FEDERAL COURT OF AUSTRALIA

Degroma Trading Inc v Viva Energy Australia Pty Ltd [2019] FCA 649

File number:	VID 1588 of 2018
Judge:	**O'CALLAGHAN J**
Date of judgment:	13 May 2019
Catchwords:	**ARBITRATION** – application for stay of proceeding pending in court under s 7 of the *International Arbitration Act 1974* (Cth) – principle of separability – whether an arbitration agreement came into existence – whether a requisite separate attack on the arbitration agreement present – where arbitration agreement alleged to be contained in an exchange of correspondence about the terms of a bill of lading – whether court or arbitrator should decide whether arbitration agreement came into existence – application for stay granted
Legislation:	*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) *International Arbitration Act 1974* (Cth) s 7
Cases cited:	*Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 *Fiona Trust & Holding Corporation v Privalow* [2008] 1 Lloyd's Rep 254 *Hancock Prospecting Pty Ltd v Reinhart* (2017) 257 FCR 442
Date of hearing:	6 March 2019
Registry:	Victoria
Division:	General Division
National Practice Area:	Admiralty and Maritime
Category:	Catchwords
Number of paragraphs:	69
Counsel for the Applicant:	Mr M R Scott QC and Ms E Levine
Solicitor for the Applicant:	HFW Australia

Counsel for the Respondent:	Mr D J Batt QC and Mr M N C Harvey
Solicitor for the Respondent:	Ashurst Australia

ORDERS

VID 1588 of 2018

BETWEEN:	**DEGROMA TRADING INC** Applicant
AND:	**VIVA ENERGY AUSTRALIA PTY LTD** Respondent
JUDGE:	**O'CALLAGHAN J**
DATE OF ORDER:	**13 MAY 2019**

THE COURT ORDERS THAT:

1. Pursuant to section 7 of the *International Arbitration Act 1974* (Cth) the whole of Federal Court of Australia proceeding no. VID 1441 of 2018 be stayed and all disputes between the parties arising from or in connection with the subject matter of that proceeding be referred to arbitration.
2. The respondent pay the applicant's costs of this application.

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

REASONS FOR JUDGMENT

O'CALLAGHAN J:

INTRODUCTION

1 The applicant, Degroma Trading Inc (**Degroma**), seeks an order pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth) (the **International Arbitration Act**) that the whole of proceeding no. VID 1441 of 2018 (the **proceeding**) commenced by the respondent, Viva Energy Australia Pty Ltd (**Viva**) against it, be stayed, and that the whole of the dispute the subject of that proceeding be referred to arbitration in London.

2 Degroma says that it and Viva have concluded an arbitration agreement, pursuant to which all disputes the subject of the proceeding are to be resolved by London arbitration at the election of either party, and that Degroma has made such an election by notice to Viva dated 11 December 2018.

3 Viva says that there is no valid arbitration agreement in force and that it is entitled to bring the claims the subject of the proceeding in this court.

EVIDENCE

4 Degroma relies on affidavits of Ms Subutay Aydin sworn 12 December 2018 and 5 February 2019.

5 The substance of that evidence, about which there is little, if any, dispute, is as follows.

6 Degroma is a company incorporated in Panama, and is the registered owner of the Panamanian-flagged oil and chemical tanker vessel, the *Diamond-T.*

7 The *Diamond-T* is managed and operated by a company called Transal Denizcilik Ticaret A.S. (**Transal**), pursuant to a written agreement between Degroma and Transal. Transal is a Turkish ship management company that manages and operates a fleet of oil and chemical tankers.

8 Degroma time chartered the *Diamond-T* to City Marine S.A. (**City Marine**), a Swiss company which is a related company of both Degroma and Transal, by a time charterparty dated 1 September 2011. By operation of the charterparty, City Marine became the disponent owner of the *Diamond-T.* (A disponent owner controls the commercial operation of a ship and is responsible for deciding the ports of call and the cargoes to be carried).

9 The time charterparty was most recently extended for a period of two years commencing 8 September 2018. Transal is, however, responsible for all aspects of the day to day commercial, operational, technical and crew management of the *Diamond-T*, including in relation to Degroma's performance of its obligations under the charterparty to City Marine.

