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THE SUPREME COURT
OF NEW SOUTH WALES
COMMERCIAL DIVISION

50015/95 SHANGHAI FOREIGN TRADE CORPORATION v SIGMA METALLURGICAL COMPANY PTY LTD & ORS

JUDGMENT

BAINTON J

Dates of Hearing: 8, 26 June 1995

Date of Judgment: 6 August 1996

Solicitors for Plaintiff: Hunt & Hunt

Counsel for First, Second, Fifth Defendants: Mr M. Jacobs QC

Solicitors for First, Second, Fifth Defendants: Freehill Hollingdale & Page

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By a summons dated 19 January 1995 Shanghai Foreign Trade Corporation as plaintiff claimed damages of $US750,000 together with interest and costs against each of five defendants. Shanghai Foreign Trade Corporation is commonly referred to as "Shantra" and I will so describe it in this judgment.

The first defendant is Sigma Metallurgical Co. Pty Ltd, a company incorporated in New South Wales. I will simply refer to it as "Sigma". The second, third, fourth and fifth defendants are individuals all of them residing in New South Wales. The second defendant Pang Kee Lee, the third defendant Chi Ju Chan and the fourth defendant Xiao Wei Zhang are each said to be a director of Sigma. The fifth defendant, Robin Sang, is said to be "an agent, manager and an employee" of Sigma. It is clear from material to which I will later refer that Pang Kee Lee, whom I will simply describe as Lee, is the principal executive of Sigma, or at least the executive of Sigma principally concerned with matters presently in dispute between Sigma and Shantra.

The plaintiff's claim is described in the summons as one for "damages arising out of breach of contract (Nos 93YN090-ES1109AU, 93YN090-ES1162AU and 93YN09

ES1180AU)* under which Sigma was to supply quantities of scrap iron said to have been "paid for by the plaintiff". The plaintiff also claimed damages from each defendant in respect of alleged breaches of s52 of the Trade Practices Act (Cth) and/or s42 of the Fair Trading Act 1987 (NSW).

This summons makes the following allegations in respect of the first and second of the three contracts to which I have referred.

*5. *On or about 15 March 1993, the Plaintiff entered into an agreement ('the first agreement') with the Defendant for the supply of mixed motor scrap iron by the First Defendant.*

Particulars

The said agreement is written and contained in a contract between the Plaintiff and the First Defendant dated 15 March 1993. The said contract is numbered 93YN090-ES1109AU.

6. *On or about 1 April 1993, the Plaintiff entered into an agreement ('the second agreement') with the Defendant for the supply of used rail scrap and re-rolling steel (namely, sheet pipe scrap and H beam scrap) by the First Defendant.*

Particulars

The said agreement is written and contained in a contract between the Plaintiff and the First Defendant dated 1 April 1993. The said contract is numbered 93YN090-ES1162AU.

8. *It was a term and condition of each of the agreements referred to above that payment for the scrap metal was to be made by the Plaintiff to the First Defendant in United States dollars: [clause (4)].*

9. *It was a further term and condition of the agreements that the Plaintiff was to open an irrevocable Letter of Credit with the Bank of China, Shanghai, in favour of the First Defendant 20 days prior to shipment following the Defendant's advice as to the time and quantity of material expected to be ready for shipment: [clause (8)].*

10. *On or about 12 April 1993, the First Defendant gave notice of the quantity and cost of the goods on the first shipment, the subject of the first and second agreement.*

Particulars

The notice of shipment was by facsimile dated 12 April 1993 enclosed:

- *Bill of Lading numbered BRS 20 128 dated 7 April 1993;*
- *Invoice numbered SI 93108 dated 12 April 1993;*
- *Packing List numbered SPL 93108 dated 12 April 1993;*
- *Bill of Lading numbered BRS 20 129 dated 9 April 1993;*
- *Invoice numbered SI 93109 dated 12 April 1993; and*
- *Packing List numbered SPL 93106 dated 12 April 1993.*

The goods being shipped from Japan were noted as:

Goods	*Quantity*	*Port of Loading*	*Cost of Goods*
Motor scraps	*500 MT*	*Tokyo*	*US$110,000*
Motor scraps	*1300 MT*	*Osaka*	*US$286,000*
Used railed	*800 MT*	*Tokyo*	*US$144,000*
Used railed	*500 MT*	*Osaka*	*US$90,000*
Sheet pipe	*350 MT*	*Tokyo*	*US$73,500*
H-Beam	*150 MT*	*Tokyo*	*US$31,500*
Totals	*3,600 MT*		*US$735,000*

11. *On or about 12 April 1993, the Plaintiff paid the First Defendant in accordance with the first and second agreements.*

Particulars

The Plaintiff paid the sum of US$200,000 into the First Defendant's account, number 018 250 161 by letter of credit.

12. *On or about 13 April 1993, the Plaintiff paid the First Defendant in accordance with the first and second agreements.*

Particulars

The Plaintiff paid the sum of US$270,000 into the First Defendant's account, number 018 250 161 by letter of credit.

13. *On or about 14 April 1993, the First Defendant by facsimile requested payment from the Plaintiff.*

14. *On or about 15 April 1993, the Plaintiff paid the First Defendant in accordance with the first and second agreements.*

Particulars

The Plaintiff paid the sum of RMB 1,760,000 (being US$200,000 upon conversion) into the First Defendant's account, number 018 250 161 by letter of credit.

17. *On or about 11 May 1993, the Plaintiff paid the First Defendant in accordance with the first and second agreements.*

Particulars

The Plaintiff paid the sum of US$80,000 in to the First Defendant's account, number 018 250 161 by letter of credit.

18. *The First Defendant has wrongfully and in breach of the First, Second and Third Agreements failed to deliver the goods.*

19. *By reason of the First Defendant's breach of the First, Second and Third Agreements, the Plaintiff has suffered loss and damage.*

Particulars

(a) Monies paid by the Plaintiff to the First Defendant:

(i)	*on or about 12 April 1993*	*US$200,000*
(ii)	*on or about 13 April 1993*	*US$270,000*
(iii)	*on or about 15 April 1993*	*US$200,000*
(iv)	*on or about 11 May 1993*	*US$80,000*
		$US750,000

(b) Interest;

(c) Loss of profit; and

(d) Costs."

I have omitted from the above account of the summons the references to the third of the three contracts because, so far as I can gather from the mass of evidence to which I must later refer, that contract was cancelled by agreement and the letter of credit furnished by Shantra to Sigma in respect of it returned to Shantra. However, the "settlement" to which I will later refer, includes a promise by Sigma to pay Shantra US$54,600 "reparation" in respect of the inability of Sigma to perform.

Nor do I propose to set out the allegations of breach of the Trade Practices Act and of the Fair Trading Act. It is enough to say that they alleged representations that goods the subject of the first and second contracts had been loaded on a vessel for delivery whereas it is now common ground that they had not.

By their notice of motion filed on 23 February 1995, they by that date having filed appearances but taken no further steps, the first, second and fifth defendants notified their intention to move for orders:

1. That pursuant to s7, Part II, International Arbitration Act 1994 (C'th) these proceedings be stayed;

2. Further and/or in the alternative these proceedings be stayed pursuant to s53, Commercial Arbitration Act 1984;

3. Further and/or in the alternative the proceedings against the second and fifth defendants be stayed pending the outcome of the arbitration between the plaintiff and the first defendant.

On 7 April 1995 those same first, second and fifth defendants filed an amended notice of motion seeking orders, inter alia,

"1. staying these proceedings pursuant to either:

(a) 57 of the International Arbitration Act, 1974 (C'th); or

(b) Art. 8 of the UNCITRAL Model Law which has the force of law in Australia pursuant to s16 of the International Arbitration Act, 1974 (C'th),

pending the determination of disputes between the plaintiff and the first defendant by the China International Economic and Trade Arbitration Commission (CIETAC).

2. further and/or in the alternative the proceedings against the second and fifth defendants be stayed pending the outcome of the arbitration between the plaintiff and the first defendant;"

The absence of any application for a stay against the third and fourth defendants is probably due to the absence of any evidence that either of them made any relevant representations to the plaintiff.

When that notice of motion came on for hearing before me I was handed what was

described on behalf of the plaintiff as its proposed amended summons.

Shantra was entitled as of right under Part 20 of r2(1) of the Rules of this Court to file that summons without leave. For reasons which will appear later in this judgment I proposed to treat that amended summons as having been filed in Court, despite the defendant's objection to that course. As submitted by the plaintiff in argument (with the support of data in the judgment of McLelland J in Flakt Australia Ltd v Wilkins & Davies Construction Co. Ltd [1979] 2 NSWLR 243 at 248) if the application for an appropriate amendment were disallowed, the plaintiff could and would commence a fresh action by filing a fresh summons in the terms of the desired amended summons. That must, save in exceptional circumstances, require the granting of leave to amend whenever that leave is required. As will later appear, further amendments are desirable properly to plead the plaintiff's case as propounded during argument and supported by the evidence.

On 12 April 1995 the solicitors for the first, second and fifth defendants filed in Court a notice of motion seeking, inter alia, an order pursuant to Part 20, r3, that the amendments to the plaintiff's summons be disallowed. What I have said above indicates that the application to disallow the Amended Statement of Claim to which I have just referred should be and accordingly it is refused.

I should add at this stage that the written submissions with which I was furnished during argument referred to a second amended summons as having been served on the solicitors for the defendants and to a reply to that summons. No such documents have been filed; nor, on the hearing of the motion for a stay, was I furnished with a copy of any such document.

The amended summons which I have treated as filed in Court contains the following amended or additional provisions.

> "A *NATURE OF DISPUTE*
>
> 1. *The Plaintiff claims that the First Defendant has admitted breaching contract numbers 93YN090-ES1109AU, 93YN090-ES1162AU and 93YN090-ES1180AU and has agreed to repay to the Plaintiff money received pursuant to the contract and reparation.*
>
> B. *ISSUES LIKELY TO ARISE*
>
> 1.0 *Contractual – Against the First Defendant*
>
> 1.1 *Whether the First Defendant is bound by the settlement of all issues in dispute evidenced in a contract between the Plaintiff and First Defendant dated 21 July 1993 and an agreement between the Plaintiff and First Defendant dated 26 May 1993 to repay to the Plaintiff moneys and reparation.*
>
> 1.2 *Whether a settlement having been reached the First Defendant is entitled to have the dispute determined by arbitration.* [Emphasis added]
>
> 1.3 *Whether these proceedings should be stayed pending an arbitral award in China.*
>
> 2.0 *Contractual – Against the Second, Third, Fourth and Fifth Defendants*
>
> 2.1 *Whether the Second, Third, Fourth and Fifth Defendants are parties to the original contract between the Plaintiff and First Defendant and thereby entitled to the benefit of any arbitration clause contained in the original contracts.*
>
> 3.0 *Trade Practices – Against all Defendants.*
>
> 3.1 *Whether the First Defendant made representations to the Plaintiff as to the supply of the goods and the Plaintiff relied upon those representations.*
>
> 3.2 *Whether the representations by the First Defendant were misleading and/or deceptive or likely to mislead and/or deceive.*
>
> 3.3 *Whether the Second, Third, Fourth and Fifth Defendants 'were persons involved' in the making of representations concerning the supply and delivery of the goods*
>
> ...
>
> C *SUMMARY OF PLAINTIFF'S CONTENTIONS*
>
> 19. *The First Defendant has admitted its failure to deliver the goods under contract numbers 93YN090-ES1109AU, 93YN090-ES1162AU and 93YN090-ES1180AU and has settled all matters by the refund to the Plaintiff moneys paid pursuant to a contract and interest in the agreed sum of $US33,750 together with reparation in the sum of $34,600."* [Emphasis added]

(I have quoted paragraph C19 verbatim. It should read that the defendant has agreed to

settle all matters by the refund etc. For the purposes of this Application I have treated it as amended so to allege. It should be so amended.)

