FEDERAL COURT OF AUSTRALIA

Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102

PRACTICE AND PROCEDURE – stay – operation of *International Arbitration Act 1974* (Cth) – approach to construction of arbitration clauses.

International Arbitration Act 1974 (Cth) s 7

ACD Tridon Inc v Tridon Australia Pty Ltd [2002] NSWSC 896 referred to
Administration of Norfolk Island v SMEC Australia Pty Ltd [2004] NFSC 1 referred to
Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90 referred to
Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488 referred to
Bakri Navigation Co Ltd v Owners of the Ship 'Golden Glory' [1991] FCA 306 referred to
Commerce Parks of DFW Freeport v Marian Construction Co 729 F 2d 334 referred to
Crane v Hegeman-Harris Co Inc [1939] All ER 68 referred to
Dowell Australia Ltd v Triden Contractors [1982] 1 NSWLR 508 referred to
Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The 'Playa Larga' and 'Marble Islands') [1983] 2 Lloyd's Rep 171 referred to and discussed
Ethiopian Oilseeds & Pulses Export Corporation v Rio Del Mar Foods Inc [1990] 1 Lloyd's Rep 86 discussed
Federal Commerce and Navigation Co Ltd v Tradex Export SA (The 'Maratha Envoy') [1978] 1 AC 1 discussed
Ferris v Plaister (1994) 34 NSWLR 474 discussed
Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd [1979] 2 NSWLR 243 referred to
Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 430 discussed
Government of Gibraltar v Kenney [1956] 2 QB 410 discussed
Gunter Henck v Andre & Cie [1970] 1 Lloyd's Rep 235 referred to
Harbour Assurance Co (UK) Ltd v Kansa General Insurance Co [1993] QB 701 referred to
HE Daniels Ltd v Carmel Importers [1953] 2 QB 242 discussed
Heyman v Darwins Ltd [1942] AC 356 referred to
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (1998) 90 FCR 1 (*The 'Kiukiang Career'*) discussed and followd
Howard Electrical & Mechanical Co v Frank Briscoe Co 754 F 2d 857 referred to
IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 466 referred to
Incitec Ltd v Alkimos Shipping Corporation [2004] FCA 698 referred to
Inco Europe Ltd v First Choice Distribution [1994] 1 WLR 270 referred to
Mir Brothers Development Pty Ltd v Atlantic Constructions Pty Ltd (1984) 1 BCL 80 discussed
Morton v Baker, Einfeld J, 25 March 1993 referred to
Pacific Carriers Ltd v BNP Paribas (2004) 208 ALR 213 referred to
Paper Products Pty ltd v Tomlinsons (Rockdale) Ltd (1993) 43 FCR 439 referred to
Prima Paint Corp v Flood & Conklin Manufacturing Co 388 US 395 referred to

QH Tours Ltd v Ship Design & Management (Australia) Pty Ltd (1991) 33 FCR 227 referred to
Re Wakim; Ex parte McNally (1999) 198 CLR 511 referred to
Recyclers of Australia Pty Ltd v Hettinga Equipment Inc (2000) 100 FCR 420 referred to
Roose Industries Ltd v Ready Mixed Concrete Ltd [1974] 2 NZLR 246 referred to
Samick Lines Co Ltd v Owners of the 'Antonis P Lemos' (The 'Antonis P Lemos') [1985] AC 711 discussed
Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332 referred to
The 'Hollandia' [1983] 1 AC 565 referred to
Union of India v EB Aaby's Rederi A/S (The 'Evje') [1953] AC 797 referred to

International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 (the "New York Convention")

Zines *Federal Jurisdiction in Australia* (3rd edn)

WALTER RAU NEUSSER OEL UND FETT AG v CROSS PACIFIC TRADING LTD AND ORS
NSD 432 of 2005

ALLSOP J
15 AUGUST 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 432 of 2005**

BETWEEN:	**WALTER RAU NEUSSER OEL UND FETT AG** **APPLICANT**
AND:	**CROSS PACIFIC TRADING LTD** **FIRST RESPONDENT**
	PATRICK SHUNG WONG **SECOND RESPONDENT**
	WILLEM JOHAN VAN VLYMEN **THIRD RESPONDENT**
	ORBIS COMMODITIES PTY LIMITED **FOURTH RESPONDENT**
	INTERNATIONAL COMTRADE & SHIPPING LIMITED **FIFTH RESPONDENT**
	RUSSELL ISLAND PLANTATION ESTATES LIMITED **SIXTH RESPONDENT**
	KAY LITTLE JOHN **SEVENTH RESPONDENT**
	AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED **EIGHTH RESPONDENT**

JUDGE:	**ALLSOP J**
DATE OF ORDER:	**15 AUGUST 2005**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The applicant and the first to sixth respondents provide to the associate to Allsop J by 17 August 2005:
   (a) submissions, if any as to the second proposed condition on the stay under s 7(2) of the *International Arbitration Act 1974* (Cth) referred to in [111] of

the entered reasons;

(b) an agreed form of orders reflecting the reasons herein, or, failing agreement, the orders for which each contends.

2. The proceedings stand over to 4.30 pm 19 August 2005 for the making of orders on the notices of motion concerning arbitration.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGE:	**ALLSOP J**
DATE:	**15 AUGUST 2005**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The brief background to this litigation can be found in my reasons dated 18 July 2005 for the discharge of freezing orders made earlier this year ([2005] FCA 955). By way of further explanation, I set out the following. On or about 4 September 2003, a contract for the purchase and sale of copra was entered between the applicant and the first respondent. The

fourth respondent later gave a guarantee of the first respondent's obligations as seller under the contract. A loan of USD 100,000 was made by the applicant to the first respondent. In May the following year, the contract was varied as to price and tonnage. The contract was subject to the standard clauses of the Federation of Oils, Seeds and Fats Association Limited (FOSFA) contract number 4.

2 It is necessary to deal with a group of interlocutory issues which arise in relation to this matter concerning an arbitration clause in the above contract.

3 The applicant has filed an amended application and an amended statement of claim. It also seeks leave to file a proposed second amended statement of claim.

4 The first to sixth respondents by motion seek orders pursuant to s 7 of the *International Arbitration Act 1974* (Cth) (the IA Act) in the following terms:

> *1. An order pursuant to Section 7 of the International Arbitration Act 1974 (Cth) for all of the Applicant's claims as set out in its Statement of Claim filed of record on the 24th March, 2005 to be stayed pending the determination of those matters alternatively pending a determination of so much of those matters as are arbitrable pursuant to the Arbitration Agreement as set out in the contract between the Applicant and the First Respondent and in accordance with the provisions of Clause 32 of the FOSFA Contract for Oil Seeds in Bulk terms.*
>
> *2. An order under Article 8 of the UNCITRAL MODEL LAW for all of the Applicant's claims as set out in its Statement of Claim filed of record of the 24th March, 2005 to be stayed pending the determination of those matters alternatively pending a determination of so much of those matters as are arbitrable pursuant to the Arbitration Agreement as set out in the Contract between the Applicant and the First Respondent and in accordance with the provisions of Clause 32 of the FOSFA Contract for Oil Seeds in Bulk terms.*

5 The applicant by motion seeks an order that until further order the first respondent be restrained from invoking or taking any steps under the arbitration agreement.

6 Necessary for the discussion of both these motions is an understanding of the pleaded claims. I have not formally given the applicant leave to amend the existing filed amended statement of claim. However, Mr Jacobs QC, who appears for the respondents with Mr Bambagiotti, has indicated that there is no objection to my determining these motions on the basis of the

proposed second amended statement of claim. He did, however, say that, in due course, there would be various objections to that proposed pleading. (I have indicated to the parties that I expect counsel to discuss any issue that may be referred to as a "pleading point".)

