Cargo Claims in Australia; Establishing Jurisdiction

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INTRODUCTION

Like any other claimant, a cargo claimant can sue his defendant by commencing in personam proceedings against him. Whilst this paper will discuss the availability of in personam proceedings, particularly in the context of a claim against a foreign defendant, it will also discuss the availability of in rem proceedings, the main advantages of which are that the cargo claimant can obtain jurisdiction here by service upon the ship within the jurisdiction and he can secure his claim by arresting the res. Particular attention will be paid in this paper to the availability of in rem proceedings, including whether such proceedings are available when the carrier is a time charterer as distinct from an owner of a ship. Finally, the paper will consider in what circumstances our courts, once seised of jurisdiction, will refuse to exercise it.

IN PERSONAM JURISDICTION — AT COMMON LAW

Like any other claimant seeking damages for loss or damage to his property, the cargo claimant can proceed in any court exercising common law jurisdiction (such as the Local Court, District Court and Supreme Court) provided that he can establish jurisdiction over his

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defendant. If the defendant is resident within the jurisdiction or conducts business here, then he should have no difficulty because under the general law the Court's jurisdiction in personam is dependent upon service of its originating process and service could be effected upon those who are actually present within the jurisdiction at the time of service. As the High Court of Australia said in *Laurie v Carroll:*

> The defendant must be amenable or answerable to the command of the writ. His amenability depended and still primarily depends upon nothing but presence within the jurisdiction.

The State courts' territorial jurisdiction ends at the state borders however as a result of s 15(1) of the *Commonwealth Service and Execution of Process Act* 1992, originating process may be served in any other State or Territory. The Act does not require any leave to be obtained before or after service nor does it require any connection between the parties or the subject matter of the litigation on the one hand or the place of issue on the other. If however the initiating process has been issued out of a Court other than the Supreme Court of a State or Territory the Court can, on the application of the person served, grant a stay of proceedings on the ground that a Court of another State that has jurisdiction to determine all the matters in issue between the parties is the appropriate Court to determine those matters.

However, in many cases the defendant will be a foreign shipowner, charterer or forwarder and not resident within Australia. Unless the defendant agrees to appoint someone within the jurisdiction to accept service of the Court's originating process or appears unconditionally following service outside of the jurisdiction, to proceed the cargo claimant will have to bring his claim within those cases where the Court's originating process may be served outside of Australia. Only the High Court of Australia, the Supreme Courts

1 *Laurie* v *Carroll* (1958) 98 CLR 310 at 323.
2 *Service and Execution Process Act* 1992 s 20.
3 It is not proposed to consider the position in the High Court because in practice no cargo claims are initiated there. If they were they would normally be remitted to another court pursuant to s 44(1) of the *Judiciary Act* 1903.

of the various States and Territories and the Federal Court of Australia have the power to permit service of process outside Australia. In New South Wales the matter is governed by Part 10 Rule 1A of the *Supreme Court Rules* which permits the service outside of Australia of originating process in *a* number of cases of which the following would be relevant for present purposes:

1A(1) (a) where the proceedings are founded on a cause of action arising in the State;

(b) where the proceedings are founded on a breach in the State of a contract wherever made ...

(c) where the subject matter of the proceedings is a contract and the contract —

(i) is made in the State:

(ii) is made on behalf of the person to be served by or through an agents carrying on business or residing in the State;

(iii) is governed by the law of the State; or (iv) is one a breach of which was committed in the State;

(d) where the proceedings are founded on a tort committed in the State;[8]

(e) where the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring;

(f) where the proceedings are for contribution or indemnity in respect of a liability enforceable by proceedings in the Court;

(g) where the person to be served is domiciled or ordinarily resident in the State;

4 This is a ground authorising proceedings against an absent defendant in all jurisdictions.
5 This is a ground authorising proceedings against an absent defendant in all jurisdictions except the Australian Capital Territory.
6 This is a ground authorising proceedings against an absent defendant in all jurisdictions except Queensland and the Australian Capital Territory.
7 This is a ground authorising proceedings against an absent defendant in all jurisdictions.
8 All jurisdictions provide for service out of the jurisdiction if the proceedings are 'founded on a tort' committed within the forum.
9 This is a ground authorising proceedings against an absent defendant in all jurisdictions except Tasmania and Western Australia.
10 All jurisdictions permit service out of the jurisdiction against a defendant who is domiciled or ordinarily resident in the jurisdiction although temporarily absent.

> (h) where the proceedings are proceedings in respect of which the person to be served has submitted or agreed to submit to the jurisdiction of the Court;
> (i) where the proceedings are properly brought against a person served or to be served in the State and the person to be served outside the State is properly joined as a party to the proceedings . . .

It is apparent from these paragraphs of Part 10 Rule 1A (and the other paragraphs which have not been quoted above) that the Rules require some nexus between the claim and the State before service outside of the State will be permitted. In the cargo claim context, the cargo claimant will usually be suing in contract (pursuant to a bill of lading or charterparty) or in tort. From the contractual point of view, to permit service outside of the State, the contract must have been:

(i) made in the State ((l)(c)(i)) including by or through an agent or the Defendant carrying on business or residing in the State

(ii) is governed by the law of the State; or
(iii) the breach occurred within the State ((l)(b)&(c)(iv))

So far as claims in tort are concerned, to permit service outside of the State, the tort must have been:

(i) committed in the State ((l)(d)); or
(ii) some damage is suffered in the State ((l)(e)).

Service will also be permitted outside of the State where the Defendant is normally domiciled or resident within the State ((l)(g)), where the Defendant has agreed to submit to the jurisdiction of the Court ((l)(h)), and where a Defendant is within the jurisdiction (which includes a foreign defendant who has submitted to the jurisdiction) another Defendant may be served outside of the jurisdiction if he is a necessary and proper party to the action.

11 All jurisdictions provide for the serving out of the jurisdiction of a person who is a necessary and proper party to an action begun against a person served within the jurisdiction.
12 *The Benarty* [1983] 1 Lloyds Rep 361.

Prior to June 1998, before a Plaintiff could effect service of originating process outside of the jurisdiction he had to obtain the leave of the Court. To do so, he had to satisfy the Court that there was a strong argument that his case fell within Part 10 Rule 1 A.[13] However, following amendments to the Rules in 1988 this requirement was dispensed with such that the current procedure is that the Plaintiff effects service without obtaining leave but that should the foreign Defendant fail to enter an appearance the Plaintiff cannot proceed further against that Defendant without obtaining the leave of the Court.

A foreign Defendant who has been served with process may also apply, pursuant to Part 10 Rule 6Afor, inter alia, an order that service of the originating process be set aside.

Upon either an application by the Plaintiff for leave to proceed or an application by the foreign Defendant to set aside service, the Plaintiff must show that the cause or causes of action upon which his claim is founded fall within Part 10 Rule 1A.[15] Whilst it is necessary for the Plaintiff to show that his claim, as framed, falls within Part 10 Rule 1A it appears no longer necessary to go further and establish a strong argument that the claim falls within Part 10 Rule 1A. However, merely framing the case within Part 10 Rule 1A may not be sufficient to either obtain leave to proceed or to defend an application for the setting aside of service. This is because the Court has a flexible discretion exercisable having regard to all the circumstances of the case. In *Esanda Finance v Wordplex Info Systems* Justice Giles said:

> The relevant rules prior to the amendments in 1988 require that the Court 1)6 satisfied' that the proceedings were proceedings to which

13 *Contender 1 Ltd* v *LEP International Pty Limited* (1988) 63 ALJR 26.

14 This is also essentially the position in Victoria, Queensland, Tasmania and the Northern Territory. In South Australia, Western Australia and the Australian Capital Territory leave to serve the Defendant out of the jurisdiction must be obtained prior to service. In the Federal Court, leave to serve out of jurisdiction may be applied for beforehand or confirmed if the Defendant fails to appear.

