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has already become vested in or has accrued to a defendant as a result of the passage of the limitation period and the passage of the time for the service of a writ must be heavier than that which rests upon one who applies in time whilst the period for service of the writ is still current, for there is then no accrued or vested right which is sought to be displaced. Whether that additional or extra burden is described by reference to exceptional circumstances or any other phrase is, I think, immaterial.

For my part, I would adopt what was said by Lord Justice Karminski in the case of *Jones v. Jones*, [1970] 3 W.L.R. 20 at p. 30. What he said was this:

> What the right test is in a matter of this kind is to some extent a matter of chronology. In my view, the real test is "good cause" or "good reason", which may be translated into the words "a sufficient reason or reasons". Discretion in a matter of this kind, as in other matters, must be exercised judicially, that is by weighing all the circumstances on each side and balancing so far as possible the priorities and merits.

For the reasons which my Lord has given I, too, think that the learned Judge came to the right conclusion and I, too, would dismiss this appeal.

[*Order: Appeal dismissed with costs; order for costs below to remain undisturbed.*]

COURT OF APPEAL

Mar. 1, 2 and 3, 1983

GOVERNMENT OF THE STATE OF KUWAIT
v.
SIR FREDERICK SNOW & PARTNERS AND OTHERS

Before Lord Justice STEPHENSON, Lord Justice Fox and Lord Justice KERR

Arbitration — Award — Enforcement — Limitation of time — Plaintiffs added defendants to action six years three months after award issued — Whether defendants could rely on Limitation Act — Whether the 6th to 11th defendants partners in the firm — Whether award a Convention award — Arbitration Act, 1975 — Limitation Act, 1939, s. 2 (1) (c).

On July 15, 1958, the plaintiffs entered into a contract with Frederick Snow & Partners (the partnership) a firm of consulting engineers, for the construction of an international airport in Kuwait. The partnership comprised three partners, Messrs. Snow, Scruby and Slatter.

By a Deed of Partnership dated Apr. 1, 1961, Messrs. Brown, Cooper and Payne were taken into the partnership, the deed being executed by all six partners and providing for the varying contributions to the capital of the six partners and the sharing of profits and losses. Each partner was to have a drawing account and access to and the right to inspect the books of account.

On the same day six separate agreements also described as Deeds of Partnership were entered into between the six partners and Messrs. Ashford, Bishop, Mackay, Hartland, Villiers and Finn (the 6th to 11th defendants). In these six agreements the six partners were described as principal partners while each of the 6th to 11th defendants was described as an associate; each deed was signed by all six partners, the associates were not given any rights or powers of a partner, were not entitled to conduct or interfere in the management of the business, nor have any access to the books of account and they did not have any share in the assets and did not contribute anything to the capital.

Disputes arose between the plaintiffs and the partnership in the course of the performance of the contract and by telex dated Oct. 29, 1964, the plaintiffs terminated the contract of July 15, 1958, while reserving all their rights.

It was accepted that the cause of action period was the period between July 15, 1958, and Oct. 29, 1964.

In 1966, Messrs. Finn, Hartland, Ashford and Bishop became junior partners under new deeds replacing those of 1961 and in 1970 they became full partners under a single deed executed by all the partners. In 1974, Mackay was made a partner of the separate firm of Sir Frederick Snow & Partners East Anglia. Mr. Villiers never succeeded in acquiring a professional qualification.

On May 22, 1972, Dr. Yassim was appointed arbitrator by the Kuwait National Court pursuant to cl. 20 of the contract and by his award, registered in Kuwait on Sept. 18, 1973, he awarded that the partnership should pay the plaintiffs a sum of Kuwaiti dinars equivalent to £3½ million.

On Mar. 23, 1979, the plaintiffs took out an originating summons under s. 26 of the Arbitration Act, 1950, against the firm of Sir Frederick Snow & Partners for leave to enforce the award in the same manner as a judgment.

On Dec. 5, 1979, the plaintiffs applied for the joinder of (a) Messrs. Scruby, Brown, Cooper and Payne (b) the 6th to 11th defendants; (c) Messrs. Scruby, M. E. Snow and P. Grundy as the executors of Sir Frederick Snow who had died in March, 1976, and had earlier retired from the partnership on Mar. 31, 1969; and (d) Messrs. Scruby and Cooper as the executors of Mr. Slatter who had died on May 25, 1971.

The 6th to 11th defendants, the partnership and the executors applied by summons to be struck out as defendants on the basis that the claim against them was time barred by s. 2 (1) (c) of the Limitation Act, 1939. The partnership summons was adjourned generally.

On Mar. 21, 1980, Mr. Justice Mustill ordered the following preliminary issues to be tried in the proceedings:

(1) The points on limitation of action raised in the summons;

(2) whether in the period between July 15, 1958 and Oct. 29, 1964, the 6th to 11th defendants were partners in the firm;

(3) whether the award relied upon by the plaintiffs was a convention award for the purpose of the Arbitration Act 1975 and

(4) whether the plaintiffs' claim failed by reason of the fact that their originating summons pre-dated Statutory Instrument 1979 No. 304.

———*Held*, by Q.B. (Com. Ct.) (MOCATTA, J.), that (1) on the evidence as well as the wording used in the deeds of 1961, the 6th to 11th defendants, made associates by those deeds with retrospective effect to Apr. 1, 1960, did not become partners but remained employees of the firm and the second preliminary issue would be answered in the negative;

(2) since Mr. Mackay had been made a partner in the separate firm of Sir Frederick Snow & Partners East Anglia, he was not brought within the summons of Mar. 23, 1979, since he was not then a partner in the firm of Sir Frederick Snow & Partners and as the ex parte application, in December, 1979, was made more than six years after the award of Sept. 18, 1973, the defence of limitation would be available to him if the decision that he was not a partner between July 15, 1958, and Oct. 29, 1964, was incorrect;

(3) the facts of the present case did not present exceptional circumstances which would justify the Court in departing from the well established rule that the Court would not permit a person to be added as a defendant to an action at a time when he could rely on a period of limitation as barring the plaintiff from bringing the action against him; here no explanation was offered on affidavit to the Court for the delay and the 6th to 11th defendants succeeded on the limitation point and the two sets of executors would be struck out as parties to these proceedings;

(4) if the award relied upon was a convention award under the 1975 Arbitration Act, then by s. 3 (1) (a) it could be enforced in the same way as the award of an arbitrator was enforceable by virtue of the Arbitration Act, 1950, s. 26; here the United Kingdom acceded to the Convention on Dec. 23, 1975, while Kuwait did not accede until Apr. 28, 1978, the accession becoming operative on July 27, 1978, and since the natural meaning of the second paragraph in s. 7 (1) of the 1975 Act was prospective and was only intended to apply to awards made in a state after that state had become a party to the convention, there was no clear reason based on the language of the second paragraph of s. 7 (1) why the definition of convention award should be given a retrospective effect; further if Kuwait had wished to safeguard their enforcement position they could have acceded to the Geneva Protocol Convention before the award was made or possibly even after it, and the third preliminary issue would be answered in the negative;

(5) the fourth preliminary issue would also be answered in the negative in that although s. 7 (2) of the Act provided that if the Arbitration (Foreign Awards) Order, 1979, which came into operation on Apr. 12, 1979, specified that a particular state was a party to the convention the order would be conclusive evidence that that state was a party to the convention, the word used in the Act was "conclusive" and not "exclusive" and was therefore not the only evidence which the Court could receive;

Effect of the successful pleas of plene administravit and plene administravit praeter on costs considered.

On appeal by the plaintiffs on the third issue as to whether the award relied on by the plaintiffs was a Convention award for the purposes of the Arbitration Act, 1975:

———*Held*, by C.A. (STEPHENSON, FOX and KERR, L.JJ.), that (1) any award made in the territory of a state which was a party to the New York Convention was a Convention award for the purposes of enforcement under the Arbitration Act, 1975 (*see* p. 602, col. 1);

(2) in the circumstances the award relied upon by the plaintiffs was a Convention award for the purposes of the 1975 Act and the appeal would be allowed (*see* p. 604, col. 2).

The following cases were referred to in the judgment:

Jackson v. Hall, [1980] A.C. 854;

West v. Gwynne, [1911] 2 Ch.D. 1;

Yew Bon Tew v. Kendaraan Bas Mara, [1982] 3 W.L.R. 1026.

