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LIGHTSOURCE TECHNOLOGIES AUSTRALIA PTY LTD v POINTSEC MOBILE TECHNOLOGIES AB
[2011] ACTSC 59 (12 April 2011)

PRIVATE INTERNATIONAL LAW – service out of jurisdiction – validity of service – non-service of supporting affidavit – service of Originating Application with different date from that ordered – irregularity not invalid – *Court Procedures Rules 2006* (ACT) rr 6505, 6507 – *Court Procedures Act 2004* (ACT) s 68(1).

PRIVATE INTERNATIONAL LAW – service out of jurisdiction – setting aside order for service – whether grounds for making order for service.

ARBITRATION – the submission and the reference – whether matter capable of being subject to arbitration – found to be capable of being arbitrated.

ARBITRATION – the submission and the reference – stay of litigation and refer al to arbitration – whether arbitration to be conducted under the law of a Convention country – *International Arbitration Act 1974* (Cth) s 7.

ARBITRATION – the submission and the reference – stay of litigation and referral to arbitration – whether stay should be ordered – *Commercial Arbitration Act 1986* (ACT) s 53.

Civil Procedure Rules (UK), r 6.9
Supreme Court Rules (British Columbia Reg 221/90), r 13(3)
Supreme Court Civil Rules (British Columbia Reg 168/2009), r 4-5(3)

Service and Execution of Process Act 1992 (Cth), s 16
International Arbitration Act 1974 (Cth), ss 3(1), 7, Sch 2
Trade Practices Act 1974 (Cth), ss 51AA, 51AC
Insurance Contracts Act 1984 (Cth), s 8

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Origin Energy Resources Ltd v Benaris International NV and Anor [2002] TASSC 50
Etri Fans Ltd v N M B(UK) Ltd [1987] 1 WLR 1110
Taunton-Collins v Cromie and Anor [1964] 2 All ER 332

No. SC 138 of 2007

Judge: Refshauge J
Supreme Court of the ACT
Date: 12 April 2011

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IN THE SUPREME COURT OF THE)
) No. SC 138 of 2007
AUSTRALIAN CAPITAL TERRITORY)

LIGHTSOURCE TECHNOLOGIES AUSTRALIA PTY LIMITED

Plaintiff

V

POINTSEC MOBILE TECHNOLOGIES AB

Defendant

O R D E R

Judge: Refshauge J

Date: 12 April 2011

Place: Canberra

THE COURT ORDERS THAT:

1. The application be dismissed.

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1. The defendant, Pointsec Mobile Technologies AB, is a Swedish company which develops and markets enterprise security software for the protection of the privacy of data and credentials on desktop and mobile computers.

2. The plaintiff, Lightsource Technologies Australia Pty Ltd, is an Australian company which resells software and related services which it has obtained from suppliers such as the defendant.

3. On 2 October 2003, the plaintiff and the defendant entered into an agreement, described as the "PMT Partner Agreement Australia" (the Agreement), whereby the defendant granted to the plaintiff a non-exclusive, non-transferable right to market and distribute certain of the defendant's software products and services in the Australian Capital Territory on the terms and conditions set out in the Agreement.

4. The Agreement contained a clause about disputes and the governing law. That clause, cl 12.8, provided:

> Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration administered by the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute).
>
> The Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce shall apply, unless the SCC Institute, taking into account the complexity of the case, the amount in dispute and other circumstances, determines, in its discretion, that the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce shall apply. In the latter case, the SCC Institute shall also decide whether the arbitral tribunal shall be composed of one or three arbitrators. Arbitration shall take place in Stockholm, Sweden, in the English language.
>
> The construction, validity, interpretation and performance of this Agreement shall be construed and governed by the substantive laws of Sweden.

5. The Australian Department of Defence began to evaluate the security software and, in November 2003, there were discussions between officers of the plaintiff and defendant with a view to the latter's software being made available for such evaluation.

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6. From 2004, officers of the plaintiff undertook work necessary to prepare to sell licences for the defendant's software to the Department and ultimately this software was included as a product approved by the Defence Signals Directorate of the Department to be included on the Directorate's Evaluated Products List.

7. For reasons not presently relevant, the plaintiff then decided that it would tender for sale of the licences to this software jointly with another Australian company, Compucat Research Pty Ltd (Compucat). The response to the Request for Proposal was submitted by these two companies on 7 April 2006.

8. The plaintiff apparently persuaded the defendant to reduce its price for sale of the software licences to the Department. The defendant alleges that the plaintiff then set a price to the Department that effected an increase in the plaintiff's margin on the sales.

9. Subsequently, however, an Australian incorporated company, Pointsec Mobile Technologies Pty Ltd (PMT Australia), established by the defendant, made direct contact with Compucat and the two apparently proceeded to exclude the plaintiff from the supply of the software to the Department.

10. A series of letters and emails passed between the parties and, later, their lawyers, in which various claims and counter-claims were made about the issue of the payments claimed by the plaintiff to be due from the defendant and the behaviour of the parties.

11. On 28 November 2006, the defendant sent a letter to the plaintiff purporting to terminate the Agreement.

12. On 16 March 2007, the plaintiff commenced these proceedings, claiming, in summary, in its Originating Application:

    a) declarations that the Defendant has acted unconscionably, including in contravention of sections 51AA and 51AC of the *Trade Practices Act 1974* (Cth);

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b) a declaration that the Defendant has been unjustly enriched at the expense of the Plaintiff; and

c) certain consequential relief (including an order for an account, equitable damages, equitable compensation and an order under section 82 of the *Trade Practices Act*) that (presumably) will be said to flow from the foregoing declarations.

13. On 10 April 2007, Master Harper granted leave to the plaintiff to serve the Originating Application and a supporting affidavit of Leonard Victor Beacham (without the exhibits) on the defendant's registered head office in Stockholm, Sweden.

14. On 13 July 2007, a sealed copy of the Originating Application and a copy of the supporting affidavit, together with translations of those documents, a copy of the order of Master Harper and some other documents not presently relevant, were delivered to a female employed at the office of the defendant in Stockholm.

15. On 16 August 2007, the defendant filed a conditional Notice of Intention to Respond under r 111 of the *Court Procedures Rules 2006* (ACT) (the Rules).

16. On 13 September 2007, it filed an Application in Proceeding seeking that service of the Originating Application be set aside, a stay of the proceedings and other similar orders. That Application was filed within the 28-day period referred to in r 111(3) and (4) of the Rules.

17. For reasons that are not entirely clear, that application did not come on for hearing until 28 May 2008. After the hearing, I reserved my decision.

The Procedural History

18. The plaintiff's Originating Application was filed and dated on 16 March 2007. It was supported by an affidavit of Leonard Victor Beacham, affirmed on 27 February 2007, and to which were exhibited a large bundle of documents including the Agreement, the Response to the Request for Proposal and correspondence and email

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communications between the plaintiff, Defendant, PMT Australia and their respective lawyers.

19. Also filed on that day was an Application in Proceedings seeking leave to serve the Originating Application and supporting affidavit on the defendant at its "registered office" in Sweden. Curiously and, no doubt, inadvertently, the first order sought service of "the originating application dated 2 March 2007". Presumably, that was a typographical error or, perhaps, the Originating Application had been earlier prepared and expected to be filed on that date. That would be consistent with the date of Mr Beacham's affidavit.

20. There was no Originating Application dated 2 March 2007 on this file and the Application in Proceedings can only have been intended to refer to the only Originating Application filed in these proceedings, namely that dated 16 March 2007.

21. An affidavit of Paul Fabian Hynes affirmed on 12 March 2007 was also filed on 16 March 2007. It purported to be made in support of the Application in Proceedings in which it was described as such. It deposed to the registered office of the defendant, it asserted Mr Hynes' belief that the plaintiff's claim, as set out in the Originating Application and supported by Mr Beacham's affidavit, had reasonable prospects of success. It was also directed, however, to the question of translation of documents for service, for it referred to the fact that all correspondence and documents that were the basis of the claim were in English. This appears directed to the order sought in the Application in Proceedings for dispensation from r 6510(2)(c) of the Rules which requires translation of documents to be served. Rule 6510 provides for service outside Australia in a country which is a signatory to and has ratified a Convention on service of documents for, inter alia, legal proceedings.

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22. The Application in Proceedings came on for hearing on 26 March 2007 and in the absence of any appearance by any party, the application was dismissed.

23. A further Application in Proceedings was issued by the plaintiff on 30 March 2007, also relying on the affidavit of Mr Hynes, and in identical terms to the earlier Application in Proceedings, including as to the error in the date of the Originating Application. That appears to have come before the Master on 10 April 2007, when his Honour made, according to the annotation on the court record, "Orders 1 and 3 in the Application of 30 March 2007". His Honour did not give leave to dispense with translation of the relevant documents, except for the substantial exhibits to Mr Beacham's affidavit.

24. I note also that the order taken out referred to an Application in Proceedings of 10 April 2007. The actual Application in Proceedings was, in fact, dated 30 March 2007 but returnable on 10 April 2007. It would appear that the return date was mistakenly taken for the date of the Application.

25. While the court is, of course, responsible for the accuracy of the orders made, it is the solicitors for the plaintiff who prepared it (see r 1606(3) of the Rules).

26. It is clear to me that the reference to the wrong date for the Originating Application came about because of the error in the order as sought in the Application in Proceedings.

27. Such errors are regrettable and efforts should be made to ensure that they do not occur. More care is needed in preparation of documents, especially documents of or for filing in the court, as they are not only a record of the proceedings, often for important public purposes, but also required to inform parties or potential parties of the course of the proceedings.