15 *Australian Iron and Steel Pty Limited v Jumbo Scheepvaart Mantschappij (Curacao)* NV (Yeldham J. 13 October 1988 unreported). Other aspects of the judgment are reported at (1988) 14 NSWLR 507, *Williams v Lips-Heelen BV* (Giles J, 1 November 1991, unreported).

16 (1990) 19 NSWLR 146.

> Pt 10, r 1, applied and that the Plaintiff had a prima facie case for the relief sought... The scheme introduced by the amendments to the Rules in 1988 did away with leave to serve the originating process out of Australia. Instead, Pt 10, r 2, now provides that the Plaintiff shall not proceed against a Defendant who does not appear except with the leave of the Court. There is no requirement stated that anything be made to appear to the Court, or that the Court be satisfied as to anything.
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> That points to a more flexible approach to the assumption of jurisdiction over a foreign Defendant. The starting point is still one or more of the paragraphs in Pt 10, r 1 but there is greater flexibility in the determination whether the proceedings fall within one of the paragraphs and whether the proceedings should otherwise continue in this Court. There being no criteria specified in Pt 10, r 2, all the circumstances of the case must be taken into account. The same flexibility can be seen in relation to any application by the foreign Defendant pursuant to Pt 10, r 6A.[18]

In this context, a Plaintiff who fails to produce evidence to establish that his claim falls within Pt 10, r 1A does so at his own peril. As Justice Giles went on to say in *Esanda Finance:*

> That does not mean that it is unnecessary to consider whether one of the paragraphs in Pt 10, r 1, is applicable, or that there is no need at all for a Plaintiff to address that matter. In many, if not most, cases a Plaintiff who failed to bring evidence demonstrating that the service overseas was authorised cannot be given leave to proceed, or would fail in resisting an application to have the originating process and its service set aside; and in some cases the weight of competing evidence on that question would fall for recognition.

The strength or weakness of the case in which the authority to serve out of Australia depends, will be a relevant factor as was the case in *Williams v Lips-Heerlen* B V where the Plaintiff established that his case fell within Part 10 Rule 1A but service was set aside at first instance as a matter of discretion because his case was very weak.

17 As a result of amendments in 1993, r 1 was re-numbered r 1A.
18 (1990) 19 NSWLR146 at p 154.
19 (1990) 19 NSW7LR146 at p 154-155.
20 CA NSW 16 August 1994.

In addition, in exercising its discretion, the Court will take into account whether it is an inappropriate forum for the trial of the proceedings. The question of inappropriate forum will be dealt with separately below.

In the cargo claims area, two issues which often arise as to whether the claim falls within Part 10 Rule 1A are first, whether the contract sued upon is governed by the law of New South Wales and second, whether any damage has been suffered in this State. Dealing with the first, the parties to a contract have the power to choose what law will govern the contact. This choice can be express or implied. The clearest instance of an implied choice is when a contract has no express choice of law clause but does have a jurisdiction or arbitration clause. Such a clause raises a strong presumption that the law of the country where litigation or arbitration is to occur has been chosen by the parties as the proper law.

Where no choice of law, either express or implied, has been made, the Court will determine the proper law according to the system of law with which the contact has its closest and most real connection.

If the cargo is being shipped pursuant to a bill of lading from any place in Australia to any place outside of Australia then pursuant to s 11(1) of the *Carnage of Goods by Sea Act* 1991 the parties are deemed to have intended to contract according to the laws in force at the place of shipment and any provision in the bill of lading to the contrary will be of no effect: s 11(2). Accordingly, any outward shipment from New South Wales pursuant to a bill of lading will plainly fall within, inter alia, sub-paragraph (c) of Part 10 Rule 1A. Section 11 of the *Carriage of Goods by Sea Act* 1991 does not extend to inward shipments nor does it apply to voyage charterparties.

21 Ft. 10, r 6A(2)(b).
22 *The Mariamina* (1983) 1 Lloyds Rep 12, *The SLS Everest* (1981) 2 LLR 389.
23 *Bonython* v *Commonwealth of Australia* (1951) AC 201 at 219, *Amin Rasheed Shipping Corp. v Kuwait Insurance Co.* (1984) AC 50 at 61,69.
24 The predecessor to s 11 of the *Carriage of Goods by Sea Act* 1991 was s 9 of the *Sea Carriage of Goods* 1924 which was held to extend to voyage charterparties *The Blooming Orchard* (No.2) (1991) 22 NSWLR 273

The second issue, which concerns tort claims only, is whether any damage has been suffered in the State. Damage for the purposes of Part 10 r lA(e) is not confined to the immediate physical injury or loss suffered at the time when the cause of action first accrues. In *The Katowice II*[26] paragraph (e) was held to extend to financial loss in respect of repairs to property even where both the damage and the repairs occurred outside the State. The relevant facts of the case were briefly as follows. The Plaintiff's claim arose out of damage occasioned to a machine whilst being loaded on the vessel at Hamburg for carriage to Sydney. The machine was repaired in Hamburg at the cost of the shipper who was reimbursed by the Plaintiff's insurance company, the funds having been remitted by the insurer from New South Wales to Germany. Justice Carruthers was satisfied that in these circumstances the Plaintiff had suffered damage in New South Wales. He said:[27]

> By reason of the injury occasioned to the machine in Germany, it was necessary for the Plaintiff to incur the obligation to repair the machine so that it would arrive for use in the Plaintiffs business in an operational condition ... Absent the requisite insurance cover, the assets of the Plaintiff would have been depleted in New South Wales in order to meet the expenditure incurred in the repair. If one accepts that the expense was incurred in Germany, it does not necessarily mean that the damage *to the plaintiff was* not suffered in New South Wales. I can see nothing logically inconsistent about the physical injury to the machine being caused in Germany, the obligation to pay for the repair being incurred in Germany, and the damage, in the sense of the consequential disadvantage or detriment, being suffered by the Plaintiff in this State.

25 See generally *Flaherty* v *Girgis* (1987) 162 CLR 574.
26 (1990) 25 NSWLR 568.
27 (1990) 25 NSWLR 568 at 577.
28 The Defendant sought leave to appeal, the judgment being an interlocutory one. The summons for leave to appeal was dismissed by the Court of Appeal on the basis that the application involved one of practice and procedure. The Defendant sought special leave to appeal to the High Court of Australia which application was discontinued following resolution of the matter.

If the decision in The Katowice II is correct then the concept of 'damage suffered in the State' is extremely wide. The Plaintiff in The Katowice II made no payment themselves, rather it was their insurers, who happen to be based in New South Wales, who reimbursed the shipper who had, in Hamburg, paid for the repairs where the machine had been damaged.

Leaving the insurance aspect to one side, can the mere depletion of the Plaintiff's assets in New South Wales be enough? What would have been the position if the shipment had nothing to do with New South Wales but the Plaintiff, who has numerous offices in Australia, attends to payment of all accounts from its Sydney office? If The Katowice II is right then the mere payment from the Sydney bank account constitutes damage suffered in the State. It essentially means that the Court will have jurisdiction if the Plaintiff resides here because invariably the Plaintiff's resources will be depleted here. Each of the paragraphs of P. 10 r 1A show the need for a connection between the claim and this state. The mere presence of the Plaintiff and the natural depletion of its assets here ought not, in the writer's view, be a sufficient connection.

The decision in The Katowice II has however been followed by 29 Justice Gray of the Federal Court of Australia in The Moon Valley.

In that case the Defendant was contracted to survey the vessel Moon Valley at the port of Vancouver in British Columbia, to a report on its suitability to carry a cargo of granular grade urea in bulk. The Defendant issued a report in Canada confirming the suitability of the vessel to carry the intended cargo and in reliance on this certificate the Plaintiff agreed to use the vessel. On arrival at Victorian ports, the cargo was found to be contaminated by water and rust.

The Plaintiff applied for and was granted leave to serve originating process on the Defendant in Canada. Following service the Defendant filed a Notice of Conditional Appearance and a Notice of Motion seeking to, inter alia, set aside service.

29 *Phosphate Co-operative Company of Australia Limited* v *SGS Supervision Services Inc. (The Moon Valley)* FCA, Gray J, unreported 7 April, 1993.

