CA on appeal from the Commercial Court; Morison J before : Brooke LJ; Latham LJ and Mr Justice Holman. 31st July 2003.

JUDGMENT : Lord Justice Brooke

1 The background and a summary of the issues on the appeal

1. This is an appeal by the defendants, by permission of the judge, from an order of Morison J, sitting in the Commercial Court on 15th November 2002, whereby he remitted to arbitrators for reconsideration two of the issues in their award sentence dated 25th January 2002 pursuant to section 68 of the Arbitration Act 1996 ("the 1996 Act") as having been made in excess of the powers given to them. These issues were the currency of the award (and in particular paragraphs 13.17 and 14.4 of the award) and the award of interest (and in particular paragraphs 13.15 and 14.1 of the award). In their reconsideration of their award the arbitrators were directed that the currency or currencies of the award were a matter of the substantive law of the dispute, and were to be decided by reference to the law of the Kingdom of Lesotho (being the law governing the contract) and moreover that the currency or currencies of the award were to be decided in accordance with the terms of the contract. The arbitrators were also directed, in relation to their award of interest, that such an award was a matter of the substantive law of the dispute, and that the award of interest was similarly to be decided by reference to the law of the Kingdom of Lesotho.

2. The claimants are the Lesotho Highlands Development Authority ("LHDA"), and the dispute arose out of certain works which the seven defendant companies (who were collectively known as the Highlands Water Venture ("HWV")) performed for LHDA in relation to the construction of the Katse Dam in Lesotho. Of the defendant companies, two came from the United Kingdom, two are South African and the other three came from Italy, Germany and France respectively. The contract works started on 1st February 1991 and on 26th February 1998 a Taking Over Certificate was issued in respect of the whole of the works.

3. The project was successfully completed on time. In 1997 a dispute arose in respect of a claim by HWV for extra labour costs, and they gave notice of their intention to submit this dispute to arbitration. Seven further claims for increased costs were later advanced. In due course the arbitrators made an award in favour of the defendants in relation to their original claim and three of their later claims: they dismissed the other four. Of the successful claims, Claims 12 and 37 were claims for the reimbursement of the increased costs of vehicle hire in Lesotho and the increased cost of local labour. Claims 53/66 and 62 were for new or adjusted prices or rates to be applied to sums due under the contract.

4. The problem that has arisen, in a nutshell, is that the arbitrators regarded themselves as free to choose the currencies in which their award should be paid and the basis on which and the rate at which LHDA should pay interest. LHDA maintain that both these matters were provided for in the parties' contract or in the law applicable to the contract, and that the arbitrators exceeded their powers in departing from the contract in the way they did. The judge upheld LHDA's contentions and held that he was entitled to exercise his powers under section 68 of the 1996 Act to remit these issues for reconsideration. The main issue that arises on this appeal is whether the judge had any power to take this course. The parties had agreed that the arbitrators' award should be final. There was therefore no right of access for either party to the court on a point of law under section 69 of the 1996 Act.

5. In order to resolve this appeal it is necessary first to set out the relevant terms of the contract, the relevant provisions of the Rules of the International Chamber of Commerce ("the ICC Rules") and the terms of reference for the arbitrators that were drawn up under those rules, and the relevant provisions of the 1996 Act.

2 The terms of the parties' contract

6. The contract was an appropriately amended form of the conditions of contract for works of engineering construction published by the Federation Internationale des Ingenieurs-Conseils (Fourth Edition 1987 reprinted 1988 with editorial amendments). Clause 5, which was concerned with the language and law of the contract, provided by Clause 5(b) that the law should be that of the law in force in the Kingdom of Lesotho. Other relevant clauses were:

   Clause 60.11 (Currency of Account and Rates of Exchange) : "The currency of account shall be Maloti and for the purposes of payment, conversion between Maloti and the currencies stated in the contract shall be made in accordance with the rates of exchange determined in accordance with Clause 72."