'Particulars

By contract entered into by the Plaintiff and First Defendant dated 21 July 1993. By document of the First Defendant dated 26 May 1993.

20. *By reason of the First Defendant's breach of the First, Second and Third Agreements, the Plaintiff has suffered loss and damage.*

Particulars

(a) Monies paid by the Plaintiff to the First Defendant:

(i)	on or about 12 April 1993	US$200,000
(ii)	on or about 13 April 1993	US$270,000
(iii)	on or about 15 April 1993	US$200,000
(iv)	on or about 11 May 1993	US$80,000
		$US750,000

(b) Reparation in the sum of $US54,600;

(c) Interest agreed in the sum of $US33,750;

(d) Interest;

(e) Loss of profit; and

(f) Costs.'

Each of the three specified contracts is on a printed form of contract signed on behalf of Shantra as buyer and Sigma as seller. This form is printed in both Chinese and English.

The contract 1109AU is dated March 15 1993. The buyer is Shantra. The seller is Sigma. It provides

'This contract is made by and between the Buyers and the Sellers whereby the Buyers agree to buy and the Sellers agree to sell the undermentioned goods on the terms and conditions stated below

Name of Commodity, Specifications, Country of Origin, Manufacturers Packing Terms and Shipping Marks	Quantity	Unit Price	Total Amount	Time of Shipment
MIX MOTOR SCRAP Packing: In Loose Remarks: Weight inspection subject to actual net weight by CCIB at discharging Port.	1000 MT This price is to be understood per MT actual net weight CIF FO CQD Jiaojiang Port, or Zhangjiagang Port. Payment: 100% of TTL amount by L/C at sight, transferable and irrevocable, third party documents, TT reimbursement, transhipment and partial shipment acceptable.	USD220/MT	USD220,000	Within 30 days after receipt of L/C
Each package shall be stencilled with unloading shipment, of host number, gross and net weights, package number, measurement and the following shipping Marks: NO SHIPPING MARK	10% more or less allowed on each item			Monthly quantity should be delivered in one shipment partial shipment allowed.

Clause 6 provided that the port of loading was to be "Japanese Port" and clause 7 specified as the port of destination "Jiaojiang Port or Zhangjiagang Port".

"8. Terms of Payment: Upon receipt from the Sellers of the advice as to the time and quantity expected ready for shipment, the Buyers shall open, 20 days before shipment with the Bank of China, Shanghai an irrevocable Letter of Credit in favour of the Sellers payable by the opening bank against sight draft accompanied by the documents as stipulated in Clause (9) of this Contract.

9. Documents: To facilitate the Buyers to check up, all documents should be made in a version identical to that used in this contract.

A. Complete set of Clean On Board Shipped Bill of Lading made out to order, blank endorsed, notifying the China National Foreign Trade Transportation Corporation ZHONGWAIYUN at the port of destination. (If the price in this Contract is based on FOB marked 'freight payable at destination' or 'freight as per charter party' if the price in this Contract is based on C&F, marked 'freight prepaid'.)

B. Invoice: indicating contract number, shipping marks, name of carrying vessel, number of the Letter of Credit and shipment number in case of partial shipments.

C. Packing List and/or Weight Memo: indicating contract number, shipping

marks, heat number, gross and net weights of each package.

D. Certificates of Quality and Quantity/Weight of the contracted goods issued by the manufacturers.
Quality Certificate to show actual results of tests to be made for each melt of steel, on chemical compositions, mechanical properties and all other tests called for by the Standard stipulated hereon. Certificate of Quantity/Weight should bear the Quantity/Weight as per each Heat.

E. Copy of telegram advising shipment according to Clause (11) of this Contract.

F. Vessel's itinerary certificate as per Clause (10) of this Contract, (required if the price in this Contract is based on C&F: not required if the price in this Contract is based on FOB.)

(11) Advice of Shipment. The Sellers shall, upon completion of loading, advise immediately the Buyers by cable of the contract number, name of commodity, number of packages, gross and net weights, invoice value, name of vessel and loading date.

(15) Delayed Delivery and Penalty:
Should the Sellers fail to effect delivery on time as stipulated in this Contract owing to causes other than Force Majeure as provided for in Clause (14) of this Contract, the Buyers shall have the right to cancel the relative quantity of the contract. Or alternatively, the Sellers may, with the Buyers' consent, postpone delivery on payment of penalty to the Buyers. The Buyers may agree to grant the Sellers a grace period of 15 days. Penalty shall be charged at the rate of 1% of the total value for every 10 days, odd days less than 10 days should be counted as 10 days. The total penalty shall be calculated from the 16th day and shall not exceed 5% of the total value of the goods involved.

(16) Arbitration: All disputes in connection with this Contract or the execution thereof shall be settled by friendly negotiation. If no settlement can be reached, the case in dispute shall then be submitted for arbitration to the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade in accordance with the Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade. The decision made by the Commission shall be accepted as final and binding upon both parties. The fees for arbitration shall be borne by the losing party unless otherwise awarded by the Commission."

Some of these printed conditions appear to be inappropriate to a contract for the sale of mixed motor scrap or used rail scrap.

Contract 1162AU was written on the same printed form. It differs only in respect of the number given to it, its date, the date of the second contract being 1 April 1993, and the description of the goods the subject of it. The goods the subject of this contract were used rail scrap at a price of $US360,000 and used re-rolling steel at a price of $US105,000, a total of $US465,000. Payment was said to be "D/P at sight by T/T remittance. Third party documents, transhipment and chartered vessel allowed".

In an affidavit sworn by the second defendant Lee on 1 March 1995, he asserted that those two contracts (and the third 1180AU) were entered into between Sigma and Shantra. He said, in paragraph 10 of that affidavit

> *"In my opinion, a dispute has arisen between the company and the plaintiff which is capable of settlement by arbitration pursuant to clause 16 of the contracts refered to by me in paragraph 4 of this affidavit."*

They are the contracts mentioned in the summons.

He went on to say in paragraph 11

> *"The Company has endeavoured to settle this dispute with the plaintiff and its appointment (sic) solicitors before proceedings were issued on 19 January 1995 and remains willing to do all that is necessary to have the dispute settled by friendly negotiation or failing such, by arbitration in accordance with the original intention expressed by the parties at the time of entering the contracts. Attached and marked 'D' is a true copy of a facsimile sent to the plaintiff's solicitors by the Company's previous solicitors Parry Carroll Kanjian on 28 November 1994."*

The annexure marked "D" stated

> *"WITHOUT PREJUDICE*
>
> *I acknowledge receipt of your fax of Friday which was not received by the writer until this morning. So that there will be no misunderstanding, we quote from a letter forwarded by us to our client as a result of our telephone conversation as follows:*
>
> I had a without prejudice discussion with Mr Jim Harrowell, the Chairman of Hunt & Hunt, solicitors who is acting for Shanghai Foreign Trade Corporation ("SFTC"). Mr Harrowell saw merit in my proposition that the matter should not be litigated in a court of law but that a solution be arrived at which is fair and equitable to both parties. By this it is meant that we start with the premise that SFTC paid Sigma an amount of money in relation to contracts for the supply of

scrap metal. As the contracts did not eventuate and no scrap metal was received, SFTC takes the view that it is entitled to a refund of those moneys. Sigma, on the other hand, alleges that the contracts did not eventuate for reasons brought about by SFTC in contravention of the agreement between the parties, the result being that Sigma incurred loss and damage which it is entitled to recover from SFTC.

If you agree that the matter should be resolved on this basis, it seems proper that each party provide the other with all documents in its possession having a bearing on the matter. Each party should also provide the other with an outline of its case stating the amounts claimed and the reasons why it is entitled to their claim. A meeting would then be arranged at which a resolution would attempt to be negotiated. If this fails, it is hoped that an agreement could be reached to have an agreed third party decide the issue in lieu of the matter proceeding to a court of law. Please confirm as soon as possible that this proposal is acceptable to your company.

On the understanding that this will be acceptable, I enclose a copy of a fax received from Mr Harrowell under which we are required to provide him with documents by the end of this week. I understand that you are proceeding with the necessary translations and I look forward to receiving copies of the translations as soon as possible.

We look forward to the matter proceeding in the hope that settlement can be negotiated to the mutual satisfaction of both parties.

Yours faithfully
Parry Carroll Kanjian
*Per:**

I should add that the assertion of Sigma of the reason why the contracts "did not eventuate" is that Shantra failed to open letters of credit timeously. It is appropriate that I add at this stage that notwithstanding a total of 21 affidavits filed in this matter by the solicitors for the applicants for a stay, not one of them or all of them collectively establish that the breach by Shantra (or for that matter any other breach by Shantra). Those acting for Sigma have ignored the precondition in clause 8 of contract 1109AU to the buyer's obligation to furnish a letter of credit. And a different method of payment than a letter of credit was called for by contract 1162AU so that Sigma's assertion of why it failed to perform that contract is simply untenable.

Were there presently extant a dispute in respect of contract 1109AU or contract 1162AU, it would prima facie be appropriate to refer the dispute in connection with each of these contracts to the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade. That entity has undergone two changes of name since the forms of contract used in this matter were printed. On 12 August 1988 it was renamed China International Economic and Trade Arbitration Commission. Since 21 June 1989 it has been known as China International Economic Trade Arbitration Commission (commonly abbreviated to CIETAC). The suggestion that CIETAC is not the same body under a new name has been twice at least raised and rejected in the High Court of Hong Kong. See Guangdong New Technology Import and Export Corporation, Jiangmen Branch v Chiu Shingt t/a HC Property and Trading Company [1991 MP 1625] (Barnes J) and Shenzhen Nan Da Industrial & Trade United Company Limited v F M International Limited [2 March 1991] (Kaplan J) (neither decision has been reported).

There are two reasons why such an order would be made. The first is that clause 16 of the contract contains a provision for referring all disputes in connection with the contract to arbitration. There is a body of authority in the United States of America, England and Australia that where a contract contains an arbitration clause, then disputes under it should be referred to arbitration and that curial proceedings instituted in lieu thereof should be stayed, at least until arbitration has terminated or aborted. I will refer later in these reasons to some of these cases.

The evidence in the application which I am considering shows that the two contracts remaining relevant for consideration were entered into in China. Neither has anything to do with Australia beyond the fact that the seller under each was a company incorporated in New South Wales and that the contracts were negotiated by a person whose ordinary place of residence is in New South Wales.

Considered in accordance with the law of New South Wales the proper law of contracts 1109AU and 1162AU is, in my opinion, the law of the Peoples Republic of China, commonly abbreviated to PRC. I reach that conclusion first because the arbitration clause is a strong indication that the proper law is that of the PRC. Their Lordships were of that view in Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA 1971 AC 572, though in that case the House decided that that indication had to give way to an express provision as to what was the proper law. See also

Bangladesh Chemical Industries Corp v Henry Stephen Shipping Co. Ltd (1981) 2 Ll.Rep. 389 per Lord Denning at 392. Secondly the transaction the subject of the contract has its closest connection with the PRC. It provides for the delivery of the goods to a port in PRC, for the opening of a letter of credit with the Shanghai branch of the Bank of China, and that inspection of the goods after discharge at port of destination is to be by the China Commodity Inspection Bureau. Thirdly, if the view expressed in John Kaldor Fabricmaker Pty Ltd v Mitchell Coots Freight (Aust) Pty Ltd (1989) NSWLR 172 by Brownie J that the proper law of contract is to be determined by the inferred actual intention of the parties is correct, then I would draw that inference in this case. Though I would have no doubt that both parties to each of the contracts knew or at least believed what was the seller's intended source of goods the contracts themselves make no provision as to the country of source. They simply provide for delivery into the PRC. The contract is to be performed in the PRC (delivery there of the goods) and paid for by arrangements made from the PRC. Those considerations in my opinion require that inference to be drawn. I do not regard the provision for payment in US$ as militating in any way against that conclusion. International trade is commonly priced in US$.