Order 8 Rule 1 (ad) of the Federal Court Rules is in very similar terms to Pt 10 r lA(e) of the Supreme Court Rules in that it permits service outside of the jurisdiction where the proceeding is founded on damage suffered wholly or partly within the jurisdiction caused by a tortious act or omission wherever occurring. The Defendant contended that the Plaintiff had not established that its claim was for the recovery of damage suffered within Australia. It argued that the 'damage' in Order 8 r 1 (ad) means damage of a kind which constitutes the element giving rise to a complete cause of action in negligence and not consequences of such damage and in that regard there was no evidence that any deterioration of the cargo had occurred while the vessel was within the territorial waters of Australia.

Justice Gray held that this argument was inconsistent with the decision in *The Katowice II* which decision he considered to be correct. Justice Gray said:

> Taking a similar view of the word 'damage' in 0 8 r l(ad), I am required to direct attention to whether the plaintiff claims in respect of disadvantage or detriment suffered by it in Australia as a result of the alleged tortious omission of the defendant. The particulars of loss and damage contained in the statement of claim all relate to expenditure incurred in Australia, allegedly as a result of the damage to the cargo. They include items such as transfer of another stored product (sulphate of ammonia) to accommodate the lump urea, sand blasting of a hopper to break up lumps of urea, screening of urea, the use of a front-end loader on lump urea, the transfer of other urea to meet market demand, the incurring of extra unloading costs and detention charges and lost by reason of unsaleability of some of the cargo. All of these items fall clearly within the word 'damage'...

I have no difficulty in accepting that each of the items referred to by Justice Gray constitute 'damage' within the meaning of Order 8 r l(ad) as each of those items were undertaken within Australia. I would disagree however that if each of those items had been under-

30 *Phosphate Co-operative Company of Australia Limited* v *SGS Supervision Services Inc. (The Moon Valley)* FCA, Gray J, unreported 7 April, 1993 at p 6.

taken outside of Australia but merely paid for from a bank account held in Australia, that that is damage within Order 8 r l(ad).

IN PERSONAM JURISDICTION — TRADE PRACTICES ACT

It is becoming more frequent to see cargo claimants framing their claims, inter alia, under the *Trade Practices Act* 1974 and in particular relying on ss 52 and 53 which deal with false and misleading conduct and false representations respectively. If the offending conduct occurs within the jurisdiction then plainly the Federal Court of Australia will have jurisdiction to determine the claim. However, if the offending conduct occurred outside of the jurisdiction the cargo claimant will need to bring himself within s 5(1) of the Act which extends the application of Part V of the Act to 'the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business in Australia'.

Accordingly, for the Act to apply to conduct occurring outside of the jurisdiction the Defendant who engaged in the offending conduct must be incorporated or carrying on business within the jurisdiction.

In addition, where the claim is a private action for damages under Section 82 of the Act, which will normally be the case when *a* cargo claimant is suing for loss or damage to his goods, the cargo claimant must also obtain the consent of the Attorney General before he can rely upon the offending conduct: s 5(3) *Trade Practices Act* 1974. The Attorney General is obliged to give consent unless he is of the opinion that the law of the country in which the offending conduct occurred authorised the conduct and it would not be in the national interest to give the consent: s 5(5). Accordingly, in most cases consent is likely to be given if sought.

31 See for instance *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd & Anor (The Bunga Kenanga)* (1993) 117 ALR 507 and *Comalco Aluminium Ltd v Mogul freight Services Pty. Ltd* (1993) 113 ALR 677.

32 The failure to obtain such permission proved fatal to the Trade Practices claims by the Plaintiff in *Hunter Grain Pty. Ltd* v *Hyundai Merchant Marine Co. Limited & Anor.*

The cargo claimant who brings his claim under the *Trade Practices Act* in the Federal Court of Australia must, like any other claimant, establish jurisdiction over the Defendant by effecting service of the Court's process upon him.

The position as to service of originating process issued out of the Federal Court outside the jurisdiction is very similar to that of the Supreme Court in that service can only be effected in certain types of cases. The types of cases are set out in Order 8 r 1 of the *Federal Court Rules* and they are very similar to that contained in Pt 10, r 1A of the *Supreme Court Rules.* The procedure however is a little different and is similar to that applicable in the Supreme Court prior to the amendment of the Rules in June 1988. That is to say, before service can be effected outside of the jurisdiction the Plaintiff must obtain the Court's leave and in doing so must satisfy the Court that the claim is one in which the Court has jurisdiction, that the claim falls within one or other of the cases set out in Order 8 r 1 and that the Plaintiff has a prima facie case for the relief which he seeks.[33] If originating process had been served outside of the jurisdiction without obtaining the Court's prior leave, then the Court can confirm the service provided it is satisfied of the matters just referred to and in addition that the failure to apply for prior leave is sufficiently explained.[34]

IN PERSONAM JURISDICTION — IN ADMIRALTY

The Admiralty Act 1988

The *Admiralty Act* 1988 (Cth) ('the Act') confers jurisdiction on the Federal Court of Australia and on the Courts of the States and Territories in respect of in personam proceedings on a maritime claim or on a claim for damage done to a ship.[35]

Accordingly, provided that the cargo claimant's claim is a maritime claim (it would not be a claim for damage done to a ship) the

33 Order 8 r 2(2) *Federal Court Rules.*
34 Order 8 r 4 *Federal Court Rules.*
35 *Admiralty Act,* 1988 (Cth), s 9(1).
36 See *The Eschersheim* [1976] 1WLR 430 Lord Diplock at 439-440.

cargo claimant can proceed in all courts with civil jurisdiction within their ordinary monetary limits, provided that the court has jurisdiction over the defendant.

No admiralty jurisdiction over inland waterways vessels

The Act does not apply however in respect of a cause of action that arises in respect of an inland waterways vessel or in respect of the use or intended use of a ship on inland waters unless that ship was, when the cause of action arose, a foreign ship.

'Inland waterways vessel' is defined in the Act as meaning a vessel used or intended to be used wholly on inland waters. 'Inland waters' is defined as meaning waters within Australia other than waters of the sea and 'sea' is defined as including all waters within the ebb and flow of the tide. In other words, the Act will not apply to a cause of action that arose in respect of a vessel used wholly on, essentially, non-tidal waters within Australia or a cause of action that arose in respect of the use or intended use of any ship on non-tidal waters within Australia unless that ship was, at the time when the cause of action arose, a foreign ship.

Accordingly, the cargo claimant will not be able to proceed in Admiralty if his goods were carried on a vessel used or intended to be used wholly on non-tidal waters within Australia or, if at the time the goods were lost or damaged, the vessel was on non-tidal waters within Australia unless that vessel was a foreign vessel. As the Act defines inland waters as meaning only the inland waters of Austra-

37 Section 5(3). 'Foreign ship' means *a* ship that is not registered, and is not permitted to be registered, under the *Shipping Registration Act,* 1981 (Cth); s 3(1) of the *Admiralty Act.* Accordingly, a ship that is not registered but is one that can be registered under the *Shipping Registration Act,* 1981 will not be a foreign ship within the meaning of the *Admiralty Act.* The only ships that are not permitted to be registered under the *Shipping Registration Act* are those registered under the law of a foreign country; s 17(1). Whilst the *Shipping Registration Act* requires the registration under the Act of all Australian owned ships as defined in the Act, if such a ship has not been registered under the Act but has been registered under the law of a foreign country, that ship will be considered, for the purpose of the Admiralty Act, as a 'foreign ship'.

38 Section 3(1).

39 Section 3(1).

40 Section 3(1). The same definition is used in the *Navigation Act,* 1912 (Cth), s 6.

lia, it may be possible for a cargo claimant to proceed in Admiralty in respect of a claim relating to goods lost or damaged on a vessel whilst on the inland waters of a foreign country. In such a case, the defendant would probably be a foreign entity and to proceed with the claim the cargo claimant will, as discussed above, have to be able to effect service of the Court's process upon the defendant.

