

The Kaplan Lecture 2009★

When is an Arbitration Agreement Waived?

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Article II(3) of the New York Convention requires a court to enforce an arbitration agreement unless it is “null and void, inoperative or incapable of being performed.” It is widely accepted that a party can waive its right to arbitrate a dispute and that this constitutes an instance where the arbitration agreement becomes “inoperative.” What is more difficult to discern is what conduct by a party will amount to a waiver of its right to arbitrate. This article examines the rich body of case law that has developed in Australia on waiver. It also surveys certain preliminary questions and more generally the exceptions to enforcement of an arbitration agreement contained in the New York Convention.

I. INTRODUCTION

My lecture has a limited scope. It is to explore the circumstances in which a party will be held to have waived its right to rely upon, and therefore enforce, an arbitration agreement. Even within this limited compass, I must make a disclaimer. I have not sought to explore the law, and authorities, in every country. Rather, my principal aim is to introduce you to the rich body of case law which has developed in Australia in recent years on this subject. It is illustrative of the view that judges and courts in Australia have adopted. I cannot say that the positions adopted are entirely consistent but the cases provide interesting illustrations of factual situations where it has been claimed that a party has waived its rights to arbitration and of the approaches adopted by the courts.

Before taking you to the cases, I will go back to basics, or first principles if you like, and these are to be found in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York, June 10, 1958 (“New York Convention”). Article II(3) of the New York Convention provides as follows:

3. The court of a Contracting State, when seized of an action in a matter, in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to the arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Thus, a mandatory obligation is imposed on the court of a contracting state to refer parties to arbitration “unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” The mandatory obligation imposed on the courts of

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contracting states, subject to the three exceptions, exists in all states that are parties to the New York Convention.

In Australia, Article II(3) of the New York Convention does not apply in its original form but has been re-enacted in a much lengthier provision contained in section 7 of the International Arbitration Act 1974. Subsection (1) requires that there be a nexus between the arbitration agreement and a Convention country or Australia. Subsection (2) is in the following terms:

(2) Subject to this Part, where:

- (a) the proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
- (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

The exceptions to the enforcement of an arbitration agreement as set out in the New York Convention are enacted in subsection (5) as follows:

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

Likewise, in England, Wales and Northern Ireland, Article II(3) of the New York Convention does not apply in its basic form but has been re-enacted. Section 9 of the Arbitration Act 1996 provides:

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(5) If a court refuses to stay the legal proceedings, any provision that an award is a condition precedent in the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

The three circumstances where enforcement of an arbitration agreement is not required by Article II(3) of the New York Convention, namely where the arbitration agreement is null and void, inoperative or incapable of being performed, were not considered

in depth by the framers of the New York Convention. It seems that Article II was drawn up with little discussion and consideration in depth.¹

A provision very similar to Article II(3) of the New York Convention is found in Article 8(1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. Article 8(1) provides as follows:

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

The exceptions to the obligation of enforcing an arbitration agreement specified in the New York Convention are certainly broad enough to cover the circumstances where an arbitration agreement has been waived. A waiver is usually raised as an instance where an arbitration agreement has become “inoperative.” While, therefore, waiver falls within the exceptions specified in the New York Convention, the exceptions clearly go beyond the situation where an arbitration agreement has been waived.

Before examining the cases on waiver, I will briefly note certain preliminary questions and then explore the meaning of each of the exceptions to enforcement specified in Article II(3).

II. PRELIMINARY QUESTIONS

There are a number of preliminary questions or matters which arise concerning the exceptions to enforcement stated in Article II(3) of the New York Convention. The first relates to the fact that there are three distinct grounds for refusing enforcement; namely, that the arbitration agreement is “null and void,” “inoperative,” or “incapable of being performed.” At times, the distinction between these three grounds may not be readily apparent and their demarcation may tend to become blurred. Take, by way of example, pathological arbitration agreements which provide for arbitrations to be administered by, or in accordance with, rules of non-existing organizations. Of course, there is a preliminary question of whether a pathological arbitration agreement fails, so that arbitration is not possible, or whether it is capable of adaptation by interpretation so that it does not fail. However, in those cases where courts have concluded that the agreement fails, some have taken the view that the agreement is “incapable of being performed.”² Other courts have found pathological clauses to be “null and void.”³ Likewise, decisions that an arbitration agreement has been waived are generally predicated on the agreement having

¹ See A.J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 56 (1981).

² *Wilson v. Lignotock USA, Inc.*, 709 F. Supp. 797 (E.D. Mich. 1989); see also the decision of the Kammergericht Berlin, May 6, 2002, referred to by Stefan Kroll in ch. 11 of E. GAILLARD & D. DI PIETRO, *ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS* 337 (2008).

³ See the cases cited by Kroll, *supra* note 2, at 332 n.37 and the decision of the French court discussed at 336.

become “inoperative” but are sometimes based on the ground that the agreement is “incapable of being performed.”

The question which arises is whether it makes any difference whether an arbitration agreement fails on the grounds that it is “null and void,” “inoperative,” or “incapable of being performed.” In many instances the answer must be “no”; the distinction between the various grounds for non-enforcement stated in Article II(3) would not seem to be of significance and all three grounds would have the same effect, namely that the court hearing the case is not required to stay the proceedings. However, Kroll suggests that there may be a difference between a finding that an arbitration agreement is “null and void” and the finding that it is “inoperative” or “incapable of being performed.” A decision that an arbitration agreement is “null and void” means that the agreement cannot function at all either for the existing dispute between the parties or future disputes arising out of the same contractual relationship. However, a decision that an arbitration agreement is “inoperative” or “incapable of being performed” does not necessarily mean that the agreement could not apply to a future dispute between the parties. It is submitted that this would only rarely be the case because as Kroll himself recognizes, the breach by one party of an arbitration agreement will generally confer on the other party a right to terminate that agreement.⁴

A second preliminary question is who determines whether an arbitration agreement is null and void, inoperative, or incapable of being performed?

The wording of the relevant legislative provisions appears, at first sight at least, to be clear. Article II(3) of the New York Convention requires a court to refer parties to arbitration “unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” This is a clear reference to the court making the finding that an arbitration agreement cannot be enforced. The wording of Article 8(1) of the Model Law is very similar. Likewise, section 7(5) of the International Arbitration Act of Australia states that a court shall not make an order staying proceedings “if the court finds that the arbitration agreement is null and void, etc.” Again, section 9(4) of the Arbitration Act 1996 (UK) requires the court to grant a stay unless satisfied that the arbitration agreement is null and void, etc.

While the obligation to determine whether an arbitration agreement is null and void, inoperative, or incapable of being performed is clearly cast upon the court by these provisions, it has been suggested that there may be a conflict between the authority of the court and the power of the arbitral tribunal to rule on its own jurisdiction. Thus, Article 16(1) of the Model Law provides that “the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.” Section 30(1)(a) of the Arbitration Act 1996 provides that, unless otherwise agreed to by the parties, the arbitral tribunal may rule on its own substantive jurisdiction as to whether there is a valid arbitration agreement.

⁴ See Kroll *supra* note 2, at 328–30.

These provisions would certainly entitle an arbitral tribunal to determine whether an arbitration agreement is null and void and perhaps whether it was inoperative or incapable of being performed.

The English Court of Appeal has held that section 30(1)(a) of the Arbitration Act 1996 does not withdraw the court's power to decide whether there is an arbitration agreement under section 9 of the Act. Potter, L.J. observed:⁵

33. As observed in Merkin, *Arbitration Law* (Lloyds of London Press) at para. 6.22.1, there is an inherent tension between the power of the court to determine whether an arbitration agreement is null and void, inoperative or incapable of being performed, and the ability of arbitrators to determine their own jurisdiction under s. 30 of the 1996 Act. However, it is clear that the court has the power to determine whether a stay of judicial proceedings should be granted. CPR 1998, Practice Direction 49G, para. 6(2) expressly confers such a power on the court "Where, a question arises as to whether an arbitration agreement has been concluded or as to whether the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement."

34. Although that does not on the face of it cover the situation where the issue is whether an arbitration agreement which was concluded has come to an end by reason of an accepted repudiation, the wording of s. 9 of the 1996 Act is such that when faced with an application for a stay in extant proceedings, it is open to the court to decide that there is no arbitration agreement for whatever reason and therefore to dismiss the application to stay. In *Birse Construction Limited v. Saint David Limited* [1999] BLR 194, Judge Humphrey Lloyd QC made this clear in the course of enumerating the options open to the court when faced with an application for a stay, his analysis and observations upon the general approach to be adopted subsequently being approved by the Court of Appeal in *Al-Naimi v. Islamic Press Agency* [2000] 1 Lloyd's Rep. 522 at 524-5. Thus, in appropriate circumstances the court may hold that it is clear that the arbitration agreement sought to be relied on for the purposes of a stay has in fact come to an end prior to the application for a stay being made or heard, and hence is "inoperative" for the purposes of s. 9(3) of the 1996 Act.

Some recent commentators have referred to the traditional approach to judicial review of the validity of an arbitration agreement, that is, permitting a court to fully review the issue on the merits before referring the matter to arbitration, as tending to be displaced by a more modern approach. This is described as a limited enquiry by the court as to whether an arbitration agreement *prima facie* exists. If so, judicial proceedings are stayed and the matter is referred to the arbitral tribunal.⁶ This approach is said to exist in Switzerland,⁷ Ontario, Hong Kong, France, India and has been adopted in the United States.⁸

A third preliminary question concerns choice of law. The question is which law, or legal principles, should be applied to determine whether an arbitration agreement is null and void, inoperative or incapable of being performed? Doak Bishop, Coriell and Campos identify three possible approaches.⁹ The first is to apply a national law selected in accordance with choice of law rules. Although the arbitration agreement is a separate agreement to the substantive contract in which it is usually contained, the arbitration agreement will usually be governed by the law applicable to the substantive agreement or by the law of

⁵ [2002] EWCA (Civ) 721.

⁶ R. Doak, Bishop W. Coriell, & M. Campos in ch. 9 of GAILLARD & DI PIETRO, *supra* note 2, at 283.

⁷ As quoted in Doak Bishop, Coriell, & Campos, at 289.

⁸ *Id.* at 284-88.

⁹ Doak, Coriell & Campos, *supra* note 6, at 288-93.

the place where the arbitration is held. A second approach is to apply a uniform international standard or the requirements of transnational public policy. Doak Bishop, Coriell and Campos quote the decision of the Paris Court of Appeals of April 20, 1988 where the court said:

[I]n the field of international arbitration, the principle of the autonomy of the arbitration agreement is of general application, as an international substantive rule upholding the legality of the arbitration agreement, quite apart from any reference to a system of choice of law, because the validity of the agreement must be judged solely in the light of the requirements of international public policy.

