

IN THE SUPREME COURT
OF NEW SOUTH WALES
ADMIRALTY DIVISION

CARRUTHERS J
JUDGE IN ADMIRALTY

Monday 19 July 1993

1571 - SAUNDERSON v CALTEX TANKER COMPANY (AUSTRALIA)
PTY LIMITED (THE "AUSTRALIA SKY")

JUDGMENT

HIS HONOUR: By Notice of Motion dated 23 December 1992, Samsung Co Limited and Samsung Shipbuilding & Heavy Industries Co Limited ("Samsung") seek to have a cross-claim brought against them by Caltex Tanker Company (Australia) Pty Limited ("Caltex") stayed pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth), or, in the alternative, pursuant to s 53 of the *Commercial Arbitration Act 1984* (NSW).

The background of the application is as follows: By Statement of Claim dated 1 May 1992 the plaintiff, Roy Saunderson, sued Caltex for damages as a result of personal injuries which he sustained whilst serving as a radio officer on board the M.T. *Australia Sky*, a large product tanker owned by Caltex. The vessel was built in Korea by Samsung pursuant to a contract between Caltex and Samsung dated 21 December 1987 (the shipbuilding contract), which provided (inter alia) for the vessel to be equipped with a rescue boat conforming to certain technical specifications.

On 14 March 1991 the *Australia Sky* put into Trial Bay for the purpose of transporting a sick crew member to hospital. The vessel anchored and the crew member was taken ashore in the rescue boat of which the plaintiff was a member of the crew. Whilst the boat was under way it was struck by a wave and the crew were thrown into the water. The plaintiff alleges that whilst he

was still in the water one of the crew started the motor of the rescue boat and the plaintiff came into contact with the propeller blades, suffering very serious injuries.

After I reserved judgment on this Notice of Motion on 7 May 1993, the plaintiff filed an Amended Statement of Claim and, for present purposes, it is convenient to note the relevant allegations of negligence against Caltex by reference to the Amended Statement of Claim. The relevant particulars of negligence are sub-paragraphs (10)(e), (f) and (n):

- (e) Failure to supply safe plant and equipment in that the boat was not suitable and safe for the purpose for which it was intended whereby the same overturned and the plaintiff was injured in trying to get back onto it.
- (f) The steering gear of the boat failed so that whoever was driving the boat after it had been re-started was unable to control it.
- (n) Failure to properly ensure that the power of the outboard motor was adequate so that the same did not enable persons having control of the boat to properly control the direction thereof.*

I understand that the plaintiff will allege at the hearing that the rescue boat had an outboard motor which had been installed without the steering shaft being firmly secured, especially as to the connection between the steering shaft and the engine bracket.

It is necessary to notice the following paragraphs in the cross-claim:

- 4. The cross claimant denies its liability to the plaintiff but in the event of the plaintiff recovering damages against it claims contribution or indemnity in respect thereof from the cross defendants and each of them.
- 5. The boat referred to in the plaintiff's statement of claim with outboard motor fitted to it was supplied to the cross claimant by the first and second cross defendants when the cross claimant acquired from the first and second cross defendants the vessel 'Australia Sky' and the said boat was

supplied to the first and second cross defendant by the third cross defendant.

- 6. Any injury loss and damage sustained by the plaintiff were occasioned by reason of the negligence of the cross defendants and each of them.

Particulars of Negligence

As against the first and second cross defendants (i.e. Samsung):

- (i) Supplying a vessel to the cross claimant, namely the 'Australia Sky', which was fitted with a rescue boat in which an outboard motor had been installed without the steering shaft being firmly secured.
- (ii) Failing to inspect the components of the rescue boat.
- (iii) Failing to warn the cross claimant of the way in which the steering shaft was connected to the engine bracket.
- (iv) Failing to stipulate and specify that the third cross defendant provide a rescue boat with outboard motor components which were safe and secure especially as to the connection between the steering shaft and engine bracket.

