

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192

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Australia's status as a forum supportive of international commercial arbitration has been strengthened by the decision of the Full Court of the Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*. The Full Court held that the commencement of *in rem* proceedings for the arrest of a ship will not constitute repudiation, or acceptance of repudiation, of an agreement to arbitrate or waiver of the right to arbitrate. The Full Court also had occasion to consider the whether claims for misleading or deceptive conduct brought under the *Trade Practices Act 1974* (Cth)(TPA) were arbitrable in the context of an 'all disputes arising out of' arbitration clause. The Full Court distinguished the decision in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc*¹ (*The Kiukiang Career*) and held that, in the context of the NYPE 1993 contract and its embedded agreement to arbitrate, TPA pleas were arbitrable notwithstanding the absence of an equivalent consumer protection statute in the law of the forum selected by the parties.

The case involved a dispute between the parties to an NYPE 1993 charter party with an arbitration clause stipulating English law arbitration in London (The Agreement). Pan Australia Shipping Pty Ltd (Pan) was involved in the coasting business in Australian waters. Comandate Marine Corp (Comandate), a Liberian company, owned a general cargo vessel called *The Comandate* (the Vessel). Under the terms of the Agreement, this vessel was time chartered to Pan for use as a second vessel in the costal trade. Pan's primary vessel, *Boomerang I*, was demise chartered from an unrelated party. The *Comandate*, which was known for a period as the *Boomerang II*, was to serve as the sister ship.

A dispute arose between Pan and Comandate after the Vessel was detained by the Australian Maritime Safety Authority (AMSA). The Vessel had a hull fracture and its master and crew lacked visas. Pan argued that Comandate had breached the terms of the time charter agreement, and USD 2.5 million in damages were sought. Pan also claimed that Comandate had made misleading representations as to future events in contravention of section 51A of the TPA. The relevant representations related to the fitness and legal entitlement of the Vessel and its crew to conduct coastal trade in Australia.

Pan commenced *in rem* proceedings in the Federal Court for the arrest of the Vessel pursuant to the *Admiralty Act 1988* (Cth), and a warrant was granted and executed against the Vessel in Fremantle. The Vessel was released five days later after security was put up by Comandate. Comandate then sought an unconditional undertaking from Pan that Pan would arbitrate in London pursuant to the Agreement, and threatened an application for an anti-suit injunction in the High Court of Justice in London in the event no undertaking was given. None was. Comandate's solicitors then commenced arbitration in London on 14 June 2006, putting Pan on notice on the same day.

Pan proceeded to apply for an anti-anti-suit injunction to restrain Comandate from applying to the High Court for an anti-suit injunction. Emmett J granted the anti-anti-suit injunction on 22 June 2006. The injunction was extended to 13 July 2006, by which time Pan had been ordered to file its Statement of Claim pursuant to r22 of the Admiralty Rules. On 23 June 2006, Comandate filed a motion for a stay of Pan's proceedings in favour of arbitration in London. This application was brought under section 7(2) of the *International Arbitration Act 1974* (Cth). The matter was heard by Emmett J on 13 and 14 July 2006. Orders extending the anti-anti-suit in favour of Pan, and denying the stay sought by Comandate, were made.²

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¹ (No.5) (1998) 90 FCR 1.

² *Pan Australia Shipping Pty Ltd v The Ship 'Comandate'* (No.2) [2006] FCA 1112.

At the same time as it sought a stay, Comandate also commenced its own *in rem* proceedings in the Federal Court for surrogate ship arrest of *The Boomerang I*. These proceedings, like those brought by Pan against the Vessel, were for security. An arrest warrant was granted on 23 June 2006 and executed the next day. The decision of Allsop J (sitting alone), refusing Pan's urgent application for the setting aside of the writ and the arrest was appealed. On expedited appeal the Full Court held that surrogate ship arrest, as provided for by s19 of the *Admiralty Act*, was not available to Comandate against *The Boomerang I*.³ Pan then sought to rely on Comandate's commencement of its own *in rem* proceedings as evidence of waiver of its right to arbitrate.

