FEDERAL COURT OF AUSTRALIA

Atlasnavios Navegacao, LDA v The Ship “Xin Tai Hai” (No 2)
[2012] FCA 1497

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| Citation: | Atlasnavios Navegacao, LDA v The Ship “Xin Tai Hai” (No 2) [2012] FCA 1497 |
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| Parties: | **ATLASNAVIOS NAVEGACAO, LDA v THE SHIP "XIN TAI HAI"** |
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| File number: |  |
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| Judge: |  |
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| Date of judgment: | 24 December 2012 |
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| Catchwords: | **ADMIRALTY** – arrest – application to Registrar for issue of arrest warrant under r 40(1) of *Admiralty Rules 1988* (Cth) – whether party seeking issue of warrant has duty of full and frank disclosure on *ex parte* application – whether duty of disclosure limited to ensuring accuracy, at time of application, of matters in affidavit in support of the issue of the warrant and matters referred to in r 40(3) – whether proceedings between the owner of *res* and plaintiff in another jurisdiction over substantially the same controversy requires disclosure**PRACTICE AND PROCEDURE** – stay of proceedings – whether Australia clearly inappropriate forum – where proceedings arose from a collision between two ships on the high seas – where parallel proceedings commenced in a local and foreign court – whether continuation of Australian proceedings would be (a) oppressive, in the sense of seriously and unfairly burdensome, prejudicial or damaging, or (b) vexatious, in the sense of productive of serious and unjustified trouble and harassment – nature and degree of connection between the proceedings and each forum – order of commencement of proceedings – in each forum – juridical advantages and disadvantages of each forum to the parties **Held:** (1) Having regard to the subject matter, scope and purpose of the *Admiralty Act 1988* (Cth) and *Admiralty Rules 1988* (Cth), a plaintiff seeking the issue of an arrest warrant does not have an unqualified obligation to make full and frank disclosure of material facts beyond those specified in the Act and Rules as necessary to be established to invoke the exercise of the power to issue a warrant – application to set aside arrest warrant and arrest dismissed. (2) Neither of the existing fora had any substantive connection to the parties, the place of the collision or the law of the place of the wrong – jurisdiction founded as of right by presence of *res* in Australian waters – no basis for finding that plaintiff’s purpose in bringing the Australian proceedings was improper – plaintiff regularly invoked the Court’s jurisdiction and sought the benefit of its legitimate advantages – Australia not a clearly inappropriate forum – application for stay dismissed  |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15AB(1)*Admiralty Act 1988 (Cth)* ss 4(3)(a), 5(1), 10, 14, 15, 15(1), 15(2)(b), 34(1)*Admiralty Rules 1988 (Cth)* rr 19, 20, 30(1), 39(3), 40(1), 40(3),  62(1) *Civil Procedure Interpretation 1992* Art 161*Convention on the Limitation of Liability for Maritime Claims 1976 done at London on 19 November 1976* Art 2(1)(a) and (d)*Limitation of Liability for Maritime Claims Act 1989 (Cth)**Limitation of Liability for Maritime Claims Act* s 6*Maritime Code of the People’s Republic of China* Chapter XI*Maritime Procedure Law of the People’s Republic of China**Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic China of 1992**Supreme People’s Court Interpretations on the Application of the Special Maritime Procedure Law of the People’s Republic of China 2003* Allsop J *Admiralty Jurisdiction and Marine Insurance*: (2003) Lecture to the New South Wales Bar AssociationAllsop J *Possible Issues in Admiralty Reform: (a) beneficial ownership and jurisdictional facts; and (b) the nature of arrest and disclosure*s; 2003 Conference of the Maritime Law Association of Australia and New Zealand; *Halsbury’s Laws of England* (2nd ed) (1931) Vol 1 at 111 [160], 113 [165]P Griggs, R Williams, J Farr: *Limitation of Liability for Maritime Claims* (4th ed 2005 LLP London) Toh Kian Sing SC: *Admiralty Law and Practice* (2nd ed) (Lexis Nexis Singapore 2007)  |
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| Cases cited: | *Aichhorn & Co KG v The Ship MV “Talabot”* (1974) 132 CLR 449 applied*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 applied*Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 applied*CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 applied *Garrard (t/as Arthur Anderson & Co) and Ors v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 referred to*Henry v Henry* (1996) 185 CLR 571 applied*In re Aro Co Ltd* [1980] Ch 196 followed*Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 applied*Lloyd Werft Bremerhaven GmbH v Owners of Ship “Zoya Kosmodemyanskaya”* (1997) 79 FCR 71 referred to*Lloyd Werft Bremerhaven GmbH v The Owners of the Ship “Zoya Kosmodemyanskaya”* [1997] FCA 379 (unreported 15 May 1997) referred to*McConaghy Pty Ltd v The Yacht “Ragamuffin”* [2004] FCA 433 applied*McGregor v Potts* (2005) 68 NSWLR 109 referred to*Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 referred to*Owners of “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404 applied*Patrick Stevedores No 2 Pty Ltd v MV Skulptor Konenkov* (1996) 64 FCR 223 referred to*PCH Offshore Pty Ltd v Dunn (No 2)* (2010) 273 ALR 167 referred to*Puttick v Tenon Ltd* (2008) 238 CLR 265 applied*Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 applied*Sea Containers Ltd v Owners of Vessel “Seacat 031”* [1993] FCA 1080 distinguished and doubted*Shell Oil Co v The Ship “Lastrigoni”* (1974) 131 CLR 1 applied*Sin Hua Enterprise Co Ltd v The Owners of the Motor Ship “Harima”* [1987] HKLR 770 not followed*Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 referred to *Suzlon Energy Ltd v Bangad (No 3)* [2012] FCA 123 referred to*The “Freccia del Nord”* [1989] 1 Lloyd’s Rep 388 referred to*The “Rainbow Spring”* [2003] 3 SLR(R) 362 not followed*The “Vasiliy Golovnin”* [2008] 4 SLR(R) 994 not followed*The Andria* *now renamed* *Vasso* [1984] QB 477 not followed*The Atlantic Star* [1974] AC 436 referred to*The Kronprinz Olav* [1921] P 52 referred to *The Owners of the Motor Vessel “Iran Amanat” v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130 applied*The Stephan J* [1985] 2 Lloyd’s Rep 344 not followed*Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 referred to*Union Steamship Co of New Zealand Ltd v The Caradale* (1937) 56 CLR 277 referred *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 applied*Ward v Williams* (1955) 92 CLR 496 applied |
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| Date of hearing: | 24, 25, 26, 27 July 2012, 3 August 2012, 28 November 2012, 4 December 2012 |
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| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 146 |
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| Counsel for the Plaintiff: | Mr G Nell SC (excepting 28 and 4 December 2012, Mr A Stewart |
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| Solicitor for the Plaintiff: | Norton Rose Australia |
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| Counsel for the Defendant: | Mr B Rayment QC Mr E Cox (excepting 28 November and 4 December 2012) |
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| Solicitor for the Defendant: | Holman Fenwick Willan |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| in admiralty |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1941 of 2011 |

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| BETWEEN: | ATLASNAVIOS NAVEGACAO, LDAPlaintiff |
| AND: | THE SHIP "XIN TAI HAI"Defendant |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 24 DECEMBER 2012 |
| WHERE MADE: | SYDNEY |

Upon the undertaking to the Court given by the plaintiff by its senior counsel on 3 August 2012 that in the event that the Court does not stay the plaintiff’s proceedings *in rem* on the interlocutory application of China Earth Shipping Inc, and the judgment dismissing the application for a stay is no longer subject to appeal, the plaintiff will forthwith apply to the Qingdao Maritime Court to withdraw its claim against China Earth Shipping Inc arising from the sinking of the MV *B Oceania* on 29 July 2011 (the plaintiff’s claim).

THE COURT ORDERS THAT:

1. The plaintiff pay China Earth Shipping Inc’s reasonable costs thrown away, as agreed or if not agreed fixed by the Registrar, in the proceedings in the Qingdao Maritime Court of the People’s Republic of China by reason of the plaintiff giving effect to its undertaking provided that:
2. the Qingdao Maritime Court permits the plaintiff to withdraw the plaintiff’s claim;
3. China Earth Shipping Inc takes all reasonable steps in the Qingdao Maritime Court to consent to the withdrawal of the plaintiff’s claim.
4. The interlocutory application, as amended, be dismissed.
5. The defendant and the applicant, China Earth Shipping Inc, pay the plaintiff’s costs of the interlocutory application.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
|  DISTRICT REGISTRY |  |
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| BETWEEN: | ATLASNAVIOS NAVEGACAO, LDAPlaintiff |
| AND: | THE SHIP "XIN TAI HAI"Defendant |

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| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

1. On 2 May 2012, *Xin Tai Hai* was arrested at Port Hedland, Western Australia in respect of a claim for a maritime lien made in the writ issued on 4 November 2011 by Atlasnavios Navegacao LDA (**Atlas**), incorporated in Portugal. Atlas were the owners of the bulk carrier, *B Oceania*, that sank following a collision with *Xin Tai Hai* in the Straits of Malacca on the evening of 29 July 2011. At the time of the collision *B Oceania* was fully laden with a cargo of 67,453 metric tonnes of iron ore fines. Hangzhou Cogeneration Import and Export Company Limited (**the cargo owner**) owned was the cargo. China Earth Shipping Inc (**China Earth**), incorporated in Panama, were the owners of *Xin Tai Hai* at the time of the collision and have remained so throughout these proceedings.
2. At the time of the arrest, each of China Earth, Atlas and the cargo owners had began proceedings arising out of the collision in the Qingdao Maritime Court of the People’s Republic of China (**the Maritime Court**). On 4 November 2011, within hours after it filed it writ in this Court, Atlas had filed an application for registration of a creditor’s right in the Maritime Court in respect of China Earth’s application to establish a limitation fund. And on 26 November 2011, Atlas filed a statement of claim against China Earth in the Maritime Court. All three parties engaged in settlement discussions soon after, but these broke down shortly before the arrest. The parties then resumed actively pursuing the various proceedings in the Maritime Court which have been progressing towards a final hearing.

# Issues

1. China Earth contends that these proceedings cannot be maintained by Atlas for two principal reasons; *first*, the arrest warrant and arrest should be set aside because Atlas did not disclose to the Registrar, when applying for the warrant, the existence of its proceedings in the Maritime Court against China Earth and, *secondly*, these proceedings are vexatious and oppressive because they are in respect of the same, or substantially the same, subject matter as those in the Maritime Court.

# Some aspects of Chinese Law

1. Many aspects of Chinese maritime law are similar to those in Australia and other common law jurisdictions. China is not a party to and has not ratified the *Convention on the Limitation of Liability for Maritime Claims 1976* done at London on 19 November 1976(**the LLMC 1976**). However, it has enacted domestic legislation, being Chapter XI of the *Maritime Code of the People’s Republic of China* (**the Maritime Code)**, that makes broadly similar provisions to those *Convention*. Australia has given the force of law to the LLMC 1976 as amended by the *1996 Protocol* (**the LLMC 1996**) with significantly higher limitation amounts in the *Limitation of Liability for Maritime Claims Act 1989 (Cth)*. Two key practical consequences for Atlas are that, if it is able to maintain these proceedings, then, *first*, any limitation fund established here by *Xin Tai Hai* and China Earth (collectively **the ship parties**) will be significantly greater than that in the Maritime Court and, *secondly*, Atlas may be able to establish that the wreck removal costs for *B Oceania*, of about USD65 million, are not subject to limitation in Australia, unlike the position in China (see s 6 of the *Limitation of Liability for Maritime Claims Act* which excludes Art 2(1)(d) of the LLMC 1976).
2. Theship parties wish to contend, if the proceedings in this Court against them are not dismissed or stayed, that, in the circumstances, Atlas’ claim for wreck removal costs does not fall within the excepted Art 2(1)(d) of LLMC 1996. Rather, they would wish to contend that such a claim, in the circumstances, is part of a broader claim that can be limited under Art 2(1)(a), being consequential loss resulting from a direct connexion with the operation of *Xin Tai Hai*. The maximum limitation amount that would be payable into a limitation fund here if the ship parties applied to limit liability in Australia for the collision is about USD 35 million.
3. Although I will discuss Chinese law more fully later, it will be helpful to explain some features now. The Maritime Court is one of the 10 specialist Maritime Courts established in the major port cities of China. Those courts are trial courts from which an appeal, where available, can be brought in the relevant provincial Higher People’s Court. The relevant appellate Court for the Qingdao Maritime Court is the Shandong Higher People’s Court which has a division experienced in maritime law. Any appeal from the Higher People’s Court is heard by the Supreme People’s Court which has a discretion to entertain any application for a retrial. The grant of such an application by the Supreme People’s Court is exceptional.
4. There is no system of binding precedent in the Chinese legal system. However, the Supreme People’s Court has the power to publish an “*interpretation*” or “*opinion*” of Chinese law that binds all courts in China as an authoritative statement of the law on its subject matter.
5. The National People’s Congress of the People’s Republic of China makes statute law. Several statutes and Supreme People’s Court interpretations provide for the practice and procedure governing civil legal proceedings in China. However, because of the specialist nature of the Maritime Courts and, no doubt, the international character of the law maritime, there are several particular statutes and interpretations that govern the practice and procedure of maritime litigation that sometimes supervene or supplement the more general statutes and interpretations. Thus, in addition to the *Maritime Code*, there is the *Maritime Procedure Law* and the Supreme People’s Court Interpretations on the Application of the Special Maritime Procedure Law of the People’s Republic of China 2003 (**the Maritime Procedure Interpretation 2003**).
6. The *Civil Procedure Law* has been supplemented by an interpretation known as the *Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic China* of 1992 (**the Civil Procedure Interpretation 1992**).