I do not know and have not by either party been informed as to the law of the PRC relating to the enforceability of such an arbitration agreement. But in my view the question of whether or not this Court should stay these proceedings must be determined by applying the laws in force in this State. The applicants for the stay appear to have been of the same view because their Amended Notice of motion expressly relies upon s7 of the International Arbitration Act 1974 (C'th) and Article 8 of the UNICITRAL Model Law which has the force of law in Australia pursuant to s16 of that Act.

Both s7 of the International Arbitration Act and Article 8 of the UNICITRAL Model Law, as adopted by that Act so require. Clause 16 of each of the two contracts to which I have referred are foreign arbitration agreements within the meaning of s7 of the International Arbitration Act 1974 (C'th) because of the provisions of s7(1)(a) which provides

"7(1) Where:

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

this section applies to the agreement."

The PRC is a convention country.

When s7(1) of the International Arbitration Act 1974 applies to an arbitration agreement, then, by s7(2), 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."

The above is subject to s7(5) which provides

(5) A court shall not make an order under subs.(2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed."

The second basis relied upon by the defendant/applicants was that Part III of the International Arbitration Act 1974 (C'th) provides that the UNICITRAL Model Law on Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 has the force of law in Australia and that Article 8 of that Model Law, which deals with international commercial arbitration (an arbitration is "international" if the parties to the arbitration agreement have at the time of the conclusion of that agreement their places of business in different States), provides

"Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or

incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the Court."

What I have thus far said (if it were all that is relevant) would indicate that this Court should stay this action, insofar as it seeks to litigate breach of contract 1109AU and 1162AU, so that Shantra's claim (unless abandoned) would be determined by arbitration in the PRC.

I turn now to the material tending against staying these proceedings. In all 21 affidavits have been filed by the solicitors for the defendants on the application I am considering. In addition to that there have been ten affidavits filed on behalf of Shantra and I have been furnished with a bundle containing 245 documents. A great number of them are written in a Chinese language and are accompanied by translations. In these documents are some asserted on behalf of Sigma to be forgeries or otherwise not what they appear to be; others assert on behalf of Sigma that the contracts 1109AU and 1162AU were entered into consequent upon a payment by way of bribery which Lee says he was compelled to make to enable him to continue to do business with Shantra or otherwise in China (an assertion categorically denied by each of those asserted to have required and accepted the bribe – conduct which under the law of the PRC could result in imprisonment or even execution) and others, most significantly for present purposes, are directed to establishing that the disputes over the nonperformance of contracts 1109AU and 1162AU were in fact resolved by agreement between the parties, an agreement documented and bearing the signature, inter alia, of Lee, but that Sigma and Lee have failed to perform the obligations undertaken in that agreement. I add that a minor part of the amount claimed is asserted by Shantra to have been agreed to be paid as a term of the consensual abandonment of contract 1008OAU.

I accept that much if not all of that material is in dispute by one side or the other: I nonetheless declined to allow cross examination on the large number of affidavits or indeed on any of them as to do so would inevitably have converted the application for a stay into a rehearsal of a trial of the proceedings if they remain in this Court or of the arbitration if one is to be conducted in the PRC. That is not to say I am prepared to accept all of this material: some of it appears to me to be so far-fetched and improbable that I would be hard pressed to accept it, even after its proponent survived cross examination upon it (if he did). Other parts of it are inconsistent with what appears at least to be genuine documents. Yet other parts reveal many occasions where promises in writing to pay what Shantra asserts that Lee agreed it would pay have come from Lee but have not been performed, and that with no, or at least no credible, explanation as to why not. That alone entitles me to infer that Lee recognised a liability by Sigma to Shantra. And Lee was obviously speaking for Sigma and with, I have no difficulty in inferring, its authority.

In the light of material of the nature of that to which I have just referred, it is not appropriate that I should simply make an order staying the present action: I must determine whether on the whole of the evidence which has been presented (bearing in mind that much of it consists of assertions by one side and denials by the other) whether I should stay the whole of the present proceedings and refer the entirety of the disputes which I have recounted to arbitration in the PRC.

I do not propose to stay the proceedings in their entirety. I have come to that decision on more than one ground. I will deal separately with each of those grounds.

As I have not seen any of the relevant witnesses, let alone heard any cross examination of any of them, nothing which I am about to say should be regarded as final findings of fact or as a finding as to the credibility of any deponent. In that statement I include the defendant Lee. It is possible that his promise to pay may have been made on a view as to liability which he has since been advised is erroneous. Determination of that question and of the credibility of witnesses will be a matter for the trial judge.

My first and primary reason is that the evidence before me indicates on a prima facie basis that the disputes over contracts 1109AU and 1162AU were in fact settled, but that Sigma, through Lee, now denies that it is so, and alternatively asserts that if it was, it that

he was coerced into that settlement by a variety of threats by or on behalf of Shantra. I am not making any finding on that matter other than that the evidence indicates there to be a triable issue.

The evidence to which I refer is

(a) First a document written in a Chinese language signed by Mr Lee with the same signature as his affidavit of 5 April 1995 bears. The translation of it is as follows

"SUBJECT: 93YN090-ES 1180AU AGREEMENT

Suggestions for managing the above agreement

1. *My company would try our very best to deliver the goods. The packing and shipment need to be delayed 40 days. We are willing to pay reparation total 0.5%, that is. US$18,200 or 180,000 RMB.*

2. *If we cannot deliver the goods by 31 May we will then pay reparation to the amount of 1.5% that is US$54,600 and we guarantee that by 1 June we will return letter of credit.*

Sigma Metallurgical Pty Ltd
26 May 1993"

The agreement 1180AU could not proceed because Sigma could not deliver. It did not deliver by 31 May 1993. It did return the letter of credit but it did not comply with its promise to pay "reparation" of $US54,600.

(b) a document, the date of typing being 17 July 1993 and the date of execution by Lee for Sigma being 21 July 1993. The translation of that document in evidence is

"CHINA NATIONAL RESOURCES RECLAMATION CORPORATION EAST CHINA BRANCH (CALLED PARTY A)

AUSTRALIA SIGMA METALLURGICAL COMPANY PTY LTD (PARTY B)

SHANGHAI FOREIGN TRADE CORPORATION (PARTY C)

In early April 1993 Party A authorized Party C to sign a contract with Party B in regard to the import of scrap rail and scrap motor (see contracts YN090-ES1109AU and 93YN090-ES1162AU). At the end of April 1993 the total amount of US$750,000 has been remitted to Party B by Party C. But up till now Party B still has not consigned the goods as agreed in the contracts to China. Party A, Party B and Party C because of this particular problem, have agreed as follows:

1. *Because Party A needs to pay a Mr Wan Gee Enterprise Pty Ltd. in Singapore all the money that is recouped from the goods to the total of US$500,000 therefore Party B must before July 31st 1993 remit to Singapore Mr Wan Gee Enterprise Pty Ltd and Party C must ensure that the amount is remitted to the following:*

   Singapore Wan Gee Enterprise Pty Ltd
   Wan Gee Enterprise Pty Ltd
   BHF Bank 'Berline Handles Une Frankurter Bank' Singapore tlx number RS 28 434 BHFSI, A/c No 582247

2. *Party B must continue to send to Party A according to the fax sent on July 13 1993 all the goods that has been listed on the contracts that have been mentioned above. After the goods have arrived, within one month Party A should use the remaining US$250,000 to pay for the delivered goods and if the amount is not sufficient then Party C is responsible to pay the outstanding amount.*

3. *If Party B cannot ship from Japan all the goods as listed in the fax before August 5 1993 Party B must immediately repay US$250,000 to Party A's foreign agent, party C's account number and also compensate Party C interest on the US$750,000 beginning April three months' bank interest = US$33,750. Party C must ensure that this is executed.*

This agreement will be effective after Parties A B and C have signed.

CHINA NATIONAL RESOURCES RECLAMATION CORPORATION EAST CHINA BRANCH
Signature Wu Li Yong

SIGMA METALLURGICAL COMPANY PTY LTD
Signature Lee Dated 21 July 1993

SHANGHAI FOREIGN TRADE CORPORATION
Signature Bian ????? Wu Yu Ping Dated 17 July 1993"

The words "Dated 17 July 1993" after the printed word Shanghai Foreign Trade Corporation have been explained to be the date on which the document was typed. It is fairly obvious, if one looks at the Chinese language version that what I assume to be the words "dated 17 July 1993" are not intended to be the date of signature.

Sigma asserts that it is not bound by this document for a number of reasons which I will subsequently examine, but unless there is any substance in those contentions this document settles the balance of the outstanding claim by requiring Sigma to pay the US$750,000 in two parts and to pay three months interest of US$33,750. If those two agreements are binding on Sigma they amount to a consensual settlement of Shantra's early claim. Neither contains any arbitration clause.

(c) a facsimile of 28 July 1993 from Sigma, signed by Lee. The translation in evidence is in the following terms:

> *"Mr Gu Li Yong*
>
> *Greetings,*
>
> *Nice to speak to you on the phone. I now make the following replies:*
>
> *1. Attached is the photocopy of 2C to the Japanese supplies to the sum of US$1,036 for 5500MT Motor scrap, sheet pipe scrap, H beam scrap, used rail scrap. Can not confirm the final time of Ship's lease, may be finalised by middle of this month, ship's goods.*
>
> *2. In regard to the US$30,000 to be transferred to Singapore because we've not yet confirmed the loan, the loan may be confirmed in the next 2 days once confirmed we will Tele-transfer to your company account.*
>
> *Please excuse us for all the inconvenience caused.*
>
> *From PK Lee"*

The original in Chinese is part of the same annexure. My examination of it indicates that the translator of para 2 has probably either misread or miswritten the amount and that it should read "the US$500,000 to be transferred...". Certainly subsequent correspondence proceeds on the basis that the parties were arguing about a promise to pay US$500,000. None of it asserts or denies a promise to pay US$50,000.

