

## **Arbitration — extension of time**

*AUSTRALIAN SHIPPING COMMISSION v KOORAGANG CEMENT  
PTY LIMITED*

Full Court of Victorian Supreme Court 25 February 1987.

The Full Court of the Victorian Supreme Court upheld the decision of McGarvie J at first instance that time for commencement of arbitration proceedings be extended by virtue of section 48 of the Commercial Arbitration Act 1984.

In this case the respondent, Kooragang Cement Pty Limited, chartered a ship from the appellant, Australian Shipping Commission, to carry bulk cargo from Adelaide to Newcastle. The charterers claimed that sea water entered the cargo hold causing damage. They commenced arbitration proceedings against the owners several days after the expiry of one year from the date of the delivery of the goods.

Clause 23 of the charterparty provided for arbitration of disputes in Melbourne. Clause 35 was a paramount clause providing that the Carriage of Goods by Sea Act 1924 was to apply to the contract. Article III rule 6 of the Hague Rules therefore applied because it was incorporated by schedule into the Carriage of Goods by Sea Act, 1924. Article III rule 6 provided that a suit for loss or damage was to be brought within one year after delivery of the goods.

The charterers therefore sought an extension of time in which to commence arbitration proceedings by virtue of section 48 of the Commercial Arbitration Act 1984. The issue for consideration was whether section 48 is capable of revising a right of action which has become barred by operation of article III rule 6 of the Hague Rules.

At first instance the trial judge had held that section 48 of the Commercial Arbitration Act 1984 empowers the making of an effective order which will revive an extinguished cause of action. He accordingly made an order for the extension of time in which to commence arbitration proceedings.

On appeal, counsel for the owners argued that section 48 was merely a general procedural provision and incapable of reviving a right of action which has ceased to exist.

The Full Court applied the decision of the English Court of Appeal in *Consolidated Investment and Contracting Co v Saponaria Shipping Co Limited*<sup>1</sup> where an order was made under section 22 of the Arbitration Act

<sup>1</sup> [1987] 1 WLR 986.

1950 to extend the time for commencement of arbitration proceedings which had expired by virtue of article III rule 6 of the Hague Rules. The court dismissed the appellant's argument that section 27 of the English Act was not analogous to the Victorian section 48 in this respect.

Furthermore, the court held that if the legislation had intended to exclude the extension of time for commencement of arbitration proceedings from section 48 it would have expressly done so.

It was therefore held that section 48 of the Commercial Arbitration Act empowered the court to make an order extending the time for commencement of arbitration proceedings which had become time barred under article III rule 6.

The court then addressed the question whether the trial judge had correctly exercised his discretion in granting such an order. The owners argued that where parties have made their bargain by reference to a widely accepted international standard, such as the Hague Rules, the court should not easily disturb the contract. Section 48 should only be exercised where there are considerations outweighing the provisions of the Hague Rules.

Kaye J was satisfied that the trial judge had reasonably exercised his discretion while Tadgell J said that the appellant had not demonstrated that the trial judge had incorrectly weighed the considerations. Murphy J merely concurred with the judgments of Tadgell and Kaye JJ.

The appeal was dismissed.