# Chronology of events

1. Before dealing with the substantive issues it is necessary to deal with the chronology of events and to discuss the nature of the proceedings in the Maritime Court. In the chronology I will indicate the events in these proceedings by putting the date in bold. I have repeated much of what I included in the chronology in my earlier reasons for granting Atlas limited interim relief on 5 June 2012: *Atlasnavios Navegacao Ltd v The Ship Xin Tai Hai* [2012] FCA 715 at [4].
2. On 19 August 2011, Atlas filed a writ in the High Court in Singapore but Atlas did not serve that writ on the three occasions (26 October 2011, 28 December 2011 and 2 April 2012) when *Xin Tai Hai* called to that jurisdiction.
3. As I will explain in more detail below, the initial involvement of the Maritime Court came about because *Xin Tai Hai* sailed into its jurisdiction. The cargo owner brought proceedings to preserve evidence on 22 August 2011 and on the same day the Maritime Court made an order for a number of items to be taken from the ship. These included her log books, her Master’s accident report and various voyage data records .
4. On 24 August 2011, China Earth began proceedings in the Maritime Court to establish a limitation fund of the equivalent of 12,144,430.00 special drawing rights under Chapter XI of the *Maritime Code* and Art 102 of the *Special Maritime Procedure Law*. The calculation of the limitation amount is based on the LLMC 1976 levels, and *Xin Tai Hai*’s gross tonnage of 94,710 tonnes. That was equivalent to about USD18 million.
5. On 26 August 2011, the Maritime Court accepted China Earth’s application to limit its liability, in the sense that the Court allowed the application to be brought in that Court. In consequence, on 30 August 2011, the Maritime Court issued a public notice of China Earth’s application to limit liability that was subsequently published in the *People’s Daily* (Overseas Edition) 6, 7 and 8 September 2011). The notice required any creditor to apply, within 60 days of 8 September 2011, to the Maritime Court to register its claim that China Earth was liable to it under Art 207 of the *Maritime Code*. Article 207 is similar to Art 2(1) of the LLMC 1976 in making provisions for the categories of claim for which a shipowner may limit its liability.
6. On 7 September 2011, the cargo owner obtained an order from the Maritime Court for the arrest of *Xin Tai Hai* and she was arrested soon after. Next, on 9 September 2011, the cargo owner objected, in the Maritime Court, to China Earth’s application to limit its liability. On 19 September 2011, the cargo owner commenced proceedings against China Earth in the Maritime Court by delivering a statement of claim that sought damages of USD12,708,563.
7. On 27 September 2011, the cargo owner obtained the arrest of *B America*, as a sister ship of *B Oceania*, in the Port of Ghent in Belgium in respect of its claim against Atlas for the loss of cargo on the sunken ship (Van Burren 20/7/12, pars 7, 8, 9, T 25, 245). On 29 September 2011, the **Swedish Club**, Atlas’ P & I Club provided a letter of undertaking in respect of the cargo owner’s claim to secure *B America*’s release. It was an agreed condition of that letter of undertaking that the cargo owner’s claim against Atlas would be pursued in an arbitration conducted in London that would be subject to English law.
8. On 13 October 2011, the Maritime Court rejected the cargo owner’s objection to a limitation fund being established. That ruling does not appear to preclude any party from challenging any entitlement that China Earth may have under the provisions of the *Maritime Code* to limit its liability in a contested final hearing of the facts.
9. On 26 October 2011, *Xin Tai Hai* called at Singapore. On 31 October 2011, the Maritime Court issued a further notice that confirmed the establishment of a limitation fund in an amount of RMB124,764,867.13, equivalent to SDR12,144,430. That fund was constituted by a letter of undertaking issued by China Shipowners Mutual Assurance Association, a Chinese protection and indemnity club (P & I club), as a local correspondent, on behalf of Assuranceforeningen SKULD (Gjensidig) (**Skuld**) and its subsidiary, Skuld (Far East) Ltd. Skuld is the P & I club with which China Earth has arranged to cover the liabilities for collision damage of the *Xin Tai Hai*.
10. On **4 November 2011**, Atlas commenced two proceedings arising from the loss of *B Oceania*: the first in this Court, by writ seeking damages against *Xin Tai Hai* and the second, in the Maritime Court, seeking to register its claim for damages in the order of USD105 million. Both claims included the costs of wreck removal of about USD65 million. Claims for wreck removal appear to be subject to limitation under the *Maritime Code*, but appear to have been excluded from limitation in Australia by s 6 of the *Limitation of Liability for Maritime Claims Act 1989* (Cth) which, with that and a number of other exceptions, gave effect to the LLMC 1976 and the *1996 Protocol* to amend that Convention (**the LLMC 1996**).
11. Under Art 112 of the *Maritime Procedure Law*, the final date allowed for a person to seek to register a claim against the limitation fund pursuant to the Maritime Court’s notices of 6, 7 and 8 September 2011 was 7 November 2011. If a creditor failed to register its claim within the time limit in those notices, Art 112 provided that the creditor was deemed to have waived its claim. Hence, Atlas now had the ability to pursue a claim against the limitation fund established in the Maritime Court because it registered that claim within the time limit. Once the maritime Court has informed a creditor that it has accepted a claim, that creditor must file a statement of claim within 7 days pursuant to Art 90 of the *Maritime Procedure Interpretation 2006*.
12. On 10 November 2011, China Earth commenced proceedings against Atlas in the Maritime Court for damages arising from *Xin Tai Hai*’s collision with *B Oceania*. However, Atlas was not served with those proceedings by the Maritime Court (because of an error in sending it to Italy) until May 2012. On 15 November 2011, the Maritime Court accepted Atlas’ application to register its claim against the limitation fund but this was only received by Atlas on 24 November 2011. As a consequence of the requirement in Art 90 of the *Maritime Procedure Interpretation 2003*, Atlas commenced proceedings against China Earth in the Maritime Court by filing a statement of claim on 26 November 2011. It was common ground that by this time, at the latest, Atlas had submitted to the jurisdiction of the Maritime Court in respect of its claims against China Earth and *vice versa*.
13. On 10 January 2012, China Earth applied to the Maritime Court for an extension of time in which to file its evidence and, on 31 January 2012, Atlas made a similar application. The Maritime Court appears to have granted those applications. At about this time settlement discussion occurred but these appear to have broken down by late April 2012.

## The Australian arrest

1. When Atlas discovered that *Xin Tai Hai* was about to arrive in Australian waters, it applied on **1 May 2012** for an arrest warrant in this Court. She was arrested by the Admiralty Marshall off Port Hedland on **2 May 2012**. On **3 May 2012**, China Earth applied to set aside the arrest warrant on the grounds that the existence of the Chinese proceedings and Atlas’ participation in them had not been disclosed to the Registrar in the affidavit in support of the arrest warrant filed pursuant to r 39(3) of the *Admiralty Rules 1988* (Cth). A number of interlocutory proceedings before me followed. The parties in these proceedings began negotiating terms for the release of *Xia Tai Hai* from arrest. Subject to the arrest being lifted, *Xia Tai Hai* was ready to load a cargo of iron ore at Port Hedland.
2. The ship parties amended their interlocutory application on 11 May 2012 by adding a further challenge to the continuance of these proceedings. This asserted that Australia was a clearly inappropriate forum for the proceedings, including by reason of the fact that Atlas had submitted to the jurisdiction of the Maritime Court prior to the arrest here. The parties agreed that it would be necessary to obtain expert evidence on the effect of Chinese law in order to be able to consider such an application properly. This evidence would took some time to assemble and the interlocutory application was heard over five days commencing on 24 July 2012.
3. Ultimately the parties reached an agreement for the release of the ship on provision of a letter of undertaking by Skuld in the sum of USD35 million, being the value of the ship at the time of her arrest. On 9 May 2012, Skuld provided its letter of undertaking to Atlas that contained the following reservation:

“This letter of undertaking is provided under protest and is made without prejudice to, or waiver of, any rights of the owners of the above ship or the above ship, including to limit their liability, to apply to have the arrest set aside or for the proceedings to be stayed in accordance with their application in Federal Court of Australia Proceedings No, NSD 1941 of 2011 filed 3 May 2012 (as amended) and for the security to be discharged or reduced by a competent court of Australia, including by reason of the receipt by the plaintiff of monies from the limitation fund established in the Qingdao Maritime Court, **provided that nothing contained in this paragraph shall preclude any proceedings or applications being brought by the owners of the above ship or the above ship either in Australia or any other jurisdiction.** In the event that a competent court of Australia orders, or the parties otherwise agree, for the security to be discharged, then the security is not effective and this letter of undertaking is to be immediately returned. In the event that a competent court of Australia orders, or the parties otherwise agree, for the security to be reduced, the sum referred to in the above paragraph is deemed to be reduced by such amount as ordered or as agreed.” (emphasis added)

1. Consequently, the ship was released from arrest on 10 May 2012. Also on that day, unbeknown to the lawyers acting in Australia for the parties, China Earth obtained a maritime injunction under Art 51 of the Chinese *Maritime Procedure Law* that ordered Atlas to release the ship from arrest immediately and to “refrain from arresting or taking any obstructive measures as against any property of [China Earth] from now on”. Relevantly, Arts 51 and 56 of the *Maritime Procedure Law* provide:

“51. A maritime injunction means the compulsory measures taken by a maritime court on the application of a maritime claimant to compel the person against whom a claim is made to act or refrain from action to prevent the legitimate rights and interests of the claimant from being infringed.

56. The following conditions shall be met before a maritime injunction can be granted:

(1) the claimant has a specific maritime claim;

(2) a breach of legal provisions or contractual provisions by the person against whom a claim is made needs to be redressed; and

(3) as a matter of urgency, loss will occur or increase if a maritime injunction is not granted forthwith.”

1. The *Maritime Procedure Law* also provides that the Maritime Court must make an order, on any application for a maritime injunction that it has allowed to be made, within 48 hours and that, when granted, such an injunction must be executed forthwith (Art 57). A party who is dissatisfied with such an order may apply for a review by the Maritime Court within five days after the order is served, but while the application for review is pending, the maritime injunction remains in force. The Maritime Court must examine the basis of the objection and determine whether or not the objector has justified the discharge or cancellation of the injunction.
2. On 10 May 2012, the Maritime Court granted a maritime injunction that required Atlas, *first*, to release *Xin Tai Hai* from arrest, and, *secondly*, not to adopt detention or other impeding measures on any property of China Earth. Although the maritime injunction had been granted by the Maritime Court on 10 May 2012, when the matter was returned before me on **11 May 2012**, the parties had not been notified of it. I then made directions setting a timetable for the hearing of the ship parties’ interlocutory application to set aside the arrest and stay the proceedings.

## The impugned supplementary application to the Maritime Court

1. On 14 May 2012, after they had learnt of the maritime injunction, the solicitors for Atlas sought an assurance from the solicitors for the ship parties that no further orders would be sought in China in relation to the arrest in Australia. No assurance was provided at that time. On 16 May 2012, China Earth attempted to have the Maritime Court accept a supplementary application for maritime injunction. That supplementary application sought an order that Atlas immediately return Skuld’s letter of undertaking given for the release of *Xin Tai Hai*. China Earth relied on Art 214 of the *Maritime Code* to support its supplementary application, which provided that:

“214. Where a limitation fund has been constituted by a person liable, any person having made a claim against the person liable may not exercise any right against any assets of the person liable. Where any ship or other property belonging to the person constituting the fund has been arrested or attached, or, where a security has been provided by such person, the courts will order without delay the release of the ship arrested or the property attached or the return of the security provided.