Fouchard Gaillard Goldman note that the decision of the Paris Court of Appeals was endorsed by the Cour de Cassation in the 1993 *Dalico* decision where the court said that:

[T]he existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.¹⁰

A third approach is to apply a national law, via a choice of law method, but only in relation to substantive defenses that are widely recognized internationally. This is described by Doak Bishop, Corriell and Campos as follows:

The maximum standard that has been gaining adherents recently, especially in United States courts, strikes a fair balance between the national law standard that stems from the typical choice-of-law approach (risking the obstruction of agreements pursuant to parochial national legislation disfavouring arbitration) and the uniform international standard (which ultimately offers no substantive set of rules for determining whether a particular invalidity defence has been proved). The maximum standard employs the typical choice-of-law approach, but it "prevents courts of law from reviewing defences charging invalidity that are not widely accepted by the international community." In other words, it only permits litigants to raise generally recognised contractual defences like duress, but it requires that those defences be adjudicated with reference to the substantive rules chosen by the parties to govern their agreement. In practice, internationally neutral defences include the typical ones we have discussed throughout this chapter, such as misrepresentation, fraud, the incapacity to agree, duress, and undue influence. Defences that might succeed in some countries under a pure national law standard, but that are excluded under the maximum standard include, for example, the existence of national laws disfavouring arbitration in particular contexts or declaring certain types of arbitration agreements "null and void" merely because of their subject-matter.¹¹

Whatever its apparent attraction, the international or transnational standard appears inconsistent with the provisions of the New York Convention itself. It is true that Article II(3) does not prescribe the law applicable to the validity, operation or performance of an arbitration agreement. However, in the context of the recognition and enforcement of an award, Article V(1)(a) provides that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the

¹⁰ FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION para. 437 (Emmanuel Gaillard & John Savage eds., 1999).

¹¹ Doak, Corriell, & Campos, *supra* note 6, at 290–91.

award was made.” Thus, this provision clearly subjects the validity of an award to a national law and it would be surprising if the validity of an arbitration agreement, when considered at an earlier time (namely in an application to stay court proceedings and enforce an award) was to be tested in accordance with principles of a non-national law.

The final preliminary question concerns the burden of proof. It has been said that the applicant for a stay must prove the existence of the arbitration agreement and that the burden then shifts to the other party to show that the purported agreement is null and void, inoperative, or incapable of being performed.¹²

III. GROUNDS FOR NON-ENFORCEMENT

As we have seen, Article II(3) of the New York Convention prescribes three grounds for non-enforcement of an arbitration agreement. I will briefly note each in turn.

A. NULL AND VOID

The first ground for excusing enforcement of an arbitration agreement is where the agreement is null and void. Most commentators agree that this covers situations where the agreement is intrinsically defective and where the consent of the parties to arbitrate disputes was vitiated by misrepresentation, fraud, duress, or undue influence.¹³

In my opinion, an arbitration agreement would also be null and void if an applicable law prohibited arbitration in contracts or transactions of the type embraced by the arbitration agreement. Thus, for example, section 11(2)(b), (3) of the Carriage of Goods by Sea Act 1991 of Australia declares ineffective an agreement for the arbitration of disputes outside Australia in a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia. Likewise, section 43 of the Insurance Contracts Act 1984 of Australia declares void an arbitration agreement in a contract of insurance unless the arbitration agreement was made after the dispute or difference arose.

A recent case from the English Court of Appeal is *Stretford v. Football Association Ltd.*¹⁴ *Stretford* concerned a license issued to Mr. Stretford, who was a player’s agent, by the Football Association. It incorporated an arbitration agreement. Subsequently, the Football Association issued disciplinary proceedings against Mr. Stretford, and Mr. Stretford in turn then commenced proceedings in the English courts challenging the disciplinary proceedings. The Football Association sought a stay of proceedings pursuant to section 9 of the Arbitration Act 1996. It was argued, on behalf of Mr. Stretford, that the arbitration agreement was null and void by reason of Article 6 of the European Convention on Human Rights which confers a right to a fair and public hearing in the determination of

¹² M. MUSTILL & S. BOYD, *COMMERCIAL ARBITRATION* 464 (2d ed. 1989).

¹³ Doak, Corriell, & Campos, *supra* note 6, at 276, 93; C. Lamm & J. Sharp in ch. 10 of GALLIARD & DI PIETRO *supra* note 2, at 300; G. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 160 (2d ed. 2001).

¹⁴ [2007] EWCA (Civ) 238.

a person's civil rights and obligations. The Court of Appeal held that the arbitration agreement was not in conflict with Article 6.

Of course, a provision such as section 43 of the Insurance Contracts Act of Australia will only apply if it is part of the applicable law which the court must apply. I have already touched on the law governing an arbitration agreement and need not traverse this ground further.

Some commentators have suggested that the contractual waiver defense also falls within the null and void exception¹⁵ and there is some U.S. authority for this view.¹⁶ However the Australian authorities, which I will turn to soon, generally predicate waiver as an instance of an arbitration agreement being "inoperative."

B. INOPERATIVE

Two learned English commentators have observed that the expression "inoperative" has no accepted meaning in English law. Mustill and Boyd say:

The expression "inoperative" has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void *ab initio*, has for some reason ceased to have effect for the future. Three situations can be envisaged in which an arbitration agreement might be said to be "inoperative." First, where the English court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English court will recognise. Second, ... there may be circumstances in which an arbitration agreement might become "inoperative" by virtue of the common law doctrines of frustration, discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties. But the fact that issues in the arbitration overlap issues in proceedings between parties who are not bound by an arbitration agreement does not make the agreement "inoperative."¹⁷

Lamm and Sharpe list circumstances which do not render agreements inoperative. These include agreements that are inconvenient, expensive, or burdensome. For example, an impecunious party cannot rely on its inability to carry out its part of the arbitration agreement as a means of securing a release from the arbitration agreement. Secondly, the fact that an arbitral award may not be enforceable will not of itself render the arbitration agreement inoperative. The risk of multiple or conflicting decisions, by itself, does not render an arbitration agreement inoperative.¹⁸

Courts in a number of jurisdictions have held that a party can waive its right to arbitrate disputes and it would seem that waiver will render an arbitration agreement inoperative. Certainly this is the view of Australian courts.¹⁹ I previously noted some United States authority which classified waiver as rendering an arbitration agreement null and void. It would seem, on general principles, that this is not correct. Commentators have suggested

¹⁵ BORN, *supra* note 12, at 160; *cf.* Doak, Corriell, & Campos, *supra* note 6, at 276–77.

¹⁶ Doak, Corriell, & Campos, *supra* note 6, cite *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1987); *ITAD Associates Inc. v. Podar Brothers*, 636 F.2d 75 (1981).

¹⁷ MUSTILL & BOYD, *supra* note 12, at 464–65.

¹⁸ Lamm & Sharpe, *supra* note 13, at 306–10.

¹⁹ *ACD Tridon Inc. v. Tridon Australia Pty Ltd.* [2002] N.S.W.S.C. 896; *Eisenwerk Hensel Bayreuth G.m.b.H. v. Australian Granites Ltd.* [2001] Qd. R. 461.

that null and void refers to an agreement that is intrinsically defective or defective ab initio while inoperative arbitration agreements are not intrinsically defective or incapable of being set in motion but subsequently become ineffective through the actions of one or both of the parties. On the basis of this demarcation, waiver clearly fits within the operative ground and not the null and void ground.

Some recent English cases have held that an arbitration agreement, like any other contract, can be repudiated by a party. If the repudiation is accepted, the arbitration agreement becomes inoperative. In *Downing v. Al Tameer Establishment*,²⁰ the claimant entered into an agreement with the defendants to develop an invention which he had patented. The agreement contained an arbitration clause. The claimant alleged that the defendants refused to perform their obligations under the agreement. On December 14, 1994, the claimant wrote to the second defendant, as representative of the first defendant, stating that a dispute existed and that the only solution was to “retain assistance from outside arbitrators.” The second defendant replied stating that if there was a contract between the claimant and the first defendant, which was denied, the claimant had committed a fundamental breach of that contract because it had failed to carry out certain requisite testing of the product. On January 19, 1995, the claimant’s U.S. lawyers wrote to the first defendant making various proposals and on February 16, 1995, the claimant’s U.S. lawyers wrote to solicitors for the first defendant but without reply. On June 15, 1995, the claimant wrote to the first defendant asking it to propose the names of potential arbitrators. The first defendant’s solicitors replied on June 22, 1995 denying that there was any contractual relationship between the claimant and the first defendant. On July 19, 1996, solicitors for the claimant wrote to the first defendant’s solicitors asking if they would accept service of a writ. On July 24, 1996, the first defendant’s solicitors again repeated that there was no contractual relationship between the parties and that they did not have instructions to accept service of proceedings and that any proceedings would be vigorously defended.

On February 12, 1997, the claimant’s solicitors replied that the claimant accepted the first defendant’s repudiatory breach of the agreement in that the first defendant had failed to provide financing as required by the agreement.

On February 13, 1997, the first defendant’s solicitors again denied any contractual relationship between the parties. On February 19, 1997, the claimant issued a writ which was served on the first defendant out of the jurisdiction in Saudi Arabia. The defendants filed acknowledgement of service on November 13, 2000 but took no further steps in the proceedings save to apply to set aside the writ under section 9 of the Arbitration Act 1996.

The Judge held that the first defendant’s letter of June 22, 1995 amounted to a repudiatory breach of the agreement to arbitrate. However, he did not think that the issue of the writ and its service amounted to a clear and unequivocal intention that the claimant had accepted the first defendant’s repudiation. Accordingly, the Judge stayed proceedings under section 9 of the Arbitration Act 1996. On appeal, the Court of Appeal agreed that

²⁰ *Supra* note 4.

the Judge was right to hold that the letter of June 22, 1995 amounted to a repudiatory breach of the agreement to arbitrate but disagreed with the Judge on the question of whether the claimant had accepted the repudiation. Potter, L.J. observed:

35. That being so, we consider (contrary to the view of the judge) that the position of a party issuing a writ following a repudiatory breach of the arbitration agreement is different from that of a person issuing proceedings simply to test the water. The question of whether or not the issue and service of proceedings is an unequivocal acceptance of the repudiation will depend upon the previous communications of the parties and whether or not, on an objective construction of the state of play when the proceedings are commenced, the fact of the issue and service of the writ amounts to an unequivocal communication to the defendant that his earlier repudiatory conduct has been accepted, in the sense that it is clear that the issue of such proceedings (i) is a response to the defendant's refusal to recognise the existence of the arbitration agreement or any obligation thereunder and (ii) reflects a consequent decision on the claimant's part himself to abandon the remedy of arbitration in favour of court proceedings.

The Court of Appeal went on to observe that nothing which the claimant had said or done would have justified the first defendant in concluding that the claimant had a desire to litigate rather than arbitrate other than in response to the first defendant's earlier stated attitude. Thus, the conditions mentioned, in the paragraph reproduced above, were satisfied at the time the stay application was heard and, in consequence, the arbitration agreement was inoperative for the purposes of section 9(4) of the 1996 Act.

In a more recent case, the court held that there was no acceptance of the repudiation. *Delta Reclamation Ltd. v. Premier Waste Management Ltd.*²¹ concerned an application by the claimant (Delta) for a stay under section 9 of the Arbitration Act 1996 of the counterclaim filed by the defendant (Premier).

