

International Arbitration Update

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Expansive view broadens horizons: All disputes means *All* disputes

A recent decision of the Federal Court significantly widens the scope of arbitration clauses so as to include issues that are ancillary to the contract. In *Comandate Marine Corp v Pan Australian Shipping Pty Ltd* [2006] FCAFC 192 the Full Court of the Federal Court of Australia considered the scope of arbitration clauses, whether a decision to litigate renders arbitration agreements inoperative and the requirement for an arbitration agreement to be in writing.

Background to the proceedings

In April 2006, Pan entered into a charter party with Comandate Marine Corp, the owners of the vessel "Comandate". The contract contained an arbitration clause providing that all disputes arising out of the contract be arbitrated in London and governed by English Law.

Pan commenced proceedings in the Federal Court of Australia, seeking amongst other things, an injunction to restrain Comandate Marine from obtaining an injunction from a foreign court that would prevent Pan filing a claim against it for misrepresentation in contravention of the *Trade Practices Act 1974* (Cth) (the TPA). The court granted the injunction sought by Pan.

Comandate Marine then commenced its own *in rem* proceedings in the Federal Court. In relation to the Pan proceedings, Comandate Marine brought a motion that they be stayed in accordance with the *International Arbitration Act 1974* (Cth) and that Pan be ordered to arbitrate the issues in the English arbitration which it had commenced.

At first instance Pan resisted the stay on the following 3 grounds, all of which were accepted by the court that:

- in bringing its own proceedings Comandate Marine had elected to litigate, rather than arbitrate the dispute;
- the charter party agreement containing the arbitration clause was not in writing as required by section 7(2) of the *International Arbitration Act 1974* (Cth); and
- claims for misleading and deceptive conduct under the TPA did not come within the scope of the arbitration clause.

On appeal to the Full Court of the Federal Court of Australia Justice Allsop, with whom Justice Finkelstein and Justice Finn agreed, allowed the appeal. Justice Allsop structured his judgment around 6 issues.

The proceedings

1. Did Comandate Marine waive or elect to abandon the London arbitration by commencing proceedings?

Justice Allsop held that the commencement of the *in rem* proceedings by Comandate Marine did not amount to a repudiation of the arbitration agreement. Justice Allsop found that there was an absence of mutually inconsistent rights – the decision to litigate or

In Brief

- In *Comandate Marine* the words "arising out of the contract" were found to be intended to cover claims in connection with contract formation, including a claim for deceptive and misleading conduct in negotiations.
- The decision significantly widens the scope of arbitration clauses to include issues that are ancillary to the contract and bring Australia into line with other jurisdictions (including NSW).

arbitrate is not a selection between inconsistent methods of dispute resolution. The court found that the step taken to commence the *in rem* proceedings was designed to advance Comandate Marine's position and it was not an unequivocal statement of abandonment of the arbitration.

2. Was there an agreement in writing for the purposes of the *International Arbitration Act 1974* (Cth)?

Under section 3(1) of the *International Arbitration Act 1974* (Cth) an arbitration agreement means an agreement in writing of the kind referred to in sub-article 1 of Article II of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Under Article II "an agreement is in writing if it is contained in ... an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement". Such an agreement may be a clause in a contract.



Negotiations between the parties took the form of telexes and emails. As a condition of delivery, Comandate Marine requested a bank guarantee from Pan. Comandate Marine also sent a telex/email recapping the outcome of negotiations and asked Pan to confirm that it was in line with "negotiations so far". Upon receiving the bank guarantee Comandate Marine indicated that delivery would occur. The vessel was then delivered to Pan and there was no more written communication between the parties.

At first instance the court noted that the written pre-contractual exchanges could not become freestanding agreements until there was an agreement to fix the vessel. The court concluded that the agreement was established with the exchange of the bank guarantee and was not contained in the exchange of emails or telexes. Consequently, there was no arbitration agreement "in writing" for the purposes of the Act.

On appeal, the court found that the arbitration clause could be contained in an exchange of letters or telegrams even where the formation of the substantive contract occurred by some other case. There was no doubt that this was the situation in the present case. Further, Justice Allsop held that once the contract did come into existence the arbitration clause contained in the exchange of documents was binding.

In addition, Justice Allsop held that even if it was necessary for the contract to be brought into existence by the sending and receiving of the relevant documents, that happened in this case. He found that the provision of the bank guarantee was a condition precedent to performance but not a condition precedent to the existence of any legal relationship. A legal relationship already existed – the parties were bound and unable to withdraw. The liability to perform on behalf of Comandate Marine was the only thing dependent on the bank guarantee.

3. Scope of the arbitration clause

The arbitration clause contained in the charter party agreement provided that: "All disputes arising out of this contract shall be arbitrated at London ... Any dispute arising hereunder shall be governed by English Law ...". The court was required to determine whether the claims brought under the TPA by Pan were covered by this clause.

Justice Allsop noted the importance of using a liberal and flexible approach in interpreting the words in contracts. The court held that the words "all disputes arising out of this contract" are flexible enough to encompass disputes with a sufficiently close connection with the formation, the terms and the performance of the contract. It is necessary in each case to assess the connection between the dispute and the contract, including the formation, terms and performance.

Thus, Justice Allsop found that all the TPA claims in this case arose out of the contract in that they arose out of the formation of the contract. Simply, without the entry into the contract there would have been no act of reliance upon which to base a claim under the TPA. Thus, the court concluded that Pan's statement of claim was encompassed by the arbitration clause.