This was an appeal by the plaintiffs His Excellency The Minister of Public Works of the Government of the State of Kuwait from the decision of Mr. Justice Mocatta ([1981] 1 Lloyd's Rep. 656) in which he held inter alia that the arbitration award made in the dispute between the plaintiffs and the defendants, Sir Frederick Snow & Partners and Others, was not a Convention award for the purposes of the 1975 Arbitration Act and was not enforceable.

Mr. Bernard Rix and Mr. J. T. Kelly (instructed by Messrs. Charles Russell & Co.) for the plaintiffs; Mr. Desmond Wright, Q.C. and Mr. Nicholas Dennys (instructed by Messrs. Blakeney's) for the first, second and third defendants (Sir Frederick Snow & Partners, Mr. George Frederick Brian Scraby and Mr. Arthur Henry Brown).

The further facts are stated in the judgment of Lord Justice Kerr.

Judgment was reserved.

Thursday, Mar. 17, 1983

JUDGMENT

Lord Justice STEPHENSON: We have handed down the judgments in this case; the appeal will be allowed. Lord Justice Fox has read the judgment of Lord Justice Kerr in draft; he agrees with that judgment and with the order which we propose.

Lord Justice KERR: This is an appeal by the plaintiffs from a decision of Mr. Justice Mocatta, of one of a number of preliminary issues in this action which he decided in a judgment delivered as long ago as Feb. 19, 1981. The judgment is reported in [1981] 1 Lloyd's Rep. 656 and this issue is dealt with at pp. 663 to 666. It raises an important question on the correct construction of the Arbitration Act, 1975, which is described in its long title as—

> . . . an Act to give effect to the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards.

The issue, briefly, is whether *any* award made in the territory of a state which is a party to the New York Convention is a "Convention award" for the purposes of enforcement under the Act, or whether this is merely so in relation to such awards to the extent that they were made after the accession of the state in question. Mr. Justice Mocatta upheld the latter construction, and the plaintiffs are now appealing against that decision.

The time-scale of the dispute and of the proceedings is remarkable and not a good advertisement of the legal process of international arbitrations. In July, 1958, a contract was concluded between the Minister of Public Works of the Government of Kuwait and the well-know defendant firm, then Frederick S. Snow & Partners, for the construction of certain civil engineering works at the airport in Kuwait. Thereafter, when certain defects appeared, evidently cracks in a runway, a dispute arose, and in October, 1964, the government terminated the contract. This contained a provision for arbitration in Kuwait, and it appears that the dispute was referred to arbitration in September, 1966. Thereafter, in the absence of agreement between the parties, an arbitrator, Dr. Aziz Ahmed Yassin, was appointed by the Kuwait National Court in May, 1972, in accordance with the arbitration clause. The arbitration then proceeded and on Sept. 15, 1973, Dr. Yassin published his award. This was in favour of the government and awarded damages and interest against the firm which amounted to the equivalent of about £3¼ million in July, 1979, the date of the points of claim in the present proceedings. The proceedings themselves had been instituted on Mar. 23, 1979, for the purpose of enforcing Dr. Yassin's award, about 5½ years after its publication. Apart from the firm itself, there were then 10 individual defendants who were alleged to be liable on the award as partners in the firm, as well as the estates of two deceased former partners. The plaintiffs at first sought to enforce the award summarily under s. 26 of the Arbitration Act, 1950, but since the defendants raised a number of issues on the validity of the award, as well as disputing its binding effect in relation to most of the defendants, Mr. Justice Donaldson considered that it was not a suitable case for summary enforcement and ordered in November, 1979, that the plaintiffs should proceed by bringing an action on the award. Then, having regard to the numerous issues between the parties, which appear in the pleadings, on Mar. 21, 1980, Mr. Justice Mustill

ordered the trial of four preliminary issues. These were decided by Mr. Justice Mocatta in his judgment of Feb. 19, 1981. The first two concerned the question as to which of the defendants, other than the firm itself, had been properly made parties to the proceedings. This involved complex investigations concerning the history of the firm and problems of limitation, and in the result Mr. Justice Mocatta held that of the original 12 defendants, apart from the firm itself, only four individuals could properly be sued on the award. Since then, as we were told, the action has been discontinued against two of these by consent, so that the only remaining defendants are now the firm and two individuals. However, the present appeal, about 18½ years since the dispute arose, is not concerned with any of these matters but only relates to the third preliminary issue ordered by Mr. Justice Mustill. This was:

> Whether the award relied on by the plaintiffs is a Convention award for the purposes of the Arbitration Act 1975?

The learned Judge answered this question in the negative, and the issue on the present appeal is whether this was correct or not. I will also briefly have to mention the fourth issue, which relates to the same topic, but the Judge's decision of this in favour of the plaintiffs is not the subject-matter of any cross-appeal by the defendants.

Having set out the dates concerning the dispute and the proceedings, I must then turn to the chronology concerning the enforcement of foreign arbitral awards which is relevant to the issue on this appeal. This relates primarily to the history of the New York Convention, particularly in the context of the accession to it by the United Kingdom and Kuwait, but it is convenient to begin with the Geneva Convention on the "Execution of Foreign Arbitral Awards" of Sept. 26, 1927, to which the United Kingdom, but not Kuwait, is also a party. Statutory effect was given to that Convention in this country by the Arbitration (Foreign Awards) Act, 1930, but it is now only necessary to refer to the Arbitration Act, 1950, which consolidated and repealed the earlier Acts in this field. The Geneva Convention of 1927 is set out in the Second Schedule to the 1950 Act, and Part II of that Act deals with the enforcement of awards under it, following upon a "Protocol on Arbitration Clauses" signed at the League of Nations on Sept. 24, 1923, which is set out in the First Schedule to the Act. For present purposes it is convenient to set out s. 35 of the 1950 Act, since it has some bearing on the construction of the 1975 Act which we have to consider:

> (1) This Part of this Act applies to any award made after the twenty-eighth day of July, nineteen hundred and twenty-four—
>
> (a) in pursuance of an agreement for arbitration to which the protocol set out in the First Schedule to this Act applies; and
>
> (b) between persons of whom one is subject to the jurisdiction of some one of such Powers as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be parties to the convention set out in the Second Schedule to this Act, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid; and
>
> (c) in one of such territories as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be territories to which the said convention applies;
>
> and an award to which this Part of this Act applies is in this Part of this Act referred to as "a foreign award".
>
> (2) His Majesty may by a subsequent Order in Council vary or revoke any Order previously made under this section.

Numerous countries became parties to the Geneva Convention, and a number of Orders in Council were made pursuant to s. 35; the latest list of countries will be found set out in Mustill & Boyd on Commercial Arbitration (1983) at pp. 639, 640.

However, the Geneva Convention proved to be unsatisfactory in a number of respects which it is unnecessary to discuss here. Accordingly, the New York Convention came into force on June 7, 1959, no doubt in the hope that it would largely, and ultimately wholly, supersede the Geneva Convention. The New York Convention adopted a more ambitious approach by being primarily designed for the enforcement of *all* foreign awards, i.e., all awards made in a state other than the state in which enforcement is sought, but with an option to enforce awards only on a basis of reciprocity, i.e., if they were made in the territories of states which adhere to the Convention. This pattern can be seen by setting out most of art. I and art. VII (2) of the New York Convention; the full text of the Convention will be found in Mustill & Boyd (supra) at p. 689 and in Russell on Arbitration, 20th ed. at p. 504.

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to

arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. . . .

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

(For present purposes we are only concerned with the option on the basis of reciprocity and not with the last sentence).

Article VII

1. . . .

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Most, but not all, states who have adhered to the New York Convention appear to have done so on this basis of reciprocity; the United Kingdom did so, and this is also shown by the Arbitration Act, 1975, to which I turn in a moment. First, however, I should briefly refer to certain differences, or alleged differences, between the two Conventions. There is a difference as regards the burden of proof, but the main differences mentioned in the argument before us relate to the grounds on which enforcement of awards may be refused. These differences can be seen by comparing art. 2 of the Geneva Convention as set out in the Second Schedule to the 1950 Act with s. 5 (2) of the 1975 Act. Thus, it was pointed out that whereas a refusal was mandatory under the former, such refusal is discretionary under the latter. But I do not think that much is to be gained from such a comparison. Thus, the last paragraph of art. 2, as well as art. 3, of the Geneva Convention also introduce a measure of discretion; moreover, the grounds for refusal under the New York Convention are wider: see in particular s. 5 (2) (c) of the 1975 Act, which has no counterpart in the Second Schedule to the 1950 Act and on which the respondents appear to place particular reliance in this case.

