

## INTERNATIONAL ARBITRATION OF ADMIRALTY AND MARITIME DISPUTES IN AUSTRALIA

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1. Underpinning the relationship between the Australian Courts exercising Admiralty and maritime jurisdiction and maritime arbitrations is the *International Arbitration Act 1974* (Cth). That Act represents the bedrock for those engaged in international trade and commerce, giving force of law in Australia to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (the New York Convention) and the *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law (UNCITRAL). Within the context of wholly domestic disputes in Australia, each State and Territory has also enacted a Commercial Arbitration Act<sup>1</sup>. These various statutes provide an enforcement mechanism for Australian Courts to refer matters to arbitration.
2. Australian Courts recognise that arbitration clauses should be read, and thus construed, as liberally as possible, as affirmed by the Full Court of the Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*<sup>2</sup> per Allsop J (Finn and Finkelstein JJ agreeing). That approach won the endorsement of Lord Hope of Craighead in *Fiona Trust & Holding Corporation v Privalov*<sup>3</sup>. There his Lordship referred to it as being firmly embedded in the law of international

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<sup>1</sup> *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act* (NT); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1984* (Vic) and *Commercial Arbitration Act 1985* (WA)

<sup>2</sup> (2006) 157 FCR 45 at 87 [165]

<sup>3</sup> [2007] 4 All ER 951 at 962–963 [31]; [2008] 1 Lloyd's Rep 254

commerce. That theme has recently been re-endorsed by Allsop P in the New South Wales Court of Appeal<sup>4</sup>.

3. The importance of arbitration in the exercise of jurisdiction by Australian superior courts under the *Admiralty Act 1988* (Cth) is underpinned by s 29. That provision empowers the Court to stay proceedings on the ground that the claim concerned should be determined by arbitration, whether in Australia or elsewhere, while the ship or other property under arrest in the proceeding, or security provided for its release, is retained by the Court as security to satisfy any arbitral award. The arrest of vessels to obtain security for foreign arbitrations is a commonplace in the Federal Court<sup>5</sup>.
4. And, in recent times, there have been some positive, but tentative signs, that, in particular, Australian traders are requiring arbitration clauses providing for the seat of their arbitration to be in Australia.
5. That brings me to the theme of what I want to say today. The New York Convention and Model Law are vital servants of international trade and commerce. About 12 per cent of the world's trade by volume is carried into and out of Australia by sea. New Zealand too has a long history of international sea trade. Our countries must develop and support efficient, skilled and internationally acceptable arbitrators who can bring their commercial abilities to bear in resolving disputes. With so much of world trade focused in the Asia-Pacific region, the need for us to develop a reputation as a centre for arbitrations is manifest. Our two nations have a very long history of impartial, independent and incorruptible courts with a well regarded jurisprudence. These are capable of providing, and do in fact provide, support to the conduct of international arbitrations.

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<sup>4</sup> *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 117 at [3]; Ipp and Macfarlan JJA agreeing

<sup>5</sup> see too *Comandate* 157 FCR at 63 [60]

6. In 2007, Lord Hoffmann explained how much arbitration had itself become an important business for the European Community saying in *West Tankers Inc v RAS Riunione Adriatica Di Sicurta SpA (The “Front Comor”)*<sup>6</sup>:

“Finally, it should be noted that the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will. For example, New York, Bermuda and Singapore are also leading centres of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community handicap itself by denying its courts the right to exercise the same jurisdiction.”

7. The clear sub-text of his Lordship’s remarks is that the business of London arbitration required protection. Accordingly, the House of Lords affirmed the grant of an anti-suit injunction restraining the defendant from pursuing court proceedings it had instituted in Syracuse, in Italy. This remedy was appropriate and it is likely that an Australian court, in similar circumstances, would also have given such relief.
8. However, his Lordship’s plea fell on deaf ears in Luxembourg, because in February 2009 the European Court of Justice resoundingly reversed the House of Lords<sup>7</sup>. The Luxembourg Court held that once the Italian Court had become seized of the proceedings (including the question of ordering a stay in favour of arbitration under the New York Convention) the Courts of another member State of the European Union could not order an anti-suit injunction restraining the moving party from pursuing its proceedings.
9. English lawyers and commentators have greeted this decision without their traditional stiff-upper lip. Professor Adrian Briggs in a casenote entitled “*Fear and Loathing in Syracuse and Luxembourg*”<sup>8</sup> wrote that:

“[t]he tactic of launching these obstructive proceedings before an Italian Court is known in the trade, if perhaps a little unfairly, as firing the ‘Italian torpedo.’”

