IN THE COURT OF APPEAL 99.242

SUPREME COURT OF QUEENSLAND

Appeal No. 5998 of 1998

Brisbane

[Eisenwerk v. Aust Granites Ltd]

BETWEEN:

EISENWERK HENSEL BAYREUTH DIPL.-ING BURKHARDT GmbH
(Defendant) Appellant

AND:

AUSTRALIAN GRANITES LIMITED
ACN 050 418 481
(Plaintiff) Respondent

Pincus JA
Thomas JA
Shepherdson J

Judgment delivered 2 July 1999

Separate reasons for judgment of each member of the Court, all concurring as to the orders made

---

APPEAL ALLOWED. ORDERS OF FRYBERG J SET ASIDE. IN LIEU ORDER THAT ACTION NO 7118 OF 1997 BE STAYED UNTIL FURTHER ORDER AND THAT THE APPLICATION FOR INJUNCTIVE RELIEF BE DISMISSED. APPELLANT TO HAVE ITS FULL COSTS BELOW AND TWO-THIRDS OF ITS COSTS IN THIS APPEAL.

CATCHWORDS: **APPEAL AND NEW TRIAL - APPEAL-GENERAL PRINCIPLES - POINTS AND OBJECTIONS NOT TAKEN BELOW - WHEN ALLOWED TO BE RAISED ON APPEAL - whether reliance on s 21 *International Arbitration Act* 1974 (Cth), overlooked below, permitted on appeal.**

ARBITRATION - THE SUBMISSION AND REFERENCE - SUBMISSION AS A DEFENCE AND AS A GROUND FOR STAY OF PROCEEDINGS - STAY OF PROCEEDINGS - JURISDICTION AND POWER OF COURT - whether right to stay proceedings under s 7(2) *International Arbitration Act* 1974 (Cth) - whether parties agreed that dispute to

be settled otherwise than in accordance with Model Law on International Commercial Arbitration - whether Court's obligation to stay proceedings absolute - whether appellant waived its right to exercise of Court's jurisdiction under s 7(2) by delivery of defence in the action - whether appellant estopped from taking advantage of right under s 7(2) by not having sought a stay when it applied to a different judge for other relief.

ESTOPPEL - FORMER ADJUDICATION AND MATTERS OF RECORD OR QUASI OF RECORD - JUDGMENT INTER PARTES - *Anshun* estoppel - whether *Anshun* principle applicable to interlocutory decision.

EVIDENCE - GENERAL - JUDICIAL NOTICE-MATTERS NOT REQUIRING PROOF - whether judicial notice may be taken of existence of International Chamber of Commerce (ICC) arbitration system and, in particular, ICC Rules of Conciliation and Arbitration.

All States Frozen Foods Pty Ltd v Commissioner of Taxation **(1990) 21 FCR 457**
Carr v Finance Corporation of Australia Ltd (No 1) **(1981) 147 CLR 246**
Cavanett v Chambers **[1968] SASR 97**
Centronics Systems Pty Ltd v Nintendo Company Limited **(1992) 39 FCR 147**
Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) **(1983) 154 CLR 120**
D A Christie Pty Ltd v Baker **[1996] 2 VR 582**
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc **(1998) 159 ALR 142**
Ling v Commonwealth of Australia **(1996) 139 ALR 159**
Macquarie Bank v National Mutual Life **(1996) 40 NSWLR 543**
National Australia Bank Ltd v KDS Construction Services Pty Ltd **(1987) 163 CLR 668**
Port of Melbourne Authority v Anshun Pty Ltd **(1981) 147 CLR 589**
Sargent v ASL Developments Ltd **(1974) 131 CLR 634**
Tanning Research Laboratories Inc v O'Brien **(1990) 169 CLR 332**
Terry v Permanent Trustee Co **(1995) 6 BPR 14,091**
Timbury v Coffee **(1941) 66 CLR 277**

International Arbitration Act **1974 (Cth), ss 7, 21**

Counsel: Mr W Sofronoff QC with him Ms C Adams for the appellant.
Mr J McKenna for the respondent.

Solicitors: Hopgood & Ganim for the appellant.
Allen Allen & Hemsley for the respondent.