(d) No such payment was made. On 12 August 1993 Shantra sent a fax to Sigma (for attention Lee) which stated

> *"This Wednesday 11 August in the morning I spoke with you on the telephone. You said that this Friday 13 August you shall return to us US$500,000 into the Singapore account which I have nominated. I wish you would not eat your words.*
>
> *According to our company Shantra and your company have signed an agreement indicating the date the money should be remitted. You are now way, way over that date agreed but our company realises that there are certain problems you need to have time to resolve therefore we are not chasing you even if you have not honoured what you have said but I sincerely hope that you will definitely provide the money as you said on 13 August into the account I nominated. Whether it is from the point of view of our friendship or our future trading but from the moral sense of business we really, really do need you to honour all that you have agreed to honour."*

(e) Sigma's response dated 14 August 1993, signed Lee, is (as translated)

> *"1. In regard to the loan in Australia this is not yet approved because I await the original copy of approval from my Bank in Hong Kong. Because my recent investment of 3 million US in a factory is mortgaged on my Hong Kong property. Although we've paid off the total from the money transferred from Hong Kong we intend to borrow 50% as cash flow. The Australian bank requires the guarantee from Hong Kong before it will release the money. The process is rather complex and this takes time. Hope you can understand.*
>
> *2. I have negotiated with our Japanese supply to return our llc looks like we can use the money quite quickly. I know you are anxious to recover the transfer of money to Singapore. I'm sorry about this delay.*
>
> *3. I am very busy and have to leave for Russia to inspect the goods immediately. I will liaise with you again."*

(f) Then on 18 August 1993 Sigma again over the signature of Lee sent a fax asserting

> *"Letter from P K Lee to Gu Li Yong*
>
> *Mr Gu,*
>
> *In regard to the transmission of money, because the bank is very slow and have not yet completed processing. We've chased them several times. Once we know it's transferred we'll immediately fax you. Mr Lee will be back by next week.*

From PK Lee"

(g) On 2 September Sigma, over the signature of Lee, sent Shantra another fax which said, in the paragraph numbered 2

> *"Regarding the US$500,000. for China National Resources Reclamation Corp. East Branch and US$54,600 – for your company, Robin Sang is now in Hong Kong to arrange the fund for the captioned. Robin will be back after the arrangement is done. It shall be early next week."*

(h) The same assertion appears in another fax, of 3 September 1993, from Sigma, over the signature of Lee in the paragraph numbered 2

> *"Regarding the US$500,000 – for China National Resources Reclamation Corp. – East Branch and US$54,600 – for your company, Robin Sang is now arranging the fund. It will be remitted accordingly as soon as it is ready."*

(i) A slightly different version appears in Sigma's next fax (of 10 September 1993) which asserts

> *"Letter from P K Lee to Wu Yu Ping*
>
> *Mr Wu,*
>
> *I've spoken to the bank several times in regard to the loan but still have not received the expected result. In Australia the economy is not stronge, the bank is very tight, with the added sluggish real estate market, the bank has no confidence to lend. Our solution is to lower the amount of the loan and ask H.K to guarantee the lowered loan.*
>
> *Also, our company's planned investment in the steel factory with Hia Cheng is not going ahead smoothly the money is still frozen, so cannot transfer the money from there. I need a couple of weeks time to return to H.K to arrange for guarantee in order to solve this problem.*
>
> *P.K Lee"*

(j) In addition, with reference to contract 1180AU Sigma, over what appears to be Lee's signature, wrote

> *"Subject: 93YN090-ES 1180AU Agreement*
>
> *Suggestions for managing the above agreement*
>
> *1. My company would try our very best to deliver the goods. The packing and shipment need to be delayed 40 days. We are willing to pay reparation total 0.5%, that is, US$18,200 or 180 RMB.*
>
> *2. If we cannot deliver the goods by 31 May we will then pay reparation to the amount of 1.5%, that is US$54,600 and we guarantee that by 1 June we will return letter of credit."*

Lee in an affidavit sworn by him on 5 April 1995 annexes a letter of 5 April 1995 from Sigma's solicitors, Freehill Hollingdale & Page, to Shantra's solicitor and asserts that the contents of the letter are true and correct. That letter was in the following terms

> *"Sigma Metallurgical Co Pty Limited ats Shanghai Foreign Trade Corporation*
>
> *In your letter of 4 April 1995, your client contends there that is no dispute to be submitted to arbitration. In our facsimile of today's date we stated that we were instructed to advise you that this approach is simplistic. We do not intend addressing each and every fact in and annexure to Mr Yu Qing Wang's affidavit but are instructed to set out below sufficient allegations of fact from which it will appear that there is indeed an arbitrable dispute. Our clients were reluctant to record these facts below as this could lead to problems for Mr Wu Yu Ping and Mr Gu Li Yong and impact on our client's ability to do business in China.*
>
> *It was for this reason that our clients instructed Messrs Parry Carroll Kanjian, who previously acted for our clients, not to go into any detail in their fax of 25 November 1994 to you.*
>
> *It is inappropriate and contrary to the authorities that will be given to the court by counsel instructed to appear for our client for the court on Friday to undertake the task of trying the disputed facts. This will usurp the function of the arbitration tribunal to whom the parties have entrusted their dispute.*
>
> *Our client instructs as follows:*
>
> *(1) It is not correct that your client made payments to our client on the dates alleged in paragraphs C11-14 of your client's summons. The payments received by our clients are as follows:*
>
> *$US200,000 19 April 1993*
> *$US200,000 21 April 1993(*)*
> *$US270,000 28 April 1993*
> *$US80,000 11 May 1993*
> *(*RMB 1.76 million received – converted to US$)*

[I note that these add up to the US$750,000 claimed]

> *(2) Our client has been doing business in China since 1979 where it was represented in Beijing by Gamma International since 1992. Between 1979*

and 1989 our client's business dealings in China exceeded $US 100 million in turnover. This office was closed in about May–June of last year after Mr Pang Kee Lee was kidnapped in Beijing whilst he was on a business trip there. We are instructed to forward you a copy of a statement made by Mr Thomas Chor Wing Chiu, solicitor who went to Beijing during January this year, on Mr P K Lee's behalf.

(3) It has been Mr Lee's experience of doing business in China that unless the foreign businessman is prepared to pay bribes to government officers concerned it is virtually impossible to get government contracts or to operate a business. It is because of this culture, that our client agreed to the facts set out in paragraph 4(d) below.

(4) It is incorrect that the only relevant contracts are those alleged in your client's summons ie, those dated 15 March, 1 April and 16 April 1993. There were further contracts of 8 November 1992, 6 April, 3 June, 2 July 1993 and 22 July 1993 (copies of these attached and marked A1 to A5). It is obvious that you have not been instructed by your client who has withheld relevant information from you. If your client's version is correct why would your client offer to give our client $US5,010,000 worth of business as late as 2 July 1993, a further ± $US1 million on 22 July 1993 and with a promise of a further $US10 million worth of business to come.

(a) The first relevant transaction in this series was by virtue of a contract dated 8 November 1992, see annexure "A1" hereto. It will be noted that this called for the opening of a transferable and irrevocable letter of credit. Your clients knew that our client would need such a document in order to fund the purchase of the scrap metal referred to in that contract. Our client proceeded to charter a vessel and paid a deposit to the vendor. When your client did not provide the letter of credit the transaction fell through with our client considerably out of pocket with regard to loss of deposit and cancellation charges for the chartering of the vessel.

(b) On or about 1 March 1993 negotiations commenced with your client which ultimately led to the contract of 15 March 1993 and referred to in your client's summons. You will note that this contract also provided for a transferable, irrevocable letter of credit which your client knew was necessary to fund the purchase.

It was understood and intended that this letter of credit would have been transferred to the Japanese vendor. It was also understood by your client that in order to effect timeously delivery our client was required within a day or two after 15 March 1993 to charter a vessel and pay a deposit.

Your client failed to provide the letter of credit timeously or at all.

As a consequence the purchase of the scrap metal from the Japanese vendor had to be cancelled and our client again lost the deposit and money paid to the shipping agent. These losses were substantial.

(c) In regard to the contract of 1 April 1993, it will be noticed that payment was not by irrevocable transferable letter of credit but by D/P at sight. What happened in this regard was that your client's Mr Wu Yu Ping and Mr Gu Li Yong explained that your client was unable to set up letters of credit. The scheme that Mr Wu Yu Ping and Mr Gu Li Yong devised to overcome this problem was that they would send our client false bills of lading. It was explained that if these false bills of lading were returned by fax, on receipt of them in Shanghai, your clients would be able to remit the funds to be paid in advance in order to secure the goods. It was suggested that our client would alter the bills of lading accordingly and then return to your client. These are the documents dated 7 and 9 April 1993 at pages 18 and 20 of Mr Yu Qing Wang's affidavit."

I interpose at this stage that photocopies of the bills of lading referred to in this paragraph are in evidence. They are none of them signed by the Master and would have been useless for the asserted purpose.

"We are instructed to point out to you that shipment from Japan to China does not take more than one week so that therefore the goods referred to in the bill of lading should have been received by your client not later than 16 April 1993. Your clients knew that these bills of lading were false and this was evidenced by the fact that the goods referred to were never delivered but nevertheless your clients made the payments referred to in paragraph (1) above, the first one being on 19 April 1993. Furthermore these bills of lading were not handed to a bank for collection. Losses were again suffered by our client as a result of the late payment of the funds under this contract.

(d) Our client's Mr Lee went to Shanghai on or about 5 April 1993 to attempt to sort out the problems in regard to payment and the losses our client had sustained. There he met with Mr Wu Yu Ping and Mr Gu Li Yong. Our client again explained the necessity for providing an irrevocable transferable letter of credit as a method of doing business.

It was during those discussions that Mr Wu Yu Ping mentioned that it would be a condition of doing further business that a bribe of $US200,000 be paid to be shared between Mr Wu Yu Ping and Mr Gu Li Yong. In the light of the prevailing atmosphere and culture of doing business in China, our clients agreed. The bribe was duly paid.

Mr Wu Yu Ping said that our client should make that payment as

soon as possible as he needed the money. We are instructed to advise you that Mr Wu Yu Ping's wife lives in a house in Parramatta, which she bought at or about this time and this leads our client to believe that the purchase of which was funded by the bribe.

(e) During the meeting of 5 April 1993, Mr Wu Yu Ping acknowledged that losses were sustained by Sigma ensuing out of the non performance by the plaintiff of contracts of 15 March and 1 April 1993. Our client would however be compensated for this loss by further substantial business. This led to the entering into of the annexure 'A2' hereto. Your client has remained silent about this contract. You will note that the amount is for $US1,295,500. Our client placed an order for the goods referred to in this contract. The entire transaction fell away as your client again failed to provide a letter of credit. The price of copper and aluminium scrap metal referred to in the order fell and the Japanese vendor retained the deposit which our client had paid.

(f) With regard to the contract of 16 April 1993 (signed 29 April 1993), we are instructed to advise that the Bulgarian suppliers were unable to supply the goods under the contract.

(5) To sum up thus far, our client's defences to your clients' claims based on the contracts of 15 march and 1 April are:

(a) your client did not comply with the terms of the contract of 15 March 1993 in that it did not provide the letter of credit timeously, our client has sustained damages including loss of profits;

(b) in regard to contract dated 1 April, the true agreement was that your client would provide cash against the faire bills of lading timeously but failed to do so with the result that our client sustained damages including a loss of profits;

(c) in regard to contract of 6 April, hereto your client did not provide the letter of credit timeously and as a result our client sustained damages including loss of profits;

(d) in regard to contract 16 April 1993, signed 29 April 1993, this transaction was cancelled per mutual consent when the letter of credit was returned to your client when the Bulgarian supplier could not provide the goods; [this is a reference to contract 1180AU]

(e) in any event the contracts were tainted with bribery and therefore not enforceable.

(6) The contract issued 2 July 1993 was signed on 6 July 1993.

(7) In July 1993, when our client was in Beijing, Mr Wu Yu Ping telephoned him and said he was with Mr Gu Li Yong. Both spoke to our client. The gist of the conversation was that the problem had to be solved that they were in trouble with their top management and unless the problem was solved our client would be in trouble personally and also in regard to his business activities in China.

