase solar modules products for our company from Trina", and said that "all their rights and obligations to sign any agreement with Trina solar is authorized by our company". Each of these representations of "agency" are, however, in some tension with the guarantee, in the same document (and which appears to have been the central purpose of the document for the parties) that Jasmin guarantees that:

> [JRC] will effect payment according to agreements; otherwise we will take the full responsibility of payment, whether the PO/contract is signed in name of our company or JRC-Services LLC.

137 The guarantee is expressed as a contingent liability. In other words, read literally, it suggests that Jasmin's obligation to pay arises ("otherwise") if JRC does not pay. This directly contradicts the notion of JRC contracting as agent for Jasmin so that Jasmin assumed the obligations under the contract.

138 To avoid this tension, senior counsel for Trina US submitted that Jasmin was the principal under the Supply Agreement for the purposes of all the obligations *except* the central obligation to pay the purchase price (ts 56). I know of no authority for the proposition that a relationship of agency can arise such that a principal becomes a party only to some parts of a contract but not to others and the agent becomes a party to those others. At the very least, such a construction is an unlikely construction of the intention of the parties.

139 It is also important to emphasise, as senior counsel for Trina US properly conceded, that the use of the word "agent", particularly by laypersons, does not necessarily connote that the legal consequences of genuine agency were intended. Indeed, even when the term "agency" is used by judges it is sometimes used in a sense other than to describe one party acting to bind another to contractual obligations: *Scott v Davis* [2000] HCA 52; (2000) 204 CLR 333, 339 [4] (Gleeson CJ).

140 Another reason why the factual circumstances do not clearly establish that JRC entered the Supply Agreement as agent for Jasmin are the circumstances immediately prior to the entry into the Supply Agreement. As the parties knew, the reason why JRC was substituted as the buyer in place of Jasmin on 2 November 2012 was that GST would be payable if the supply were made directly to Jasmin. Mr Parkins had explained that Jasmin could not "purchase anything directly from Trina". In other words, Jasmin could not be a party to the contract. Mr Parkins had explained that if Jasmin were to proceed then JRC had to be the purchaser and Jasmin had to be the guarantor. This was the circumstance immediately before entry into the Supply Agreement.

141 For these reasons, I am not presently satisfied that JRC entered the Supply Agreement as agent for Jasmin.

ISSUE 3: DO THE PROCEEDINGS INVOLVE THE DETERMINATION OF A MATTER THAT, IN PURSUANCE OF THE AGREEMENT, IS CAPABLE OF SETTLEMENT BY ARBITRATION?

142 In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 [234]-[245], the Full Court considered the meaning of the phrase in s 7(2)(b) of the *International Arbitration Act* that "the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration". As the Court observed, s 7(1)(b) is a reduction into domestic law of aspects of Article II of the New York Convention. It involves the "notion of the matter being capable of settlement by arbitration in conformity with the presence of that requirement in Article II sub-article 1".

143 Clause 11.1 of the Supply Agreement provides as follows:

> **Dispute Resolution: Arbitration**
> 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. The Parties shall arrange for the arbitration to commence no later than ninety (90) days after the date of the demand for arbitration.

144 In *Allergan Pharmaceuticals Inc & Anor v Bausch & Lomb Inc & Anor* (1985) ATPR 40-636, Bausch & Lomb sought orders, staying the proceedings under s 7 of the *Arbitration (Foreign Awards and Agreements) Act* 1974 (Cth). The parties had entered into an agreement for the sale or resale of an enzyme contact lens cleaner outside of the United States of America. The arbitration agreement between the parties provided that:

> Any controversy or claims arising out of or relating to this Agreement shall be settled by arbitration in the City of New York, State of New York, in accordance with the Rules of the American Arbitration Association, and the judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

145 The agreement was expressly governed by the law of New York. Allergan brought claims under the *Trade Practices Act* against Bausch & Lomb. In that case, Beaumont J allowed a stay only in relation to the claims that involved relief for breach of contract. His Honour refused to stay the proceedings in relation to the causes of action relating to the *Trade Practices Act*. His Honour held that "the statutory causes of action … sued upon exist independently of contract. They are consumer protection provisions which in no way depend upon any private agreement for their source" (47,173-174).