I turn now to the application for a stay pursuant to the provisions of s 7(2) of the *International Arbitration Act* (the 'Act'). It is relevant to notice in this context the provisions of s 7 of the Act:

*7(1) Where:

- (a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;
- (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.*

Section 3(1) defines 'arbitration agreement' as meaning:

'an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention' (i.e. the New York Convention 1958).

Sub-article I of Article II of the Convention is in the following terms:

"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."

Article XII (Arbitration) of the shipbuilding contract is in the following terms:

1. Decision by the Classification Society:

If any dispute arises between the parties hereto in regard to the design and/or construction of the VESSEL, its machinery and equipment, and/or in respect of the materials and/or workmanship thereof and/or thereon, and/or in respect of interpretations of this Contract or the Specification, the parties may by mutual agreement refer the dispute to the Classification Society or to such other expert as may be mutually agreed between the parties hereto, and whose decision shall be final, conclusive and binding upon the parties hereto.

2. Proceedings of Arbitration:

In the event that the parties hereto do not agree to settle a dispute according to Paragraph 1 of this Article and/or in the event of any other dispute of any kind whatsoever between the parties and relating to this Contract or its revision or any stipulation herein, such dispute shall be submitted to arbitration in London. Each party shall appoint an arbitrator being an arbitrator carrying on business in London involving the arbitration of disputes of a like kind to that between the parties and in the event that they cannot agree, the two arbitrators so appointed shall appoint an Umpire. If the two arbitrators are unable to agree upon an umpire within twenty (20) days after appointment of the second arbitrator, either of the said two arbitrators may apply to the President for the time being of the London Maritime Arbitrators Association to appoint the third arbitrator, and the three arbitrators shall constitute the Board of Arbitration. Such arbitration shall be in accordance with and subject to the provisions of the British Arbitration Act 1979 or any statutory modification or re-enactment thereof for the time being in force.

Either party may demand arbitration of any such dispute by giving notice to the other party. Any demand for arbitration by either of the parties hereto shall state the name of the arbitrator appointed by such party and shall also state specifically the question or questions as to which such party is demanding arbitration. Within Fourteen (14) days after receipt of such notice of such demand for arbitration, the other party shall in turn appoint a second arbitrator and give notice in writing of such appointment to the party demanding arbitration. If a party fails to appoint an arbitrator as aforementioned within Fourteen (14) days following receipt of notice of demand for arbitration by the other party, the party failing to appoint an arbitrator shall be deemed to have accepted and appointed, as its own arbitrator, the arbitrator appointed by the party demanding arbitration and the arbitration shall proceed before sole arbitrator who alone in such event shall constitute the Arbitration Board.

The award of the arbitrators and/or Umpire shall be final and binding on both parties.

3. Notice of Award:

The award shall immediately be given to the BUYER and the BUILDER by telex confirmed in writing.

4. Expenses:

The Arbitrators or the Umpire (if the Arbitrators cannot agree) shall determine which party shall bear the expenses of the arbitration or the portion of such expenses which each party shall bear."

The evidence satisfies me that the following elements have been established -

- (1) There is in existence an arbitration agreement of the kind referred to in sub-article 1 of Article II of the Convention. The "defined legal relationship" is to be found in the shipbuilding contract.
- (2) Section 7 of the Act applies to the arbitration agreement because:
 - (a) the procedure in relation to arbitration under the arbitration agreement is, by the terms of Article XII2 of the agreement

governed by the law of England, which is a Convention country: s 7(1)(a); alternatively

(b) Korea is a Convention country and at the time when the arbitration agreement was made, Samsung was domiciled there: s 7(1)(d).

(3) The cross-claim by Caltex in respect of which the stay is sought constitutes proceedings instituted by a party to an arbitration agreement against another party to the agreement which are pending in a court: s 7(2)(a).

(4) Such proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration: s 7(2)(b). This is because the essential issue raised by the cross-claim is whether the rescue boat supplied by Samsung was defective, and the rescue boat was supplied pursuant to the shipbuilding contract. Accordingly, it constitutes a dispute "in regard to the design and/or construction of the vessel, its machinery and equipment, and/or in respect of the materials and/or workmanship thereof and/or thereon" within the meaning of Article XIII; alternatively "any other dispute of any kind whatsoever between the parties and relating to this Contract" within the meaning of Article XII.