Clause 60.12 (Payments to Contractor) : "All payments to the Contractor by the Employer shall be made

(a) In the case of a claim for additional payment under the Contract where the Contractor is due reimbursement of cost, in the currencies stated in the Contract but in the proportions as far as possible in which the costs were incurred as agreed with the Engineer;

(b) In the case of payment for any Provisional Sum item, in the currencies stated in the Contract but in the proportions applicable to the item as agreed with the Engineer at the time when the Engineer gives instructions for the work covered by the item to be carried out;

(c) In any other case, including any increase or decrease in price under Sub-Clause 70.1 in the currencies and proportions stated in the Contract which proportions shall remain fixed for the duration of the Contract."

Clause 72.1 (Rates of Exchange) : "Payments to the Contractor shall not be subject to variations in the rates of exchange between Maloti and the foreign currencies that have been stated in the Contract. The rates of exchange to be used for the Contract shall be the selling rates applicable at close of business of the Central Bank of Lesotho 42 days before the closing date for submission of tenders, which rates shall have been notified to the contractor by the Employer prior to the submission of tenders and included in the Contract."

Clause 72.2 (Currency Proportions) : "Payments shall be made to the Contractor by the Employer in the currency proportions stated in the Contract subject to the provisions of Sub-Clause 60.12."

7. As a supplement to the Tender the parties agreed what were described as currency requirements. In short they provided that in relation to each contractual payment 58.35% would be payable in Maloti (the unit of currency in Lesotho) or South African rand, 6.96% in German deutschmarks, 13.38% in French francs, 10.97% in Italian lira and 10.34% in pounds sterling. The "*Clause 72.1 Exchange Rates*" were to be parity for the rand, 0.6571 for the deutschmarks, 2.2206 for the franc, 484.8643 for the lira, and 0.2355 for the pound.

8. In addition the parties agreed that for the two local currencies the rate of interest applicable to sums due on unpaid interim certificates was to be 1% over prime overdraft rate charged by First National Bank of South Africa. For the other currencies it was to be 2% in excess of the commercial interest reference rate applicable on the due date to the relevant currency.

9. Clause 67.3 of the contract contained the arbitration clause. So far as is now relevant, any arbitration was to be conducted by three arbitrators under the ICC Rules, and the law to be applied by the arbitrators to the merits of the dispute was to be the law of Lesotho. The award of the arbitrators was to be final and binding between the parties.

3 The ICC Rules and the arbitrators' terms of reference

10. By article 18(1)(g) of the ICC Rules the arbitral tribunal was to draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document containing their terms of reference which was to include, among other things, particulars of the applicable procedural rules. Article 28(b) for its part provided that: *"Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."*

11. The arbitral tribunal in due course drew up and signed their terms of reference pursuant to Article 18(1)(g), to which the parties agreed. For present purposes it is necessary only to refer to paragraphs 6.4 and 6.5, 7.1 and 7.2, and 8.1 and 8.3 of this document. Paragraph 6.4 set out the parties' contractual arbitration clause in full. It was prefaced by the words: *"Subject to these Terms of Reference, the parties have agreed that this arbitration will be governed by the following arbitration clause in the contract."*

12. The other clauses I have mentioned provide:

6.5 The parties, by exchange of correspondence agreed that London should be designated as the place of arbitration.

7.1 As the seat of the arbitration is to be London, the dispute is to be finally settled in accordance with the provisions of the Arbitration Act 1996 (UK) (which will apply in lieu of the Arbitration Act No 12 of 1980 of Lesotho) and the rules of arbitration of the International Chamber of Commerce in force as from 1 January 1998.

7.2 The law applicable to the substance of the dispute pursuant to clause 5 of the Conditions of Particular Application and the arbitration agreement referred to in paragraph 6.4 is to be that in force in the Kingdom of Lesotho.