The difficulties which arise with inland waterways vessels are of little, if any, practical significance when dealing with in personam jurisdiction. Whilst a court may not be entitled to exercise Admiralty jurisdiction over a defendant in respect of a claim arising from carriage on an inland waterways vessel, the court will still be entitled to exercise its common law jurisdiction, but again subject to its ability to effect service of its originating process on the defendant. Inland waterways vessels become of real significance when the cargo claimant is seeking to exercise in rem jurisdiction, which is a jurisdiction exercised in Admiralty and not common law.

To proceed in admiralty must have a maritime claim which can be either a proprietary maritime claim or a general maritime claim

As stated above, to proceed in Admiralty in personam, the cargo claimant's claim must be a maritime claim or a claim for damage done to a ship. It will not be a claim for damage done to a ship but will be a maritime claim.

A 'maritime claim' is defined in the Act as being either *a* proprietary maritime claim or a general maritime claim. 'Proprietary maritime claims' are claims involving disputes over title to or possession of a ship, mortgage claims, co-ownership disputes, claims to enforce in rem judgments and associated claims for interest. Apart from claims to enforce in rem judgments, the claim of a cargo owner will not be a proprietary maritime claim.

41 Section 3(1).
42 Section 9(1).
43 Section 4(1).

Cargo claimant's claim is a general maritime claim

Section 4(3) of the Act sets out an exhaustive list (23 in total) of what will constitute a general maritime claim. In this context, the relevant categories are paragraphs (a),(d),(e) and (f) which provide:

> 4(3) A reference in this Act to a general maritime claim is a reference to:
>
> (a) a claim for damage done by a ship (whether by collision or otherwise);
> (d) a claim (including a claim for loss of life or personal injury) arising out of an act or omission of:
> (i) the owner or charterer of a ship;
> (ii) a person in possession or control of a ship; or
> (iii) a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of a ship is liable; being an act or omission in the navigation or management of the ship, including an act or omission in connection with:
> (iv) the loading of goods on to, or the disembarkation of persons from, the ship;
> (v) the embarkation of persons on to, or the disembarkation of persons from, the ship; and
> (vi) the carriage of goods or persons on the ship;
> (e) a claim for loss of, or damage to, goods carried by a ship;
> (f) a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise.

The claim of a cargo claimant will normally fall within one or more of these categories. In any event, all that the cargo claimant need show to establish jurisdiction is that he has a 'strong argument' that his claim falls within one of these categories. Whilst at the ultimate trial he will have to prove, on a balance of probabilities, that his claim falls within one of the categories, at the preliminary stage of whether the Court has jurisdiction he need only prove that he has a 'strong argument.

44 See *The Shin Kobe* Mara (1994) 181 CLR 404 and *The Bass Reefer* (1992) 109 ALR 505.

Service of in personam proceedings in Admiralty

Whilst the Act applies to all ships, irrespective of the places of residence or domicile of their owners and all maritime claims, wherever arising, there is nothing in the Act or the *Admiralty Rules* that permits that jurisdiction in personam to be established other than by service of originating process upon the defendant. Accordingly, there is no difference in establishing jurisdiction over a defendant in personam proceedings brought in Admiralty compared with in personam proceedings brought at Common Law as discussed above. Rule 6 of the *Admiralty Rules* provides that the Rules of the Court exercising jurisdiction under the Act continue to apply to Admiralty actions to the extent that they are not inconsistent with the *Admiralty Rules.*

ACTION IN REM

In addition to his right to proceed in personam, the cargo claimant may be able to proceed in rem. Pursuant to s 10 of the *Admiralty Act,* the Federal Court and the Supreme Courts of the Territories and the States have jurisdiction in respect of proceedings commenced as actions in rem.

Jurisdiction in rem is obtained by service of initiating process on the res within Australia, including the territorial sea. Accordingly, a cargo claimant who cannot obtain in personam jurisdiction can still obtain in rem jurisdiction by waiting for the res to come within the jurisdiction and then effecting service of originating process upon it. The owner of the res would still be entitled to seek a stay of the proceedings on forum non conveniens grounds (to be discussed below). If however a stay was to be granted on these grounds and the res was under arrest, the court can order that substitute security [47] be provided as a condition of any stay.

45 *Admiralty Act* 1988, s 5(1).

46 Pursuant to Section 11 of the Act, jurisdiction in respect of admiralty actions in rem may also be conferred, by proclamation, on other courts of the States or Territories. To date no such proclamation has been made.

47 Section 29.

A plaintiff can proceed both in personam and in rem at the one time, although he cannot do so in the same proceedings. In fact, it is quite common for plaintiffs to do so, especially in cargo claim cases. This is so for two reasons. First, to use the threat of such proceedings to obtain security for the in personam claim. Second, if the cargo owner is unsure as to who was the carrier of his cargo, the safe course of action is to commence in rem proceedings against the vessel, should the question of who was the carrier not be able to be clarified. An action in rem against a ship or other property can only be commenced under the *Admiralty Act.*

The Act confers jurisdiction in rem in respect of maritime liens, proprietary maritime claims, owners' liabilities, s 17. and demise charterers' liabilities . With respect to owners' liabilities, the Act also confers jurisdiction in respect of surrogate ships. As stated above, the claim of a cargo claimant will not be a proprietary maritime claim unless it is for the satisfaction or enforcement of an in rem judgement.

An action in rem can be brought upon a maritime lien

Dealing firstly with maritime liens, s 15 of the Act provides:

> 15 (1) A proceeding on a maritime lien or other charge in respect of a ship or other property subject to the lien or charge may be commenced as an action in rem against the ship or property. (2) A reference in sub-section (1) to a maritime lien includes a reference to a lien for:
>
> (a) salvage;
> (b) damage done by a ship;
> (c) wages of the Master, or of a member of the crew, of a ship; or
> (d) Master's disbursements.

48 Admiralty Rules, Rule 18.
49 Section 14.
50 Section 15.
51 Section 16.
52 Sections 17 and 18.
53 Section 19.

Prior to the passing of the *Admiralty Act,* the claims recognised as giving rise to maritime liens were:

1. Damage done by a ship.
2. Salvage.
3. Seamens' wages.
4 Master's wages and disbursements. 5.

Bottomry and respondentia.

With the exception of bottomry and respondentia all of these recognised maritime liens are included in s 15(2) of the Act. Whilst bottomry and respondentia are maritime liens, they are now obsolescent if not obsolete and for this reason have not been specifically included in s 15(2) of the Act.[58]

The Act does not create any new maritime liens or other charges. However, since s 15(2) provides that a maritime lien 'includes' the listed claims, other claims could be created by the common law as constituting maritime liens.

A maritime lien travels with the ship and survives any changes in ownership of the ship. This may prove to be very important to a cargo claimant because, as we will see below, a change in ownership of the vessel concerned prior to the commencement of proceedings would otherwise prevent the cargo claimant from proceeding in rem.

54 Thomas, para. 12.
55 Bottomry is a charge over a ship in order to secure monies for necessaries so that a voyage can continue; Davies & Dickey *Shipping Law* 2nd ed 1995) at pp 132-4.
56 Respondentia is a charge solely on a ship's cargo and the rules of respondentia are similar to those of bottomry; Davies & Dickey *Shipping Law* (2nd ed 1995) at p 134.
57 See *The Halcyon Isle* [1981] AC 221 at 232.
58 In its explanatory memorandum, the Law Reform Commission described the list in sub-clause 15(2) of the draft Admiralty Bill (being the equivalent of s 15(2) of the Act) as being an indicative list 'stating the most important liens these days'; LRC report No 33 at p 239.
59 Section 6.
60 See for instance *The Bold Bucdeugh* (1851) Moo.P.C.267 at 284.

A cargo claimant will have a maritime lien in limited circumstances, primarily collision cases.

Of the liens referred to in s 15(2) of the Act, or recognised at common law, only the lien 'damage done by a ship' is likely to be of assistance to the cargo claimant.

