CHAPTER THREE

STAY OF LEGAL PROCEEDINGS TO ARBITRATION

THE ARBITRATION ACT 1996
PART I
ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

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It is not uncommon for a party to an arbitration agreement to regret that decision once a dispute arises, particularly if there is a perception that litigation may be in their better interests.[1] When this occurs, for whatever reason, that party may commence litigation. If the other party consents to litigation, either expressly or by implication – which is demonstrated by taking an active part in the litigation, then the arbitration provision is defeated.

However, this is not inevitable. Where the other party continues to value arbitration there is the facility in most (but not all) jurisdictions to apply to the court to "stay" the litigation as and until the arbitral proceedings are exhausted. Where a stay to arbitration is available it will be :-

1) as a recognition of and respect for the collective choice (autonomy) of the parties, and
2) a policy decision of the courts and the government to defer to private dispute resolution for financial reasons, namely to limit costs to the judicial system.

The stay facility in England and Wales is long standing, but was uncertain prior to the 1996 Act, given the tendency of the judiciary to find reasons for accepting jurisdiction founded on an unjustified professional distrust of private dispute resolution particularly in the period from 1950 through to the passing of the new Act. The 1996 Act sought to immunise the arbitral process from unnecessary interference by the judiciary. Today **s9 Arbitration Act 1996** provides a relatively robust mechanism for the stay of court proceedings to arbitration where the parties have previously agreed that that was the preferred mechanism for the resolution of future disputes between them.

The discretionary grounds for refusal do not admit of a preference for judicial determination. The key factors, as per **s9(4) Arbitration Act 1996**, are that the agreement is null and void, inoperative or incapable of performance. **s9(5) Arbitration Act** negates the effect of a ***Scott v Avery*** Clause in the advent that the court does refuse a stay.

Section 9 Arbitration Act 1996. Stay of legal proceedings.

9.(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.*

9(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.*

9(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.*

9(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.*

9(5) *If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.*

Article 8 Model Law : Arbitration agreement and substantive claim before court

8(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.*

8(2) *where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*

[1] The consequences of choosing a particular form or dispute resolution, a specific forum and governing law can turn out to be detrimental to one party and beneficial to another.

Clause 9 Stay of Legal Proceedings

50. We have proposed a number of changes to the present statutory position (section 4(1) of the 1950 Act and section 1 of the 1975 Act), having in mind Article 8 of the Model Law, our treaty obligations, and other considerations.

51. We have made it clear that a stay can be sought of a counterclaim as well as a claim. The existing legislation could be said not to cover counterclaims, since it required the party seeking a stay first to enter an "appearance", which a defendant to counterclaim could not do. Indeed, "appearance" is no longer the appropriate expression in the High Court in any event, and never was the appropriate expression in the county court. We have also made clear that an application can be made to stay part of legal proceedings, where other parts are not subject to an agreement to arbitrate.

52. Further, the Clause provides that an application is only to be made by a party against whom legal proceedings are brought (as opposed to any other party).

53. We have provided that an application may be made for a stay even where the matter cannot be referred to arbitration immediately, because the parties have agreed first to use other dispute resolution procedures. This reflects dicta of Lord Mustill ***Channel Tunnel v Balfour Beatty*** [1993] AC 334.

54. In this Clause we have made a stay mandatory unless the Court is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. This is the language of the Model Law and of course of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, presently to be found in the Arbitration Act 1975.

55. The Arbitration Act 1975 contained a further ground for refusing a stay, namely where the Court was satisfied that *"there was not in fact any dispute between the parties with regard to the matter agreed to be referred"* These words do not appear in the New York Convention and in our view are confusing and unnecessary, for the reasons given in ***Hayter v Nelson*** [1990] 2 Lloyd's Rep. 265.

56. In Part II of the Bill these provisions are altered in cases of "domestic arbitration agreements" as there defined.

57. We have included a provision (sub-section (5)) that where the Court refuses to stay the legal proceedings, any term making an award a condition precedent to the bringing of legal proceedings (known as a ***Scott v Avery*** clause) will cease to have effect. This avoids a situation where the arbitration clause is unworkable, yet no legal proceedings can be successfully brought. Whilst one respondent suggested that this may go too far, it appears to be a matter of basic justice that a situation in which a party can neither arbitrate nor litigate must be avoided.

THE CASE LAW

It is perhaps not surprising that section 9 has resulted in a flurry of judicial activity, triggered by parties attempting to escape their prior contractual / arbitral obligations. The traffic has mainly and happily for arbitration, been one way, that is to say, in favour of arbitration but there have been exceptions, often linked to the uncertainty of the arbitration clause, jurisdiction and availability of a tribunal. The failures no longer represent judicial opposition to arbitration per se, not surprisingly given that ADR is now flavour of the month, at least with the UK government, the Department of Constitutional Affairs and Her Majesties Court Service (HMCS.), the judiciary's pay master as espoused by the Woolf Reforms and the CPR 1998.

Crouch Mining Ltd v British Coal [1996]. [2] Stay to arbitration – due at end of project likely to be in 2004. Did this deprive a party of opportunity of justice? Neld : NO. This is what the parties contracted for and must therefore live with. Scottish arbitration – implications of New York award.

Palmers Corrosion Control v Tyne Dock [1997]. [3] s4 AA 1950 : Stay: Third party. CA on appeal from QBD (HHJ Faulks) : Stay of third party proceedings to arbitration removed.

Malekout v Medical Sickness Annuity [1998]. [4] S4 AA 1950 Stay appeal : Application for an extension of time and for leave to appeal : availability of legal aid – ability to engage in arbitration due to impecuniosity : applicant would have received £10K / year in invalidity pension – absence of which caused the impecuniosity.

Andrews v Brock Buildings Ltd **[1996]**.[5] Dispute about delay on a contract. Sub-contractor alleged contractor responsible. Contractor terminated the contract. Sub-contractor put into liquidation by a creditor for £8K. Administrator in pursuit of £120K. Contractor commenced action for £60K for delay. Sub-contractor applied for a stay to arbitration – acceded to at first instance – sub-contractor likely to recover £70K for wrongful determination – contractor claim likely to fail. Appeal on grounds of sub-contractor's poor financial status. Appeal failed : Appears likely that the sub-contractor's financial state due to the contractor's wrong doing. Stay to arbitration affirmed.

Ali Shipping v Sour Brodogradeevna Industrija **[1996].**[6] Having participated in an on-going arbitration a party discovered a get out card viz a cancellation clause : They sought a judicial determination in lieu of arbitration : CA held : Too late to back out of the arbitration. If this was a preliminary matter tribunal could deal with it quickly.

Davies Middleton v Toyo Engineering Corp **[1997].**[7] Jurisdiction of court to determine whether ADR exhausted and dispute now subject to arbitration : CA stayed action to arbitration.

Inco Europe Ltd v First Choice Distribution **[1998]**.[8] Stay to arbitration granted.

Wylie v Corrigan **[1998].** Application to cist to arbitration rejected. The litigation had proceeded without objection and decisions entered upon the record. Applicant had waived right to arbitration. Before Lords Coulsfield, Milligan and Allanbridge.

S.S. Foreign &Commonwealth Affairs v Percy Thomas Partnership **[1998].**[9] Contract performed 1986/87. Applications to appoint an arbitrator in April 1996 in respect of a defective roof. Notices of appointment issued in 1992 & 1993. Trial delayed pending supporting evidence. Court struck applications out for inordinate delay.

Beaufort Developments (NI) Ltd v Gilbert-Ash Ltd **[1998].**[10] Arbitration - Stay of court proceedings - Grant of stay - Building contract - Employer claiming damages against contractor and architects for breach of contract and negligence - Building contract providing for disputes to be referred to arbitration -Arbitrator having power to open up, review and revise architects' certificates and opinions - Whether court having similar power - Whether court proceedings should be stayed to enable dispute between employer and contractor to be settled by arbitration.