On December 21, 2006, the parties signed an agreement for the storage and processing of used tyres. The agreement contained a broad arbitration clause. In early December 2007, disputes had arisen under the contract. By that time Delta had taken delivery and processed some 7000 tonnes of tyres. Delta complained that it could not accept any further tyres for processing as the agreed storage and processing areas were full. It complained that Premier had failed to provide Delta with sufficient storage space for the processed tyres. For its part, Premier contended that the agreement was at an end and indeed it never came into existence because the necessary license from the Environmental Agency was not granted within four months of the signing of the agreement. By a letter dated December 6, 2007, Premier served a notice on Delta withdrawing from the agreement.

On November 29, 2007, Stintons, Delta's solicitors, wrote to Muckle, solicitors for Premier, stating that Delta had little alternative but to commence proceedings and to seek an urgent interim injunction. The letter went on to state that Delta were content to pursue the matter either in court or by way of arbitration and use the powers granted to the court under section 44 of the Act. The letter invited Muckle to indicate which method of disposal Premier wished to adopt. Muckle did not respond to the letter.

²¹ [2008] EWHC B16 (QB).

Delta did not follow the procedure for applying for an interim injunction by way of an arbitration claim form but, instead, issued a generally endorsed claim form seeking an interim and final mandatory injunction and damages. Delta had therefore elected to issue ordinary proceedings rather than claim an injunction under section 44 of the Act within an arbitration proceeding.

The injunction application was heard on December 20, 2007 and the application was dismissed with costs. At the hearing, Premier indicated to the court that it was intending to apply for a stay under section 9 of the Arbitration Act 1996.

Premier did not file an acknowledgement of service following the judgment and did not file a defense or counterclaim within the time specified in the Rules. On July 7, 2008, Stintons served on Premier a notice to arbitrate the dispute. On August 8, 2008, Muckle wrote to Stintons challenging the right to arbitrate. Muckle pointed out that the proceedings were still extant and that Delta had chosen to litigate rather than rely on the arbitration clause. The letter included the defense and counterclaim then being filed in the court. No permission was sought for the late filing.

On August 22, 2008, without taking any other steps in the counterclaim, Delta applied for a stay of the counterclaim. In the grounds in support of the application, Delta invited the court to stay its own action on the ground that there was no justification for parallel court and arbitration proceedings.

In considering whether the counterclaim should be stayed, the court observed that it was too simplistic an approach to assert that the existence of the court proceedings meant that it was necessarily too late for Delta to rely on the arbitration clause. The court referred to the decision of the Court of the Appeal in the *Downing* case and noted that the Court of Appeal approved the application of ordinary contractual principles to the agreement to arbitrate. The Judge decided as follows:

35. In this case there is nothing in the pre-actions correspondence which amounts to a repudiatory breach of the arbitration agreement by Delta. The letter before action plainly recognises the efficacy of the arbitration agreement. It is highly arguable that the issue of the Part 7 Claim Form amounted to a breach of the arbitration agreement, but there is nothing in this case that amounts to an acceptance of that breach so as to bring the arbitration agreement to an end. In particular Premier defended the application for interlocutory relief on the basis that it was preserving its right to apply for a stay under section 9 and has taken no steps in the action after that. In those circumstances I do not think that the arbitration agreement had become inoperable on the date that the notice to arbitrate was served.

36. Whilst I agree with Mr Cavender that part of the Counterclaim is parasitic to the Claim, the claim for £460,000 damages for removal of the UTDAR is a separate claim. Thus I reject the submission that the whole of the Counterclaim is parasitic.

37. In my view therefore the Court is bound to grant a stay of the Counterclaim under section 9(4) of the Act.

An interesting point arose in the Hong Kong decision of *China Merchants Heavy Industry Company Ltd. v. JGC Corp.*²² That case concerned a dispute resolution clause and

²² Hong Kong Court of Appeal, No. 112 of 2001, July 4, 2001.

a contract between an owner and a contractor. It provided that if there was a dispute between the two parties which could not be settled by mutual agreement, the owner would state its decision in writing. The contractor had the right to serve a notice in writing requesting arbitration within fifteen days. The contractor was dissatisfied with the decision of the owner but did not give notice of arbitration and instead instituted proceedings in the court. The owner applied for a stay of proceedings on account of the arbitration agreement. The contractor contended that its failure to serve a notice to arbitrate within the fifteen-day time limit rendered the arbitration agreement inoperative under Article 8(1) of the UNCITRAL Model Law. The Court of Appeal stated that it was “stretching the language of Article 8(1) unduly to call an agreement conferring a right on a party to refer a dispute to arbitration ‘inoperative’ merely because the party chose not to exercise that right.” The case essentially turned on the construction of the dispute resolution clause which the Court of Appeal held required the arbitration of disputes in the event that the contractor did not agree with the owner’s decision. It also lends some support to the view that a party cannot rely on its own act or omission to render an arbitration agreement inoperative.

C. INCAPABLE OF BEING PERFORMED

Mustill and Boyd describe “incapable of being performed” in the following terms:

“Incapable of being performed” connotes something more than mere difficulty or inconvenience or delay in performing the arbitration. There must be some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement: for example, where the mechanism for constituting the tribunal breaks down in a way which the Court has no ability to repair, or where a sole arbitrator named in the agreement cannot or will not act. The fact that the claim is time-barred does not in itself render the arbitration incapable of being performed: the arbitration can proceed, although it will inevitably result in the claim being dismissed. Where the effect of the time lift is not to bar the claim but merely to bar the right to arbitrate the position is, however, less clear. It might be argued in such a case that the arbitration agreement was not “incapable of being performed,” but merely “incapable of being invoked.” But we consider that this argument is unsound, and that the plaintiff should be permitted to pursue his claim by action, as was presumably the intention of the parties in agreeing to a time bar which barred the right to arbitration without extinguishing the claim.²³

On the other hand, Kroll suggests a broader test:

Arbitration agreements are considered to be “incapable of being performed” where the arbitration cannot effectively be set in motion. According to the Bermudan Court of Appeal this is only the case when the “party submitting the agreement . . . not capable of performance [can] demonstrate that even given the willingness of both parties to perform it, the agreement cannot be performed.” It is beyond doubt that, in those cases, the arbitration agreement is “incapable of being performed.” However, in other cases the test promulgated by the Bermudan Court appears to be too narrow, at least when it is taken literally. Its underlying rationale is that no party should be allowed to rely on its own obstructive behaviour to evade obligations freely entered into by concluding an arbitration

²³ MUSTILL & BOYD, *supra* note 12, at 465.

agreement. On the other hand, however, it is usually not possible to force a party to cooperate in the constitution of the tribunal. Therefore the test for the non-obstructing party must be whether the arbitration proceedings can be effectively set into motion even without the cooperation of the other party. In light of this test, the “incapable of being performed” defence should also not be equated with the English doctrine of frustration, as was done in some decisions.²⁴

Kroll cites pathological arbitration agreements as an oft-quoted example of agreements which are incapable of being performed. However, he notes that this would only be the case in those rare situations where it is not possible to give an arbitration agreement an operation by a process of interpretation or the use of implied terms. Another example cited by Kroll are problems with the constitution of the tribunal such as the non-availability of a pre-selected arbitrator. He refers to the decision of a German court which held, in a case in which the agreed appointment procedure could not be set in motion without the cooperation of both parties, that the arbitration agreement was incapable of being performed. In a French decision, a clause providing for the appointment of the tribunal by a non-existent arbitration institution was held to be manifestly void rather than incapable of being performed.

In England it would seem that impecuniosity of a party does not render an arbitration agreement incapable of being performed.²⁵ Thus it would seem that a party’s financial inability to participate in the arbitration would not render the arbitration agreement incapable of being performed.²⁶ Kroll notes that a different position has been taken in Austria, Germany, and India, where in two older decisions the Indian Supreme Court held that the non-availability of foreign exchange rendered arbitration agreements providing for arbitration in Moscow and London incapable of being performed since the Indian party could not effectively defend its rights in the foreign arbitration proceedings.²⁷

In England, it has been held that the fact that a party is incapable of satisfying an award given against it is not a ground for concluding that the arbitration agreement is incapable of being performed. In *The Rena K*, Brandon, J. observed:

It follows from what is said above that the context in which the words “incapable of being performed” are used is the context of the recognition and enforcement of arbitration agreements which, if valid and effective, will result in awards being made; and not the context of the recognition and enforcement of such awards themselves after they have been made. Having regard in that context it appears to me that the words “incapable of being performed” should be construed as referring only to the question whether an arbitration agreement is capable of being performed up to the stage when it results in an award; and should not be construed as extending to the question whether, once award has been made, the party against whom it is made will be capable of satisfying it. There is the further point that, even if the words “incapable of being performed” were given the extended meaning discussed above, the fact that, if an award were made against one party, he would be incapable of satisfying it, would not necessarily mean that the arbitration agreement was incapable of being performed. This is because the arbitration might also result in the

²⁴ Kroll, *supra* note 2, at 326.

²⁵ *Paczy v. Haendler & Natermann G.m.b.H.*, [1981] 1 Lloyd’s Rep. 302.

²⁶ *Pro Tech Industries v. URS Corp.*, 377 F.3d 868 (2004), however, for exceptions on grounds of unconscionability, see Kroll, *supra* note 2, at 346.

²⁷ Kroll, *supra* note 2, at 347.

award being made against the other party, in which case the incapacity concerned would be irrelevant. For the reasons which I have given I decide this first point of law against the cargo-owners. I hold that the fact that one of the parties to an arbitration agreement would be incapable of satisfying an award if it should be made against him does not make such agreement “incapable of being performed” within the meaning of s.1(1) of the 1975 Act.²⁸

The fact that an arbitration agreement does not include all the parties to the dispute and that, therefore, there will be a division of proceedings does not render an arbitration agreement incapable of being performed.²⁹

In England, the Court of Appeal has held that an arbitration agreement is not incapable of being performed because the arbitrator cannot award one of the remedies available in an English court.³⁰

IV. WAIVER

As previously noted, it is widely accepted that the obligation to arbitrate disputes can be waived. Waiver falls within the grounds for non-enforcement set out in Article II(3) of the New York Convention. It is generally regarded as an instance where the arbitration agreement is inoperative although it is occasionally said to make the arbitration agreement null and void or incapable of being performed.

While Article II(3) of the New York Convention, Article 8(1) of the UNCITRAL Model Law and section 9 of the Arbitration Act 1996 all provide that an arbitration agreement need not be enforced if it is “null and void, inoperative or incapable of being performed,” there is a difference between the provisions. Both the English Arbitration Act and the Model Law impose a temporal limitation on an application to stay proceedings or otherwise enforce an arbitration agreement. Section 9(3) of the Arbitration Act 1996 provides that “an application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.” Thus, in England, a party who takes a procedural step to acknowledge legal proceedings instituted against him does not waive his right to arbitration, because he is not permitted to apply for a stay before that time. On the other hand, once he has taken any step in the legal proceedings to answer the substantive claim there is, in effect, a statutory waiver of the right to arbitrate a claim brought against him.