In the cargo claim context, 'damage done by a ship' is limited to damage done by a ship to cargo carried on board another ship. It does not include damage or lost cargo carried on board the carrying vessel. That is to say, if the cargo claimant's goods are being carried on ship 'A' which is in collision with ship 'B' the cargo claimant would have a maritime lien over ship 'B' but not ship 'A'. To be ultimately successful the cargo claimant would, of course, have to establish that ship 'B' was in some way at fault.

For a claim for damage or loss to cargo to come within 'damage done by a ship' it must be shown that the loss or damage was actively caused by the ship herself. Unless this can be shown no maritime lien will exist. In *The Eschershiem* Lord Diplock said:

> The figurative phrase 'damage done by a ship' is a term of art in maritime law whose meaning is well settled by authority … to fall within the phrase not only must the damage be the direct result or natural consequence of something done by those engaged in the navigation of the ship but the ship itself must the actual instrument by which the damage was done. The commonest case is that of collision.. . but physical contact between the ship and whatever object sustains the damage is not essential—a ship may negligently cause a wash by which some other vessel or property on shore is damaged.

Accordingly, in practice, a cargo claimant will have a maritime lien only where the loss or damage to his cargo has resulted from a collision between the ship upon which his goods are being carried and another ship. His lien however will only be over the 'other' ship and not the ship upon which his goods were being carried. He will

61 See *The Eschersheim* [1976] 2 Lloyd's Rep 1.
62 [1976] 2 Lloyd's Rep 1 at 8.

be able to proceed in rem against that other ship irrespective of any changes in her ownership since the date of the collision.

An action in rem can be brought upon a general maritime claim

Section 17 of the Act provides as follows:

> 17. Where, in relation to a general maritime claim concerning a ship or other property, a relevant person:
> (a) was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property; and
> (b) is, when the proceeding is commenced, the owner of the ship or property; a proceeding on the claim may be commenced as an action in rem against the ship or property.

The claim of the cargo claimant will be a general maritime claim. To proceed in rem pursuant to s 17 of the Act, however, the claim must also, first, concern a ship or other property; second, the 'relevant person' must, when the cause of action arose, have been the owner of or charterer of, or in possession or control of, the ship or property; and third, the relevant person must be, when the proceeding is commenced, the owner of the ship or property. If these criteria are met, then proceedings may be commenced as an action in rem against the ship or property.

Must be a direct nexus between the claim and the ship

The first requirement is that the general maritime claim must concern a ship or other property. As discussed earlier, to constitute a general maritime claim, the claim must have a direct connection with a ship. The United Kingdom and New Zealand equivalents refer to the claim arising 'in connection' with a ship. In Hetherington, *Annotated Admiralty Legislation* the author suggests that the word 'concerning' would be interpreted in the same way as the words 'in connection'. In the writer's view, in ordinary parlance, the word 'concerning' suggests that the claim should have an even stronger

63 *Supreme Court Act* 1981 (UK) s 21(4).
64 *Admiralty Act* 1973 (NZ) s 5(2)(b).
65 At p 64.

relationship with the ship than being a claim that has some connection with the ship. Having said that, the words 'in connection' as used in the English legislation have been construed as requiring a direct nexus between the claim and the ship in respect of which the claim arose. That ship is often referred to as the offending or wrongdoing ship.

In *The Eschersheim* the House of Lords said;

> It is clear that to be liable to arrest a ship must not only be the property of the Defendant to the action but must also identifiable as a ship in connection with which the claim made in the action arose (or a sister ship of that ship). The nature of the 'connection' between the ship and the claim must have been intended to be the same as is expressed in the corresponding phrase in the Convention 'the particular ship in respect of which the maritime claim arose'. One must therefore look at the description of each of the maritime claims included in the list in order to identify the particular ship in respect of which a claim of that description could arise.

Earlier in this paper I have identified those paragraphs of s 4(3) of the Act which are likely to be of relevance in the cargo claim context. The first, paragraph (a) is 'damage done by a ship' which I have discussed above in the context of maritime liens. It is apparent from that discussion that the ship to which paragraph (a) refers is not the ship on which the goods are being carried but the other ship involved in the particular incident.

Paragraph (d) of s 4(3) of the Act is concerned with a claim arising out of an act or omission of, inter alia, the owner of a ship in the navigation etc of the ship including an act or omission in connection with the loading or carriage of goods on the ship. The particular ship here is the ship upon which the goods are being carried at the time of the act or omission.

Sub-paragraph (e) of s 4(3) of the Act is concerned with a claim for loss or damage to goods carried by a ship and, again, the particular

66 [1976] 1 WLR 430.
67 [1976] 2 Lloyd's Rep 1 at 7.

ship involved is the ship upon which the goods are being carried at the time of the loss or damage.

Finally, paragraph (f) of s 4(3) of the Act is concerned with a claim arising out of an agreement relating to the carriage of goods by a ship or the charter of a ship. The particular ship will be the ship the subject of the agreement to carry or charter.

The 'relevant person'

Section 17 of the Act refers to the 'relevant person' which is defined to mean 'a person who would be liable on the claim in a proceeding commenced as an action in personam'.

The definition of 'relevant person' is concerned with hypothetical /-q 70 rather than actual liability. In *The St. Elefterio,* Willmer J considered that the natural construction of the words 'the person who would be liable' ins 3(4) of the *Administration of Justice Act,* 1956 (UK) as meaning 'the person who would be liable on the assumption that the action succeeds'.

'Charterer' not limited to 'demise charterer'

Section 17 further requires that the relevant person was, when the cause of action arose, 'the owner or charterer of, or in possession or control of, the ship or property'. The United Kingdom and New Zealand equivalents contain nearly identical wording. In *The Span Terza* Donaldson LJ (as he then was) in his dissenting judgment, limited the word 'charterer' to a demise charterer. The word 'charterer' is not defined in the Act but on a natural construction it would encompass not only demise charters but also time and voyage charters. The reason for any doubt arises from the use of the words 'or in possession or in control' in the phrase 'the owner or charterer of, or in possession or in control of, the ship' especially when compared

68 Section 3(1).
69 *Ocean Industries Pty Ltd v The Owners of the ship MV 'Steven C* [1994] 1 Qd R 69.
70 [1957] 179.
71 [1957] 179 at 185.
72 *Supreme Court Act* 1981 (UK) s 21(4), *Admiralty Act* 1973 (NZ) s 5(2).
73 [1982] 1 Lloyd's Rep 225.

with Article 3 of the Arrest Convention 1952, upon which convention the statutory provisions were largely based. In his dissenting Judgment in *The Span Terza* Lord Justice Donaldson said:

> So I come back to the question of the meaning of the word 'charterer'. It seems to me that there are quite a number of forms of charterer; you can have a voyage charterer; you can have time charterers; you can have consecutive voyage charterers and no doubt there are a large number of other varieties of charterer, all of whom are contracting for the services of a ship with a crew, being run and managed by the owner of the ship or somebody who is in the position of the owner of a ship. But in addition there is a very special form of charterer, the demise charterer, who has nothing whatsoever in common with any other form of charterer and is, for most practical purposes, the owner of a ship. It seems to me that in the context of the phrase 'the owner or charterer of, or in possession or in control of, the ship' the proper construction of the word 'charterer' is to confine it to somebody who is an owner-type charterer: in other words, a demise charterer.

However, the majority in *The Span Terza* were satisfied that 'charterer' was not so limited. Sir David Cairns, with whom Lord Justice Stephenson agreed, said:

> The only way of escaping from it is by interpreting the word 'charterer' in s 3(4) to 'demise charterer'. If it is to be supposed that Parliament meant to be included as the 'person' mentioned in the sub-section only a person who, like the owner or one of the types of persons mentioned after 'charterers', was at the time in question a person in possession or control of the ship, then that interpretation would give effect to that contention.
>
> For my part, as a matter of construction I find it impossible to construe the words in that way. If only a demise charterer were meant, one would of course have expected 'demise' to have been inserted before the word 'charterer'. Alternatively the word 'charterer' could have been omitted altogether, because a demise charterer would be included in the words 'the person in possession or control'.