Specifically, the "matter" that is "capable of settlement by arbitration" is the claim for relief contained in the cross-claim. (See *Fakt Australia Ltd v Wilkins & Davies Construction Co Ltd* [1979] 2 NSWLR 243 at 250, per McLelland J). This is a claim for contribution or indemnity by Caltex against Samsung in the event that the plaintiff recovers damages against Caltex.

Samsung has accordingly, in my view, satisfied all the elements required to establish its right to a mandatory stay under s 7(2) of the Act.

There are, however, certain aspects of the argument addressed to the Court on behalf of Caltex which should be noticed.

Caltex structured an argument as follows. It was said that the cross-claim was based upon s 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) which, relevantly, provides that where damage is suffered by any person as a result of a tort -

'(c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise...'

(I observe, parenthetically, that the cross-claim does not plead that it was instituted in pursuance of the *Law Reform (Miscellaneous Provisions) Act*.)

Thus, it was said that the cross-claim raises for determination by this Court the question whether, upon the assumption that Caltex is found liable as a tortfeasor to the plaintiff, Samsung would if sued have been liable to the plaintiff in respect of the same damage, whether as a joint tortfeasor or otherwise. In the event that this question is answered in the affirmative the issue would then arise as to the amount of contribution recoverable by Caltex from Samsung, being such as may be found by this Court to be just and equitable, having regard to the extent of the responsibility of Samsung for the damage in accordance with s 5(2) of the *Law Reform (Miscellaneous Provisions) Act*.

These issues (or disputes) are, it was argued, distinguishable from disputes of the kind which are the subject of the arbitration agreement, they being disputes relating to the contractual obligations of the parties.

I am unable to accept this line of argument. The reality is that the cross-claim arises out of the contractual relationship between Caltex and Samsung irrespective of the specific manner in which it is pleaded. It is only by reason of the shipbuilding contract that Caltex is in a position to claim against Samsung in relation to the rescue boat and it is essential to have regard to the terms of the shipbuilding contract for the purpose of

ascertaining the validity or otherwise of the claim or contribution or indemnity made in the cross-claim. In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107, Lord Scarman, speaking on behalf of the Privy Council said:

'Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship.'

This passage was repeated by Lord Bridge of Harwich in *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 303. See also *Panizza & Co Pty Limited v Allied Interstate (Qld) Pty Limited* [1976] 2 NSWLR 192 at 196, per Samuels JA. Of course, it was not necessary for Caltex to rely upon the *Law Reform (Miscellaneous Provisions) Act* to found its cross-claim. Sufficient justification may be found for the institution of the cross-claim in the alleged breach of the contractual relationship between the two parties giving rise to a potential claim by the plaintiff against Caltex.

It should be noticed in this regard that the ambit of the arbitration agreement is very wide indeed. The words 'relating to this contract' in Article XII are of the widest import. See *IBM Australia Limited v National Distribution Service Limited* (1991) 22 NSWLR 466 at 477, per Kirby P, and Mustill and Boyd, *Commercial Arbitration* (2nd ed) p 119, and the cases there cited.

It is also pertinent to observe in this context that the word 'matter' in s 7(2) of the Act has received a wide construction. See *Tanning Research Laboratory Inc v O'Brien* [1989-90] 169 CLR 332 at 351-352, where Deane and Gaudron JJ, in their joint judgment, said:

'The word 'matter' is not defined in the Act. In the quite different context of Ch. III of the Constitution, it has been held that the word 'matter' means 'the whole matter' and encompasses 'all claims made within the scope of the controversy': *Fencott v Muller* (1963) 152

CLR 570, at 603. See also *Philip Morris Inc v Adam P. Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, at 475. However, in any context, 'matter' is a word of wide import. In the context of s 7(2), the expression 'matter ... capable of settlement by arbitration' may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, the expression 'matter ... capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. See *Flakt* [1976] 2 NSWLR, at 250. It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy. The words 'capable of settlement by arbitration' indicate that the controversy must be one falling within the scope of the arbitration agreement and, perhaps, one relating to rights which are not required to be determined exclusively by the exercise of judicial power. See Mustill and Boyd, *Law and Practice of Commercial Arbitration in England*, 2nd ed. (1980), pp. 149-150, where it is noted that 'English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not' but that the powers of an arbitrator 'are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state.'