Section 8(1) of the Model Law contains a not-dissimilar temporal limitation. It requires a court before which an action is brought in a matter which is the subject of an arbitration agreement to, at the request of a party, “not later than when submitting his first statement on the substance of a dispute” to refer the parties to arbitration unless the agreement is “null and void, inoperative or incapable of being performed.” In addition, Article 8(1) of the Model Law also imposes a statutory waiver of the right to arbitrate

²⁸ [1978] 1 Lloyd's Rep. 545, 552–53.

²⁹ See the many cases cited by Kroll, *supra* note 2, at 351 n.102.

³⁰ *Société Commerciale de Reassurance v. Eras Int'l Ltd.*, [1992] 1 Lloyd's Rep. 570.

after the defendant/respondent has submitted its first statement on the substance of the dispute to the court.

In contrast, Article II(3) of the New York Convention imposes no temporal limitation on the enforcement of an arbitration agreement and the question which therefore arises is at what point of time will a defendant, in court proceedings, be held to have waived his or her right to arbitration?

Before considering this question, I will briefly note two recent English cases which examine the meaning of the limitation in section 9(3) of the Arbitration Act precluding an application for a stay after a person has taken any step in the proceedings to answer the substantive claim. Both cases are decisions of the Court of Appeal.

The first case is *Patel v. Patel*.³¹ There the plaintiff, on January 21, 1998, issued a writ endorsed with a statement of claim seeking damages for a breach of a building contract by the defendant. On February 23, 1998, the defendant acknowledged service of the writ and endorsed that acknowledgement with an intention to defend the action. On March 23, 1998, the court issued a default judgment, no defense having been served. On April 28, 1998, the defendant issued a summons for an order that the default judgment be set aside unconditionally and that the defendant be given leave to defend the action and make two counterclaims. On May 19, 1998, the defendant swore two affidavits, the first setting out the fact that he required the judgment to be set aside and dealing with the merits. In the second affidavit the defendant indicated that he wished to stay the proceedings pursuant to the Arbitration Act 1996. It appears that the application to stay the proceedings was then made. The judge at first instance took the view that the defendant was not entitled to a stay because the defendant had asked that he be given leave to defend the action and counterclaim and had therefore taken the step in the proceedings to answer the substantive claim. The Court of Appeal allowed an appeal. Lord Woolf, M.R. observed:

Accordingly, the starting point for this court should be to approach the language of subsection 9(3) by applying the actual words of the subsection. We have to ask ourselves, “has the defendant in these proceedings taken any step to answer the substantive claim?” When considering that, the terms of the UNCITRAL Model Law on International Commercial Arbitration (1985), should be taken into account, because it is clear that those who are responsible for drafting the Act had the provisions of the Model Law in mind when doing so. I merely therefore set out what Article 8 says, though recognising that I regard the best test to be the words which actually appear in the Act.

Article 8 of the Model Law says:

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

I draw attention to the words in Article 8(a) of the Model Law, “substance of the dispute.” Mr. Raeside says that it is no coincidence that if one looks at section 9(3) of the Arbitration Act

³¹ [2000] Q.B. 551.

1996 you find the words “the substantive claim.” He says one echoes the other, although obviously not in the same precise terms.

In this case, as I have already indicated, it all turns on the language of the summons. The fact that the defendant applied to set aside the default judgment cannot be of any assistance to the plaintiff in his contention that the defendant is not entitled to a stay. Unless there was an application to set aside the default judgment, there was nothing to stay. If, therefore, the defendant had merely asked for the default judgment to be set aside, he would undoubtedly have been entitled to a stay. But he went on to say that it should be set aside unconditionally and the defendant be given leave to defend this action and counterclaim. Again, the fact that he asked for it to be set aside unconditionally cannot help the plaintiff. It is the words “the defendant be given leave to defend this action and counterclaim” which might cause problems.³²

Counsel for the plaintiff submitted that by seeking leave to defend and to counterclaim, the defendant was saying that he was going to defend the action and counterclaim. This was a clear indication that the defendant was not going to arbitrate. However, Lord Woolf concluded that there was no waiver:

I recognise the force of that submission. However, the defendant did not need to ask for leave to defend this action and counterclaim. He would be entitled to do so if he merely had the judgment set aside. They were otiose to the relief which he needed. Unlike the affidavits they did not deal with the substance of the dispute. He then asked for consequential directions. This is ambivalent. One direction which he asked for would be a direction for a stay. There is no sign of election in the fact that he asked for consequential directions. This appeal turns on whether, by asking for something which was otiose to the relief which the defendant was seeking, is he to be deprived of his entitlement under the Act of a right to a stay? It seems to me that to hold that the mere inclusion of something otiose in a summons preventing a stay would involve an approach to section 9 which would be inconsistent with the spirit of the Act which I have sought to indicate. Accordingly I would allow the appeal and reverse the decision of the judge and grant the defendant a stay pending arbitration.

The second case is *Capital Trust Investments Ltd. v. Radio Design T.J.A.B.*³³ In that case the defendant applied for a stay of court proceedings instituted against it and subsequently issued a further application that “in the event that its application for a stay is unsuccessful, the first defendant applies for summary judgment against the claimant.” Clarke, L.J., delivering the judgment of the Court of Appeal, said that the application was not a step in the proceedings because it did not indicate a willingness to proceed with a determination by the courts instead of arbitration. On the contrary, it made clear than the application for summary judgment was only advanced in the event that its application for a stay was unsuccessful.

I now turn to consider the Australian cases on waiver. The first is the decision of the Federal Court of Australia in *Re Bakri Navigation Company Ltd. v. Ship “Golden Glory.”*³⁴ There, the plaintiff commenced proceedings in the Federal Court in Sydney on April 27, 1991 seeking a declaration that it had a binding contract for the sale to it of the ship *Golden Glory* and an order for the specific performance of that contract. The ship was arrested on

³² *Id.* at 556.

³³ [2002] EWCA (Civ) 135.

³⁴ [1991] F.C.A. 235.

April 28, 1991. The defendant, the owners of the ship, applied for release of the ship from arrest on May 3, 1991. The court ordered that the *Golden Glory* be released from arrest after obtaining certain undertakings from the defendant. The court order recited as follows:

UPON the Defendant by its counsel undertaking to the Court:

- (a) That the Defendant will take all steps on its part as are properly necessary to prepare these proceedings for trial on 15, 16 and 17 May 1991;
- (b) That the Defendant will not, without the prior written consent of the Plaintiff, sell, transfer title to, mortgage or otherwise encumber in any manner whatsoever the ship or any interest in the ship "Golden Glory" pending the determination of these proceedings (including any appeals to the Federal Court of Australia or otherwise, and including any applications for special leave to appeal that might be taken therefrom to the High Court of Australia);
- (c) That it will comply (subject to its rights to seek variation or discharge thereof, and to appeal therefrom) with any Orders made against it in these proceedings;

AND NOTING that the Defendant has procured the delivery to the Sydney solicitors for the Plaintiff of a Deed in the form of Exhibit D on the application filed in these proceedings on 1 May 1991, and that arrangements satisfactory to the Marshal and as set out in Exhibit E on that application have been made for the payment of the fees and expenses of the Marshal in connection with the custody of the said ship while it was under arrest,

THE COURT ORDERS that the ship "Golden Glory" be released from arrest.

[Exhibit D was a deed made between the plaintiff and the defendant and guaranteed by a third party whereby the defendant covenanted to comply with the undertakings given to the court.]

At the hearing, which was held on May 15, 1991, the defendant argued that there was no concluded contract between the parties and, alternatively, if there was, it contained an agreement for the arbitration of disputes in London. The plaintiff contended that there was a concluded contract and that the court proceedings should not be stayed because the arbitration agreement had become "null and void, inoperative or incapable of being performed."

The court held that there was a concluded contract which contained a London arbitration clause but decided that the arbitration agreement had become inoperative. The court cited with approval the passage from Mustill and Boyd, reproduced earlier, and concluded that the arbitration agreement had become inoperative for the third reason cited by Mustill and Boyd, namely that it had ceased to operate by reason of some further agreement between the parties. The undertakings given to the court, which were embodied in the deed made on May 1, 1991 (Exhibit D) constituted such an agreement.

This case is not, strictly speaking, an instance of waiver of an arbitration agreement, but of its express abrogation.

The next case is *Eisenwerk Hensel Bayreuth G.m.b.H. v. Australian Granites Ltd.*³⁵ Eisenwerk, a German machinery manufacturer, agreed to sell to and install certain machinery for Australian Granites. There were three contracts and each contained an International Chamber of Commerce (ICC) arbitration clause. Australian Granites claimed, after the machinery was installed, that it was defective and withheld payment of

³⁵ [2001] 1 Qd. R. 461.

DM247,000. On August 11, 1997, Australian Granites commenced an action in the Supreme Court of Queensland claiming damages for breach of contract, negligence, and breach of the Trade Practices Act. Eisenwerk entered into a conditional appearance on October 3, 1997.

In February 1998, Australian Granites applied to have the conditional appearance struck out. Eisenwerk, almost at the same time, applied to have the service of the writ set aside and the writ struck out or, alternatively, applied for an order that the whole of the proceedings be stayed. Eisenwerk's application was based on an allegation of lack of jurisdiction and forum non conveniens. On February 18, 1998, the court (Lee, J.) allowed Australian Granites' application and dismissed Eisenwerk's application. Eisenwerk thereupon entered an unconditional appearance on March 27, 1998. On April 22, 1998 Eisenwerk commenced an ICC arbitration.

Eisenwerk was due to deliver its defense in the Queensland proceedings on April 24, 1998 but failed to do so. On May 2, Australian Granites' solicitor wrote to Eisenwerk's solicitor refusing any extension of time for delivery of the defense and advising that he had instructions to proceed to file a summons seeking a default judgment and an injunction restraining the arbitration proceedings. On May 7, Eisenwerk's solicitor responded with a number of requests for documents and particulars but without prejudice to its right to pursue resolution of the dispute through ICC arbitration. On May 8, Eisenwerk delivered its defense but under cover of a letter which stated that the defendant was not resiling from its intention to, or waiving its right to, pursue resolution of the dispute through ICC arbitration.

On May 19, Eisenwerk issued a summons seeking a stay of proceedings on account of the arbitration agreement and Australian Granites responded three days later with a motion seeking an injunction restraining Eisenwerk from making its application and restraining the prosecution of the arbitration proceedings. These applications came on for hearing before Fryberg, J.

Before Fryberg, J., Australian Granites argued that Eisenwerk deliberately did not rely on the arbitration clause when it sought to have service of the writ set aside or the proceedings stayed in February 1998. At that time it argued that there was no jurisdiction and that Queensland was a forum non conveniens. Australian Granites contended that Eisenwerk was therefore estopped from relying on the arbitration clause subsequently by virtue of the principle espoused by the High Court in *Port of Melbourne Authority v. Anshun Pty Ltd.*³⁶ Eisenwerk contended that the doctrine in *Anshun* does not apply to interlocutory applications and that, in any event, a stay was mandatory under section 7(2) of the International Arbitration Act 1974.