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28. It appears that the Originating Application and affidavit of Mr Beacham were then translated into Swedish and the English and Swedish versions, together with the Certificate Identifying the Exhibits to Mr Beacham's affidavit, the Master's Order and a covering letter from the plaintiff's solicitors, were sent to a process server in Sweden who deposed in an affidavit made on 13 July 2007 that they were all handed to a female employee at the headquarters of the defendant in Stockholm, Sweden. There was no issue in the proceedings as to whether this mode of service complied with any applicable Convention.

29. As noted above (at [15] and [16]), on 16 August 2007 a conditional Notice of Intention to Respond was filed by the defendant and on 13 September 2007, the Application in Proceedings with which I am now concerned was filed.

The Challenge to the Proceedings

30. In helpful, extensive submissions, the Defendant's Submissions, dated 12 November 2007, filed in support of the orders sought in the Application in Proceedings, the defendant made the following claims about the proceedings, namely that:

    (a) the defendant was not validly served with the plaintiff's Originating Application;

    (b) the order granting leave to serve the Originating Application should be set aside; and

    (c) the proceedings should be permanently stayed in favour of arbitration in Sweden in accordance with cl 12.8 of the Agreement.

31. The plaintiff challenged each of these claims.

32. I shall deal with each in turn.

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Valid Service

33. The initial thrust of the defendant's challenge to the service of the Originating Application, set out in the Defendant's Submissions, was based on the failure of the plaintiff to serve a copy of the affidavit of Mr Hynes as required by r 6507 of the Rules.

34. Subsequently, the defendant filed a document entitled Defendant's Supplementary Submissions, dated 27 November 2007, in which it noted the discrepancy between the dates of the Originating Application and of the document that the Master's Order gave leave to serve and submitted that no service had taken place at all, for no Originating Application dated 2 March 2007 had been delivered to the Head Office of the defendant at all.

35. It is clear that the affidavit of Mr Hynes was not served in Sweden. An additional affidavit of service disclosed that it was served on the Canberra solicitors of the defendant on 26 September 2007.

36. The plaintiff had sought leave to serve the Originating Application outside Australia under r 6505 of the Rules, which provides:

> **6505** (1) The court may give leave for service outside Australia of –
>
> (a) an originating process if service outside Australia is not allowed under rule 6501 (Service Outside Australia – service of originating process without leave); or
>
> (b) a counterclaim or third-party notice if service outside Australia is not allowed under rule 6502 (Service outside Australia – counterclaim or third-party notice); or
>
> (c) a document in a proceeding other than an originating process, counterclaim or third-party notice.

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> (2) An application for leave under this rule must be supported by affidavit or other evidence –
>
> (a) for an originating process mentioned in subrule (1)(a) – establishing the plaintiff's belief that the plaintiff has a good cause of action; and
>
> (b) showing in what place or country the person on whom the document is to be served is, or probably may be found; and
>
> (c) stating the grounds on which the application is made.

37. Rule 6501 sets out the circumstances where an originating process may be served outside Australia without leave and enumerates a large number of circumstances where there is what might be regarded as traditional connections with this Territory such as ordinarily to found this court's jurisdiction.

38. It is conceivable that some or all of the unconscionable conduct the subject of the claims made by the plaintiff occurred in this Territory such as to bring the proceedings within r 6501, but neither party submitted that this was so, and I will proceed on the basis that r 6505 applies.

39. In that event, r 6507 then provides:

> **6507** (1) If the court gives leave for a document to be served outside Australia, it may give directions about the time for filing a notice of intention to respond or defence or anything else.
>
> (2) If a document is served outside Australia with the court's leave, a copy of each of the following must be served with the document:
>
> (a) a sealed copy of the order giving leave;
>
> (b) each affidavit filed in the court in support of the application for the leave;
>
> (c) an exhibit mentioned in the affidavit.

40. The Master's Order of 10 April 2007 dispensed with the requirement in r 6507 (2)(c).

41. It was common ground that the affidavit of Mr Hynes was not served with the Originating Application as required by this rule.

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42. It seems to me also that the Application in Proceedings and the order should have noted Mr Beacham's affidavit as supporting the Application since it set out the details of the claim. It was clearly necessary for the Master to have regard to it for an understanding of the nature of the claim. Indeed, the order itself referred to it as a "supporting affidavit", though, of course, it was a supporting affidavit to the Originating Application.

43. To obtain leave to serve out of the jurisdiction requires the applicant to show a good arguable case. As Debelle J said of a relevantly identical rule in the South Australian *Supreme Court Rules 1987* (SA) in *K & S Corporation Ltd and Anor v Number 1 Betting Shop Ltd & Ors* [2005] SASC 228 (*K & S Corporation*) (at [92]):

> Considerations of comity and restraint require that a plaintiff seeking leave to serve out of the jurisdiction should satisfy the Court that he has a good arguable case. This is not to require the Court to satisfy itself that the plaintiff will succeed on the merits. Instead, the Court will examine whether the plaintiff has a probable cause of action: *Société Général de Paris v Dreyfus Brothers* (1887) 37 Ch D 215 per Lindley LJ at 225. The same proposition was expressed in these terms in *Metall Und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 434:
>
> > While the court cannot at this stage determine whether the plaintiff, if given leave, will succeed, it must be satisfied that the plaintiff has a good chance of doing so.

44. See also *The Duke Group Ltd (In Liq) v Alamain Investments Ltd (In Liq) and Ors* [2005] SASC 411 (at [8]).

45. In *K & S Corporation*, Debelle J held, over the defendant's objection, that an affidavit was not necessary for the grant of leave and that a properly drawn statement of claim could suffice (at [45]):

> When seeking leave to serve out of the jurisdiction, a plaintiff must demonstrate that he has a good arguable case and that there is a real and substantial connection between this Court and the defendant or the subject matter of the litigation. The reasons for that conclusion will be given later in this judgment. Where a statement of claim has been properly drawn, it will, as a general rule, be possible to decide after an examination of the terms of the statement of claim whether those two tests have been satisfied. As the

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majority of the High Court said in *Agar v Hyde* (2000) 201 CLR 552 at [52], in a context only slightly different,

> Often enough, the statement of claim will reveal all that is necessary to know whether the plaintiff's claim is of the requisite kind.

46. In those circumstances, the affidavit of Mr Beacham was critical. It stood effectively as the Statement of Claim. While the affidavit of Mr Hynes dealt with the formal matters, it could not deal with the substantive claim in the way that Mr Beacham, a participant in the events, could do so. Mr Beacham's affidavit, of course, was what was served and with a Swedish translation as well.

47. It seems to me that the defects in the order and the failure to serve the affidavit of Mr Hynes are not fatal.

48. As to the failure to serve the affidavit of Mr Hynes, it is clear to me that failure to comply with r 6507(2) does not render service invalid. That is not the terms of the rule. It would have been easy enough so to provide, as in s 16 of the *Service and Execution of Process Act 1992* (Cth). The rule itself refers to service of the Originating Application clearly implying that service of that document is an independent step to the service of the other documents mentioned in r 6507.

49. In any event, the purpose of the rule is to ensure that the person served is given full information about the proceedings. The affidavit of Mr Beacham, which was served, with a translation, was, in that context, perhaps more important then that of Mr Hynes for it gave a detailed account of the plaintiff's claims and how they were said to arise. While the affidavit of Mr Hynes was not irrelevant, it perhaps provided less information that a foreign defendant would need to know.

50. Certainly, a foreign defendant which wished to challenge the order for service, such as under r 40(1)(c), would be helped by some of the evidence in the affidavit of Mr Hynes. Nevertheless, it was ultimately provided. The real substance, however,

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that the foreign defendant would need to address was in Mr Beacham's affidavit, which was served.

51. It is not true that, if failure to serve documents, such as the affidavit of Mr Hynes, does not render service of the originating process invalid, there is no sanction for breach. The court could do a number of things: require the plaintiff to serve the omitted documents at its own expense, adjourn proceedings until served and order costs of the adjournment and so on.

52. I am satisfied that the failure to serve the affidavit of Mr Hynes with service of the other documents, including the Originating Application, has not rendered that service invalid or ineffective.

53. The other error is somewhat more problematic. As McPherson J said in *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1990] 1 Qd R 101 (at 107):

> It is certainly true that at one time strict compliance with the requirements for issuing or serving a writ of summons or other process out of the jurisdiction was insisted upon, and that virtually any departure from them tended to be regarded as fatal. Several of the authorities are referred to in the learned judgment of Master Lee in *Hunter v Singh* [1986] 1 Qd R 106, at 120-125. In that case the Master held that defects in a notice in lieu of writ served in Fiji rendered it ineffective for the purpose of service there and that the proceedings could not be validated under the provisions of O 93 r 17 of the Rules.

54. As Collins J said in *BAS Capital Funding Corporation and Ors v Medfinco Ltd & Ors* [2004] 1 Lloyd's Rep 652 (at [216]:

> Proper service is particularly important in international cases, where the basis of jurisdiction is service.

55. McPherson J, however, considered that O 93 r 17 had a wider operation and permitted the plaintiff to rely on the delivery of a Writ of Summons as effective service despite the defect that it had been served without leave and that the endorsement was not in such a form as to show that the subject matter of the action came within the rules

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permitting service out of the jurisdiction and did not identify each claim in respect of which cross-vesting laws were involved.

56. It is now clear that failure to obtain leave is an irregularity which can be waived by a party or the court: *Leal v Dunlop Bio-processes International Ltd* [1984] 1 WLR 874.

57. The judicial trend of not visiting with the sanction of invalidity failures strictly to comply with the provisions about service out of the jurisdiction has continued.

58. In *Richard Crookes Constructions (Qld) Pty Ltd v Wendell* [1990] 1 Qd R 392, the Queensland Rules provided that, for service out of the jurisdiction, only a notice of writ should be served and the writ itself should not be served. It was submitted that, in that case, where both the notice and writ were served contrary to the rules, the service was a nullity and an abuse of process. Cooper J, however, held (at 398) that service of the writ did not taint the service of the notice, which his Honour held to be effectively served.