In the instant case it could not be said that the issues raised by the cross-claim could be said to require determination only by the exercise of judicial power. They are issues of the kind which frequently fall for determination by commercial arbitrators.

In any event, if the issues in the cross-claim extend beyond the matter which can be referred to arbitration under Article XII, so that the proceedings are not wholly congruent with the 'matter' which is to be referred to arbitration, the whole of the proceedings must be stayed until an award is made on the matter referred. See *Flakt*, at 250, cited by Brennan and Dawson JJ in their joint judgment in *Tanning Research Laboratories v O'Brien*, at 345.

Finally, it was argued by Caltex that even if the elements necessary to found a stay were otherwise established, a stay cannot be granted until the

plaintiff obtains judgment against Caltex. This submission must, however, be rejected. In my view a dispute arose between the parties immediately Caltex served the cross-claim upon Samsung, which was at no stage willing to accede to the relief claimed. See *The "American Sioux"* [1980] 2 Lloyd's Rep 224 at 228.

Thus, in my view, Samsung has made out a case for a mandatory stay of the cross-claim. No question of discretion arises: *Nova (Jersey) Knit Ltd v Kamngem Spinnerei GmbH* [1977] 1 Lloyd's Rep 463 at 466. No argument was addressed to me with regard to the imposition of conditions upon such a stay. Accordingly, I will allow the parties to bring in short minutes with relation to this judgment and hear argument, if necessary, on the imposition of conditions. Caltex is to pay the costs of this Notice of Motion.

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INTERNATIONAL
ARBITRATION REPORT

IN THE SUPREME COURT
OF NEW SOUTH WALES
ADMIRALTY DIVISION

CARRUTHERS J
JUDGE IN ADMIRALTY

Monday 19 July 1993

1592 - SAUNDERSON v CALTEX TANKER COMPANY (AUSTRALIA)
PTY LIMITED (THE "AUSTRALIA SKY")

JUDGMENT

HIS HONOUR: By Notice of Motion dated 23 December 1992, Samsung Co Limited and Samsung Shipbuilding & Heavy Industries Co Limited ("Samsung") seek to have a cross-claim brought against them by Caltex Tanker Company (Australia) Pty Limited ("Caltex") stayed pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth), or, in the alternative, pursuant to s 53 of the *Commercial Arbitration Act 1984* (NSW).

The background of the application is as follows: By Statement of Claim dated 1 May 1992 the plaintiff, Roy Saunderson, sued Caltex for damages as a result of personal injuries which he sustained whilst serving as a radio officer on board the M.T. *Australia Sky*, a large product tanker owned by Caltex. The vessel was built in Korea by Samsung pursuant to a contract between Caltex and Samsung dated 21 December 1987 (the shipbuilding contract), which provided (inter alia) for the vessel to be equipped with a rescue boat conforming to certain technical specifications.

On 14 March 1991 the *Australia Sky* put into Trial Bay for the purpose of transporting a sick crew member to hospital. The vessel anchored and the crew member was taken ashore in the rescue boat of which the plaintiff was a member of the crew. Whilst the boat was under way it was struck by a wave and the crew were thrown into the water. The plaintiff alleges that whilst he

was still in the water one of the crew started the motor of the rescue boat and the plaintiff came into contact with the propeller blades, suffering very serious injuries.