74 [1982] 1 Lloyd's Rep 225 at p.230.
75 [1982] 1 Lloyd's Rep 225 at p.227.

A similar conclusion had been reached a few years earlier by the Court of Appeal of Singapore in *The Permina 108* although shortly thereafter the High Court of Hong Kong in *The Ledesco Una* reached the contrary view.

The issue was reconsidered by the Supreme Court of Hong Kong a few years later in *The Sextum* but by this time the English Court of Appeal had given Judgment in *The Span Terza.* The facts in the *Sextum* were similar to the other cases where this issue has arisen in that it was alleged that the Defendant time charterers owed monies to the Plaintiff under the relevant time charterparties, as a result of which the Plaintiffs arrested the Defendant's vessel Sextum. Mr Justice Penlington dismissed an application by the Defendants for the release of their vessel from arrest. In doing so, Mr Justice Penlington refused to follow *The Ledesco Una* and preferred to adopt the approach in *The Permina 108* and *The Span Terza.* He said,

> I prefer the reasoning behind *The Permina 108* and *the Span Terza.* I consider that I should give the word 'charterer' its ordinary meaning and it should not be restricted to demise charterer. I do not think that even if the Convention is worded differently from the Act that it is sufficient reason to put such a restrictive meaning on it.[79]

These same considerations would apply with even more force so far as the *Admiralty Aci* 1988 is concerned because unlike the United Kingdom and Hong Kong equivalents, the *Admiralty Act* was not passed so as to give effect to the Arrest Convention. Accordingly, to the extent to which foreign courts might refer to the Arrest Convention as an aid to the construction of their relevant legislation, it is far less appropriate, if not inappropriate, for an Australian Court to do so.

Interestingly, despite being in the minority in the *Span Terza* and the subsequent decisions following the majority in that case, in the

76 [1978] 1 Lloyd's Rep 311.
77 [1978] 2 Lloyd's Rep 99.
78 [1982] 2 Lloyd's Rep 532.
79 [1982] 2 Lloyd's Rep 532 at 534.

80
Evpo Agnic Lord Donaldson, MR, whilst obiter, did not resile from his opinion that charterer meant 'demise charterer'.

To my knowledge the issue has not been raised in Australia. Whilst there are some conflicting decisions on this issue, the greater weight of the authorities supports the view that 'charterer' should be given its natural construction and include a demise, time or voyage charterer. That view is reinforced by an examination of the *Admiralty Act* as a whole and in particular s 18 of the Act.

Section 18 specifically deals with demise charterers' liabilities. It provides:

> 18. Where, in relation to a maritime claim concerning a ship, a relevant person:
> (a) was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property; and
> (b) is, when the proceeding is commenced, a demise charterer of the ship;
>
> a proceeding on the claim may be commenced as an action in rem against the ship.'

Section 18 permits a claim against a ship where the relevant person was, when the cause of action arose, 'the owner or charterer, or in possession or control, of the ship' and is, when the proceeding is commenced 'a demise charterer of the ship'. The Act therefore draws a distinction between a 'charterer', which is a generic term and will include a demise, time or voyage charterer, and a 'demise charterer'. Because the Act makes this distinction it is difficult to see why the term 'charterer' in ss 17,18 and 19 would be construed to mean 'demise charterer'.

80 [1988] 2 Lloyd's Rep 411.
81 [1988] 2 Lloyd's Rep 411 at 414.
82 Commentators have also expressed differing views. See for instance S. J. Hazelwood, 'Gaps in the Action in Rem — Plugged?' [1982] LMCLQ 422; S. J. Tabbush, 'Arrest of Ships Owned by Charterers' [1982] LMCLQ 585; A. M. Tettenborn, 'The Time Charterer, The One-Ship Company and the Sister-Ship Action in Rem' [1981] LMCLQ 507. The first two articles support the wider view, the latter the narrower view. Also see D. C. Jackson *Enforcement of Maritime Claims* at p 80.

Relevant person must be the owner or demise charterer of the wrong-doing ship when Writ filed in Court

Assuming then that the cargo claimant can show that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or control, of the ship or property, to proceed in rem against the ship or property he must also prove that when the proceedings were commenced, the relevant person was 'the owner of the ship or property'. Proceedings are commenced when the initiating process is filed in, or issued by, the Court and will be valid for service for a period of twelve months after it has been issued and may not be served after that time without the leave of the Court.[87]

Accordingly, if at the time when the Writ is filed in the Registry the relevant person was the owner of the ship, the cargo claimant may proceed in rem against that ship pursuant to s 17 of the Act. If, however, the relevant person is not the owner of that ship at the time the Writ is filed, but is in fact the demise charterer of that ship, then the cargo claimant may still proceed in rem against that ship pursuant to s 18 of the Act.

Accordingly, the combined result of ss 17 and 18 is that the cargo claimant can proceed in rem against the wrong doing ship if the party that would be liable in an action in personam was either the owner of the ship, the charterer, be it a charter by way of demise, time or voyage, or otherwise in possession or control of the ship and is, when the proceedings are filed in the Court, either the owner of the ship, including the beneficial owner, or the demise charterer of the ship. He would not be able to proceed against the ship if the party liable

83 Section 3(2) of the Act.

84 Rule 20, *Admiralty Rules*. Interestingly, the previous New South Wales Admiralty Rules (now repealed) provided for the Writ to be renewed from time to time and is also the position in the UK. However, r 20 does not provide for a general renewal of the Writ as such but rather that if a Writ has not been served within a period of twelve months after it was issued, it cannot be served at all unless with the leave of the Court. Accordingly, it would seem that the practice will become to wait for the vessel to come within the jurisdiction or be on a voyage to the jurisdiction and to then apply to the Court for leave to serve the vessel.

in personam is, at the time when the action is filed is in the Court, a time or voyage charterer of the ship.

An action in rem upon a general maritime claim can be brought against a surrogate ship

However, if the relevant person is the owner of another ship, even though that ship is not the 'wrong doing ship', then the cargo claimant will be able to proceed in rem against that ship pursuant to s 19 of the Act. This will be the case even if there is no direct relationship between the wrong-doing ship and the ship in respect of which proceedings are being brought. That is to say, the two ships concerned do not have to be 'sister snips'. Section 19 provides:

> 19. A proceeding on a general maritime claim concerning a ship may be commenced as an action in rem against some other ship if;
>
> (a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship; and
> (b) that person is, when the proceeding is commenced, the owner of the second-mentioned ship.'

The 'second-mentioned ship' is called a 'surrogate ship'. As s 19 of the Act is limited to general maritime claims, the right to proceed against a surrogate ship does not extend to proprietary maritime claims, nor does it extend to a ship which is chartered, be it by demise, voyage or time charter, by the relevant person.

To proceed pursuant to s 19, the claim must be a general maritime claim concerning a ship and the person who would be liable in a claim in personam must have been, when the cause of action arose, the owner or charterer (which for the reasons discussed above would include a demise, time or voyage charterer), or in possession or control of the ship in respect of which the claim concerns and that person must be, when the Writ is filed in the Court, the owner (which

85 This was also the position prior to the commencement of the *Admiralty Act:* See *Shell Oil Co* v *The Lastrigoni* (1974) 131 CLR1.
86 Section 3(6) of the Act.

for the reasons earlier discussed would included the beneficial owner) of the surrogate ship. Accordingly, by way of example, if a cargo claimant's goods have been lost or damaged on ship 'A' due to the negligence of her owners, those owners would be a 'relevant person', ie they would be liable in personam. If they remained the owners of ship 'A' at the time the Writ was filed in the Court, then the cargo claimant could proceed in rem against ship 'A' pursuant to s 17 of the Act. If that owner also owned another ship, ship 'B', the cargo claimant can proceed in rem against ship 'B' as long as when the Writ is filed in the Court the owner of ship 'A' (at the time of the loss or damage) was the owner of ship 'B'. This is so even if the owner of ship 'A' is no longer the owner of that ship when the Writ is filed or did not become the owner of ship 'B' until after the loss or damage on ship 'A' arose.