However, on behalf of the respondents it was also submitted that the effect of s. 5 (1) of the 1975 Act, which provides that enforcement "shall not be refused except in the cases mentioned in this section", might possibly be to preclude a defence of limitation in relation to the enforcement of awards under that Act, or that the wording of this provision has some other bearing on the problem of construction facing us on this appeal. I feel bound to say that I cannot for one moment accept any argument on these lines. Article III of the New York Convention provides that—

> . . . each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . .

and it is settled law that all issues as to limitations are procedural in their nature. On the aspect of limitation, the enforcement of awards under the 1975 Act pursuant to the New York Convention is in my view precisely the same as under the Second Schedule to the 1950 Act pursuant to the Geneva Convention. Both Acts must be read in conjunction with what is now s. 7 of the Limitation Act, 1980, which provides that an action to enforce an award (other than under seal)—

> . . . shall not be brought after the expiration of six years from the date on which the cause of action accrued.

The same applies to awards which are merely enforceable at common law. Whatever may be the effect of this provision in the context of any particular case, I cannot accept that problems concerning limitation have any bearing on this appeal.

In the upshot I was accordingly left with the impression that in the present case little, if anything, is likely to turn on any differences in the grounds for refusal of enforcement as between the position at common law and under either of the Conventions, and neither party was able to point to any relevant differences for present purposes. However, we nevertheless have to decide this preliminary issue; it is clearly of great importance generally, and, as we were told, an issue to which the Government of Kuwait attaches importance in relation to other awards."

Before turning to the relevant provisions of the 1975 Act I must then return to the chronology. As already mentioned, the New York Convention came into force on June 7, 1959, as between the first states which adhered to it. The award, as also already mentioned, was published on Sept. 15, 1973. At the time the

United Kingdom, but not Kuwait, was a party to the Geneva Convention, and neither was a party to the New York Convention. Accordingly, the award was then enforceable in this country, if at all, only at common law, either summarily in the same manner as a judgment under s. 26 of the 1950 Act, or by bringing an action on the award. Both of these remedies are equally available in relation to Convention and other awards.

Then, on Dec. 23, 1975, the United Kingdom became a party to the New York Convention and the 1975 Act came into force. This left the position in relation to the present award as before. Then, however, Kuwait also became a party to the New York Convention on July 27, 1978, and thereafter, on Mar. 23, 1979, as already mentioned, the present proceedings were instituted by the plaintiffs to enforce the award as a New York Convention award under the 1975 Act. The Order in Council declaring Kuwait to be a party to the New York Convention was not made until Apr. 14, 1979. The fact that this had not yet happened when the present proceedings were instituted was the point raised by the fourth preliminary issue to which I have already referred. However, Mr. Justice Mocatta held in this respect that although an Order in Council, once made, and while in force, is "conclusive evidence" that a state is a party to the Convention (see s. 7 (2) of the 1975 Act as set out below), that fact can also be proved by other evidence, and there is no challenge to this conclusion on the present appeal. The issue is whether, after July 27, 1978, when Kuwait became a party to the New York Convention, the United Kingdom already being a party, the award made in Kuwait in 1973 can be enforced as a New York Convention award under the 1975 Act. The learned Judge held that it could not, because on his construction of the Act it only applies to awards made in Kuwait after that date and not before, and it is this conclusion which is challenged before us.

I then turn to the relevant provisions of the 1975 Act, and I think that one can go directly to s. 2, under the cross-heading "Enforcement of Convention Awards", which was clearly designed to give effect to art. VII (2) of the New York Convention which I have already cited:

> 2. Replacement of former provisions.
>
> Sections 3 to 6 of this Act shall have effect with respect to the enforcement of Convention awards; and where a Convention award would, but for this section, be also a foreign award within the meaning of Part II of the Arbitration Act 1950, that Part shall not apply to it.

Section 3 deals with the effect of Convention awards in the different parts of the United Kingdom, and I only set out the beginning:

> 3. (1) A Convention award shall, subject to the following provisions of this Act, be enforceable—
>
> (a) In England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950 . . .

Then I need not set out ss. 4, 5 and 6, though I have already mentioned s. 5 ("Refusal of enforcement") by way of comparison with the Geneva Convention, and I can go directly to the crucial interpretation provisions in s. 7, omitting the definitions of "arbitration agreement" and "The New York Convention" which need not be set out.

> 7. (1) In this Act . . . "Convention award" means an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention.
>
> (2) If Her Majesty by Order in Council declares that any State specified in the Order is a party to the New York Convention the Order shall, while in force, be conclusive evidence that that State is a party to that Convention.
>
> (3) An Order in Council under this section may be varied or revoked by a subsequent Order in Council.

Both Mr. Rix, Q.C., for the appellants, and Mr. Desmond Wright, Q.C., for the respondents, submitted that the natural meaning of these provisions in s. 7 bears out their respective constructions, and both invoked grounds of policy in support of these; there was also a good deal of discussion about "retroactivity" in this connection, to which I turn later. Furthermore, since the Act was designed to give effect to an international Convention, we were also referred to a good deal of material from other countries bearing upon the problem to some extent, viz. the legislation which gave effect to the Convention in other States, the decisions of foreign Courts and learned articles by writers in other countries. Many, but by no means all, of the matters which were canvassed are mentioned below.

I found the point of construction one of considerable difficulty, and my mind wavered upon it during Counsel's skilful arguments. Mr. Justice Mocatta who of course had to deal with many other, and perhaps even more complex,

issues in this case, ultimately decided in favour of the defendants for three brief reasons. First, after referring to a number of authorities dealing with retroactivity in the construction of statutes, he concluded that there was no clear reason, based on the language of the definition of "Convention award", why this should be given what he regarded as retrospective effect. Secondly, he preferred a "prospective" construction as being more in accordance with the language of the definition. Thirdly, he said that—

> . . . Kuwait could have substantially safeguarded their enforcement position by acceding to the Geneva Protocol and Convention before the award was made and possibly even after it.

However, Mr. Wright did not seek to rely upon this, and in my view it cannot assist the respondents. As regards the first two reasons, I have reached the clear conclusion, with great respect, that there is no substance in the "retroactivity" argument, and on a careful analysis of the Act, whether taken alone or in the context of the Convention, I have also reached the conclusion that the appellants' construction is correct. I propose to list my reasons for reaching these conclusions, but it is difficult to place them in any particular order of logic or importance.

(1) In the ultimate analysis the problem revolves round the question whether the word "made" in the phrase "an award made" is to have attached to it some chronological meaning, i.e., made after the date when a particular state becomes a party to the Convention, or whether it is merely to be construed geographically, in the sense that the award must have been made in the territory of a state which is a party to the Convention when the award is sought to be enforced under the Act. Although at first sight the view formed by Mr. Justice Mocatta may well appear to be preferable, I do not think that it follows upon a closer reading of the definition. The phrase "which is a party to the . . . Convention" qualifies "State" and not "award made". As pointed out during the argument by Lord Justice Fox, this becomes even more clearly apparent if the whole definition of "Convention award" is read into some of the provisions of the Act instead of using the abbreviation, e.g., if it is read into s. 3 (1) set out above. Accordingly, looking at the definition in isolation, I feel that the point is a very open one, and that there is certainly no clear preference for the respondents' construction.

(2) The appellants submit that when an award is presented to the Court for enforcement under the Act, the definition shows that the Court only needs to ask itself two questions, viz. (i) in the territory of what state was the award made, and (ii) is that state a party to the Convention? On the wording of the definition the Court is not concerned with the date of accession by the state in question, and, when the definition is read together with sub-s. (2), it is clear that the definition does not envisage that the Orders in Council need or will make any reference to the date of accession. I think that this is right. In saying this, I merely note, but otherwise disregard, that the irrelevance of any date of accession is in fact borne out when one looks at the Orders in Council themselves, which make no reference to dates, since Mr. Wright correctly reminded us that an Act cannot be construed by reference to any subordinate legislation made under it: see *Jackson v. Hall*, [1980] A.C. 854 (House of Lords). However, the point on the definition remains: the respondents' construction requires the words "is a party to the Convention" to be read as if there were added words such as "and was a party when the award in question was made".

(3) The absence of any reference in the definition to any date relating to awards which qualify the enforcement in my view becomes even more significant when this feature of the 1975 Act is contrasted with the language used in other legislation in this field. Thus, s. 35 of the 1950 Act as set out above, dealing with the enforcement of Geneva Convention awards, provides expressly that Part II of the Act applies to awards made after July 28, 1924. Similarly, s. 1 (2) (c) of the Foreign Judgments (Reciprocal Enforcement) Act 1933 provides that Part I applies only to judgments—

> . . . given after the coming into operation of the Order in Council directing that this Part of this Act shall extend to that foreign country.