<sup>6</sup> [2007] 1 Lloyd’s Rep 391 at 395 [23]

<sup>7</sup> *Allianz SpA v West Tankers Inc (The “Front Comor”)* [2009] 1 Lloyd’s Rep 413

<sup>8</sup> [2009] *Lloyd’s Maritime and Commercial Law Quarterly* 161 at 163 n14. He is, of course, Professor of Private International Law at Oxford

Another Oxford don, Edwin Peel said that:

“[t]here is little merit in detailed assessment of the reasoning of the court, and not only because there is not much of it.”<sup>9</sup>

10. The Luxembourg Court’s judgment was a further development of its destructive handiwork against anti-suit injunctions seeking to restrain proceedings that have been commenced in another member State of the European Union vexatiously or oppressively to defeat or forestall (English) proceedings. This began in *Turner v Grovit*<sup>10</sup> on which Justice Hugh Williams gave his 2005 FS Dethridge address<sup>11</sup>.
11. The facts in the *Front Comor*<sup>12</sup> were that in August 2000 a petrol tanker chartered by Erg Petroli SpA collided with a pier owned by Erg off the Italian port city of Syracuse. Erg as owner of the, now ruined, jetty claimed on its insurers, and began arbitration proceedings against the ship owner in respect of its uninsured losses. The arbitration commenced in London in accordance with English law, as provided for by the arbitration clause in the charterparty. Three years later in July 2003 Erg’s subrogated insurers commenced proceedings against the ship owners in the Tribunale di Siracusa seeking recovery of the sums paid to Erg under the policy. Next, the ship owners sought an anti-suit injunction in England against the insurers, which was granted at first instance. The foundation of that claim was that the insurers had been subrogated to the rights of their insured, Erg, and, thus, were bound by its agreement to arbitrate.
12. Colman J granted an anti-suit injunction restraining the insurers from continuing the Italian proceedings. The insurers’ appeal was heard by the House of Lords, which upheld the judge. Their Lordships made a reference to the Luxembourg Court of the question whether an anti-suit injunction restraining breach of an

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<sup>9</sup> “Arbitration and Anti-Suit Injunction in the European Union” (2009) 125 *Law Quarterly Review* 365

<sup>10</sup> [2005] 1 AC 101; [2004] 2 Lloyd’s Rep 169

<sup>11</sup> “Anti-Suit Injunctions Damp Squib or Another Shot in the Maritime Locker? Reflections on *Turner v Grovit*” (2006) 20 *Australia & New Zealand Maritime Law Journal* 4

<sup>12</sup> [2009] 1 Lloyd’s Rep 413

arbitration clause could be made in relation to a proceeding in a court of a member State of the European Union.

13. The ECJ's answer appears to have all but ended the reign of terror UK courts exerted over continental Europe through the remedy of the anti-suit injunction. Professor Briggs added to his panegyric:

“[w]e should all reflect that it is possible to expect the worst and still be disappointed<sup>13</sup>.”

14. One can see that this air of disappointment results not simply from the stifling of an esoteric remedy unique to the common law, or more properly, Equity, but also from the possible consequences of the outcome on the London arbitration industry. In their speeches referring the question to the ECJ, Lords Hoffmann and Mance unsubtly pointed out the impact they feared that the answer eventually given by the ECJ might have. In the *Front Comor*<sup>14</sup> Lord Hoffmann warned:

“The courts are there to serve the business community, rather the other way around. No one is obliged to choose London. The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly does not deter parties to commercial agreements. On the contrary, *it may be regarded as one of the advantages which the chosen seat of arbitration has to offer*. Professor Schlosser rightly comments that if other Member States wish to attract arbitration business, they might do well to offer similar remedies.”

15. And Lord Mance added that the opinion of advocate general Darmon for an earlier decision of the ECJ:

“... highlighted the “fundamental importance” of modern arbitration, its essential deliberate independence of litigation *and the role of major international arbitration centres like London. All are potentially affected*<sup>15</sup>.”