10 Clause 13(a) of the time charterparty provides: "The master (although appointed by Owners) shall be under the orders and direction of Charterers as regards employment of the vessel, agency and other arrangements, and shall sign bills of lading as Charterers or their agents may direct … without prejudice to this charter …".

11 By a voyage charter dated 17 September 2018, City Marine voyage chartered the *Diamond- T* to Viva.

12 The voyage charter was for the carriage in October 2018 of a cargo of Viva's diesel and unleaded petroleum products from Geelong to Tasmania. Freight was USD332,500, plus 10% GST, plus 1.5% freight tax. Demurrage was USD19,000 per day pro rata.

13 Clause 33(1) of the voyage charterparty provided as follows: "Subject to the provisions of this clause Charterers may require the master to sign bills of lading for any cargo in such form as Charterers direct."

14 The port agent at Geelong was a company called Gulf Agency Company (Australia) Pty Ltd (**Gulf Agency**). Gulf Agency was nominated by Viva and at relevant times acted jointly as Viva's, and City Marine's, agent.

15 The shipbrokers for the voyage charter were Clarksons Platou (Australia) Pty Ltd (**Clarksons**), which acted as an intermediary for communications between Degroma (primarily with Ms Aydin) and Viva.

16 Viva also appointed Intertek Testing Services (Australia) Pty Ltd (**Intertek**) to manage technical matters relating to the cargo and its loading on board, including inspections, surveys and testing.

17 On 16 October 2018, Transal (acting as agent for Degroma) sent an email to Gulf Agency Company (acting as agent for Viva) as follows: "please provide us draft bill of ladings for our review and approval."

18 On 17 October 2018, in response to a request from Gulf Agency, Intertek emailed a draft "Viva Energy Australia Tanker Bill of Lading" for the cargo to Gulf Agency, copied to Transal.

19 It was an owners' bill of lading, to be signed by the Master of the *Diamond-T* (the **Master**) on behalf of the vessel's registered owner. It referred to, and incorporated, 11 clauses printed on the reverse.

20 Clause 10(B) contained the following term:

> Any dispute arising out of this Bill of Lading shall be decided by the English Courts to whose jurisdiction the parties hereby agree.
>
> Notwithstanding the foregoing, but without prejudice to any party's rights to arrest or maintaining the arrest of any maritime property, either party may by giving written notice of election to the other party, elect to have such dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act 1850, or any sstatutory [sic] modification or re-enactment thereof for the time being in force …

21 On 18 October 2018, Transal emailed Intertek with some proposed changes to the front of the draft bill of lading. With respect to the terms on the reverse, Transal proposed insertion of the following wording: "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated".

22 By this time, it seems that the *Diamond-T* had arrived at Viva's terminal in Geelong and had commenced cargo loading operations.

23 On 19 October 2018, Intertek replied to Transal: "FYI, This is a standard VIVA BOL [Bill of Lading] format for the loading operations at Geelong. As per VIVA Personnel's instructions, I will be able to amend below highlighted comments only," referring to three of the changes proposed by Transal to the front part of the draft bill of lading. Intertek did not agree to Transal's proposed change to the reverse of the bill set out in [21] above.

24 On the same day, there were reports of a potential problem with the condition of the cargo that had been loaded onto the *Diamond-T*, and Viva requested that the cargo already loaded on board the vessel be discharged back ashore.

25 Further loadings (and un-loadings) of Viva's cargo onto (and from) the *Diamond-T* apparently nonetheless continued until around 25 October 2018, although the evidence is unclear about what quantities of cargo were intended to be carried and what quantities were loaded and unloaded during those few days.

26 Between 21 October 2018 and 24 October 2018, Transal communicated by email with Clarksons (the shipbroker) about adding an adverse remark concerning the condition of the

cargo on the front of the bill of lading (called "clausing"), as well as about the quantity of the cargo and the loading completion date to be inserted on the front of the bill of lading.

27 The question of clausing first arose in an email from Transal to Clarksons on 21 October 2018. Clarksons responded by email later the same day, as follows:

> As far as Bills of lading and the relevant wording are concerned, Charterers would prefer to wait until loading is completed before they decide.