Hearing Date: 8 March 1999.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 5998 of 1998

Brisbane

Before Pincus JA
Thomas JA
Shepherdson J

[Eisenwerk v. Aust Granites Ltd]

BETWEEN:

EISENWERK HENSEL BAYREUTH DIPL.-ING BURKHARDT GmbH
(Defendant) Appellant

AND:

AUSTRALIAN GRANITES LIMITED
ACN 050 418 481
(Plaintiff) Respondent

REASONS FOR JUDGMENT - PINCUS JA

Judgment delivered 2 July 1999

1 The parties to this appeal, "Australian Granites" and "Hensel", made contracts in 1994 and 1995 under which Hensel agreed to supply equipment for Australian Granites' business. Disputes have arisen; Hensel has not received the full price, and this is so, Australian Granites says, because the equipment supplied was deficient. Australian Granites says it has a claim in damages exceeding $20M.

2 Each contract included a term to the effect that disputes would be settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce and Hensel has initiated arbitration proceedings relying on that clause, by writing to the International Court of

Arbitration in Paris. For its part Australian Granites has sued for damages in the Supreme Court of Queensland and has, so far successfully, resisted attempts by Hensel to pursue ICC arbitration.

3 The appeal, brought by Hensel, is against orders of Fryberg J refusing to stay Australian Granites' action, but restraining Hensel from pursuing the ICC arbitration. On the face of it one might have thought there was something to be said for holding the parties to their agreement to arbitrate, but Australian Granites says that agreement should not be implemented for reasons the essence of which is that Hensel did not raise the arbitration clause as a ground for staying Australian Granites' action when the dispute has previously been brought before the Supreme Court and that the arbitration clause was waived by Hensel delivering a defence in the action.

4 The facts relevant to the issue whether the dispute should be resolved by ICC arbitration or by suit in the Supreme Court of Queensland are not in dispute; what is in question is the legal effect of the events which have occurred, of the arbitration clause and of provisions of the *International Arbitration Act* 1974 (Cth) ("the Act"). Further, as it appears to me, no question of exercise of judicial discretion need be discussed. Hensel is a German entity based in Bayreuth, Bavaria, and Australian Granites is a North Queensland company. Each says, no doubt credibly, that most of its witnesses reside in the country where it operates. Were there a discretion involved, it might be noted that in an ICC arbitration but not in an action in the Supreme Court of Queensland it would be possible to conduct the hearing in a place other than Germany or Queensland.

5 The key point in Hensel's case is that it says it has a right to have the action stayed under s 7(2) of the Act, which is as follows:

> "Subject to this Part, where:
>
> (a) 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".

6 Section 7(1) sets out four conditions of application of the section to an arbitration agreement; it is not in dispute that each of those conditions applies and that were there no other relevant provision in the Act, Hensel would have a prima facie right to a stay of the action; I say "prima facie" because of Australian Granites' argument that the right to arbitration has been lost by waiver or the like. But Australian Granites says that s 7(2) is, so far as the right to a stay is concerned, overridden by Article 8(1) of what the Act calls the "Model Law". Section 15 of the Act defines that expression as follows:

> "'Model Law' means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, the English text of which is set out in Schedule 2".

7 Article 8(1) of the Model Law is in terms which do not permit of a stay of the action in the present case because, before applying for a stay, Hensel delivered its defence in the action; so much is common ground. But Hensel argues that Article 8 has no application because the Model Law is wholly irrelevant. Section 16(1) of the Act gives the Model Law the force of law in Australia, but s 21 says:

> "If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) 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".

8 The first question, then, is whether within the meaning of s 21 of the Act the parties have agreed that their disputes are to be "settled otherwise than in accordance with the Model Law".

Clearly the agreement between the parties expresses no such intention, so the question is whether it implies that the parties do not desire settlement in accordance with the Model Law. The relevant provision is contained in General Conditions forming part of each contract, Clause 13.1 of which reads as follows:

> "Any dispute arising out of the Contract shall be finally settled, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators designated in conformity with those Rules".