1. The *Maritime Procedure Interpretation 2003* provided, in Art 86, that, after a limitation fund has been constituted, any party that makes a claim against the fund must not assert any right against any other property of the person constituting such a fund in respect of such a claim.
2. Also on 16 May 2012, the solicitors for the ship parties wrote to the solicitors for Atlas, declining to give the assurance sought. China Earth had further difficulties in having the supplementary application accepted by the Maritime Court until it was accepted eventually on 17 May 2011. Like the original application for a maritime injunction, the supplementary application ordinarily would be heard *ex parte* by the Maritime Court, without notice to Atlas. If the Maritime Court were minded to grant the supplementary maritime injunction, Atlas would then be given notice of it and have a right to apply for its reconsideration under Art 58 of the *Maritime Procedure Law*.
3. On **18 May 2012**, Atlas sought an anti-suit injunction in this Court seeking to restrain China Earth from pursuing its supplementary application in the Maritime Court. I granted an *ex parte* anti-suit injunction at that time, which was continued on 22 May 2012 up to 31 May 2012.
4. Next, Atlas applied to the Maritime Court on 23 May 2012 for reconsideration of its original maritime injunction, and that Court gave notice to the parties on 25 May 2012 that it would deal with that application on 31 May 2012. On **29 May 2012**, China Earth entered a conditional appearance in these proceedings.
5. Next, on 31 May 2012, the Maritime Court rejected Atlas’ application for reconsideration of the maritime injunction granted on 10 May 2012. The Maritime Court’s reasons for doing so were that Atlas had submitted to its jurisdiction by registering its claim on the limitation fund on 4 November 2011 and commencing its proceedings on 26 November 2011. The Court held that Art 86 of the *Maritime Procedure Interpretation 2003* operated in respect of Atlas’ actions both within and outside China. Accordingly, the Court held that Atlas’ successful application in this Court to arrest *Xin Tai Hai* had been in breach of Art 86 and in order to address that breach the Court had granted the maritime injunction on 10 May 2012. The Maritime Court then held that since the ship had been released from arrest, the first limb of the injunction had done its work. However, it held that Atlas was still in breach of the second limb because it had obtained security in Australia in the form of Skuld’s letter of undertaking of 9 May 2012. In these circumstances the Maritime Court held that Atlas’ arguments for reconsideration of the decision to grant the maritime injunction were not tenable and its application was dismissed.
6. On **31 May 2012**, before the decision of the Maritime Court of the same date was known to the parties here, I continued the interim relief granted on 18 May 2012 restraining China Earth from pursuing its supplementary application until further order and ordered both it and Atlas to apply jointly to the Maritime Court to adjourn the hearing and determination of that application.
7. On **5 June 2012**, I made orders to prepare the ship parties’ interlocutory application for hearing on 24 July 2012: *Atlasnavios* [2012] FCA 715. On the same day, the Maritime Court required China Earth to file its maritime accident investigation form and evidence in Atlas’ proceedings.
8. On 12 June 2012, the Maritime Court indicated that it would not act on the joint request of the parties to defer hearing China Earth’s supplementary application. Pursuant to the orders I had made in that event, China Earth applied to withdraw its supplementary application on the same day.
9. On 15 June 2012 Atlas filed an objection to jurisdiction in the Maritime Court and an application to stay the proceedings. China Earth filed an argument in the Maritime Court opposing the stay on 19 June 2012 and on 26 June 2012, it filed its argument in support of that Court’s jurisdiction.
10. The Maritime Court made a ruling on 4 July 2012 dismissing Atlas’ objections to jurisdiction . It held that there was no evidence that *Xin Tai Hai* had called at Singapore or another foreign port before arriving at Qingdao immediately following the collision. In those circumstances, the Court found that Art 102 of the *Special Maritime Procedure Law* conferred jurisdiction on it as to constitute a limitation fund. That was because Art 80 of the *Maritime Procedure Interpretation 2003* provided that if a maritime accident occurred outside Chinese territory, the accident was deemed to have occurred for the purposes of Art 102 at the first Chinese port where the ship arrived after the accident, regardless of whether she had been in another (foreign) port before that. Thus, Qingdao was deemed to be the place where the collision with *B Oceania* occurred when *Xin Tai Hai* arrived there. The Court held that this gave it jurisdiction. In addition, it held that a limitation fund had been effectively constituted for the purposes of Art 109 of the *Maritime Procedure Law*. Next, the Court found that because Atlas had brought its own claim against China Earth in that Court, that was in effect a cross action over the same issues arising out of the same collision. That factor was also held to give the Maritime Court jurisdiction over Atlas in the proceeding China Earth had brought against it. Accordingly, the Court dismissed Atlas’ objection to its jurisdiction.
11. On 10 July 2012, Atlas filed the first round of its evidence in the Maritime Court on the collision liability issues.
12. After I reserved judgment on **3 August 2012**, some further steps have occurred in the various proceedings in the Maritime Court. On **4 December 2012**, I granted leave to the ship parties to reopen and both parties tendered evidence updating what had happened in the Maritime Court. On 15 August 2012, China Earth submitted additional evidence to the Maritime Court.
13. The cargo owner applied *ex parte* in Atlas’ proceedings against China Earth to be added as a third party with no independent claim. The Maritime Court granted that application on 6 September 2012. Atlas filed a notice of objection to that decision on 16 October 2012. There is a dispute between Atlas’ and China Earth’s Chinese lawyers as to whether Atlas can object. The Maritime Court has not yet dealt with Atlas’ objection.
14. In the meantime, on 19 September 2012 there was a hearing in the Maritime Court at which Atlas and China Earth exchanged their evidence and made limited submissions about the state of the evidence. On 27 September 2012 China Earth filed an application for an order that Atlas submit further evidence relating to the collision including *B Oceania*’s log books, VDR and ISM documentation. On 22 November 2012, Wangui Yang, China Earth’s lawyer, was telephoned by a clerk of the Maritime Court who informed Mr Wang that the hearing on collision liability would occur on 13 December 2012. Atlas’ lawyer, Cao Shufeng considered that the nature of the hearing on 13 December 2012 was unlikely to be that of a final hearing on liability. That was because a number of outstanding interlocutory matters required determination first and the Court had not made directions for the conduct of a final hearing Mr Yang did not agree with that assessment and was preparing for the hearing on the basis of his understanding.
15. On any view, since May 2012, the various proceedings in the Maritime Court have been progressed in accordance with its procedures and orders towards final hearings occurring, albeit with interlocutory objections and attempts to review or appeal some decisions.

# Other matters

1. Evelyn Mason, the deputy head of Skuld (Far East) gave evidence that as Skuld stands behind the ship parties, it intends that China Earth will appear and defend these proceedings if they are allowed to continue in this Court. However, at present China Earth has not appeared unconditionally in these proceedings.
2. Immediately following the sinking of *Xin Tai Hai* the Marine Department of Malaysia seized and retained her voyage data recorder (**VDR**) data records. Usually a VDR will contain data from or of a ship’s radar, automatic identification system (**AIS**), ship’s movements (such as course and speed), oral communications occurring on microphones on the bridge and VHF radio traffic to or from the ship. Although Atlas had sought to be provided access to, or a copy of, those records, the Department had not co-operated and had not acceded to those requests. At the hearing before me on 3 August 2012, senior counsel for the ship parties gave an undertaking that China Earth would produce to the Maritime Court, as part of its evidence in the proceedings between it and Atlas, its VDR in relation to the collision. Mr Wang said that Atlas’ Chinese lawyers had never asked for the ship’s VDR data to be produced.
3. The VDR on *B Oceania* sank with her. Soon after, on 4 and 5 August 2011 another ship ran over the wreck of *B Oceania* where it lay in the Straits of Malacca causing three decks in the bridge structure to topple over. Colin Barker, a special casualty representative appointed by Lloyd’s, was then supervising an attempt to recover the VDR from *B Oceania*. Mr Barker informed Atlas’ solicitor, Ernest van Buuren, that despite searches for the VDR in the aftermath of the second collision, it could not be located.
4. The working and documentary language of *B Oceania*’a crew was English although it was not the native tongue of any of the crew who were Filipinos, Ukranians and a Bulgarian. In contrast, all of *Xin Tai Hai*’s crew were Chinese nationals and speak Chinese as their first language .

# Atlas’ explanation for bringing proceedings in Australia and China

1. Atlas and the Swedish Club explained their decision to bring these proceedings through evidence given by their solicitors, Mr van Buuren and Jesse Kennedy. Mr Kennedy said that Atlas desired to sue *Xin Tai Hai* in Australia because, *first*, she could be compelled to produce a copy of the VDR data (if available), *secondly*, the limitation fund under LLMC 1996 would be greater than under other Conventions, and, I infer, Chinese law, and *thirdly*, because Atlas wished to obtain a judgment by an Australian court that would be enforceable overseas.
2. In late October 2011, Mr Kennedy looked at publicly available AIS data for *Xin Tai Hai* that revealed her current location and intended destination. He monitored this AIS data which initially showed that the ship’s then destination was Australia with an estimated arrival time of 30 October 2011. Subsequently, the destination changed to Singapore and then to a port in Brazil, where she steamed. The ship remained in Brazil in November 2011. He next established an email alert that would notify him of when the AIS data showed Australia as a destination. However, in the meantime, the effect of Art 112 of the *Maritime Procedure Law* had created a time limit of 7 November 2011 for Atlas to commence proceedings in the Maritime Court, if it were unable before that to arrest *Xin Tai Hai*, or bring proceedings against her or her owners, in a jurisdiction that provided for a larger limitation fund: see [20].
3. Atlas determined to issue the writ here a few hours before commencing its proceedings in the Maritime Court. Mr van Buuren did not have or seek instructions to disclose anything about the proceedings in the Maritime Court to this Court at the time of the issue of the writ or the arrest warrant. He did not consider that Atlas, or its lawyers, had a duty to disclose to this Court the Chinese proceedings or the fact that a limitation fund had been constituted in the Maritime Court.
4. Atlas said that if the present application by the ship parties were unsuccessful, it would withdraw its claim in the Maritime Court. This generated a considerable controversy as to the ability of a party to do so under Chinese law. Mr Wang said that he had been told, in May 2012 by Judge **Song**, the presiding judge in the Maritime Court, of a conversation the judge had had with **Zhang** Yutian, one of Atlas’ lawyers. Ms Zhang had enquired what the Maritime Court would do if Atlas asked to withdraw its proceedings against China Earth. Judge Song said that he replied that it was unlikely that the Court would grant such an application.

# The expert evidence on Chinese law

1. **Liu** Shoujie gave expert evidence on Chinese law for the ship parties. He was a former senior and presiding judge of a tribunal within the Civil Division of the Supreme People’s Court for 10 years. Prior to that, Judge Liu had been a judge of the Dalian Maritime Court for 17 hears. As a judge, he specialised in hearing shipping and commercial matters. Judge Liu was now working with a major international law firm in Beijing as a senior expert consultant while also acting as a supervisor of LLM candidates at Dalian Maritime University and as a visiting professor at Shanghai Maritime University.
2. **Zhao** Jinsong was called as Atlas’ expert. He was a professor of maritime law at KoGuan Law School of Shanghai Jiao Tong University as well as holding a number of other senior academic positions there. Professor Zhao was also a visiting professor at the Greenwich Maritime Institute of the University of Greenwich, and a part time or guest professor of law at Dalian Maritime, Shanghai Maritime and Beijing Foreign Studies Universities. He also provided judicial education to Chinese judges on aspects of maritime law. He was a senior partner and shipping lawyer with a Chinese law firm and practised law in China since 2002, having in the six previous years worked as a consultant on Chinese law for two major English specialist maritime law firms.
3. Relevantly, Art 131 of the *Civil Procedure Law* allows a party to apply to a Court, including the Maritime Court, for permission to withdraw its case at any time before judgment. The article gives the Court a discretion to grant or refuse such an application. It also provides that if the Court refuses the application and the plaintiff, after being served with a summons, later fails to appear without justification, the Court can give judgment by default. In addition, Art 129 provides that if a plaintiff is served with a summons and later fails to appear without justification, or withdraws during a hearing without the Court’s permission, the Court has a discretion to treat the case as having been withdrawn by the plaintiff and, if there is a counterclaim, it can enter judgment against the plaintiff on the counterclaim by default. Under Art 13 the parties are free to deal with their civil and litigation rights in the way they prefer “within the scope provided by the law”.
4. The experts disagreed about how Art 161 of the *Civil Procedure Interpretation 1992* affects the exercise of the Court’s discretion when a party applies to withdraw under Art 131 of the *Civil Procedure Law* or a situation arises where a case can be treated as being withdrawn. The English translation of Article 161 reads:

“In respect of the case where a party applies to withdraw or it can be deemed as withdrawn, where there is any unlawful act on the part of the party to be dealt with by law, the people’s court may disapprove the application to withdraw or do not deem the case as withdrawn.”