And in the recent Civil Jurisdiction and Judgments Act, 1982 the same course has been adopted: see Schedule 1, art. 54, and Schedule 3, art. 34. I think that the omission of any reference to any date, directly or indirectly, and the use of the present tense ("is a party to the Convention") are deliberate and significant. In relation to the latter point Mr. Wright urged us to bear in mind that, in the reciprocity provision in the first sentence of art. I (3) of the Convention, the word "Contracting State" is used, and submitted that "awards made only in the territory of another Contracting State" can only refer to awards made after a state has become a "Contracting State", or that these words are at least ambiguous in the present context. However, in my view no weight can be given to this argument. Quite apart from the fact that "Contracting State" is used throughout the

Convention in every context, the significance of the option as to reciprocity is to confine enforcement to awards made "only in the territory of another Contracting State" in contrast with the enforcement of *all* foreign awards, wherever made, under art. I. As Mr. Rix aptly put it, it is an option relating to geographical and not to chronological limits; there is no indication that the dates of the awards are in any way relevant. And, in so far as the Convention may be ambiguous in this respect, the unqualified use in the Act of the words "awards made in the territory of a state which is *a party to the Convention*" (not "a Contracting State") supports the conclusion that the only relevant factor under the Act is also a geographical one.

(4) Next, there is in my view a fundamental fallacy in the respondents' main line of argument. This bears both on construction and on the plea against "retroactivity". Mr. Wright repeatedly submitted that an award "cannot change its character", and, as Mr. Justice Mocatta summarized the submission which he ultimately accepted—

> . . . the award could not change its character on 27th July 1978, nearly four years after it had been published.

However, it can easily be shown that awards can, and will, "change their character", in the sense of a change in the basis for their enforcement, by reason of the accession to the New York Convention of the state in which enforcement is sought or of the state in whose territory the award was made. Thus, take the following examples in the context of the United Kingdom. State X was a party to the Geneva Convention; it then acceded to the New York Convention; and an award was then made in its territory. Until Dec. 23, 1975 the award would have been enforceable here under the Geneva Convention. But, after Dec. 23, 1975, the award would become enforceable under the 1975 Act by virtue of s. 2 set out above. Similarly, if state X had never been a party to the Geneva Convention, but had then acceded directly to the New York Convention, an award made thereafter would, in the United Kingdom only, have been enforceable at common law until Dec. 23, 1975, but would have become enforceable as a "Convention award" under the 1975 Act thereafter, as Mr. Wright expressly and rightly conceded. These are "changes in character" resulting from the accession to the New York Convention of the United Kingdom, the state in which enforcement is sought. Then, take the case of the accession to the New York Convention by state X, the state in which an award is made. Suppose that state X was still only a party to the Geneva Convention in 1977 when an award is made in its territory. The award would then clearly have been enforceable here under the Geneva Convention alone. (The Orders in Council made under the Geneva Convention remain in force: see Russell on Arbitration at p. 477). But, upon the accession by state X to the New York Convention in, say 1978, I think that the effect of s. 2 of the 1975 Act would again clearly be to turn the award into a "Convention award" under the 1975 Act, since it would qualify under both Conventions. In this case, accordingly, a "change in the character of the award" would result from the accession of the state in whose territory the award was made.

(5) The respondents' argument which Mr. Justice Mocatta accepted also faces a formidable difficulty of pure construction. As Mr. Rix rightly pointed out, the twice repeated phrase "is a party" in s. 7 (2) must have the same meaning as "is a party" in the definition of "Convention award" in s. 7 (1). But, on Mr. Wright's argument, the meaning of this phrase differs in the following respect. In s. 7 (2) it clearly means what it says, and the date of accession of the state in question is irrelevant. However, in the definition of "Convention award" in s. 7 (1), the same words must be interpreted to mean, in effect, "is and was a party at the date when the award was made", as pointed out in (2) above.

(6) I can see no reason of policy, in the sense of the presumed intention of Parliament as expressed in the 1975 Act, which favours the respondents' construction. First, to put it broadly, the interest of the United Kingdom lies in the enforcement by the Courts of other contracting states of awards made here, and to that extent we may hope for a wider basis of reciprocity if we enforce all awards made in states which are parties to the New York Convention. Secondly, the realities can be put more bluntly. Mr. Wright submitted that the New York Convention is like a club, and that the attitude of the United Kingdom is, in effect; "Once you have joined the club, we will enforce your awards". However, this merely begs the question of construction: which awards? All of them? Or only those made thereafter? Furthermore, the Convention is not a selective club. Any state can adhere to it. Unless the Convention is denounced in toto under art. XIII, every adherent must enforce all awards made in the territory of every other adherent, past or future. So, why should awards made in Ruritania after Ruritania has chosen to adhere to the Convention be any more deserving of enforcement than those made before? In my view, the presumed intention of Parliament, on grounds of policy, does not enter into the question of construction.

fully argued in the Court of Appeal than it has been in your Lordships' House, where important new points have been canvassed. Moreover, the issues arising in the case have a significance for the well known insurance company standing behind the defendant which goes beyond the sum of money in dispute in the case. I would propose that there be no order in respect of the costs in the Court of Appeal or in this House.

Appeal allowed. Cause remitted to Queen's Bench Division with direction that new trial be held.
No order as to costs in House of Lords or Court of Appeal.

Solicitors: *Hextall Erskine & Co. for Vincent P. Fitzpatrick & Co., Belfast; Robin Thompson & Partners for Francis Hanna & Co., Belfast.*

M. G.

[COURT OF APPEAL]

* MINISTER OF PUBLIC WORKS OF THE GOVERNMENT OF THE STATE OF KUWAIT *v.* SIR FREDERICK SNOW & PARTNERS AND OTHERS

[1979 K No. 295]

1983 Feb. 28; March 1, 2, 3; 17 — Stephenson, Kerr and Fox L.JJ.

Arbitration—Award—Enforcement—Award made in Kuwait—Kuwait and United Kingdom becoming parties to Convention subsequent to award—Whether "Convention award"—Arbitration Act 1975 (c. 3), s. 7 (1)

In 1958 a contract for engineering services was concluded between the plaintiff, a Kuwaiti government minister, and the defendants, an English firm of consulting engineers. A dispute arose between the parties which, in accordance with the contract, was referred to a Kuwaiti arbitrator who made an award in the plaintiff's favour in 1973. At the time of the award neither Kuwait nor the United Kingdom were parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In 1975 the United Kingdom acceded to the Convention and the Arbitration Act 1975 was enacted to give effect to it. Kuwait acceded to the Convention in 1978 and in 1979 the plaintiff instituted proceedings in England against the defendants for enforcement of the award. On a trial of, inter alia, a preliminary issue as to whether the award relied on by the plaintiff was a "Convention award" for the purposes of enforcement under the Act of 1975, Mocatta J., concluding, inter alia, that the statutory definition of "Convention award" in section 7 (1) of the Act [1] should not be given retrospective effect, answered the question in the negative.

[1] Arbitration Act 1975, s. 7 (1): see post, p. 825C–D.

On appeal by the plaintiff:—

Held, allowing the appeal, that the reference to "award made" in the definition of "Convention award" in section 7 (1) of the Act was a reference to an award being made in the territory of a state that was a party to the Convention and not a reference to the award being made at a time when the state was a party to the Convention; that, in the absence of any reference in the Act to the date on which awards qualified as Convention awards and since the legislature had deliberately used the present tense in section 7 (1) when referring to a state that "is" a party to the Convention, the Act was to be construed so that after a state became a party to the Convention, its arbitration awards whenever made were to be enforced under the Act as Convention awards (post, pp. 825H–826B, H, 827B–C, 828D–E, 829G–H).

Decision of Mocatta J. [1981] 1 Lloyd's Rep. 656 reversed.

The following cases are referred to in the judgment of Kerr L.J.:

Jackson v. *Hall* [1980] A.C. 854; [1980] 2 W.L.R. 118; [1980] 1 All E.R. 177, H.L.(E.).
West v. *Gwynne* [1911] 2 Ch. 1, C.A.
Yew Bon Tew v. *Kenderaan Bas Mara* [1983] 1 A.C. 553; [1982] 3 W.L.R. 1026; [1982] 3 All E.R. 833, P.C.

