complied with, the Court must grant a stay of Court proceedings and has no discretion as under section 53 of the Uniform Acts.

Section 7(5) of the Act however provides:

> "A Court shall not make an order under sub-section (2) if the Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed".

In this case, His Honour found that undertakings given to the Court in earlier interlocutory proceedings in the action in effect rendered the arbitration agreement "inoperative or ineffective" with respect to the claims involved in the proceedings before the Court. He therefore refused to grant a stay of proceedings pursuant to section 7(2) of the Act.

JUDICIAL COMMENT

The following is part of the judgement in National Distribution Services Ltd v IBM Australia Limited.

> "Today much more than ever before, commercial persons and entities entering into contracts have to be conscious of the possibilities of future disputes and of the need to provide for their resolution. The delays, costs and expense attendant upon curial litigation are common knowledge in the commercial community. Also, I think it is fair to say, that the methods of dispute resolution, other than curial determination, particularly arbitration, are also well known. Many businessmen take the view that for whatever reason, they prefer to have any dispute in which they may be involved determined by arbitration rather than litigation. They express this intention in words which many require construction by a court. However, in approaching this task of construction, a court should no longer accept the underlying concept which permeated many judgments in earlier times that businessmen intended only technical disputes, or disputes as to quality, to be dealt with by arbitration. There used to be a perception amongst judges that legal questions were unlikely to have been intended to be the subject matter of arbitration. It is in this regard that current developments in dispute resolution have their impact. On the face of it, when one has, as is the case here, a widely drawn submission to arbitration, it is a somewhat curious notion that the court should take the view that, notwithstanding its evident width, the parties intended to preserve some disputes for curial disposition. At the end of the day, of course it is the intention of the parties that is determinative but, in ascertaining their intention, one is entitled to make the approach in the way I have indicated."

National Distribution Services v. IBM Australia Limited, unreported, Supreme Court of New South Wales 21 December 1990 Rogers CJ Comm. D, 21 December 1990.