9 A point was made, on appeal, that the content of the Rules of Conciliation and Arbitration of the International Chamber of Commerce was not proved below. The Court must take judicial notice of the existence of the ICC arbitration system, the ICC Court of Arbitration being "the most important institution for the arbitral settlement of international trade disputes": see *Schmitthoff's Export Trade*, (9th ed.), at 676; the author adds that the ICC Court of Arbitration has the "confidence and respect of businessmen all over the world . . .". In my opinion such notice should also be taken of the fact that there are rules for ICC arbitration and of the content of such rules. As is pointed out by Hensel's senior counsel, Mr Sofronoff QC they are published in a number of scholarly texts ("learned works . . . appropriate documentary material of indisputable accuracy": *Halsbury's Laws of Australia*, Vol 13, para 195-1910) concerning arbitration; in my view they constitute facts "about which there can be no real dispute": *Cavanett v Chambers* [1968] SASR 97 at 101, quoted in *Gordon M Jenkins & Associates Pty Ltd v Coleman* (1989) 87 ALR 477 at 485; see also *All States Frozen Foods Pty Ltd v Commissioner of Taxation* (1990) 21 FCR 457 at 465, 466, *Timbury v Coffee* (1941) 66 CLR 277 at 284, *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* (1983) 154 CLR 120 at 123, 124, 125 and passim. The Court would, in any event, properly exercise its discretion under O 70 r 10 by admitting evidence

of the content of the Rules, special leave being unnecessary where the judgment appealed from is interlocutory.

10 As one would expect, the content of the ICC Rules of Conciliation and Arbitration has changed from time to time. There was discussion before us as to whether the rules current when the contracts between the parties were made, or those current when the dispute was referred to arbitration, would govern; it appears to me that the latter is the preferable view, but I cannot find any difference between the two possibly relevant sets of rules - one in force as from 1 January 1988 and the other as from 1 January 1998 - which is significant for present purposes. It would have made little sense to agree to subject disputes to arbitration under both the Model Law and the ICC Rules, since the two are irreconcilable in a number of respects. For example, the provisions concerning the number and identity of the arbitrators are quite different: see as to the Model Law, Article 10 and s 18 of the Act, and as to ICC arbitration, Articles 1 and 8 of the 1998 Rules.

11 It might be thought that the question whether a clause such as that contained in the contracts which are in issue is effective to exclude the Model Law is a matter of some importance, for the arbitration clause in the present case conforms to an international standard; making allowances for variances, perhaps due to translation, cl 13.1 of the General Conditions, quoted above, is an adoption of the clause recommended by the ICC for use by those wishing to have their disputes resolved under its rules. The 1988 ICC Rules as set out in Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 1991, (2nd ed.) state the recommended clause as follows:

> "All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules".

If Australian Granites' argument is right, use of this recommended clause is insufficient to avoid the, surely highly inconvenient, result that the parties are bound to both a Model Law arbitration and an ICC arbitration. And the former would not be an arbitration under the aegis of an established international organisation, as the latter is; it should be noted that the Model Law has not been widely adopted. Only 19 countries had adopted it, to the month of February 1998, and those countries did not include Germany: see A Shields, "The development of a uniform framework for international arbitration" (1998) 16 *The Arbitrator* 217 at 224.

12 In my opinion the better view is 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. It follows that, insofar as Australian Granites relies upon (and succeeded below on) the argument that Article 8 of the Model Law precluded the grant of a stay of the action in favour of Hensel, after delivery of its defence, that view must be rejected. In consequence, the provision of domestic law which governs the right to a stay is s 7(2) of the Act, quoted above.

13 As I have pointed out, it is common ground that the conditions of application of s 7(2) are satisfied. On the face of the provision, it gives the court to which application is made for a stay of such an action as was begun by Australian Granites no discretion; it says that the court "*shall*, by order **. . .** stay the proceedings **. . .** ", although conditions may be imposed.

14 It is contended for Australian Granites that the section must be read down so as to accommodate, at least to some extent, restrictions on the grant of a stay which are not expressed in it. Mr McKenna pointed out, cogently as it appears to me, that Parliament could hardly have intended that the Court's obligation to grant a stay must be exercised in favour of an applicant even

if the application is made at the end of a lengthy trial, no earlier suggestion of reliance on an arbitration clause having been made. One cannot of course ignore the word "shall" in s 7(2), which has its origin in Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which is Schedule 1 to the Act:

> "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 arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

15 But the answer which Mr McKenna puts forward in support of the contention that despite the word "shall" the court's obligation to stay is not absolute is that Hensel's right to apply for a stay is a private one which may be waived; I agree. It should be added that the wording of the latter part of Article II(3) of the New York Convention is reflected in s 7(5) of the Act:

> "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".