Trade Practices Act 1974 (Cth) and cognate State legislation

7 The first part of the pleading concerns the *Trade Practices Act 1974* (Cth) (the TP Act) and equivalent State legislation. Various representations are pleaded. The first, second and third respondents (CPT, Mr Wong and Mr Van Vlymen) are said to have made the following representations on or about 4 September 2003:

1. the "Registration Representations": that CPT was an incorporated entity, authorised to carry on business as a company, was a company whose registration as a company was current by the law of its place of incorporation, was not the subject of a notice of deregistration and dissolution or was not the subject of such a notice other than one which was supported by an answer and was a company that would continue to be maintained on the relevant register.
2. the "Australian Company Representations": that CPT was incorporated and resident in Australia.
3. the "Title Representation": that CPT had, or would have, title to copra from the sixth respondent, RIPEL.

   (These representations were said to arise from two emails from Mr Wong to the applicant and the contract of 4 September 2003 itself as purportedly executed. In part these are pleaded as representations as to future matters.)

8 Mr Wong and Mr Van Vlymen are said to have made the following representations to the applicant on or about 4 and 11 September 2003.

4. the "Director Representations": that each was a director of the CPT.

   (This representation was said to arise from an email from Mr Wong to Mr Horn on 4 September and its signature, the signature on and execution of the contract under CPT's common seal, the execution by each as directors of CPT of a promissory note and a statement on or about 17 September 2003 by Mr Van Vlymen to someone at "Creditform" as agent for the applicant.)
5. the "Orbis Representations": that Orbis had AUD 2 million in unencumbered assets, that Orbis had, and would have, the capacity to meet its obligations under

its guarantee of CPT's obligations and that CPT, as principal debtor, would remain an incorporated entity.

(These representations are said to arise from conversation between Mr Van Vlymen and Mr Horn, a draft guarantee, emails and the guarantee in question.)

9 CPT, Mr Wong and Mr Van Vlymen are said to have made the following representation on or about 24 October 2003:

6. the "Incorporation Representation": that CPT was an incorporated entity registered under the law of the Cook Islands and had not been deregistered and dissolved under that law.

(This representation is said to have arisen from an invoice for copra signed by, or at the direction of, Mr Wong and/or Mr Van Vlymen.)

10 CPT, Mr Wong, Mr Van Vlymen and the seventh respondent Ms Littlejohn (an employee of one of the respondents or a related entity) are said to have repeated the Incorporation Representation on 11 November 2003 by issuing another invoice for copra.

11 CPT, Mr Wong, Mr Van Vlymen and Ms Littlejohn are said to have continued the Registration Representations, the Incorporation Representation and the Orbis Representations from 24 October 2003 by the issue of invoices for copra.

12 Each of the Director Representations, the Registration Representations and the Orbis Representations are said to have been continuing representations by CPT, Mr Wong, Mr Van Vlymen and, with some exceptions, Orbis by reason of various oral and written statements in September 2003.

13 CPT, Mr Wong, Mr Van Vlymen, Orbis, the fifth respondent (ICS) and Ms Littlejohn are said to have made the following representations from 24 October 2003 to 18 June 2004 by signing and issuing invoices and accepting payment.

7. The "Copra Transfer Representations": that CPT had acquired title to copra, that upon payment title to the copra would be transferred to the applicant, that CPT had transferred and delivered copra invoiced and recorded in delivery notes to sheds at Yandina, that copra invoiced was held in the sheds on behalf of the applicant, that CPT was incorporated and that each invoice and delivery note

evidenced a genuine transaction by CPT.

14 These representations were said to have been false and misleading in the following respects:

(a) as to the Registration Representations: CPT was not authorised or permitted by law to carry on business after 4 July 2003, notice as to deregistration was given on 6 August and on 6 October CPT was deregistered and dissolved;
(b) as to the Director Representations: Mr Wong and Mr Van Vlymen were at no time directors of CPT;
(c) as to the Incorporation Representation: CPT was not incorporated after 6 October 2003 at any material time;
(d) as to the Australian Company Representation CPT was not incorporated in Australia or resident in Australia;
(e) as to the Title Representation: CPT did not have at any material time contractual entitlement to purchase copra from RIPEL or could not have acquired title after 6 October because of its deregistered status.

15 Mr Wong and Mr Van Vlymen are said to have accessorial involvement in this misleading and deceptive conduct.

16 The above representations were also said to have been false and misleading in the following respects:

(a) as to the Copra Transfer Representations: CPT was not incorporated after 6 October 2003;
(b) as to the Orbis Representations: Orbis did not have reserves of AUD 2 million and there were no reasonable grounds for Mr Van Vlymen and Orbis to represent that Orbis could guarantee CPT's obligations under the contract of sale.

17 CPT, Mr Wong, Mr Van Vlymen and Orbis are said to have accessorial involvement in the Orbis Representations. Also, they, together with ICS, RIPEL and Ms Littlejohn are said to have accessorial involvement in the Copra Transfer Representations.

18 It was said that the applicant entered the contract relying on and induced by the Registration Representations, Australian Company Representations, the Title Representation and the Director Representations made by CPT, Mr Wong and Mr Van Vlymen.

19 It was said that the applicant advanced the loan of USD 100,000 in reliance upon these same representations and the Orbis Representations by CPT, Mr Wong, Mr Van Vlymen and Orbis.

20 It was said that the applicant paid sums totalling USD 994,706.58 on invoices and delivery notes in reliance on the Contract Representations (a term not otherwise defined in the relevant pleading, but presumably the Registration Representations), the Incorporation Representation and the Copra Transfer Representations.

21 There is also an allegation of a contravention of s 53(d) of the TPA concerning an affiliation of CPT with a company called Fayman Shipping Pty Limited (the "Fayman Representation").

22 The relief sought consequent upon the various contraventions includes damages, orders settling aside or declaring void the contract of sale, the promissory note and the arbitration agreement within the said contract.

Fraud

23 The following representations are said to have been made fraudulently by the following people:

(a) the Registration Representations and the Director Representations by CPT, Mr Wong and Mr Van Vlymen
(b) the Copra Transfer Representations by CPT, Mr Wong, Mr Van Vlymen, Orbis, ICS and Ms Littlejohn.

24 All respondents are said to have been knowingly involved in and assisted in the above fraud.

25 It is said that the applicant was induced by the fraud to enter the contract, accept the promissory note, make the loan, make payment under the contract and to vary the contract.

The Corporations Act 2001 (Cth)

26 Various claims were made under the *Corporations Act 2001* (Cth). First, a claim is pleaded under s 131 against Mr Wong and Mr Van Vlymen in relation to the contract said to have been purportedly entered on behalf of CPT.

27 Secondly, a claim is pleaded under ss 156 and 601CD against Mr Wong and Mr Van Vlymen.

The International Arbitration Act 1974 (Cth)

28 The following is pleaded in para 66 of the proposed pleading:

> *Further and in the alternative the applicant says that the agreement to arbitrate in the contract as amended is null and void within section 7(5) of the* International Arbitration Act *1974 and or is not capable of settlement by arbitration within section 7(2) and or that the disputes herein are not with* (sic: within) *the scope of the said agreement and or by reason of the avoidance of the said contract and or by reason of the relief claimed under section 87 and or in equity for mistake and or by reason of an order made under s 1324(1) of the* Corporations Act *are not within section 7(1) of the said Act.*

29 The pleading then sets out various claims under the contract and in restitution. These include the claims that, by operation of the contract for sale, in particular cll 25 and 29, the contract had ended, entitling the applicant to be repaid the claimed sums.

The claim for a stay under the *International Arbitration Act 1974*

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.

31 Article II of the New York Convention provided as follows:

> 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.*
> 2. *The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*
> 3. *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

32 There was no debate between the parties about the application of the IA Act here, that is, that s 7(1) of the IA Act was satisfied.