Fryberg, J. then turned to consider the two legislative provisions, namely section 7 of the International Arbitration Act (which implements the New York Convention) and Article 8 of the Model Law. Fryberg, J. noted that Article 8 is subject to the temporal limitation that an application to refer parties to arbitration must be made not later than

³⁶ (1981) 147 C.L.R. 589.

when submitting the first statement on the substance of the dispute. This temporal limitation is not found in the New York Convention nor in section 7 of the International Arbitration Act which is the legislative provision based upon it. However, and somewhat controversially, Fryberg, J. held that:

- (1) the Model Law was enacted after section 7 of the International Arbitration Act;
- (2) was inconsistent with it; and therefore
- (3) impliedly amended it.

He therefore concluded that section 7(2) provides for a stay only if the application is made “not later than when submitting a party’s first statement on the substance of the dispute.”

Fryberg, J. then turned to consider the defense filed by Eisenwerk. He acknowledged it was a “holding type” defense and was submitted with the express reservation of the right to seek the resolution of the dispute by arbitration. The Judge described the defense as probably incomplete and unsatisfactory. However, in his view, it still constituted a statement “on the substance of the dispute.” As the defense had been filed some days before the application for a stay, it was filed too late.

The decision of Fryberg, J. is controversial and, in my opinion, incorrect. It is true that Article 8 of the Model Law is not identical to section 7 of the International Arbitration Act but that does not mean that the provisions are inconsistent. Both provisions aim to give effect to an arbitration agreement and both can coexist as independent bases for seeking a stay of court proceedings. Section 7 is based on Article II of the New York Convention. It is submitted that clear and express words would be required before it could be concluded that the Australian Parliament intended to limit the circumstances in which an arbitration agreement can be enforced, that is, by a stay, and therefore the implementation of its international obligations to give effect to the New York Convention. These views, which I expressed in a published work, were subsequently accepted by the Full Court of the Federal Court of Australia which held that section 7 and Article 8 operate as independent provisions.³⁷

The decision of Fryberg, J. was subject to an appeal and was overturned by the Court of Appeal of the Supreme Court of Queensland. However, one aspect of the Court’s reasoning is just as controversial as the decision of Fryberg, J.

Section 21 of the International Arbitration Act enables parties to exclude the application of the Model Law. Section 21 says that if the parties to an arbitration agreement have agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute. The Court of Appeal noted that the parties had specified that the arbitration was to be conducted under the Rules of the ICC.

³⁷ *Comandante Marine Corp. v. Pan Australia Shipping Pty Ltd.*, *infra* note 46, para. 204 of the Judgment of Allsop, J.

Pincus, J.A., with whom the other judges agreed, observed that “by expressly opting for one well-known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the Model Law.”

This aspect of the court’s judgment has been roundly criticized and is, in my opinion, erroneous. It was followed in Singapore but has since been overturned by a legislative amendment in that jurisdiction. A proposal has also been made to amend the Australian legislation to make it clear that the selection of a set of arbitral rules is not evidence of an intention to displace the Model Law.

Having decided that Article 8 of the Model Law was inapplicable, the Court of Appeal proceeded to consider whether a stay should be granted under section 7(2) of the International Arbitration Act. Pincus, J.A. noted that a stay under section 7(2) was mandatory (in line with the mandatory obligation imposed by Article II(3) of the New York Convention) but was subject to the exception where the court finds the arbitration agreement null and void, inoperative, or incapable of being performed. The court noted that an arbitration agreement could be waived and would therefore be inoperative. Australian Granites argued that Eisenwerk had lost its right to arbitrate because of its conduct at the hearing before Lee, J. when it sought to set aside the writ for lack of jurisdiction or alternatively stay proceedings on the ground of *forum non conveniens*, and that it did so by delivering a defense.

Turning first to Eisenwerk’s application before Lee, J., Pincus, J.A. observed that neither the submission that the Supreme Court of Queensland lacked jurisdiction nor that the action should be stayed on the grounds of *forum non conveniens* involved a waiver of the right to arbitrate. Australian Granites relied on the *Anshun* principle that a party will be estopped from asserting an additional claim which could have been raised in earlier proceedings if it would result in inconsistent judgments. The Court of Appeal expressed reservation as to whether the *Anshun* principle applied to interlocutory decisions and therefore did not believe that it was determinative.

Pincus, J.A. then turned to consider whether the delivery of a defense in the action was an unequivocal waiver of the right to arbitration. He held that it was not because Eisenwerk delivered a defense only because it was imminently threatened with an application for judgment in default of defense; Eisenwerk had previously delivered a request to the ICC for arbitration and had provided a copy of the request to Australian Granites and the defense was served accompanied by a letter which denied any intention on the part of Eisenwerk to waive pursuit of the arbitration which it had already instituted.

In result, the Court of Appeal held that Eisenwerk was neither estopped from relying on the arbitration clause nor had it waived its right to arbitration.

The next case in the series is *ACD Tridon Inc. v. Tridon Australia Pty Ltd.*³⁸ This is a decision of Austin, J. of the Equity Division of the Supreme Court of New South Wales.

Tridon Ltd. was a Canadian company which manufactured and distributed motor vehicle accessories and parts. It had a wholly-owned Australian subsidiary, Tridon Australia

³⁸ [2002] N.S.W.S.C. 896.

Pty Ltd., the First Defendant (TAPL). TAPL distributed its products in Australia. TAPL, in its turn, had a subsidiary Tridon New Zealand Pty Ltd. which distributed the products in New Zealand (TNZL).

In 1988, Tridon Ltd. sold two-thirds of its shares in TAPL to a Mr Lennox, the second defendant. Tridon Ltd. and Mr. Lennox entered into a shareholders' agreement which purported to regulate the conduct of TAPL's affairs for the future. Tridon Ltd. and TAPL also entered into a ninety-nine year distributorship agreement pursuant to which TAPL and TNZL were granted exclusive rights to distribute Tridon's products in Australia and New Zealand ("the distribution agreement"). Thereafter, the board of TNZL consisted of Mr. and Mrs. Lennox and a nominee of Tridon Ltd. (Harry Arkin).

In 1999 Tridon Ltd. and a company called Tomkins Canada Acquisitions Corp. (part of the Tomkins Group of Canada) entered into an amalgamation under the Business Corporations Act of Ontario. The amalgamation had the effect that the business formerly carried on in the name of Tridon Ltd. came to be carried on in the name of ACD Tridon Inc., the plaintiff in the proceeding ("Tridon").

Mr. Lennox and Tridon had a falling out. Mr. Lennox was concerned about the amalgamation, because some subsidiaries in the Tomkins Group were in direct competition with TAPL.

On January 3, 2000, Tridon gave notice to TAPL, under the distribution agreement, that it had ceased to manufacture all classes of products named in the second schedule to the Agreement, and consequently under the terms of the Agreement, it purported to vary the second schedule by withdrawing all of the products in it. Tridon then required TAPL to obtain comparable products from subsidiaries of the Tomkins Group which were TAPL's competitors in Australia. Mr. Lennox was concerned that these arrangements gave his competitors sensitive commercial information about TAPL's turnover of products and the costs of products to TAPL.

For some time Tridon had been attempting to obtain access to the records of TAPL and its subsidiaries, including in proceedings against TAPL and TNZL and Mr. Lennox in the High Court of New Zealand.

The shareholders' agreement provided for the compulsory acquisition of shares of a party who was in default and constituted the non-defaulting party, the agent and attorney of the defaulting party for the purpose of effecting the acquisition. In January 2002, purporting to rely upon this provision, Mr. Lennox sought to transfer Tridon's remaining shares in TAPL to himself.

In August 2002, Tridon commenced proceedings in the Supreme Court of New South Wales seeking orders for access to corporate documents of TAPL and its subsidiary TNZL and orders invalidating a transfer of shares in the first defendant and rectifying the share register accordingly and order to address allegedly oppressive conduct in the management of TAPL including an order that it be wound up. In seeking this relief, the plaintiff relied partly on statutory remedies under the Corporations Act 2001 of Australia and partly on the provisions of the shareholders' agreement. The first defendant was TAPL, the second, Mr. Lennox, the third, Mrs. Lennox and the fourth, TNZL.

Prior to the commencement of the NSW proceedings, TAPL commenced an arbitration against Tridon in 2000. John Clark, Q.C. was appointed arbitrator. The principal issue in the arbitration was whether Tridon could validly notify TAPL that it had ceased to manufacture all classes of products named in the second schedule to the Distribution Agreement and consequently that it had varied the second schedule by withdrawing all of the products in it. On April 30, 2002, TAPL sought leave to expand the scope of the arbitration by amending its points of claim so as to produce a substantial overlapping with the dispute which was before the Supreme Court of NSW.

The distribution agreement, which was made between Tridon Ltd. (Tridon's predecessor), TAPL and TNZL was dated October 4, 1988 and had a term of ninety-nine years. It provided for the arbitration of disputes in clause 18.1 as follows:

18.1 Any dispute, difference or question which may arise at any time hereafter between the Company and the Distributor with respect to the true construction of this Agreement or the rights and liabilities of the parties hereto shall, unless otherwise herein expressly provided, be referred to the decision of a single arbitrator in New South Wales to be agreed upon between the parties or in default of agreement for fourteen days to be appointed at the request of either party by the President for the time being of the Institute of Chartered Accountants in accordance with and subject to the provisions of the Commercial Arbitration Act of New South Wales or any statutory modification or re-enactment thereof for the time being in force.

Clause 119 stated that the distribution agreement was deemed to have been made in the State of New South Wales and the construction, validity, and performance of the agreement was governed in all respects by the law of that state.

The shareholders' agreement was made between Tridon Ltd. and Mr. Lennox and was also dated October 4, 1988. It provided for the arbitration of disputes in clause 19 as follows:

19. Disputes

All disputes or differences between the parties hereto touching and concerning the construction or effect of this Agreement or the rights and liabilities hereunder which cannot be amicably settled within three (3) months from the date such dispute or difference first arose shall be referred to arbitration pursuant to the provisions of the Arbitration Act 1982 as amended.

Clause 120 of the shareholders' agreement stated that it was to be governed by and construed in accordance with the laws of the state of New South Wales.

TAPL, Mr. Lennox and TNZL each applied for a stay of the proceedings in the Supreme Court of New South Wales pursuant to section 7(2)(b) of the International Arbitration Act 1974, section 53(1) of the Commercial Arbitration Act 1984 (NSW), the Court's general jurisdiction under section 23 of the Supreme Court Act 1970 (NSW) and Article 8 of the UNCITRAL Model Law.

In the course of a long judgment, Austin, J. had to determine a number of discrete issues concerning the application for a stay. One of the first matters he dealt with concerned an allegation by Tridon that the defendants had waived their right to arbitration.

Austin, J. noted that the Queensland Court of Appeal in *Australian Granites Ltd. v. Eisenwerk Hensel Bayreuth G.m.b.H.*³⁹ held that a right to apply for a stay under section 7(2) of the International Arbitration Act is a private one and may be waived. Section 7 of the International Arbitration Act implements Article II of the New York Convention in Australia. The court, in *Eisenwerk*, held that waiver renders an arbitration agreement “inoperative.” Austin, J. observed that this reasoning was not challenged before him and he accepted it.