The appellant employer entered into a contract dated 3 May 1994 with the contractor for the construction of a nine-storey office block in Belfast. The contract was in the standard JCT form. By a separate contract it employed a firm of architects. By art 5 of the JCT agreement, the parties agreed to refer any disputes arising thereunder or in connection therewith to arbitration and by c141 any such arbitrator was expressly empowered to open up, review and revise the architects' certificates. Litigation commenced in Northern

2 ***Crouch Mining Ltd v British Coal Corporation (t/a British Coal) [1996] EWCA Civ 981*** Saville LJ; Brooke LJ. 18th November 1996.
3 ***Palmers Corrosion Control Ltd v Tyne Dock Engineering Ltd [1997] EWCA Civ 2776*** Staughton LJ; Hirst LJ; Potter LJ 20th November 1997.
4 ***Malekout v Medical Sickness Annuity & Life Assurance Society Ltd [1998] EWCA Civ 872*** Hirst LJ : Brooke LJ. 21st May 1998
5 ***Andrews, Trustee Of Property Of v Brock Buildings (Kessingland) Ltd [1996] EWCA Civ 1023***. CA. MR; Aldous LJ; Brooke LJ
6 ***Ali Shipping Corporation v Sour Brodogradeevna Industrija [1996] EWCA Civ 1258.*** CA before Hirst LJ; Waite LJ; Peter Gibson LJ.
7 ***Davies Middleton v Toyo Engineering Corp [1997] EWCA Civ 2318.*** CA before Simon Brown LJ; Phillips LJ.
8 ***Inco Europe Ltd v First Choice Distribution [1998] EWCA Civ 1461***. CA before Hobhouse LJ; Thorpe LJ; Mummery LJ.
9 ***HM S.S. Foreign and Commonwealth Affairs v Percy Thomas Partnership [1998] EWHC TCC 348.*** HHJ Bowsher QC.
10 ***Beaufort Developments (NI) Ltd V Gilbert-Ash Ltd [1998] All ER 778.***

Ireland on 31 August 1995 when the contractor issued a writ, claiming about £230,000 and interest due under six architects' certificates. In December 1995 the employer issued a writ against both the contractor and the architects, claiming damages for negligence and breach of contract. Thereafter, the contractor applied to the court for an order staying the employer's action pursuant to s 4 of the Arbitration Act of (Northern Ireland) Act 1937. The master granted the stay. On appeal, his decision was affirmed by the judge who held that he was bound by authority to hold that an arbitrator would have the power to 'open up, review and revise' certificates or opinions of the architect which the court did not possess and that, if a stay was refused, the contractor would be at a grave disadvantage in that it g would be faced with architect's certificates which the court would not be able to review. The Court of Appeal in Northern Ireland upheld the judge's decision and the employer appealed.

Held - The court had not been deprived, by the power which the parties had h given to their arbitrator to open up, review and revise certificates, opinions and decisions of the architect, of its ordinary power to determine the rights and obligations of the parties and to provide them with the usual remedies. In the circumstances, there would be no injustice to the contractor in refusing a stay. Indeed, to grant a stay would be to risk conflicting decisions in the separate proceedings which would be needed to determine the respective responsibilities I to the employer of the contractor and of the architect. Accordingly, the appeal would be allowed. [11]

Inco Alloys Ltd v First Choice [1999].[12] The third defendant in this action, Steinweg (Handelsveem BY) appealed from the decision of HH Judge Hegarty QC to refuse leave to appeal against his refusal to grant a stay of the action under s.9 Arbitration Act 1996. The application was on the ground that the action, a claim for damages in respect of the loss of a consignment of nickel cathodes being carried from Rotterdam to Hereford, was brought in respect of a matter which the plaintiffs had agreed to refer to arbitration. The plaintiffs' claim against Steinweg was for damages for breach of contract as the first CMR carrier, i.e. the person or entity with whom the actual contract of carriage was made. Inco Europe made that contract with Steinweg and Inco Alloys claimed under the CMR consignment note as the consignee of the goods who was entitled to enforce the contract of carriage. Steinweg claimed that any contractual relationship they had with the plaintiff was on the terms of the FENEX conditions (the conditions of the Netherlands Association for Forwarding and Logistics) as referred to on the back of their invoices, which included an arbitration clause requirng the arbitrators to observe international transport treaties "*and they were therefore entitled to a stay under s.9 of the 1996 Act."*

The judge refused to grant the stay, holding that the arbitration agreement was *"null and void or inoperative"*. He held that the arbitration clause was incorporated in the contractual relationship between Inco Europe and Steinweg and was also binding on Inco Alloys. He also held that as a matter of construction the claim made in the action fell within the matters to be referred to FENEX arbitration.

However, he held that because the plaintiffs were mounting a contractual claim under CMR against Steinweg, the arbitration clause must be held to be void and invalid because it did not expressly provide that the arbitration tribunal should apply the CMR Convention in accordance with the requirements of articles 33 and 41 of CMR. He also held that the plaintiffs had a good arguable case that Steinweg was the first carrier of this consignment under CMR.

He refused leave to appeal because it appeared that s.107 and para. 37 of the Third Schedule to the 1996 Act had removed the jurisdiction of the CA to entertain any appeal from a decision of a lower court or judge under s.9. The issues before the court were its jurisdiction to entertain the appeal and, if it had jurisdiction, the merits of the application.

HELD:

(1) Neither the Report of the Departmental Advisory Committee on the Bill which became the 1996 Act nor the Parliamentary Debates supported an intention to remove any right of appeal in respect of the grant or refusal of a stay of litigation.

[11] ***Northern Regional Health Authority v Derek Crouch Construction Co Ltd*** [1984] 2 All ER 175 overruled.

[12] ***Inco Alloys Ltd v First Choice*** *[1999] 1 All ER 820.*

(2) To conclude that the right of appeal had nevertheless been removed would result in discrepancies of treatment within the 1996 Act and would not be a rational method of treating the UK's international obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as re-enacted in the 1996 Act.

(3) The removal of a right of appeal (with leave) from a decision whether or not to stay litigation covered by an arbitration clause would not be consequential upon anything contained in the 1996 Act, but a radical and additional provision. Such a change in the pre-existing law was not achieved by wording such as that used in s.107 of the 1996 Act. The effect was that the amendment to s18(1) Supreme Court Act 1981 must be understood as giving effect to the exclusions and restrictions on the right of appeal to the CA laid down in Part I of the 1996 Act and no more.

(4) There was nothing in Part I which excluded the jurisdiction of the CA in these circumstances, although there were a number of sections which did, expressly and for good reason, limit rights of appeal.

(5) There was a jurisdiction of the CA to hear appeals from decisions of a judge or court under s.9 of the 1996 Act and there was a right of an aggrieved party to apply to the judge or to the CA for leave to appeal and a power of that judge or the CA to grant leave.

(6) There was no evidence to support the judge's conclusions that the plaintiffs had a good arguable case that Steinweg was the first CMR carrier, i.e. that Steinweg had made a contract of carriage with Inco Europe. He should have concluded that the plaintiffs had not provided any basis for their allegation that Steinweg was the carrier and that the evidence on which the plaintiffs relied showed no more than that Steinweg was a forwarder.

(7) The FENEX arbitration clause did not offend against CMR. The effect of the judge's conclusion was that the Convention could never be satisfied by a multi-purpose arbitration clause. This clause contained an express requirement that the arbitrators should observe the applicable convention [13]

(8) In any event the relevant question was whether a contract of carriage had been made between Inco Europe and Steinweg, an issue which the parties had agreed would be decided by FENEX arbitration and which was antecedent to any question of the application of the CMR Convention. The judge's reasoning in relation to the CMR Convention provided no basis for nullifying the effect of or refusing to enforce that arbitration agreement.