1. The experts debated in their concurrent evidence the meaning of the word “may” as it affected the power to disapprove and the nature of the “unlawful act” referred to in Art 161. They both agreed that Art 131 gave the Maritime Court a discretion to allow Atlas to withdraw its claim there, as Atlas had foreshadowed would happen if these proceedings are not stayed. They also agreed that because Art 13 of the *Civil Procedure Law* gave the parties a degree of autonomy in the conduct of their litigation, ordinarily a Chinese Court would allow a plaintiff to withdraw its case under Art 131. They agreed that Art 161 of the *Civil Procedure Interpretation 1992* provides the only situation in which a court would refuse to allow a party to withdraw. In addition, even if it is arguable that some act on the part of a party is “unlawful”, but the facts or circumstances are very complex, the Court can exercise its discretion under Art 161 to allow the party to withdraw without determining the issue of “unlawfulness”.
2. The experts debated the effect of the reasoning for the decisions of the Maritime Court to grant the maritime injunction against Atlas’ and to refuse its application for reconsideration of that injunction [27]-[34]. The Maritime Court had found Atlas to have been in breach of Art 86 of the *Maritime Procedure Interpretation 2003* in procuring the arrest here and in obtaining and retaining Skuld’s letter of undertaking as security for its claim in this Court. The experts said that if Atlas now sought to withdraw its claim in the Maritime Court to pursue these proceedings, that Court would first need to consider and determine how it would deal with Atlas’ refusal or failure to return the letter of undertaking in accordance with the maritime injunction, before making a decision under Art 131. If it found that Atlas had committed an unlawful act, being a breach of its own orders, then it might decide to impose a fine or other penalty before considering the application to withdraw.
3. The unlawful act, however, must be a civil, administrative procedural or criminal act that is within the same proceedings. In other words, as I understood the effect of their evidence, the experts agreed that if a party has done something amounting to an unlawful act within the litigation, the Court can, and ordinarily would, refuse to let the party withdraw before the Court deals with the consequence of that conduct. The Court must then consider all of the consequences flowing from the unlawful act, which court include, here, Atlas’ refusal or failure to return Skuld’s letter of undertaking it had obtained here as security for the release of the ship.
4. The experts offered differing views about how the Maritime Court would be likely to apply those provisions and whether Atlas would be able to withdraw its application. However, it would not be appropriate to make any findings on that point for two reasons. *First*, the Maritime Court will no doubt act judicially and in accordance with the law of China on the facts that will be before it at a future point in time. I do not consider that this Court should make a prediction about how the Maritime Court will decide an issue of this kind, particularly since it will exercise a discretion on a factual scenario that is yet to be identified. *Secondly*, the Maritime Court could possibly take into account the orders directed to protecting the parties’ interests that this Court made and any conditions imposed if a stay is not granted.

# The legislative scheme concerning applications to arrest

1. The *Admiralty Act 1988* (Cth) applies, by force of s 5(1), to all ships, irrespective of the places of residence or domicile of their owners and to all maritime claims, wherever arising with certain limited and not presently relevant exceptions. A claim for damage done by a ship (whether by collision or otherwise) is a general maritime claim (s 4(3)(a)). Part III of the Act creates rights to commence proceedings as actions *in rem* and s 10, among other matters, confers jurisdiction in such actions on this Court. A proceeding may only be commenced as an action *in rem* as provided by the Act (s 14). Relevantly, s 15 provides that a maritime lien includes a lien for damage done by a ship (s 15(2)(b)) and:

“15(1) A proceeding on a maritime lien … in respect of a ship … subject to the lien … may be commenced as an action *in rem* **against the ship** …” (bold emphasis added)

1. As s 15(1) and ss 16, 17, 18 and 19 provide, an action *in rem* is commenced against the ship (or other property), not against a relevant person, (as defined in s 3(1)) being a person who would be liable on a claim in a proceeding commenced as an action *in personam*. The Act creates strictures in ss 20, 21 and 22 on service of initiating process in a proceeding commenced as an action *in rem*. Relevantly, s 22(1) provides that initiating process in a proceeding commenced as an action *in rem* in this Court may be served on the ship, and the ship may be arrested in such a proceeding, at any place within Australia, including within the Australian territorial sea. Section 20 provides, relevantly, that once service of initiating process in a proceeding commenced as an action *in rem* under ss 15, 17, 18 or 19 has been effected on a ship, the plaintiff cannot serve initiating process in that, or another, proceeding on the same claim unless the former service has been set aside or that proceeding has been discontinued, dismissed or struck out. (However, if a surrogate ship has been arrested under s 19, s 20(4) permits the arrest of another ship subject to a maritime lien if the amount recovered against the surrogate ship or relevant person in the proceeding under s 19, is less than the amount of the claim on the maritime lien.)
2. Importantly, s 29 provides:

“**29 Security in relation to stayed or dismissed proceedings**

(1) Where:

(a) it appears to the court in which a proceeding commenced under this Act is pending that the proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Australia or elsewhere) or by a court of a foreign country; and

(b) a ship or other property is under arrest in the proceeding;

the court may order that the proceeding be stayed on condition that the ship or property be retained by the court as security for the satisfaction of any award or judgment that may be made in the arbitration or in a proceeding in the court of the foreign country.

(2) Subsection (1) does not limit any other power of the court.

(3) The power of the court to stay or dismiss a proceeding includes power to do so on such conditions as are just, including a condition:

(a) with respect to the institution or prosecution of the arbitration or proceeding in the court of the foreign country; and

(b) that equivalent security be provided for the satisfaction of any award or judgment that may be made in the arbitration or in the proceeding in the court of the foreign country.

(4) Where a court has made an order under subsection (1) or (3), the court may make such interim or supplementary orders as are appropriate in relation to the ship or property for the purpose of preserving:

(a) the ship or property; or

(b) the rights of a party or of a person interested in the ship or property.

(5) Where:

(a) a ship or other property is under arrest in a proceeding;

(b) an award or judgment as mentioned in subsection (1) has been made in favour of a party; and

(c) apart from this section, the award or judgment is enforceable in Australia;

then, in addition to any other proceeding that may be taken by the party to enforce the award or judgment, the party may apply to the court in the stayed proceeding for an appropriate order in relation to the ship or property to give effect to the award or judgment.”

1. Another significant provision, s 34(1)(a)(ii), creates a remedy in damages for a person who suffers loss or damage as a direct result of a plaintiff unreasonably and without good cause obtaining the arrest of a ship. Section 34 also creates the same remedy in respect of a plaintiff who unreasonably and without good cause demands excessive security or fails to consent to release of the ship (s 34(1)(a)(i) and (b)).
2. The Admiralty Rules provide that a proceeding commenced as an action *in rem* must be commenced by a writ in accordance with the prescribed Form 6 (r 19). The writ is effective for service for the 12 months period after its issue and may not be served after then without the leave of the Court (r 20). Part V of the Rules deals with service of initiating process. Relevantly, initiating process in a proceeding commenced as an action *in rem* must be served by securely affixing a sealed copy of the writ to a mast, or other conspicuous part of the ship (now usually the bridge window) (r 30(1)).
3. Next, Div I of Pt VI of the Rules provides, among other matters, for applications for an arrest warrant and, by force of r 39A, the disclosure of certain matters to the Marshal that might affect safety. Rule 39 provides that a party to a proceeding commenced as an action *in rem* may apply in accordance with Form 12 for an arrest warrant in respect of the ship against which the proceeding was commenced. Form 12 simply provides for the name of the ship to be inserted in respect of which the warrant is sought and gives an undertaking to the Court by the applicant or its Australian legal practitioner to pay the costs and expenses of the Marshal in complying with the application for the arrest and in relation to the ship while she is under arrest. The application for the arrest warrant must be supported by an affidavit made by the applicant, its Australian legal practitioner or its agent (r 39(2)). That affidavit must comply with r 39(3) which provides:

“(3) The affidavit must be in accordance with Form 13 and must set out particulars of the claim and any necessary facts that would entitle an action *in rem* to be brought, in accordance with the Act, in respect of the claim.”

1. Form 13 is in the following terms:

“**Form 13 Affidavit to support application for arrest warrant**

(subrule 39 (3))

(*Title*)

AFFIDAVIT TO SUPPORT APPLICATION FOR ARREST WARRANT

1. I am 1.

2. I ask for a warrant for the arrest of 2.

3. The claim in respect of which the arrest is sought concerns 3.

4. I have caused a search to be made of the Register of Caveats Against Arrest and no such caveat is in force/the following caveat/s is/are4 in force: 4,5.

5. The following documents have been served on the caveators6 on the following respective dates: 7.

6. The claim has not been satisfied/has been partly satisfied4 as follows:

(a) an amount of $ 8 has been paid into court in the 9;

(b) security to the value $ 8 for payment of claim has been

 given 10.

7.11 The amount of salvage money awarded or agreed to be accepted is

$ 8 and is being held by 12.

8. The aid of the court is necessary to enable the claim to be satisfied.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. *insert full name and description of deponent*

2. *if ship, insert name of ship and port of registry; if other property, describe property*

3. *set out short particulars of the claim and any necessary facts that would entitle an action in rem to be brought, in accordance with the Admiralty Act 1988, in respect of the claim*

4. *strike out whichever is not applicable*

5. *set out short particulars of caveats in force*

6. *set out clearly which documents have been served on each of the caveators*

7. *set out when each document was served*

8. *insert amount*

9. *insert name of court*

10. *set out where security held*

11. *complete paragraph 7 only if claim is a salvage claim*

12. *insert name and address of person holding salvage money*”

1. Nothing in r 39A requires disclosure of any matter going beyond a disclosure to the Marshal of matters that could affect the safety of persons or property, including the ship. While such a disclosure might be made before or at the time of the application for the issue of the arrest warrant, the evident purpose of r 39A, is to alert the Marshal to matters concerning the execution of the warrant and the subsequent custody of the ship (or other property) while the arrest continues.
2. Next, r 40(1) provides that “Subject to this rule, the Registrar may issue an arrest warrant”. (The ship parties particularly rely on the use of the word “may” in r 40(1).) Importantly, provides that the Registrar must not issue the warrant, “[e]xcept by leave of the court”, if the Registrar is made aware that (1) a relevant caveat against the arrest of the ship is in force, (2) the proceeding has been stayed because payment has been made into court or (3) a bail bond for not less than the amount claimed has been filed. Notably, each of those three matters should have been addressed in pars 4 and 6 of the affidavit made in accordance with Form 13. However, the Registrar may become aware of such matters because, for example, they occur between the time the affidavit is made and the application for the issue of the arrest warrant is brought to the Registrar for his or her consideration.

# The need for disclosure in other jurisdictions

1. In principle, a party who applies *ex parte* for an order in the exercise of a judicial or quasi-judicial discretionary power has a duty to bring to the attention of the Court, or quasi-judicial decision-maker, all facts material to the determination of the applicant’s entitlement in the exercise of the power: *Garrard (t/as Arthur Anderson & Co) and Ors v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 676B-677F per Mahoney AP with whom Clarke JA agreed. Mahoney AP saw this duty as arising where the *ex parte* applicant sought a discretionary order that creates or confirms rights that otherwise would not exist (32 NSWLR at 677E-F, 679D-E; see too *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681-682 per Isaacs J.
2. The parties referred to the requirements in other jurisdictions relating to what, if any, disclosure needed to be made on the *ex parte* application to issue an arrest warrant. Of course, each of those jurisdictions has, and had, its own legislative regime that is different from that under the Act and the Rules here.
3. The treatment of the circumstances in which a ship may be arrested has varied in England in the last 30 years. In *The Andria* *now renamed* *Vasso* [1984] QB 477 at 491G-492B, Waller, Slade and Robert Goff LJJ held that it was axiomatic that, in *ex parte* proceedings seeking the issue of an arrest warrant, the plaintiff had a duty to make full and frank disclosure of all material facts known to it. That was because under the then form of O 75 r 5(1) of the Rules of the Supreme Court (Eng) (**RSC**) the power to order an arrest was discretionary, not mandatory and the Court’s exercise of its power could be affected by the manner in which, or the purpose for which, the plaintiff had proceeded. In *The Stephan J* [1985] 2 Lloyd’s Rep 344 at 346 Sheen J followed, without referring to it, the principle in *The Vasso* [1984] QB 477, requiring full and frank disclosure in an application for an arrest warrant.
4. As a result of that decision, RSC O 75 r 5 was amended in 1986 to provide for the issue of an arrest warrant as of right, so that it was no longer a discretionary remedy: *The Varna* [1993] 2 Lloyd’s Rep 253 at 255-256 per Scott LJ with whom Rose LJ agreed. Their Lordships held that, as a consequence, the issue of the warrant now being as of right, the requirement for full and frank disclosure mandated by the decision in *The Vasso* [1984] QB 477 was not engaged. The current position in England now appears to be the same as that in the early twentieth century described in *Halsbury’s Laws of England (2nd ed) (1931)* Vol 1 at 111 [160] where the editors (Lord Merrivale P, Langton J and H Gordon Willmer) said that the warrant was usually issued as of course unless a caveat against arrest were entered: see too at 113 [165]; see too *In re Aro Co Ltd* [1980] Ch 196 at 206A per Stephenson, Brandon and Brightman LJJ.
5. In both Hong Kong and Singapore the power to issue an arrest warrant is discretionary. The Courts in each of those jurisdictions require plaintiffs to make full and frank disclosure of all material facts in making applications for the issue of a warrant. In Hong Kong the English Rules applicable when *The Vasso* [1984] QB 477 was decided also operated in the then British Territory and, unsurprisingly the Hong Kong Court of Appeal followed that decision in *Sin Hua Enterprise Co Ltd v The Owners of the Motor Ship “Harima”* [1987] HKLR 770 at 772D-773B. The Singapore Court of Appeal took a similar view of the discretionary power to issue an arrest warrant in O 70 r 4(1) of the Rules of Court (Cap 332 R 5: 1997 Rev Ed) (Sing) in its decisions in *The “Rainbow Spring”* [2003] 3 SLR(R) 362 at 373-374 [32]; *The “Vasiliy Golovnin”* [2008] 4 SLR(R) 994 at 1024-1205 [83]-[84]; see too Toh Kian Sing SC: *Admiralty Law and Practice* (2nd ed) (Lexis Nexis Singapore 2007) at pp 171-174.