Austin, J. noted that the term “waiver” has frequently been used imprecisely. A number of cases which purport to apply the doctrine of waiver are really cases of contract, estoppel, or election. *Tridon* did not rely on equitable estoppel, because it did not contend that the defendants’ relevant conduct has caused it any detriment that could not be addressed by an order for costs. There was no suggestion that the defendants’ omission to raise the arbitration clauses at an earlier time was attributable to a contract. Nor, in this context, was an instance of election between alternative and inconsistent rights. Austin, J. observed:

In the present case the defendants had a choice to insist on arbitration or to allow their disputes with *Tridon* to be determined curially. The making of that choice would not involve election between inconsistent rights. It would simply involve selecting one of two procedures for the adjudication of the dispute. In any event, the defendants did not, prior to the hearing of the stay applications, make any unequivocal or final choice between alternative procedures. At various stages in the history of the litigation prior to the hearing, the defendants adopted positions which, if maintained concurrently, would be inconsistent positions, but they have not persisted concurrently with inconsistent positions, and even if they had, doing so would not constitute an unequivocal choice between inconsistent rights. This is not a case of election, as that word is explained in *Verwayen’s* case.⁴⁰

Having distinguished equitable estoppel, contract and election, Austin, J. then turned to waiver in its pure form. He said that there were two uses of the term. In the stronger sense it meant the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either expressed or implied from conduct. It was described by another Australian judge, Gaudron, J., in *Commonwealth v. Verwayen*⁴¹ as:

[W]hen a party to litigation deliberately chooses not to take a point or fails to take a point when it comes to notice, the courts may adopt a more stringent attitude, treating the point as having been irrevocably abandoned. Usually, the party who has thus failed to take the point is said to have “waived” it.

A second meaning of waiver, described by Austin, J. as waiver in the weaker sense, is that described by Dawson, J. in *Verwayen* as “non-insistence upon a right either by choice or by default.”⁴² Austin, J. said that this apparently referred to a matter going to

³⁹ [2001] 1 Q.D.R. 461, 466–67.

⁴⁰ *Id.* para. 58 of the Judgment.

⁴¹ (1990) 170 C.L.R. 394, 482.

⁴² *Id.* at 457.

the exercise of the court's discretion rather than a legal doctrine. The exercise of the discretion would presumably arise in a context such as an application for a stay, or leave to amend, or to strike out the relevant pleading. The discretionary matter is whether a party, having failed to insist upon his right at an appropriate time, should later be allowed to do so.

Having described waiver at some length, Austin, J. turned to consider whether the defendants had waived their rights to arbitration in the case before him. Tridon claimed that by virtue of five steps taken by the defendants in the proceedings, they had waived their right.

- (i) Tridon commenced the proceedings on November 29, 2001, by summons made returnable on December 4, 2001. On the return date, directions were made establishing a timetable for evidence. TAPL and Mr. Lennox consented to those directions although Mr. Lennox foreshadowed an application for a stay based on the arbitration clause. At an interlocutory hearing on January 29, 2002, TAPL and Mr. and Mrs. Lennox gave an interim undertaking not to deal with the TAPL shares purportedly transferred from Tridon. In April 2002, TAPL gave an undertaking not to deal with its assets otherwise than in the ordinary course of business. Tridon claimed that in consenting to directions and then giving these undertakings, TAPL and Mr. Lennox both submitted to the jurisdiction of the court. The Judge did not agree. Austin, J. observed:

In my view the conduct of TAPL and Mr and Mrs Lennox in these matters was consistent with their seeking to refer the dispute to arbitration. One can rationally take the view that it is desirable to consent to timetabling directions to avoid any costs penalty, even though one believes, and intends to persuade the Court at an appropriate time, that the dispute should be arbitrated. Similarly, faced with the threat on application for an injunction, which one might judge likely to succeed, one can rationally give undertakings consistently with an intention to seek a reference to arbitration at an appropriate stage.

Delay in an application to refer a dispute to arbitration might, eventually, give rise to discretionary grounds for refusing the application ("waiver" in the weaker sense identified by Dawson J) and conduct by which a party deliberately defers the making of an application for stay until the curial proceeding has been well-developed might constitute "waiver" in the stronger sense identified by Toohy and Gaudron JJ. But the facts here well short of either of these situations.⁴³

- (ii) Tridon commenced the New Zealand proceeding against TNZL, TAPL, and Mr. Lennox on December 19, 2001. The claims made in that proceeding cover part of the ground covered by the claims made in the New South Wales proceeding. TNZL, TAPL, and Mr. Lennox contested the jurisdiction of the New Zealand court on the basis that the matters sought to be put in issue would more appropriately and conveniently be determined in the New South Wales proceeding. Mr. Lennox also referred to the arbitration clause in the shareholders'

⁴³ *Eisenwerk*, *supra* note 19, para. 68 of the Judgment.

agreement. Tridon said that by contesting jurisdiction in New Zealand in this fashion, TNZL, TAPL, and Mr. Lennox expressly chose to have Tridon's claims determined in the New South Wales court. Austin, J. agreed that the defendants expressed a preference for the New South Wales court over the New Zealand court as a curial venue. However, Mr. Lennox made it clear enough that arbitration remained for him an alternative to curial resolution of the disputes; and the conduct of TAPL and TNZL did not amount to the kind of abandonment of rights that would give rise to a waiver in the stronger sense.

- (iii) On February 28, 2002, Mr. Lennox made application to the New South Wales court for the determination as separate questions of various matters arising in the proceedings. The application was supported by TAPL. Tridon submitted that on making this application, Mr. Lennox was affirming, with TAPL's support, the continuation of proceedings in the court. Austin, J. observed that this was true but that the conduct did not, in his opinion, amount to a waiver, in the stronger sense of his right to seek referral to arbitration.
- (iv) Following the commencement of the New Zealand proceeding, TNZL, TAPL, and Mr. Lennox filed objection to the jurisdiction of the New Zealand court. The parties agreed that the New Zealand proceedings should be adjourned pending resolution of the proceedings in New South Wales and TNZL, through its holding company TAPL, agreed to being joined as a party to the New South Wales proceeding, subject to suspension of the New Zealand proceeding. This agreement was implemented in a consent memorandum filed with the New Zealand court and consent orders were made for the indefinite adjournment of the New Zealand proceeding. Austin, J. was of the opinion that these facts did not constitute a waiver and that the defendants were simply exploring various ways of achieving resolution of the whole or parts of their disputes with Tridon.
- (v) On June 13, 2001, on the application of TAPL, the New South Wales court made orders requiring Tridon to produce certain documents to the court. The application had been strongly resisted by Tridon. Tridon argued that in obtaining these orders, TAPL invoked the coercive powers of the court in aid of the conduct of the proceeding. Austin, J. stated that the obtaining of orders for production had no bearing on the question of waiver beyond showing that TAPL was in June 2002 engaged in an interlocutory application in the curial proceeding and was not confining its attention to the stay application for the purposes of arbitration. Its conduct in seeking orders for production did not give rise to a waiver in the stronger sense.

Having held that none of the factual circumstances relied upon by Tridon, considered in isolation, gave rise to a waiver in the stronger sense, the Judge also decided that the whole course of conduct by the defendants did not itself constitute a waiver in the stronger sense.

Austin, J. then turned to consider waiver in the weaker sense. Tridon relied on three matters as relevant to the exercise of the Judge's discretion to refuse the application for a stay:

- (1) TAPL, TNZL, and Mr. Lennox choose to take advantage of the proceedings in the court when it suited them to do so both before and after filing their stay applications;
- (2) TNZL expressly consented to its joinder in the New South Wales proceeding;
- (3) the defendants were aware of the potential for arbitration since there was already an arbitration proceeding between TAPL and Tridon under the distribution agreement and Mr. Lennox had foreshadowed a stay application.

Austin, J. stated that the defendants had taken different approaches from time to time as to the most expeditious method of achieving resolution of their disputes with Tridon but the short-term steps taken to explore the prospects of resolution with Tridon in the court were not unreasonable and it would be wrong to construe these as abandoning a right of referral to arbitration.

Austin, J. commented as follows:

To the extent that, by pursuing these other avenues, the defendants have caused Tridon to incur costs that might have been avoided if their applications for a stay and referral to arbitration had been made at the first available opportunity, any unfair prejudice to Tridon can be addressed by an appropriate order as to costs, upon the principles enunciated in such cases as *Cropper v. Smith* (1984) 26 Ch. D. 700, *Ketteman v. Hansel Properties Ltd.* [1987] AC 189 and *State of Queensland v. JL Holdings Pty Ltd.* (1997) 189 CLR 146. I should say that at this stage, I am far from persuaded that such a costs order is justified, though I shall hear submissions on the point.

My conclusion is that the defendants have not, in any sense, waived their right to apply for a stay of the whole or any part of proceeding and for referral of the whole or parts of the dispute to arbitration. I agree with counsel for Tridon that the Court would not permit a party to demand the enforcement of an arbitration clause at the end of the final hearing in court, either because of waiver in the strong sense or the adverse exercise of the Court's discretion. But that is not the present case. The difference is that by committing to a final hearing, the litigant has irrevocably committed to curial rather than arbitral determination of the dispute. Lesser conduct might also amount to an irrevocable abandonment of the right to arbitration, but wherever the line is drawn, the defendants' conduct here cannot be so categorised.⁴⁴

After determining that the right to arbitration had not been waived, Austin, J. proceeded to consider whether the requirements for a stay under section 7(2) of the International Arbitration Act were satisfied and whether all the claims fell within the arbitration agreement.

The fourth Australian case is a decision of the Supreme Court of Victoria in 2005.

In *La Donna Pty Ltd. v. Wolford A. G.*,⁴⁵ a Victorian company, La Donna Pty Ltd., was appointed sole distributor in Australia and New Zealand of high quality hosiery and

⁴⁴ *Id.* paras. 89 and 90 of the Judgment.

⁴⁵ [2005] V.S.C. 359, Supreme Court of Victoria, Whelan, J., August 31, 2005.

lingerie designed and manufactured by an Austrian company, Wolford A.G. The sole distribution agreement was dated June 23, 2003, and contained an arbitration agreement as follows:

(1) All disputes arising out of this agreement or related to its violation, termination or nullity shall be finally settled under the Rules of Arbitration and conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) by one or several arbitrators appointed in accordance with these rules. The place of arbitration shall be Bregenz, the language to be used in the arbitral proceedings is German. The award of the Arbitral Tribunal cannot be challenged, provided the mandatory provisions of the Austrian Code of Civil Procedures have been observed.

(2) All legal issues arising from or in connection with this Agreement along with the Arbitration Clause set forth in paragraph (1), including the question of its valid conclusion and its preliminary and subsequent effects, shall be governed by and construed in accordance with Austrian Law.