The following additional cases were cited in argument:

Barber v. *Pigden* [1937] 1 K.B. 664; [1937] 1 All E.R. 115, C.A.
Beadling v. *Goll* (1922) 39 T.L.R. 128, C.A.
Boodle v. *Davis* (1853) 8 Ex. 351.
Colonial Sugar Refining Co. v. *Irving* [1905] A.C. 369, P.C.
Hutchinson v. *Jauncey* [1950] 1 K.B. 574; [1950] 1 All E.R. 165, C.A.
Joseph Suche & Co. Ltd., In re (1875) 1 Ch.D. 48.
Lauri v. *Renad* [1892] 3 Ch. 402, C.A.
Moscow v/o Exportkhleb v. *Helmville Ltd.* [1977] 2 Lloyd's Rep. 121.
Nova (Jersey) Knit Ltd. v. *Kammgarn Spinnerei G.m.b.H.* [1976] 2 Lloyd's Rep. 155, C.A.
Salomon v. *Customs and Excise Commissioners* [1967] 2 Q.B. 116; [1966] 3 W.L.R. 1223; [1966] 3 All E.R. 871, C.A.
Stag Line Ltd. v. *Foscolo, Mango and Co. Ltd.* [1932] A.C. 328, H.L.(E.).
Sunshine Porcelain Potteries Pty. Ltd. v. *Nash* [1961] A.C. 927; [1961] 3 W.L.R. 727; [1961] 3 All E.R. 203, P.C.
Tracomin S.A. v. *Sudan Oil Seeds Co. Ltd.* [1983] 1 W.L.R. 662; [1983] 1 All E.R. 404.
Ward v. *British Oak Insurance Co. Ltd.* [1932] 1 K.B. 392.

APPEAL from Mocatta J.

By an originating summons dated March 23, 1979, the plaintiff, the Minister of Public Works of the Government of Kuwait, sought against the defendants, Sir Frederick Snow & Partners, enforcement of an arbitration award made on September 15, 1973, by an arbitrator appointed by the Kuwait National Court, Dr. Aziz Ahmed Yassin.

By an order dated March 21, 1980, Mustill J. ordered that, inter alia, there be tried as a preliminary issue in the proceedings whether the award relied on by the plaintiff was a Convention award for the purposes of the Arbitration Act 1975. On February 19, 1981, Mocatta J. held, inter alia, that Dr. Yassin's award was not a Convention award.

By a notice of appeal dated May 29, 1981, the plaintiff appealed on the grounds, inter alia, that (1) the natural and ordinary meaning of the words of the statutory definition in section 7 (1) of the Act of 1975

was that an award was a "Convention award" if at the time when its enforcement was sought the state in which it was made was a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (2) In construing the statutory definition of "Convention award" so as to exclude awards made in a state before that state had acceded to the Convention the judge had erred in impliedly supplying an omission, namely, the words "and was at the time the award was made" between the words "which is" and the words "a party to the New York Convention." (3) The judge failed to construe the statute as a whole; the judge's construction entailed absurdities or lacunae when applied to other sections of the Act of 1975 and the provisions of the Convention and failed to give effect to the Convention. (4) If, contrary to the contention set out in (2), the definition of "Convention award" could be given the construction given to it by the judge without impliedly supplying the words "and was at the time the award was made," such a construction was at variance with the provisions of article XIII of the Convention, whose effect was to preclude proceedings to enforce an award after the state in which it had been made had ceased to be a party to the Convention and notwithstanding that the award had been made at a time when the state in which it had been made was a party to the Convention. (5) The judge's construction was at variance with the construction to be implied from Orders in Council made under section 7 (2) of the Act of 1975: the Orders made in pursuance thereof did not refer to dates of accession and impliedly treated them as irrelevant. (6) The judge erred if and in so far as he applied the presumption against retrospectivity to the plaintiff's proposed contention in that (i) the plaintiff's proposed construction was not retrospective in the proper sense, i.e. it did not take away or impair any vested right; and conversely (ii) the Act of 1975 was procedural; alterations in procedure were always retrospective unless there was some good reason why they should not be and no one had a vested right in procedure.

The facts are stated in the judgment of Kerr L.J.

Bernard Rix Q.C. and *John Tracy Kelly* for the plaintiff.
Desmond Wright Q.C. and *Nicholas Dennys* for the defendants.

Cur. adv. vult.

March 17. The following judgments were handed down.

STEPHENSON L.J. We have handed down the judgments in this case; the appeal will be allowed. Fox L.J. has read the judgment of Kerr L.J. in draft; he agrees with that judgment and with the order which we propose.

KERR L.J. This is an appeal by the plaintiffs from a decision of Mocatta J., of one of a number of preliminary issues in this action which he decided in a judgment delivered as long ago as February 19, 1981: [1981] 1 Lloyd's Rep. 656, 663–666. It raises an important question on the correct construction of the Arbitration Act 1975, which is described in its long title as "An Act to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards." The issue, briefly, is whether *any* award made in the territory of a state which is a party to the New York Convention is a "Convention award" for the purposes of enforcement under the Act, or whether this is merely

so in relation to such awards to the extent that they were made after the accession of the state in question. Mocatta J. upheld the latter construction, and the plaintiff is now appealing against that decision.

The timescale of the dispute and of the proceedings is remarkable and not a good advertisement for the legal process of international arbitrations. In July 1958 a contract was concluded between the plaintiff, the Minister of Public Works of the Government of Kuwait and the well-known defendant firm, then Frederick S. Snow & Partners, for the construction of certain civil engineering works at the airport in Kuwait. Thereafter, when certain defects appeared, evidently cracks in a runway, a dispute arose, and in October 1964 the plaintiff terminated the contract. This contained a provision for arbitration in Kuwait, and it appears that the dispute was referred to arbitration in September 1966. Thereafter, in the absence of agreement between the parties, an arbitrator, Dr. Aziz Ahmed Yassin, was appointed by the Kuwait National Court in May 1972 in accordance with the arbitration clause. The arbitration then proceeded and on September 15, 1973, Dr. Yassin published his award. This was in favour of the plaintiff and awarded damages and interest against the defendant firm which amounted to the equivalent of about £3¼ million in July 1979, the date of the points of claim in the present proceedings. The proceedings themselves had been instituted on March 23, 1979, for the purpose of enforcing Dr. Yassin's award, about 5½ years after its publication. Apart from the defendant firm itself, there were then ten individual defendants who were alleged to be liable on the award as partners in the firm, as well as the estates of two deceased former partners. The plaintiff at first sought to enforce the award summarily under section 26 of the Arbitration Act 1950, but since the defendants raised a number of issues on the validity of the award, as well as disputing its binding effect in relation to most of the defendants, Donaldson J. considered that it was not a suitable case for summary enforcement and ordered in November 1979 that the plaintiff should proceed by bringing an action on the award. Then, having regard to the numerous issues between the parties, which appear in the pleadings, on March 21, 1980, Mustill J. ordered the trial of four preliminary issues. These were decided by Mocatta J. in his judgment of February 19, 1981. The first two concerned the question as to which of the defendants, other than the firm itself, had been properly made parties to the proceedings. This involved complex investigations concerning the history of the firm and problems of limitation, and in the result Mocatta J. held that of the original 12 defendants, apart from the firm itself, only four individuals could properly be sued on the award. Since then, as we were told, the action has been discontinued against two of these by consent, so that the only remaining defendants are now the firm and two individuals. However, the present appeal, about 18½ years since the dispute arose, is not concerned with any of these matters but only relates to the third preliminary issue ordered by Mustill J. This was: "Whether the award relied on by the plaintiff is a Convention award for the purposes of the Arbitration Act 1975?" The judge answered this question in the negative, and the issue on the present appeal is whether this was correct or not. I will also briefly have to mention the fourth issue, which relates to the same topic, but the judge's decision of this in favour of the plaintiff is not the subject matter of any cross-appeal by the defendants.