# Should the arrest warrant and arrest be set aside?

1. In *Sea Containers Ltd v Owners of Vessel “Seacat 031”* [1993] FCA 1080 (7 June 1993) Lockhart J set aside an arrest warrant that had been issued following an *ex parte* application on the order of another judge on the basis of a material non-disclosure by the plaintiff when making the application. His Honour observed that applications to set aside arrest warrants are not the same as motions to discharge *ex parte* injunctions in equity proceedings, although, he said, there were certain similarities. He held that because information with a material bearing on the existence of the cause of action had not been put before the other judge, the arrest warrant should be discharged. He said that the principle had been partly identified by Sheen J in *The “Stephan J”* [1985] 2 Lloyd’s Rep at 346 as a duty of a party applying *ex parte* “to make full disclosure of all relevant facts”. But Lockhart J said that the principle was wider and that a party who seeks *ex parte* relief under the *Admiralty Act* or *Rules* “must put to the Court all relevant material that could bear upon a right to *ex parte* relief”.
2. The ship parties argued that Lockhart J was correct and that I should follow his decision as well as the similar conclusions in decisions in England (under the earlier provisions of the RSC governing arrest) in *The Vasso* [1984] QB 477, and the cases that followed it in Singapore and Hong Kong. The ship parties contended that the Australian Law Reform Commission had erred in its statement of the existing law in its 1986 Report: *Civil Admiralty Jurisdiction* (ALRC 33) at 196 [245] where it said:

“Arrest is a legal remedy available as of right; the Mareva injunction is equitable and discretionary.”

1. In my opinion, the ship parties’ argument should be rejected. The starting point in considering the necessity for a person in applying to arrest a ship to draw a matter to the Registrar’s or Court’s attention is the text of the Act and the Rules: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ.
2. The *Admiralty Act* and *Admiralty Rules* do not contain any express requirement that a person applying for the arrest of a ship or other property (which, for simplicity, I will call a “**ship**” in these reasons) must disclose any other matters than those expressly stated in the *Admiralty Rules*. Additionally, r 40(3) contemplates that the Registrar may become aware of one of three particular facts (the existence of a caveat against arrest, payment into court or the filing of a bail bond) that would prevent the issue of the arrest warrant, except with leave of the Court. If the plaintiff becomes aware of any of those matters and they have not been disclosed in the affidavit in Form 13 used to support its application for the issue of the arrest warrant, I am of opinion the plaintiff has a duty to disclose that matter fully and frankly to the Registrar. Such a duty complements and reinforces the evident purpose of r 40(3).
3. The Act is primarily concerned with jurisdiction and deals with remedies only to extend them in certain respects: *Owners of “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404 at 422 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. The Court said (181 CLR at 422):

“The purpose of the Act is to vest and confer jurisdiction with respect to maritime claims as defined in s. 4, subject to certain specified limits, and to permit the arrest of a ship or other property in proceedings properly commenced as an action in rem (s. 22). And subject to s. 33, which empowers the court to make orders for sale and for settlement of accounts in proceedings between co-owners, and to s. 34, which provides for damages for unjustified arrest, the Act is not concerned to prescribe the remedies available for the disposition of those claims.”

Importantly, their Honours had said earlier (181 CLR at 421):

“It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not to be found in the express words.” (citations omitted)

1. The purpose of the Act is to confer jurisdiction on certain courts so as to enable one of those Courts to hear and determine a proceeding on a proprietary or general maritime claim, a maritime lien or other matter provided for by the Act. The structure of the Act grants a plaintiff the right to commence proceedings as an action *in rem* against a ship in respect of the maritime claims it defines, provided that the conditions of one of ss 15, 16, 17, 18 or 19 are satisfied. As Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ noted in *The Owners of the Motor Vessel “Iran Amanat” v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130 at 137-138 [18]-[20] the question of the Court’s jurisdiction under the Act must be answered by reference to the nature of the plaintiff’s claim as put forward. That determination is made without reference to whether the claim as put forward is likely to succeed or not. In the absence of a contention, or basis to consider whether, that claim is frivolous or vexatious, the issue is whether the claim as put forward reveals a jurisdictional foundation for the action *in rem* under ss 15, 16, 17, 18 or 19, not what the strength of that claim is. Thus, the consideration that the Registrar must give under r 40(1), ordinarily, will be whether the claim as put forward, and proved in the affidavit in Form 13 under r 39(3), reveals that the Court has jurisdiction over the ship. However, as their Honours pointed out, there will be cases where it is apparent that the claim is not established, as opposed to being weak, an arrest warrant should not be issued and if it is, it will be set aside: *Iran Amanat* 196 CLR at 139 [23] applying *Shell Oil Co v The Ship “Lastrigoni”* (1974) 131 CLR 1 at 6 per Menzizes J.
2. The question whether the Act and Rules create a duty to disclose to the Registrar under r 40(1) matters other than those expressly identified in the legislative scheme has to be addressed in light of the following considerations. *First*, the underlying cause of action that forms the basis of the claim will often be contested or contestable. *Secondly*, in the absence of an agreement to accept service, an action *in rem* cannot proceed unless the writ is served on the ship within Australia or its territorial sea: ss 20, 22: *Aichhorn & Co KG v The Ship MV “Talabot”* (1974) 132 CLR 449 at 454-456 per Menzies, Gibbs and Mason JJ, see too at 452 per Stephen J. The arrest of a ship is not equivalent to the grant of an injunction. Rather, an arrest creates or perfects a security for the maritime claim in the jurisdiction of the Court created by the Act: *McConaghy Pty Ltd v The Yacht “Ragamuffin”* [2004] FCA 433 at [6] per Allsop J; see too *In re Aro Co Ltd* [1980] Ch at 205B-206B.
3. *Thirdly*, and critically, the action *in rem*, in Australia, is a proceeding against the *res* not against a relevant person: *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 63 [60], 79 [119]-[120], 81 [128]-[129] per Allsop J with whom Finkelstein J agreed. Finn J reserved his opinion on this issue at 51 [3]. However, in my opinion, Allsop J was correct since the words of Part III of the Act create the right to commence a proceeding “as an action *in rem* **against a ship** or other property” (emphasis added) (see ss 14-19). Each of ss 15, 16, 17, 18 and 19 prescribes its own jurisdictional preconditions that a plaintiff must satisfy in order to commence proceedings under the relevant section as an action *in rem* against a *res*. The point, here, is that the proceedings *in rem* under the Act are against the *res* not against its owners or the relevant person.
4. *Fourthly*, the Rules do not prescribe any further matter to be disclosed in applying for an arrest than those that address the satisfaction of r 39(3) and Form 13 together with any additional matter not disclosed in the Form 13 affidavit that falls within r 40(3) and is known to the plaintiff and would prevent the Registrar issuing the warrant. Given that most actions *in rem* will involve contested underlying facts as to whether or not the cause of action can be proved, it is difficult to postulate what would, or would not, be material to the exercise of any supposed discretion of the Registrar under r 40(1). In one sense it could be material that the relevant person may have a good defence or may be able to claim a stay because an arbitration is on foot. However, since any such matter does not affect the existence of the Court’s jurisdiction under the Act, it is difficult to see how it could bear on the exercise of the power under r 40(1) that is ancillary to and protective of that jurisdiction: *Iran Amanat* 196 CLR 137-138 [18]-[20].
5. If the Registrar’s power under r 40(1) were conditioned on the necessity to disclose other material facts, than those expressly provided for in the Rules, going to the exercise of his or her discretion, rr 39(3), 40(3) and Form 13 would have had to be cast in different terms. If the plaintiff becomes aware before the Registrar issues the warrant, and possibly before it is executed, that a new fact has emerged that either makes a statement in the Form 13 affidavit incorrect or misleading or affects the situation under r 40(3), then it would have a duty fully and frankly to disclose the true position to the Registrar.
6. In my opinion, Lockhart J’s decision in *Sea Containers* [1993] FCA 1080 is distinguishable from the usual position where an application for the issue of an arrest warrant is made to the Registrar under rr 39 and 40. *First*, the application to issue the arrest warrant in that case was made to a judge, not the Registrar. It is not apparent from his Honour’s reasons what was in evidence on the *ex parte* application and the reason why it was made to a judge and not the Registrar. *Secondly*, his Honour did not expressly consider or construe any of the provisions of the Act or Rules relevant to the issue of an arrest warrant.
7. *Thirdly*, Sheen J’s decision in *The Stephan J* [1985] 2 Lloyd’s Rep 344 which Lockhart J followed, was based on the decision in *The Vasso* [1984] QB 577 and a version of the RSC that were subsequently amended. The amendments made clear, as the Court of Appeal held in *The Varna* [1993] 2 Lloyd’s Rep at 257-258, that an arrest warrant would now be issued in England, on an application for it, as a matter of right, not discretion. Here, r 40(3) creates the circumstances which, if the requirements of Form 13 have been met, would justify the Registrar refusing to issue the arrest warrant under r 40(1). *Fourthly*,Lockhart J’s decision was given before the decisions of the High Court in *Shin Kobe Maru* 181 CLR 404 and *Iran Amanat* 196 CLR 130. By force of those decisions, and in particular the fact that the strength of the claim is not relevant to the existence of the Court’s jurisdiction (*Iran Amanat* 196 CLR at 137-138 [18]-[20]), I am of opinion that if Lockhart J’s decision is not distinguishable, it was wrongly decided.
8. Although r 40(1) uses the word “may” as conditioning the power to issue an arrest warrant that the rule reposes in the Registrar, that word does not create an unfettered discretion. Having regard to the subject matter, scope and purpose of the Act and the Rules, I am of opinion that the word “may” in r 40(1) creates a limited discretion to refuse to issue an arrest warrant. Clearly enough, if any of the provisions of r 39(3), r 40 or Form 13 are not satisfied, the Registrar would be entitled not to issue a warrant. So too, if the Registrar considered that the application or the proceeding was an abuse of the process of the Court, he or she could refuse to issue the warrant. But such a situation would be exceptional. While a person applying for the issue of a warrant in the latter situation would have a duty to disclose the abuse of process, it is unlikely that this would be done dutifully by that person. Nonetheless, so much might appear inadvertently, as it sometimes does in cases where a litigant is acting in a way amounting to an abuse of process. A person who is acting to abuse the process of the Court is unlikely to reveal intentionally that he, she or it has engaged in that abuse. Accordingly, the Australian Law Reform Commission created the remedy in damages in s 34.
9. What is equally significant about r 40(1) is that the power it gives to the Registrar is conditioned on the other provisions of r 40 and not on compliance with r 39. The evident purpose of the framing of r 40(1) in this way is to give the Registrar power in an urgent or appropriate case to issue an arrest warrant even though the requirements for its issue, other than those made mandatory by r 40(3), have not been met. For example, a ship may be steaming out of the jurisdiction after having collided with another ship or maritime property, like a wharf, and before all formalities or paper work, such as an affidavit, have been prepared. In such a situation, an applicant for the issue of the warrant would have a duty of full and frank disclosure of all material facts. That duty may well extend, depending on the circumstances, beyond those matters that would have appeared in any documents that would have been available or before the Registrar in more usual situations.
10. Similarly, if the plaintiff became aware that evidence or other material placed before the Registrar in applying for the issue of the warrant was incorrect, or no longer correct, it would have a duty to place the new matter fully and frankly before the Registrar forthwith: cf *Lloyd Werft Bremerhaven GmbH v The Owners of the Ship “Zoya Kosmodemyanskaya”* [1997] FCA 379 (unreported 15 May 1997) at pp 36-37 per Tamberlin J; see too on appeal: *Lloyd Werft Bremerhaven GmbH v Owners of Ship “Zoya Kosmodemyanskaya”* (1997) 79 FCR 71 at 94F-95A per Beaumont, Burchett and Lindgren JJ. This obligation is essential so as to ensure that the Registrar (or Court) proceeds on the basis of evidence and other material that is complete, accurate and not misleading so far as the plaintiff is aware.
11. The power in r 40(1) does not have the character of a judicial or quasi-judicial discretion that extends beyond ensuring that the preconditions for the issue of the warrant have been satisfied and no reason exists under r 40(3) to refuse to do so. Moreover, s 29 recognises that the Court may stay or dismiss a proceeding after a ship has been arrested and, as an incident of that power, may deal with the security in the form of the *res* or a substitute (such as cash, letter of undertaking or bail bond) as appropriate. Thus, the Act contemplates that after an arrest a relevant person may appear and either apply for a dismissal or stay of the proceeding or make a substantive defence. Indeed, this is a usual situation. In *Ward v Williams* (1955) 92 CLR 496 at 507 Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ said:

“Jurisdiction and powers are conferred on judicial bodies, usually for the enforcement of rights and the protection of interests, and permissive language will often in such a case be used not because it is intended to give the tribunal a discretion to grant or refuse the remedy, but because, although it is intended or contemplated that persons interested will be entitled to the remedy the tribunal is empowered to give, it is also intended, or at all events taken for granted, that the existence of the interest and the validity of the claim to the remedy of a person seeking it will be for the tribunal to determine.”