In March and April 2005, Wolford purported to terminate the distributorship agreement, relying on the turnover targets in the agreement. Shortly thereafter, La Donna commenced proceedings in the Supreme Court of Victoria contending, in effect, that it was entitled to continue as sole distributor, or, alternatively, to seek damages for breach of contract. In addition to the distributorship agreement, La Donna alleged other agreements referred to as the proceeding agreement and the further agreement. In addition to its contractual claims, La Donna put forward claims for misleading and deceptive conduct under the Trade Practices Act and claims in negligence and unconscionable conduct. La Donna's action was commenced with a generally endorsed writ issued on April 29, 2005. On the same day, a summons seeking interlocutory relief was issued and *ex parte* injunctions were granted by the court. A contested application for interlocutory relief then followed, with interlocutory injunctions being granted on May 13, 2005. By a summons dated May 26, 2005, Wolford sought security for its costs and the proceedings in the sum of AU\$388,682. The summons was supported by affidavits which detailed the steps which were to be taken on Wolford's behalf in the court proceedings and set out in the estimated costs which Wolford would incur in litigating the material in the court to the conclusion of the trial. The application for security for costs was initially adjourned while the parties went to mediation. The mediation was unsuccessful, following which the court dismissed Wolford's application for security for costs on the grounds that Wolford had failed to establish that La Donna's financial position was precarious. Following this, on August 4, 2005, Wolford sought an order staying the proceedings pursuant to section 7 of the International Arbitration Act 1974 and section 53 of the State of Victoria's Commercial Arbitration Act 1984. The focus of the application was on section 7 of the International Arbitration Act.

La Donna opposed the application for a stay. The two principal issues raised were: (i) whether the proceedings involved the determination of a matter that, pursuant to the agreement, was capable of settlement by arbitration; (ii) whether, in the circumstances, the arbitration agreement was null and void, inoperative, or incapable of being performed.

The Judge concluded that the arbitration clause should not be read narrowly and that the terms of the clause in question encompassed all of La Donna's claims. It then turned to consider the question of waiver.

Whelan, J. had to determine whether the arbitration agreement was ineffective in the terms set out in section 7(5) of the International Arbitration Act. He noted that Austin, J. had ruled in *ACD Tridon Inc. v. Tridon Australia Pty Ltd.* that a right to arbitration could be waived. He then turned to examine the conduct of Wolford. He concluded that Wolford's participation in the mediation and in the proceedings leading to the grant of the interlocutory injunction did not constitute a waiver of the right to arbitrate:

23. In this application, La Donna submitted that Wolford had abandoned its right to a stay by its failure to reserve its position or to foreshadow a stay application, by its conduct in contesting the injunction, by its conduct in acquiescing or agreeing to the directions, and by its participation in the mediation. It seems to me that this conduct was all relevantly similar to the kind of conduct considered by Austin J. in *Tridon*, which he found to be insufficient to constitute an unequivocal abandonment. I am conscious of the distinction between *Tridon* and this case, in that in *Tridon* the reluctant party had expressly reserved its position on a number of occasions, but I do not think that circumstance alone makes a difference.

24. If all that was relied upon here were the steps taken on the interlocutory injunction, the directions and the mediation, I would find, as Austin J did, that there had been no abandonment, as a party could rationally take the view that it was desirable to participate in those steps even though one believed, and intended to persuade the Court at an appropriate time, that the dispute should be arbitrated.

However, he concluded that the application for security for costs was quite different and involved an implied assumption that the litigation would proceed to trial:

25. The application for security for costs falls into an entirely different category, however. That application was based on the explicit premise that the litigation would proceed to trial in the absence of a settlement, and that the matters the subject of the proceeding would be determined by the Court.

26. Wolford sought an advantage, or at least sought to impose upon La Donna a burden, which was based upon the proposition that the litigation would proceed in this Court, that the defendant would take steps, and that the defendant would incur costs in taking those steps, in that litigation in this Court. This step was an unequivocal abandonment of the alternative course, being an application for a stay and a consequent arbitration.

27. To allow Wolford to rely on the arbitration provision now would be to permit it to approbate and reprobate. In my view, it has waived the provisions and thereby rendered them inoperative.

The Judge concluded:

30. The application by summons filed 4 August 2005 should be dismissed for the reason that I have found, pursuant to section 7(5) of the International Arbitration Act 1974 (Cth), that the arbitration agreement is inoperative, the right to insist upon arbitration having been waived by the unequivocal choice to pursue litigation, and the consequent abandonment of arbitration, which was necessarily involved in the application for security for costs.

A recent case in the series is a decision of the Full Court of the Federal Court of Australia in *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd.*⁴⁶ Pan Australia Shipping Pty Ltd. ("Pan") was an Australian company which carried on a coastal liner shipping service to and from Australian ports. The service run by Pan was undertaken

⁴⁶ [2006] F.C.A.F.C. 192; Finn, Finklestein, and Allsop, JJ., December 20, 2006.

initially by one ship, *Boomerang I*, and was also to be undertaken by a second ship, *Comandate*. *Comandate*, a general cargo vessel, was registered in Liberia, managed and owned by Greek interests. It was time chartered to Pan by Comandate Marine Corp (“Comandate Marine”), a company registered in Liberia. The time charter included the terms contained in the New York Produce Exchange Form 1993 Revision (NYPE 93). Clause 45(b) of the NYPE 93 provided for the arbitration of disputes in London as follows:

(b) London

All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping one to be appointed by each of the parties, with the power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. *Any dispute arising hereunder shall be governed by English Law.*

Disputes arose under the time charter and Pan sought damages in the sum of U.S.\$2.5 million. Pan commenced *in rem* proceedings against the *Comandate* in the Federal Court of Australia under the Admiralty Act 1988 (Cth) and obtained the arrest of the vessel. Security was put up by or on behalf of Comandate Marine and the *Comandate* was released from arrest. The London solicitors for Comandate Marine sought an assurance that Pan would submit all disputes exclusively to arbitration in accordance with clause 45(b) of the time charter. Comandate Marine’s London solicitors indicated that failing the provision of such assurance they were instructed to seek an anti-suit injunction in the High Court of Justice in London to restrain Pan from taking any steps to prosecute its claims otherwise than in London arbitration.

On June 20, 2006, Emmett, J., in the Federal Court of Australia, made *ex parte* orders to restrain Comandate Marine from taking any step in the High Court of Justice or in any other court to restrain the continuation of the proceedings in the Federal Court under the Admiralty Act (anti-anti-suit injunction).

On June 22, 2006, the Judge made orders extending the anti-anti-suit injunction up to and including July 13, 2006. At the time of the order on June 22, 2006 there was no notice of motion filed on behalf of Comandate Marine seeking a stay under the International Arbitration Act 1974 (Cth) (which, inter alia, gives effect in Australia to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“New York Convention”)). The orders made by the Judge provided for the filing of such a motion, which was done on June 23, 2006. On July 6, 2006 a statement was filed by Pan.

On July 13 and 14, 2006, Emmett, J. considered whether the anti-anti-suit injunction should be extended or whether a stay of proceedings should be granted under the International Arbitration Act. The Judge dismissed the motion for a stay of proceedings and left undisturbed the anti-anti-suit injunction.

On June 14, 2006, Comandate Marine’s London solicitors notified Pan of the commencement of an arbitration in London. On June 23, 2006, the day it served its notice

of motion under the International Arbitration Act seeking a stay of proceedings, Comandate Marine, as plaintiff, commenced *in rem* proceedings against *Boomerang I*. The *Boomerang I* was arrested on June 24, 2006 but the writ and the arrest were set aside by the Full Court of the Federal Court on June 27, 2006.

The primary claims Pan asserted against Comandate Marine involved alleged representations made by Comandate Marine prior to entering into the time charter. Pan alleged that Comandate Marine represented that it would provide a master and crew who were capable of performing their obligations contemplated under the charter in Australian coastal waters; that the master, officers and crew of the vessel were able to enter and work in Australia; that the vessel would be kept in a thoroughly efficient state and that the vessel would be seaworthy in all respects. Pan asserted that these representations were misleading and deceptive and that the master, officers, and crew did not have the necessary visas to work in Australia, and that the ship was not seaworthy. It was asserted that the representations made by or on behalf of Comandate Marine were misleading or deceptive and in breach of the Trade Practices Act 1974 (Cth) of Australia.

A second claim put forward by Pan related to the event when the personnel of the Comandate were not able to obtain visas in Australia and proceeded to sail for Singapore. Pan asserted that by refusing to sail to Sydney and stating an intention to sail for Singapore, Comandate Marine evinced an intention not to be bound by the time charter in breach of other provisions of the Trade Practices Act.

Among the issues considered on appeal by the Full Court was the following question:

Did Comandate Marine waive or abandon its right to arbitration in London and had it elected to submit the resolution of all disputes arising out of the time charter to the Federal Court of Australia by commencing *in rem* proceedings against and arresting the *Boomerang I*?

Before the Full Court the leading judgment was given by Allsop, J., with whom Finkelstein, J. agreed and Finn, J. agreed in part.

The primary Judge had concluded that Comandate Marine had elected not to pursue its arbitration proceedings by beginning its *in rem* proceedings against *Boomerang I* without indicating on the writ that it intended to seek a stay of proceedings or that the proceedings were brought solely for the purpose of obtaining security for the London arbitration. The Judge also concluded that the conduct of both parties in electing to litigate in the court had resulted in the arbitration agreement being, in substance, abandoned. He concluded that the arbitration agreement was either “incapable of being performed” or “inoperative” for the purposes of section 7(5) of the International Arbitration Act. In the Full Court, Allsop, J. concluded that the primary Judge had erred in concluding that the institution of *in rem* proceedings was inconsistent with arbitration. Allsop, J. said:

The notion of inconsistent rights was explained by Stephen J in *Sargent v. ASL Developments Ltd* (1974) 131 CLR 634 at 641–2: the rights are inconsistent if neither may be enjoyed without the extinction of the other. For instance, when a contract is repudiated the innocent party either accepts the repudiation and ends the contract or chooses not to end the contract. Both cannot be done—the contract is either ended or on foot. A litigant who has bound itself to arbitrate and

commences so to do and who files court proceedings as well may be acting oppressively or abusively and may be in breach of contract, but has not elected between inconsistent rights. Here, the filing of the writ did not extinguish the rights under the arbitration agreement; it may or may not have constituted, or formed part of, an inconsistent course of conduct; it may or may not have amounted to a breach of contract; but it did not cause or presuppose the extinction of the rights under the arbitration agreement.

He also said:

Taken alone, the commencement of the *in rem* action did not work an election or waiver of any right to arbitrate. There was no step by Comandate Marine unequivocally inconsistent with the existence of the right and obligation to arbitrate.

This is not to say that legal proceedings may not be conducted to such a point that the only conclusion is that the party can be taken to have waived or abandoned the right to arbitrate: *The Commonwealth of Australia v. Verwayen* (1990) 170 CLR 394 at 472 per Toohey J. Thus, at this point it is necessary to appreciate the balance of the evidence.