In the light of the prevailing atmosphere that our client was aware that businessmen in China involved in disputes with government officials were in personal jeopardy, our client agreed to see Mr Gu Li Yong and Mr Wu Yu Ping later on that month. When our client arrived at Mr Wu Yu Ping's office he was shown Annexure 'K' which had already been signed by the other parties. He was told by Mr Wu Yu Ping that this document was required by him so as to satisfy Mr Wu Yu Ping's top management otherwise both he and Mr Lee would be in trouble. Mr Lee took this as a threat to his personal safety and to his business interests. Our client pointed out that the terms of the document were unfair in the light of the fact that our client had sustained the losses referred to above and in any event it was totally impossible to deliver the goods by 31 July 1993. Mr Wu Yu Ping said that our client should not worry about the document as it would never be enforced. He then went on to say that he had already provided our client with some $US5 million worth of business and he would increase that order by another $1 million worth of business immediately and he would also give our client two more contracts worth about $US5 million each. He undertook that there would be no problem as there had in the past with the timeously issue of irrevocable transferable letters of credit. He suggested that our client would be able to fulfil the terms of Annexure 'K' out of the profits that would be generated from new business to the order of $16 million. The profits generated from the transaction would be sufficient to fund the purchase of the goods. During the meeting Mr Lee gave Mr Wu Yu Ping hard copies of all of the documents proving our client's loss. The actual loss without taking into account loss of profits, came into the order of $US700,000.

The reference to annexure K is a reference to the document which Lee signed for Sigma on 21 July 1993.

(8) Mr Wu Yu Ping explained to Mr P K Lee that it may take some time for the new business to come through and in the meantime he should send a fax as part of the pretence to say that the money was coming so that they could show the fax to Singapore. This was followed by further requests of this nature by Mr Wu Yu Ping. On 22 July 1993 a further contract was entered into for $US972,000 (see Annexure 'A5').

(9) Your client did provide a Letter of Credit for part of the amount of the contract of 2 July 1993. The transaction fell through when your client's nominated supplier in Russia refused to accept the Letters of Credit when it was not in accordance with their terms. Mr Wu Yu Ping was informed of this by Mr Lee. Mr Wu Yu Ping undertook to rectify the matter but this

never happened. No Letter of Credit was provided for contract of 22 July 1993. The further business of some $US10 million which was promised never eventuated.

(10) It was at about this time that the Letters of Credit was not acceptable to the Russian supplier that Mr Wu Yu Ping again asked for a fax so that he could show this to his superiors.

(11) Our client sustained losses in respect of one of the contracts above. These losses included our client's accommodation and airfare in Russia and banking charges incurred by transfer of Letters of Credit.

(12) We are also instructed to advise you that when Mr Wu Yu Ping was in Sydney our client paid him US$15,000 cash as part of a bribe.

Clearly there is a substantial dispute between the parties that can be best determined by CIETAC in China which will be well conversant with Chinese laws, particularly the unenforceability of contracts tainted with corruption.

Yours faithfully
FREEHILL HOLLINGDALE & PAGE

Per:"

I again interpose to assert that each of Wu Yu Ping and Gu Li Wong have sworn affidavits denying Lee's assertions against him and giving prima facie sound reasons why he did not and would not have done what is asserted against him.

Lee in his affidavit of 6 April 1995 says of this document

"When I arrived at the meeting at Mr Wu Yu Ping's office I was shown a document which had already been signed by the plaintiff and the China National Resources Reclamation Corporation. Attached and marked C is a true copy of the document given to me at this meeting. Mr Wu Yu Ping said to me words to the following effect: 'I need you to sign this document so that I can satisfy my top management. If this document is not signed I could get into trouble. If I get into trouble I could make trouble for you too.' *I was concerned for my personal safety and for the continuation of my business operations in China. I regarded what Mr Wu Yu Ping said as a threat to both. At this meeting I gave Mr Wu Yu Ping hard copies of all the documents proving the Company's loss to date. These showed that without taking into account the loss of profit that the loss to the Company was in the order of US$700,000 arising from the plaintiff's breaches of the contracts referred to above. I said to Mr Wu Yu Ping words to the following effect:* 'I think that the terms of the document are unfair to my Company. The Company has sustained losses in previous contracts. In any event it will be impossible for us to deliver the goods referred to in this document by 31 July 1993.' *Mr Wu Yu Ping replied with words to the following effect:* 'Do not worry about the contract. It is not a real contract. It will never be enforced. I have to have something on my file to satisfy my superiors otherwise I am in trouble and you will be in trouble too.' *Then Mr Wu Yu Ping went on to say:* 'If I give your Company approximately US$1,000,000 worth of business immediately and two more contracts worth US$5,000,000 each and there are no further problems concerning the letters of credit and the transactions are completed so that you will make substantial profits then you will be in a position to pay and effect delivery of the goods referred to in the contract in favour of the China National Resource Reclamation Corporation – East China Branch.'

I considered my options. On the one hand if I refused to sign, my person would be in danger and my business in jeopardy. If the China National Resources Reclamation Corporation – East China Branch carried out the promises Mr Wu Yu Ping made, the Company's profits would be so substantial that the Company could afford to fulfil the contract. I would never have agreed to the contract on behalf of the Company had the threat not been made and the whole of the operation of the contract not been conditional upon the successful implementation of some US$11 millionworth of business and the profits generated therefrom."

Wu Yu Ping denies this account of the execution of this agreement. He also denies the validity of the reasons imputed to him by Lee.

So does Bian Xiaolin, Manager of Shantra's No. 1 Business Department which is responsible for the importation of, inter alia, metals, and Wu Yu Ping's "boss", who says he was present at this meeting and that the document was signed on behalf of all parties at that meeting (he is one of the signatories).

(. . . .)

There is a deal more material to the same effect. As what I have already recounted demonstrates to my satisfaction that Shantra has made out a prima facie case that its initial claim has been "settled" by the agreement of 21 July 1993 and that this settlement agreement has not been performed (it contains no arbitration clause), I am satisfied that I am not required (or indeed entitled) to stay this action insofar as it claims to have the settlement agreement performed or damages for breach, which would amount to the same figure in dollar terms.

Sigma submits that nonetheless I should in fact stay the whole action and refer it to arbitration in the PRC. It asserts that there are several reasons why I should do so.

The first is that the "settlement agreement" of 21 July 1993 was a "sham" so that the breaches alleged by Shantra are in dispute and should be resolved under and only under the arbitration clause. That in my view is a bootstrap argument. It assumes in its own favour that the original dispute remains unsettled. If it does, then in due course it should be referred to arbitration: but as I intend to order the determination of whether or not it has been settled as a separate issue and in advance of the other issues in the present proceedings (thus effectively staying the remainder of the present action against Sigma) the argument for Sigma will prevail if, but only if, the dispute referred to arbitration by the contracts has not been settled by the parties. If there has been no such settlement, s7(2) of the International Arbitration Act 1974, Article 8(1) of the UNICITRAL Model Law will require that I stay this action and refer it to arbitration; s7(2) because it will then be clear that the dispute between the parties "involve the determination of a matter that, in pursuance of the arbitration agreement is capable of settlement by arbitration", and, in the case of Article 8(1) because there will have been shown to be a dispute the subject of an arbitration agreement which is not "null and void, inoperative or incapable of being performed".

Support for this first submission was sought from the many decisions in recent years upholding and enforcing arbitration agreements, as an alternative to curial proceedings.

The USA cases evince a clear present view, but it is of comparatively recent adoption. In United Steelworkers of America v Warrior and Gulf Navigation Co. (1960) 363 US p574 (a decision of the United States Court of Appeal for the Fifth Circuit) the majority of the Court in an opinion prepared by Mr Justice Douglas, upheld the enforceability of an arbitration agreement between an employer and its employees. But in the course of doing so, he said (at p578)

> *" Thus the run of arbitration cases, illustrated by Wilko v Swan, 346 US 427, becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts towards arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."*

The "hostility" to which Justice Douglas referred soon changed to encouragement, endorsement and determined enforcement.

In 1979 the United States Court of Appeals, Fifth Circuit, delivered its judgment in Wick v Atlantic Marine Inc. 605 Federal Reporter 2d Series, p166. At p168 the Court said:

> *In the case at bar it cannot be said with positive assurance that the arbitration clause cannot be construed to include within its scope the plaintiff's claims of breach of contract, breach of warranty, and negligent design and construction. See Southwestern Enameling Corp. v General Bronze Corp 434 F.2d 330 (5th Cir. 1970). The question then becomes whether those claims are so tied in with the claim of fraud and deceit, which is not fairly within the arbitration clause, that they cannot be severed for purposes of arbitration.*
>
> *In Sibley v Tandy Corp. 543 F.2d 540 (5th Cir. 1976), the court distinguished claims which are legally 'intertwined' and those which are merely 'dependent'. In that case, as in this, resolution by the arbitrator of the arbitrable portions could have rendered the non-arbitrable portion largely at an end. That, however, did not mean the issues were legally intertwined, and the court ordered judicial proceedings stayed pending arbitration. 543 F.2d at 543-44. Compare Shapiro v Jaslow, 320 F.Supp. 598 (S.D.N.Y.1970).*
>
> *[3] As the district court noted in its order, there is an allegation that the arbitration clause was induced by fraud. If, in fact, the arbitration clause was induced by fraud, there can be no arbitration; and if the party charging this fraud shows there is substance to his charge, there must be a judicial trial of that question before a stay can issue. Robert Lawrence Co. v Devonshire Fabrics, Inc., 271 F.2d 402, 410-11 (2d Cir. 1959), cert. dismissed 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37 (1960).*
>
> *Accordingly, we reverse and remand this case to the district court to determine whether the buyers were fraudulently induced to enter into the arbitration agreement. If they were not, then the district court is directed to stay further judicial proceedings pending arbitration on the breach of contract claims, the breach of warranty claim, and the negligent construction and design claim."*

The paragraph numbered [3] in this citation is particularly relevant to a problem in this matter with which I will deal later in these reasons.

In Commerce Park at DFW Freeport v Mardian Construction Company 729 Federal

Reporter 2d Series p234, the Fifth Circuit of the United States Court of Appeals said at p338

> *"Having determined that the parties may, if they choose, agree to arbitrate claims arising under the DTPA, we turn to the issue whether the dispute between the parties in the instant case was properly deemed arbitrable by the district court. Initially, we note that the question of arbitrability is to be decided by the court on the basis of the contract entered into by the parties. See 9 U.S.C. s3; see also Southland, 104 S.Ct at 860 n.7; Prima Paint Corp v Flood & Conklin Mfg. Co. 388 U.S. 395, 404, 406, 87 S.Ct. 1801, 1806, 1807, 18 L.Ed.2d 1270 (1967). Arbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue ...' Wick v Atlantic Marine, Inc. 605 F.2d 166, 168 (5th Cir.1979). Doubts as to arbitrability are to be resolved in favour of arbitration. See Moses H. Cone, supra, 103 S.Ct. at 941. In Prima Paint, supra, the Supreme Court established that 'in passing upon a s3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate'. 388 U.S. at 404, 87 S.Ct. at 1806. Thus, for example, if one of the parties alleges fraud in the inducement of the arbitration clause itself, see id. at 403-04, 87 S.Ct. at 1805-06, this may be determined by the Court."*

The reference to "the DTPA" is a reference to the Deceptive Trade Practises – Consumer Protection Act, of Texas.