146 In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45, 92-93 [185]-[186], Allsop J (as his Honour then was), emphasised that the decision in *Allegan* did not mean that a *Trade Practices Act* claim can never be characterised as one "arising out of a contract".

147 The decision in *Allergan* involved a close examination of the particular circumstanes of that case. However, since the decision there has been a stronger emphasis on the principle that arbitration agreements should be construed with a broad, liberal, and flexible approach: *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66; (2013) 298 ALR 666, 684 [56] (Martin CJ); *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45, 87 [164] (Allsop J with whom Finn and Finkelstein JJ agreed); *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 [41] (Allsop J).

148 Applying this approach, in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1, 20, Emmett J concluded that an arbitration agreement that extends to "any matter or thing of whatsoever nature arising *in connection* with the relevant agreement" would, as a matter of construction, be "wide enough to include a claim alleging contravention of Pt V of the *Trade Practices Act* inducing the contract in question".

149 In light of my conclusion concerning the first and second issues, it is not necessary to descend in this case to a close examination of the particular facts in order to determine whether or not they have sufficient connection with the Supply Agreement. My initial impression is that this hurdle would have been comfortably overcome by application of a broad and flexible approach. In any event, in oral submissions, counsel for Jasmin ultimately conceded this issue, which he described as the *Allergan* point (ts 36).

ISSUE 4: IS THE POWER TO SET ASIDE A CONTRACT UNDER THE *AUSTRALIAN CONSUMER LAW* A "SOVEREIGN ACT VESTED EXPLICITLY IN AUSTRALIAN COURTS"?

150 In written submissions, Jasmin made a further submission. The submission was confused and does not easily bear paraphrase:

> … the statutory power to set aside a contract pursuant to the ACL constitutes a sovereign act vested explicitly in Australian Courts (Division 8 of Part XI of the *Competition and Consumer Act 2010* (Cth)), the exercise of which need not be subject to any common law principle that the arbitration clause survives the termination. This gives rise to the fact that relief seeking to set aside the Supply Agreement (by potentially a non-party to it) is not capable of being arbitrated. That is because the power of the arbitrator is logically undercut, by the exercise of the power (see *IBM Australia v National Distribution Services Ltd* (1991) 22 NSWLR 466, 485B-D, 487E). Moreover, an inability to raise these ACL arguments would allow Trina US to outflank the ACL (and Parliament's intention) by the use of arbitration.

151 It is very difficult to understand this submission. If Jasmin is not a party to the Supply Agreement then it is not bound by it and s 7 of the *International Arbitration Act* is not engaged. If Jasmin *is* a party to the Supply Agreement, then even if the arbitrator has no power to set aside the contract, this would not preclude this court from staying the remainder of the proceedings (ie "so much of the proceedings as involves the determination of that matter") and therefore only permitting service out of an application seeking to set aside the Supply Agreement: see also *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894; (2008) 219 FLR 461, 465 [18] (Barrett J).

152 More fundamentally, it is not clear why Jasmin says that a statutory power to set aside a contract is a "sovereign act" which is not capable of being arbitrated. It may be that Jasmin's

reference to *IBM Australia v National Distribution Services Ltd* (1991) 22 NSWLR 466 was intended to support an argument that the arbitrator would not have power to order that the Supply Agreement is void because that would mean that the arbitration clause is void which would then deprive the arbitrator of authority to decide the matter.