33 Subject to an important qualification concerning disputes arising from the carriage of goods by sea (see s 2C of the IA Act), s 7 of the IA Act provides for a mandatory stay of proceedings dealing with disputes the subject of arbitration. It provides as follows:

> *(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;*
> *(b) 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 country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;*
> *(c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or*
> *(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.*
>
> *(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.*
>
> *(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.*
>
> *(4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.*
>
> *(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.*

34 The phrase "arbitration agreement" is defined in s 3(1) of the IA Act to mean

> *an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention.*

35 Sub-article 1 of Article II of the New York Convention is in terms referred to above.

36 The contract for sale to which I referred in [17] of my reasons of 18 July 2005 contained the following clause:

> *Terms:* *As per current F.O.S.F.A contract No 4 applicable at the date of sale.*
>
> *...*
>
> *Arbitration:* *In London as per the rules and regulations laid down by F.O.S.F.A relating to arbitration and appeal under contract number 4.*

37 The FOSFA contract number 4 contained an arbitration clause in the following terms.

> *32. ARBITRATION:* ***Any dispute arising out of this contract, including any question of law arising in connection therewith*** *shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Association Limited, in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant. Neither party herein, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be), in accordance with the Rules of Arbitration and Appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of Award from the arbitrators, umpire or Board of Appeal (as the case may be), shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute.*
> (emphasis added)

38 Thus, relevantly, the arbitration clause in the contract, being a contract between the applicant and the first respondent, CPT, provided for:

> *any dispute arising out of this contract, including any question of law arising in connection therewith*

to be referred to arbitration.

The arguments of the parties

39 Complex and lengthy submissions have been filed on behalf of the parties. I am grateful to counsel for the thoughtful and comprehensive submissions. They will remain with the file. It would overburden this interlocutory judgment to deal with every presentation of the submission. Some evidence has been filed and the parties agree that it can be taken as read. To the extent that I have failed to appreciate the nature or extent of any argument, that can be raised by counsel.

40 The issues are as follows:

(a) First, what is the meaning and extent of the arbitration clause. This involves both a textual analysis and application of the meaning ascribed to the words to the claims made in the proposed second amended statement of claim. This issue provides the framework within which all other issues below are to be analysed. I will call this the "scope of the arbitration agreement issue".

(b) Secondly, it is said by the applicant that by reason of the various claims that are made the arbitration agreement is "null and void, inoperative or incapable of being performed" for the purposes of s 7(5) of the IA Act. These issues, which I will call the "the s7(5) issues", are not without their complexities, both in legal resolution and procedural management.

(c) Thirdly, depending upon the resolution of the scope of the arbitration agreement issue and the s 7(5) issues, and assuming that some stay is called for by the operation of s 7(2) of the IA Act, the extent of the mandatory stay thus called for. This issue, which I will call the "mandatory stay issue", calls for some consideration of the meaning of the word "matter" in s 7 of the IA Act.

(d) Fourthly, also depending upon the resolution of the scope of the arbitration agreement issue and the s 7(5) issues, and assuming that some mandatory stay is called for by s 7(2) of the IA Act, should some further stay be imposed in the exercise of a discretion. I will call this the "discretionary stay issue".

(e) Fifthly, also depending upon the resolution of earlier issues, and assuming that some mandatory stay is called for by the operation of s 7(2) of the IA Act, what conditions, if any, should be placed upon such a stay? I will call this the "stay conditions issue".

(f) Sixthly, consequential upon the resolution of these issues will be the question of

the further disposition of the present controversy before the Court.

Issue 1: the scope of the arbitration agreement issue

The construction of the clause and the relevant authorities

41 The proper approach to the construction and interpretation of arbitration clauses has been discussed in many cases in recent years. Arbitration clauses are contractual provisions (better analysed as separate agreements: see Issue 2 below) and are governed by the ordinary rules of contractual interpretation. However, the authorities are clear that a liberal approach to their meaning should be given, without any policy attempting to restrict their scope. That is not to say that all arbitration clauses should be given an identically broad meaning. The parties and (as here) industry associations are free to choose such language as they wish. A liberal interpretation of words with an elastic meaning does not entitle one to give the words in question meaning which they do not bear. The emphasis on a liberal interpretation of appropriately wide words has been an attempt by judges in more recent years to counter a restrictive approach to construction of arbitration clauses reflective of suspicion of removal of disputes from courts (being a suspicion more evident in years past). 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 with the clause: cf *Howard Electrical & Mechanical Co v Frank Briscoe Co* 754 F 2d 857, 850; and *Commerce Parks of DFW Freeport v Marian Construction Co* 729 F 2d 334,338. There is no legal presumption at work. The Court must construe the contract giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration.

42 This liberal approach can be seen as underpinned by the following consideration. The courts will presume 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.

43 The above general approach can be discerned in, and distilled from, many cases, most

notably, *Heyman v Darwins Ltd* [1942] AC 356; *Government of Gibraltar v Kenney* [1956] 2 QB 410; *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The 'Playa Larga' and 'Marble Islands')* [1983] 2 Lloyd's Rep 171; *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488; *Ethiopian Oilseeds & Pulses Export Corporation v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep 86; *Dowell Australia Ltd v Triden Contractors* [1982] 1 NSWLR 508; *Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246; *Harbour Assurance Co (UK) Ltd v Kansa General Insurance Co* [1993] QB 701; *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, especially 475-77; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 430, especially 165-66 and 168; and *Ferris v Plaister* (1994) 34 NSWLR 474.

44 Mr Jacobs QC submitted that the words here are to be understood, textually, as saying any dispute arising out of the contract and including any question of law arising *in connection with the contract*. I do not agree with this textual construction of the words. The *disputes* submitted are those *arising out of the contract*. These disputes include any question of law arising in connection with such disputes. The word "therewith" takes one back to the set of disputes that the clause submits to arbitration. This is to reinforce the authority of the arbitrator to decide legal questions that may arise in connection with the submission. This is not to give a restricted meaning to the words of the agreement. It is only to recognize that the agreement to submit was in respect of "any dispute arising out of the contract", and included all questions of law arising in connection with such disputes.

45 The phrase "arising out of" has been the subject of judicial consideration on a number of occasions. It goes without saying that the process of contractual construction is one directed to the particular contract in question which, of course, can be affected by the particular circumstances and context of the making of the contract in question: cf *Pacific Carriers Ltd v BNP Paribas* (2004) 208 ALR 213. However, standard form contracts, including in particular standard forms international terms and conditions of organisations such as FOSFA, using phrases that have had meanings given to them by commercial courts, should be interpreted, in the interests of international comity and international commercial certainty, in a consistent way, giving weight to those previous decisions. Of course, if the particular circumstances of the case or the other provisions of the contract point in a different direction, a different construction may obtain. In this respect, the words of Lord Diplock in *Federal Commerce and Navigation Co Ltd v Tradex Export SA (The 'Maratha Envoy')* [1978] 1 AC 1

at 8 are especially worth noting, even though made in the context of charterparties:

> ***In practice the contracts negotiated in this market by the parties or their brokers are based upon one or other of a number of printed forms of charter-parties appropriate to the various kinds of use to which vessels are put.*** *These forms incorporate numerous standard clauses to which additions, often in the form of other well-known standard clauses, and deletions are agreed in the course of the bargaining process in which agreement is also reached upon such basic terms as rates of freight, demurrage and dispatch money.*
>
> *...*
>
> ***No market such as freight, insurance or commodity market****, in which dealings involve the parties entering into legal relations of some complexity with one another,* ***can operate efficiently without the use of standard forms of contract and standard clauses to be used in them. Apart from enabling negotiations to be conducted quickly, standard clauses serve two purposes****. First, they enable those making use of the market to compare one offer with another to see which is the better; and this, as I have pointed out, involve considering not only the figures for freight, demurrage and dispatch money, but those clauses of the charter-party that deal with the allocation of misfortune risks between charterer and shipowner, particularly those risks which may result in delay.* ***The second purpose served by standard clauses is that they become the subject of exegesis by the Courts so that the way in which they will apply to the adventure contemplated by the charter-party will be understood in the same way by both the parties when they are negotiating its terms and carrying them out****.*
>
> *It is no part of the function of a Court of justice to dictate to charterers and shipowners the terms of the contracts into which they ought to enter on the freight market; but* ***it is an important function of a Court****, and particularly of your Lordship's House,* ***to provide them with legal certainty at the negotiation stage as to what it is that they are agreeing to****. ...*
> [emphasis added]

46 Mahoney JA in *Ferris v Plaister* at 498 made a similar point.

47 There is no particular background fact here relevant to the making of the contract which would lead to the conclusion that the parties were not intending the standard form FOSFA contract to bear a meaning affected and influenced by the relevant case law on the phrase "arising out of" in the arbitration context.