In 1987 the Second Circuit of the United States Court of Appeal in Genesco Inc. v T. Kakiuchi & Co. Ltd 805 Federal Reporter 2d Series 840 at 847 said

> *"Where, as here, a determination has been made that parties have entered into binding and enforceable agreements to arbitrate their disputes, the Supreme Court has made it evident that questions regarding the scope of the arbitration provision must be addressed:*
>
> > *'With a healthy regard for the federal policy favoring arbitration ... the Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'*
>
> *Moses H. Cone, 460 U.S. at 24-25, 103 S.Ct. at 941. This 'emphatic federal policy in favour of arbitral dispute resolution' 'applies with special force in the field of international commerce'. Mitsubishi, 105, S.Ct. at 3356-57.*
>
> *We expressed the same view in S.A. Mineracao da Trindade-Samitri v Utah Int'l Inc. ('Samitri'):*
>
> > *The federal policy favouring arbitration requires us to construe arbitration clauses as broadly as possible. '[D]oubts as to arbitrability should be "resolved in favour of coverage," ... language excluding certain disputes from arbitration must be "clear and unambiguous" or "unmistakably clear" and ... arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute".'"*

And in the same year the Ninth Circuit of that Court said, in Management and Technical Consultants S.A. v Parsons-Jurden International Corp 820 Federal Reporter 2d Series 1531 at 1534

> *"Federal arbitration law has established a presumption that an arbitral body has acted within its powers. Howard Elec. and Mechanical Co. v Frank Briscoe Co. 754 F.2d 847, 850 (9th Cir. 1985). This presumption exists to effectuate the "liberal federal policy favoring arbitration agreements." Mitsubishi Motors v Soler Chrysler-Plymouth, 473 U.S. 614, 625, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985) (quoting Moses H. Cone Memorial Hospital v Mercury Constr. Corp 460 U.S. 1, 24, 103 S.Ct 927, 941, 74 L.Ed.2d 765 (1983)); Parsons & Whittemore, 508 F.2d at 976. The policy favouring arbitration 'applies with special force in the field of international commerce.' Mitsubishi, 105 S.Ct. at 3356-57. See also Genesco Inc. v T. Kakiuchi & Co. 815 F.2d 840, 847 (2d Cir.1987) (recognising added presumption). We review de novo a contention that the subject matter of the arbitration lies outside the scope of a contract, since the arbitrability of a dispute concerns contract interpretation and only those disputes which a party has agreed to submit to arbitration may be so resolved. Mediterranean Enterprises, Inc. v Ssangyong Corp 708 F.2d 1458, 1463 (9th Cir. 1983). However, we construe arbitral authority broadly to comport with the enforcement-facilitating thrust of the Convention and the policy favoring arbitration. Parsons & Whitemore, 508 F.2d at 976."*

In England the rule used to be that the existence of an arbitration agreement did not prevent any party to it from commencing and maintaining judicial proceedings, because, it was asserted, parties cannot oust the jurisdiction of the Courts by agreeing to do so. But nonetheless a Court had power to order a stay pending such an arbitration.

In Earl of Mexborough v Bower (1843) 1 Beav 125 (49 ER 1011) the Master of the Rolls (Ld Longdale) said (at 46 ER 1013).

> *"The remaining argument is, that the deed contains a clause for a reference to arbitration. Now there are a great number of cases in which, from the difficulty of ascertaining the truth and the great complication of the rights and interests involved, it is almost impossible for the Court to do strict justice between parties within such limits of time and expense as are in any degree proportionate to the value of the interests in question. Many cases occur, in which it is perfectly clear, that by means of a reference to arbitration, the real interests of the parties will be*

much better satisfied than they could be by any litigation in a Court of Justice. In these cases the Court has shewn itself very anxious that matters of this kind should be determined in a way most beneficial to the parties, and much more so, when it finds that the parties, anticipating difficulties of that kind, have provided for their settlement by arbitration. It has, however, been decided, that these clauses for a reference are not binding upon the parties, who cannot contract themselves out of their right to have their disputes settled in Courts of Justice. Notwithstanding the many cases in which a reference to arbitration may justly be preferred to prolonged litigation in Court, cases without end arise, in which, by no possibility, could arbitrators do that justice which the powers of Courts of Justice enable them to administer. Cases arise which were not in the contemplation of the parties when they entered into their agreement. It has, under these circumstances, been, I think, justly held, that arbitration clauses are not to be enforced against the parties, and I find nothing in the wording of these particular clauses which at all alters this case."

This decision was affirmed on appeal.

Twelve years later came the decision of the House of Lords in Scott v Avery (1856) 5 HLC 811. Their Lordships held that a provision in a contract referring to arbitration a difference between parties to it and providing that no action could be maintained in respect of the matter in difference until the difference had been decided by arbitrators, and then only for such sum as the arbitrators might award, was lawful and valid and accordingly that no action was maintainable until an award was made.

Scott v Avery, or at least the principle for which it is cited, is much referred to, but I suspect that few have read it. It is an interesting example of the course of litigation in the last century. The action was brought in the Court of Exchequer. The plaintiff sued to recover his loss under what was in effect the rules of an insurance club which provided that claims should in the first instance be ascertained and settled by the Committee and that entitlement to demand and sue for claims arose as soon as but not before the amount to be paid was so ascertained. The plaintiff sued before the amount was so ascertained. The defendant demurred. The Court of Exchequer found for the plaintiff. The Court of Exchequer Chamber reversed that decision. The plaintiff appealed to the House of Lords.

The report records that "The Judges were summoned, and Mr Baron Parke, Mr Baron Alderson, Mr Justice Coleridge, Mr Justice Maule, Mr Justice Cresswell, Mr Justice Wightman, Mr Justice Erle, Mr Justice Williams, Mr Baron Martin, Mr Justice Compton and Mr Justice Crowder attended". The matter was argued by Counsel for each party and the Judges on 25 June 1835 requested and were granted time to consider the question. On 10 May 1856 the Judges again attended before their Lordships and each expressed his view in the form of a judgment, each of which is reported in full. They differed. On 10 July 1850 the Lord Chancellor, Lord Cranworth, and Lord Campbell each delivered a speech upholding their decision of the Exchequer Chamber and Lord Cranworth stated that Ld Brougham who was absent in consequence of illness, concurred. Thus was a monumental decision reached in the 1850s.

By the time of the publication of Volume I of the 1st Edition of Halsbury's Laws of England (1907) the law was as stated in para 946, namely

"A submission authorises the arbitrator thereby appointed to hear and determine the matter in dispute between the parties, but it does not oust the jurisdiction of the Court. Any party to a submission may, therefore, before the award is made commence legal proceedings in respect of any claim or cause of action included in the submission. At common law the Court had no jurisdiction to stay such proceedings; but where the submission is contained in a written agreement, the Court has jurisdiction under the Arbitration Act, 1889, to stay proceedings commenced in respect of any matter agreed to be referred to arbitration.

Where the submission is contained in a written agreement it has the same effect as if it had been made an order of Court.

The Court will not, as a rule, restrain an arbitrator from proceeding with a reference on the ground that the award will be inoperative; but where the submission itself is impeached, an injunction may be granted to restrain the arbitrator from proceeding until the question of the validity of the submission has been determined."

The reference to the Arbitration Act 1889 is to s4 of that Act. It provided

"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do

all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

There is no doubt that since the commencement of the 1889 Act Courts in England have become progressively more disposed to enforce arbitration agreements than they were in earlier times. S4 of the Arbitration Act 1950 expressly empowers a Court to stay its own proceedings pending arbitration, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration. And now, if the arbitration is "non-domestic" an English Court must stay proceedings in respect of the dispute the subject of the arbitration agreement if the other party to the arbitration agreement, after appearance, applies for such an order before delivering any pleadings or taking any other steps in the proceedings (Arbitration Act 1975, sI).

The present principles applied in England are those stated by Lord Mustill, with the concurrence of Lords Keith of Kinkel, Goff of Chevely, Jauncey of Tullichettle and Brown Wilkinson in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd (1993) 2 WLR 262 at 280 where he approved what was said by Parker LJ in Home and Overseas Insurance Co. Ltd v Mentor Insurance Co. (UK) Ltd 1990 IWLR 153 at 158 namely

> *"In cases where there is an arbitration clause it is in my judgment the more necessary that full scale argument should not be permitted. The parties have agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.*
>
> *In the case of a commercial arbitration the above remarks apply with even greater force, perhaps especially when the dispute turns upon construction, or the complication of terms or trade practice. Arbitrators and umpires in the same business or trade as the parties are certainly as well or better able than the court to judge what the parties must be taken to have meant or intended by the words or phrases they have used, to judge what the parties would at once have replied if an innocent bystander had asked what was to happen in a certain event not dealt with by the contract, and to know what are the practices in the trade. Not only is the defendant entitled to have the dispute decided in the first instance by such persons but the court should not in my view, save in the clearest of cases, decide the question without the benefit of their views. In very clear cases a plaintiff is no doubt entitled to his summary judgment notwithstanding the clause, but when a plaintiff seeks immediate judgment in other than a clear case and resists the submission of the dispute to the tribunal on which he has agreed, one is bound to wonder whether the course which he has taken is prompted by the knowledge that the chosen tribunal with its more intimate knowledge of the trade may reach a conclusion adverse to him in respect of which he might either fail to obtain leave to appeal or if he did obtain leave, fail to demonstrate any error."*

The same approach can be found in the numerous cases where the arbitration provision in a contract has been held to remain operative even though the remaining provisions of the contract not because, for example, they may be void for illegality (Harbour Assurance Co. (UK) Ltd v Kansa General International Insurance Co. Ltd [1993] QB 701) or may be avoidable for innocent misrepresentation, undue influence or duress (per Steyn J in Harbour Assurance Co (UK) Ltd at first instance (1992) 1 LIR 91 at 91).

In the Court of Appeal in Harbour Assurance Co (UK) Ltd, Ralph Gibson LJ reviewed the English Cases prior from Hayman v Darwin Ltd (1942) AC 356) to the time of his judgment and concluded, at p714 "The question whether all the promises contained in the agreement were rendered invalid and void at the time when the parties signed the documents by the illegality of the agreement is in my judgment a dispute arising out of the agreement.".

In this State, however, the Court of Appeal has held by a majority (Clarke and Handley JJA, Kirby P dissenting on this question) that the effect of a declaration that a contract which contains an arbitration clause is void ab initio is that there never was a contractually valid submission to arbitration. See IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 460 at 485 (Clarke JA) and 487 (Handley JA). Apart from this decision, which appears to be out of line with the approach taken in other jurisdictions, the approach in Australia to arbitration clauses has also been to uphold and enforce them. A clear example is Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337. The arbitration clause in that case contained a Scott v Avery clause. The contract referred "all disputes arising out of the contract to arbitration". The contract containing that clause was held to have been terminated by

frustration, insofar as it provided for work to be done, but not insofar as it required disputes to be submitted to arbitration. See per Mason J at pp364-6.

The principles to which I have referred require that if a dispute the subject of litigation in this Court has, by contract between the parties, been submitted to arbitration then this Court should stay these proceedings, or so much of them as the parties have agreed to submit to arbitration, so that the consensually chosen method of dispute resolution should proceed.

But that approach does not, in my opinion, require that I stay so much of the present action as seeks to enforce the settlement agreement. The reference in clause 16 of the contracts is to "All disputes in connection with this Contract or the execution thereof". "This contract" is 1109AU in one case and 1162AU in the other. If the disputes as to those contracts were settled by agreement, as Shantra asserts, then there remains nothing to be submitted to arbitration under either arbitration clause. Sigma's response to that contention is that it disputes Shantra's asserted settlement agreement and that dispute is one "in connection with" contracts 1162AU and 1109AU and therefore the arbitration clause in each contract applies also to Sigma's dispute that it settled the disputes under each of those contracts.