It was necessary, therefore, to examine the evidence to see whether Comandate Marine had waived or abandoned its right to arbitrate. Allsop, J. referred to communications from Comandate Marine's London solicitors to Pan's Sydney solicitors who repeatedly asked whether Pan "will abide by the exclusive English law and arbitration provisions." The response from Pan's solicitors was equivocal. Allsop, J. concluded that "taking the whole of Pan's conduct up to and including June 22, 2006 it is not clear to me that Pan evinced an intention not to be bound by the arbitration agreement." He also said "the filing of the writ *in rem* against *Boomerang I* was in the context of Comandate Marine continuing to assert its wish for the dispute to be arbitrated ... there is nothing to suggest that Comandate Marine ever evinced an intention to abandon the arbitration." The Judge also noted that "the action against *Boomerang I* was capable of being prosecuted as a means of obtaining security for the arbitration." There was another reason why the commencement of the action *in rem* did not constitute an abandonment of the right to arbitrate. Allsop, J. notes that under Australian law an action *in rem* when commenced is not against the relevant person but rather it is against the ship, thus the institution of the action *in rem* did not constitute the commencement of legal proceedings against Pan. In this respect, Australian law differs from English law as enunciated in the *Republic of India v. India Steamship Co. Ltd. (No. 2) (The Indian Grace)*.⁴⁷ There Lord Steyn said that an action against an inanimate object (the ship) was a fiction which had outlived its useful life and that an action *in rem* should be regarded as an action to which the owner or the demise charterer was a party.

Allsop, J. concluded that there was no election between inconsistent rights, no abandonment of the arbitration and no unequivocal acceptance of any repudiation by Pan, assuming one to have been demonstrated.

The most recent case is a decision of the Supreme Court of Victoria in *AED Oil Ltd. v. Puffin FPSO Ltd.*⁴⁸ The case concerned a charter contract for a converted tanker.

⁴⁷ [1998] A.C. 878.

⁴⁸ [2009] V.S.C. 534; Judd, J., December 1, 2009.

The charter contract was initially made between AED Oil, an Australian company, and Puffin, a company incorporated in Malta. It appears that AED Oil also provided a security for the monies it was obliged to pay Puffin in the form of a fixed charge over its assets.

The charter contract was novated to AED Services Pte Ltd., a company incorporated in Singapore, when the parties entered into a deed of novation and amendment. AED Services replaced AED Oil under the contract. However, AED Oil was required to enter into a guarantee in a prescribed form in favor of Puffin under which it promised to guarantee the obligations of AED Services under the charter contract. Moreover, the deed of novation and amendment acknowledged that Puffin's rights under or pursuant to the charge remained in full force and effect.

The charter contract was designed to ensure that payments made to Puffin were net of any amount of tax which AED Services was required to deduct from payments or which Puffin might be obliged to pay. The intention was that Puffin would receive the full amount of its invoices and that any tax liabilities incurred as a consequence of the payments would ultimately be borne by AED Services.

Subsequently, Puffin served written demands on AED Services and AED Oil in respect of Australian taxation which Puffin was obliged to pay and in respect of overdue invoices. Thereafter, AED Oil commenced proceedings in the Supreme Court of Victoria against Puffin seeking to restrain Puffin from taking any steps to enforce the registered fixed charge in favor of Puffin which secured the obligations of AED Oil as guarantor of the performance of AED Services. Puffin filed a defense and also counterclaimed against AED Oil for the amounts allegedly due.

AED Oil and AED Services then applied to the court for an application that the counterclaim be stayed on account of an arbitration agreement contained in Article 33 of the charter contract.

The arbitration agreement itself included a provision in clause 33.10 which stated:

Nothing in this Article 33 prevents a party from seeking urgent interlocutory or declaratory relief from a court of competent jurisdiction where, in that party's reasonable opinion, that action is necessary to protect that party's rights.

Puffin defended the application for a stay arguing, *inter alia*, that AED Oil was not a party to the arbitration agreement and had waived its right to arbitrate thereby rendering the arbitration agreement "inoperative."

The court held that although AED Oil was no longer a party to the arbitration agreement, it was a person claiming through or under a party to an arbitration agreement within the meaning of section 7(4) of the International Arbitration Act and was therefore bound by the arbitration agreement. Judd, J. said:

74. Applied in the context of the present case, the criteria enunciated by Finkelstein J would be satisfied by AED Oil. It is the ultimate owner of AED Services. Its liability under the guarantee is to ensure performance by AED Services of its obligations. Puffin has made identical demands upon AED Oil under the guarantee for alleged failures by AED Services in its performance. If AED Services has a right to invoke the arbitration agreement for the resolution of a dispute, where its obligation is guaranteed by AED Oil, the connection or proximity of AED Oil is such that it

may invoke the arbitration clause to protect its own position. AED Oil is claiming “through or under” AED Services.

In relation to the argument of waiver, the Judge summed up Puffin’s argument as follows:

75. Next, Puffin argued that AED Oil had submitted to jurisdiction and waived its right to arbitrate. It argued that the waiver rendered the arbitration agreement “inoperative” for the purposes of s. 7(5) of the Act.

76. Puffin submitted that AED Oil had gone much further than was required to protect its position when it commenced the proceeding to restrain the appointment of a receiver and manager. In that proceeding it sought declarations challenging the amounts claimed under the notices of demand; sought and obtained an order that Puffin file a defence; and at least acquiesced in an order that Puffin be entitled to file a counterclaim. Both AED Oil and AED Services have filed defences to the counterclaim. Puffin submitted that the counterclaim was a natural and probable consequence of the proceeding commenced by AED Oil and its application for a stay should be rejected on that basis.

Judd, J. concluded that there had been no waiver:

78. Waiver must always be an intentional act with knowledge. But in the context of steps in litigation its application may depend upon the extent to which the relationship of the parties has changed as a consequence. In the present case, AED Oil sought urgent injunctive relief. Such action was expressly authorised as an exception to the arbitration agreement to which Puffin and AED Services are part. It is true that AED Oil and AED Services both filed defences. That step in the proceeding does not, however, constitute a waiver of the right to arbitrate or amount to an election to submit to jurisdiction such as to render the arbitration agreement “inoperative.” Puffin’s position has not materially changed as a consequence. The applicants have in all other respects acted promptly to make their applications for a stay.

79. Further, Puffin does not contend that AED Services has, by its conduct, rendered the arbitration agreement “inoperative.” That being so, it would be unjust to conclude that while AED Services could avail itself of the arbitration agreement a party claiming “through or under” AED Services could not.

Finally, the court held that both the claims of AED Oil and the counterclaims of Puffin fell within the exception in clause 33.10 enabling a party to apply to court to seek urgent interlocutory relief.

V. CONCLUSION

What do the Australian cases teach us about waiver of the right to arbitrate? Let me try and draw some brief conclusions.

- (i) A party who seeks to stay court proceedings and have a matter referred to arbitration faces time limitations under Article 8(1) of the Model Law and section 9(3) of the Arbitration Act 1996 (UK). The application must be made “not later than when first submitting his first statement on the substance of the dispute” or before “he has taken any step in those proceedings to answer the substantive claim.” No such temporal limitation is imposed by Article II(3) of the New York

Convention nor section 7 of the International Arbitration Act 1974 (Australia). The temporal limitations under the Model Law and the Arbitration Act 1996, in requiring an application for a stay to be brought at an early stage in the court proceedings, render it unlikely, but not impossible, that an applicant will be held to have waived its right to arbitration. In contrast, Article II(3) of the New York Convention and section 7 of the International Arbitration Act 1974 (Australia) contain no temporal limitation and, therefore, raise the possibility of an application for a stay being raised at any stage in the court proceedings. In these circumstances, a very real question arises as to what steps a defendant may safely take in litigation before being held to have waived its right to rely on an arbitration agreement.

- (ii) Waiver is an instance of an arbitration agreement being “inoperative” within the meaning of Article II(3) of the New York Convention as implemented by section 7 of the International Arbitration Act of Australia.⁴⁹
- (iii) Australian courts have said that “waiver” should, strictly speaking, be distinguished from estoppel, contract, election, and acceptance of repudiation.⁵⁰
- (iv) An example of estoppel, one which was not accepted on the facts, is found in *Eisenwerk*.⁵¹ An instance of an arbitration agreement being overridden or abrogated by a subsequent agreement or contract is found in *Bakri*.⁵² In both *ACD Tridon* and *Comandate Marine*, the courts held that the selection of a method of dispute resolution does not involve an election between inconsistent rights. Finally, in relation to acceptance of repudiation, I have noted two English cases where it was contended that an arbitration agreement was repudiated and the other party had accepted the repudiation.⁵³
- (v) The Australian cases acknowledge that “waiver” is sometimes used in a broad sense to include estoppel and election. But it has an application beyond these legal doctrines. In *ACD Tridon*, Austin, J. spoke of two further meanings of “waiver.” One, explained by Toohey, J. of the High Court of Australia in *Verwayen*,⁵⁴ is “the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct.” Austin, J. also referred to a “weaker” definition of waiver provided by Dawson, J. in *Verwayen*. “Waiver” in this sense indicates the “non-insistence upon a right either by choice or by default.”

⁴⁹ *Eisenwerk*, *supra* note 19; *ACD Tridon*, *supra* note 19; *La Donna Pty Ltd. v. Wolford A.G.*, *supra* note 45.

⁵⁰ See *ACD Tridon*, *supra* note 19, para. 55 of the judgment; see also the observations of Allsop, J. in *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd.*, *supra* note 46.

⁵¹ *Supra* note 35.

⁵² *Supra* note 34.

⁵³ See *Downing v. LAL Tameer Establishment*, *supra* note 20; *Delta Reclamation Ltd. v. Premier Waste Management Ltd.*, *supra* note 21.

⁵⁴ *Commonwealth v. Verwayen* (1990) 170 C.L.R. 394.

In *Comandate*, Allsop, J. described “waiver” in terms of “abandonment (express or implied) of the arbitration.”⁵⁵

- (vi) In determining whether there has been a waiver of a right to arbitrate, Australian courts have looked at all the relevant facts, including the steps taken in the court proceedings and the statements of the parties, including the correspondence between the parties’ lawyers. Because questions of waiver are fact specific, earlier cases should be read with caution. They merely constitute illustrations, on the specific facts before the court, as to whether there was waiver in that case.

Thus, for example, in *La Donna*⁵⁶ an application for security for costs was held to constitute a waiver of the arbitration agreement. However, had the defendant sought to stay the proceedings prior to the application for security for costs and had the application for security for costs been expressed to be conditional on its stay application not being granted, it might be doubted whether the application for security for costs would have constituted a waiver of the arbitration agreement. In *Eisenwerk*, it was held that the lodging of a defense did not constitute a waiver because it was done by way of a procedural step to prevent the entry of a judgment by default and was accompanied by a covering letter indicating that the defendant required arbitration of the dispute. Absent these special circumstances, it might be thought that the entry of a defense to the substance of a claim would constitute a waiver of a right to arbitration.

⁵⁵ See para. 131 of the Judgment of Allsop, J. in *Comandate Marine*, *supra* note 46.

⁵⁶ *La Donna Pty Ltd. v. Wolford A.G.*, *supra* note 45.