8.1 The Tribunal shall have the power to make a Partial, or Interim, Award on any issue or matter before making a final Award. Any such Award or Awards shall to the extent to which the Tribunal considers to be appropriate,

specify a single net amount (if any) to be paid by one party to the other, having regard both to the Claimants' claim[s] and the Respondent's counter-claim.

8.3 By signing these Terms of Reference, the parties accept the validity of the appointment of [the] Tribunal and of the Proceedings and acknowledge the jurisdiction of the Tribunal over all matters in dispute therein."

4 The Arbitration Act 1996: relevant provisions

13. Since the arbitration was being conducted in London, Part I of the 1996 Act applied: see section 2 of that Act. Section 4 and Schedule 1 contain the familiar provision for mandatory and non-mandatory provisions of the Act. Section 68, in particular, is a mandatory provision, which is to *"have effect notwithstanding any agreement to the contrary"* (section 4(1)). The non-mandatory provisions of Part I, on the other hand, allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement (section 4(2)). Section 4(5) provides that: *"The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter."*

14. Sections 48 (Remedies) and 49 (Interest) are non-mandatory, as is made clear in sub-section (1) of each section. Section 48(2) and (4) provide:

"(2) Unless otherwise agreed by the parties, the tribunal has the following powers.

(4) The tribunal may order the payment of a sum of money, in any currency."

15. Sections 49(2), (3) and (6) provide:

"(2) Unless otherwise agreed by the parties the following provisions apply.

(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case –

(a) on the whole or part of any amount awarded by the tribunal in respect of any period up to the date of the award.

(6) The above provisions do not affect any other power of the tribunal to award interest."

16. Finally, section 68(1) and (2) provide, so far as is material:

"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67)."

5 The arbitrators' award and the judgment of Morison J

17. It is convenient to adopt the judge's description (in paras 19-22 of his judgment) of the relevant features of the arbitrators' award: *"**What the Tribunal did***

19 Paragraph 13 of the Partial Award is headed 'Currency and Interest'. The structure of the paragraph is as follows: sub-paragraphs 13.1 to 13.13, inclusive, set out an accurate summary of the parties' cases on this topic; in sub-paragraphs 13.14 and 13.15 the Tribunal dealt with the principles upon which interest would be awarded; and sub-paragraph 13.17 dealt with the principles regarding the currency of the award.

20 For the purposes of this hearing, the crucial sub-paragraphs in the Partial Award are 13.15 and 13.17. The relevant passages are these:

13.15 'As regards interest the submissions of the parties raise the fundamental question whether the right to interest is a matter governed by the procedural law of the arbitration, being English law, or whether it is governed by the law applicable to the substance of the dispute, being the Law of the Kingdom of Lesotho. Whilst it is possible that in different jurisdictions the right to interest may be regarded as governed by the substantive law … there can be no doubt that the right to interest is regarded as a matter of procedure under English law. The Tribunal received no evidence as to the applicable rules of conflict of law in Lesotho and therefore must presume this to be the same as English law. This would lead the Tribunal to conclude that interest is governed by English law. The issue is, in any event, placed beyond doubt by the agreed Terms of Reference which state expressly [para 7.1: for its terms see paragraph 12 of this judgment].'

13.17 'As regards the currency in which sums should be awarded, the Tribunal is of opinion that this issue is also a matter of procedural law … For the reasons set forth in paragraph 13.15 above, the Tribunal is of opinion that the powers under section 48 of the Arbitration Act 1996 are, prima facie, available. As in the case of

section 49, section 48 applies 'unless otherwise agreed by the parties'. The Respondent contended that the matter of currencies was dealt with under the contract. Whilst this may provide for the currencies in which payment under the contract is to be made, the contract is silent as to the currency in which any arbitral award is to be given. The Tribunal is of the opinion that the parties have not 'otherwise agreed' on the powers available to the Tribunal, and the Tribunal accordingly concludes that it has the power to order payment of any sum of money found to be due in any currency. Accordingly, while the Tribunal takes careful note of the contract currencies and their stated proportions, the Tribunal will express its awards in such currencies as are considered appropriate in the circumstances.'