1. Here, the Registrar is required to be satisfied that the Form 13 affidavit establishes the facts that must be proved to authorise the issue of the warrant and that no disqualifying circumstance referred to in r 40(3) exists. Once the Registrar has been satisfied of those matters, the Act and Rules evince the intention that he or she shall issue the arrest warrant.
2. Accordingly, having regard to the subject matter, scope and purpose of the Act and Rules, it would not be appropriate to impose a duty on a plaintiff seeking the issue of an arrest warrant that comprises an unqualified obligation to make full and frank disclosure of other material facts beyond those specified in the Act and Rules as necessary to be established to invoke the exercise of the power to issue a warrant under r 40(1).
3. Atlas had a maritime lien against *Xin Tai Hai* that travelled with her to Port Hedland, regardless of whether China Earth remained her owner or a relevant person and regardless of whether Atlas had brought proceedings in the Maritime Court. If Atlas acted unreasonably and without good cause in obtaining the arrest, s 34 gave China Earth a right to recover any loss or damage that it suffered as a direct result of the arrest. Moreover, the Court retained power, both under s 29 and as an incident of the control over its own process, to set aside the arrest or release the ship with or without conditions. That power would allow the Court to set aside the arrest, or, indeed, the writ, if an abuse of process had occurred: *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at 93-94 [27]-[28] per French CJ, Gummow, Hayne and Crennan JJ.
4. Moreover, under s 29 of the Act the Court has power to order that the *res* or other security be retained to abide the outcome of arbitration or proceedings brought in another jurisdiction because Australia is a clearly inappropriate forum. Indeed, in *Comandate* 157 FCR 45 the plaintiff sought only damages in the writ and did not disclose the existence of an arbitration clause between it and the relevant person, that had not been invoked prior to the arrest. After causing the ship to be arrested, the plaintiff began arbitration proceedings. The Full Court held that the plaintiff would have anticipated, before commencing the proceeding, that, on the facts of that case, after ship had been arrested, the relevant person would argue (as it did) that there was no jurisdiction *in rem* against the ship under s 19. Their Honours held that if s 19 had been validly invoked then, despite the absence of any endorsement of the writ indicating such an intention, the plaintiff could have made an application under s 29 for security for the arbitration that it had commenced after the arrest (157 FCR at 64-65 [64]).
5. Writing extrajudicially in 2003, Allsop J expressed the view that in modern times, to a significant extent, “… arrest has become regarded as a pre-emptive security device, available virtually on demand to someone with an arguable claim against a relevant person if the other requirements are said to be present and if the other requirements can be substantiated, if challenged”: *Admiralty Jurisdiction and Marine Insurance*: Allsop J (2003) Lecture to the New South Wales Bar Association, at [121]: see too the *Talabot* 132 CLR at 455. In another lecture at the 2003 Conference of the Maritime Law Association of Australia and New Zealand; *Possible Issues in Admiralty Reform: (a) beneficial ownership and jurisdictional facts; and (b) the nature of arrest and disclosure*, at [148], Allsop J said:

“the particular history of the action *in rem*, the strong elements or presumption of entitlement, the role of arrest as a method of obtaining jurisdiction against the property for a *claim*, and as a method of encouraging a personal appearance of the relevant person, mark the procedure as quite different from a procedure in equity to protect a party's position requiring a balancing of merits and competing conveniences. These considerations not only set the procedures apart, but they give a different context to the notion of disclosure.”

1. The conclusion in ALRC 33 at 196 [245] that arrest is a remedy available as of right is reflected in its recommendation to create the right to damages in s 34. In explaining why the new provision was appropriate, to replace the narrower action for wrongful arrest, the Commission said (ALRC 33 at 258-259 [304]):

“The present law provides some safeguards against abuse, but in the light of the expanded right of arrest recommended for the proposed legislation, the responsibility of the arresting party to act in a reasonable manner should be expressly stated in the Act. Excessive demands for security (that is, demands that are unreasonable and without good cause at the time of the demand) should result in a liability for damages in the same manner as for an unreasonable arrest or caveat against release. This approach will also cater for the considerable overlap in practice between unreasonable demands for security and unreasonable arrests or refusals to release.”

1. The ship parties argued that because the Commission misunderstood that arrest was a remedy available as of right, its supposedly erroneous view should not affect the construction of the Act or Rules. Whether or not the Commission correctly understood the availability of the remedy of arrest in the various State and Territory legislative regimes as at 1 January 1986 (being the date on which ALRC 33 stated the law), is not relevant. The way in which the Commission proposed to the Parliament the new Act and Rules would operate was predictated on its view of the availability of arrest as of right. That affected, for example, the new right the Commission proposed in what is now s 34 and its drafting of the Act and the Rules. I have arrived at my construction of r 40(1) after having regard to the text of the Act and Rules: *Alcan* 239 CLR at 46-47 [47]. The matters referred to in ALRC 33 have reinforced my independently arrived at construction: cf s 15AB(1) and (2)(b) *Acts Interpretation Act 1901* (Cth). Indeed, as Sheppard J remarked in *Patrick Stevedores No 2 Pty Ltd v MV Skulptor Konenkov* (1996) 64 FCR 223 at 229E-F it is essential to refer to ALRC 33 given its connection to the form of the Act as passed.
2. Ships are elusive, as Lord Simon of Glaisdale observed in his dissenting speech in *The Atlantic Star* [1974] AC 436, 472H. Ships engaged in international trade and commerce are literally here today and gone tomorrow. Sheen J accurately noted in *The “Freccia del Nord”* [1989] 1 Lloyd’s Rep 388 at 392 that many a writ *in rem* has been issued in the hope or expectation that the ship against which the plaintiff has claimed will sail into the jurisdiction. Frequently, that hope or expectation is frustrated or thwarted by a change in sailing orders to the ship’s master. Atlas was entitled to issue the writ and wait until *Xin Tai Hai* sailed into Australian jurisdiction. The ship had to be present here in order for Atlas to serve the writ and to cause her arrest: *Talabot* 132 CLR 449; ss 20, 22 of the Act.
3. Here, this Court undoubtedly had jurisdiction to arrest *Xin Tai Hai* and to proceed to hear and determine Atlas’ claim. The existence of the proceedings in the Maritime Court did not affect the jurisdiction that the Act conferred on this Court. In and of that jurisdiction, Atlas had a right to have the ship arrested. It regularly invoked that right. Mason CJ, Deane, Dawson and Gaudron JJ held in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554 and 571 that a plaintiff who has regularly invoked the jurisdiction of a court has a *prima facie* right to insist upon its exercise. That case determined that the defendant had the onus of establishing that proceedings so commenced should be stayed on the ground that Australia was a clearly inappropriate forum.
4. The ship parties asserted that the existence of Atlas’ proceedings in, and submission to the jurisdiction of, the Martime Court was a material fact that, if disclosed, may have influenced the Registrar in exercising the power to issue the arrest warrant under r 40(1). They contended that such a disclosure may have caused the Registrar to refer the matter to a judge. The ship parties also argued that Atlas should have disclosed to the Registrar that it had registered a claim against the limitation fund, the existence of the limitation fund itself, the cargo owner’s proceedings, including the ship’s arrest at the cargo owner’s instance, Atlas’ unserved writ issued in Singapore and what the ship parties asserted, *first*, would be a breach of Art 214 of the *Maritime Code* and Art 86 of the *Maritime Procedure Interpretation 2003* if Atlas succeeded in obtaining the arrest of the ship and, *secondly*, was Atlas’ dominant purpose in seeking the arrest here, namely to avoid the jurisdiction of the Maritime Court.
5. In my opinion, those arguments have no substance. *First*, the ship parties did not contend that, at the time it was made on 1 May 2012, Atlas’ application for the issue of the arrest warrant was unreasonable and without good cause within the meaning of s 34 of the Act. At that time too, not much had occurred in the Maritime Court proceedings brought by Atlas beyond the initial pleadings because of the interposition of the parties’ settlement negotiations. The cargo owner’s proceedings in the Maritime Court did not involve Atlas at that time because Atlas had agreed to the London arbitration with the cargo owner. *Xin Tai Hai* would be in the jurisdiction of this Court evanescently. It is likely that had China Earth perceived any risk that she might be arrested, the ship would have sailed away from Australian waters and jurisdiction.
6. *Secondly*, the existence of Atlas’ and the other proceedings in the Maritime Court did not necessarily mean that these proceedings would be an abuse of process, vexatious or oppressive or conducted in a clearly inappropriate forum. The position under Chinese law was complex, taking up much time in the hearing on the stay application, after substantive evidence had been obtained. Additionally, just as in *Comandate* 157 FCR 45, the ultimate outcome of the arrest, indeed of this application, may have been that the ship, or the security offered in substitution for the ship to obtain her release, would be held to abide the outcome of the limitation or other proceedings in the Maritime Court. So, one must ask, what was the Registrar, or indeed a judge, to do if presented with the information about Atlas’, or the other, proceedings in the Maritime Court or Atlas’ alleged breaches of Chinese procedures or purpose in seeking to arrest the ship on the application under r 40(1)?
7. There could be no obligation on Atlas to disclose the existence, or contemplated immediate institution, of Atlas’ Maritime Court proceedings when it filed its writ on 4 November 2011. The purpose of the arrest on 2 May 2012 was to obtain security for Atlas’ unadjudicated claim on its maritime lien. By that time the parties’ positions had moved on during the ensuing six months and Atlas had become a plaintiff in its proceedings in the Maritime Court. Those proceedings had not progressed to any final judgment. It was not clear in early May 2012, or now, whether China Earth would succeed in limiting its liability in accordance with Chinese law. The maritime lien still existed. *Xin Tai Hai* was never a party to any proceedings in the Maritime Court. Unless an international convention or treaty or other domestically applicable legislation requires it to do so, it is not the usual role of a domestic Court to enforce the procedural or substantive laws of other nations. If Atlas put itself in breach of the Chinese legal provisions as asserted by the ship parties, that was not relevant to whether the undoubted jurisdiction of this Court over the ship should be exercised. I am not satisfied that Atlas knew that it had breached Chinese law in seeking the arrest or would do so if the arrest occurred.
8. In my opinion, the provision of any information relied on by the ship parties was not necessary. In addition, that information could not have affected the Registrar’s decision whether or not to issue the arrest warrant under r 40(1). The Act and Rules are premised on the basis that provided that the conditions required for an arrest warrant are satisfied, and no countervailing factor under r 40(3) exists, the plaintiff is entitled as of right to arrest a ship named in its writ. The complexities of the position in the Maritime Court could not have shown to the Registrar that what the plaintiff sought was not *bona fide* open to it, and within this Court’s jurisdiction. It is obvious that Atlas’ dominant purpose was to avail itself of the jurisdiction of this Court and the benefit of the internationally recognised provisions of LLMC 1996 in the event it recovered more than any security given by the ship parties here. The question whether Australia was a clearly inappropriate forum could not be even gauged at the time of the application for the arrest warrant on the information then available.
9. For these reasons, I reject the ship parties’ application to set aside the arrest and the issue of the arrest warrant.

# Clearly inappropriate forum – The principles

1. I summarised the general principles applicable to the consideration of an application to stay proceedings on the ground that Australia is a clearly inappropriate forum in *Suzlon Energy Ltd v Bangad (No 3)* [2012] FCA 123 at [51]-[54] and have drawn on that below. However, these proceedings involve at least one additional feature that was not present in *Suzlon (No 3)* [2012] FCA 123, namely the existence of concurrent proceedings in China.
2. In *Voth* 171 CLR at 565 Mason CJ, Deane, Dawson and Gaudron JJ suggested that, in “the ordinary case” of a stay application on the ground of clearly inappropriate forum, counsel should be able to furnish the primary judge with any necessary assistance by a short, written and preferably agreed summary identification of relevant connecting factors “and by oral submissions measured in minutes rather than hours”. Their Honours had described earlier approaches dealing with this difficult area as involving “a war of affidavits” (171 CLR at 558). As in *Suzlon (No 3)* [2012] FCA 123 at [51], that encouragement seems to have bypassed this application. However, complexity of stay applications now appears to be an accepted consequence of the exercise of “long arm” jurisdiction by superior courts in Australia, as recognised in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 519 [73] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
3. The following propositions emerge from the majority reasons in *Voth* 171 CLR 538, with which Brennan J agreed at 572:
4. An Australian court must exercise jurisdiction that is conferred on it, except where it is established to be a clearly inappropriate forum (171 CLR at 559).
5. The power to stay, based on the Court being a clearly inappropriate forum is discretionary, and involves a subjective balancing process, in which various factors and matters of impression, in all the circumstances, are weighed as had been explained by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247-248 (whose judgment was substantially approved in *Voth* 171 CLR at 564).
6. Ordinarily, the local court will not be a clearly inappropriate forum if there is no foreign tribunal that has jurisdiction over the defendant and would entertain the particular proceedings that the plaintiff wishes to bring (*Oceanic* 165 CLR at 248). However, where there is no real connection between the subject matter of, or parties to, the litigation, the local court may be clearly inappropriate if the law of the place where the alleged wrong occurred did not allow proceedings to be brought for its redress (e.g. in a jurisdiction where a traffic accident occurred and that had an exclusive statutory compensation scheme, a suit brought in this jurisdiction would be in a clearly inappropriate forum) (*Voth* 171 CLR 558-559).
7. The rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case (*Voth* 171 CLR at 554).
8. The last proposition was reaffirmed in *Puttick v Tenon Ltd* (2008) 238 CLR 265 at 277 [29] per French CJ, Gummow, Hayne and Kiefel JJ. Their Honours held that ordinarily, a defendant will be entitled to a stay of proceedings against it that have been served on it within Australia, if it establishes that the local Court is a clearly inappropriate forum for the determination of the dispute having regard to the circumstances of the particular case, the availability of an alternative foreign forum to whose jurisdiction the defendant is amenable. However, they emphasised the point made by the majority in *Voth* 171 CLR at 565 that the question on a stay application focuses on the inappropriateness of the local Court and not the appropriateness or comparative appropriateness of the actual or suggested foreign forum.
9. Thus, a court is not an inappropriate forum merely because another is more appropriate: *Zhang* 210 CLR at 503 [24]. There, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ held that a court’s power to stay proceedings is an aspect of its inherent or implied power to prevent its own processes being used to bring about injustice. They cited with approval the following reasoning of Dawson, Gaudron, McHugh and Gummow JJ in *Henry v Henry* (1996) 185 CLR 571 at 587 (*Zhang* 210 CLR at 503-504 [25]):