16. The Luxembourg Court silently rejected their Lordships' arguments premised on maintaining London as a prominent seat of arbitration.<sup>16</sup> At the moment international trade has not been completely cut adrift.

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<sup>13</sup> Adrian Biggs, 'Fear and Loathing in Syracuse and Luxembourg' (2009) *Lloyd's Maritime and Commercial Law Quarterly* 161 at 162

<sup>14</sup> [2007] 1 Lloyd's Rep 391 at 395 [22]

<sup>15</sup> [2007] 1 Lloyd's Rep 391 at 396 [32]

17. Thus, while at a doctrinal level the ECJ's decision turned on a rather narrow analysis of a European Union directive, as the House of Lords recognised, it is a case that promises to have a lasting effect on the ability of London to provide its previously reliable seat of arbitration.
18. In this respect, England's loss may be Australia's and New Zealand's gain. Australia faces none of the same obstacles to the grant of anti-suit injunctions to restrain a breach of an arbitration clause. Indeed, all things being pre-*Front Comor*-equal it is likely that Australian and New Zealand courts will be called on to deploy the important remedy of anti-suit injunctions to complement and uphold international traders' bargains providing for arbitration.
19. The jurisdiction to order anti-suit injunctions restraining breach of an arbitration agreement is firmly part of Australian law as a result of the High Court of Australia's decision in *CSR Ltd v Cigna Insurance Australia Ltd*<sup>17</sup>. And the Australian courts will also enforce international arbitration agreements by staying their own proceedings, as the High Court did in *Tanning Research Laboratories Inc v O'Brien*<sup>18</sup>.
20. The jurisdiction and willingness of a nation's courts to respect and uphold the parties' contractual choice of an international arbitration agreement for resolution of their disputes by granting remedies consistent with that choice, such as stays of domestic proceedings or the grant of an anti-suit injunction, is a key consideration for the commercial community in choosing a seat of arbitration. The latter remedy may involve potentially complex issues of comity with a foreign court, as Allsop J has observed<sup>19</sup>. The recognition that the courts in Australia now give to international arbitration agreements and awards should inspire confidence in those involved in Admiralty and maritime matters and other international traders to provide in their contracts for local seats for their arbitrations.

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<sup>16</sup> The Advocate General did, however, address the concerns raised by the House of Lords: [2008] 2 Lloyd's Rep 661 at 670–671 [65]–[73].

<sup>17</sup> (1997) 189 CLR 345 at 392

<sup>18</sup> (1990) 169 CLR 332

<sup>19</sup> *Comandate* 157 FCR at 110 [252]

21. The remedy of an anti-suit injunction has assumed a position of prominence with the rise of large transnational litigation. The grant of an injunction restraining a breach of, either, an arbitration or exclusive jurisdiction clause is founded on a basis distinct from an anti-suit injunction restraining proceedings in an inappropriate forum. The former will be granted to restrain a breach of contract, while the latter is concerned with the prevention of vexatious and oppressive litigation<sup>20</sup>.
22. Unlike the position now in Europe, if an anti-suit injunction is sought to prevent an actual or threatened breach of an arbitration clause it may be granted if it will be, what Steyn LJ once described as, “the only effective remedy” for breach of an arbitration agreement<sup>21</sup>. Unsurprisingly, in the past English judges had been bold enough to suggest that in this context “comity has a smaller role” to play<sup>22</sup>, and that a reticence to grant anti-suit injunctive relief stemming from concern about a possible breach of comity should not trouble the Court in restraining a party from litigating in breach of contract.
23. For Australia the position was clarified in *CSR*<sup>23</sup> where Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ said:

“Similarly, as Gummow J pointed out in *National Mutual Holdings Pty Ltd v Sentry Corporation*<sup>24</sup>, a court may grant an injunction to restrain a person from commencing or continuing foreign proceedings if they, the foreign proceedings, interfere with or have a tendency to interfere with proceedings pending in that court.