21. *Paragraph 14 of the Partial Award is headed 'Conclusion as to Amounts Due and Currencies'. In sub-paragraph 14.1 they set out the principal sums in relation to each head of claim which succeeded, expressed in Maloti. To these sums the Tribunal added interest in purported exercise of their powers under section 49 of the Act. They concluded that interest should run 'on a normal commercial basis' from the dates which they then determined in relation to each claim. The table below shows the sums expressed in Maloti and the date from which interest was to run.*

Claim No	Value of the Claim in Maloti	Date from which Interest runs
Claim 12	46,659	1 Jan 1997
Claim 37	14,321,105	1 July 1996
Claim 53/66	3,000,713	1 July 1996
Claim 62 Total	1,532,522 18,900,099	1 July 1997

22. *Paragraph 14.4 of the Partial Award deals with the question of currencies: 'The Tribunal must decide in what currencies the foregoing sums are to be awarded and when any conversion is carried out, in order to determine the applicable interest rates in respect of each currency on an average basis. Having considered [the parties'] submissions and the powers available to the Tribunal, the Tribunal is of opinion that it would be appropriate that the final Award should be rendered in European currencies and not in Maloti. For the purpose of conversion, the Tribunal determines that sums presently stated in Maloti should be converted in the same ratio, inter se, as the four European currencies are stated. This gives rise to the following percentages:*

Currency	Percentage
Italian Lira	26.34%
UK pounds	24.83%
French Francs	32.12%
Deutsche Marks	16.71%
	100%

The Tribunal then converted the non-UK currencies into Euros and expressed their Partial award in Euros and pounds sterling."

18. After summarising the submissions of the parties, the judge set out his decision in paragraph 25 of his judgment, which contained ten sub-paragraphs. Neither side has disputed in this appeal his conclusion that section 67 of the 1996 Act has no relevance in this case. This must either be a section 68 case or the application must fail.

19. The judge observed that the tribunal had approached the currency and interest issues in a manner different from the way that either party had presented the case. He made the mild comment that it might have been more helpful if the method they were minded to adopt had been put to the parties for their comments, while acknowledging that HWV, for their part, had invited the tribunal to exercise its powers under sections 48 and 49 of the Act. He went on to observe that the parties' oral and written submissions to the tribunal were not as helpful as they might have been. He said that it would appear from their reasons that

they regarded both the currency and interest issues as matters of procedural rather than substantive law. He concluded this part of his judgment by saying (at para 27(5)):

"With great respect to the Tribunal I consider that they did not have the power to make an award in a currency different from that provided for in the Contract. The currencies stipulated for, based in part on the currencies in which costs had been incurred, were the currencies which the Engineer was required to adhere to in any certificate he gave. The arbitrators were in no different position in relation to non-procedural matters. The law to be applied was the law of Lesotho, which for this purpose must be assumed to be the same as English Law. As a matter of English Law, the currency of the award is a matter to be determined by the applicable law of the contract, as Mr White QC correctly submitted. The arbitrators were required by the terms of reference to 'award in the respective currencies', that is, in the currencies stipulated for in the Contract, save to the extent that the parties otherwise agreed.

The Tribunal were right not to follow the argument presented by Mr Glick QC. The words 'subject to these terms of reference' do not permit the Tribunal to treat what was a matter or substance [or rather, a matter governed by the substantive or applicable law] as a matter of procedure. The words contemplate that on [properly called] procedural matters the Arbitration Act will apply. They do not mean, and cannot reasonably be thought to mean, that the provisions of the Act predominate over the arbitration clause on matters of substance. In other words, the phrase 'subject to these terms of reference' means, and, I think, can only mean, subject to matters of procedure being governed by clause 7.1. I do not consider that the parties can have thought that Mr Glick's construction was right; and the Tribunal itself did not adopt it."