153 In *IBM Australia,* at 485, Clarke JA said:

> the effect of a declaration that a contract, which contains an arbitration clause, is void ab initio is that there never was a contractually valid submission to arbitration: see *Heyman v Darwins, Ltd* [1942] AC 356 at 367, 383 and 395 and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 364. The received doctrine is that for this reason an arbitrator has no jurisdiction to determine whether or not a contract containing the arbitration clause under which he was appointed was, or should be declared to have been, void ab initio. If, the argument proceeds, that is the well-recognised law then an intention to grant to an arbitrator power to exercise extensive powers, including the power to declare the contract void ab initio, should not be attributed to the parties.
> I am prepared to accept that, properly construed, the clause did not empower an arbitrator to make a declaration that the contract was void ab initio. But acceptance of that proposition does not lead to the conclusion that the arbitrator was not empowered to determine claims based on s 52 of the Act.

154 Similarly, at 487, Handley JA agreed that:

> an arbitrator, whose jurisdiction arises under a submission which is a term of a contract, cannot exercise a power to void that contract ab initio. Such an award would destroy his jurisdiction or authority to make any award at all.

155 Both of these statements were obiter dicta. The only issue was whether the arbitrator had jurisdiction. The primary judge held that the arbitrator did have jurisdiction and an appeal was dismissed.

156 In *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2007] 4 All ER 951, 959 [17], Lord Hoffmann described a reason why a conclusion that a contract is void does not mean that the arbitration clause within it is void. This reason has been described as the principle of "separability":

> The principle of separability enacted in s 7 [of the *Arbitration Act 1996* (UK)] means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement in invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and tone of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration

> agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.

157 Australian courts, following this principle of separability, have not followed the comments of Clarke JA or Handley JA in *IBM Australia*: see Delaney J and Lewis K "The Presumptive Approach to the Construction of Arbitration Agreements and the Principle of Separability – English Law Post *Fiona Trust* and Australian Law Contrasted" (2008) 31(1) UNSW Law Journal 341.

158 The stream of authority against the obiter dicta in *IBM Australia* began with decisions of this court in *QH Tours v Ship Design & Management (Aust) Pty Ltd* (1991) 105 ALR 371, 384 (Foster J) and *Morton v Baker* [1993] FCA 111 [5] (Einfeld J).

159 The decision in *IBM* was subsequently not followed by the New South Wales Court of Appeal in *Ferris v Plaister* (1994) 34 NSWLR 474. In that decision, Kirby P referred to authority to the contrary in the Federal Court, as well as contrary authority in the United States, England, Bermuda, Germany, and Sweden. He described reasons of policy, practicality, principle, and analogy for why an arbitrator can decide that a contract is void ab initio without depriving himself or herself of jurisdiction. The same conclusion was reached by the other justices. In particular, Clarke JA explained that in *IBM Australia* his obiter dicta view had not been the subject of argument to the contrary, and had been assumed to be correct by himself and Handley JA on the basis of English authority that "has been abandoned in England and elsewhere" (500).

160 The obiter dicta in *IBM Australia* was again not followed in *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102, where Allsop J described the "tide of persuasive judicial opinion" as running to the contrary ([89]). Again, in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2009) 157 FCR 45, 105 [229], Allsop J referred to the rejection of the obiter dicta in *IBM* by the New South Wales Court of Appeal in *Ferris* and said that *Ferris* should be followed not merely because it is not plainly wrong, but because it is correct.

161 To the extent that Jasmin's argument raised public policy matters which are somehow separate from the *IBM Australia* decision, those arguments bear close resemblance to those

which were rejected by Jagot J in *Casaceli v Natuzzi SpA* [2012] FCA 691; (2012) 292 ALR 143, 159 [50]:

> The applicants' fifth proposition is that by reason of the nature of the claims I should be satisfied that the matter is not capable of settlement by arbitration. The applicants cited *Comandate Marine Corp* at [200]. I do not consider that passage supports the applicants' contentions. Nor do I consider the other cases cited by the applicants as supporting their position that the type of claims they have in fact made (that is, as against Natuzzi SpA, for damages for breach of trade practices legislation) are other than capable of settlement by arbitration. It seems to me that the applicants sought to surround their claims with an aura of important public policy issues when, in substance, the dispute is a commercial cause between two companies involved in the international furniture trade by which one company seeks damages from another. The idea that a dispute of this character is only capable of resolution by an exercise of judicial power is far-fetched. Although the source of the claims is Australian legislation which serves important public policy objectives it is difficult to accept that the matter in this case is not precisely the type of matter where effect should be given to the intention of the parties to submit disputes between them arising out of contract regulating their overall commercial dealings, the Dealership Agreement, to arbitration. It is well settled that such claims are capable of settlement by arbitration.