28 By email sent 21 October 2018 at 10:36pm, Transal replied as follows:

> We reserse [sic] all of our rights about signing of bill of lading by completion of loading.

29 By email sent 21 October 2018 at 10:45am, Clarksons replied as follows:

> With regards to [bill of lading] wording, Charterers will need to discuss this matter with their legal dept tomorrow, Monday 22nd Oct.

30 Clarksons responded by email sent 22 October 2018 at 10:21am as follows:

> With regard to the [bill of lading] wording, Charterers have advised they have no issue with Master adding clause/signing dirty [bills of lading] as per your advice below.

31 That afternoon, Clarksons wrote to Transal as follows:

> Further to below, Charterers have confirmed they will require the [bill of lading] to be signed, although the [bill of lading] may be clausedby the Master to note the apparent condition of the cargo loaded in Geelong (not analysed, particulates etc).
>
> Can you please confirm the [bill of lading] will be signed?

32 That evening at 11:02pm, Transal replied, advising of how the Master would clause the bill and requesting a final draft bill of lading, as follows:

> In reply of below email, we would like to advise that by considering the cargoes loaded upto now the master will clause the bill as below.
>
> - Dark particles present in cargo and the cargo being haze.
> - Cargo loaded without being analysed
>
> By the way, please assist to revert with final draft of bill of lading for our review.

33 By email sent 23 October 2018 at 10:19 am, Clarksons replies to Transal as follows:

> Charterers have requested the following when wording clause on [bill of lading],
>
> ++
>
> Please request the clauses are specific, replace cargo with grades in question, and identify the tanks that have any specific particles/haze, if not all tanks have particles/haze. Reference to analysis or lack thereof should be quantified by a relative

> time(s), i.e. after 1m sample, after loading etc
>
> ++
>
> Reverting with Draft [bill of lading].

34 On 23 October 2018 at 6:24pm, Transal replied as follows:

> Owners do not mind to be specific [sic] about all tanks and grades, but according to the master all cargo contains particles and is hazy.
>
> Similarly, Owners do not mind being specific with regard to sample analysis either, but to simplify things we would propose the following clauses instead:
>
> - Dark particles present in all cargo
> - All cargo appearing hazy
> - Cargo quality unknown

35 By email sent 23 October 2018 at 7:29pm, Transal told the Master to clause the bill of lading in accordance with those three bullet points, and forwarded a copy of the third draft bill of lading as received from Clarksons, saying:

> Also, pls find attached draft bill of lading as received from charterer. All figures are for reference only and should be used the actual quantity only [sic]. The insertion of loading completed on the day 24th Oct, 2018 for reference only and then the actual date will be inserted by completion of loading time.

36 On 24 October 2018, by email sent at 8:47am, Clarksons forwarded Viva's response to Transal with respect to the clausing on the bill of lading, as follows:

> Viva has no issues with the Master making a statement on the [bill of lading] providing his opinion of the quality of the final cargo loaded but needs to ensure:
>
> - No reference is made to the ULP95 and ULP98 as the product has been discharged back to shore and will not be re-loaded.
> - As we are de-bottoming ALL ULP91 and Diesel tanks back to shore, wait until samples and results have been advised before making a statement on the cargo quality.
> - Viva is provided with the statement/wording and is confirmed before adding the it [sic] to the [bill of lading]. Understand this could delay the vessel sailing.

37 By email sent 24 October 2018 at 9:47pm, Transal replied as follows:

> Owners' [sic] confirm that the master will of course make remarks about the condition of the cargo that has actually been loaded and stated in the final bills of lading.
>
> Unfortunately, the master cannot rely on shippers'/charterers' cargo analysis when deciding whether a bill of lading should be claused or not. When you instruct us to issue a bill of lading, the master becomes obliged towards the receivers to assess the cargo's appearance based on his own investigations.
>
> The vessel's departure is not conditioned upon the signing of bill of lading unless

> charterers/shippers make it one. Thus, as far Owners' [sic] are concerned, the vessel can sail on completion of loading without bills of lading being issued.