(9) The judge should have held that Steinweg was entitled to the stay of the action against it.

Leave to appeal to the House of Lords granted. The House of Lords granted an application by Inco Europe Ltd for leave to appeal in this case on 21 August 1999. The appeal Committee had been unable to reach a unanimous decision and the matter was therefore referred to a hearing for final resolution. The appeal was set down for hearing on 16 June 1999 and referred to an Appellate Committee for determination.

***Wealands v CLC Contractors Ltd* [1999].**[14] Review of relevant law before confirming stay. Ensured that all liked disputes before same tribunal.

Jitendra Bhailalhhai Patel v Dilesh R Patel [1999].[15] This matter concerned the defendant's appeal from the order of Wilcox J made on 16th October 1998 whereby it was ordered that the defendant's summons dated 19 May 1998 be dismissed. On 21 January 1998 the plaintiff issued a writ endorsed with a statement of claim seeking damages for breach of a building contract by the defendant. On 23 February the defendant acknowledged service of the writ and endorsed on the acknowledgement his intention to defend the action. On 23 March the judgment in default of defence was entered against the defendant. On 28 April the defendant issued a summons seeking (I) an order that judgement entered by the plaintiff be set aside unconditionally (ii) that the defendant be given leave to defend the action and counter claim ; and (iii) that consequential directions be given. At the hearing of the defendant's summons, the judge took the view that because of the terms of paragraphs (I) and (ii) of the summons the situation which arose was one where the defendant had taken a step in the proceedings to answer the substantive claim. Accordingly s9(3) Arbitration Act 1996 applied and the

[13] ***Bofors UVA v Skandia Transport*** *(1982) 1 Lloyds Rep 410 distinguished.*

[14] ***Wealands v CLC Contractors Ltd [1999] EWCA Civ 1922.*** CA before Nourse LJ; Mantell LJ; Mance LJ.

[15] ***Jitendra Bhailalhhai Patel v Dilesh R Patel*** [1999] CA (Lord Woolf MR, *24.3.99.*

defendant could not seek a stay of the proceedings. The defendant appealed. The question which arose for the court's consideration was whether, for the purpose of s9(3) of the 1996 Act, the application for a stay was made after the defendant "had taken any step in the proceedings to answer the substantive claim" by virtue of the issue and service of the summons dated 28 April 1998.

The court held :-

(1) The principle outlined in ***Pitchers v Plaza*** [1940][16] applied to the new law under the 1996 Act as it did to the Arbitration Act 1950. Furthermore, the general approach under the old law had been summarised in Mustill & Boyd on Commercial Arbitration 2nd ed p472.

(2) In a case where there were two affidavits, one which stated that the party required a stay and the other dealing with the merits, that could not be taken as steps for the purpose of s.9 of the 1996 Act and prevent a stay of the proceedings being granted.

(3) The 1996 Act tried to set out in readily understandable terms what was required of parties to arbitrate. The starting point for the court was to approach the language of s9(3) by applying the actual words of the subsection and ask whether the defendant in the instant proceedings had taken any step to answer the substantive claim. At that point it could be appropriate to consider the terms of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, in particular Art.8 thereof. However, the best test was that which appeared in the 1996 Act.

(4) In the instant case, the fact that the defendant had applied to have the default judgment set aside did not assist the plaintiff in his contention that the defendant was not entitled to a stay, since unless there was an application to set aside the default judgment there would be nothing to stay. It followed that if the defendant had merely asked for the default judgment to be set aside he would undoubtedly have been entitled to a stay of the proceedings.

(5) The defendant did not need to ask for leave to defend the action and counterclaim since he was entitled to do so. Whether judgment was set aside was otiose to the relief which the defendant needed. Furthermore, the application seeking consequential directions was ambivalent: one direction could have been a direction that there be a stay of the proceedings. Accordingly, the judge was wrong to dismiss the defendant's application fur a stay of the proceedings. Appeal allowed. Stay of proceedings granted pending the outcome of arbitration.

London Central & Suburban Dev Ltd v Gary Banger *[1999].*[17] By a contract containing an arbitration clause the Defendant provided M&E services to the plaintiff. Disputes arose and the plaintiff commenced High Court proceedings by generally endorsed writ. The Defendants acknowledgement of service form was accompanied by a letter to the court containing a section of about one and a half pages headed "Defence", concluding with a reservation of the right to provide "additional defence information" when the statement of claim was properly particularised. Upon later obtaining legal advice, the Defendants applied to stay the proceedings to arbitration. This was resisted by the plaintiffs on the grounds that by virtue of Section 9(3) of the Act the Defendants had lost the right to a stay by taking a step in those proceedings to answer the substantive claim.

The court held that the Defendants were not entitled to a stay. The court had to consider whether the letter accompanying the acknowledgement of service form was a *"step in the proceedings"* and an *"answer to the substantive claim"*. If so, the court has no power to order a stay because the Section says that an application may not be made by a person who has so acted. In considering whether the letter was a step in the proceedings, the court should "*step back*" and have regard to relevant related acts and exchanges between the parties following that letter. In addition the court was not either required or entitled to confine its consideration of the requisite step to ones that were in strict conformity with the rules of court, though the non-conformity of an alleged step to the rules might be a relevant consideration. In this case, although the Defendant was entitled to await service of a statement of claim from the plaintiff before serving a defence, he was not precluded from serving one earlier, and this in fact is what he did. Thus the letter is the taking of a step in the proceedings and is one which answers the substantive claim.

[16] ***Pitchers v Plaza*** [1940] 1 All ER 151

[17] ***London Central & Suburban Dev Ltd v Gary Banger*** *[1999] ADRLJ 119.*

Reichhold Norway ASA v Goldman Sachs International **[1999]**.[18] Where plaintiffs, who were engaged in a foreign arbitration against a company not party to relevant English proceedings, brought an action in England against defendants in respect of claims which arose out of the same subject matter the court, in exercise of its inherent jurisdiction, might properly stay the action pending final determination of the arbitration. The Court of Appeal so held when dismissing an appeal by Reichhold Norway ASA and Reichhold Chemicals Inc from Mr Justice Moore-Bick, who, on the application of the defendants, Goldman Sachs International, stayed the action brought against them by the plaintiffs for damages for negligent misstatement in respect of the sale to the plaintiffs' by Jotun AS of the issued share capital of Jotun Polymer Holdings AS.

The stay was to operate until final determination of the arbitration between the plaintiffs and Jotun which was proceeding in Norway under an arbitration clause in the sale agreement governed by Norwegian law.

The Lord Chief Justice referred to the factual inter-relationship between the action and the foreign arbitration, and said that Mr Carr accepted the court's wide discretion to grant a stay and did not challenge its jurisdiction to make such an order: but he had submitted that such power could never properly be exercised in a case such as the present. He had argued that the plaintiffs' case could not be stigmatised as abusive, oppressive, vexatious or brought in bad faith and that the present order was without precedent. Mr Pollock had accepted both submissions.

Mr Carr had contended that the order violated a fundamental principle that a plaintiff making a bona fide claim, not tainted with abuse, oppression or any vexatious quality might sue in the English court any defendant over whom the court had jurisdiction; that a plaintiff did not have to obtain "a passport" from the court to sue such a defendant; and that the court had no role to decide whom a plaintiff might or might not sue here. [19] He also relied on the current doctrines of lis alibi pendens and forum non conveniens, both of which, he argued, depended on showing disadvantage to the defendant from suit in the English jurisdiction.