162 In oral submissions, when these points were ventilated, counsel for Jasmin properly abandoned this submission (ts 9).

ISSUE 5: IS IT APPROPRIATE TO DECIDE THIS ISSUE AS PART OF THE RESIDUAL DISCRETION OR SHOULD THIS ISSUE BE AGITATED AFTER SERVICE OF THE PROCESS IN THE UNITED STATES?

163 For the reasons I have indicated, if it were necessary to decide whether Trina US was entitled to a stay of the proceedings then I would refuse that stay. However, it is unnecessary to reach a final conclusion on that point and inappropriate to do so in the absence of full submissions on many of the matters I have indicated. It suffices to say that I do not consider that it is sufficiently clear that the proceeding would be stayed for me to exercise a residual discretion to refuse leave. If these matters are to be argued fully, it is appropriate that any such arguments take place in an application for a stay, with appropriate evidence, after the service of process.

164 This cautious approach is consistent with the abbreviated manner in which courts have suggested that applications for leave to serve out should be heard (see above at [107]). The same applies, with greater strength, to the question of exercise of a residual discretion to refuse leave to serve process out of the jurisdiction on the basis that a stay might be ordered.

Conclusion

165 Jasmin should be granted leave to serve its application and statement of claim on Trina US. This is not a final determination of any issue concerning whether Trina US is entitled to a stay of the proceedings. It is a determination only that I do not consider it appropriate to exercise a residual discretion to refuse leave. Nevertheless, for the reasons I have indicated, there are serious obstacles to any application for a stay which is based upon s 7(2) of the *International Arbitration Act.*

166 Although these reasons do not purport to determine finally any issue concerning a stay of proceedings based on s 7(2) of the *International Arbitration Act*, I am conscious that the serious legal obstacles to such a stay which I have described might be said to derive from the application of the law of the forum in order to determine whether a person is a party to a contract containing a submission to arbitration. A final conclusion that Jasmin is not a party to the Supply Agreement, based on the law of the forum, leads to the possible conclusion (which has not occurred in this case) that the same issues could potentially be litigated in an arbitration in New York as well as in the Federal Court of Australia. It might be expected to be only in extremely rare circumstances that the laws of different countries would reach different conclusions on the very basic question of whether a person has become a party to an agreement. And if such different conclusions exist then it is hard to see why a person who says that they are not a party to a contract should have applied the different law of a foreign jurisdiction to which the person says he or she never consented.

167 In this case such a conclusion may depend upon the tribunal and the court reaching different conclusions concerning whether (i) a person has agreed to become a party to a written contract which does not name that person as a party, (ii) where the person is described, in that written agreement, and elsewhere, as a guarantor of the party to the written contract, and (iii) where that person was removed as a party from the contract specifically for tax reasons that would arise if that person were a party. If this is a correct characterisation of the facts then it might be thought surprising that courts or tribunals in any jurisdiction would differ in the conclusion reached by application of the law of the forum.

168 No issue of costs was ventilated by the parties. In the circumstances described in paragraph [165] above, the proper course would be to reserve costs.

169 The parties should confer on the appropriate terms of orders for the manner of service and should jointly contact my associate by 4 pm tomorrow with those proposed orders and an agreed date for further directions in the week beginning 11 January 2016.

I certify that the preceding one hundred and sixty nine (169) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Edelman.

Associate:

Dated: 17 December 2015