Equally, if a cargo claimant's goods have been lost or damaged on ship 'A' due to the negligence of her demise charterers, those demise charterers would be a 'relevant person', ie they would be liable in personam. If they remained the demise charterers of ship 'A' at the time the Writ was filed in the Court, then the cargo claimant could proceed in rem against ship 'A' pursuant to s 18 of the Act. This will be so even if the demise charter then comes to an end. If that demise charterer also owned another ship, ship 'B', the cargo claimant can proceed in rem against ship 'B' as long as when the Writ is filed in the Court the demise charterer (of ship 'A' at the time of the loss or damage) was the owner of ship 'B'. That is, the relevant person must own ship 'B' — it is not enough to demise charter ship 'B'. Again, this is so even if the demise charterers of ship 'A' are no longer the demise charterers of that ship when the Writ is filed.

On the other hand, if the relevant person is the time charterer of ship 'A', the cargo claimant could not proceed in rem against ship 'A' pursuant to ss 17 or 18 of the Act unless at the time when the Writ was filed in the Court, the time charterers had become either the owners or demise charterers of ship 'A'. Whilst this is possible, it would be unlikely to occur in practice. However, if the time charterer of ship 'A' owns ship 'B' at the time when the Writ is filed in the

Court, then the cargo claimant can proceed in rem against ship 'B' pursuant to s 19 of the Act. Once again, this will be so even if the time charterer of ship 'A' is no longer the time charterer of that ship when the Writ is filed or did not become the owner of ship B until after the cause of action arose. In the greater majority of cases, time charterers will probably not own vessels in their own name, however, it is certainly not uncommon for a particular time charterer to also own ships, in which case the right, pursuant to s 19 of the Act, to proceed in rem against such other ships may be of great value to a cargo claimant.

Service of in rem proceedings in Admiralty

Jurisdiction in rem is based upon the presence of the ship (or other property) in Australia and its territorial waters at the time of service. The provisions for service out of the jurisdiction cannot be used to permit service of process in rem abroad. Nor can service be effected by way of substituted service.

Initiating process in a proceeding commenced as an action in rem in the Federal Court may be served on a ship at any place within Australia including within the territorial sea. If the initiating process has been issued in a Supreme Court of a State or Territory then that process may be served within that State or Territory, including within the limits of the territorial sea adjacent to that State or Territory and, in addition, it may be served at any other place within Australia, including the territorial sea, if, at any time whilst the process was effective for service, the ship came within the particular State or Territory.

Accordingly, it can be seen that a cargo claimant who cannot otherwise establish in personam jurisdiction in Australia for his claim, can obtain in rem jurisdiction by waiting for the ship to come within Australia, including its territorial sea, and then effecting

87 *The Talabot* (1975) 132 CLR 449.
88 *The Alley Cat* (1993) 36 FCR129.
89 Section 22(1) *Admiralty Act*.
90 Section 22(2) *Admiralty Act*.

service of initiating process upon it. There are two qualifications which I would make. The first is, if the ship is a foreign ship in innocent passage through the territorial sea then service or arrest is prohibited. Australia is a party to the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958. The restriction contained in s 22(4) of the Act implements the obligation imposed by Article 20(2) of the Convention. The second qualification is that the owners of the ship would still be entitled to seek a stay of the proceedings on forum non conveniens grounds.

IN **PERSONAM AND IN REM JURISDICTION — EXCLUSIVE JURISDICTION AND ARBITRATION CLAUSES**

More often than not bills of lading and charterparties contain exclusive jurisdiction or arbitration clauses, the latter being more prevalent in charterparties than bills of lading.

Section 11 of the *Carriage of Goods by Sea Act* 1991 provides:

> 11. (1) All parties to:
>
> (a) a bill of lading, or a similar document of title, relating to the carriage of goods from any place in Australia to any place outside Australia; or
> (b) a non-negotiable document of a kind mentioned in subparagraph 10(l)(b)(iii), relating to such a carriage of goods;
>
> are taken to have intended to contract according to the laws in force at the place of shipment.
>
> (2) An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:
>
> (a) preclude or limit the effect of subsection (1) in respect of *a* bill of lading or a document mentioned in that subsection; or

91 Section 22(4) *Admiralty Act* 1988.

(b) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or a document mentioned in subsection (1); or

(c) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:

(i) a bill of lading, or a similar document of title, relating to the carriage of goods from any place outside Australia to any place in Australia; or (ii) a non-negotiable document of a kind mentioned in subparagraph 10(l)(b)(iii) relating to such a carriage of goods.

The predecessor to Section 11 was Section 9 of the *Sea-Carriage of Goods Act 1924* which provided:

9 (1) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

(2) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.'

Section 9 of the 1924 Act rendered void any stipulation or agreement 'purporting to oust or lessen the jurisdiction of the Court' whereas s 11 of the 1991 Act renders ineffective any agreement which purports to 'preclude or limit the jurisdiction of a Court'. There is yet to be any judicial consideration of whether there is any significant difference between ousting or lessening on the one hand and precluding or limiting on the other. In my view there is little, if any, difference.

Section 9 of the 1924 Act extended to a 'document relating to the carriage of goods' which had been held to include a voyage charter-

party.[Q9] Section 11 of the 1991 Act is however limited to bills of lading and similar documents of title unless the parties to the document concerned expressly provide that the amended Hague Rules apply 'as if the document was a bill of lading'

Accordingly, if the bill of lading relates to the carriage of goods either inwards or outwards from Australia and it contains a clause that provides for disputes to be determined by a foreign court, such a clause seeks to preclude or limit the jurisdiction of the Australian Courts and will be of no effect at least so far as the parties to the bill of lading are concerned. In *Kim Mellor Imports Pty Ltd v Eurolevant* SPA,[94] Justice Rogers held that Section 9(2) of the 1924 Act did not apply to apply to third parties. His Honour said:

> It is significant … to note that s9(l) is introduced by the words, 'All parties to any bill of lading or document relating to the carriage of goods'… in my view it would be an odd situation if the first limb of s9(l) which is clearly addressed to the same type of problems as the second limb of s9(l) were to be restricted to actual parties, whereas the balance of the section extended beyond it.

In reaching his decision, Justice Rogers considered it significant that when the Parliament passed the Act in 1924, prior to the decisions in recent times whereby parties could seek to rely upon the provisions of contracts entered into by other parties and not themselves, there was no reason why the Parliament would have given any thought to provisions of a bill of lading impacting on anyone other than a party to it. In light of the historical evolution of bills of lading and contracts generally in relation to third parties Justice Rogers considered that a purposive interpretation of the section required effect to be given to the law as it stood at the time of the enactment of the Act in 1924 and that therefore s 9(2) was limited in its application to the parties to the bill of lading.

92 *The Blooming Orchard (No.2)* (1991) 22 NSWLR 273.
93 Section 11(2) *Admiralty Act* 1988 and see *Compagnie Des Messageries Maritime* v *Wilson* (1954) 94 CLR 577.
94 (1986) 7 NSWLR 269.
95 (1986) 7 NSWLR 269,271 and 272.

As can be seen from the above, the scheme of s 11 of the 1991 Act is similar tos 9of the 1924Act. Section 11(1) is restricted to'all parties to … a bill of lading'. Subsection (2) simply refers to 'an agreement' and the issue will be, once again, whether subsection (2) should be limited to the actual parties to the particular bill of lading etc. In my view it should not and should simply be given its natural construction. Certainly, the historical basis upon which Justice Rogers relied in *Kim Mellor Imports Pty Ltd v Eurolevant SPA* would not be applicable to s 11 of the 1991 Act.

The same considerations as discussed above with respect to foreign jurisdiction clauses would apply to a foreign arbitration clause as it would equally purport to preclude or limit the jurisdiction of Australian Courts. If however the bill of lading provides for submission to local arbitration the position is probably different, the issue being whether the submission to local arbitration 'precludes or limits' the jurisdiction of the local Courts.