It appears to me that if, for example, Hensel had written to Australian Granites after the action was begun, saying that it did not wish to arbitrate but would litigate, that would make the arbitration agreement "inoperative" within the meaning of s 7(5).

16 This view of the matter receives some support from authority to which Mr McKenna referred us, in particular *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1998) 159 ALR 142 at 153. It is not necessary for present purposes to express a view on the question whether s 7 should be held to have only that effect which is attributed to it at that page and enough to note that the Full Court of the Federal Court decided the *Hi-Fert* case on the basis that "s 7 does not purport to direct the manner and outcome of the exercise by the Federal Court of its jurisdiction".

17 The remaining question in the case, then, is whether Hensel has so acted as to waive its right

to an exercise of the Court's jurisdiction under s 7(2) of the Act in its favour - or to put that more generally, has so acted as to lose that right. The arguments principally advanced on behalf of Australian Granites were that Hensel's right was lost because of its conduct at a hearing before Lee J and that it did so by delivering a defence.

18 It is desirable to give some dates. The action I have mentioned was begun on 11 August 1997 and, notice in lieu of the writ having been served, a conditional appearance was entered by Hensel on 3 October 1997. That denied the court's jurisdiction. On 2 February 1998, Australian Granites filed a summons seeking to strike out the conditional appearance and that came before the court on 18 February 1998, on which date Hensel caused a summons to be filed asking that service of the notice in lieu of the writ be set aside and that the writ of summons be struck out. Both applications were heard by Lee J. His Honour decided them in favour of Australian Granites, striking out the conditional appearance and so Hensel entered an unconditional one. Unfortunately, as I understand the matter, no record of his Honour's reasons is available, but it can be seen from the written submissions made on behalf of Hensel, which are in evidence, that Hensel submitted that it was not shown that the case was within the jurisdiction of the Supreme Court of Queensland and, alternatively, that the action should be stayed on the ground that the Queensland Supreme Court was a clearly inappropriate forum.

19 Neither submission involved a waiver of the right to arbitrate, but it was submitted for Australian Granites in this Court that what might conveniently be called the *Anshun* principle applied, so as to preclude Hensel from later seeking a stay. In this connection reliance was particularly placed upon an exchange between counsel when before Lee J. Counsel for Australian Granites there made submissions in relation to the arbitration clause; there was then some discussion between counsel, at the end of which counsel for Australian Granites told the judge, and

his opponent agreed, that the latter did not propose to make any submissions in respect of the arbitration clause. It seems clear, then, that at least at that stage Hensel had not determined to refer the matter to arbitration under cl 13.1 of the General Conditions.

20 Australian Granites' reliance on the *Anshun* principle, enunciated in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, is based on the view that an application for a stay based on the arbitration clause could and should have been made when the matter was before Lee J. In *Anshun* an injured workman recovered damages against both the Port of Melbourne Authority and Anshun Pty Ltd for personal injuries. Each defendant in that action claimed contribution from the other and in consequence of that judgment was given making each defendant ultimately responsible for part of the damages. Then, in a second action, the Authority sued Anshun claiming indemnity under a contract and the Supreme Court of Victoria permanently stayed that action - rightly, the High Court held. The bases of this conclusion in the High Court were that the contractual indemnity was so relevant to the subject matter of the first action that it was unreasonable not to plead it as a defence there (602), and that if the course Anshun had taken were allowed, it could lead to conflicting judgments (603).

21 In commenting upon *Anshun*, Handley JA remarked in an article entitled "Anshun Today" in (1997) 71 ALJ 934 at 938, that there the High Court rejected the test that:

> "**. . .** additional claims that 'could and therefore should' have been litigated in the first suit will be barred, but held that claims that would result in inconsistent judgments will be barred. Between these two extremes we have the test of reasonableness based on the relevancy of the omitted claims to the subject matter of the first suit. The test is whether it 'would be expected' having regard to the nature and subject matter of the first suit that the additional claim would have been raised in that suit".

