

# **Pan Australia Shipping Pty Ltd v The Ship “Comandate” (No 2)**

[2006] FCA 112

Nicholas Floreani<sup>1</sup>

*Where arbitral proceedings brought in England and in rem proceedings brought in Federal Court of Australia by the same party, the action in rem constituted an election to litigate rather than arbitrate – Abandonment of right to arbitrate – Whether right to arbitrate waived – Whether arbitration agreement rendered inoperative*

This decision of Justice Rares is a significant decision from the Federal Court of Australia in respect of the question of whether an election by a party for urgent interim relief can amount to a waiver of an arbitration clause.

## **Facts**

On 9 June 2006, Pan Australia Shipping Pty Ltd (“Pan”) commenced proceedings in rem and caused the arrest of the ship *Comandate*, a Liberian flagged vessel owned by Comandate Marine Corporation (“Comandate Marine”).

An injunction restraining Comandate Marine from applying to the English Courts for an order restraining Pan from bringing claims under the *Trade Practices Act* was granted in previous proceedings in the Federal Court.

Comandate Marine commenced new proceedings in rem in the Federal Court of Australia and arrested another ship the *Boomerang I*, a vessel which Pan had chartered. Later, on Pan’s application, the court set aside the arrest.

In the meantime, Comandate Marine applied for a stay of these proceedings and for an order that Pan arbitrate the issues in the arbitration which has begun in London. Pan resisted the stay on a number of bases including that Comandate Marine, by bringing its in rem proceedings to arrest the *Boomerang I* elected to litigate, and not arbitrate, the whole dispute.

## **Election**

On the question as to whether by seeking the particular relief which it did and pursuing the arrest of the *Boomerang I*, Comandate Marine made an election not to arbitrate at London the dispute, his Honour referred to the High Court’s decision in *Immer (No 145) Pty Ltd v. Uniting Church of Australia Property Trust (New South Wales)* (1993) 182 CLR 26 in which their Honours held:

---

1 Nicholas Floreani is a barrister in Christopher Legoe Chambers. Adelaide.

*'That a party can be only held to have elected if it had so communicated its election to the other party in clear and unequivocal terms. An election arises when a party is confronted with and makes a choice between the exercise of alternative and inconsistent rights. The party is not obliged to elect at once, but when it takes a step which is consistent only with one of those rights the law attributes to it an election to abandon the other right'.*

His Honour found that because Comandate Marine elected to litigate the dispute in the Federal Court and Pan has too, the arbitration agreement had been abandoned or for the purposes of section 7(5) of the *International Arbitration Act* rendered inoperative or incapable of being performed.

## **Conclusion**

This case highlights the importance of considering, from a strategic point of view, what effect certain interim relief measures are to have upon any subsequent reliance on an arbitration clause. A party who submits itself to the court's jurisdiction, may find itself committed to the path it has chosen.