After I reserved judgment on this Notice of Motion on 7 May 1993, the plaintiff filed an Amended Statement of Claim and, for present purposes, it is convenient to note the relevant allegations of negligence against Caltex by reference to the Amended Statement of Claim. The relevant particulars of negligence are sub-paragraphs (10)(e), (f) and (n):

- (e) Failure to supply safe plant and equipment in that the boat was not suitable and safe for the purpose for which it was intended whereby the same overturned and the plaintiff was injured in trying to get back onto it.
- (f) The steering gear of the boat failed so that whoever was driving the boat after it had been re-started was unable to control it.
- (n) Failure to properly ensure that the power of the outboard motor was adequate so that the same did not enable persons having control of the boat to properly control the direction thereof.

I understand that the plaintiff will allege at the hearing that the rescue boat had an outboard motor which had been installed without the steering shaft being firmly secured, especially as to the connection between the steering shaft and the engine bracket.

It is necessary to notice the following paragraphs in the cross-claim:

- 4. The cross claimant denies its liability to the plaintiff but in the event of the plaintiff recovering damages against it claims contribution or indemnity in respect thereof from the cross defendants and each of them.
- 5. The boat referred to in the plaintiff's statement of claim with outboard motor fitted to it was supplied to the cross claimant by the first and second cross defendants when the cross claimant acquired from the first and second cross defendants the vessel 'Australia Sky' and the said boat was

supplied to the first and second cross defendant by the third cross defendant.

6. Any injury loss and damage sustained by the plaintiff were occasioned by reason of the negligence of the cross defendants and each of them.

Particulars of Negligence

As against the first and second cross defendants [i.e. Samsung]:

- (i) Supplying a vessel to the cross claimant, namely the 'Australia Sky', which was fitted with a rescue boat in which an outboard motor had been installed without the steering shaft being firmly secured.
- (ii) Failing to inspect the components of the rescue boat.
- (iii) Failing to warn the cross claimant of the way in which the steering shaft was connected to the engine bracket.
- (iv) Failing to stipulate and specify that the third cross defendant provide a rescue boat with outboard motor components which were safe and secure especially as to the connection between the steering shaft and engine bracket.

I turn now to the application for a stay pursuant to the provisions of s 7(2) of the *International Arbitration Act* (the 'Act'). It is relevant to notice in this context the provisions of s 7 of the Act:

'7(1) Where:

- (a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;
- (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.*

Section 3(1) defines 'arbitration agreement' as meaning:

'an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention' (i.e. the New York Convention 1958).

Sub-article 1 of Article II of the Convention is in the following terms:

'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.'

Article XII (Arbitration) of the shipbuilding contract is in the following terms:

1. Decision by the Classification Society:

If any dispute arises between the parties hereto in regard to the design and/or construction of the VESSEL, its machinery and equipment, and/or in respect of the materials and/or workmanship thereof and/or thereon, and/or in respect of interpretations of this Contract or the Specification, the parties may by mutual agreement refer the dispute to the Classification Society or to such other expert as may be mutually agreed between the parties hereto, and whose decision shall be final, conclusive and binding upon the parties hereto.

2. Proceedings of Arbitration:

In the event that the parties hereto do not agree to settle a dispute according to Paragraph 1 of this Article and/or in the event of any other dispute of any kind whatsoever between the parties and relating to this Contract or its rescission or any stipulation herein, such dispute shall be submitted to arbitration in London. Each party shall appoint an arbitrator being an arbitrator carrying on business in London involving the arbitration of disputes of a like kind to that between the parties and in the event that they cannot agree, the two arbitrators so appointed shall appoint an Umpire. If the two arbitrators are unable to agree upon an umpire within twenty (20) days after appointment of the second arbitrator, either of the said two arbitrators may apply to the President for the time being of the London Maritime Arbitrators Association to appoint the third arbitrator, and the three arbitrators shall constitute the Board of Arbitration. Such arbitration shall be in accordance with and subject to the provisions of the British Arbitration Act 1979 or any statutory modification or re-enactment thereof for the time being in force.