“In *Voth* ((1990) 171 CLR 538 at 564-565), this Court adopted for Australia the test propounded by Deane J in *Oceanic Sun*, namely, that a stay should be granted if the local court is a clearly inappropriate forum, which will be the case if continuation of the proceedings in that court would be oppressive, in the sense of “seriously and unfairly burdensome, prejudicial or damaging”, or, vexatious, in the sense of “productive of serious and unjustified trouble and harassment” (*Oceanic Sun* (1988) 165 CLR 197 at 247). It was also held in *Voth* that, in determining whether the local court is a clearly inappropriate forum, “the discussion by Lord Goff in *Spiliada* ([1987] AC 460 at 477-478, 482-484) of relevant “connecting factors” and “a legitimate personal or juridical advantage” provides valuable assistance” (*Voth* (1990) 171 CLR 538 at 564-565). In this last regard, Lord Goff of Chieveley expressed the view that legitimate personal or juridical advantage is a relevant but not decisive consideration, the fundamental question being “where the case may be tried “suitably for the interests of all the parties and for the ends of justice”” (*Spiliada* [1987] AC 460 at 482, quoting *Sim v Robinow* (1892) 19 R 665 at 668, per Lord Kinnear).”

1. The nature and degree of connection between the proceedings and the forum are fundamental factors in assessing whether the forum is clearly inappropriate: cf *McGregor v Potts* (2005) 68 NSWLR 109 at 120 [47] per Brereton J; *PCH Offshore Pty Ltd v Dunn (No 2)* (2010) 273 ALR 167 at 184 [120], 188 [150] per Siopis J.
2. Importantly, in *Henry* 185 CLR at 590-591 Dawson, Gaudron, McHugh and Gummow JJ discussed the principles applicable in a stay application when parallel proceedings have been instituted in a local and foreign court. They said that *prima facie* it is vexatious and oppressive to bring proceedings concerning the same issues in different countries that have jurisdiction in respect of the matter.
3. As their Honours pointed out, after adopting what Dixon J had said in *Union Steamship Co of New Zealand Ltd v The Caradale* (1937) 56 CLR 277 at 281, viewed from the standpoint of the parties, there will be inconvenience and embarrassment if the same issue is litigated in the Courts of different countries that have different legal regimes, that are very likely to permit of entirely different outcomes. They continued (185 CLR at 591):

“**It does not follow that, because one or other of the proceedings is prima facie vexatious or oppressive within the *Voth* sense of those words, the local proceedings should be stayed.**  However, it does follow that the fact that there are or, even, that there may be simultaneous proceedings in different countries with respect to the same controversy is highly relevant to the question whether the local proceedings are oppressive in the sense of “seriously and unfairly burdensome, prejudicial or damaging”, or, vexatious, in the sense of “productive of serious and unjustified trouble and harassment”. **And it also follows that courts should strive, to the extent that *Voth* permits, to avoid that situation.**” (emphasis added)

1. The substantive law of the forum is a very significant, but not exclusive, factor in the exercise of the Court’s discretion on such an application (*Voth* 171 CLR at 566; *Henry* 185 CLR at 589). Ordinarily, a stay will not be appropriate while both Courts have jurisdiction but the orders of the foreign court will not be recognised here (185 CLR at 592). Dawson, Gaudron, McHugh and Gummow JJ said in *Henry* 185 CLR at 592-293 that it also would be necessary to consider, without being exhaustive:
* which forum can provide more effectively for complete resolution of the matters involved in the parties’ controversy;
* the order in which the proceedings were instituted;
* the stage that each proceeding had reached and the costs that had been incurred;
* the connection, if any, of the parties and their controversy to each jurisdiction and the issues on which relief might depend in those jurisdictions;
* the resources of the parties, the relevance of their and the witnesses’ understandings of languages in each jurisdiction.

In the end, their Honours said (185 CLR at 593):

“the question whether Australia is a clearly inappropriate forum is one that depends on the general circumstances of the case, taking into account the true nature and full extent of the issues involved.”

1. Where the issues are not the same in the different Courts, the question is whether, having regard to the controversy as a whole, the Australian proceedings are vexatious or oppressive in the sense that they are “productive of serious and unjustified trouble and harassment” or “seriously and unfairly burdensome, prejudicial or damaging”: *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 400-401 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ citing from the explanation of those terms by Deane J in *Oceanic Sun* 165 CLR at 247 that was adopted by the majority in *Voth* 171 CLR 538.

# The ship parties’ submissions

1. The ship parties argued that these proceedings were vexatious and oppressive in the sense explained in the passage I have quoted in [115] from *CSR* 189 CLR at 400-401. They also relied on several English and other overseas decisions for the purpose of showing that in international Admiralty litigation those Courts would have stayed these proceedings. These decisions included ones where the local plaintiff sought to take advantage of the availability a higher limitation fund provided for in that forum. The problem with using such authorities is that they did not address the test of clearly inappropriate forum that the High Court developed in *Voth* 171 CLR 538.
2. The ship parties relied on the *prima facie* position in *Henry* 185 CLR at 591 that Atlas’ proceedings here were vexatious and oppressive since, so they contended, they:
* duplicated, in substance, Atlas’ proceedings in the Maritime Court;
* had involved the ship parties here by force of the arrest in early May 2012 about six months after Atlas had filed its proceedings in the Maritime Court in November 2011;
* occurred in circumstances where Atlas had submitted to the jurisdiction of the Maritime Court, if not before their commencement, by that act of bringing proceedings in China;
* because Atlas’ dominant purpose in bringing these proceedings was to take advantage of the higher available limitation fund and the possible exclusion here of wreck removal costs from limitation of shipowners’ liability.
1. In addition, the ship parties argued that the juridical advantages and disadvantages each of them and Atlas gained or suffered in the two jurisdictions effectively counter-balanced each other. The ship parties submitted that substantial justice could be done in the Maritime Court. They contended that the cargo owner was also involved in the Maritime Court proceedings. The ship parties also argued that Atlas’ failure to serve its Singapore proceedings on any of the three occasions that *Xin Tai Hai* had called there since those proceedings began had significance.
2. During the course of the hearing Atlas proffered undertakings on two occasions as to what it would do in respect of its proceedings in the Maritime Court if the ship parties’ interlocutory application were dismissed. The final form of Atlas’ undertaking, given on 3 August 2012 was that Atlas undertook to the Court that:

“in the event that the Court does not stay the plaintiff’s proceedings *in rem* on the interlocutory application of China Earth Shipping Inc, and the judgment dismissing the application for a stay is no longer subject to appeal, the plaintiff will forthwith apply to the Qingdao Maritime Court to withdraw its claim against China Earth Shipping Inc arising from the sinking of the MV ‘*B Oceania*’ on 29 July 2011.”

1. The ship parties noted that this undertaking left open the real possibility that the Maritime Court would reject Atlas’ application to withdraw its proceedings. In that event, as the ship parties submitted, the parties would be locked into parallel litigation in the two jurisdictions.
2. The ship parties also relied on the decision of the Maritime Court on 29 May 2012 (see [34]), as binding on Atlas, that Atlas had infringed Chinese law by causing the arrest of *Xin Tai Hai* and the provision of Skuld’s letter of undertaking to secure her release. They argued that this finding showed that these proceedings are vexatious and oppressive.

# Consideration

1. Neither China nor Australia is a “natural” form for the litigation to resolve liabilities arising from the collision that resulted in the sinking of *B Oceania* in the Straits of Malacca on 29 July 2011. The parties proceeded on the hypothesis that the natural forum is probably Malaysia. The arrival of *Xin Tai Hai* in its jurisdiction on 22 August 2011 provided the occasion for the Maritime Court’s involvement in the various proceedings that are now before it. After the cargo owner succeeded in obtaining an order to preserve evidence, China Earth immediately commenced proceedings to limit its liability under Ch XI of the *Maritime Code*.That step no doubt was driven by thesignificant benefit to China Earth and Skuld if a limitation fund were established in China that would respond to all claims that Atlas had, amounting to about USD105 million, as well as to the cargo owner’s claim. Having set the ordinary processes of Chinese law in motion, China Earth could put Atlas to its election whether *or* not to seek to recover any part of its loss in China.
2. As it happened that is what Atlas did, having waited as long as it could to see if *Xin Tai Hai* would call here or in some other jurisdiction with a more favourable regime for limitation of liability for maritime claims than China offered to a person in Atlas’ position. *First*, Atlas filed its writ in Singapore on 19 August 2011, a few days before China Earth became a party to the cargo owners’ application to preserve evidence in the Maritime Court. That chronology explains why there was no point in Atlas subsequently serving its writ in Singapore. This is because that nation appears to be a party to LLMC 1976, but not to have adopted the 1996 protocol. Singapore also appears to have allowed persons in China Earth’s position, but not salvors, to limit liability for wreck removal, as does China: see: P Griggs, R Williams, J Farr: *Limitation of Liability for Maritime Claims* (4th ed 2005 LLP London) at 373-375. Neither party called evidence on the law of Singapore. Since China Earth asserted that something (that it did not specify) turned on Atlas’ failure to serve its writ in that jurisdiction, it had the onus of showing why this failure mattered in the scheme of things. If Singaporean law is as stated in the 2005 text, it is obvious that Atlas would achieve nothing by serving its writ in that jurisdiction.
3. On the other hand, Atlas’ intention to proceed here is readily understandable. Until *Xin Tai Hai* was served with the writ in these proceedings, contemporaneously with her arrest on 2 May 2012 in accordance with r 43(3), she was not subject to the jurisdiction of this Court. However, that does not mean that these proceedings were commenced only when she was served. I reject the ship parties’ argument that the proceedings in the Maritime Court were begun first.
4. The *Admiralty Act* draws a clear distinction in s 20(1) between the commencement of an action *in rem* and the position where “service of initiating process in a proceeding commenced as mentioned in sections 15, 17, 18 or 19 has been effected on a ship”. Stephenson, Brandon and Brightman LJJ held in *In re Aro Co Ltd* [1980] Ch at 209 B-E that the issue of the writ, which is akin to the commencement of proceedings, had the immediate effect of encumbering a ship with the plaintiff’s claim and creating its status as a secured creditor from that moment, even though the writ was only served later. They drew this distinction between the benefit of that status accruing to the plaintiff from commencing its proceedings and the time at which the jurisdiction of the Court was exercised over the ship when she was served or arrested. They concluded ([1980] Ch at 211B):

“The service of the writ adds nothing to the status of the claimant vis-à-vis the vessel sued. This is established by the issue of the writ. As between plaintiff and defendant, service merely causes time to commence running within which the defendant must enter an appearance in order to avoid being a respondent to a motion for judgment by default.”