59. The Court of Appeal of England and Wales had to consider validity of service in *Golden Ocean Assurance Ltd & World Mariner Shipping v Martin* [1990] 2 Lloyd's Rep 215 (*the Golden Mariner*). In that case, a number of underwriters were sued in the English Courts, some of whom were out of the jurisdiction. Writs were served on six such defendants, but the writ served on each was for a different defendant and not addressed to the defendant on which the writ was served. The writs were, however, impeccable in form, content and every other respect. The court at first instance held that this amounted to no service at all, but on appeal, the Court of Appeal held that the service was effective, but irregular and capable of cure. As Lloyd LJ said (at 219) "[t]his was grossly defective. But service, or purported service, it remained".

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60. In addition, one defendant was served only with a form of acknowledgment of service of the writ, but not the writ itself. The Court of Appeal, by majority, held also that this was irregular service, but service, and capable of cure.

61. More recently, in *Phillips and Anor v Symes & Ors (No 3)* [2008] 1 WLR 180 (often cited as *Phillips v Nussberger*), the House of Lords had to consider whether service out of England of certain documents was valid. The originating process itself had been removed from the bundle of documents for service, though a German translation of it together with particulars of the claim had been properly delivered to the defendant with the other required documents. Lord Brown of Eaton–under-Heywood (with whom Lord Bingham of Cornhill and Lord Rodger of Earlsberry agreed) held that the court could dispense with service under r 6.9 of *Civil Procedure Rules* (UK) and continued (at 189-90):

> **36.** So much for the court's power to dispense with service under rule 6.9. Should the court in its discretion exercise such power? That the court would do so in a purely domestic context is surely clear beyond argument, and this notwithstanding that the exercise of the power would operate to defeat a prospective Limitation Act defence. Is it, however, appropriate to make an order which has the effect of altering the priority of the seisin of proceedings under an international Convention?
>
> **37.** On any view the power is one to be exercised sparingly and only in the most exceptional circumstances. It is difficult to suppose, for example, that it could ever properly be exercised if there had been no process of service whatever. ...
>
> There can be no question here but that the second and third defendants were served with 'an equivalent document': they had not only the German translation of the omitted claim form but the detailed particulars of claim (in both English and German) as well.
>
> **38.** In my judgment the circumstances here were indeed exceptional, the call on the exercise of the court's discretion compelling. As stated, the second and third defendants plainly suffered no prejudice whatever by the failure to serve the original claim form but rather sought to exploit it, to steal a march on the claimants.

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62. The House of Lords approved what the Court of Appeal had said and done in *The Golden Mariner* and applied that approach to hold that service was effective and that the court was not merely retrospectively validating what was invalid.

63. While this has many differences from the present case, it does appear that a court should not be too hasty to find service invalid.

64. In *Olafsson v Gissurarson (No 2)* [2008] 1 WLR 2016, the Court of Appeal was required to consider the situation where an Icelandic businessman had issued proceedings in England against a defendant domiciled in Iceland in respect of an alleged libel published in England. The relevant documents were delivered to the defendant who read, understood and retained them, but service did not comply with Icelandic law.

65. The Court of Appeal dismissed the appeal against an order dispensing with service, Sir Anthony Clarke MR said (at 2028: [32]):

> In my judgment, on the particular facts of this case, where the claim form was issued in time and delivered to the defendant within the period for service by a method of service which the claimant and his solicitors could reasonably have thought was a reasonable method of service, and where the defendant knew precisely what the claim was from the claim form, it would be unjust and contrary to the principle of the overriding objective that cases should be determined justly to refuse the relief.

66. It seems to me on the basis of these authorities that the service here was effective but irregular. Section 68(1) of the *Court Procedures Act 2004* (ACT):

> **68.** (1) No proceedings in the court are to be invalidated by any formal defect or by any irregularity, unless the court is of opinion that substantial injustice has been caused and that the injustice cannot be remedied by an order of the court.
>
> (2) The court may make an order declaring that any proceeding is valid despite any formal defect or any irregularity.

67. Ultimately, the defendant did not seek a declaration that the service was void but that the service should be set aside because of the accumulated errors and irregularities.

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The defendant expressly eschewed any claim that it was prejudiced. It did rely, however, on the need to treat foreign entities, not prima facie subject to the court's jurisdiction, with considerable respect and fairness, certainly valid points to be made. It was submitted that it could be disrespectful in this sense for a foreign defendant to be required to come to the jurisdiction, no doubt at expense, and then have to prove prejudice.

68. Section 68(1), however, denies to irregular service invalidity unless I am of the opinion that substantial injustice has been caused or that the injustice cannot be remedied by an order of the court. In my view, despite the cogent arguments of the defendant, there is no injustice here and none was identified by the defendant. In coming to this view, I rely on the following matters:

(a) the parties had corresponded about their issues in dispute and the defendant knew that proceedings were in contemplation;

(b) the defendant, through its counsel, did not identify the incorrect date of the Originating Application in its Outline of Submissions and it was not until supplementary submissions were filed about a fortnight later that the matter was raised, strongly suggesting that there had been no misleading of the defendant;

(c) the defendant seemed well able to respond effectively to the proceedings;

(d) the defect was not egregious, though it was a serious one, albeit, an error likely to be explained as above;

(e) the defendant had come to Australia to conduct business and had even apparently established a company here for that purpose;

(f) the plaintiff, though contributing, through its carelessness, to the error, had not behaved in a way that disentitled it to the relief provided by the section; and

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(g) no prejudice had been asserted or shown that the defendant suffered.

69. I reject this ground of challenge.

Setting aside the order for service

70. The defendant's second challenge was to the Master's order itself, which it was said should be set aside on two grounds:

(a) the plaintiff's affidavit in support of the application for that order did not state the grounds on which that order was sought, as required by the Rules;

(b) the order granting leave should in any event not have been made having regard to the circumstances of these claims.

71. The court is given power under r 40(1)(c) of the Rules to set aside an order for service of an originating process. The Rules do not set out any criteria or circumstances under which this power should or should not be exercised.

72. In addition, a person affected by an order obtained ex parte without notice always has a right to approach the court and have the application reheard: *Savcor Pty Ltd v Catholic Protection International APS* (2005) 12 VR 639 (at 646; [20]) per Gillard AJA (with whom Ormiston and Buchanan JJA agreed).

73. The defendant first says that the affidavit of Mr Hynes was not sufficient to justify the order for leave, in that it did not set out the grounds on which the order was sought. This is required under r 6505(2)(c) of the Rules set out above (at [36]).

74. Mr Hynes deposed relevantly in his affidavit:

> 3. The plaintiff commenced proceedings in the Supreme Court of the Australian Capital Territory by way of originating application dated 2 March 2007 and supported by the affidavit of Leonard Victor Beacham, affirmed on 27 February 2007.
>
> 4. I am informed and believe that all correspondence and documents upon which the plaintiff's claim is based are expressed in the English language.

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> 5. I believe, on the basis of provable facts and a reasonably arguable view of the law, that the plaintiff's claim, as pleaded in the originating application and supported by the Affidavit of Leonard Victor Beacham, has reasonable prospects of success.
>
> 6. The defendant's registered head office is at Humlegardsgatan 14 SE 102 49 Stockholm SWEDEN.

75. It, thus, complied with the requirements of r 6505(2)(a) and (b) of the Rules.

76. In my view, the Master must have had regard to the affidavit of Mr Beacham in coming to the view that there were reasonable grounds for making the order in compliance with r 6505(2)(a) of the Rules. That affidavit was expressly referred to in paragraphs 3 and 5 of the affidavit of Mr Hynes. Insofar as it was referred to in paragraph 5 of that affidavit, it could almost be said to be incorporated by reference. Certainly, it would have been inevitable that the Master would have had regard to it in the same way as a statement of claim would be considered. See *Agar v Hyde* (2000) 201 CLR 552 (at 574; [52]). I am prepared so to find.

77. In my view, the grounds referred to in r 6505(2)(c) of the Rules are intended at least to encompass the circumstances and basis for the claim made by the plaintiff against the defendant. It would also include the circumstances and basis for showing that there was such a connection with the jurisdiction of the court to satisfy the court that the order should be made.

78. I accept that when the plaintiff's lawyers appeared before the Master, they should have asked the Master to read the affidavit of Mr Beacham (and probably did so) and that this should have been disclosed on the order. This is an omission that is of concern but I am not prepared to hold that it discloses that a proper consideration was not given to the application, particularly in the light of the very clear reference in paragraph 5 of the affidavit of Mr Hynes to that of Mr Beacham.

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79. The defendant, nevertheless, claimed that there was not sufficient basis for the order to have been made and it should be set aside for that reason.

80. The defendant pointed out that, although the grounds on which an application may be granted are not specified in the Rules, the court's discretion must be limited by some appropriate principles. Reference was made to the power of the court to grant such leave and thereby, on service, assume jurisdiction, in the commonly used term of "an exorbitant jurisdiction". As Lord Diplock (with whom Lord Roskill, Lord Brandon of Oakbrook and Lord Brightman agreed) said in the House of Lords in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] 1 AC 50 (at 65-6):

> My Lords, the jurisdiction exercised by an English court over a foreign corporation which has no place of business in this country, as a result of granting leave under R.S.C., Ord 11, r.1(1)(f) for service out of the jurisdiction of a writ on that corporation, is an exorbitant jurisdiction, i.e., it is one which, under general English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition. Comity thus dictates that the judicial discretion to grant leave under this paragraph of R.S.C., Ord. 11. R.1(1) should be exercised with circumspection in cases where there exists an alternative forum, viz. the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules.