The inherent power to grant anti-suit injunctions is not confined to the examples just given. As with other aspects of that power, it is not to be restricted to defined and closed categories<sup>25</sup>. Rather, it is to be exercised when the administration of

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<sup>20</sup> see Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (2003) at 201; Sir Lawrence Collins, *Dicey, Morris and Collins: The Conflict of Laws* (14<sup>th</sup> ed, 2006) at 746

<sup>21</sup> *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588 at 598E-F per Brown P, Steyn and Kennedy LJJ

<sup>22</sup> *OT Africa Line v Magic Sportswear Corp* [2005] 2 Lloyd's Rep 170 at 179 [32] per Longmore LJ

<sup>23</sup> 189 CLR at 391-392

<sup>24</sup> (1989) 22 FCR 209 at 232. See also, e.g. *Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F 2d 909 at 927; *Re Siromath Pty Ltd [No 3]* (1991) 25 NSWLR 25 at 29-30

<sup>25</sup> see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639, and the cases there cited. See further *Hamilton v Oades* (1989) 166 CLR 486 at 502; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25-26, 74; *Ridgeway v The Queen* (1995) 184 CLR 19 at 60, 75

justice so demands or, in the context of anti-suit injunctions, when necessary for the protection of the court's own proceedings or processes.”

24. A subset of the anti-suit injunction, is the anti-anti-suit one. It, too, has utility in Australia's international and maritime arbitration industry. Such an order has been made by the Federal Court of Australia, at least, twice in the last 3 years, although one<sup>26</sup> was overturned on appeal. In *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd*<sup>27</sup> a charterer, BHP, had employed Cosco to find a sub-charterer for a vessel. The shipbrokers delivered the ship to a different, financially insecure, sub-charterer than the one BHP alleged they had represented to it. Some hire was not paid by the sub-charterer. BHP sued Cosco for engaging in misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act 1974* (Cth), negligent misstatement and breach of warranty of authority. The shipbrokers communicated to BHP their intention to commence and proceed with London arbitration, purportedly in accordance with the charterparty between BHP and the sub-charter. There was no arbitration agreement directly between BHP and Cosco. Yet Cosco appointed an “arbitrator” in London. BHP sought an anti-anti-suit injunction against Cosco and the arbitrator. After determining that the shipbrokers were not claiming through or under a party to the arbitration agreement, and, as such, could not invoke the agreement in the English courts, Finkelstein J granted an anti-anti-suit injunction, restraining the defendant shipbrokers, Cosco, from approaching the English courts to obtain an anti-suit injunction to restrain the Australian proceedings.
25. The anti-anti-suit injunction is a means by which the Court can prevent vexatious or oppressive conduct by a party who threatens to misuse an arbitration agreement in another forum. Obviously, the circumstances in which the Courts are likely to grant this species of relief will be quite limited. And the jurisdiction must be carefully exercised so as not to either frustrate the legitimate invocation of an international arbitration agreement or facilitate an abuse of the arbitral process by the party seeking the relief.

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<sup>26</sup> The decision in *Pan Australia Shipping Pty Ltd v Ship 'Comandate' (No 2)* (2006) 234 ALR 483

<sup>27</sup> (2008) 168 FCR 169



26. A principal objective of international arbitration is, as Professor Briggs commented, to “keep the resolution of disputes as far away from the court as practicable”<sup>28</sup>. In today’s globalised business and legal community, this objective will be realised more readily by the parties’ selection as the seat for their arbitration, a State whose courts are independent, efficient and respected. Australia has demonstrated a preparedness in its laws and court systems to facilitate the enforcement both of arbitration agreements and awards.
27. It will be important to build up a reputation for quality, efficiency and integrity of arbitrators in our two nations so that international merchants and traders will be able to exercise an informed choice of an alternative forum, now that London is no longer what it was.
28. International arbitration is, of course, inherently different from domestic arbitration. Jan Paulsson, a leading French exponent of the former explained the difference as follows:
- “... [domestic] arbitration is an alternative to courts, but international arbitration is a monopoly.”<sup>29</sup>
29. The reason for this distinction is not far to seek. Those involved in international trade and commerce, including the maritime industry, need a basis to enforce their rights. Defendants will not always, indeed may frequently not, be amenable to the jurisdiction of a judicial system in which the plaintiff will have confidence. The ratification of the New York Convention and Model Law by most nations, however, ensures that international arbitral agreements and awards are likely to be enforceable in many jurisdictions where foreign judgments will not. That is why the Australian Courts’ preparedness to enforce the incidents of international arbitration offers protection against the launching in this region of “Italian torpedoes”.

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<sup>28</sup> Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (2008) at 199

<sup>29</sup> 'International Arbitration Is Not Arbitration' (2008) 2 *Stockholm International Arbitration Review* 1