Either party may demand arbitration of any such dispute by giving notice to the other party. Any demand for arbitration by either of the parties hereto shall state the name of the arbitrator appointed by such party and shall also state specifically the question or questions as to which such party is demanding arbitration. Within Fourteen (4) days after receipt of such notice of such demand for arbitration, the other party shall in turn appoint a second arbitrator and give notice in writing of such appointment to the party demanding arbitration. If a party fails to appoint an arbitrator as aforementioned within Fourteen (14) days following receipt of notice of demand for arbitration by the other party, the party failing to appoint an arbitrator shall be deemed to have accepted and appointed, as its own arbitrator, the arbitrator appointed by the party demanding arbitration and the arbitration shall proceed before sole arbitrator who alone in such event shall constitute the Arbitration Board.

The award of the arbitrators and/or Umpire shall be final and binding on both parties.

3. Notice of Award:

The award shall immediately be given to the BUYER and the BUILDER by telex confirmed in writing.

4. Expenses:

The Arbitrators or the Umpire (if the Arbitrators cannot agree) shall determine which party shall bear the expenses of the arbitration or the portion of such expenses which each party shall bear."

The evidence satisfies me that the following elements have been established -

- (1) There is in existence an arbitration agreement of the kind referred to in sub-article 1 of Article II of the Convention. The "defined legal relationship" is to be found in the shipbuilding contract.
- (2) Section 7 of the Act applies to the arbitration agreement because:-
 - (a) the procedure in relation to arbitration under the arbitration agreement is, by the terms of Article XIII of the agreement

governed by the law of England, which is a Convention country: s 7(1)(a); alternatively

(b) Korea is a Convention country and at the time when the arbitration agreement was made, Samsung was domiciled there: s 7(1)(d).

(3) The cross-claim by Caltex in respect of which the stay is sought constitutes proceedings instituted by a party to an arbitration agreement against another party to the agreement which are pending in a court: s 7(2)(a).

(4) Such proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration: s 7(2)(b). This is because the essential issue raised by the cross-claim is whether the rescue boat supplied by Samsung was defective, and the rescue boat was supplied pursuant to the shipbuilding contract. Accordingly, it constitutes a dispute "in regard to the design and/or construction of the vessel, its machinery and equipment, and/or in respect of the materials and/or workmanship thereof and/or thereon" within the meaning of Article XII1; alternatively "any other dispute of any kind whatsoever between the parties and relating to this Contract" within the meaning of Article XII2.

Specifically, the "matter" that is "capable of settlement by arbitration" is the claim for relief contained in the cross-claim. (See *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* [1979] 2 NSWLR 243 at 250, per McLelland J). This is a claim for contribution or indemnity by Caltex against Samsung in the event that the plaintiff recovers damages against Caltex.

Samsung has accordingly, in my view, satisfied all the elements required to establish its right to a mandatory stay under s 7(2) of the Act.

There are, however, certain aspects of the argument addressed to the Court on behalf of Caltex which should be noticed.

Caltex structured an argument as follows. It was said that the cross-claim was based upon s 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) which, relevantly, provides that where damage is suffered by any person as a result of a tort -

- (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise...'

(I observe, parenthetically, that the cross-claim does not plead that it was instituted in pursuance of the *Law Reform (Miscellaneous Provisions) Act*.)

Thus, it was said that the cross-claim raises for determination by this Court the question whether, upon the assumption that Caltex is found liable as a tortfeasor to the plaintiff, Samsung would if sued have been liable to the plaintiff in respect of the same damage, whether as a joint tortfeasor or otherwise. In the event that this question is answered in the affirmative the issue would then arise as to the amount of contribution recoverable by Caltex from Samsung, being such as may be found by *this Court* to be just and equitable, having regard to the extent of the responsibility of Samsung for the damage in accordance with s 5(2) of the *Law Reform (Miscellaneous Provisions) Act*.

These issues (or disputes) are, it was argued, distinguishable from disputes of the kind which are the subject of the arbitration agreement, they being disputes relating to the contractual obligations of the parties.