48 Hirst J in *Ethiopian Oilseeds* undertook an extensive examination of many cases dealing with arbitration clauses. That decision (dealing as it did with the phrase "arising out of") was

referred to with unqualified approval by Gleeson CJ (with whom Meagher JA and Sheller JA agreed) as reflecting the current state of law in New South Wales in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* at 165. There, Gleeson CJ said:

> *When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument.*
>
> *In* Ethiopian Oilseeds*, Hirst J held that a claim for rectification of a contract gave rise to a dispute "arising out of" the relevant agreement.*
>
> *That decision,* ***and the reasoning underlying it****, reflects the current state of the law in New South Wales: see also* IBM Australia Ltd v National Distribution Services Ltd *(1991) 22 NSWLR 466 at 475-477, per Kirby P.*
> (emphasis added)

49 The approach enunciated by Hirst J and, through him, by Gleeson CJ, Meagher JA and Sheller JA, is consistent with most modern authorities: *Heyman v Darwins Ltd* especially at 366; *HE Daniels Ltd v Carmel Importers* [1953] 2 QB 242, 255; *Government of Gibraltar v Kenney* at 421-23; *Gunter Henck v Andre & Cie* [1970] 1 Lloyd's Rep 235, 240-41 (Mocatta J); *The 'Playa Larga'; Ashville Investments Ltd v Elmer Contractors Ltd;* cf *Union of India v EB Aaby's Rederi A/S (The 'Evje')* [1953] AC 797, 814 and 817.

50 It is helpful for the resolution of the present controversy to elucidate the bare, though essential, propositions distilled by Gleeson CJ in the first paragraph cited above from *Francis Travel.* The potential width of the phrase "arising out of" can be seen in *Samick Lines Co Ltd v Owners of the 'Antonis P Lemos' (The 'Antonis P Lemos')* [1985] AC 711 (a case discussed by Hirst J as part of his reasoning approved by Gleeson CJ in *Francis Travel*). The issue in *Samick* was the meaning of a provision of the *Supreme Court Act, 1981* (UK) conferring Admiralty jurisdiction in the following relevant terms:

> *any claim arising out of any agreement relating to… the use or hire of a ship*

Lord Brandon (with whom Lord Scarman, Lord Diplock, Lord Roskill and Lord Templeman agreed) said the following at 727.

> *With regard to the first point, I would readily accept that in certain contexts*

> *the expression "arising out of" may, on the ordinary and natural meaning of the words used, be the equivalent of the expression "arising under", and not that of the wider expression "connected with". In my view, however,* ***the expression "arising out of" is, on the ordinary and natural meaning of the words used, capable, in other contexts, of being the equivalent of the wider expression "connected with". Whether the expression "arising out of" has the narrower or the wider meaning in any particular case must depend on the context in which it is used.***
> [emphasis added]

51 The context for giving the words "arising out of" a wide meaning is provided here by their being found in an arbitration clause and, therefore, being subject to the considerations to which I have referred.

52 Another case discussed and applied by Hirst J in *Ethiopian Oilseeds* was the decision of Sellers J (as his Lordship then was) in *Government of Gibraltar v Kenney*. In that case the arbitration clause was framed, relevantly, as follows:

> *any dispute ... in relation to any thing or matter arising out of or under this agreement…*

53 After reference to *Heyman v Darwins Ltd,* Sellers J, at 421-22, made clear that the phrase "arise out of" was wide enough to encompass claims not contractual in nature, but which had a "close association" with the contract, or were "incidental to" the contract, or which required the "same investigation of the contract and its terms and the performance under it" as claims in contract would, and which were "so closely linked with the contract". This same view of the English meaning of the phrase "arising out of" was expressed by Lord Brandon, 30 years later, in *The 'Antonis P Lemos'.* This meaning encompasses notions of practical connection of the dispute with the contract of a kind redolent of the ascertainment of the extent of the "matter" in the sense used in Chapter III of the Constitution in relation to federal jurisdiction. I will return to this in due course. For present purposes, it is sufficient to note that Sellers J viewed the words "arising out of the contract" as wide enough to encompass a relationship of closeness with the agreement itself and its performance. Such an approach can be seen to be conformable with the presumed intentions of the parties to have possible disputes connected with the making, the terms and the performance of the contract dealt with by one forum – the arbitration. To that extent the words "arise out of the contract" are apt, or at least sufficiently flexible, to encompass a sufficiently close connection with the making, the terms, and the performance of the contract as permit the words "arise out of" aptly or appropriately to

describe the connection with the contract. These words encompass more than merely arising as a contractually classified complaint from one party's rights or another party's obligations under, or in, a bilateral juridical relationship.

54 These views of Sellers J that the words "arising out of" encompass a relationship of connection assist in appreciating the importance of what Hirst J said in concluding, as he did, in *Ethiopian Oilseeds,* in the following terms at 97:

> *I derive considerably more assistance from the* Ashville *case itself. This is authority that a claim for rectification is within the scope of "arising thereunder or in connection therewith".* ***I find it very difficult to make any distinction between the words "arising out of" and "arising in connection with", the two phrases appearing to me to be virtually synonymous****. I also respectfully agree with Lord Justice Balcombe and Lord Justice Bingham that the parties must be presumed to have intended to refer to arbitration all the disputes arising out of this particular transaction (which must include a plea for rectification), and not to have two sets of proceedings; this view seems to me to be underlined by sub-cl. (b) of the arbitration clause. The reasoning of the Queensland Court in* Drennan*'s case, approved by the Court of Appeal, and referring specifically to disputes "arising out of or concerning" the agreement, seems to me particularly apt in the context of the present case. I also place great weight on the cases, stretching from the* Gibraltar *case to the* Mantovani *case, which emphasize* ***the wide amplitude of the words "arising out of", echoed in the statement in Mustill and Boyd that they cover every dispute except a dispute as to whether there was ever a contract at all.***
>
> *The dicta in* Heyman v. Darwins *seem to me more apt than those in* The Evje *when, as here, disputes arising both "under" and "out of" the contracts are included in the clause, which surely suggests that the second phrase must add something to the first. For the same reason this particular clause would seem to me to fall within a context, recognised by Lord Brandon in* The Antonis P. Lemos*, where "out of" is wider and equivalent to "connected with".*
>
> *I derive no assistance whatsoever from the* Agip *case and* The Olympic Pride*, where no decision on the point was made.*
>
> *Stepping back and viewing this body of authority as a whole, it seems clear that while "arising under" standing alone would probably not cover rectification for the reasons given in the* Fillite *case, "arising out of" in the present context should be given a wide interpretation covering disputes other than one as to the very existence of the contract itself, so as to give effect to the parties' presumed intention not to have two sets of proceedings.*
>
> *For all these reasons, I have come to the conclusion, and I hold, that rectification is within the scope of this arbitration clause.*
> [emphasis added]

55 See also Ackner LJ (as his Lordship then was) in *The 'Playa Larga'* at 183.

56 The width of the phrase "arising out of" in this context and its synonymity with the expression "in connection with" reflect the practical, rather than theoretical, meaning to be given to the word "contract" out of which the disputes may arise. The notion of a contract can involve practical commercial considerations of formation, extent and scope, and performance of the juridical bonds between the parties. One would not generally expect, in a commercial agreement dealing with dispute resolution, the word to be limited to the notion of the juridical rights and obligations. After all, the disputes, if they are to arise, will do so not only out of such rights and obligations, but also out of the practical matters of formation and performance of the arrangement.