His Lordship referred to the defendants' argument, which he accepted subject to all the qualifications which were inherent in it. He said that Mr Pollock had taken issue not so much with the general thrust of Mr Carr's submissions as with their absolute nature: he did not assert that a plaintiff had to obtain "a passport" and he pointed out that the judge had not lent support to any such statement of principle. But he did assert that forensic practice was changing and developing; that the movement was towards greater control by the courts over the course of proceedings; and that the Court of Appeal should be slow to interfere with a judge's procedural directions unless, unlike here, they were vitiated by error of law or manifest error. [20]

His Lordship referred to the series of examples posed by Mr Pollock in seeking to justify the making of the judge's order: If the plaintiffs had issued proceedings in England against Jotun and separately against the defendants the court could order that the action against the defendants await the outcome of the proceedings against Jotun. Similarly, if the plaintiffs gave notice of arbitration against Jotun in England pursuant to an English arbitration clause and also sued the defendants in court proceedings the court could order that the action await the outcome of the arbitration reference against Jotun.

In each case Mr Pollock had not submitted that the court would necessarily make such an order, but only that on appropriate facts it properly could do so. If his propositions were correct, he posed the bull question: W***hat difference did it make in principle that the arbitration was in Norway instead of England***? He had contrasted the effect of the judge's order with a stay granted on grounds of lis alibi pendens or forum non conveniens where it would in all probability be permanent and the plaintiff would be driven from the judgment seat. That was not so here; the plaintiffs' claim against the defendants was alive and well, but delayed for a year to await the outcome of the arbitration in Norway and in the expectation, on the judge's part, that the action might then not be effective at all.

As Mr Pollock had accepted, a stay such as the present would only be granted in rare and compelling circumstances, account always being taken of the legitimate interests of plaintiffs and the requirement that

[18] ***Reichhold Norway ASA v Goldman Sachs International [1999] EWCA Civ 1703*** before Lord Bingham of Cornhill, CJ, Otton L.J. Robert Walker L.J.

[19] see ***Abraham v Thompson*** ([1997] 4 All ER 362, 374) and ***Molnlycke AB v Procter and Gamble Ltd*** ([1992] 1 WLR 1112, 1124).

[20] see ***Ashmore v Corporation of Lloyd's*** ([1992] 1 WLR 446) and ***Thermawear Ltd v Linton*** (The Times October 20, 1995).

there should be no prejudice to them beyond that which the interests of justice were thought to justify. It was plain that in exercising the jurisdiction the court would have to be mindful of the effect of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). In the present case the judge's order fell properly within the exercise of his discretion; the appeal would be dismissed. Lord Justice Otton and Lord Justice Robert Walker agreed.

Bankers Trust Co International v P T Jakarta International Hotels & Development *[1999] QBD.* This matter arose as a result of an application for an injunction to restrain litigation in Indonesia pending the hearing of an arbitration in England. In the autumn of 1997 the applicants and the respondent entered into a number of currency swap transactions under the terms of an ISDA Master Agreement which contained a London Court of International Arbitration ('LCIA') arbitration clause providing for arbitration in London under English law. In January 1998, due to the financial turmoil in Indonesia, the respondent defaulted on the agreements, and subsequent negotiations for restructuring came to nothing. In January 1999 the respondent instituted proceedings in Indonesia claiming that the transactions should be set aside, and claiming damages and indemnities of about US$850 million. These proceedings were served on the applicants in February for a return date of 16 March. In the meantime the applicants gave notice of default, and then terminated the agreements on 25 February, claiming sums due of about US$85 million.

On 2 March Cresswell J ordered a temporary ex parte injunction to last until the present hearing to restrain the Indonesian litigation, and the applicant initiated an LCIA arbitration. Full notice was given to the respondent of the application to extend the injunction over the hearing of, and delivery of an award in, the arbitration, but the respondent did not appear at the hearing on 12 March. The court held:-

(1) To be entitled to an injunction the applicants had to establish a high degree of probability that their case was right and that they were entitled as of right to have the foreign litigation restrained. Judgment of Colman J in ***Baniers Trast Co v P T Mayora Jndbh*** *(1999)* followed.

(2) The claims made in the Indonesian proceedings appeared to disclose no causes of action.

(3) In any event all of those claims were covered by the arbitration clause and could be dealt with in the arbitration. The Indonesian proceedings were thus a breach of the arbitration clause contained in the ISDA Master Agreement. The injunction, if granted, would be to restrain this breach.

(4) The LCIA was one of the longest-established of all major international arbitration institutions; to deny effect to an arbitration clause pursuant to LCIA rules would be to create a real risk that the worldwide currency swaps market might be undermined

(5) It was highly desirable that the arbitration be conducted as expeditiously as possible, as the ***Mayora*** dispute would be.

(6) The applicants had discharged the burden imposed by the case of ***Mayora*** (supra), and an injunction over the hearing of the arbitration and delivery of an award would be granted.

Injunction accordingly.

La Pantofola D'Orso S.P.A. v Blaine **[1999].**[21] Application to cist to arbitration rejected. The litigation had proceeded without objection. Claimant had waived right to arbitration. Lord Hamilton.

Redland Aggregated Ltd v Shepherd Hill Engineering Ltd *[1998] CA.* Appeal of the plaintiff from the order of Mr Recorder Brian Knight QC sitting as a deputy Official Referee made on 23 May 1997 whereby he dismissed the plaintiff"s originating summons for declaratory' relief that the subcontract dispute between itself and the defendant be referred to arbitration.

The defendant was engaged by Essex Country Council ('the council') under the standard form of civil engineering contract ICE Fifth Edition (June 1973) (revised 1979) (reprinted January 1986) as main contractor for the construction of a bypass ('the main contract' I. The plaintiff was engaged by the defendant under a subcontract. standard form FCEC 'Blue' Form (September 1984). to carry out asphalting ('the subcontract'). The works under the subcontract were substantially completed by 17 January 1995 and the works under the main contract were certified as complete on 19 February 1995. Disputes arose between the plaintiff and the defendant

[21] ***La Pantofola D'Orso S.P.A. v Blaine [1999] ScotsSC CA107/14(20)/97.***

relating to payment of an outstanding sum. The plaintiff sought by letter dated 15 February 1995, to refer that dispute to arbitration in accordance with the arbitration agreement in the subcontract.

The defendant sought to have the subcontract dispute dealt with together with a dispute that had arisen under the main contract. The issues in respect of which the defendant alleged touched and concerned the issues in the subcontract dispute. This was provided for under clause 18(2) of the subcontract which provided that *" the contractor may by notice in writing to the subcontractor require that any dispute under the contract be dealt with jointly with the dispute under the main contract in accordance with the provisions of clause 66 thereof".*

The defendant served such a notice on 6 March 1995 but then continued to negotiate with the council After two years the plaintiff sought declaratory relief that it was entitled to have the subcontract dispute referred to arbitration whilst the defendant argued that it was entitled to continue negotiation with the council The judge found for the defendant and dismissed the plaintiff's summons. The plaintiff appealed contending that the defendant had a positive duty to progress tripartite arbitration. The court held :-

(1) It was clear that the purpose of the provisions for joining a subcontract dispute to a main contract dispute was to avoid the possibility of inconsistent findings. ***Erith v Costain*** [*1994)* ADRLJ *123).*

(2) Although cl.18(2) of the subcontract provided for notice to be served joining the subcontract dispute to the main contract dispute, the main contract did not contain any provision regarding the determination of subcontract disputes.

(3) The defendant's submissions that because of the difficulties involved in a tripartite arbitration the parties must have intended for some alternative form of joint dispute resolution (such as two sets of arbitration proceedings before the same arbitrator) could not be supported. The wording of cI. 18 clearly envisaged a tripartite arbitration.

(4) That being so, the question arose as to when the defendant was obliged to arrange the tripartite arbitration and in particular whether there was no limit of time whilst the defendant negotiated with the council.