Having set out the dates concerning the dispute and the proceedings, I must then turn to the chronology concerning the enforcement of foreign arbitral awards which is relevant to the issue on this appeal. This relates

primarily to the history of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (Cmnd. 6419), particularly in the context of the accession to it by the United Kingdom and Kuwait, but it is convenient to begin with the Geneva Convention on the Execution of Foreign Arbitral Awards of September 26, 1927, to which the United Kingdom, but not Kuwait, is also a party. Statutory effect was given to that Convention in this country by the Arbitration (Foreign Awards) Act 1930, but it is now only necessary to refer to the Arbitration Act 1950, which consolidated and repealed the earlier Acts in this field. The Geneva Convention of 1927 is set out in Schedule 2 to the Act of 1950, and Part II of that Act deals with the enforcement of awards under it, following upon a "Protocol on arbitration clauses" signed at the League of Nations on September 24, 1923, which is set out in Schedule 1 to the Act of 1950. For present purposes it is convenient to set out section 35 of the Act of 1950, since it has some bearing on the construction of the Act of 1975 which we have to consider:

> "(1) This Part of this Act applies to any award made after July 28, 1924—(*a*) in pursuance of an agreement for arbitration to which the protocol set out in Schedule 1 to this Act applies; and (*b*) between persons of whom one is subject to the jurisdiction of some one of such Powers as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be parties to the convention set out in Schedule 2 to this Act, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid; and (*c*) in one of such territories as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be territories to which the said convention applies; and an award to which this Part of this Act applies is in this Part of this Act referred to as 'a foreign award.' (2) His Majesty may by a subsequent Order in Council vary or revoke any Order previously made under this section."

Numerous countries became parties to the Geneva Convention, and a number of Orders in Council were made pursuant to section 35; the latest list of countries will be found set out in *Mustill & Boyd, Commercial Arbitration* (1982), pp. 639–640.

However, the Geneva Convention proved to be unsatisfactory in a number of respects which it is unnecessary to discuss here. Accordingly, the New York Convention came into force on June 10, 1958, no doubt in the hope that it would largely, and ultimately wholly, supersede the Geneva Convention. The New York Convention adopted a more mote ambitious approach by being primarily designed for the enforcement of *all* foreign awards, i.e. all awards made in a state other than the state in which enforcement is sought, but with an option to enforce awards only on a basis of reciprocity, i.e. if they were made in the territories of states which adhere to the Convention. This pattern can be seen by setting out most of article I and article VII (2) of the New York Convention; the full text of the Convention will be found in *Mustill & Boyd, Commercial Arbitration*, pp. 689–693 and in *Russell on Arbitration*, 20th ed. (1982), pp. 504–509:

> "*Article I*
>
> "1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.

> It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought. . . .
>
> "3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration."

(For present purposes we are only concerned with the option on the basis of reciprocity and not with the last sentence).

> "*Article VII*
>
> "2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 shall cease to have effect between contracting states on their becoming bound and to the extent that they become bound, by this Convention."

Most, but not all, states who have adhered to the New York Convention appear to have done so on this basis of reciprocity; the United Kingdom did so, and this is also shown by the Arbitration Act 1975 to which I turn in a moment. First, however, I should briefly refer to certain differences, or alleged differences, between the two Conventions. There is a difference as regards the burden of proof, but the main differences mentioned in the argument before us relate to the grounds on which enforcement of awards may be refused. These differences can be seen by comparing article 2 of the Geneva Convention as set out in Schedule 2 to the Act of 1950 with section 5 (2) of the Act of 1975. Thus, it was pointed out that whereas a refusal was mandatory under the former, such refusal is discretionary under the latter. But I do not think that much is to be gained from such a comparison. Thus, the last paragraph of article 2, as well as article 3, of the Geneva Convention also introduce a measure of discretion; moreover, the grounds for refusal under the New York Convention are wider: see in particular section 5 (2) (*c*) of the Act of 1975, which has no counterpart in Schedule 2 to the Act of 1950 and on which the defendants appear to place particular reliance in this case.

However, on behalf of the defendants it was also submitted that the effect of section 5 (1) of the Act of 1975, which provides that enforcement "shall not be refused except in the cases mentioned in this section," might possibly be to preclude a defence of limitation in relation to the enforcement of awards under that Act, or that the wording of this provision has some other bearing on the problem of construction facing us on this appeal. I feel bound to say that I cannot for one moment accept any argument on these lines. Article III of the New York Convention provides:

> "Each contracting state shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . ."

and it is settled law that all issues as to limitation are procedural in their nature. On the aspect of limitation, the enforcement [illegible] Act of 1975 pursuant to the New York Convention is in my view precisely the same as under Schedule 2 to the Act of 1950 pursuant to the Geneva Convention. Both Acts must be read in conjunction with what is now section 7 of the Limitation Act 1980, which provides that an action to

enforce an award (other than under seal) " shall not be brought after the expiration of six years from the date on which the cause of action accrued." The same applies to awards which are merely enforceable at common law. Whatever may be the effect of this provision in the context of any particular case, I cannot accept that problems concerning limitation have any bearing on this appeal.

In the upshot I was accordingly left with the impression that in the present case little, if anything, is likely to turn on any differences in the grounds for refusal of enforcement as between the position at common law and under either of the Conventions, and neither party was able to point to any relevant difference for present purposes. However, we nevertheless have to decide this preliminary issue; it is clearly of great importance generally, and, as we were told, an issue to which the Government of Kuwait attaches importance in relation to other awards.

Before turning to the relevant provisions of the Act of 1975 I must then return to the chronology. As already mentioned, the New York Convention came into force on June 10, 1958, as between the first states which adhered to it. The award, as also already mentioned, was published on September 15, 1973. At that time the United Kingdom, but not Kuwait, was a party to the Geneva Convention, and neither was a party to the New York Convention. Accordingly, the award was then enforceable in this country, if at all, only at common law, either summarily in the same manner as a judgment under section 26 of the Act of 1950, or by bringing an action on the award. Both of these remedies are equally available in relation to Convention and other awards.

Then, on December 23, 1975, the United Kingdom became a party to the New York Convention and the Act of 1975 came into force. This left the position in relation to the present award as before. Then, however, Kuwait also became a party to the New York Convention on July 27, 1978, and thereafter, on March 23, 1979, as already mentioned, the present proceedings were instituted by the plaintiff to enforce the award as a New York Convention award under the Act of 1975. The Order in Council declaring Kuwait to be a party to the New York Convention was not made until April 14, 1979. The fact that this had not yet happened when the present proceedings were instituted was the point raised by the fourth preliminary issue to which I have already referred. However, Mocatta J. held in this respect that although an Order in Council, once made, and while in force, is conclusive evidence that a state is a party to the Convention (see section 7 (2) of the Act of 1975 as set out below), that fact can also be proved by other evidence, and there is no challenge to this conclusion on the present appeal. The issue is whether, after July 27, 1978, when Kuwait became a party to the New York Convention, the United Kingdom already being a party, the award made in Kuwait in 1973 can be enforced as a New York Convention award under the Act of 1975. The judge held that it could not, because on his construction of the Act it only applies to awards made in Kuwait after that date and not before, and it is this conclusion which is challenged before us.

I then turn to the relevant provisions of the Act of 1975, and I think that one can go directly to section 2, under the cross-heading " Enforcement of Convention awards," which was clearly designed to give effect to article VII (2) of the New York Convention which I have already cited:

> " 2. Sections 3 to 6 of this Act shall have effect with respect to the enforcement of Convention awards; and where a Convention award would, but for this section, be also a foreign award within the meaning of Part II of the Arbitration Act 1950, that Part shall not apply to it."

Section 3 deals with the effect of Convention awards in the different parts of the United Kingdom, and I only set out the beginning:

> "(1) A Convention award shall, subject to the following provisions of this Act, be enforceable—(*a*) In England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950; . . ."

Then I need not set out sections 4, 5 and 6, though I have already mentioned section 5 (refusal of enforcement) by way of comparison with the Geneva Convention, and I can go directly to the crucial interpretation provisions in section 7, omitting the definitions of " arbitration agreement " and " The New York Convention " which need not be set out:

> " (1) . . . ' Convention award ' means an award made in pursuance of an arbitration agreement in the territory of a state, other than the United Kingdom, which is a party to the New York Convention; . . . (2) If Her Majesty by Order in Council declares that any state specified in the Order is a party to the New York Convention the Order shall, while in force, be conclusive evidence that that state is a party to that Convention. (3) An Order in Council under this section may be varied or revoked by a subsequent Order in Council."

Both Mr. Rix, for the plaintiff, and Mr. Wright, for the defendants, submitted that the natural meaning of these provisions in section 7 bears out their respective constructions, and both invoked grounds of policy in support of these; there was also a good deal of discussion about " retroactivity " in this connection, to which I turn later. Furthermore, since the Act of 1975 was designed to give effect to an international Convention, we were also referred to a good deal of material from other countries bearing upon the problem to some extent, viz. the legislation which gave effect to the Convention in other states, the decisions of foreign courts and articles by writers in other countries. Many, but by no means all, of the matters which were canvassed are mentioned below.