38 On 26 October 2018, Clarksons relayed Viva's instructions to Transal that the *Diamond-T* should discharge the cargo back ashore and then vacate her berth.

39 That instruction was made subject to a reservation of position on cargo contamination. Degroma's response included requesting clarification of intentions with respect to the charterparty.

40 A dispute regarding alleged contamination of the cargo then developed between Degroma and Viva, as well as between City Marine and Viva.

41 Viva commenced an arrest proceeding on 15 November 2018.

42 The writ claimed damages for losses allegedly suffered as a result of contamination of the cargo "due to the failure of the vessel, negligently and in breach of its duties as bailee of the plaintiff's cargo, properly to clean cargo tanks of the vessel Diamond-T prior to loading".

43 The vessel was arrested and Degroma was named as the relevant person.

44 The statement of claim filed by Viva against Degroma alleges that Degroma breached its duty as a bailee, was negligent, engaged in negligent misstatement, and engaged in misleading or deceptive conduct in contravention of s 18 of the Australian Consumer Law.

45 On 11 December 2018, Degroma gave notice to Viva of Degroma's election pursuant to what it says is the binding arbitration agreement in cl 10(B) of the bill of lading to refer the dispute between the parties to arbitration in London. City Marine has also commenced an arbitration in London against Viva.

THE PARTIES' SUBMISSIONS

Degroma's case

46 Degroma brings its application for a stay pursuant to s 7 of the International Arbitration Act.

47 Sub section 7(2) 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.

48 The term "court" in s 7(2) is defined in s 3 to include the Federal Court of Australia.

49 The provisions of s 7(2) apply to arbitration agreements which fall within one of prescribed criteria of s 7(1).

50 Section 7 applies in these circumstances, because pursuant to s 7(1)(d), s 7(2) applies 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". A "Convention country" is defined in s 3 to mean a country (other than Australia) that is a Contracting State within the meaning of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Degroma is incorporated in Panama, which is a Convention Contracting State. It is therefore a Convention country.

51 Section 3 of the International Arbitration Act provides that an "arbitration agreement" means an agreement in writing of the kind referred to in Art II(1) of the Convention, which provides:

> Each Contracting State shall recognize 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.

52 Further, Art II(2) of the Convention provides that 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.

53 Degroma says that cl 10(B) of the bill of lading constitutes a separable, concluded arbitration agreement between Viva and Degroma for the purposes of Art II of the Convention, irrespective of whether the whole of the bill of lading is binding on the parties.

54 Degroma relies principally on the judgment of Allsop J, as the Chief Justice then was, in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 84-86, [147]-[156] (Finkelstein J agreeing), and the judgment of the Full Court in *Hancock Prospecting Pty Ltd v Reinhart* (2017) 257 FCR 442, especially at 526-539, [341]-[394] (Allsop CJ, Besanko J and myself).

55 As for *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*, Degroma says that it stands for the proposition that Art II requires bilateral recognition of an arbitration agreement, whereby the terms of the agreement and assent to those terms are in exchanged documents, rather than a unilateral communication and tacit acceptance. It relies in particular on the following passage (at [149] – [151]):