20. He went on to hold that the tribunal's error amounted to an excess of power (see section 68(2)(b) of the 1996 Act). For the reasons he had given, he did not think the tribunal had the power to make an award in currencies other than those stipulated for in the contract. By purporting to exercise a discretion which they wrongly believed was conferred on them by the Act they were asserting a power which they did not possess. He therefore remitted the matter of the currency of the Award back to the tribunal so that they might produce an Award which accorded with the contractual provisions.

21. The judge found the question of interest less clear, in the sense that there was still a debate as to whether interest as part of damages was a matter determined by the applicable law or by the *lex fori* (as the Tribunal thought). He found the answer in the fact that the rate of contractual interest had been agreed between the parties, and the tribunal was acting as though they were performing the engineer's function under the contract. It appeared to be the case that by the law of Lesotho interest was only payable when LHDA could be said to be in culpable default, and in any event the amount of the interest could not exceed the amount of the principal.

22. If he was wrong about this, he noted that the right to claim interest by way of damages in a tort case was not a matter of procedure in a private international law sense. It was an issue of tort and thus governed by the appropriate substantive law. He could see no good reason why, if the issue of contract was a matter for the applicable law, it should cease to be so where the claim was for interest damages.

23. During the course of the hearing in this court Mr Glick QC, who again appeared for HWV, abandoned reliance on the words "*Subject to these Terms of Reference*" (see para 11 above). These words clearly refer to the procedural changes set out in paragraphs 6.5 and 7.1 of the terms of reference (see para 12 above) and nothing more. He relied strongly, however, on the argument that sections 48(4) and section 49(3) of the 1996 Act (see paras 14 and 15 above) gave the arbitrators an unfettered power to order the payment of a sum of money in any currency or to make what they considered to be an appropriate award of interest. If in the exercise of those powers they got the law wrong (if, for instance, they failed to apply the applicable law of the contract when they should have done) they might have made an error of law challengeable under section 69 of the Act (if available) but they would not have exceeded their powers within the meaning of section 68.

24. He contrasted the present case with a case in which the parties had agreed to disapply section 48 and 49 and to direct the tribunal to award sums in the currency identified in the contract, convertible at the rate of exchange identified in the contract, and to award interest according to the applicable law of the contract. In such a case the tribunal would indeed be acting in excess of their powers if they ignored these directions. Similarly, if the terms of reference had empowered the tribunal to award interest at an appropriate rate from the date on which they considered sums were payable to HWV and they had awarded interest from

some earlier date, the tribunal would have exceeded their powers in this regard. In this case, however, the tribunal had acted within their powers even if, which he did not concede, they had misapplied the law.

6 Currency: English Law

25. Longstanding principles of English procedural law were restated by the House of Lords in ***In re United Railways of Havana and Regla Warehouses Ltd*** [1961] AC 1007. A sum was held to be due from that company in US dollars under a lease and another agreement which were both governed by the law of Pennsylvania. The House of Lords held that the sum provable in the liquidation of the company was to be converted at the rates of exchange prevailing at the respective dates when the several sums arising by the company to the creditor fell due and payable. In other words, although the substantive debt was a US dollar debt, English procedural law dictated (a) that it must be converted into English pounds for the purposes of converting it into a debt provable in an English liquidation and (b) the date at which each debt should be converted into English currency.