I am unable to accept this line of argument. The reality is that the cross-claim arises out of the contractual relationship between Caltex and Samsung irrespective of the specific manner in which it is pleaded. It is only by reason of the shipbuilding contract that Caltex is in a position to claim against Samsung in relation to the rescue boat and it is essential to have regard to the terms of the shipbuilding contract for the purpose of

ascertaining the validity or otherwise of the claim for contribution or indemnity made in the cross-claim. In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107, Lord Scarman, speaking on behalf of the Privy Council said:

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This passage was repeated by Lord Bridge of Harwich in *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 303. See also *Panozza & Co Pty Limited v Allied Interstate (Qld) Pty Limited* [1976] 2 NSWLR 192 at 196, per Samuels JA. Of course, it was not necessary for Caltex to rely upon the *Law Reform (Miscellaneous Provisions) Act* to found its cross-claim. Sufficient justification may be found for the institution of the cross-claim in the alleged breach of the contractual relationship between the two parties giving rise to a potential claim by the plaintiff against Caltex.

It should be noticed in this regard that the ambit of the arbitration agreement is very wide indeed. The words "relating to this contract" in Article XII2 are of the widest import. See *IBM Australia Limited v National Distribution Service Limited* (1991) 22 NSWLR 466 at 477, per Kirby P, and Mustill and Boyd, *Commercial Arbitration* (2nd ed) p 119, and the cases there cited.

It is also pertinent to observe in this context that the word "matter" in s 7(2) of the Act has received a wide construction. See *Tunning Research Laboratory Inc v O'Brien* [1989-90] 169 CLR 332 at 351-352, where Deane and Gaudron JJ, in their joint judgment, said:

'The word "matter" is not defined in the Act. In the quite different context of Ch. III of the Constitution, it has been held that the word "matter" means "the whole matter" and encompasses "all claims made within the scope of the controversy": *Fencott v Muller* (1963) 152

CLR 570, at 603. See also *Philip Morris Inc v Adam P. Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, at 475. However, in any context, 'matter' is a word of wide import. In the context of s 7(2), the expression 'matter ... capable of settlement by arbitration' may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, the expression 'matter ... capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. See *Flakt* [1979] 2 NSWLR, at 250. It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy. The words 'capable of settlement by arbitration' indicate that the controversy must be one falling within the scope of the arbitration agreement and, perhaps, one relating to rights which are not required to be determined exclusively by the exercise of judicial power. See Mustill and Boyd, *Law and Practice of Commercial Arbitration in England*, 2nd ed. (1980), pp. 149-150, where it is noted that 'English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not' but that the powers of an arbitrator 'are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state.'

In the instant case it could not be said that the issues raised by the cross-claim could be said to require determination only by the exercise of judicial power. They are issues of the kind which frequently fall for determination by commercial arbitrators.

In any event, if the issues in the cross-claim extend beyond the matter which can be referred to arbitration under Article XII, so that the proceedings are not wholly congruent with the "matter" which is to be referred to arbitration, the whole of the proceedings must be stayed until an award is made on the matter referred. See *Flakt*, at 250, cited by Brennan and Dawson JJ in their joint judgment in *Tanning Research Laboratories v O'Brien*, at 345.

Finally, it was argued by Caltex that even if the elements necessary to found a stay were otherwise established, a stay cannot be granted until the

plaintiff obtains judgment against Caltex. This submission must, however, be rejected. In my view a dispute arose between the parties immediately Caltex served the cross-claim upon Samsung, which was at no stage willing to accede to the relief claimed. See *The "American Sioux"* [1980] 2 Lloyd's Rep 224 at 228.

Thus, in my view, Samsung has made out a case for a mandatory stay of the cross-claim. No question of discretion arises: *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 Lloyd's Rep 463 at 466. No argument was addressed to me with regard to the imposition of conditions upon such a stay. Accordingly, I will allow the parties to bring in short minutes with relation to this judgment and hear argument, if necessary, on the imposition of conditions. Caltex is to pay the costs of this Notice of Motion.

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