> 149. Article II does not say that the only agreement to which it refers is one which was formed or concluded by the act of signing or by the despatch or receipt of a letter or telegram. What is required is that there be more than a unilateral statement in writing of the arbitration clause or arbitration agreement. **The bilateral recognition of the clause or arbitration agreement will be achieved** if the arbitral clause is in a contract, or if the arbitration agreement is, signed by the parties or if the arbitral clause is in a contract, or **if the arbitration agreement is, contained in an exchange of letters** or telegrams. Here, there was no signing of any such document. Rather there was an exchange of letters or telegrams in which were contained the arbitral clause and the whole time charter. Even assuming that the contract did not spring into life with the act of despatch or receipt of a letter or telegram, but with some conduct of one of the parties, once the contract exists **or once there is a binding arbitration agreement, the arbitral clause in the contract or the arbitration agreement can be said to be contained in the exchange of letters or telegrams.**
>
> 150. Each of the cases relied on by the primary judge in dealing with this issue was directed to the circumstance where the arbitral clause in a contract or the arbitration agreement was only found in writing emanating from one side. That was inadequate. Nowhere in these cases was there an arbitral clause in a contract or an arbitration agreement in a signed document or contained in an exchange of letters or telegrams. **The requirement that the arbitral clause in a contract or an arbitration agreement be contained in an exchange of letters or telegrams is not a requirement that the contract be formed by the act of signing or the exchange of letters or telegrams. The clause in a contract or the arbitration agreement can be contained in an exchange of letters and telegrams even if the act of formation was some conduct** …
>
> 151. This is not a requirement that the contract be formed by such a document being signed or sent or received but that the terms *and* the assent to such terms are in a signed document or in exchanged documents. Thus, as here, **where one finds clear and unambiguous exchanges of letters or telegrams setting out the arbitral clause** and indeed the whole of the agreement, **and the assent thereto**, the fact that the contract springs into life upon the provision of the bank guarantee (pursuant to the consensus to be found in the already exchanged letters or telegrams) does not gainsay the proposition that the arbitral clause in the contract or the arbitration agreement was contained in the exchange of relevant documents …
>
> (Bold emphasis added; italics in original).

56 Degroma says that the requirement referred to in [150] of *Comandate* above is satisfied, because both Viva and Degroma, acting through their respective agents, engaged in an unambiguous exchange of correspondence attaching drafts of the bill of lading, each of which contained the arbitration agreement contained in cl 10(B).

57 Degroma submits that it is significant that the arbitration agreement in cl 10(B) was first proffered by Viva as part of the standard terms of its template bill of lading. It says that it was accepted by Transal, acting on behalf of Degroma, and that although the parties exchanged comments on aspects of the draft bill of lading, they did not seek to negotiate the terms of cl 10(B).

58 Degroma relies on *Hancock v Reinhart* (2017) 257 FCR 442, in particular in relation to the question of separability. (That case dealt with a stay application under s 8(1) of the *Commercial Arbitration Act 2010* (NSW), but s 8(1) is in analogous terms to s 7 of the International Arbitration Act.)

59 In *Hancock v Rinehart,* the Full Court allowed the appeal and granted the stay sought. Degroma submits that there is an even stronger basis to refer the question of whether there is an arbitration agreement to the arbitrator in this case because Viva makes no separate attack on the arbitration agreement. Degroma says, on the contrary, that Viva's challenge:

> is wholly bound up in its broader contention that an agreement between the applicant and the respondent (the bill of lading) was not finalised and therefore has no contractual significance. For example, at [20] of its outline of submissions dated 12 February 2019 Viva asserts that '*the Draft Bill of Lading lacks the necessary element of bilateral recognition*'. To the extent that this is a challenge to the arbitration agreement contained in cl 10(B), it is parasitical to the challenge to the bill of lading and involves an examination of the same transactional context as the assessment of liability. The evidence on this application demonstrates this because it covers the bill of lading itself in the circumstances of its negotiation as evidence of a contract of carriage or the terms of bailment, and the commencement of loading …
>
> (Italics in original).

60 For those reasons, Degroma submits that I should proceed as the Full Court did in *Hancock v Rinehart* and permit the London arbitrator to determine whether there is a concluded arbitration agreement between the parties – that is, to determine whether or not Viva and Degroma each assented in an exchange of documents to the terms of cl 10(B) such that there is an agreement in writing for the purposes of Art II and thus an arbitration agreement for ss 3 and 7 of the International Arbitration Act.

Viva's case

61 If I may say so, with great respect to him, Mr DJ Batt QC, who appeared with Mr MNC Harvey for Viva, put his client's case most succinctly during the course of his oral submissions on 6 March, as follows:

> The pertinent question, your Honour, is, is it or is it not the case, as our learned friend