I found the point of construction one of considerable difficulty, and my mind wavered upon it during counsel's skilful arguments. Mocatta J., who of course had to deal with many other, and perhaps even more complex, issues in this case, ultimately decided in favour of the defendants for three brief reasons. First, after referring to a number of authorities dealing with retroactivity in the construction of statutes, he concluded that there was no clear reason, based on the language of the definition of " Convention award," why this should be given what he regarded as retrospective effect. Secondly, he preferred a prospective construction as being more in accordance with the language of the definition. Thirdly, he said:

> " Kuwait could have substantially safeguarded their enforcement position by acceding to the Geneva Protocol and Convention before the award was made and possibly even after [illegible]

However, Mr. Wright did not seek to rely upon this [illegible] cannot assist the defendants. As regards the first two reasons, I have reached the clear conclusion, with great respect, that there is no substance in the retroactvity argument, and on a careful analysis of the Act of 1975, whether taken alone or in the context of the Convention I have also

reached the conclusion that the plaintiff's construction is correct. I propose to list my reasons for reaching these conclusions, but it is difficult to place them in any particular order of logic or importance.

(1) In the ultimate analysis the problem revolves round the question whether the word "made" in the phrase "an award made" in section 7 (1) of the Act of 1975 is to have attached to it some chronological meaning, i.e. made after the date when a particular state becomes a party to the Convention, or whether it is merely to be construed geographically, in the sense that the award must have been made in the territory of a state which is a party to the Convention when the award is sought to be enforced under the Act. Although at first sight the view formed by Mocatta J. may well appear to be preferable, I do not think that it follows upon a closer reading of the definition. The phrase "which is a party to the . . . Convention" in section 7 (1) qualifies "state" and not "award made." As pointed out during the argument by Fox L.J., this becomes even more clearly apparent if the whole definition of "Convention award" is read into some of the provisions of the Act of 1975 instead of using the abbreviation, e.g. if it is read into section 3 (1) set out above. Accordingly, looking at the definition in isolation, I feel that the point is a very open one, and that there is certainly no clear preference for the defendants' construction.

(2) The plaintiff submits that when an award is presented to the court for enforcement under the Act of 1975 the definition shows that the court only needs to ask itself two questions, viz. (i) in the territory of what state was the award made, and (ii) is that state a party to the Convention? On the wording of the definition the court is not concerned with the date of accession by the state in question, and, when the definition is read together with section 7 (2), it is clear that the definition does not envisage that the Orders in Council need or will make any reference to the date of accession. I think that this is right. In saying this, I merely note, but otherwise disregard, that the irrelevance of any date of accession is in fact borne out when one looks at the Orders in Council themselves, which make no reference to dates, since Mr. Wright correctly reminded us that an Act cannot be construed by reference to any subordinate legislation made under it: see *Jackson* v. *Hall* [1980] A.C. 854. However, the point on the definition remains: the defendants' construction requires the words "is a party to the Convention" to be read as if there were added words such as "and was a party when the award in question was made."

(3) The absence of any reference in the definition to any date relating to awards which qualify for enforcement, in my view, becomes even more significant when this feature of the Act of 1975 is contrasted with the language used in other legislation in this field. Thus, section 35 of the Act of 1950 as set out above, dealing with the enforcement of Geneva Convention awards, provides expressly that Part II of the Act applies to awards made after July 28, 1924. Similarly, section 1 (2) (*c*) of the Foreign Judgments (Reciprocal Enforcement) Act 1933 provides that Part I applies only to judgments "given after the coming into operation of the Order in Council directing that this Part of this Act shall extend to that foreign country," and in the recent Civil Jurisdiction and Judgments Act 1982 the same course has been adopted: see Schedule 1, article 54, and Schedule 3, article 34. I think that the omission of any reference to any date, directly or indirectly, and the use of the present tense ("is a party to the Convention") are deliberate and significant. In relation to the latter point

Mr. Wright urged us to bear in mind that, in the reciprocity provision in the first sentence of article 1 (3) of the New York Convention, the words "contracting state" are used, and submitted that "awards made only in the territory of another contracting state" can only refer to awards made after a state has become a "contracting state," or that these words are at least ambiguous in the present context. However, in my view no weight can be given to this argument. Quite apart from the fact that "contracting state" is used throughout the Convention in every context, the significance of the option as to reciprocity is to confine enforcement to awards made "only in the territory of another contracting state" in contrast with the enforcement of *all* foreign awards, wherever made, under article I. As Mr. Rix aptly put it, it is an option relating to geographical and not to chronological limits; there is no indication that the dates of the awards are in any way relevant and, in so far as the Convention may be ambiguous in this respect, the unqualified use in the Act of 1975 of the words "an award made . . . in the territory of a state . . . which is *a party to the . . . Convention*" (not a "contracting state") supports the conclusion that the only relevant factor under the Act is also a geographical one.

(4) Next, there is, in my view, a fundamental fallacy in the defendants' main line of argument. This bears both on construction and on the plea against "retroactivity." Mr. Wright repeatedly submitted that an award "cannot change its character," and, as Mocatta J. [1981] 1 Lloyd's Rep. 656, 664 summarised the submission which he ultimately accepted, "the award could not change its character on July 27, 1978, nearly four years after it had been published."

However, it can easily be shown that awards can, and will, "change their character," in the sense of a change in the basis for their enforcement, by reason of the accession to the New York Convention of the state in which enforcement is sought or of the state in whose territory the award was made. Thus, take the following examples in the context of the United Kingdom. State X was a party to the Geneva Convention; it then acceded to the New York Convention; and an award was then made in its territory. Until December 23, 1975, the award would have been enforceable here under the Geneva Convention. But, after December 23, 1975, the award would become enforceable under the Act of 1975 by virtue of section 2 set out above. Similarly, if state X had never been a party to the Geneva Convention, but had then acceded directly to the New York Convention, an award made thereafter would, in the United Kingdom, only have been enforceable at common law until December 23, 1975, but would have become enforceable as a "Convention award" under the Act of 1975 thereafter, as Mr. Wright expressly and rightly conceded. These are "changes in character" resulting from the accession to the New York Convention of the United Kingdom, the state in which enforcement is sought. Then, take the case of the accession to the New York Convention by state X, the state in which an award is made. Suppose that state X was still only a party to the Geneva Convention in 1977 when an award is made in its territory. The award would then clearly have been enforceable here under the Geneva Convention alone. (The Orders in Council made under the Geneva Convention remain in force: see *Russell on Arbitration*, 20th ed. (1982), p. 477.) But, upon the accession by state X to the New York Convention in, say, 1978, I think that the effect of section 3 of the Act of 1975 would again clearly be to turn the award into a "Convention award" under the Act of 1975, since it would qualify under both Con-

ventions. In this case, accordingly, a "change in the character of the award" would result from the accession of the state in whose territory the award was made.

(5) The defendants' argument which Mocatta J. accepted also faces a formidable difficulty of pure construction. As Mr. Rix rightly pointed out, the twice repeated phrase "is a party" in section 7 (2) must have the same meaning as "is a party" in the definition of "Convention award" in section 7 (1). But, on Mr. Wright's argument, the meaning of this phrase differs in the following respect. In section 7 (2) it clearly means what it says, and the date of accession of the state in question is irrelevant. However, in the definition of "Convention award" in section 7 (1), the same words must be interpreted to mean, in effect, "is and was a party at the date when the award was made," as pointed out in (2) above.

(6) I can see no reason of policy, in the sense of the presumed intention of Parliament as expressed in the Act of 1975, which favours the defendants' construction. First, to put it broadly, the interest of the United Kingdom lies in the enforcement by the courts of other contracting states of awards made here, and to that extent we may hope for a wider basis of reciprocity if we enforce all awards made in states which are parties to the New York Convention. Secondly, the realities can be put more bluntly. Mr. Wright submitted that the New York Convention is like a club, and that the attitude of the United Kingdom is, in effect: "Once you have joined the club, we will enforce your awards." However, this merely begs the question of construction: which awards? All of them? Or only those made thereafter? Furthermore, the Convention is not a selective club. Any state can adhere to it. Unless the Convention is denounced in toto under article XIII, every adherent must enforce all awards made in the territory of every other adherent, past or future. So why should awards made in Ruritania, after Ruritania has chosen to adhere to the Convention, be any more deserving of enforcement than those made before? In my view, the presumed intention of Parliament, on grounds of policy, does not enter into the question of construction.