It is correct to assert that there is a connection between the contracts 1162AU and 1109AU and the asserted settlement agreement. Each of contracts 1109AU and 1162AU is a sine qua non of the settlement agreement. Suppose that during negotiations relating to performance of a contract, or recompense for nonperformance or inadequate performance one party libelled the other. Again, the existence of the contract would be a sine qua non of the libel but I do not think that any lawyer would regard the question of libel or no and if so how much to have been referred to arbitration by a clause such as clause 16 of these contracts. The expression "in connection with this Contract or the execution thereof" is in my opinion a reference to the making, meaning, validity or enforceability and the carrying out of each contract. It goes no further than that: it does not extend to the validity or enforcement of a settlement agreement reached by friendly negotiation. It calls for friendly negotiation: it brings arbitration into play if, but only if, "no settlement can be reached".

Sigma also submitted that the question of settlement or no was required to be referred to arbitration because such an asserted settlement did not permit a finding that the arbitration agreement was 'null and void, inoperative or incapable of being performed' within the meaning of Article 8(1) of the UNICITRAL Model Law. For my part it appears clear that if the dispute has been resolved (by 'friendly agreement' or otherwise) an agreement to arbitrate that dispute 'if no settlement can be reached' (to quote the English version of clause 16) is inoperative. There remains no such dispute. Gummow J, whilst a judge of the Federal Court, came to that conclusion, namely that settlement of an arbitrable dispute rendered the arbitration agreement otherwise applicable 'inoperative', in Bakri Navigation Company Ltd v Glorious Shipping SA, owners of Ship 'Golden Glory', 5 June 1991 (unreported). True it is that in that case Gummow J found, after hearing evidence and argument, that there had been a settlement. The parties were in dispute on that question – he heard that dispute and concluded that there had been a settlement. I have not yet reached that stage: it is the question I propose be determined separately and in advance of any other issues in these proceedings, as Gummow J did in Bakri.

Lest I might do so Sigma tendered some evidence that the asserted settlement agreement was void. That evidence was, first, by an affidavit sworn 12 May 1995 by Qui Gangjie "a partner of the legal firm King & Wood, PRC Lawyers". He prepared an opinion as to the "settlement agreement" based on Lee's version of what happened leading to its execution. On that basis his opinion was that the "settlement agreement" under the law of the PRC is unenforceable. But the circumstances in which that agreement came to be made need first to be determined before that opinion is of any utility. Those circumstances will be determined in the separate issue to be tried here.

Later, during an unfortunately long interval between the commencement and conclusion of the hearing, a further opinion was tendered. This was of Huang Yanming an attorney-at-law of the PRC and "a duly appointed arbitrator of CIETAC". He expressed an opinion on the assertions in a six page letter of 16 June 1995 from Sigma's Solicitors in Sydney. I set out that letter in full

"We are urgently seeking an opinion from an expert knowledgable in regards to international commercial arbitration law and principles of PRC law.

We have outlined below in summary form the nature of the advice which we seek.

1. *This request for advice is in relation to a New South Wales Supreme Court, Commercial Division case, brought by a Chinese corporation against two Australian domicile Chinese men and a company controlled by one of them. We act for three defendants, Mr Pang Kee Lee, Mr Robin Sang and Sigma metallurgical Company Pty Limited. Our client, Sigma, is an Australian registered company, it has been sued by the Shanghai Foreign Trade Corporation which is alleged to be a Chinese corporation established under the laws of the Peoples' Republic of China. Mr Pang Kee Lee is a director and shareholder of Sigma. Mr Robin Sang was at the relevant time, an employed business manager of Sigma.*

2. *Sigma entered into 3 contracts relevant to this dispute with the plaintiff for the delivery of metal scraps of Japan to certain ports in China. These contracts all in standard form, contain an arbitration clause which reads as follows:*

   All disputes in connection with this contract or the execution thereof shall be settled by friendly negotiation. If no settlement can be reached, the case in dispute shall then be submitted for arbitration to the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade in accordance with the Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade. The decision made by the Commission shall be accepted as final and binding upon both parties. The fees for arbitration shall be borne by the losing party unless otherwise awarded by the Commission.

3. *The arbitration clause provides for arbitration by the Foreign Trade Arbitration Commission. In accordance with their rules this Association has now changed its name to CIETAC.*

4. *The relevant articles of the CIETAC Rules are:*

   Article 4 *The Arbitration Commission has the power to decide on the existence and validity of an arbitration agreement and the jurisdiction over an arbitration case.*

   Article 5 *An arbitration clause contained in a contract shall be regarded as existing independently and separately from the other clauses of the contract and an arbitration agreement attached to a contract shall be treated as a part of the contract existing independently and separately from other parts of the contract. The validity of an arbitration clause or an arbitration agreement shall not be affected by the modification, rescission, termination, invalidity or revocation of the contract.*

   Article 7 *Once the parties agree to submit their dispute to the Arbitration Commission for arbitration, it shall be deemed that they have agreed to conduct the arbitration under these rules.*

5. *The CIETAC rules are incorporated into the arbitration clause by virtue of Article 7. Article 4 gives the Arbitration tribunal jurisdiction to determine the existence of and validity of an arbitration agreement and the jurisdiction over an arbitration case.*

6. *Our client Sigma alleges that it has certain defences to claims made under the contracts by Shantra. These defences are summarized as follows:*

   4.1 *The claim for damages by Sigma exceeds Shantra's claim.*

   4.2 *In order to obtain performance under the principal contracts Mr Lee was obliged to pay a bribe of US$200,000 to Mr Wu and Mr Gu of the Plaintiff company and CNRRC.*

7. *Shantra alleges that all disputes between our clients was settled on 21 July 1993 in terms f an agreement which is annexed to these instructions. The agreement in the proceedings is referred to as documents in bundle 127. It will be convenient if you would refer to this document as document 127 in your advice.*

8. *Inquiries made by us in regard to PRC law have already informed us of the following:*

   (a) *Article 2 of the Foreign Economic Contract Law provides that economic contracts executed between enterprises or other economic entities of the Peoples' Republic of China and foreign enterprises, other foreign economic entities or individuals fall within this law.*

   (b) *The Explanations on the Foreign Economic Contract Law (the 'Explanations') further specify 17 kinds of foreign economic contracts which include the import and/or export contract executed between a Chinese enterprise and a foreign enterprise.*

   (c) *According to Decision on Strengthening Explanations on Laws by the Standing Committee of the National Peoples' Congress of PRC adopted at the 19th meeting of the Standing Committee of the Fifth National Peoples' Congress on 10 June 1981, the Supreme Peoples' Court has been authorised to give explanations on laws and regulations. Accordingly the explanations referred to in the above paragraph have the force of law in China.*

The copy of the contract attached being one of the principal contracts entered into between the plaintiff and Sigma is a contra

which falls within the definition of a foreign economic contract described in the Explanations and the Foreign Economic Contract Law.

(d) Under Article 3 of the Foreign Economic Contract Law it is provided that all of the contracts will be unenforceable if they violate or conflict with any PRC law applicable to the parties. Article 3 of the Explanations provides circumstances in which a foreign economic contract will be found to be invalid. These circumstances include

(1) where one party to the contract deliberately creates a false impression, withholds the truth or employs other means of deception in order to give the other party to the contract a mistaken impression at the time of signing the contract, or employs conceived means which causes economic losses or other harm to another party so as to force the other party to sign the contract or, by taking advantage of another's precarious position, forces it to go against its will and sign a contract containing unjust provisions.

(2) The contract violates the public interests of Chinese Society or the fundamental principles of Chinese law which include voluntariness, fairness and honesty of contractual relations.

(e) Further pursuant to Article 11 of the Foreign Economic Contract Law, in circumstances where the contract is found to be invalid the party responsible for the invalidity 'shall bear the responsibility for compensating the other party for losses suffered as consequences of the invalidity of the contract.'

9. According to Australian and English law, there is a difference between the proper law of the principal contract and the proper law of the arbitration agreement.

We believe that you are personally acquainted with Mr Marcus Jacobs QC whom you met at a dinner organised by Professor David Flint of the University of Technology, Sydney. Mr Marcus Jacobs QC is a barrister who briefed to act for our clients in this matter.

On pp1821 to 1823 of his book International Commercial Arbitration, a copy of which we believe you have but we have attached the relevant pages to our letter, deals with the distinction between the proper law of the contract and the arbitration agreement.

The first question we wish to pose is:

1. Whether or not in accordance with PRC law, the proper law of the arbitration clause is PRC law?

May we refer you to paras [9.10] and [9.11] of Mr Jacob's book and in particular his reference to the Bank Mallet case at p2818.

2. We understand that if our clients prove the allegation that the principal contracts are tainted with corruption under PRC law, those contracts are unenforceable by Shantra. Is that correct?

3. In regard to the document at bundle 127, the defences which our clients have to any claim made under that document are:

- The document is a sham and was not, in any event, intended by the parties
- The document is in any event unenforceable under the PRC laws
- The document is in any event tainted by corruption and is thus unenforceable
- The document was signed under duress.

4. You will see that clause 1 of the document at 127 contains a promise by Sigma to pay CNRRC a certain sum of money through CNRRC's agent in Singapore.

5. The second clause 2 contains an undertaking by Sigma to export goods, scrap metal, and to have these delivered in China to CNRRC.

6. The third clause of the document at 127 is conditional upon Sigma failing to fulfil the obligations in clause (2).

7. There are a number of cases decided in the American Courts concerning the scope or width of an international arbitration clause. The principles to be drawn from the American cases on this point is that there is a presumption in favour of arbitrability. As a result the court will liberally construe the international arbitration clauses and only in those cases where there is no doubt that the dispute stands outside the scope of the arbitration clause, will a stay be refused. We have forwarded copies of these relevant American cases with Mr Thomas Chiu for you to have a look at.

We know that the Chinese government and courts favour settlement of international commercial disputes by international arbitration.

8. We need your expert opinion concerning the following in regard to the document 127:

(a) If the principal contracts were tainted by bribery and are themselves unenforceable, is the document at bundle 127 which purports to settle the disputes arising out of the principal contracts also regarded under PRC law to be tainted with the same

corruption and therefore unenforceable?

(b) If the obligation under clause 1 of the Document 127 is in favour of CNRRC as it appears to be, is there any basis in PRC law for Shantra to enforce it?

(c) As CNRRC cannot be involved in a contract for the importation of goods because of article 2 of the Foreign Economic Contract Law and as clause 2 concerns itself with the importation of goods by CNRRC into China, can CNRRC enforce that obligation?

(d) Clause 3 only takes effect if clause 3 is not fulfilled. If clause 2 cannot be enforced by CNRRC can either CNRRC or Shantra enforce clause 3?

(e) Under clause 2 CNRRC has undertaken to pay Sigma US$250,000 for the balance of goods when they are delivered. Is that obligation invalid by virtue of CNRRC being unable to enter into importation contracts?

(f) If Sigma cannot force CNRRC to pay that amount, doesn't that effect the whole contract and all the clauses are unenforceable?

(g) Under PRC law do the same principles as set out in paragraph 7 above apply to the interpretation of international arbitration agreements namely that there is a presumption in favour of arbitrability and as a result the court will liberally construe the arbitration clauses and only in those cases where there is no doubt that a dispute stands outside the scope of the arbitration clause will the dispute not be arbitrated.

(h) You will see the phrase 'in connection with' in the arbitration clause. According to PRC law is this phrase wide enough to give CEITAC jurisdiction to determine the disputes which have arisen in regard to the validity of the document at bundle 127?

(i) Is this question helped, if you refer to Article 4 of the CEITAC rules which incorporated by reference into the Arbitration Agreement.

We would be most grateful if all your answers to our questions are supported by reasoned statements which when received may be put into a form acceptable as evidence in an Australian court. For this reason we may request that you swear an affidavit to certify that the opinion you provide is true and correct according to PRC law.