(5) Negotiations were to be encouraged but a lengthy period of negotiation was not allowed by the provisions of the main contract. Under the main contract clause 66 set out a timetable under which the dispute could be referred to an engineer; if there was no decision within three months then within a further three months the dispute could be referred to arbitration. Where no specific time limits were laid down a reasonable time was to be implied.

(6) A reasonable time in the circumstances would be a short period-and certainly not as long as 2 years or 18 months.

(7) The problem which arose was where it was not possible to arrange for a tripartite arbitration, either because the defendant was not prepared to arrange it or the council employer was not willing to agree to it.

(8) The subcontract cl.18 was not a promissory term entitling the plaintiff subcontractor to damages for breach but a condition subsequent. That is, if not performed the plaintiff was not obliged to participate in a tripartite arbitration and could pursue its claim independently against the defendant main contractors ***Sudbrook v Eggleton*** [*1983].*[22]

(9) Here the defendant had shown that it was unable or unwilling to pursue tripartite arbitration and in those circumstances the plaintiff was entitled to have the subcontract dispute independently referred to arbitration.

Appeal allowed. Leave to appeal to the House of Lords refused. The House of Lords received an application from Shepherd Hill Engineering Ltd seeking leave to appeal in this case. The Appeal Committee was unable to reach a unanimous decision and the matter was therefore referred to a hearing on 29 March 1999.

Birse Construction Ltd v St David Ltd **[1999].**[23] Jurisdiction : Proof of existence of a contract, containing an arbitration agreement that gave rise to jurisdiction and right to a stay to arbitration.

Plaintiff contractors commenced court proceedings to recover payment for work allegedly done under a letter of intent. The Defendants asserted that the works in question were performed under a contract incorporating

[22] ***Sudbrook v Eggleton*** *[1983] AC 444).*

[23] ***Birse Construction Ltd v St David Ltd [1999] EWHC TCC 253***

the conditions of the JCT 80 Standard Form of Contract and containing an arbitration clause, and they applied to stay the plaintiff's action to arbitration pursuant to Section 9 of the Act.

The court held that the works in question were undertaken pursuant to a contract containing an arbitration clause, and accordingly the matter would be stayed to arbitration. Section 30 of the Act permits an arbitral tribunal to decide questions of jurisdiction but it is not mandatory and the existence of this power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed.

Normally a court would first have to be satisfied that there is an arbitration agreement before staying the proceedings to arbitration, but in some cases it would be better for the court to leave the matter to be decided by an arbitrator (e.g. where the determination of whether or not a contract was made also embraces the determination of the scope of the contract). Ordinarily however, the matter should not be left to an arbitrator unless it is virtually certain that there is an arbitration clause or there is only a dispute about the ambit or scope of the arbitration agreement. It is highly desirable that an issue such as the formation of a contract incorporating an arbitration agreement should be determined by the court before time and money is expended on an assumption which might turn out not to be valid. HHJ Humphrey Lloyd. 12th February 1999

Birse Construction Ltd v St David Ltd **[2000].**[24] Jurisdiction : No contract concluded. Arbitration agreement not alive. No stay to arbitration.

George Martin Ltd v Shaheed Jamal **[2000].**[25] Waiver : application to sist hearing to arbitration denied. By participating in the litigation without complaint the right to arbitrate was lost.

Ahmad Al Naimi (t/a Buildmaster C.S) v Islamic Press Agency Inc. **(2000)** Waller J CA. The plaintiff respondent was a builder who in July 1996 signed a con-tract in the form JCT Agreement for Minor Biildng Works (1980 edition) to carry out building work for the defendant. During the course of the contract the respondent carried out work not originally envisaged in the contract The contract was terminated and the respondent claimed the additional work was not covered by the contract but was the subject of a separate, oral contract which did not contain an arbitration clause. The respondent was legally aided, but his legal aid would not cover arbitration proceedings.

The matter went before Bowsher J, QBD. It was held that where there were genuine disputes between parties to a contract which might or might not be caught by the arbitration clause in the contract, the court should order a stay of court proceedings under **s.9 Arbitration Act 1996** and allow the arbitrator to decide any question of his jurisdiction under s.**30 Arbitration Act 1996.** The court went on to hold that bearing in mind ***Halki Shipping Corp v Sopex Oil Ltd*** [1998*]*,[26] there were 'genuine disputes' concerning the construction of the contract of July 1996. Accordingly the application was granted and the proceedings were stayed under **s.9.**

The claimant appealed that judgement on the grounds that the judge had refused to decide whether the matters forming the subject matter of the action were covered by the arbitration agreement relied on by the defendants. The appeal raised the point as to the proper approach of the court to an application under **s.9 Arbitration 1996 Act,** particularly in light of the change, brought about by the Act, as to the arbitrator's powers to decide his own jurisdiction. The court held :-

(1) There were four courses open to the court on an application to stay proceedings under **s.9 Arbitration Act 1996.** These were:
   (a) to decide on the affidavit evidence that there was an arbitration agreement, and grant a stay accordingly;
   (b) to stay the proceedings on the basis that the arbitrator would decide whether there was an arbitration agreement;
   (c) to order an issue to be tried; or
   (d) to decide that there was no arbitration agreement and dismiss the application.[27] The court could

[24] ***Birse Construction Ltd v St David Ltd [2000] Lawtel AC0100051.*** Recorder Colin Reese QC. TCC. August 2000.
[25] ***George Martin (Builders) Ltd v Shaheed Jamal [2000] Scotsc A1291/98.*** Sheriff AL Steward.
[26] ***Halki Shipping Corp v Sopex Oil Ltd*** *(1998] 1 WLR 726,*
[27] *dicta* of HH Judge Humphrey Lloyd CC in ***Birse Construction Ltd v St David Ltd*** *(1999) BLR 194* approved

alternatively grant a stay under its inherent jurisdiction. This could be sensible where good sense and litigation management made it desirable for an arbitrator to consider the whole matter first

(2) Where, as here, both sides wished the court to decide on the affidavit evidence whether or not the dispute was covered by the arbitration agreement then the court should do so, and the judge was wrong to refer that decision to the arbitrator.

(3) On the affidavit evidence it was overwhelmingly clear that there was only ever a single contract which had been extended to cover the additional work and to which the arbitration clause applied.

(4) A stay should therefore be granted, and at the same time it should be made clear that the court had decided the issue of the applicability of the arbitration clause in favour of the defendant

Appeal dismissed.

Inco Europe Ltd & Taco Alloys Ltd v First Choice & Logistics Planning Services Ltd [2000] HL. The matter concerned the plaintiffs' appeal from the Court of Appeal's (CA) decision solely on the question of whether an appeal lay to the CA from a decision of the first instance court made under s.9 of the Arbitration Act 1996.

The plaintiffs did not seek to challenge the decision of the CA if; contrary to their submissions, the CA did have such jurisdiction. Section 9, which empowered the court to stay legal proceedings brought against a patty to an arbitration agreement in respect of a matter; which under the agreement was to be referred to arbitration, was silent on this point.

It was argued for the appellants that s.1 8 (1)(g) of the Supreme Court Act 1981, as amended by s107 and Sch. 3 to the 1996 Act, read: *'No appeal shall lie to the Court of Appeal. . . (g) except as provided by Part I of the Arbitration Act 1996 from any decision of the High Court under that Part'*. The effect of this, as the decision under s.9 was a decision of the High Court under Part I of the 1996 Act, was that no appeal lay to the CA from the original decision. The CA rejected the submission. **HELD**:

(1) The decision of the CA was correct. The drafting of para. 37(2) Sched 3 which set out the amendment to s.18(1)(g) of the 1981 Act, had gone awry.