(7) Nor do I think that any argument against retroactivity is of any substance. If the illustrations in (4) above imply retroactivity, then to that extent the Act of 1975 is inevitably retrospective. But, although "retrospective" is an ugly word in the context of construing a statute, it is often misapplied. Thus, in *West v. Gwynne* [1911] 2 Ch. 1, this court had to consider a statute which outlawed the right to demand payments, in relation to "all leases," for the landlords' consent to assignment, etc., and it was argued that the statute should not be construed so as to apply to existing but only to future leases in order to avoid any retrospective construction. This argument was rejected unanimously. Buckley L.J. said, at pp. 11–12:

> "To my mind the word 'retrospective' is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. . . . There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights."

There are also many other considerations in this context. Thus, as the judge [1981] 1 Lloyd's Rep. 656, 665 pointed out, the presumption against a retrospective construction does not apply to statutes which are procedural in their nature; in relation to procedural statutes the presumption is the other way. However, a statute dealing merely with the recognition or enforcement of prior rights would be classified as procedural under our rules of private international law: see *Dicey and Morris, The Conflict of Laws*, 10th ed. (1980), vol. 2, pp. 1177–1178. Moreover, if all retrospective effect were to be avoided in the present context, then one would logically have to go back beyond the arbitration agreement itself. Thus, in *Mustill & Boyd, Commercial Arbitration* (1982), p. 375, note 4, the decision at first instance in the present case is summarised as follows:

> "An award is not a 'Convention award' unless the state in question was a party to the Convention at the date of the award and (semble) at the date of the arbitration agreement: . . ."

This addition would be logical to bar all retrospectivity, but on any view it is clearly an unwarranted extension of the Act of 1975, and Mr. Wright's argument rightly disclaimed it. In any event, as pointed out by Lord Brightman in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 A.C. 553, 563, the term "procedural" can also be misleading; the question is whether a particular construction "would impair existing rights and obligations." However, I do not consider that the defendants ever had anything in the nature of a "vested right," as they contend, not to have this award enforced against them under the New York Convention, but only at common law.

(8) I do not think that much assistance is to be gained from the foreign material which Mr. Rix put before us. All of it derives from the introduction by Mr. Giorgio Gaja to *International Commercial Arbitration, New York Convention* (Oceana Booklet 2 (1978), section I.A.5) which contains a valuable survey of the legislation and decisions concerning the Convention in different countries and a review of the writings about it. The question of retroactivity is complicated by the fact that in a number of states the legislation giving effect to the Convention provided expressly that it was only to apply to awards made thereafter. But, where this has not been the case, the predominant view appears to be that the Convention has what would—I think inaccurately—be described as having retrospective effect. However, in my view the material is too disparate to provide any reliable guidance for present purposes under the principle of comity, other than to show that there is nothing internationally dissonant in the construction of the Act of 1975 which I consider to be correct, for the reasons already stated, and that this construction in fact appears to be in line with the law in other New York Convention states.

Accordingly, I would allow this appeal and answer the preliminary issue affirmatively, by holding that the award relied on by the plaintiff is a Convention award for the purposes of the Act of 1975.

Stephenson L.J. I agree and have only this to add. [illegible] the time of this court is taken in attempting to discern the meaning of statutes. Much if not most of that time might have been saved if Parliament had added a few words to make its meaning plain. Making allowance for the obstacles which Parliamentary procedure may put in the way of clarity, for the political considerations which may sometimes invite ambiguity and for the impossibility of foreseeing what situations may confer

consideration of particular statutory provisions, I cannot help thinking that the issue in the present appeal is one which the legislature might have been expected to have saved the parties the trouble and expense of litigating by the simple addition to section 7 (1) of the Arbitration Act 1975 of such words as: " whether the award is made before or after that state is a party to that Convention." I say this because, as Kerr L.J. has pointed out, this legislation is in a realm where the question left open to argument by the language of section 7 (1) had already been considered and answered beyond doubt by those who drafted section 35 of the Arbitration Act of 1950 and section 1 (2) (*c*) of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

Appeal allowed.
Leave to appeal refused.

Solicitors: *Charles Russell & Co.; Blakeney's.*

[Reported by Mrs. Maria Fleischmann, Barrister-at-Law]

[COMMISSARY COURT OF THE CITY AND DIOCESE OF CANTERBURY]

* *In re* CHRIST CHURCH, CROYDON

1982 June 19 Judge Newey Q.C., Com.Gen.

Ecclesiastical Law—Faculty—Demolition of church—Church in unsafe condition—Repairable building of interest and quality—Church requiring adaptation to parish's current needs—Petition for faculty to demolish and replace church—Whether faculty jurisdiction appropriate—Whether faculty to be granted—Faculty Jurisdiction Measure 1964 (No. 5), s. 2 (2)

A church built in 1850 by a notable architect and a building of quality and interest, became unsafe and the congregation met in the church hall. The church was capable of being repaired but required adapting to the current needs of the parish. After careful consideration by the parish, a petition was presented by the vicar and churchwardens seeking a faculty, pursuant to section 2 (2) of the Faculty Jurisdiction Measure 1964,[1] authorising the demolition of the church and its replacement by a new church forming part of a centre consisting of a main section for worship and incorporating other rooms to be used for church purposes. There were no parties opponent to the petition, but the view of the Council for the Care of Churches was that the existing church should be retained, and the Advisory Board for Redundant Churches submitted that the proper procedure for dealing with the issue of demolition was that provided by the Pastoral Measure 1968 and not that under the Faculty Jurisdiction Measure 1964.

On the petition:—

Held, granting a faculty, (1) that, although the procedure to obtain authorisation for the demolition of a church by

[1] Faculty Jurisdiction Measure 1964, s. 2: "(2) The court may grant a faculty for the demolition of the whole or part of a church if the court is satisfied that another church will be erected on the site or curtilage of the church in question or part thereof to take the place of that church."

faculty application under section 2 of the Faculty Jurisdiction Measure 1964 might in some respects be less satisfactory than the procedure under the Pastoral Measure 1968, it was not without advantages and the petitioners were entitled to make use of it and that, accordingly, it would not be a proper course for the court to dismiss the petition and direct that the matters raised therein should be dealt with under the Pastoral Measure 1968 (post, p. 831F–H).

(2) That, although the church could be repaired and adapted to parish needs and its demolition would mean losing a church of interest and quality, an adaptation would neither be functionally as satisfactory nor as economical to heat and maintain as a new building and would in many respects destroy the quality of the church; that, accordingly, on balance the court was in favour of demolition and rebuilding; but that demolition could not commence until the court was satisfied, inter alia, that sufficient funds would be available to meet the cost of a new church (post, pp. 836G–H, 837A–B, G–H).

No cases are referred to in the judgment.

PETITION

The incumbent and churchwardens of the parish of Christ Church, Croydon, petitioned for a faculty authorising the demolition of the church and its replacement by a new church centre.

The Central Council of Diocesan Advisory Committees for the Care of Churches, in response to the notice of the petition given to the council pursuant to section 2 (1) (ii) of the Faculty Jurisdiction Measure 1964, opposed the proposal to demolish the church.

The Advisory Board for Redundant Churches wrote to the Commissary General suggesting that the petition should be dismissed and a direction made that the case should be dealt with under the Pastoral Measure 1968.

The facts are stated in the judgment.

The petitioners in person.
Mr. Saunders for the Council for the Care of Churches.
The Archdeacon of Croydon as amicus curiae.
The Advisory Board for Redundant Churches was not represented.

JUDGE NEWEY Q.C. Com.Gen. By way of preface to this judgment I think I ought to refer to a letter which I have received from the Advisory Board for Redundant Churches and which I read out earlier today. It suggests that I should dismiss this application and direct that the case be dealt with in what it describes as " the normal way " under the Pastoral Measure 1968. I have thought about the suggestion, but it seems to me it would not be proper to take such a course. The Faculty Jurisdiction Measure 1964, section 2 (2), empowers the Commissary Court to authorise the demolition of a church subject to a replacement church being provided and since the law so provides it appears to me that the petitioners are perfectly entitled to make use of it and to apply to the court. Procedure by faculty application may be less satisfactory than procedure under the Pastoral Measure 1968 in some respects, for example [illegible] native uses, but it is not without advantages. It provides for a public examination of proposals before any decision is made and gives an ordinary member of a congregation and anyone else an opportunity to appear and to express his or her views locally before a much less august body than the Privy Council.