Emmett J found for Pan in Comandate's application for a stay under the *International Arbitration Act 1974* (Cth) (*IAA*). His Honour held that Comandate had waived or elected to abandon the London arbitration by commencing *in rem* proceedings for surrogate ship arrest in Australia. His decision in this regard was partly based upon the fact that contraventions of s51A of the *TPA* were pleaded in the alternative to Pan's claim for breach of the time charter agreement. In deciding whether the stay sought by Comandate should be granted, His Honour considered the requirement of s7(2) of the *IAA*. Under that section, the Court must stay *in curia* 'proceedings [that] involve the determination of a matter that is capable of settlement by arbitration'. This section of the *IAA* imports domestic legal concepts of 'arbitrability'. If a dispute is capable of settlement by arbitration, it will be 'arbitrable'. Determining arbitrability is first a question of domestic law and domestic public policy, and, secondly, a question of the proper construction of the arbitration clause. The arbitration clause is a 'contract within the contract', and as such principles of contract law guide the Court in its construction. Emmett J held that, whilst Pan's claims for breach of the time charter agreement were arbitrable, its claims under the *TPA* were not. In reaching this conclusion, His Honour construed the phrase 'arising out of' narrowly to exclude representations made in the formation (pre-contract) stages of the Agreement.

This finding accords with the ratio in the *The Kiukiang Career*. That case involved a freight contract that contained a similarly worded arbitration clause. Claims for breach were brought, with concurrent pleas under the *TPA*. The Full Court of the Federal Court held that the *TPA* claims were outside the scope of the arbitration clause, and refused to stay the *in curia* proceedings. In so doing, the Court took a restrictive view of the arbitration clause, which was at odds with the approach of Hirst J in *Ethiopian Oilseeds v Rio del Mar Foods Inc*⁴ (*Ethiopian Oilseeds*).

Submissions on the binding nature of the narrow interpretation of arbitration clauses espoused by *The Kiukiang Career* were made by Counsel for Pan at first instance. These submissions were accepted by Emmett J. On appeal, the Full Court disagreed. The Court held that the ratio in *Ethiopian Oilseeds*, supportive as it was of the broad interpretation of 'arising out of' type arbitration clauses to include *TPA* claims, was binding, and that the decision in *The Kiukiang Career* was inconsistent with modern authority. Allsop J went as far as saying that *The Kiukiang Career* wrongly decided:

...to the extent that *The Kiukiang Career*, especially at 21-22, can be seen to be authority, albeit obiter, for the proposition that the phrase 'arising out of' [in an arbitration clause] cannot include a claim based on pre-contract representations and that the phrase should not be analysed...by reference to the approach illuminated by Hirst J in *Ethiopian Oilseeds* and the Court of Appeal in *Francis Travel* then I am persuaded that it is wrong and inconsistent with the approach of modern authority...⁵

The *TPA* claims were, therefore, within the scope of the arbitration agreement that bound the parties. Neither the fact that the agreement to arbitrate would take Pan to a jurisdiction without the *TPA* or equivalent legislation, nor the prospect of an English Court issuing an anti-suit injunction to deprive Pan of the curial opportunity to argue in favour of the inclusion of the *TPA* claims within the reference, was significant. The scope of the clause, and the *TPA* pleas proper, were for the arbitrators to decide.⁶ The fact that Pan may be disadvantaged if the arbitrators interpreted the clause narrowly (that is, to exclude causes under foreign consumer protection statutes like the *TPA*) did not guide the Court. Rather, it appears that

³ *Comandate Marine Corp v The Ship 'Boomerang I'* (2006) 151 FCR 403.

⁴ [1990] 1 Lloyd's Rep. 86.

⁵ Above n3 [184].

⁶ Above n 3 [241] (Allsop J).

respect for party autonomy,⁷ coupled with policy considerations in favour of arbitration as a means of settling international commercial disputes,⁸ motivated the Full Court in deciding questions of scope and arbitrability.