(2) The phrase 'except as provided' in s18(l)(g) in its original form meant 'except in accordance with the provisions of the Arbitration Act 1979', those provisions being restrictions on appeal. Section 18(1)(g) did not impose additional restrictions on the right to appeal to the CA from decisions of the High Court, but brought forward into s18(1) restrictions on rights of appeal already expressed in the relevant sections of the 1979 Act.

(3) The style of drafting of the 1996 Act pointed strongly to the conclusion that where a section was silent about an appeal from a decision of the court, no restriction was intended. The draftsman must have intended that, save to the extent that an appeal was expressly circumscribed, parties to court decisions under the various sections would be able to exercise whatever rights of appeal were available to them from sources outside the 1996 Act itself.

(4) However; as drafted and enacted, by including within its scope every court decision under Part I 1996 Act, the new para. (g) abolished an appeal to the CA from all court decisions made under Part I save for decisions made under sections containing restrictions on such an appeal. This abolition, moreover; was achieved by a paradoxical drafting technique: when the draftsman intended to restrict the right of appeal, he did so expressly, but when taking the more far-reaching step of wholly excluding a right of appeal he said nothing about this in the section. Instead, on the literal reading of the new para. (g) the abolition was effected by an obscure provision, supposedly no more than consequential, in one of the schedules to the Act Para. 37(2) Sch. 3).

(5) The draftsman had slipped up. The new s18(1)(g), substituted by para. 37(2), should be read as confined to decisions of the High Court under sections of Part 1 which made provision regarding an appeal from such decisions. In other words, 'from any decision of the High Court under that Part' was to be read as meaning 'from any decision of the High Court under a section in that Part which provides for an appeal from such decision'.

(6) In this case the court was sure of the intended purpose of the statute in question, that the draftsman and

Parliament had inadvertently failed to give effect to that purpose and was also, crucially, sure of the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The insertion of the additional words was not too far-reaching. The court was able to give effect to a construction of the statute which accorded with the intention of the legislature. Appeal dismissed.

***Zietsman, R v Dental Practice Board* [2000].**[28] Where a tribunal has the power to defer a decision pending outcome of other proceedings this power does not override any duty to promptly investigate. A tribunal cannot indefinitely defer pending an outcome which is delayed itself for an indefinite period.

Ahmad Al-Naimi v Islamic Press Agency Inc* [2000] EWCA *Civ 17.[29] Stay issued at 1st instance - leaving it to tribunal to rule on jurisdiction : On appeal stay confirmed - but CA chose to address the jurisdiction issue and found the tribunal had jurisdiction..

***Petroleo Brasiliero SA v Mellitus Shipping Inc* [2001].**[30] Stay to arbitration s9. Part 20 defendants to a charter party action cannot seek a stay on grounds of arbitration clause in bills of lading. Court had the jurisdiction over the action to which they could be validly enjoined.

***Capital Trust Investment Ltd. v Radio Design AB* [2002].**[31] Was appellant a party to the arbitration agreement? Had the respondent's taken a step in litigation preventing a stay. No. Stay to arbitration in Sweden upheld.

***Downing v Al Tameer Establishment* [2002]**:[32] Disputes as to whether there was a valid arbitration agreement : Held : Arbitrator has initial jurisdiction over jurisdiction. Choice of substantive law not indicative of procedural law.

***McGruther & Apollo Enginering* [2002]**[33] Liquidation proceedings cisted by lower court pending outcome of arbitration. Appeal repelled on the facts

McGruther v Blin [2003] ScotSC P30/01.[34] In this Scottish case liquidation proceedings were cisted (stayed) by the court pending the outcome of arbitration by a lower court. The appeal was repelled.

***Sun Life Assurance Co of Canada v CX Reinsurance Co Ltd.* [2003].** [35]Appeal against a refusal to grant a stay on the grounds that there was no arbitration agreement. Whilst there was by mutual agreement an oral agreement, a written treaty was never concluded between the parties. Appeal failed. CA

***Import Export Metro Ltd. v Compania Sud Americana De Vapores S.A.* [2003].**[36] Application for stay to arbitration in Chile refused. Whilst the fact that the two proceedings were at the same time and that might cause inconvenience, the claims were distinct and separate. Application refused.

***Through Transport Mutual Insurance v New India Assurance* [2003]**.[37] Declaration that there was a valid arbitration agreement : anti-suit against Finnish litigation.

***Newman Shopfitters v Gleeson* [2003].**[38] Want of prosecution : Case cisted for want of prosecution – originally destined for arbitration – claimants delayed excessively and lost right of action.

Whiting v Halverson* [2003].**[39] ***An ex-member of a club continued to be bound by the club's rules, including arbitration procedures after membership ended. Accordingly the dispute was stayed to arbitration at the Club's behest. This is a logical application of the doctrine of separability, which ensures that simply because a

28 ***Zietsman, R v Dental Practice Board [2000] EWHC Admin 433.*** HHJ Jack Beatson QC.
29 ***Ahmad Al-Naimi (t/a Buildmaster Construction) v Islamic Press Agency Inc [2000] EWCA Civ 17.*** CA before Waller LJ; Chadwick LJ.
30 ***Petroleo Brasiliero SA v Mellitus Shipping Inc [2001] EWCA Civ 418.*** CA before Potter LJ; Sedley LJ; Jonathan Parker LJ.
31 ***Capital Trust Investment Ltd. v Radio Design AB [2002] EWCA Civ 135.*** CA before Schiemann LJ; Clarke LJ; Arden LJ.
32 ***Downing v Al Tameer Establishment [2002] EWCA Civ 721.*** CA before Potter LJ; Keene LJ; Mr Justice Sumner.
33 ***McGruther & Apollo Enginering [2002] P310/01.*** . Lady Smith.
34 ***McGruther v Blin [2003] ScotSC P30/01.*** Lords Hamilton ; McCluskey and Weir.
35 ***Sun Life Assurance Co of Canada v CX Reinsurance Co Ltd. [2003] EWCA Civ 283.*** Potter LJ; Carnwath LJ; Mr Justice Lawrence Collins.
36 ***Import Export Metro Ltd. v Compania Sud Americana De Vapores S.A. [2003] EWHC 11 (Comm).*** Mr Justice Gross.
37 ***Through Transport Mutual Insurance Association Ltd v New India Assurance Co. Ltd. [2003] EWHC 3158 (Comm)*** . Mr Justice Moore-Bick
38 ***Newman Shopfitters Ltd v. M.J. Gleeson Group Plc [2003] ScotSC 17.*** Sheriff Principal Ian MacPhail
39 ***Whiting v Halverson [2003] EWCA Civ 403.*** CA before Schiemann LJ; Brooke LJ.

contract has been purportedly been avoided, lawfully or otherwise, this provides no grounds to evade the chosen dispute resolution procedure. Arbitration survives determination of relationships.

Placito v Slater **[2003]** .[40] Party had undertaken not to pursue an action : this did not prevent the court from considering an application for extension of time. In the circumstances no extension was justified.

Benford Ltd v Lopecan SL **[2004].**[41] Main contract contained an arbitration clause – but individual supply contracts subject to litigation. Counterclaim to a supply contract had potential to involve main contract issues if sum due rose above a certain level. Court refused stay – decided the amount – in the event below the limit. Court pointed out that once the figure was fixed by the court, an arbitration would be pointless since all the tribunal could do would be to confirm the judgment figure.

Through Transport Mutual Ins. Assoc (Eurasia) Ltd v New India Ass. Assoc. Co Ltd **[2004].** [42]Stay to arbitration upheld : Foreign Anti-Suit injunction lifted.

Birse Construction Ltd. v McCormick Ltd **[2004].**[43] Time of accrual of cause of action. Coulson HHJ Peter

Enron v Clapp **[2004].**[44] Arguable defence to part of an enforcement judgment : other part no defence. Enforcement in part ordered. Any dispute on quantum re outstanding sum to be settled if at all at either parties behest by arbitration. Anti-suit injunction against commencing action in Texas court since arbitration / exclusive jurisdiction & law clause effective.