81. Nevertheless, since that approach was enunciated, the courts have recognised that changes in society have called for a re-assessment of the precise approach. Thus, Gaudron, McHugh, Gummow and Hayne JJ noted in *Agar v Hyde* (at 570-1):

> Considerations of comity, and consequent restraint, have informed many of the reported decisions about service out of the jurisdiction. It is, however, important to notice that rules of court, or local statutes, providing for service outside the jurisdiction are now commonplace – at least in jurisdictions whose legal systems have been formed or influenced by common law traditions. Further, as the Court of Appeal rightly noted in its reasons in these matters, contemporary developments in communications and transport make the degree of 'inconvenience and annoyance' to which a foreign defendant would be put, if brought into the courts of this jurisdiction, 'of a qualitatively different order to that which existed in 1885'
>
> The considerations of comity and restraint, to which reference has so often been made in cases concerning service out of the jurisdiction, will often be of greatest relevance in considering questions of forum non conveniens. The

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> starting point for the present inquiry, however, must be the terms of the Rules, not any general considerations of the kind just mentioned.
>
> (Footnotes omitted)

82. It is, then, in this context that the application for leave is to be made.

83. Rule 6505 of the Rules has no counterpart in many jurisdictions. South Australia, New Zealand and some Canadian provinces are exceptions. An analysis of the cases was undertaken by Debelle J in *K & S Corporation and Anor v Number 1 Betting Shop Ltd & Ors*. In *The Duke Group Ltd (In Liq) v Alamain Investments Ltd (In Liq) & Ors* [2005] SASC 411, White J summarised those principles that Debelle J drew from his analysis as follows (at [8]):

> 1. An applicant must show that it has a good arguable case. Satisfaction by the Court that the applicant has a 'good arguable case' does not involve any prediction or assessment as to the prospects of the success of the claim.
>
> 2. An applicant must show that there is a real and substantial connection between the defendant or the subject matter of the litigation and South Australia.
>
> 3. The amount claimed by the defendant or the value of the property in dispute is not insubstantial.
>
> 4. Given the potential for the Court to cause offence if it was to arrogate jurisdiction to itself improperly, considerations of comity and restraint are important.
>
> 5. The existence or otherwise of the above matters can be determined by reference to the pleadings in the third party proceeding or by reference to a supporting affidavit or both.
>
> (Footnotes omitted).

84. In *Cockburn v Kinzie Industries Inc* (1988) 1 PRNZ 243, Hardie Boys J commented of the equivalent New Zealand High Court Rules (at 247) as follows:

> ... I consider that r220 must be construed in a way that gives it practical effect. I do not think that it was intended to refer only to proceedings in which the Court already has jurisdiction. If it were, there would be little point to it. I think it clear that it was intended to enable the Court to assume jurisdiction in every kind of case which it is otherwise competent to deal with. This intention has been obscured by the use of the word 'jurisdiction' in the clause 'which the Court has jurisdiction to hear and determine'.

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85. It was said in *Fenbury Ltd (In Liq) and Ors v The Hong Kong and Shanghai Banking Corporation Ltd & Anor* [1996] SASC 5957 that those remarks were approved by the Privy Council in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187 (at 198), but it appears that the comment there recorded was simply a submission of counsel for the respondents and not a statement of approval by the Board, though (at 217) the Board did adopt what Hardie Boys J had to say about forum non-conveniens in that case, implying some approval of the approach in the case.

86. Service was permitted in much the same way in British Columbia under r 13(3) of the Supreme Court Rules (BC Reg 221/90), since repealed, and rr 4-5(3) of the Supreme Court Civil Rules (BC Reg 168/2009).

87. In *Turbide v Orrell* (BCSC, Master Horn, C973476, 6 June 1998, unreported) Master Horn said (at [6]):

> [6] I refer, for convenience sake, to a decision of my own in *Exta-Sea Charters Ltd v Forma Log Ltd* (1991) 48 CPC (2d) 36 (BCSC) in which case I held that to invoke the discretion of the court under Rule 13(3) to order service upon a defendant out of the Province, there must be a real and substantial connection between:
>
> (a) the defendant and British Columbia, or
>
> (b) the cause of action and British Columbia; or
>
> (c) the thing being litigated over and British Columbia; or
>
> (d) a person and British Columbia where the status of that person is the issue.
>
> I held that in considering whether to make an order under Rule 13(3) considerations of *forum conveniens* play no part.

88. See also: *Cook and Ors v Parcel, Mauro, Hulten & Spaanstra, P.C.* (1997) 143 DLR (4th) 213.

89. Of course, as noted in *K & S Corporation* (see [43] above), the court does not try the action to ascertain if it will succeed on the merits; it is only necessary to show that

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there is a probable cause of action in which the plaintiff has a good chance of doing so, without assessing the strength of the plaintiff's claim.

90. In this case, using the list of principles enunciated by White J (see [83] above), I assess the case as follows.

1. There does seem to me to be a good arguable case. It seems that the plaintiff could fairly claim it was substantially responsible for the effort needed to obtain the supply contract from the Department, that it brought Compucat into the arrangements and that the defendant has attempted to subvert that arrangement in a way that could be described as unconscionable. Whether this will be proved is another matter. I consider there is a good arguable case.

   It is true that this is based on the material in the affidavit of Mr Beacham and the exhibits to it, but, as I have already noted, I consider that that affidavit was properly before the Master when the order for leave to serve the defendant was made.

2. It seems to me also that there is a real and substantial connection with the Territory. The supply contract to the Department is one that was negotiated in the Territory: the supply will, no doubt, be largely provided in the Territory.

3. The amount claimed is clearly substantial, in the hundreds of thousands of dollars.

4. Comity and restraint has, of course, nothing to do with political considerations. While there may be special circumstances where political considerations may be taken into account in deciding whether an action should be permitted to proceed, it would not ordinarily be relevant where the legislature has permitted the court to accept jurisdiction. See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 (at 430; [10] to [13]) per

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Black CJ and Finkelstein J and (at 434-5; [38]) per Moore J (who dissented from the final order on other grounds). I note that the defendant has now chosen to have a presence in Australia, to the extent that it has registered a subsidiary here which acts as a very active agent for it and which has been actively involved in the matters giving rise to the cause of action here. Given that all the relevant activities seem to have taken place in Australia and that there is not a strong connection with Sweden, other than as the location of the defendant and, I can only speculate, the development and creation of the software, I do not see that the exercise of jurisdiction by this Court is an overreach or is likely to cause offence to Sweden.

5. As noted above, in considering these matters, I have given consideration to the affidavits of both Mr Beacham (and the exhibits to it) and Mr Hynes.

91. I decline to set aside the order granting leave for service of the Originating Application.

Stay of proceedings

92. Much of the argument in this case was directed towards the question raised in the defendant's Application in Proceedings, namely whether there should be a stay of proceedings because of cl 12.8 (see [4] above).

93. The defendant put this claim on four bases:

(a) section 7 of the *International Arbitration Act 1974* (Cth);

(b) Article 8 of the UNCITRAL Model Law set out in Schedule 2 of the IA Act;

(c) section 53 of the *Commercial Arbitration Act 1986* (ACT); and

(d) in the exercise of the Court's inherent power and jurisdiction to stay proceedings before it, including in conjunction with the exercise of the above powers.

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94. I shall deal with each in turn.

(a) *International Arbitration Act 1974* (Cth) (IA Act)

95. The IA Act is concerned with the recognition and enforcement of foreign arbitral awards and the conduct of international arbitrators. It also gives force of law to the UNCITRAL Model Law on International Commercial Arbitration (Model Law) adopted by the United Nations Commission on International Trade Law on 21 June 1985, the English text of which is set out in Sch 2 of the Act. The Model Law will be considered below.

96. As Allsop J said in *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 (*Walter Rau Case*) (at [30]):

> The IA Act was Australia's domestic legislative response to its international obligations under the United Nations Conference on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 (the 'New York Convention'), which appears at Schedule 1 to the IA Act.

97. Part II of the IA Act relates to Enforcement of Foreign Awards and includes s 7 which provides for the enforcement of foreign arbitration agreements. The section, relevantly, provides:

> **7. (1)** Where:
>
> (a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;
>
> ...
>
> (d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;
>
> this section applies to the agreement.

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> **(2)** Subject to this Part, where:
>
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;
>
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.
>
> ...
>
> **(5)** A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

98. This is in similar terms to Article II of the New York Convention.

99. It is to be noted that, where s 7 of the IA Act applies, then a party may apply for a stay of proceedings and the court is obliged to grant such a stay and refer the parties to arbitration. Where the section applies and the conditions are met, the court has no discretion to refuse a stay. See *Flakt Australia Ltd v Wilkens & Davies Construction Co Ltd* [1979] 2 NSWLR 243 (at 245, 250); *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 (at 350).

100. For the section to apply, so far as these proceedings are concerned, there are four preconditions:

    (a) there is an '*arbitration agreement*' within the meaning of s 3(1) of the IA Act between the parties to the court proceedings;

    (b) the agreement falls within one or more of pars (a) to (d) of s 7(1) of the IA Act, with the result that s 7 of the IA Act applies to that agreement (s 7(1) of the IA Act);

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(c) the proceedings have been instituted in a court by a party to the arbitration agreement to which s 7 applies against another party to that agreement (s 7(2)(a) of the IA Act); and

(d) those proceedings involve the determination of a matter that, under the arbitration agreement, is capable of settlement by arbitration (s 7(2)(b) of the IA Act).

101. As to (a), s 3(1) of the IA Act defines 'arbitration agreement' as follows:

> **"arbitration agreement"** means an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention;

102. The same sub-section defines "Convention" as follows:

> **"Convention"** means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of the English text of which is set out in Schedule 1.

103. Sub-article 1 of Article II of that Convention (in Schedule 1 to the IA Act) is in the following terms:

> Article II
>
> 1. 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.