57 The precise content of what is not encompassed by the phrase, as expressed by Mustill and Boyd *Commercial Arbitration* (1989 2nd Ed p 120): "the dispute as to whether there was ever a contract at all" (see the above extracted passage from *Ethiopian Oilseeds*), must be approached with care. To the extent that such a conclusion is based on *Heyman v Darwins Ltd,* regard may need to be paid to the more recent case law on what has been called the doctrine of separability (as to which, see Issue 2, below). One may need to be precise as to why it is said there is no substantive agreement, and whether it is a question of avoidance, or another attendant or supervening consideration, or whether no agreement (substantive or arbitral) was ever formal.

58 This body of authority must, however, be viewed in the light of the decision of the Full Court of this Court in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1998) 90 FCR 1 (*The 'Kiukiang Career')*.

59 *The* '*Kiukiang Career'* involved the construction of an arbitration clause in a contract of affreightment concerning the carriage of fertiliser from Florida to Australia. The clause was in the following terms:

> *Any dispute arising from this charter or any Bill of Lading issued hereunder shall be settled in accordance with the provisions of the* Arbitration Act 1950 (UK), *and any subsequent Acts, in London…*
>
> *This Charterparty shall be governed by and construed in accordance with*

> *English law.*
>
> *The Arbitrators and Umpire shall be commercial men normally engaged in the shipping industry.*

The allegations in the pleading made by the party to the arbitration agreement (who was the consignee) included a case under the TP Act based on oral assurances given to it before contractual formation that the ship's holds would be completely free of grain contamination. These claims were also pleaded as claims for negligent misrepresentation and as collateral warranties. (The presence of any grain in the cargo of fertiliser would prevent its entry into Australia for quarantine reasons. This is what, in fact, occurred.)

60 There were also claims of breach of the contract of affreightment. Emmett J found the dispute under the TP Act and the other claims framed non-contractually, which were based on conduct before the contract, fell outside the arbitration clause. Branson J agreed with the reasons of Emmett J. Beaumont J concurred for reasons that were differently expressed. Thus, I will concentrate on the reasons of Emmett J.

61 First, Emmett J construed the word "Charter" in the relevant provision as referring to the instrument, not the transaction. This "narrow construction" (as his Honour called it) was reached after considering other relevant clauses and documents. Emmett J, whilst agreeing that the phrase "arising from" was equivalent to "arising out of", rejected the primary judge's view that the phrase "arising from" should be construed to convey a meaning equivalent to the expression "arising out of" or "arising in connection with". Subject to any textual demands of the documentation at hand, that approach of the primary judge (that is the approach rejected by Emmett J) was conformable with the jurisprudence to which I have referred. Emmett J did, however, rely on specific textual matters concerning this document, saying at 15:

> *The primary judge held that the words "arising from" should be construed to convey a meaning equivalent to the expressions "arising out of" or "arising in connection with". If that construction were correct, the words "or any bill of lading hereunder" would be surplusage. That is to say, a dispute arising from a bill of lading issued under the Charter Contract would clearly be a dispute arising out of or in connection with the Charter Contract. The inclusion of those additional words indicates a limited effect was intended by the expression "arising from this charter".*

After describing the claims, Emmett J considered the jurisprudence in the area. Importantly,

Emmett J considered that the Court of Appeal decision in *IBM* was to be understood as based on the phrase "in relation to" which his Honour said was wider than the phrase "arising out of". Emmett J said at 19:

> *It is significant that the expression "or related to this agreement" was regarded as decisive by all members of the Court of Appeal in attracting the principle stated in GIO v Atkinson-Leighton. Kirby P also relied on that part of the clause in order to distinguish an earlier decision of the Court of Appeal of Mir Brothers Developments Pty Ltd v Atlantic Constructions Pty Ltd (1984) 1 BCL 80 where the clause in question did not contain those words. Clause 34, of course, does not include that wider expression but is limited to the expression "arising from".*

62 Emmett J also referred to *QH Tours Ltd v Ship Design & Management (Australia) Pty Ltd* (1991) 33 FCR 227 in which Foster J had a clause before him containing the phrase "arising thereunder or in connection therewith". Once again, Emmett J emphasised the comparative width of the second part of that clause, and, implicitly, what his Honour saw as the restricted scope of the phrase "arising from". His Honour found support for this in the narrow scope given to the phrase "arising under" by French J in *Paper Products Pty ltd v Tomlinsons (Rockdale) Ltd* (1993) 43 FCR 439. Emmett J stated the following at 20-21, about French J's reasons in *Paper Products.*

> *In Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd (1993) 43 FCR 439, French J considered a clause submitting to arbitration "any dispute ...* arising under *this agreement". His Honour observed that there is little point in multiplying case citations and examples. When the language of an arbitration clause is sufficiently elastic, then the more liberal approach of the courts to which Kirby P referred may be appropriate. His Honour observed that a wide construction of such clauses can be supported on the basis that it is unlikely to have been the intention of the parties to divide artificially their disputes into contractual matters which could be dealt with by an arbitrator and non-contractual matters which would fall to be dealt with in the courts.*
>
> *However, French J considered that when the parties have agreed upon a restricted form of words which in terms limit the reference to matters arising ex contractu, there is little room for movement. His Honour was satisfied that neither the Trade Practices Act claim in that case nor claims for breach of warranty and negligent misstatement could be said to arise* under *the agreement in question. They all arose out of matters which were antecedent to the agreement even though they may have involved questions which also go to its performance. His Honour considered that none of the authorities supported the wide construction of the clause contended for. His Honour concluded that the natural meaning of the words in question did not support their extension to disputes arising out of matters antecedent to the agreement (at 448). The terms of the arbitration clause considered by French J were*

> *clearly not as wide as the clauses under consideration in the IBM case and in the QH Tours case. On the other hand the expression "arising under" is certainly not narrower than the expression "arising from".*

63 Thus, Emmett J saw "arising under" and "arising from" to be equivalent to each other and narrower than the composite phrases in *IBM* and *QH Tours,* "arising out of or related to" and "arising thereunder or in connection therewith".

64 Emmett J then referred to *Mir Brothers Development Pty Ltd v Atlantic Constructions Pty Ltd* (1984) 1 BCL 80. The view of Samuels JA, in that case, that rectification did not "arise out of" the contract can be seen as reflecting the narrow view of the English Court of Appeal in *Crane v Hegeman-Harris Co Inc* [1939] All ER 68 that has not been followed in the cases (including English Court of Appeal and Commonwealth intermediate appellate court cases) discussed by Hirst J in *Ethiopian Oilseeds*, as approved by Gleeson CJ in *Francis Travel.*

65 Emmett J then referred to what Gleeson CJ had said in *Francis Travel.* His Honour said that the conclusion in *Francis Travel* was that a claim arising out of a contravention of the TP Act during the performance of the agreement could be a claim arising out of the agreement. Whilst it is true that the claim there was that a purported termination of an agency agreement was wrongful by reason of what had been represented during the course of the agreement, the endorsement by the whole Court in *Francis Travel* of the decision *and the reasoning* of Hirst J in *Ethiopian Oilseeds,* and of the reasons of Kirby P in *IBM* at 475-77 was more far-reaching in terms of principle than the narrow proposition for which Emmett J said the case stood. It is true that in *IBM* Kirby P distinguished *Mir Brothers* by the absence in the clause in that case of the phrase "or related to" which appeared in *IBM*. However, a more fundamental disagreement, and discordance in approach, with *Mir Brothers* can be detected in the reasons of Kirby P in *IBM* and Gleeson CJ in *Francis Travel.* This is not clearly illuminated by Gleeson CJ's endorsement of the *reasoning* of Hirst J in *Ethiopian Oilseeds.* Of particular importance in this respect are the views of Hirst J of the synonymity of the phrases "arise out of" and "in connection with" in the arbitration clause context.