We would ask that if you have any doubts in respect of the questions that we have raised in our letter that you discuss these by telephonic conference with our counsel Mr Jacobs QC. We understand that Mr Thomas Chiu will be visiting you on Monday 19 June 1995 to discuss our questions and to provide you with copies of the documentation ref to in our letter.

Yours faithfully
Freehill Hollingdale & Page
per Claire Inglis*

I now reproduce in full the opinion furnished.

*1.1 The China International Economic and Trade Arbitration Commission (CIETAC), a sole and exclusive organisation set up in accordance with the Government Administrative Council of the Central People's Government (the present State Council of PRC) adopted at its 225th Session on 6 May 1964 for the establishment of a Foreign Trade Commission within the China Council for the Promotion of International Trade.

1.2 CIETAC was formerly called a Foreign Trade Commission (FTC) from the date of issuing of the Notice Concerning the Conversion of Foreign Trade Arbitration Commission into Foreign Economic and Trade Arbitration Commission by the State of PRC on 26 February 1980.

2.1 I am conversant with the standard form of contracts containing the arbitration clause in clause 16 quoted on page 2 of my instructions of 16 June 1995.

2.2 This clause is modelled almost exactly on the CIETAC Model Arbitration clause recommended by it. I am aware from my knowledge of this clause and of the decisions of CIETAC concerning it that it is intended to be broad in its width/scope.

3.1 The CIETAC rules are incorporated by reference via Article 7 into the arbitration clause.

3.2 Under Article 4 the question whether or not a dispute falls within the arbitration clause is in itself arbitrable by the CIETAC Commission.

3.3 Accordingly, in my opinion, the Commission has jurisdiction to determine whether or not the disputes concerning the document at Bundle 127 are arbitrable.

4.1 According to PRC law there is a difference between the proper law of the principal contracts and the proper law of the arbitration agreements.

See Article 257 of the Civil Procedure law of the People's Republic of China the 4th Plenary Session of the People's Congress of 9 April 1991.

4.2 In accordance with PRC law the proper law of the arbitration agreements will determine the width/scope of the arbitration clauses.

4.3 In accordance with PRC law, the proper law of the arbitration clauses in this matter is PRC law. See Article 257 of the Civil Procedure Law of the PRC.

4.4 Accordingly, the width/scope of the arbitration clauses is to be determined in accordance with the PRC law.

5.1 I have been given copies of and have read the following decisions of the Courts of the United States of America:

(a) Commerce Pack at DFW Freeport v Meridian Construction Company 729 F 2d 334 (1984)

(b) In the matter of Ferrara v United Grain Growers 441 F Supp 778 (1977)

(c) Howard Electrical and Mechanical Inc v Frank Briscoe Co Inc 754 F 2d 847 (1985)

(d) Genesco Inc v T Kakiuchi & Co Ltd 815 F 2d 840 (2nd Cir) 1987.

(e) Mar-Len of Louisiana v Parsons-Gilbane 773 F 2d 633 (1985).

(f) Management and Technical Consultants v Parsons-Jurden International Corp 820 F 2d 1531 (9th Cir) (1987).

(g) Moses H Cone Memorial Hospital v Mercury Construction Corp 460 US 1.

(h) Parsons and Whittemore Overseas Co Inc v Societe Generale de L'industrie du Papier (Rakta) 508 F 2d 969 (1974)

(i) United Steelworkers of America v Warrior and Gulf Navigation Co 363 US 574.

(j) Wick v Atlantic Marine Inc 605 F 2d 166 (1979).

5.2 The Chinese Government and the PRC Courts favour settlement on international disputes by International Arbitration. This is supported by the PRC Government's:

(a) inclusion of arbitration clauses in the Standard Form of Contracts;

(b) re-structuring of foreign trade arbitration into CIETAC

(c) inviting foreign legal experts to sit as arbitrators in CIETAC arbitrations.

5.3 There is a strong government and judicial bias in favour of arbitrations for the resolution of international commercial disputes, the same basis as is apparent and has been delineated in the American decisions referred to in paragraph 4.1 above.

5.4 The holdings of the American courts in the cases listed in paragraph 4.1 above, on the following issues are in accordance with PRC law and the strong government and judicial bias in favour of arbitrations for the resolution of International Commercial Arbitration disputes:

(a) The presumption in favour of arbitrability.

(b) The liberal construction of arbitration clauses.

(c) The resolution of any doubt concerning the width/scope of an arbitration clause in favour of arbitration and the inclusion of the dispute within the scope of the arbitration clause.

5.5 In my view, the phrase 'in connection with' in the arbitration clauses in question is wide enough to include the disputes concerning the validity of the document at Bundle 127, as listed in paragraph 3 on p5 of Freehill's instructions of 16 June 1995. A PRC Court if it is asked to rule on this question will, in my view, hold that the said disputes, according to PRC law are 'in connection with' two of the principal contracts, viz. Nos. UN-090-ES1109AU, 93YN090-ES1162AU.

Accordingly, all those questions are arbitrable by the Arbitration Tribunal set up in accordance with CIETAC Rules.

6.1 There is a PRC government policy of controlling foreign trade in China. A company cannot enter into a foreign trade contract or buy any commodity abroad without specific authority. See Article 4 of the Interim Regulations of PRC on the Licensing System for Import Commodities (promulgated by the State Council of PRC on 10 January 1984), viz

> 'various categories of companies that have been approved by the State to engage in import business must handle the import business operations strictly in accordance with the approved scope of business and with the catalogue of import commodities.'

See the authorisation and explanation on laws and regulations by the Supreme People's Court. This is also specified in Article 33 of the Organic Law of the People's Court of the PRC by the National People's Congress of the PRC adopted at the second meeting of 1 July 1979, and amended by the Standing Committee of the national People's Congress of PRC at the second meeting of 2 September 1983.

6.2 CNRRC does not have the authority to enter into any foreign trade contract or buy any commodity abroad.

6.3 CNRRC is not a party to contracts in YN090-ES1109 AU, 93YN090-

ES1162AU, 93YN090-ES1180AU. There is no privity of contract between Sigma and CNRRC in regard to those contracts. It follows that Sigma, according to PRC law, is not obligated to CNRRC arising from those contracts.

6.4 *The document at Bundle 127 is a document which, in my view, concerns itself with foreign trade and the importation of commodities into China, and therefore falls within the legal principles set out in paragraph 6.1 above.*

7. *In regard to the document at Bundle 127, in my opinion:*

(a) *Clause 1 cannot be enforced and is null and void in that:*

(i) *There is no privity of contract according to PRC law between CNRRC's Singapore agent and Sigma.*

(ii) *The obligation referred to in clause 1 is an obligation arising out of a foreign trade contract and concerns itself with the buying of a commodity abroad.*

(b) *Clause 2 is a clause for the exporting of goods from a foreign country and the importation of goods into China, as this clause is in favour of CNRRC it is unenforceable under PRC law as CNRRC is not authorised to import scrap metal into China.*

Furthermore, even if Sigma carries out the undertaking recorded in this paragraph, it will not be able to compel CNRRC to pay it the sum of $US250,000 referred to in this clause.

(c) *Clause 3 contains a secondary obligation which is dependent upon the non-fulfilment of clause 2. If clause 2 is invalid, which, and in my opinion it is for the reasons stated above, clause 3 is similarly invalid.*

8. *In my view, in accordance with PRC law, the answers to the questions put to me in paragraph 8 of my letter of instructions are:*

(a) *Reply 8(a)* *Yes, the agreement in Bundle 127 is not enforceable. Please refer to my reply to Question 2.*

(b) *Reply 8(b)* *No. Please refer to my reply to Question 2. Moreover, in principle, there is no specification of obligation and rights of Shantra.*

(c) *Reply 8(c)* *CNRRC cannot enforce that obligation because as mentioned earlier, CNRRC has no import or export rights in accordance with PRC law.*

(d) *Reply 8(d)* *Yes, neither CNRRC nor Shantra can enforce clause 3.*

(e) *Reply 8(e)* *Yes.*

(f) *Reply 8(f)* *Yes. Please refer to my reply to Question 2.*

(g) *Reply 8(g)* *Yes.*

(h) *Reply 8(h)* *Yes.*

(i) *Reply 8(i)* *No. Please refer to Article 5 of CIETAC Rules."*

Whilst I admire the command of the English language exhibited by this Opinion, I am not so impressed by some of its contents. While the opinion expressed in para 5.5 may be correct in accordance with the law of the PRC (I have no reason to doubt that it is) the question for my determination is whether the law of Australia requires me to stay a determination of whether the dispute has been settled. For the reasons already given I am of the opinion that it does not.

More importantly, however, I am not prepared to act on the views expressed in paras 6 to 8 because I regard them as proceeding on a misunderstanding of the 21 July 1993 "contract".

Evidence before me indicates that in respect of contracts 1109AU and 1162AU (and indeed other contracts with Sigma) Shantra was acting as agent for CNRRC. I assume that CNRRC directly or indirectly put Shantra in funds to pay Sigma. Should Shantra recover under proceedings here or in China, it would be accountable to CNRRC (Clause 3 recognises this). Nothing in the Huang Yanmin opinion deals with or even recognises this. Clause 1 of the 21 July 1993 "contract" simply recognises this in that CNRRC directs its agent to employ funds which CNRRC expects it to receive for CNRRC in discharging a liability of CNRRC to someone else on some completely unspecified account. I add to this that I am not prepared to act on para 6.4 because I do not know what is meant by "concerns itself with foreign trade". That is hardly an expression of legal precision. It might mean that foreign trade disputes have been settled by it but this opinion does not say that in accordance with the law of the PRC such a settlement in

favour of a PRC entity is null and void) or it might mean that it involves a trading transaction. If this latter is meant I can only assume that Mr Yanming has been imperfectly instructed.

Though dealing with a quite different question the approach of Brennan and Davison JJ in their joint judgment in Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332 in my opinion supports the view which I have just expressed.

I need to deal with one further submission for Sigma. It is that the dispute concerning the US$54,600 (re contract 1180AU) is a dispute "in connection with" that contract and that there is in any event no consideration for the promise to pay that amount.

I see no difference between the assertion that the claim for US$54,600 is "in connection with" a disputed claim under contract 1180AU and the assertion that the settlement of claims under the other two contracts is "in connection with" the disputed claims under those contracts and I reject the submission for the same reasons.

Plainly the consideration for the promised US$54,600 payment is, or at least includes, the settlement of the claims under the other two contracts.

The orders which I make are accordingly as follows:

1. I dismiss the application to disallow the plaintiff's amended statement of claim and I order the defendant Sigma Metallurgical Company Pty Ltd to pay the plaintiff's costs of that application.
2. I direct that there be heard separately and in advance of all other questions in this action the claim of the plaintiff that its dispute with the first defendant relating to contracts 93YN090-ES1109AU
   93YN090-ES1162AU
   93YN090-ES1180AU
   or any one or more of them has been settled on the terms contained in a document dated 21 July 1993 to which each of China National Resources Reclamation Corporation East China Branch, Sigma Metallurgical Company Pty Ltd and Shanghai Foreign Trade Corporation is a party, a copy whereof is annexure G39 to the affidavit of 4 May 1995 of Gu Li Yong filed in this action.
3. I stay the hearing of all other claims in this action until further order.
4. I reserve the question of the costs of Sigma Metallurgical Company Pty Ltd's application for a stay until the determination of the question referred to in Order 2 above.
5. I list this matter for directions on Friday 9 August 1996.

sD
TAIT
FOR
REGISTRAR OF
THE HONOURABLE MR. JUSTICE
EASTON.

Associate

Date 6.8.96