The issue of whether Comandate had accepted the repudiation of that agreement by bringing its own *in rem* proceedings for surrogate ship arrest was approached differently. Pan claimed that it had repudiated the agreement to arbitrate, and that Comandate had accepted this repudiation. Allsop J was of the view that, in order to determine whether there had been a repudiation of the agreement to arbitrate, and a subsequent acceptance of repudiation, required examination of the facts of the case and the application of principles of contract law.⁹ He looked to the terms of the letters exchanged by facsimile between the solicitors for the parties in the period between the dispute arising and Pan's application for the anti-suit injunction. Allsop J held that the refusal of Pan's Australian solicitors to unequivocally confirm that they would go to London did not amount to a repudiation of the agreement to arbitrate.¹⁰ He noted that there existed no principle that a failure to answer questions constitutes repudiatory conduct.¹¹ Pan's refusal to respond to Comandate's request for confirmation did not, therefore, amount to repudiation, and as such there was no repudiatory conduct for Comandate to accept. Allsop J then turned to Pan's alternative submission that Comandate had repudiated the agreement to arbitrate by commencement of its own *in rem* proceedings against *The Boomerang I*.

This submission prompted Allsop J to consider the procedural status of an *in rem* proceeding in Australian law. He reviewed the body of authority on point and seemed to accept, at least for argument's sake, that if Comandate's application for the arrest of *The Boomerang I* could be characterized as an *in personam* proceeding (that is, against Pan rather than its vessel), then by filing that application, Comandate may have repudiated the agreement to arbitrate. Allsop J held that, notwithstanding the decision of the House of Lords in *Republic of India v India Steamship Co Ltd (No.2) (The Indian Grace)*,¹² where it was held that an action *in rem* is an action against the owners of the ship from the moment the Court is seized of jurisdiction, the procedural status of an *in rem* proceeding for arrest was akin to an interlocutory application for security.¹³ Allsop J disagreed with their Lordships in *The Indian Grace*, stating in *obiter* that an action *in rem* does not become an action *in personam* once the relevant person (that is, the owner of the vessel) enters an appearance.¹⁴ Whilst accepting that the relevant person's entry of an unconditional appearance to the *in rem* proceedings did create an *in personam* proceeding, Allsop J was of the opinion that, in such a case, the newer *in personam* proceeding does not merge with the older *in rem* action.¹⁵ Proceedings *in rem* run parallel to *in personam* proceedings and are not subsumed by them once an appearance is entered. In forming this view, Allsop J was influenced by procedural theory.¹⁶ The effect of *in rem* proceedings having a procedural status separate from *in personam* proceedings here was that Comandate had not commenced against Pan by applying for the arrest of its ship. It followed that Comandate had not repudiated its agreement to arbitrate, because it had not commenced curial proceedings against the other party to that agreement, but only its vessel. As there was no repudiation to accept, it was not open to Pan to terminate the agreement to arbitrate in London. Accordingly, a stay was granted in favour of Comandate, compelling Pan to arbitrate in London under English law *pacta sunt servanda*.

The Comandate case is authority for three propositions. First, *in rem* proceedings are proceedings against the ship until an appearance is entered, after which time the *in rem* action survives alongside the suit *in personam* that arises from the appearance of the relevant person to the *in rem* proceedings. Secondly, the commencement of *in rem* proceedings for the arrest of a ship will not constitute repudiation (or acceptance of repudiation) of an agreement to arbitrate because the parties to the *in rem* proceedings (that is, applicant and vessel) are not the same as those to the arbitration agreement. Finally, *TPA* claims will fall within the

⁷ *Ibid* [164-165].

⁸ *Ibid* [184, 193-194].

⁹ *Ibid* [86].

¹⁰ *Ibid* [92].

¹¹ *Ibid* [86].

¹² [1998] AC 878.

¹³ Above n 3 [91].

¹⁴ *Ibid* [99, 105].

¹⁵ *Ibid* [105].

¹⁶ *Ibid* [107].

scope of an arbitration clause drafted so as to include claims 'arising under/out of' the charterparty in so far as they relate to conduct or representations that have occurred or been made in the stages before formation of the contract. More generally, the decision shows that the Federal Court is both supportive of arbitration as a means of settling international commercial disputes and aware of the threat posed to the operation of the New York Convention model by domestic judicial decisions that disregard party autonomy. For practitioners of maritime law the decision also shows that the Federal Court of Australia is not afraid of taking a different approach from the House of Lords on the jurisprudence of *in rem* proceedings, and that the place of *in rem* proceedings in Australian maritime law has not been shaken by *The Indian Grace*.