66 Emmett J said the following at 21-22:

> *The conclusion in Francis Travel Marketing Pty Ltd, however, is not decisive of the question now presently under consideration. Nor is it inconsistent with the decision of French J in Paper Products Pty Ltd.* ***That is to say, a claim***

arising out of contravention of the Trade Practices Act during the performance of an agreement could be a claim **arising out of** ***the agreement.***

Such a claim could also be said to arise from *the agreement. In other words, but for the agreement, there would have been no basis for making the allegation of contravention of the Trade Practices Act. Such a claim would be dependent upon there being a contractual relationship between the parties.*

However, ***where there is a dispute as to a claim in respect of conduct which is antecedent to the making of a contract, I do not consider that such a dispute can be said to arise*** **from** ***the contract in question.*** *In relation to the Addendum Contract, for example, the conduct complained of by Hi-Fert was antecedent to and did not depend upon the contractual relationship that existed by reason of the Addendum Contract. That latter contractual relationship was induced by the conduct complained of. In the present case, the Non-contractual Claims are not generated by the Charter Contract. They will not be resolved by examining the Charter Contract but by considering and assessing evidence external to it. They do not* arise out of *the Charter Contract nor do they* arise from *the Charter Contract.*

WBC contended that the Non-contractual Claims are claims which arise from *the Charter Contract or the Addendum Contract in all practical senses. WBC contended that commercial commonsense requires that the inevitable negotiations which normally lead to agreements such as are in question would be intended by the parties to be governed by the same arbitration clause.*

The primary judge in the present case held that the term "arising from" is equivalent to "arising in connection with" or "arising out of". *After referring to Francis Travel, his Honour concluded that the expression "arising from" is at least as wide as the expression "arising out of". In reliance on the* New Shorter Oxford Dictionary*, his Honour was of the view that the words "out of" are commonly used in the sense of "from". For example, the expression "out of" may mean:*

- *"from inside a containing space"*
- *"from within the range or limit of"*
- *"from (something) as a source or origin"*
- *"from (something) as a cause or motive; as a result of effect of … ".*

Those definitions rather confirm that the expression "arising in connection with" is wider than the expression "arising out of". *For the reasons which I have indicated, the circumstances of Francis Travel were relevantly different from those presently under consideration because the agency agreement was an integral part of the cause of action relating to its termination. Even if the claim in that case arose* out of *or* from *the agency agreement, that does not govern this case.*
(emphasis added)

67 That this approach is contrary to *Ethiopian Oilseeds* and the New South Wales Court of Appeal in *Francis Travel* is illuminated by the view of Emmett J that the primary judge

(Tamberlin J) was in error in his approach when the primary judge said the following (71 FCR at 179):

> *In giving a broad interpretation to the expression "arising out of" in Francis Travel, Gleeson CJ agreed with the analysis of authorities undertaken by Hirst J, in Ethiopian Oilseeds v Rio del Mar, and observed* [that] *his Lordship's analysis reflected the current state of the law as it applies in New South Wales.*
>
> *The expression "arising from" is at least as wide, in my view, as the expression "arising out of". The words "out of" are commonly used in the sense of "from". See for example the meanings assigned to "out of" in the* New Shorter Oxford Dictionary *(1993), p 2039.*
>
> *Hi-Fert sought to distinguish the decision and reasoning in Francis Travel, on the basis that the Court of Appeal may not have appreciated the exact terms under consideration by Hirst J in Ethiopian Oilseeds. It is true that Gleeson CJ in referring to that case only refers to the expression "arising out of" whereas the complete expression under consideration was "any dispute* arising out of or under *this contract". In my view, there is no force in this speculation for two reasons.*
>
> *The first is that at 97, Hirst J gave a wide meaning to the expression `arising out of'. He said:*
>
> > *"I find it very difficult to make any distinction between the words `arising out of' and `arising in connection with', the two phrases appearing to me to be virtually synonymous."*
>
> *The second is that there is no basis in the reasons for decision in Francis Travel for the assumption that the three learned judges who comprised the Court overlooked the wording addressed by Hirst J. In Ethiopian Oilseeds his Lordship canvassed and discussed a range of expressions akin to "arising out of" in considerable detail.*

68 With respect, I find the expression of view of Tamberlin J to be reflective of the course of persuasive authority on these types of clauses since *Heyman v Dawins Ltd.* I am, however, bound by the Full Court. It is true that *The 'Kiukiang Career'* can be seen to be dealing with different words. It may be said to be distinguishable on that basis. However, given the terms of the reasons of Emmett J and the rejected approach of Tamberlin J, it would be wrong, I think, to ignore the statements of meaning given to the relevant phrases by Emmett J.

The application of the clause to the pleaded claims

69 Conformably with the approach of Emmett J in *The 'Kiukiang Career'* the representations and misleading or deceptive conduct which are said to have occurred prior to the entry into

the contract and which are said to have induced the applicant to enter the contract fall outside the phrase "arising out of". If I were free to deal with the matter in accordance with *Ethiopian Oilseeds* I would find those matters to be closely connected with the formation of the contract and within the arbitration clause.

70 Some of the representations, however, are said to have been made after the formation of the contract. These representations fall within the ambit of the arbitration clause. As Emmett J said in *The 'Kiukiang Career'* at 21:

> *A claim arising out of contravention of the* [TP Act] *during the performance of an agreement could be a claim arising out of the agreement.*

71 To the extent that the representations are said to have been made before the contract and to have induced the formation of the contract, I consider myself bound by *The 'Kiukiang Career'* to hold that they lie outside the arbitration agreement. To the extent that conduct which occurred after the contract and connected therewith is said to found relief, whether damages or otherwise, conformably with *The 'Kiukiang Career'* such can be said to arise out of the contract.

72 Thus, the representations in paragraph 10 of the proposed second amended statement of claim as particularised and the claims based on them are outside the clause, but those in paragraph 12 (in part), paragraphs 13, 15, 16, 17, 18 and 19, and the claims based on those paragraphs are within the clause. The parties may need to give consideration to the precise consequences of this division for the purposes of orders.

73 As to the arbitrability of claims under the TP Act, *IBM* and *Francis Travel* are authorities for the proposition that such claims can be submitted to arbitration. The judgments of both Beaumont J and Emmett J in *The 'Kiukiang Career'* at 7 per Beaumont J and 23-4 per Emmett J reveal the potential difficulties in the simple proposition that parties may make a contract to submit a framework of rights and obligations and powers of relief found in a statute such as the TP Act to resolution by an arbitrator. The question whether that has been done is answered by the construction of the submission clause in question. If, however, the substantive agreement and its resolution are governed by foreign law it may be that a relevant domestic statute, which would be applicable in the courts of the forum, will be seen by the arbitrator to be irrelevant as a statute of a legal system foreign to the resolution of disputes.

This would be by no means a rare or unlikely event. Courts and arbitrators in England have, on occasions, set to one side, as irrelevant, Australian statutes, the terms of which compulsorily require the regulation of the commercial transaction by reference to the Australian statute (there being some relevant nexus), by reason of the operation of English conflict of law rules. This has occurred in insurance disputes with English proper law clauses in respect of which policies of insurance the *Insurance Contract Act 1984,* and in particular s 8 thereof, applied, and in carriage of goods by sea disputes to which ss 10 and 11 of the *Carriage of Goods by Sea Act 1991* (Cth) applied. See generally in this respect *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90; and *The 'Hollandia'* [1983] 1 AC 565.

74 On one view, such considerations may not affect the otherwise plain operation of s 7(2) of the IA Act. However, they may be very relevant to the question of the terms of any stay. I will return to this under Issue 5 below.

75 Subject to the matters the subject of consideration in Issue 2 concerning separability, the same analysis governs the fraudulent conduct claims. The claims based on the fraudulent conduct prior to, and said to have been undertaken with the intention of inducing, the contract fall outside the arbitration agreement. However, the conduct involved in, or connected with, the performance of the contract can be seen to arise out of the contract. This dichotomy can be seen by reference to paragraph 47 of the proposed second amended statement of claim which was in the following terms:

> *Induced by and in reliance upon the said fraudulent representations the applicant entered into the contract dated 4 September 2003, accepted the Promissory Note dated 11 September 2003, made payment of the Loan, made payment under the invoices and entered into the variation of the said contract on or about 20 May 2004.*

Apart from the original inducement to enter into the contract of September 2003, the fraudulent representations, which themselves arose out of aspects of the performance of the contract, or matters connected therewith, are said to have induced steps ancillary to the performance, or working, of the contract.

