7 (2) applied, then he had no discretion in the matter and would not refuse to grant a stay of the proceedings on the ground of comparative inconvenience or expense. The use of the word "shall" meant he had no discretion. The position of course is different pursuant to section 53 of the uniform Commercial Arbitration Acts where the court has a discretion as to whether or not to grant a stay of proceedings.

After analysing the contractual relationship between the parties, His Honour found that in fact there was not an "agreement in writing" between the parties as defined by Article II of the 1958 New York Convention. Accordingly, His Honour did not grant the application for a stay of proceedings.

REPUDIATION OF ARBITRATION AGREEMENT

(Unreported, Supreme Court of Western Australia, Rowland J.—19 January 1990)

BRUNSWICK NL v SAM GRAHAM NOMINEES PTY LTD

Brunswick NL ("Brunswick") entered into an agreement with Sam Graham Nominees Pty. Ltd. ("Graham") pursuant to which Graham carried out mining works for Brunswick. The agreement contained a clause as follows:-

> *"ARBITRATION*
>
> If any question difference or dispute whatsoever arises between the parties upon or in relation to or in connection with the Contract which cannot be resolved by mutual agreement such question difference or disputed may be referred to arbitration as hereunder stated, and for such purpose either party may as soon as reasonably practicable by notice in writing to the other party clearly specify the nature of such question difference or dispute and call for the point or points at issue to be submitted for settlement by arbitration".

Brunswick issued proceedings against Graham claiming damages for breach of contract. Graham applied for a stay of those proceedings pursuant to section 53 of the Arbitration Act. Section 53, so far as is relevant, provides:-

> "(1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement . . ."

"Arbitration agreement" is defined in section 4 (1) of the Commercial Arbitration Act as meaning:

> "An agreement in writing to refer present or future disputes to arbitration".

Brunswick argued that the "arbitration" clause contained in the contract, because of the use of the word "may" was only permissive and that there was no "arbitration agreement" and that therefore section 53 was not applicable. Brunswick relied upon the decision of Menhennitt J. in *Hammond v Wolt* [1975] V. R. 108 where His Honour held that a somewhat similar clause was not a "submission" within the meaning of the 1958 Victorian Arbitration Act and that therefore a stay of application could not be made. In that case, His Honour held that it was only when a notice of dispute was given pursuant to the clause that a submission to arbitration crystallised.

In the present case, His Honour distinguished *Hammond v Wolt* and held that the clause in the agreement was in fact an arbitration agreement and that therefore he had power under the Act to order a stay. His Honour stated:-

> ". . . the court will, in these times, be slow to construe the Act so that a contractual right which otherwise exists will be lost simply because one party, on knowing that a dispute exists and a claim is being made, can defeat that contractual entitlement".

A week after Brunswick had issued its writ against Graham, Graham issued a writ against Brunswick. It later discontinued its action against Brunswick. This did not deter His Honour from granting a stay of the court proceedings issued by Brunswick nor was the court prepared to grant an interlocutory injunction. It was argued for Brunswick that Graham, by issuing its writ, had repudiated the arbitration agreement and it sought an interlocutory injunction to restrain the arbitration from proceeding. His Honour did not accept this argument. His Honour had difficulty in seeing how an election to sue at common law would amount to a repudiation of an arbitration agreement which was permissive in nature. His Honour indicated however that the case may well be different where then there was an obligation upon a party to arbitrate rather than a clause which was permissive in nature as in the present case.