In the present case, no question of inconsistent judgments arises, but, if *Anshun* applies, it must be on the basis that Hensel behaved unreasonably in not applying for a s 7(2) stay before Lee J on 18

February 1998; it should have launched a particular sort of counter-attack, according to Australian Granites' argument. In *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, Brennan and Dawson JJ. discussed the application of the *Anshun* principle to an "unadjudicated cause of action which can be enforced only in fresh proceedings". Their Honours said that a plaintiff having such a cause of action -

> ". . . cannot be precluded from taking fresh proceedings merely because he could have and, if you will, should have counterclaimed on that cause of action in a forum chosen by the opposite party in proceedings in which the opposite party sued him. We do not read the majority judgment in *Port of Melbourne Authority v. Anshun Pty Ltd* as holding the contrary, except in a case where the relief claimed in the second proceeding is inconsistent with the judgment in the first . . .". (346)

Further, I note that attempts to apply *Anshun* to bar claims not previously adjudicated upon have had little success: *Terry v Permanent Trustee Australia Ltd* (1995) 6 BPR 14,091 (dismissal of action for specific performance followed by proceedings to recover deposit), *Macquarie Bank Ltd v. National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543, (two actions by a bank against solicitors raising different allegations of negligence); *Ling v Commonwealth of Australia* (1996) 139 ALR 159.

22 If the *Anshun* principle is to apply against Hensel, it must be on the basis that it was obliged to opt for arbitration under cl 13.1 before any determination was made as to whether the Supreme Court of Queensland had jurisdiction. Had Hensel succeeded on the jurisdictional point, then there were various possibilities open to it such as a suit for the price of its work in Germany or resolution of the dispute by some agreed method of arbitration other than under the ICC rules. It would certainly have been convenient if Hensel had made up its mind in favour of ICC arbitration before the matters before Lee J were disposed of by his Honour; but I note that a period of only 16 days elapsed between the filing of Australian Granites' summons and the hearing before Lee J and that

Australian Granites took four months to decide to attack the conditional appearance.

23 To my mind, a substantial hurdle in the path of Australian Granites, in seeking to rely on the *Anshun* principle as an answer to s 7(2) of the Act, is that it is unclear whether and to what extent the principle has application to interlocutory decisions. The orders made by Lee J did not of course finally determine the rights of the parties: *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246 at 248. In *D A Christie Pty Ltd v Baker* [1996] 2 VR 582, Hayne and Charles JJA considered the possibility of application of *Anshun* to a second application for an extension of time within which to bring an action for personal injuries, under s 23A of the *Limitation of Actions Act* 1958 (Vic.) Hayne JA adopted the view that *Anshun's* case could not apply because the decision on the first application was not final (602), as did Charles JA (606). I respectfully agree.

24 In summary, Hensel's conduct before Lee J and in particular its failure then to seek a stay of the proceedings on the basis of the arbitration clause cannot in my view bring the principle of *Anshun* into operation. Looking at the matter more broadly, it would be parochial, perhaps, to hold that Hensel was unreasonable in failing to reach, in time to apply for a stay before Lee J, decisions on such questions as the application of the Model Law (not adopted in Germany) and, generally, the effect of the Australian Act on its rights, in such a way as to determine on the course it chose two months later, viz to have an ICC arbitration.

25 A second point taken on behalf of Australian Granites is that the delivery of a defence in the action was an unequivocal waiver of the right to arbitrate. I do not, with all respect to the argument, propose to deal with the point at length, for it is clear from correspondence that Hensel delivered a defence only because it was imminently threatened with an application for judgment in default of defence, that being a few days overdue. Hensel delivered a request for an ICC arbitration,

incorporating an elaborate statement of claim, on 22 April 1998 and on 5 May 1998 sent that to the other side. The response, the following day, was an intimation that a summons for judgment in default would be filed and two days later a defence was served accompanied by a letter which, as had previous correspondence, denied that Hensel intended to waive pursuit of the arbitration which it had already instituted. Ordinarily, an election "**. . .** must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other": *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 646, quoted in *Immer (No 145) Pty Ltd v The Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 at 38, 39. There was no unequivocal election.