76 On the above approach, the Fayman Representation falls outside the arbitration clause.

77 The *Corporations Act* claims in paragraphs 54-59 of the proposed second amended statement of claim are not against the first respondent and so are not covered by the arbitration

agreement, which the applicant only made with the first respondent.

78 The *Corporations Act* claims in paragraphs 60-65 of the proposed second amended statement of claim against the second and third respondents are not covered by the arbitration agreement. As to those claims against the first respondent, for the reasons expressed above, to the extent that they arise from conduct antecedent to the original contract, they do not arise out of the contract, otherwise they do.

79 The contractual claims in paragraphs 67 to 84 and 87 to 89 of the proposed second amended statement of claim clearly fall within the arbitration agreement.

80 The claims under the guarantee given by the fourth respondent do not fall within the arbitration agreement.

81 The claims in restitution arise under a number of rubrics: "mistake", "total failure of consideration" and "money had and received". The claim for mistake is set out in paragraphs 90-96 of the proposed second amended statement of claim. Various mistakes are there pleaded. Some of the mistakes are said to have been causative of the entry into the contract of September 2003, some are said to be causative of steps taken in the performance of or in connection with the performance of the contract – the making of the loan of USD 100,000 and the payments of the invoices under the contract. Utilising the approach of Emmett J in *The 'Kiukiang Career',* I conclude that the claims based on mistake said to have been causative of the original contract are relevantly indistinguishable from the pre-contractual representation claims with which I have already dealt. Thus, they fall outside the arbitration agreement. Likewise, the mistake claims which presuppose the existence of the contract and seek relief in relation to conduct induced after the formation of the September 2003 contract can be seen as falling within the clause. The "total failure of consideration" and "moneys had and received" bases do not appear to be founded in any different manner. Certainly no separate bases have been pleaded.

Issue 2: the s 7(5) issues

82 The applicant has sought a declaration in paragraph 51 of the filed amended application that:

> *...the agreement between the Applicant and the First Respondent dated 4 September 2003, as amended on or about 20 May 2004, for the sale and*

> *supply of south pacific copra by the First Respondent to the Applicant is void under the terms of that agreement.*

83 A similar claim is made in paragraph 52 about the agreement as amended in May 2004.

84 In paragraph 34 of the proposed second amended statement of claim, one prayer for relief under the TP Act is for an order under s 87 of the TP Act "setting aside or declaring void" the contract dated 4 September 2003 "and as varied", the promissory note and the arbitration agreement within the contract. In the same paragraph the applicant seeks "an order declaring void in equity the said contract".

85 The same relief is set out in paragraph 53 of the proposed second amended statement of claim arising from the claim under the TP Act pursuant to the Fayman Representation.

86 Paragraph 66 of the proposed second amended statement of claim is in the following terms:

> *Further and in the alternative the applicant says that the agreement to arbitrate in the contract as amended is null and void within section 7(5) of the* International Arbitration Act 1974 *and or is not capable of settlement by arbitration within section 7(2) and or that the disputes herein are not with the scope of the said agreement and or by reason of the avoidance of the said contract and or by reason of the relief claimed under section 87 and or in equity for mistake and or by reason of an order made under s 1324(1) of the* Corporations Act *are not within section 7(1) of the said Act.*

87 Whether or not all these paragraphs are pleaded properly has not been argued. I will deal with the bases put forward by the applicant as to why s 7(5) of the IA Act prevents, in this case, the order for a stay under s 7(2).

88 The first submission of the applicant is that the claim for relief in the terms made, *ipso facto*, means that s 7(5) is invoked, and thus a stay under s 7(2) should not be ordered, until the resolution of that issue at the trial. I disagree. First, of course, to the extent that the claims for relief are founded on matters which fall outside the arbitration agreement no stay under s 7(2) will be given. That is not because of s 7(5), but because of the lack of engagement of s 7(2). Secondly, and more importantly, the pleading of the TP Act and fraud in the present terms and the claim of voidness is not adequate to engage s 7(5). The applicant's submissions in this regard ignore the development of the law as to the severability and separateness of arbitration clauses. If one posits that the claim under the TP Act and the

fraud claim fall within the terms of the arbitration agreement, then the conclusion is that the parties have agreed that the arbitrator shall have authority to determine those issues. In years gone by, the claim for avoidance of the agreement which contained the arbitration clause was dealt with by concluding that the arbitrator did not have authority to hear such a claim, because, if it were well founded, there could be seen to be, logically, no agreement to submit the dispute to arbitration. The arbitration clause fell within the avoided contract.

89 The tide of persuasive judicial opinion runs contrary to this simple *a priori* approach. In *Ferris v Plaister* (1994) 34 NSWLR 474 (in particular, if I may say so with respect, the luminous judgment of Kirby P) the New South Wales Court of Appeal rejected the earlier approach reflected in the line of authority that concluded with *Heyman v Darwins Ltd.* The arbitration clause is seen as constituting a severable and separate agreement between the parties. Thus, what is required for s7(5) to be engaged and to justify the matter of avoidance for fraud or otherwise not being referred to the arbitrator for decision, is that the fraud or vitiating conduct be directed to the arbitration clause itself: see for example *Prima Paint Corp v Flood & Conklin Manufacturing Co* 388 US 395, 402-404; *Ferris v Plaister*; *QH Tours*; *Morton v Baker,* Einfeld J, 25 March 1993; and *Harbour Assurance Company (UK) Ltd v Kansa General International Co Ltd.*

90 The conclusory assertions in the amended application are insufficient because the facts pleaded in the proposed second amended application do not raise a claim directed to the arbitration clause. There is no reason why, on the assumption that the arbitrator has been invested contractually to resolve issues of the avoidance of the substantive contract, that he or she should not do so. Apart from assertion, unsupported by a claim directed specifically to the arbitration clause, there is no basis to conclude that these claims satisfy s 7(5).

91 This approach conforms with an operation of s 7 of the IA Act in accordance with the fostering of the aims of the New York Convention and the Model Law. To allow the assertion of voidness or of the entitlement of avoidance, unsupported by a pleaded claim directed at the arbitration clause, to defeat a stay under s 7(2) would undermine the intent of the operation of the New York Convention and the IA Act which was intended to give it effect. To quote Judge Schwebel, as cited by Kirby P in *Ferris v Plaister,* at 488-489:

> *2. If a party could avoid arbitration by the mere assertion that the principal agreement is invalid, it would be a very simple way to avoid arbitration*

> *or to delay the resolution of the dispute by arbitration . A court would then have to determine whether the contract was valid at its inception. Then the parties would need to arbitrate the rest of their dispute. The advantages of a single arbitration would thereby be lost. Yet, by agreeing to the arbitration clause, that was the imputed contractual intention of the parties.*
>
> ...
>
> 4. *Without separability, a court would be required to consider the substance of the dispute. This would be necessary to determine whether the arbitrator was correct to find that the agreement was valid so that the arbitrator had jurisdiction. To allow this would conflict with the international and local law precluding a review of awards on the merits and holding parties to their agreement to submit disputes to arbitration.*

92 I do not read anything said by Gummow J in *Bakri Navigation Co Ltd v Owners of the Ship 'Golden Glory'* [1991] FCA 306 at [51]-[52], or by Beaumont J in *Administration of Norfolk Island v SMEC Australia Pty Ltd* [2004] NFSC 1 at [100] as inconsistent with anything that I have said.

93 The other basis for the invocation of s 7(5) is more difficult. After 4 September 2003, the first respondent was deregistered under the Cook Islands company legislation for its failure to pay fees or comply with other administrative requirements. It is now back on the relevant register. There is a dispute about foreign law whether these matters have the consequence (which I would, *prima facie,* find surprising) that the deregistration (and, according to the applicant, dissolution) of the first respondent for a time strips it forever of all contractual rights, and presumably obligations, under the arbitration agreement. It is said that the arbitration agreement simply now does not exist, and so s 7(5) is engaged and no stay under s 7(2) can be given.