104. It seems to me that cl 12.8 is an arbitration agreement. Though the defendant did not concede this, there was no real dispute about it. It refers in terms to the settlement of "[a]ny dispute, controversy or claim ... finally ... by arbitration". It refers to the defined legal relationship, namely the Agreement, which creates a legal relationship, defined by its terms, and the dispute, controversy or claim required by the Agreement to arise out of or in connection with the Agreement seems relevantly to cover the requirement that it be "in respect of" the legal relationship. Clause 12.8 is in

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relevantly similar terms to the clause considered in *Hi-Fert Pty Ltd and Anor v Kiukiang Maritime Carriers Inc (No 5) and Anor* (1998) 90 FCR 1, where that clause was held to be an arbitration agreement.

105. The Agreement will clearly operate to refer those matters capable of settlement by arbitration to arbitration and so all these conditions are fulfilled. I hold the clause to be an arbitration agreement.

106. As to (b), s 7(1)(a) and (d) of the IA Act are both relevant. Evidence was adduced from which I am satisfied that:

(a) Sweden is a Convention country and cl 12.8 provides for arbitration under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; and

(b) The defendant is incorporated in and carries on business in Sweden.

107. The place of incorporation of a company has been said to be taken to be the place of residence of the company: *Elders CED Ltd v Dravo Corporation* (1984) 59 ALR 206 (at 208).

108. As a result, the conditions in s 7(1) (a) and (d) are satisfied, save for the question of whether the arbitration is governed by the law of Sweden. That is something on which there was no direct evidence. It is not expressly provided for in cl 12.8. That clause does, however, provide that the arbitration shall take place in Stockholm, Sweden.

109. In *American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312, Giles CJ Comm D said (at 324):

> The seat of the arbitration is not necessarily where it is held, although where the parties have failed to choose the law governing the conduct of the arbitration it will prima facie be the law of the country in which the arbitration is held because that is the country most closely connected with the proceedings: see *James Miller & Partners Ltd v Whitworth Street Estates*

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> *(Manchester) Ltd* [1970] AC 583 at 607, 609, 616; *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at 453-454; *Bank Mellat v Helliniki Techniki SA* [1984] QB 291 at 301.

110. This, however, does not appear to be sufficient to show what is required by s 7(1)(a), namely that "the procedure in relation to arbitration ... is governed ... by the law of a Convention country".

111. The Rules by which the arbitration procedure is required to be governed under the Agreement are promulgated by the Arbitration Institute of the Stockholm Chamber of Commerce. There is no material which satisfies me that these Rules form part of the law of Sweden. See *Timic v Hammock* [2001] FCA 74 (at [15]).

112. I am satisfied that the matters in s 7(1)(d) of the IA Act have been made out but for this latter reason am not satisfied of the matters set out in s 7(1)(a), that is that the procedure is governed by the law of Sweden.

113. As to (c), the parties to the arbitration agreement are the parties to these proceedings and so the provisions of s 7(2)(a) of the IA Act are satisfied.

114. Finally, as to (d), the question of whether the proceedings are capable of being settled by arbitration is somewhat more complicated. In approaching this issue, I have been much assisted by the detailed, comprehensive and illuminating submissions of Mr G J Nell SC, counsel for the defendant. In them, he submitted that this requires identification of the matter (or matters) involved in the court proceedings (see s 7(2)(b) of the IA Act).

115. The term "matter" was considered by McLelland J in *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* (at 250), namely:

> In my opinion, the word 'matter' in s 7(2)(b) denotes any claim for relief of a kind proper for determination in a court. It does not include every issue which would, or might, arise for decision in the course of the determination of such a claim.

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Deane and Gaudron JJ, in *Tanning Research Laboratories Inc v O'Brien* (at 351), quoted this passage with approval and, went on to say (at 351):

> In the context of s 7(2), the expression 'matter ... capable of settlement by arbitration' may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, the expression 'matter ... capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. See *Flakt* [[1979] 2 N.S.W.L.R., at p 250]. It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy.

See also *Elders CED Ltd v Dravo Corporation* (at 210).

116. There need, however, be no exact identification between the subject matter of the proceedings and of the arbitration or, indeed, between the actual parties. As Deane and Gaudron JJ put it (at 353):

> Section 7(2) of the Act is concerned with 'proceedings [which] involve the determination of a matter ... capable of settlement by arbitration'. Its operation is thus not confined to proceedings in which the parties seek the same relief as might have been sought in arbitration proceedings. Because s 7(2) has this wider operation, the question whether a person is claiming through or under a party to the arbitration agreement is necessarily to be answered by reference to the subject matter in controversy rather than the formal nature of the proceedings or the precise legal character of the person initiating or defending the proceedings.

117. The matter, the subject of the proceedings, is to be ascertained from the pleadings and from the underlying subject matter upon which the pleadings (including, where relevant, the defence) are based: *Recyclers of Australia Pty Ltd and Anor v Hettinga Equipment Inc and Anor* (2000) 100 FCR 420 (at 426, [18]). Here, it is to be ascertained from the Originating Application and the affidavit of Mr Beacham.

118. The subject matter of the proceedings may be adequately summarised as unconscionable conduct claimed to have been committed, to the detriment of the plaintiff, by the defendant in its dealings with the Department and with Compucat in connection with licensing of the defendant's software and the provision of related

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services, as well as in refusing to supply licences and services to the plaintiff under the Agreement, such claims being made both at common law and under the *Trade Practices Act 1974* (Cth), ss 51AA and 51AC, as well as a declaration that the defendant has been unjustly enriched at the expense of the plaintiff, entitling the plaintiff to damages or equitable compensation.

119. The next issue, then is whether that matter is capable of settlement by arbitration under the terms of the arbitration agreement: *Tanning Research Laboratories Inc v O'Brien* (at 350); *La Donna Pty Ltd v Wolford AG* (2005) 194 FLR 26 (at 29; [16]); *Recyclers of Australia Pty Ltd and Anor v Hettings Equipment Inc and Anor* (at 426; [21]).

120. This involves two steps, namely whether the matter as so identified falls within the scope of the arbitration agreement and, secondly, whether it is a claim that is able to be disposed of by arbitration.

121. The first step involves the construction of the Agreement, governed by the ordinary rules of contractual interpretation. See the *Walter Rau Case* (at [41]) where Allsop J referred to the authorities requiring "a liberal approach" to the meaning of arbitration clauses. His Honour further explained this in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 (*Comandate*) (in a passage with which Finn and Finkelstein JJ agreed), where his Honour said (at 87; [165]):

> This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places. This may be seen to be especially so in circumstances where disputes can be given different labels, or placed into different juridical categories, possibly by reference to the approaches of different legal systems. The benevolent and encouraging approach to consensual alternative non-curial dispute resolution assists in the conclusion that words capable of broad and flexible meaning will be given liberal construction and content. This approach conforms with a common-sense approach to commercial agreements, in particular when the parties are

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> operating in a truly international market and come from different countries and legal systems and it provides appropriate respect for party autonomy.

122. His Honour referred to some thirteen authorities from which, among many others, it was said this approach can be "discerned in, and distilled from".

123. In particular, it requires the court to determine the meaning of the clause "by what a reasonable person in the position of [the parties] would have understood [it] to mean": *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 (at 462). The court there cited with approval what Lord Wilberforce said in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (at 995-6), namely:

> In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

124. As Mansfield J said in *Seeley International Pty Ltd v Electra Air Conditioning BV* (2008) 246 ALR 589 (at 595; [24]):

> Where there is an agreement to arbitrate, there are sound commonsense and commercial reasons why the scope of the disputes agreed to be arbitrated should be robustly assessed.

125. Nevertheless, as Hargrave J said (at [18] to [20]) in *TCL Airconditioning (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553, after a careful analysis of the authorities:

> In *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd, Allsop J* stated:
>
> > There is no legal rule that a dispute necessarily falls within an arbitration clause unless the court can be persuaded with 'positive assurance' that the clause is not susceptible of any meaning that would include the dispute within the clause ... There is no legal presumption at work.
>
> Similarly, in *ACD Tridon v Tridon Australia*, Austin J stated that there was no presumption in favour of arbitrability.
>
> In my opinion, the statements by Allsop J and Austin J that there is no legal presumption at work are correct, and have not been altered by anything said by Allsop J in Comandate Marine or by Lord Hoffman in Premium Nafta Products.

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(Footnotes omitted).

126. I have much of the relevant material about the circumstances of the Agreement in the affidavit of Mr Beacham.

127. Neither party, however, submitted that there were particular principles or issues in Swedish law that would require me to construe the Agreement and the arbitration clause in it in a particular way or, more importantly, in a way inconsistent with the approach outlined above. I shall do so.

128. Broadly, this appears to require me to facilitate rather than impede the operation of the arbitration clause and the agreement of the parties that it represents though without a presumption in favour of arbitration. I will take a liberal and not narrow approach to cl 12.8.

129. It is, of course, expressed in wide terms, both as to the subject matter of the referral ('any dispute, controversy or claim") and as to the relationship of these to the Agreement ("arising out of or in connection with"). It is also wide in its reference to the linked matter, namely the Agreement but also its breach, termination or invalidity.

130. An extensive examination of the many cases which use the term "arising out of" was undertaken by Hirst J in *Ethiopian Oilseeds & Pulses Export Corp v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep 86. As summarised by Gleeson CJ (with whom Meagher and Sheller JJA agreed) in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 (at 165), his Honour found that this phrase has usually been given a wide meaning. Thus, as Sellen J said in *Government of Gibraltar v Kenney* [1956] 2 QB 410 (at 421-2):

> ...it is quite clear that "arising out of" is very much wider than "under" the agreement. This clause very widely incorporates a difference or dispute in relation to 'any thing or matter "arising out of" as well as "under" the agreement and, in my view, everything which is claimed in this arbitration

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> can be said to be a dispute or difference in relation to any thing "arising out of"' the agreement.
>
> It is true that a quantum meruit is a quasi-contract and arises, in a sense, on an implied contract and not on any express agreement, but, in my view, in the circumstances of this case (although it may not be in all cases) the quantum meruit is an incident which arises out of the contract. It is not a remedy for breach nor does it arise on frustration, but it is an incident, which does arise as a consequence of the contract or "arising out of" it.