1. This however, does not detract from the force of the ship parties’ argument that until the arrest they proceeded in the Maritime Court ignorant of the existence of these proceedings until the ship had been arrested. While Atlas filed its claim in the Maritime Court on 26 November 2011 nothing substantive appears to have occurred in those proceedings except that both China Earth and Atlas obtained extensions of time to file evidence in that Court, while they engaged in settlement negotiations prior to the arrest: [21]-[22].
2. The ship parties argued correctly that it is relevant, as a general proposition, to consider the stage that the proceedings have reached in each Court when deciding if a stay is appropriate. However, here the pendency of their application for a stay since it was made on 11 May 2012 has stultified the progress of these proceedings, while China Earth has been more than content to see the various proceedings in the Maritime Court progress in their ordinary course. These proceedings have not progressed because the parties sought time to collect evidence and engaged in a contested hearing over five days. Unfortunately, I have not been able to finalise these reasons earlier. Thus at least in the order of 10 weeks delay was due to the need to prepare for and hear the ship owners’ application. Had they not made it, these proceedings would also have been able to progress in their ordinary course.
3. The rationale for the exercise of the power to stay is the avoidance of injustice between the parties in the particular case: *Voth* 171 CLR at 554; *Puttick* 238 CLR at 277 [29]. It would create an injustice to any party against whose proceedings an application for a stay was made, if the pendency of that application of itself caused the balance to swing against that party through inactivity in the local court, while the foreign proceedings progressed. Having now considered the not inconsiderable and highly technical expert evidence, the appropriateness of the observation made by Mason CJ, Deane, Dawson and Gaudron JJ in *Voth* 171 CLR at 565 that such applications should take minutes not hours, let alone nearly five days, is self evident: [107]. Despite having had the benefit of two highly eminent Chinese legal experts giving expert evidence over two days, I am not persuaded that it was of any great assistance in determining the critical issue of whether this Court is a clearly inappropriate forum. Often in inter-jurisdictional contests between parties, one or other Court will have made an order that one party relies on as showing its adversary’s conduct in the other jurisdiction is contrary to the first court’s order. The correctness of that assertion, ordinarily, will not affect whether the second court will, or will be bound by its law to, proceed with or stay the litigation before it. Nor should the Courts of one nation, ordinarily, be required to embark on what can only be a guessing game of how the other nation’s court will proceed in certain circumstances.
4. Here, the critical features of the substantive law of China were not in issue, namely that its law of limitation of liability for maritime claims closely follows the scheme of, but does not ratify or implement, the LLMC 1976, but with presently immaterial local adaptions, and includes the right to limit for wreck removal claims. Likewise China’s procedural law, like that of many maritime nations (and as Art 14 of the LLMC 1976 contemplates), provides time limits for persons to make known their intention to claim on a limitation fund: see e.g. r 62(1) of the *Admiralty Rules* and *The Kronprinz Olav* [1921] P 52.
5. In my opinion, the critical circumstances in which to assess whether the ship parties have established that a stay should be granted must be those that existed at the time of *Xin Tai Hai*’s arrest and immediately thereafter. Atlas had submitted to the Maritime Court’s jurisdiction by no later than when it filed its proceedings against China Earth on 26 November 2011. That conduct was engaged in because by then the Maritime Court was the only place where *Xin Tai Hai* or her owners had become subject to any nation’s jurisdiction in respect of the collision. Before then, Atlas had become entitled to the status of a secured creditor in Australia when it commenced these proceedings.
6. Following the arrest in May 2012, Judge Song indicated in response to Ms Zhang’s query on behalf of Atlas, that it was unlikely that the Maritime Court would grant any application by Atlas to withdraw its proceedings: [52]. Judge Song did not say that such an application could or would not be granted by the Maritime Court in any circumstances. The expert evidence suggests that the Maritime Court has a discretion to allow Atlas to withdraw, but may have to consider whether Atlas has committed an unlawful act under Art 161 of the *Civil Procedure Interpretation 1992* and, if so, how to deal with it: [58]-[60].
7. It is also relevant that China Earth would still have to conduct its defence to the cargo owner’s proceedings in the Maritime Court, regardless of Atlas’ participation. Thus, in assessing the impact on the parties to this proceeding of Atlas’ conduct, and its potential, in the Maritime Court, it is relevant that China Earth would be an active litigant in the Maritime Court whether or not Atlas continued with its claim there or here. In addition, Atlas and the cargo owner have agreed to a London arbitration of the latter’s claim. The cargo owner appears to have been allowed recently to obtain what seems to be the status of a party without its own claim in Atlas’ proceedings against China Earth. However, Atlas is seeking to overturn that privilege of the cargo owner and it is not clear whether that course is open to Atlas: [42].
8. The parties did not actively pursue the proceedings in the Maritime Court during their settlement negotiations for most of the six months from the commencement of these proceedings until the arrest. Moreover, China Earth’s claim against Atlas was not served until after the arrest. Thus, substantively at the time of the arrest, Atlas had only sought and obtained registration of its claim on the limitation fund and commenced its proceedings in the Maritime Court. Those steps were important procedurally, just as was Atlas’ filing of its writ in this Court. But, there was no evidence of any significant expense or forensic effort undertaken by China Earth in the Maritime Court proceedings before the arrest that specifically involved it addressing what Atlas had done in that Court. And such work as China Earth had done in the Maritime Court is highly likely to have been necessary in any event since it would want to defend the cargo owner’s claim on the basis that *Xin Tai Hai* was either not at fault in the collision or, if it were, its responsibility should be reduced to as small a proportion as possible.
9. In essence, the activity in respect of Atlas’ proceedings in the Maritime Court since 11 May 2012 has been attributable largely to China Earth seeking to use its rights in that Court to progress those proceedings and to keep Atlas locked into them. That was a legitimate and understandable forensic choice by China Earth. But, China Earth’s complaint that the activity in the Maritime Court since 11 May 2012 had meant, or produced the result, that these proceedings were, or if allowed to continue to run in parallel would be, oppressive or vexatious, rings hollow. That is because those activities in the Maritime Court were not the product of Atlas pursuing the Maritime Court proceedings in a manner that was oppressive or vexatious. Rather, Atlas was facing a potential sword of Damocles, that if it immediately withdrew, or sought to withdraw, its proceeding in the Maritime Court, the ship parties might yet succeed on this interlocutory application leaving Atlas with no active forum in which it could pursue its claim. That dilemma arose partly, of course, because Atlas had taken proceedings in both jurisdictions. But it was always in China Earth’s interest to progress the Maritime Court proceedings in their ordinary course, even if by doing so, it caused itself to be burdened with the consequences of that litigation. For that reason, it would not be reasonable to conclude that the continuation of these proceedings, which have been effectively suspended while the stay application brought by the ship parties has been pending, is oppressive or vexatious on the ship parties or China Earth itself in the context of the parallel proceedings by Atlas in the Maritime Court.
10. An unfortunate feature of cross jurisdictional disputes, is that often, as here, no one Court or tribunal can exercise jurisdiction over all parties to the dispute, unless they are all present in or willing to participate in the one forum, be it a Court or arbitral tribunal. Here, whatever the position in the Maritime Court, Atlas and the cargo owner decided to resolve their dispute in a London arbitration rather than in a Belgian Court or the Maritime Court. The cargo owner had, however, brought proceedings against China Earth in the Maritime Court, leading to the application to establish the limitation fund and China Earth’s proceedings against Atlas that were begun on 10 November 2011 (but remained unserved for six months in the Maritime Court), two weeks before Atlas filed its statement of claim.
11. Accordingly, I am not satisfied that Atlas’ proceedings in the Maritime Court were, or had been, either oppressive or vexatious at the time the ship parties amended their interlocutory application on 11 May 2012 to seek a stay or subsequently. Both Atlas and the ship parties recognised that, if these proceedings were allowed to go to trial, Atlas would opt to litigate here. And, importantly Atlas had the status of a secured creditor for its maritime lien once it filed its writ in this Court, even though it could not begin to assert that status until it served *Xin Tai Hai* in Australia: *In re Aro Co Ltd* [1980] Ch 196.
12. I reject the ship parties’ argument that Atlas’ purpose in bringing its proceedings here was in some way improper. Atlas’ right to arrest the ship, and her presence as a party in proceedings *in rem* in this Court were not available to it in China. Once the limitation fund had been established under the domestic law of China, Atlas could not attain the status of a secured creditor there; nor could it treat the ship as a party there. Because China has not ratified the LLMC 1976 or 1996, the existence of the limitation fund in the Maritime Court of itself does not inhibit anyone from arresting the ship in an action *in rem* anywhere else (unlike the position under Art 13 of the LLMC 1976). Of course, Atlas had submitted to the jurisdiction of the Maritime Court and so became subject to the operation of Chinese law, including its provisions to protect the property of the shipowner, or a person in China Earth’s position, who had established a limitation fund on which Atlas had sought to make a claim.
13. However, Atlas initiated these proceedings at a time when it appeared that Australia was a possible destination for *Xin Tai Hai* in the future. It did so in the knowledge that there was a real possibility that the very large wreck removal expense may not be subject to limitation because of s 6 of the *Limitation of Liability for Maritime Claims Act* when read together with the right to exclude such claims in Art 18(1) of the LLMC 1976. If Atlas could achieve that result and escape any or any substantial finding of fault on its part, it could recover judgment for a substantial part of its loss. That would be a far cry from what the same findings would produce in the Maritime Court because of the lower amount of the limitation fund and the inclusion of wreck removal expenses in the limitable claims. For this reason Atlas’ purpose in filing its proceeding and causing the arrest was a proper and legitimate use of this Court’s process.
14. It would not be appropriate on this application to determine whether China Earth’s argument that the damage suffered by paying for wreck removal is consequential loss resulting from the operation of *B Oceania* and, so within Art 2(1)(a) of the LLMC 1976. It suffices to say that such a construction would give Art 2(1)(d) very little work to do when it expressly relates to claims in respect of wreck removal. The States Parties to the LLMC 1976 no doubt had in mind that there could be good policy reasons to allow a State Party to exclude claims under Art 2(1)(d) from being subject to limitation, as Australia has done, and for that exclusion to mean what it said.
15. Mason CJ, Deane, Dawson and Gaudron JJ in *Voth* 171 CLR at 564-565 pointed to the valuable assistance to be gained from Lord Goff of Chieveley’s discussion of relevant “connecting factors” and “a legitimate personal or juridical advantage” in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 477-478, 482-484 in assessing whether the local court is a clearly inappropriate forum. Those connecting factors include matters affecting convenience, expense, availability of witnesses, the law that is applicable to resolve the substantive issues and the places where the parties carry on business. Lord Goff pointed out that any comparison of relative differences in procedure or Court systems is unlikely to show that any party will suffer an injustice by being compelled to accept a well recognised system of justice available in a foreign Court. In *Voth* 171 CLR at 559, the majority held that one justification for the clearly inappropriate forum test was that the local judge will have both knowledge and experience with which to assess if the local court is clearly inappropriate, as opposed to the embarrassing task of evaluating matters relating to the other court’s appropriateness.
16. Here, neither of the existing fora had any substantive connection to the parties, the place of the collision or the law of the place of the wrong (*lex loci delicti*). There are differences in the first languages of the crews, and particularly the bridge team, of each ship. The crews are and can be expected to be peripatetic. Neither shipowner had any connection with either China or Australia. There was no evidence that the substantive law in relation to liability for the collision would differ in either jurisdiction. Overall, the substantive law applicable to the ship parties’ entitlement to limitation of liability is likely to be the same in each jurisdiction except in respect of the quantum and the issue of whether wreck removal costs are subject to limitation of liability at all. While there are differences between the practice and procedure of the Maritime Court and this Court, there is no reason to think anything should turn on those.
17. The power to grant a stay must be exercised so as, if possible, to avoid a situation in which two courts of different nations bear in parallel what is substantially the same dispute: *Henry* 185 CLR at 591. However, the rationale for the exercise of that power is the avoidance of injustice between the parties in the particular case: *Puttick* 238 CLR at 277 [29]. In *Spiliada* [1987] AC at 477C-D, Lord Goff said that there was no reason for the local court to grant a stay in cases where there was no “natural” forum such as with collisions on the high seas, and jurisdiction had been founded as of right. He then observed:

“It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum.”

1. I am not satisfied that this Court is a clearly inappropriate forum, even if the Maritime Court were not to permit Atlas to withdraw its claim against China Earth. Atlas regularly invoked this Court’s jurisdiction and seeks the benefit of the legitimate advantages of the greater amount of security for its claim, a larger limitation fund and exclusion from limitation of liability of wreck removal expenses to which it seems, *prima facie*, entitled.
2. As I have found, there is little evidence that the ship parties were subject to any significant additional expense or burdens in the Maritime Court proceedings at the time that they brought the stay application here or that such expense, as they have since incurred, would not have been necessary in relation to defending the cargo owner’s claim. In any event, the ship parties should not be able to elevate their position here by what has transpired in the Maritime Court since 11 May 2012 as they sought to use the benefits of its procedures to advance matters there. That would be unjust to Atlas. While it is desirable that the risk of inconsistent judgments be avoided, that is still possible. However, China Earth could consent to Atlas withdrawing its claim in the Maritime Court.
3. In my opinion, in addition to accepting the undertaking proffered by Atlas as a condition of refusing to stay these proceedings, I should order it to pay China Earth’s costs thrown away in the Maritime Court, by reason of Atlas withdrawing its proceedings if that Court permits it to do so and China Earth takes all reasonable steps to consent to that occurring. If China Earth does so it will be compensated for the costs that it would have incurred unnecessarily because of Atlas’ proceedings. On balance, I have concluded that since all parties have acted in a way that appears to be appropriate for their respective interests, even though China Earth has been on notice that since 11 May 2012 that it may be at risk as to the costs it was incurring in the Maritime Court, it should be able to recover those costs if it now consents to Atlas withdrawing its proceedings.
4. Since China Earth has failed here, its interlocutory application should be dismissed with costs. I will grant liberty to the parties to apply to vary the expression of the orders I make today in case my formulation has overlooked some aspect of Chinese law or inadvertently has created a difficulty in respect of the proceedings in the Maritime Court.

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| I certify that the preceding one hundred and forty-six (146) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate: Dated: 24 December 2012