Until the decision in *The Kmsnogrosk* the authorities had, in this context, only dealt with foreign arbitration or jurisdiction clauses as distinct from local arbitration clauses. The facts in *The Krasnogrosk* were briefly as follows. The Plaintiff had voyage chartered the Defendant's vessel for the carriage of a cargo of broken steel rollers from Port Kembla to Singapore. The charterparty contained a London arbitration clause. A dispute arose and instead of referring the matter to arbitration in London the parties agreed to refer the dispute to arbitration in Sydney. An arbitrator was appointed and he subsequently made an award.

The Plaintiff commenced winding up proceedings against the Defendant for failing to pay the award and on the winding up application the Defendant alleged that the arbitration agreement was rendered void by s 9(1) of the Sea Carriage of Goods Act 1924.

96 See *Kim Mellor Imports Pty Ltd* v *Eurolevant Spa* (1986) 7 NSWLR 269 at 271 but which was a case dealing with s 9(2) of the *Sea Carriage of Goods Act* 1924 which was the predecessor to s 11(2) of the 1991 Act. Also see s 21 of the *Carriage of Goods by Sea Act* 1991 which provides that nothing in the *International Arbitration Act* 1974 is to effect the operation of Section 11 of the *Carriage of Goods by Sea Act* 1991.

97 (1993) 31 NSWLR 18.

At first instance, Justice Bryson rejected the Defendant's arguments holding, inter alia, that the arbitration agreement did not purport to oust or lessen the jurisdiction of the Court. The Defendant appealed to the Court of Appeal which, by a majority, dismissed the appeal but on different grounds. The majority held that s 9(1) did not operate to avoid or nullify an award made pursuant to an arbitration agreement. In other words, whether the arbitration agreement was void or not was irrelevant as the Award itself was plainly valid. In practical terms, it was too late for the Defendant to seek to attack the validity of the arbitration agreement. In the course of his judgment, Justice Sheller dealt with the issue whether an agreement to submit disputes to local arbitration would be an agreement purporting to oust or lessen the jurisdiction of the Australian Courts. Whilst the Court did not decide the issue, Justice Sheller said:

> It does not necessary follow that an arbitration agreement within the meaning of the *Commercial Arbitration Act* 1984 purports to oust or lessen the jurisdiction of any Australian Court. The interaction between an arbitration conducted pursuant to such an agreement and the supervisory and supportive role of the Court found in provisions of the *Commercial Arbitration Act* 1984 dealing with vacancies, removal, attendance of witnesses and appeals, such as ss 10,17,18(1), 38, 39 42, 44, 48, and particularly s 53 and s 55 which provide for the stay of proceedings and the effect to be given to *Scott v Avery* clauses, suggest to me that such an agreement not only does not oust or lessen the jurisdiction of Australian Courts but does not purport to do so.

Whilst foreign judicial and arbitration clauses in bills of lading will be caught by s 11 of the 1991 Act it would seem that local arbitration clauses will not.

Charterparties will not be caught by s 11. Most charterparties provide for foreign arbitration. The parties are free to waive such provisions and agree to their dispute being determined in some other jurisdiction, by way of either judicial proceedings or arbitration. If no

98 SC (NSW) Bryson J, 11 August 1992, unreported.
99 (1993) 31 NSWLR 18 at 41.

such agreement is reached and one party, in the cargo claim context the voyage charterer, commences proceedings in an Australian Court then, on the application of the shipowner the court will grant a stay. International arbitration is governed by the *International Arbitration Act* 1974 with purely domestic arbitration being regulated by the *Commercial Arbitration Acts* of the States or Territories. Part n of the *International Arbitration Act* enacts as part of the law of Australia the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Part HI enacts as part of the law of Australia the *UNCITRAL Model Law on International Commercial Arbitration* 1985. Both the Convention and the Model Law contain provisions staying actions brought in breach of an arbitration agreement.

There is significant overlap between the Convention and the Model Law. The Convention would be applicable in the following situations:

(a) where the procedure in relation to the arbitration is governed by the law of a foreign Convention country (such as the United States and the United Kingdom);
(b) if the procedure is not governed by the law of a convention country but one of the parties was, at the time of the agreement, domiciled or ordinarily resident in Australia; or
(c) a party to the agreement was, at the time of the agreement, domiciled or ordinarily resident in a foreign Convention country.

Most charterparties are either subject to English or United States law and arbitration. As such, those charterparties would be governed by the Convention. They are also likely to be governed by the Model Law as it applies to 'International Commercial Arbitration'[102]. According to the footnote which has been reproduced together with the Model Law in Schedule 1 to the Act, the term

100 With the exception of Queensland, each State and Territory has passed a uniform statute under the title of *Commercial Arbitration Act.* In Queensland the *Arbitration Act* 1973 continues to apply.
101 Section 7(1) *International Arbitration Act* 1974.
102 Article 1(1) of the Model Law being schedule to the *International Arbitration Act* 1974.

'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature whether contractual or not. An arbitration is defined as international if:

(a) the places of business of the parties are in different states;
(b) if the parties' places of business are in the same state one of the following places is situated outside the state;
    (i) the place of arbitration
    (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place at which the subject matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Most arbitration agreements in charterparties are likely to be 'international' within the meaning of the Model Law.

The relevant provisions of the Convention and the Model Law which deal with staying proceedings brought in breach of an arbitration agreement are s 7(2) of the Act and Article 8 of the Model Law respectively. Both provisions provide for a mandatory stay, that is to say, the court has no discretion to refuse a stay in a situation to which the agreement extends.

In in rem proceedings if those proceedings are to be stayed or dismissed on the grounds that the claim should be determined by either local or foreign arbitration or by foreign judicial proceedings and the ship concerned is under arrest the Court has a discretion to order that the stay be on condition that the ship be retained by the Court as security for the claim. The Court has a general discretion as to the terms which it can impose on any stay or dismissal of proceedings including imposing a condition as to the provision of equivalent security for the claim.

103 Article 1 (3) of the Model Law.
104 Section 29(1) *Admiralty Act* 1988.
105 Section 29(3) *Admiralty Act 1988.*

IN **PERSONAM AND IN REM JURISDICTION — FORUM NON CONVENIENS**

Even if a cargo claimant is able to show that his claim, be it a claim either in personam or in rem, is within the relevant Court's jurisdiction, that he has been able to effect service of initiating process on the Defendant and the Defendant is not entitled to a stay because of a foreign jurisdiction or arbitration clause in the relevant agreement, the Court may still, on the Defendant's application, refuse to hear the claim on the grounds of forum non conveniens. That is to say, an Australian Court may decline to exercise jurisdiction where it is satisfied that having regard to the circumstances of the particular case it is a clearly inappropriate forum for the determination of the dispute. This principle applies whether the jurisdiction invoked by the Plaintiff is based on service within the jurisdiction or on service outside the jurisdiction. In the latter case, the principle will be the same whether or not the Court's prior leave is needed.

The test, as enunciated by the High Court of Australia in *Voth v Manildra Flour Mills* is that a Defendant will ordinarily be entitled to an order for a stay or the dismissal of an action in he persuades the Court that, having regard to the circumstances of the particular case and the availability of a foreign tribunal to whose jurisdiction the Defendant is amenable and which would entertain the matter, the local Court is a clearly inappropriate forum for the determination of the dispute. The question whether the local Court is a clearly inappropriate forum requires attention to be directed to the inappropriateness of the local Court and not the appropriateness or comparative appropriateness of the suggested foreign forum.

The onus of proof will usually be upon the Defendant except in those cases where the rules of the particular Court require the Court's leave before service outside of the jurisdiction will be permitted. In those cases the onus of proof will be upon the Plaintiff.

106 (1990) 171 CLR 538.
107 *Voth* v *Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564 applying *Oceanic Sun Line Special Shipping Co Inc* v *Fay* (1988) 165 CLR 197 at 247-8.
108 *Voth* v *Manidra Flour Mills Pty Ltd* (1990) 171 CLR 539 at 564.