26 A further objection to reliance on the arbitration clause is simply that, it is said, the clause was not relied on before Fryberg J in the way presently in question. This is a puzzling circumstance. As I have explained, the arbitration was instituted in April and the initiating documents were sent to Australian Granites' solicitors on 5 May 1998. Those steps were followed by an application for a stay of the action, filed on 19 May 1998, to which Australian Granites' solicitors responded by a notice of motion asking for an injunction restraining pursuit of the arbitration. In the reasons of Fryberg J, his Honour quotes cl 13.1, of the arbitration clause, on the first page and subsequently discusses the arbitration proceedings in some detail. The judge also set out the terms of s 7(2) of the Act, but held in effect that it was overridden by the Model Law. I accept that, as Mr Sofronoff told us on Hensel's behalf in response to a question from the bench, the "particular point" was not taken below. But it is not perfectly clear to me what was the point referred to; Fryberg J was plainly seized of the fact that there was an arbitration clause and that Hensel persisted in its desire to have the disputes resolved under it.

27 What, as I understand the matter, was perhaps overlooked below was that s 21 of the Act gives effect to an agreement not to have disputes settled in accordance with the Model Law; this is, if correct, a little surprising. If the effect of s 21 was overlooked then the matter is purely one of law and its not having been discussed below, by either counsel, is no bar to reliance on the provision on appeal; evidence could not have affected resolution of the question: *National Australia Bank Ltd v KDS Construction Services Pty Ltd* (1987) 163 CLR 668 at 679-680, *Centronics Systems Pty Ltd v Nintendo Company Limited* (1992) 39 FCR 147 at 189.

28 It should be added that there were other questions raised before us which it is unnecessary to discuss, because of the conclusion reached to this point. Mr Sofronoff contended that Fryberg J did not take into account discretionary considerations in deciding whether to enjoin pursuit of the arbitration and he also made submissions in favour of the conclusion that even if the Model Law applies - I have held it does not - the appeal should succeed; I have not dealt with those points.

29 In summary:

(1) The parties contracted out of the Model Law by agreeing that disputes were to be settled otherwise than in accordance with that Law: cl 13.1 of the General Conditions, s 21 of the Act.

(2) Under s 7(2) of the Act, Hensel had a prima facie right to have the action stayed.

(3) Hensel is not precluded from taking advantage of that right by:

(a) not having sought a stay on the ground of the existence of the arbitration clause, when it applied to Lee J for other relief;

(b) having, under threat of an immediate application for judgment, delivered a defence in the action, which delivery was accompanied by clear statements that it wished to pursue the arbitration.

(4) Insofar as Hensel's case has been argued on an additional legal ground in this Court, namely s 21 of the Act, it is just that it should be allowed to rely on that section.

30 For the reasons I have given the appeal should in my opinion be allowed and the orders of Fryberg J set aside. In lieu it should be ordered that action no 7118 of 1997 be stayed until further order, and that the application to Fryberg J for injunctive relief be dismissed. As to costs, I propose that Hensel have its full costs below, and two-thirds of its costs in this appeal.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 5998 of 1998

Brisbane

Before Pincus JA
Thomas JA
Shepherdson J

[Eisenwerk v Aust. Granites Ltd]

BETWEEN:

EISENWERK HENSEL BAYREUTH DIPL.-ING BURKHARDT GmbH
(Defendant) Appellant

AND:

AUSTRALIAN GRANITES LIMITED
ACN 050 418 481
(Plaintiff) Respondent

REASONS FOR JUDGMENT - THOMAS JA

Judgment delivered 2 July 1999

1 I agree with the reasons of Pincus JA and with the orders that he proposes.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 5998 of 1998

Brisbane

Before Pincus JA
Thomas JA
Shepherdson J

[Eisenwerk v. Aust. Granites Ltd]

BETWEEN:

EISENWERK HENSEL BAYREUTH DIPL.-ING BURKHARDT GmbH
(Defendant) Appellant

AND:

AUSTRALIAN GRANITES LIMITED
ACN 050 418 481
(Plaintiff) Respondent

REASONS FOR JUDGMENT - SHEPHERDSON J

Judgment delivered 2 July 1999

1 I have read the reasons for judgment prepared by Pincus JA. I agree with the orders he proposes and with his reasons.