94 The applicant says that this is a matter for trial. The respondents say that I should determine this on the motion. Conflicting evidence of foreign lawyers has been filed and has been taken as read (with the consent of the parties). No cross-examination of them has taken place.

95 The status of the first respondent, after it was struck off the relevant register, is a central issue in claims against the first respondent that are not the subject of a s 7(2) stay and in claims against other respondents not a party to the arbitration agreement. The views of the two lawyers, Ms Harvey and Mr McFadzien, as to the precise legal status of the first respondent

during the period in which it was struck off differs. The resolution of this issue is a matter for trial.

96 Related to that issue is the question of whether the status of the arbitration agreement is affected by the period of deregistration: Is there still an arbitration agreement between the applicant and the first respondent? Mr McFadzien says that there is because, in his view, the first respondent was never dissolved. Ms Harvey, on the other hand, says that the first respondent did cease to exit; although, it now (again on her view) exists.

97 As to the effect of the deregistration of the first respondent, Ms Harvey was asked the following question and gave the following answer in her report:

> *According to the law of the Cook Islands, if a company has been dissolved what is the status of any contracts made with the company? Does any contract with that company cease to exist?*
>
> *There is no provision in the Act which provides that contracts entered into with companies that are subsequently dissolved cease to exist. Again, we would expect that the provisions of the relevant contract and the applicable contract law would apply.*

98 Ms Harvey's report concluded with the following caveat:

> *Due to time constraints, the responses set out above are very brief. We have not had time to conduct a research and the above responses have been provided with reference only to the International Companies Act and the writer's own knowledge. Having said that, as far as the writer is aware, none of the issues raised above have been the subject of judicial consideration in the Cook Islands.*

99 This question about the status of any contract, though related to the issue for trial about the fact of dissolution, is not an issue for trial. It is an issue on the motion for the stay. I am not prepared to conclude that, under Cook Islands law, or by any relevant contractual rule or rule of property law, there is no longer any arbitration clause existing between the applicant and the first respondent. There has been no coherently articulated basis for that conclusion. As a matter of logic, if the applicant is correct, the doctrine of severability or separability could not be used to save it. On the basis of the materials and arguments existing between the applicant and the first respondent presently before the Court, I am not prepared to conclude that s 7(5) of the IA Act prevents the engagement of s 7(2) and so the issue of a stay because of the

asserted evaporation of the arbitration agreement: cf *Inco Europe Ltd v First Choice Distribution* [1994] 1 WLR 270, 280.

100 However, to the extent that the litigation of the matter proceeds, in due course, and throws up a real issue about the possible present non-existence of the arbitration agreement, the applicant will be at liberty to make an application for the dissolution of any existing stay under s 7(2).

Issue 3: the mandatory stay issue

101 The terms of s 7(2) call for the stay of the proceedings or so much of the proceeding as involves determination of the matter that, in pursuance of the arbitration agreement, is capable of settlement by arbitration.

102 The word "matter" has special constitutional and legislative significance in the context of Chapter III of the Constitution and the investiture and conferral of federal jurisdiction. In this context the meaning of the word "matter" is wide. It encompasses the justiciable controversy between the actors to it comprised of the substructure of facts and claims which give rise to the controversy. It is not a cause of action. It is not a proceeding. It is the controversy between or among the parties which may span several proceedings, possibly in more than one court: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [139]-[142]; Zines *Federal Jurisdiction in Australia* (3rd edn) pp 15-21.

103 The context here, of course, is not a constitutional one, the imperatives of which are the coherent, civil and comprehensive resolution of justiciable disputes or controversies as the third arm of government, but is a contractual one. It is the giving effect to the agreement of parties to have the dispute (identified by the words chosen by them) resolved by an arbitral, rather than curial, process. Thus the "matter" referred to in s 7(2) is the contractually identified subject matter of the arbitration agreement. See *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* [1979] 2 NSWLR 243, 250; *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332; *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420, 424-26; and *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896. If, after the process of construction of the arbitration agreement, only some aspects of what would otherwise be the justiciable controversy can be seen to have been submitted to arbitration, s 7(2) does not operate to require a stay of that part of the wider

"matter" (by way of justiciable controversy) that has not been agreed to be submitted to arbitration. Whilst Deane J and Gaudron J in *Tanning Research* appeared to take a broader view of the word "matter" than the majority, even they recognised the "quite different context" of Chapter III of the Constitution to that of the IA Act.

104 Thus, the mandatory stay is in respect of those claims that properly fall within the arbitration agreement that I have earlier identified.

Issue 4: the discretionary stay issue

105 The question as to whether some or all of the claims not the subject of the mandatory stay, being the pre-contractual claims against the first respondent and all the claims against the other respondents (they not being parties to the arbitration agreement), should be stayed is affected by a number of factors. There is a clear inter-relationship between the issues raised in the claims covered by the arbitration agreement and those not. One way of approaching the matter would be to stay the whole controversy until the arbitration is complete and deal with the issues with the arbitrated dispute complete. In some cases, that approach can be seen to be both convenient and conducive to the encouragement of the arbitration process. Here, however other considerations obtain. Significant and wide disputes affect people (the second to seventh respondents) who will not be bound by the result of the arbitration. Those people have been accused of fraud. I can hear this matter this year. A case with such serious allegations should, if possible, be heard as soon as possible. It is in the public interest to do so.

106 Also, some claims (involving allegations of fraud) concerning the first respondent are not stayed under s 7(2) of the IA Act. Thus at least some claims involving the first respondent will need to be litigated in this Court.

107 The dominant consideration, however, is the resolution of these serious issues as soon as possible in this Court. This would be my view even if I were prepared to approach the stay under s 7(2) in accordance with *Ethiopian Oilseeds*, which would have resulted in a stay of all claims against the first respondent.

108 In the circumstances, I am not prepared to stay any part of the controversy, other than that mandated by s 7(2) of the IA Act.

Issue 5: the stay conditions issue

109 There are two conditions which I think should be attached to the stay.

110 First, I would impose a condition that reference to arbitration not proceed until after determination of proceedings in the Federal Court. If the applicant is entitled to set aside or have avoided the substantive agreement, the parties should not be required to litigate a case before the arbitrator on the hypothesis of a valid agreement. Also, the risk of inconsistent findings should be avoided: *Incitec Ltd v Alkimos Shipping Corporation* [2004] FCA 698, especially at [47] to [62]. That risk of course, could be avoided in part by staying the court proceedings. However, given the fraud allegations and the participation of the first respondent in the court proceedings it is more appropriate to allow the court proceeding to proceed promptly, as they can.

111 Secondly, I would impose a condition upon the parties to the arbitration to consent to all aspects of any TP Act claims, which would have been justiciable in this Court, being litigated in the arbitration irrespective of any conclusion as to the proper law. Such a condition would solve the potential conflict of Australian domestic statutory public policy and the operation by a foreign arbitrator of the rules of conflicts of law to set at nought governing Australian law. The arbitration agreement is a contract about submission. Its enforcement should not undermine the operation of a statute such as the TP Act.

112 I have not heard the parties on this latter condition and I will do so.

Issue 6: the further disposition of these proceedings

113 The parties should bring in short minutes of order giving effect to these reasons. Both sides have to a degree been successful. The costs of the motions will be costs in the cause.

114 I will permit the parties two days to put in such submissions on the second condition as they are advised. I will make orders at 4.30 pm on Friday, 19 August 2005.

115 The proceedings, except insofar as I propose to grant a stay, will be set down for hearing to commence at 10.15 am on Tuesday 20 September 2005.

I certify that the preceding one hundred and fifteen (115) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop .

Associate:

Dated: 15 August 2005

Counsel for the Applicant:	Mr A W Street SC with Mr J A N Hogan-Doran
Solicitor for the Applicant:	Ebsworth & Ebsworth
Counsel for the Respondent:	Mr M S Jacobs QC with Mr P J Bambagiotti
Solicitor for the Respondent:	Alexander & Associates
Date of Hearing:	10 June 2005
Last Submission Received:	27 July 2005
Date of Judgment:	15 August 2005