Justice Allsop distinguished this case from the decision of the Full Court in *The 'Kiukiang Career'* due to the difference in words between 'arising out of' and 'arising from', with the former given a wider interpretation (*Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (No 5) (1998) 90 FCR 1). In *The 'Kiukiang Career'* the Full Court of the Federal Court of Australia adopted a narrow view of the words "arising from".

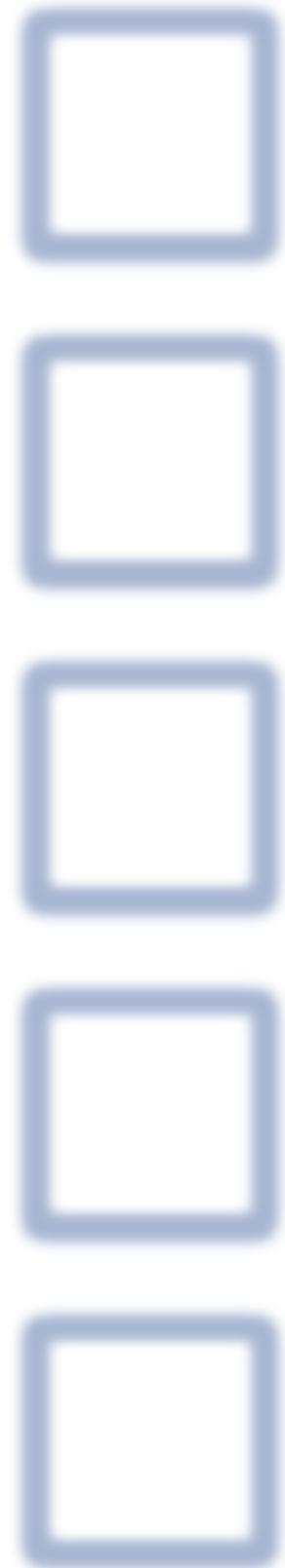
4. Operation of the *International Arbitration Act 1974* (Cth)

In order to aid the enforcement of foreign arbitration agreements under section 7(2) of the *International Arbitration Act 1974* (Cth), the

section provides that where a party to an arbitration agreement has instituted proceedings against another party to the agreement which are pending in a court and the proceedings involve determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration, the court shall, on the application of a party to the agreement, stay the proceedings and refer the parties to arbitration in respect of that matter. The court should refer parties to arbitration unless it finds the arbitration agreement to be "null and void, inoperative or incapable of being performed". Justice Allsop considered the application of this phrase in the case.

Justice Allsop held that the court was obliged to stay the proceedings pursuant to section 7. In doing so he relied on the doctrine of separability, following *Ferris v Plaister* (1994) 34 NSWLR 474 in holding that an arbitration clause is to be regarded as separate and severable from the main contract. His Honour stated that the doctrine of separability is part of the proper common law approach to analysing arbitration clauses and agreements. As a result, an arbitration clause is considered to be an agreement independent from the main contract. Further, His Honour found no basis for concluding that the arbitration agreement of the time charter, as opposed to the substantive agreement, was null and void in this case.

Finally, Justice Allsop considered, in general terms, the meaning of "a matter" capable of settlement by arbitration within section 7 of the *International Arbitration Act*. His Honour found that a dispute concerning the time chartering of a general cargo ship for commercial purposes is a matter capable of settlement by arbitration whether that dispute relates to the formation or performance of that contract. There was nothing in the present case to suggest that such a quintessentially commercially based dispute is



not appropriate for arbitration in accordance with the venue and law chosen by the parties. No conditions were placed on the stay.

5. Are there other bases for a stay assuming the inapplicability of the *International Arbitration Act 1974 (Cth)*?

In essence, Justice Allsop held that the connection of the matter with the domestic law of Australia as a factor for litigating in Australia does not outweigh the holding of the parties to their bargain. His Honour emphasised that the commercial parties in this case freely entered a bargain to resolve their disputes in London according to English law. He stated that there are powerful and discretionary reasons why an arbitration agreement should be enforced, even if the contractually chosen venue and law give rise to rights not entirely the same as under the parties' domestic law.

Justice Allsop therefore found no other base for granting a stay. However, His Honour reserved judgment on the question of the enforcement of an arbitration clause which would deny a party a chance to ventilate its rights under statute, such as the TPA, finding it unnecessary to decide that matter in the present case.

6. The "anti-anti-suit" injunction

In light of His Honour's view that there should be an unconditional stay of Pan's proceedings, Justice Allsop found there was no reason for Comandate Marine to seek an anti-suit injunction. Therefore, the "anti-anti-suit" injunction was of no further useful purpose.

Scope of arbitration clauses widened

The decision in *Comandate Marine* significantly widens the scope of arbitration clauses to include issues that are ancillary to the contract,

as it found that the words "arising out of the contract" were intended to cover claims in connection with contract formation, including a claim for deceptive and misleading conduct in negotiations. The decision brings Australia into line with other jurisdictions (including NSW – *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160) that have followed decisions such as *Ethiopian Oil Seeds Pulse Export Corporation v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep 86.

Lessons for drafting arbitration clauses

Notwithstanding the decision of Justice Allsop, we recommend that arbitration clauses be drafted as wide as possible along the lines of the model arbitration clause prepared by the Australian Centre for International Commercial Arbitration (see: www.acica.org.au).

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