131. As Allsop J said in *Walter Rau Case* (at [53]) these words "encompass more than merely arising as a contractually classified complaint...". His Honour went on to say (at [56]) that the words "reflect the practical rather than theoretical, meaning to be given to the word 'contract' out of which the disputes may arise."

132 So far as cl 12.8 refers also to "dispute ... in connection with", I note that Yeldham J said of such a phrase in *Dowell Australia Ltd v Triden Contractors Pty Ltd* [1982] 1 NSWLR 508 (at 515), that the phrase

> ...should be restricted no further than necessary and should ... exclude only claims entirely unrelated to the commercial transaction covered by the contract.

133. See also *Elkateb v Lawindi* (1997) 42 NSWLR 396 (at 402).

134. The phrases "arising out of" and "in connection with" should not be read down: *Incitec Ltd v Alkimos Shipping Corporation and Anor* (2004) 206 ALR 558 (at 564; [32]).

135. In this case, applying these principles, the arbitration clause appears wide enough to cover claims for quantum meruit (*Elkateb v Lawindi* (at 402-3); *O'Connor v LEAW Pty Ltd* (1997) 42 NSWLR 285 (at 303)) and, therefore, for unjust enrichment, since quantum meruit is based on a restitution claim based on unjust enrichment: *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (at 255).

136. It was also submitted that both phrases were wide enough to encompass the claims made under the *Trade Practices Act*. This is an area in which there has been some controversy.

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137. In *Allergan Pharmaceuticals Inc and Anor v Bausch & Lomb Inc and Anor* [1985] FCA 369, Beaumont J held (at [34]) that contraventions of sections of the Act "arise exclusively from the statutory provisions themselves" and not from any contractual relationship between the parties. This approach was followed in *Hi-Fert Pty Ltd and Anor v Kiukiang Maritime Carriers Inc (No 5) and Anor* (at 15-23) where it was held (at 23) that the relevant agreement, which contained the arbitration clause, was "no more than the background against which the conduct occurred". See also *Alstom Power Ltd v Eraring Energy* [2004] FCA 706 (at [6]). The court further held that, coupled with a reference to the arbitration under English legislation, a reference there to the contract being governed by English law was an indication that "the parties did not intend that claim arising out of statute would be resolved by arbitrators in London" (at 23).

138. That approach, however, has now been apparently overruled by *Comandate* where Allsop J (with whom Finkelstein J and, on this issue, Finn J agreed) held that neither case should be followed, thus bringing the Federal Court into line with the NSW jurisdiction as expressed in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*. That latter case accepted that claims under the *Trade Practices Act* were amenable to arbitration. His Honour did, however, accept in *Commandate* (at 93; [186]) that where a claim under the *Trade Practices Act* involved the deception of the public (as opposed to a party) questions of whether it arose out of the contract may arise.

139. That, however, is not the situation here. In this case, the precise nature of the plaintiff's case is not able to be definitely ascertained in the absence of particulars. Doing the best I can, however, it seems to me that it covers the following elements:

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(a) unconscionability – dealing directly with Compucat when it was aware that the tender to the Department had been lodged jointly by the plaintiff and Compucat; refusing to pay the commission said to be due under the Agreement; terminating the Agreement; supplying software and licences independently of the plaintiff.

While the first and last of these are not breaches of the Agreement, they can only be seen as unconscionable in the context of the Agreement. For example, without the Agreement, the plaintiff's participation in the tender would have been at least much less valuable and its risk greater. It is only the existence of the Agreement that gives any colour of unconscionability to the dealings between the defendant and Compucat.

(b) Quantum meruit – failing to pay commissions that would have been due under the Agreement if the ongoing supply had been affected under it and which would recompense the plaintiff for the work done in the tender process;

(c) Unjust enrichment – failing to pay commissions that would have been due under the Agreement if the ongoing supply had been effected under it and which permitted the defendant to keep the full price of the software and licences, which was available to the defendant because of the work done by the plaintiff.

Both of these clearly rely on the Agreement, even though the claims are for moneys that are not due under the Agreement, but would have been if the defendant had neither terminated it nor dealt directly with Compucat.

(d) Termination of the Agreement – terminating it unfairly or unreasonably or unconscionably.

Clearly this is arising from the termination of the Agreement.

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140. It seems to me that each of these is a claim that arises in connection with the Agreement. It is integrally connected with and certainly not unrelated to the commercial transaction in the Agreement (see [132] above).

141. Thus, following the approach taken in *Transfield Philippines Inc & Ors v Pacific Hydro Ltd and Ors* [2006] VSC 175 (at [87]), I conclude that the unconscionable conduct includes conduct that is expressed to be included in the arbitration clause and it thus falls within the scope of the clause.

142. The second element is the question of whether the dispute is of a type that can properly be the subject of arbitration. The Full Bench of the Industrial Relations Commission of New South Wales put it this way in *Metrocall Inc v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1 (at 21; [63]):

> The final question to be considered, therefore, is whether the subject matter of the proceedings is one that is 'capable of settlement by arbitration'. As Deane J and Gaudron J observed in *Tanning Research Laboratories Inc v O'Brien* (at 351):
>
> > ... The words 'capable of settlement by arbitration' indicate that the controversy must be one falling within the scope of the arbitration agreement and, perhaps, one relating to rights which are not required to be determined exclusively by the exercise of judicial power.
>
> That is, although a necessary condition of the conclusion that a matter is 'capable of settlement by arbitration' is the finding that the controversy is one within the scope of the arbitration agreement, that finding may not be sufficient for that conclusion. Although the other members of the court did not consider this aspect we do not consider that the conclusion of Deane J and Gaudron J in this respect is inconsistent with the approach of the other members of the court and we therefore consider that we are obliged to apply it. We have already dealt with the first of these issues and now turn to the second issue as to whether it was open to the parties to agree to confer on a private arbitrator the power to resolve proceedings under s 106 of the *Industrial Relations Act*.

143. In *ACD Tridon v Tridon Australia* [2002] NSWSC 896, Austin J carefully examined this issue. He identified two kinds of limitations. The first (at [185] to [188]) concerned whether the arbitrator had jurisdiction to decide if the contract containing the arbitration clause is a valid contract. His Honour's conclusion may need to be

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revised in the light of decisions such as *Ferris v Plaister* (1994) 34 NSWLR 474. See, also, *Comandate* (at 101-105; [218] to [229]). That question, however, does not arise here.

144. The second limitation was of the kind referred to by Gaudron and Deane JJ in *Tanning Research Laboratories Inc v O'Brien*. Austin J explained it in *ACD Tridon v Tridon Australia* as follows (at [189]):

> 189 The second kind of limitation was described by MJ Mustill & SC Boyd, *Law and Practice of Commercial Arbitration in England* (second edition, 1898), p 149. After stating the general principle that any dispute or claim concerning legal rights which can be the subject of an enforceable award is capable of being settled by arbitration, and noting that the general principle was subject to some reservations, the authors proceeded to explain the reservations, including the following:
>
>> Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order or a decision that an agreement is exempt from the competition rules of the EEC under Article 85(3) of the Treaty of Rome. [footnotes omitted]

145. Thus, in *Metrocall Inc v Electronic Tracking Systems Pty Ltd*, the court there held that a claim under s 106 of the *Industrial Relations Act 1996* (NSW) was not capable of being the subject of an arbitration because the section is aimed at contracts which are against the public interest so that, when dealing with them, the Commission is exercising a function not merely in the manner of ordinary inter partes litigation but so as to achieve a public interest in the achievement of the industrial objectives set out in the Act (at 28; [28]).

146. Similarly, a winding up by the Court is a matter in which there is a public interest and requires court involvement: *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 (at [18]).

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147. Austin J also indicated that where the judgment will affect rights and interests of third parties the claim is not appropriate to be the subject of arbitration and that is an important consideration which may take the dispute out of the realm of arbitration. In this sense, it replicates the comment of Beaumont J in *Allergan Pharmaceuticals Inc and Anor v Bausch & Lomb Inc and Anor* (at [35]).

148. A further limitation, albeit of a slightly different, but related, kind is where a person not parties to the arbitration clause are necessary parties. As the Western Australian Court of Appeal said in *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110 (at [43]):

> On the contrary, where a party to an arbitration agreement makes the same claim against both the other party to the arbitration agreement and a person who is not a party to the arbitration agreement – with the result that, so far as it involves the latter, the dispute cannot be referred to arbitration – it will generally be equally difficult to ascribe to the parties to the arbitration agreement an intention that in such an event the dispute should be fragmented and that the liability of the party to the arbitration agreement and that of the third party respectively should be determined in different forums.

149. The approach to this second limitation was summed up by Allsop J in *Comandate* (at 98; [200]) as follows:

> The types of disputes which national laws may see as not arbitrable and which were the subject of discussion leading up to both the Convention and the model law are disputes such as those concerning intellectual property, anti-trust and competition disputes, securities transactions and insolvency. It is unnecessary to discuss the subject in detail. (See generally A Redfern and M Hunter, *Law and Practice of Commercial Arbitration,* 4th ed, Thomson/Sweet and Maxwell, London, 2004 at 138 et seq; M Mustill and S Boyd, *Commercial Arbitration 2001 Companion*, Butterworths, London, at 70-76; D St. J Sutton , J and Gill, *Russell on Arbitration* , Sweet and Maxwell, London, 2003 at 12-15.) It is sufficient to say three things at this point. First, the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate. Secondly, the identification and control of these subjects was the legitimate domain of national legislatures and courts. Thirdly, in none of the *travaux préparatoires* was there discussion that the notion of a matter not being capable of settlement by arbitration was to be understood by reference to whether an otherwise arbitrable type of dispute or claim will be ventilated fully in the arbitral forum applying the laws chosen by the parties to govern

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> the dispute in the same way and to the same extent as it would be ventilated in a national court applying national laws.