Three Shipping v Harebell Shipping **[2004].**[45] Owners had an option to arbitrate or litigate. Charterers had no option. Owners submitted dispute to arbitration. Charterers commenced litigation. Opposing the action for a stay the charterers maintained that since they had no option to arbitrate they had no duty to do so and thus had done nothing wrong and the litigation was therefore valid. Court disagreed. Once the owners opted for arbitration the charterers could not decline and litigation ended.

ET Plus SA v Welter **[2005].**[46] Whilst Et Plus & Channel tunnel were subject to a Paris Arbitration agreement others including the respondent to this application were not, accordingly the stay to Paris rejected. Certain of the actions filed were dismissed out of hand. There remaining actions were stayed pending the outcome of the Paris arbitration.

Law Debenture Trust Corporation Plc v Elektrim Finance BV **[2005].**[47] Contract provided for arbitration but gave one party the right to litigate. One party submitted dispute to arbitration. Subsequently the other commenced litigation. Application for stay refused. The contract did not create an embargo on litigation once arbitration commenced.

OT Africa Line Ltd v Magic Sportswear Corp **[2005]**. [48] Issue : whether s6(1) of the Canadian Marine Liability Act 2001 which enabled the Canadian court to override an arbitration clause, choice of law and exclusive jurisdiction (here London) was a reason to issue to stay to the Canadian Court. Held : Stay refused – anti-suit injunction issued.

Carvill v Camperdown **[2005]**.[49] Arbitration provisions between A & B do not prevent C who is not a party to the arbitration agreement from maintaining court action and enjoining A & B. Stay refused..

Nokia v Interdigital Technology Corp **[2005].**[50] Application to stay patent proceedings pending arbitration on amounts due under licence. Held : Stay refused – validity of patent a key factor in the validity of sums due under the licence and thus key to the outcome of the arbitration – and thus needs to be settled as soon as

40 ***Placito v Slater [2003] EWCA Civ 1863***. Potter LJ; Laws LJ; Arden LJ

41 ***Benford Ltd. v Lopecan SL [2004] EWHC 1897 (Comm).*** Mr Justice Morison

42 ***Through Transport Mutual Ins. Assoc (Eurasia) Ltd v New India Ass. Assoc. Co Ltd [2004] EWCA Civ 1598.*** LCJ; Clarke LJ; Rix LJ.

43 ***Birse Construction Ltd. v McCormick (U.K.) Ltd [2004] EWHC 3053 (TCC)***

44 ***Enron (Thrace) Exploration and Production BV v Clapp [2004] EWHC 1612 (Comm).*** Mr Justice Langley

45 ***NB Three Shipping Ltd. v Harebell Shipping Ltd. [2004] EWHC 2001 (Comm).*** Mr Justice Morison.

46 ***ET Plus SA v Welter [2005] EWHC 2115*** . Mr Justice Gross

47 ***Law Debenture Trust Corporation Plc v Elektrim Finance BV [2005] EWHC 1412 (Ch)*** . See ***Three Shipping Ltd v Harebell Shipping Ltd*** [2005] 1 Lloyds Rep 509. Order restraining continuation of the arbitration issues. Mr Justice Mann

48 ***OT Africa Line Ltd v Magic Sportswear Corporation [2005] EWCA Civ 710*** . CA before Laws LJ; Rix LJ; Longmore LJ.

49 ***Carvill America Incorporated v Camperdown UK Ltd [2005] EWCA Civ 645***. CA before Ward LJ; Clarke LJ; Longmore LJ.

50 ***Nokia Corporation v Interdigital Technology Corporation [2005] EWCA Civ 614.*** CA before Mummery LJ; Rix LJ; Jacob LJ

possible to assist the tribunal.

***West Tankers Inc v Ras Riunione Adriatica Di Sicurta Spa* [2005].**[51] Contract substantively subject to Italian Law. Arbitration – London subject to English Law and jurisdiction. Arbitration virtually complete. Syracuse litigation commenced, hearings scheduled several months away. Under Italian law subrogation did not extend to arbitration – thus the arbitration would be ignored in Italy. Court concluded that this was an appropriate case for an anti-suit order.

***Sawyer v Atari* [2005].**[52] Four contracts re publishing rights of computer games subject to arbitration – stay granted : remaining 4 contracts – court held proper law is English law not US and stay refused.

***Glidepath v Early Red Corp* [2005].**[53] Unsuccessful defendant to an action for stay to arbitration and withdrawal of freezing order appealed costs on basis that the day before the hearing they had conceded the stay. However this was not drawn to attention of court and argument adduced resisting the stay. Appeal failed.

***Abu Dhabi Investment Co v Clarkson & Co* [2006].**[54] Application for stay to arbitration in the UAE. Court held that since arbitration as opposed to litigation in the UAE, of a dispute not related to the execution of a contract, is permissive, not compulsory, this amounted to an application for a stay to litigation in the UAE. Accordingly the application was refused.

Weissfisch v Julius* [2006] EWCA *Civ 218. Jurisdiction : Unsuccessful appeal against refusal of application for an interim order to stay arbitral jurisdiction hearing. Arbitration agreement - seat - Switzerland : Swiss choice of Law : Kompetenze/Kompetenze. CA before the LCJ; MR; Mr Moses.

***Park Lane Ventures Ltd v Locke* [2006].**[55] Party withdrew and application for stay. The application submitted existence of documents. This provided evidence for the purposes of this litigation that both parties intended the documents to have legal force.

***Ravennavi v New Century Shipbuilding Co* [2006].** [56] "An Entire agreement" contract which contained an arbitration clause replaced a prior agreement that contained a litigation clause. Application to serve out of jurisdiction withdrawn.

***Legal Services Commission v Aaronson* [2006].**[57] Following a successful application for a stay the LSC argued that costs should not follow the event because their attempts to settle outside arbitration were frustrated because the applicants had refused to disclose documents outside the arbitration. Held : Whilst obstructive, this was not a reason to deprive the applicants of costs of the application.

***Korbetis v Transgrain Shipping* [2005].**[58] Had an arbitrator been validly appointed? A fax accepting the nomination of an arbitrator was sent to the wrong fax address and was not received. This defect was discovered many months later and an attempt made to appoint the arbitrator by sending a statement of claim direct to him. Postal rule applied to misdirected fax. No acceptance communicated. No appointment made. The arbitration became time barred and the subsequent appointment was too late. A section 12 application for extension of time refused.

***Hillcourt v Teliasonera [2006]*.**[59] Stay of Enforcement of arbitral award pending litigation of significant counterclaim.

Fiona Trust v Privalov [2006]. [60] S9 AA 1996 : Stay to arbitration. Application to stay to arbitration refused.

***Albon v Naza [2007]. .*[61]** S9 AA 1996 : Stay s9 : forum. Multi-faceted dispute : car sales to Malaysia : some

51 ***West Tankers Inc v Ras Riunione Adriatica Di Sicurta Spa [2005] EWHC 454 (Comm).*** Mr Justice Colman

52 ***Sawyer v Atari Interactive Inc [2005] EWHC 2351 (Ch).*** Mr Justice Lawrence Collins.

53 ***Glidepath Holdings BV v Early Red Corporation [2005] EWCA Civ 525.*** CA before the VC; Clarke LJ; Neuberger LJ.

54 ***Abu Dhabi Investment Co v H Clarkson & Company Ltd. [2006] EWHC 1252 (Comm)*** Mr Justice Morison.

55 ***Park Lane Ventures Ltd v Locke [2006] EWHC 1578 (Ch).*** Mr John Randall QC.. Deputy Judge

56 ***Ravennavi Spa v New Century Shipbuilding Company Ltd [2006] EWHC 733 (Comm).*** Mrs Justice Gloster.