> submits, that clause 10B is an arbitration agreement that has come into existence between the parties. We don't resile from the proposition that that is ultimately the question and, in part, that's the question because of the doctrine of separability, and it's a question because that's how Mr Scott puts it.
>
> What we say is that to determine that question, properly understanding the course of events the documents had passed and the terms of clause 10B itself, one will inevitably have to determine whether the bill of lading acquired a contractual effect between the parties or not. Perhaps, to put it in a different fashion, what we really say is, unless it did, you couldn't have – you couldn't conclude that clause 10B had acquired contractual effect. Not because clause 10B or such a provision could never be a freestanding agreement because separability shows it can be, but rather than analysing the facts here and the terms of the document, it's only going to be if there's contractual effect in a bill of lading.
>
> …
>
> … [W]e say … that when you look at the facts, the bill of lading was passing as a document itself. There were no separate dealings about 10B. It's a bit like – if I can take another example, perhaps a bit rashly because I don't say they're on all fours, but if two parties are negotiating a design and construct contract and clause 52 is an arbitration provision, yes, it's true that that exchanges of documents about that potential clause could ultimately result in it having contractual force regardless of what happened to the rest of the document. But, most likely, when there's a general set of dealings about a – why the draft document, it's going to be if and only if – and we say it's the proper analysis here, if and only if there's a meeting of the minds on the document more generally that you could say that the parties have agreed to arbitrate any disputes.

62 Part of that case is put on a textual basis. Clause 10(B) commences with the words "[a]ny dispute arising out of this Bill of Lading etc". Mr Batt submits that for such a dispute to "arise out of" the bill of lading, the bill of lading must come into existence. Viva's case, of course, is that the exchanges detailed above do not constitute a binding agreement. Viva says that it is entitled to bring and press a bailment, negligence and ACL claim in this court, therefore, because there is no valid arbitration agreement, because there can be no such valid agreement without a binding bill of lading.

CONSIDERATION

63 It is not necessary to burden these reasons with a repetition of what the Full Court said in *Hancock v Reinhart* (2017) 257 FCR 442 about separability. There was no dispute between the parties about the principles summarised in that case.

64 For reasons we explained in *Hancock v Rinehart*, and which, as I say, need not be repeated here, the court is not required to decide whether the arbitration agreement exists, because the competence principle is wide enough to permit the arbitral tribunal to decide any question of jurisdiction, including whether the arbitration agreement came into existence. The real issue

in a case such as this is the practical question of whether the court **should** hear a separate attack on the arbitration agreement (here, whether it was ever brought into existence in the first place) or permit the arbitrator to hear it, by staying its own proceeding. That will depend on the nature of the attack and all the circumstances (including that the decision by the arbitral tribunal is not final and that the International Arbitration Act should be construed to facilitate, not impede, the process of arbitration). See *Hancock v Reinhart* (2017) 257 FCR 442 at 536, [377]-[378].

65 It seems to me that, because of Viva's submission that it will "inevitably" be necessary to determine whether the bill of lading acquired a contractual effect between the parties in order to determine whether an arbitration came into effect, there is little prospect that the question of whether the arbitrator has jurisdiction can be determined separately from the question of whether the main agreement (the bill of lading) binds the parties and, if so, what are its terms.

66 It is true that Viva's pleaded case in this court has nothing to do with the bill of lading – the causes of action instead include bailment, negligence and contravention of s 18 of the ACL.

67 Nonetheless, if this court heard the question of whether an arbitration agreement exists, bound up as it is, on Viva's own case, with the broader question of whether the parties are bound by a bill of lading, and if so, by what terms, it would run the risk of embracing, rather than avoiding, "the vice of a de facto determination of the substantive claims under the guise of a preliminary determination of the validity of the arbitration agreement". See *Hancock v Reinhart* (2017) 257 FCR 442 at 537, [383].

68 Further, it seems to me that Viva's argument that the arbitration cannot exist independently of the bill of lading is exactly the kind of argument which the doctrine of separability is intended to prevent. As Lord Hoffmann said in *Fiona Trust & Holding Corporation v Privalow* [2008] 1 Lloyd's Rep 254, in a passage cited with approval in *Hancock v Reinhart* (2017) 257 FCR 442 at 530, [357]:

> It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 [of the Arbitration Act 1996 (UK)] [which is the UK statutory recognition of separability] in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.

69 For those reasons, I will make orders staying the proceeding and remitting to the matter to the arbitrator.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan.

Associate:

Dated: 13 May 2019