150. None of these matters apply here, however, and do not suggest that the current claim is one not susceptible of arbitration. Accordingly, s 7(2) of the IA Act applies.

151. That, however, is not the end of the matter, for s 7(5), if applicable, prevents s 7(2) from mandating a stay. That section, set out above (at [97]), applies where the arbitration clause or agreement is "null and void, inoperative or incapable of being performed". In my view, the agreement (clause) here is not null and void (as to the meaning of which, see *Comandate* (at 99-101; [207] to [216]).

152. Whether an arbitration agreement is inoperative or incapable of being performed does not seem to have been the subject of a great deal of judicial scrutiny.

153. A number of common law doctrines have been held to render an arbitration clause inoperative. For example, in *La Donna Pty Ltd v Wolford AG*, Whelan J held that the right to apply for a stay under s 7(2) of the IA Act was a private right and could be waived. This can be a waiver in a "stronger sense" where a party has made an unequivocal choice between alternatives so as to have abandoned its right to arbitration. Whelan J also referred to what he called "waiver in the weaker sense" where there was conduct which may preclude a successful application based on the exercise of the court's discretion.

154. Waiver was also considered in detail by Austin J in *ACD Tridon v Tridon Australia Pty Ltd*. That does not apply here.

155. Other common law doctrines include where the arbitration agreement has ceased to exist because of its frustration (see *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337) or its repudiation (see *Building & Engineering Constructions (Aust) Ltd v Property Securities No 1 Pty Ltd* [1960] VR 673).

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156. As the governing law of the Agreement is the law of Sweden, I am not sure how the court should deal with those issues. It may be that I should follow Bainton J in *Shanghai Foreign Trade Corporation v Sigma Metallurgical Co Pty Ltd and Ors* (1996) 133 FLR 417, where his Honour was considering a contract the proper law of which was, he found, the Peoples Republic of China, but held (at 427):

> I do not know and have not by either party been informed as to the law of the PRC [Peoples Republic of China] relating to the enforceability of such an arbitration agreement. But in my view the question of whether or not this Court should stay these proceedings must be determined by applying the laws in force in this State. The applicants for the stay appear to have been of the same view because their Amended Notice of motion expressly relies upon s 7 of the *International Arbitration Act* 1974 (Cth) and Article 8 of the UNICITRAL Model Law which has the force of law in Australia pursuant to s 16 of that Act.

157. It would appear that an arbitration agreement could also become inoperative through operation of statute. For example, it appears that this occurred because of the operation of the *Insurance Contracts Act 1984* (Cth) s 8 where the statute itself provides for the proper law of the contract regardless of any express provision to the contrary in the agreement in *Akai Pty Ltd v People's Insurance Company Ltd* (1996) 188 CLR 418.

158. In *HIH Casualty & General Insurance Ltd (In Liq) v Wallace* (2006) 68 NSWLR 603, Einstein J referred (at 619; [40]) to the breadth of the operation of s 7(5) and held that s 19 of the *Insurance Act 1902* (NSW), which provided a statutory option to arbitrate or litigate, overrode s 7(2) of the IA Act in the sense that it made the arbitration agreement inoperative where a party chose to litigate.

159. The plaintiff submitted that cl 11.7 of the Agreement rendered the arbitration agreement inoperative in this case. That clause is in the following terms:

> No action or claim of any type relating to this Agreement may be brought or made by Partner or PMT more than six (6) months after Partner or PMT, as the case may be, first knew or should have known of the basis for the action or claim.

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160. The plaintiff submitted that this meant that the arbitration agreement was inoperative or incapable of being performed. It certainly bars the commencing of a claim outside the six month period and, to this extent, renders the arbitration agreement inoperative and, arguably, incapable of being performed.

161. Limitation clauses may, however, bar claims for actions as well. Such clauses are commonly referred to as "Atlantic Shipping" clauses; see *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus and Co* [1922] 2 AC 250. Those clauses, however, bar the claim, not merely the ability to commence the arbitration. Commonly, they use phrases such as "where this provision is not complied with the claim shall be deemed to be waived and absolutely barred". This, of course, makes it clear that the cause of action itself is barred and undermined. I can see no element of this in cl 11.7.

162. Such limitation clauses are said to be of two types, "claim-barring clauses" and "remedy-barring clauses". The two are defined in footnotes to paragraph 652 in *Halsbury's Laws of England* (Butterworths: London, 1991) 4th ed v 2 as follows:

> 5 'Claim-barring clauses', which bar the claim, operate in the same way as a statutory time-bar. If the act required by the clause is not done, the claimant cannot succeed on his substantive claim. He could still commence an arbitration, but the award would necessarily be against him. A High Court action would fail in the same way that a claim barred by statute would fail.
>
> 6 'Remedy-barring clauses' which bar the ability to commence an arbitration, do not have the effect of barring the substantive claim. The claimant may still pursue that claim through other avenues, such as the High Court, but may not commence an arbitration.

163. For a judicial description of this distinction, see *Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 2 All ER 1471 (at 1473) per Devlin J, though his Honour there held that a clause similar to cl 11.7 was a claim-barring clause.

164. Whilst I am inclined to the view that cl 11.7 is a remedy-barring clause, it is not necessary for me finally to decide that. If I were to be wrong in this, then the

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defendant would have a good defence to the claim which it could plead in the proceedings. Of course, it is not obliged to do so. I do not consider that affects the question I have to decide.

165. The defendant made three points in relation to this. In the first place, he challenged the construction of the clause asking, rhetorically, "Would a businessman really agree on the arbitration clause that would have this effect?". There are two answers to this. In the first place, the cases disclose examples of where this is the precise effect of the clauses in commercial contracts which have been entered into by businessmen. In the second place, there are ways of drafting a clause to give the effect for which the defendant contends, if that is really what is contended, and those ways have not here been used. I should reasonably defer to the words of the Agreement.

166. In the second place, it was contended that the effect of the clause as so construed was that by delay, the party who is to bring the claim can circumvent the arbitration. That again, is, perhaps an argument to justify not construing the clause as only a remedy-barring clause. The party could then defeat any subsequent proceedings by pleading the bar. Leaving that aside, either party has the power at any time to refer a matter to arbitration and the defendant knew by at least early August 2006 that there was a dispute. Indeed, the plaintiff's lawyer threatened proceedings, which could have been a trigger to refer the dispute to arbitration. Arbitration is not like litigation, where a plaintiff must make out a claim; either party can refer a dispute for settlement. Again, of course, I note that there are a number of reported (and, no doubt, more unreported) cases where this is how the clause was construed.

167. Thirdly, it was submitted that there was still work for the arbitrator when cl 11.7 was operative, for if a claim was submitted to the arbitrator, he or she would still have to decide whether the claim was within time. It seems to me that this does not make the

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arbitration clause operative or capable of performance. The waiver or abandonment of a claim similarly leaves the clause with similar power but prevents the claim being settled by arbitration. An arbitrator could conceivably be required to decide whether the arbitration agreement had been waived or abandoned. The effect of the time bar here is, in my view, relevantly equivalent to waiver or abandonment. The arbitration agreement is inoperative or incapable of performance as a mechanism to resolve the dispute.

168. If, as noted above, waiver or abandonment renders the arbitration clause inoperative or incapable of performance, so, in my view, does a time bar.

169. As a result, I consider s 7(5) of the IA Act applies. I have already found that the preconditions in s 7(1)(a) of the Act have not been made out. Accordingly, I am not bound to grant a stay under s 7(2) of the IA Act.

170. This, of course, does not mean that the proceedings in this court are not time barred, for that depends upon the true construction of cl 11.7 on which I have not heard full argument. In any event, it is a matter for the defendant as to whether to raise the time bar in the proceedings in this court and, if so, to make out that it applies.

171. It may be that if the defendant had undertaken not to raise cl 11.7 in the arbitration or consented to a condition of the stay to that effect, s 7(5) of the IA Act might not have been applicable. I did not, however, hear argument on that and I leave it undecided.

(b) UNCITRAL Model Law article 8

172. Article 8 of the UNCITRAL Model Law, which is Schedule 2 to the IA Act and given force of law by s 16 of the IA Act, is in the following terms:

> Article 8: *Arbitration agreement and substantive claim before court*
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his

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> first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

173. It operates independently of s 7 of the IA Act but is in very similar terms. It applies to "international commercial arbitration" (art 1(1)) which requires the parties at the time an arbitration agreement is concluded to have their places of business in different countries (contracting States). This requirement is met here, where the plaintiff's place of business is in Australia while that of the defendant is in Sweden.

174. It is clearly a commercial contract and no submission was made contrary to that.

175. Section 21 of the IA Act permits the parties to agree that the Model Law will not apply to the settlement of the dispute. The Agreement does not expressly so provide. There is no evidence before me that the parties have otherwise so agreed.

176. Clause 12.8 does, however, specify that the Rules for Expedited Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce or alternatively the Rules of the Institute shall apply. Does this implicitly exclude the Model Law?

177. In *Eisenwerk Hensel Bayreith Dipl – Ing Burkhardt GmbH v Australian Granites Ltd* [2001] 1 Qd R 461, Pincus JA (with whom Thomas JJA and Shepherdson J agreed) held (at 466; [12]) that by opting for one form of arbitration, the parties showed an intention not to adopt a different system. I respectfully agree.