57 ***Legal Services Commission v Aaronson [2006] EWHC 1231 (QB) .*** Mr Justice Jack

58 ***LJ Korbetis v Transgrain Shipping BV [2005] EWHC 1345 (QB) .*** Toulson HHJ

59 ***Hillcourt v Teliasonera [2006] EWHC 508 (Ch) LAWTEL AC9100860.*** HHJ Evans-Lombe J.

60 ***Fiona Trust & Holding Corp v Privalov [2006] EWHC 2583 (Comm)*** : Mr Justice Morrison . 20th October 2006.

aspects subject to Malaysian arbitration : other aspects entirely UK based and not subject to arbitration. Permission to pursue certain claims annulled.

A v B [2007] EWHC 54 (Comm) [62]***:*** Costs : Stay to arbitration : CPR 44.4(2) : Costs of a successful application for a stay to arbitration normally awarded on an indemnity basis.

West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA [2007] UKHL 4 :[63] Stay : Restraining order and EC Law in support of arbitration. Whether or not it was inline with EC Regulation 44/2001 to restrain a party from pursuing litigation before the court of a member state was in question. House of Lords felt it was but that a reference to the ECJ was justifiable since matter not entirely clear.

Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD [2007] EWHC 665 (Ch)[64] S9 AA 1996 : Stay s9 : Jurisdiction. Existence of contract and Malaysian arbitration clause. Held : English Court had first to determine existence of contract before a stay to arbitration could be ordered.

Homepace Ltd v Sita South East Ltd [2007] EWHC 629 (Ch):[65] S9 AA 1996 : Validity of certification. Certification process and arbitration provision in a mining lease. Certification as to mine-able resources flawed - certifier did not answer the question posed - departing from the remit. Certificate invalid - accordingly arbitration clause did not kick in. No stay to arbitration.

Mabey and Johnson Ltd v Danos [2007] EWHC 1094 (Ch) :[66] S9 AA 1996 : Stay to arbitration : fraud - forum conveniens. Agency dispute already subject to arbitration - in Jamaica. Fraud action filed against the Principal - should this be stayed to arbitration as well - did Jamaica have jurisdiction. Held : All the relevant players in the UK. Justice required a full trial. Stay refused. Two applications for stay to arbitration in a civil fraud trial. One successful – relevant arbitration clause : one failed – third party not subject to arbitration clause.

Loon Energy Inc v Integra Mining [2007] EWHC 1876 (Comm) :[67] S9 AA 1996 : Stay : declarations. Application for stay to arbitration : applications for declarations on interpretation of terms of contract.

El Nasharty v J. Sainsbury Plc [2007] EWHC 2618 (Comm) : [68] S9 AA 1996. Application for a declaration that an agreement for sale of shares in Egyptian Distribution Group SAE was entered into as a result of duress and has been avoided. In his Points of Claim he additionally claims damages of at least US$104,000,000. The agreement contained an arbitration clause, pursuant to which Sainsbury make this application. Stay granted.

Heifer International Inc v Helge Christiansen [2007] EWHC 3015 (TCC) : [69] S9 AA 1996. Application for stay to the Danish Building & Construction Arbitration Board of a dispute about a UK building project. Impact of the UCTA & Brussels Convention. Stay granted.

[61] ***Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD [2007] EWHC 9 (Ch) :*** Mr Justice Lightman. 23rd January 2007.

[62] ***A v B [2007] EWHC 54 (Comm) :*** Colman J. 23rd January 2007.

[63] ***West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA [2007] UKHL 4 :*** Lords Nicholls, Steyn, Hoffmann, Rodger, Mance. 21st February 2007.

[64] ***Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD [2007] EWHC 665 (Ch)*** Mr Justice Lightman. 29th March 2007.

[65] ***Homepace Ltd v Sita South East Ltd [2007] EWHC 629 (Ch):*** Mr N Strauss QC. 30th March 2007.

[66] ***Mabey and Johnson Ltd v Danos [2007] EWHC 1094 (Ch) :*** Mr Justice Henderson. 11th May 2007.

[67] ***Loon Energy Inc v Integra Mining [2007] EWHC 1876 (Comm):*** Mr Justice Langley. 31st July 2007.

[68] ***El Nasharty v J. Sainsbury Plc [2007] EWHC 2618 (Comm) :*** Mr Justice Tomlinson. 13th November 2007.

[69] ***Heifer International Inc v Helge Christiansen [2007] EWHC 3015 (TCC) :*** HHJ. Toulmin. 18th December 2007.

S10 Arbitration Act 1996. Reference of interpleader issue to arbitration.

10.(1) Where in legal proceedings relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief shall direct that the issue be determined in accordance with the agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed.

10(2) Where subsection (1) applies but the court does not direct that the issue be determined in accordance with the arbitration agreement, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall not affect the determination of that issue by the court.

S10(2) Arbitration Act 1996 expressly sets aside the impact of any **Scott v Avery** clause.

Clause 10 Reference of Interpleader Issue to Arbitration. DAC 1996.

58. This Clause is based on Section 5 of the 1950 Act. We have however taken the opportunity of making a stay mandatory so as to comply with the New York Convention, as well as trying to express the provision in simpler, clearer terms. The Clause is required because *`interpleader'* arises where one party claiming no right himself in the subject matter, is facing conflicting claims from other parties and does not know to which of them he should account. English law allows such a party to bring those in contention before the Court which may order the latter to fight out the question between themselves. If they have agreed to arbitrate the matter then Clause 9 would not itself operate, since the party seeking interpleader relief would not be making a claim which he had agreed to arbitrate.

59. We have not defined "*interpleader*", although some suggested that we should, given that this is a legal term of art, which goes far beyond arbitration contexts.

S11 Arbitration Act 1996. Retention of security where Admiralty proceedings stayed.

11(1) Where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest

(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or

(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

11(2) Subject to any provision made by rules of court and to any necessary modifications, the same law and practice shall apply in relation to property rained in pursuance of an order as would apply if it were held for the purposes of proceedings in the court making the order.

As to the Admiralty Jurisdiction of the court see s20 Supreme Courts Act 1971

Clause 11 Retention of Security where Admiralty Proceedings stayed. DAC 1996.

60. This Clause is not intended to do more than re-enact the present statutory position as found in Section 26 of the Civil Jurisdiction and Judgments Act 1982.

61. Clauses 9 to 11 are, of course, mandatory.

Self Assessment Exercise No5

1 Noddy buys 100,000 tons of toys from big ears under a contract which states that any question as to the quality of the toys must be arbitrated. Noddy discovers that only 95,000 tons are delivered and files a claim in court for short delivery.

Big Ears seeks your advice as to whether a stay of action is possible pending the outcome of arbitral proceedings.

2 Farouk, an Egyptian buyer of building materials shipped from England seeks a stay of action for non-payment of goods by John an English seller, and insists on arbitrating the dispute in Egypt on the basis that defective goods were delivered.

Discuss whether the English court can or will proceed.

3 Rachman engages Bob the Builder to build a block of flats. Bob submits a payment dispute to adjudication. Rachman thinks adjudication is a pointless exercise and wants to arbitrate under the contract's express arbitration clause.

Advise Rachman as to whether or not he can afford to ignore the adjudication and refer the dispute to arbitration or ignore both and litigate.

4. Charlie, the defendant in a payment dispute lost an adjudication but refused to pay, claiming that he had a far bigger outstanding counter claim. Andy, the builder has commenced enforcement proceedings.

Advise Charlie as to the availability or otherwise of a stay of the enforcement proceedings pending the outcome of arbitration in respect of the counterclaim.

What difference, if any might if make if Andy has a number of outstanding County Court Judgements and is in an apparently precarious financial position ?