178. I have perused the Rules for Expedited Arbitration and there are real differences between it and the Model Law.

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179. In my view, the parties have agreed in the arbitration agreement to proceed other than in accordance with the Model Law, which does not apply. Accordingly, article 8 does not require me to refer this matter to arbitration.

(c) *Commercial Arbitration Act 1986* (ACT) s 53

180. The defendant submitted that I could exercise power under s 53 of the *Commercial Arbitration Act*. That section relevantly provides:

> (1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied –
>
> (a) That there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
>
> (b) That the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration;
>
> May make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.

181. There are three conditions for proceedings under this section. They are that:

(a) a party to an arbitration agreement commences proceedings in a court against another party to that agreement;

(b) the proceedings are in respect of a matter that the parties have agreed is to be referred to arbitration pursuant to the arbitration agreement; and

(c) the application for a stay has not been made after the applicant has filed pleadings or taken any step in the proceeding other than filing a notice of intention to respond or defence.

182. It is quite clear that requirement (a) is satisfied. On the basis of my findings above (at [140]), requirement (b) is also satisfied.

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183. As to requirement (c), I have noted above (at [16]) that the Application in Proceedings was filed within the time limited by the Rules and was, in fact, the document next filed on the Court file after the Notice of Intention to Respond. Condition (c) is satisfied.

184. As a result, I have power to order a stay, if satisfied that:

(d) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and

(e) the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.

185. As to (e), the affidavit of Ms Steinbrich of 12 September 2007 deposes at paragraph 15:

> I refer to clause 12.8 of the PMT Partner Agreement (a copy of which is at Exhibit "NS-1"). Pointsec is ready, willing and able to do all things necessary for the proper conduct of an arbitration in Sweden administered by the Arbitration Institute of the Stockholm Chamber of Commerce for any claim that Lightsource may wish to make against Pointsec, and has been so ready, willing and able since prior to the commencement of these proceedings.

186. There was no countervailing evidence and she was not cross-examined. Subject to one matter, I am satisfied of condition (e).

187. That one matter is as to the effect of the time bar. It could be argued that, in these circumstances, a party who proposes to plead in the arbitration (if there is, as there is in litigation, a discretion) the time bar can be said to be ready, willing and able to do all things necessary for the proper conduct of the arbitration. I accept that this is a rather startling proposition. I have not heard argument on it and, in view of my opinion on condition (d), I do not need to come to a decision on it.

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188. Turning then to condition (d), the defendant submitted that there was no sufficient reason why the matter should not be referred to arbitration. In *GWJ Blackman & Co SA v Oliver Davey Glass Co Pty Ltd & Noel Searle Pty Ltd* [1966] VR 570, the Full Court of the Supreme Court of Victoria observed (at 574):

> In form the section throws upon the party to a submission, who desires that the agreement for a submission should be enforced, the burden of satisfying the court that there is no sufficient reason why the matter should not be referred in accordance with the submission. But in applying the section the courts have consistently acted on the view that the parties should be kept to their bargain unless strong reasons are shown why an action commenced in defiance of the agreement for a submission should be allowed to continue. In substance it is the party who is resisting the application for a stay who has the burden of satisfying the court that there are strong grounds for refusing to allow the dispute to be determined in accordance with the submission.

189. In *Thomas (WC) & Sons Pty Ltd v Burge (Australia) Pty Ltd; General Produce Co Third Party* [1975] VR 801, the Full Court affirmed (at 805) that the burden lay on the party commencing the court proceedings to show that there was sufficient reason for not staying the proceedings. The court also accepted "that the bias in favour of granting a stay was particularly strong in the case of a contract with an international element". This is clearly stated by the High Court in *Huddart Parker Ltd v Ship "Mill Hill"* (1950) 81 CLR 502 (at 508-9).

190. Various bases have been identified by the courts and amounting to a sufficient reason for not referring a matter to arbitration. Where there are complex issues of law and no or little dispute of fact, the matter should not ordinarily be referred to arbitration: *Plummer v Delaforce* [1964-5] NSWR 1550 (at 1556); *O'Neill & Clayton Pty Ltd v Ellis & Clark Pty Ltd* (1978) 20 SASR 132 (at 134).

191. Similarly where there are likely to be a multiplicity of proceedings if the matter or part of it proceeds by arbitration with attendant costs and possible inconsistent verdicts, a stay would seem undesirable: *Abigroup Contractors Pty Ltd v Transfield Pty Ltd and Anor* (1998) 217 ALR 435 (at 451). That may not in all cases, however, be sufficient

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of itself to warrant a stay: *Channel Tunnel Group Ltd and Anor v Balfour Beatty Construction Ltd* [1993] AC 334 (at 353). Some aspects of the application of local legislation may preferably be heard by courts with appropriate jurisdiction; thus Lockhart J in *Petersville Ltd and Anor v Peters (WA) Ltd* (1997) ATPR ¶ 41-566 held (at 43,847) that a court with special expertise in dealing with complex legal and factual issues, such as market definition, competition and anti-competitive behaviour under the *Trade Practices Act* should be preferred in such cases to arbitration.

192. If a party to the proceedings is not amenable to arbitration, that is also a reason not to stay the proceedings: *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587 (at 600). The risk here is also of a multiplicity of proceedings with the possibility of inconsistent verdicts: *Mulgrave Central Mill Co Ltd v Hagglunds Drives Pty Ltd and Anor* [2002] 2 Qd R 514 (at 530). See also *Warnervale Concreting Pty Ltd (In Liq) v Abigroup Contractors Pty Ltd* [2002] NSWSC 452.

193. There are, however, a number of reasons for not referring the matter to arbitration:

- the proceedings under the *Trade Practices Act* may not be susceptible of determination in Sweden under Swedish law and are better dealt with in Australia by courts well familiar with the statutory (and common law) concepts of unconscionability;
- the proceedings have a strong connection with Australia where, no doubt, most of the relevant witnesses are and where all the relevant conduct occurred;
- the arbitration is now time-barred;
- the plaintiff has foreshadowed that there are other persons who could be joined to the proceedings who are not party to the arbitration agreement and who, therefore, could not be party to the arbitration, though none have yet been joined.

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194. None of these matters by themselves would constitute a reason of sufficient substance to justify the refusal of a stay. Indeed, some are rather weak and would not of themselves justify overriding the apparent contractual intention of the parties.

195. It seems to me that the matter is finely balanced but, on balance, I consider that, taken together, these matters amount to a sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.

(d) Inherent jurisdiction

196. The defendant sought, in the alternative, that I should stay the proceedings in the exercise of the inherent jurisdiction of the court. There were, however, no significant submissions made under this head.

197. There seems no doubt that a court has such inherent power. See *Stevens v Trewin & van den Broek* [1968] Qd R 411; *Commonwealth v Adelaide Steamship Industries Pty Ltd* (1974) 24 FLR 97 (at 100, 113). This, of course, requires a finding that the proceedings are an abuse of process.

198. In *Ahmed Al-Naimi v Islamic Press Agency* [2000] 1 Lloyd's Rep 522, Waller LJ said (at 525):

> The only other point I would make so far as the above approach is concerned is that it must not be overlooked that the court has an inherent power to stay proceedings. I would in fact accept that on a proper construction of s 9 it can be said with force that a court should be satisfied (a) that there is an arbitration clause and (b) that the subject of the action is within that clause, before the court can grant a stay under that section. But a stay under the inherent jurisdiction may in fact be sensible in a situation where the court cannot be sure of those matters but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first.

199. See also *Origin Energy Resources Ltd v Benaris International NV and Anor* [2002] TASSC 50 (at [42]).

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200. On this issue, Woolf LJ in *Etri Fans Ltd v N M B(UK) Ltd* [1987] 1 WLR 1110 said (at 1114):

> I prefer the submission of Mr Boyd that there is such an inherent jurisdiction in the court. In particular, in order to protect itself in relation to attempts to abuse the process of the court, the court has undoubtedly very wide powers of staying proceedings. However, as Mr Boyd concedes, because here the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant a stay under its inherent jurisdiction in situations dealt with by the statutory provision, but where it could or would not do so in exercise of its statutory jurisdiction, will be rare. The jurisdiction is truly a residual one principally confined to dealing with cases not contemplated by the statutory provisions.

201. It seems to me that there is no abuse of process here. Indeed, the reasons for not granting a stay under s 53 of the *Commercial Arbitration Act* are powerful reasons for not granting a stay under the court's inherent jurisdiction. I decline to do so.

Conclusion

202. As a result of these findings, the application must be dismissed. I shall hear the parties as to costs.

Postscript

203. It appears that on 28 May 2009, Compucat was joined as a party to the proceedings. Compucat is not a party to the Agreement. That joinder does not appear to have been opposed by the defendant, though the record is unclear.

204. That joinder, had it been effected in the original Originating Application, would have been a powerful basis for holding that the proceedings were not capable of resolution by arbitration, though this would in part depend on the precise nature of the claim against that new defendant. See *Panharpur Cooling Towers Ltd v Paramount (WA) Ltd* (at [43]); *Savcor Pty Ltd v New South Wales* (at 600).

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205. It would also be a powerful factor for refusing a stay under s 53 of the *Commercial Arbitration Act*. The risk of a multiplicity of proceedings and inconsistent verdicts is too great. See *Taunton-Collins v Cromie and Anor* [1964] 2 All ER 332 (at 333, 334).

I certify that the preceding two hundred-and-five (205) numbered paragraphs are a true copy of the Reasons for Judgment herein of his Honour, Justice Refshauge.

Associate:

Date: 12 April 2011

Counsel for the Plaintiff:	Mr C Robinson
Solicitor for the Plaintiff:	Moray & Agnew
Counsel for the Defendant:	Mr G J Nell SC
Solicitor for the Defendant:	Snedden Hall & Gallop
Date of hearing:	28 May 2008
Date of judgment:	12 April 2011

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