26. ***Jugoslavenska Oceanske Plovidba v Castle Investment Co Inc*** [1974] QB 292 showed a shift from this position, so far as arbitrators were concerned. London arbitrators had made an award for unpaid hire in US dollars, being the currency of the hire contract. An issue arose whether an English court could give leave under section 26 of the Arbitration Act 1950 to enforce the award in the same manner as a judgment to the same effect. This court held that English arbitrators had jurisdiction to make their awards in a foreign currency where that currency was the currency of the contract, and that such an award could be enforced with the leave of the court by converting the award into sterling at the rate of exchange ruling at the date of the award. Lord Denning MR said at pp 298-9: *"In my opinion English arbitrators have authority, jurisdiction and power to make an award for payment of an amount in foreign currency. They can do this – and I would add, should do this – whenever the money of account and the money of payment is in one single foreign currency. They should make their award in that currency because it is the proper currency of the contract. By that I mean that it is the currency with which the payments under the contract have the closest and most real connection. Likewise, whenever the proper currency of a contract is a foreign currency, English arbitrators can and should make their award in that currency, unless the parties have expressly or impliedly agreed otherwise. The proper currency can usually be ascertained without difficulty. But if the transaction is closely connected with two currencies (as in* ***The Teh Hu*** *[1970] P 106 Japanese salvors of a Panamanian vessel) the arbitrators can and should make their award in whichever of the two currencies seems to them to produce the most appropriate and just result."*

27. Roskill LJ, for his part, said at p 305: *"I would only add on this part of the case that this decision does not amount to a general licence to arbitrators and umpires to make awards in any currency they choose heedless of the provisions of the contract with which they are concerned. The currency of account and the currency of payment will in most cases be easily ascertainable just as the proper law of a contract is in most cases easily ascertainable. In a few cases the problem will be difficult as in a few cases the question of proper law is difficult. But even in a difficult case the problem must ultimately be capable of solution and the arbitrators (if they wish) can – as I would think – always decide as a matter of discretion to make an award in sterling unless either the terms of the contract in question or of the arbitration agreement under which their jurisdiction arises or some other reason prevents them from so doing."*

28. It followed that in most contract cases it would be relatively easy for arbitrators to detect the currency of account and the currency of payment and to make their award in that currency, being the proper currency of the parties' contract. In difficult cases the arbitrators might have to use more imagination to arrive at a just result. Roskill LJ, for his part, suggested a route which arbitrators might take as a matter of discretion so long as they were not prevented from going down that route by the parties' agreement. English procedural law provided the rules to apply if an award made in a foreign currency had to be converted into sterling for the purpose of enforcement in England.

29. In ***Miliangos v George Frank (Textiles) Ltd*** [1976] AC 443 the House of Lords declined to follow the ***United Railways of Havana*** decision so far as judgments in court proceedings were concerned. The instability of the pound sterling in international markets had brought about this change of policy. Lord Wilberforce distinguished clearly between the substance of the debtor's obligations and the effect of English procedural law when a debt in a foreign currency came to be enforced in England. Two short passages from his speech make the distinction clear: *"The substance of the debtor's obligations depends upon the proper law of the contract (here Swiss law); and though English law (lex fori) prevails as regards procedural matters, it must surely be wrong in*

principle to allow procedure to affect, detrimentally, the substance of the creditor's rights … [I]f means exist for giving effect to the substance of a foreign obligation, conformably with the rules of private international law, procedure should not unnecessarily stand in the way." (465F-H)

"…[O]bjections based on authority against making an order in specie for the payment or delivery of foreign money, are not, on examination, found to rest on any solid principle or indeed on more than the Court's discretion." (466D-E).

See also Lord Cross of Chelsea at pp 497G-498A and Lord Edmund-Davies at p 498F-G.

7 Currency: Conclusion

30. It follows that where there is a contract which identifies the currency of account and the currency of payment and specifies the proportions of any debt due under the contract which must be apportioned in different currencies to the different members of an international consortium, section 48(4) of the 1996 Act merely repeats in codified form what had already been established by this court in the ***Jugoslavenska Oceanska*** case, namely that English procedural law did not require London arbitrators to convert this substantive debt in a foreign currency into English currency for the purpose of making their award. The parties' agreement was clear on the face of their contract, and the arbitrators, standing in the shoes of the engineer, were bound to give effect to it. Section 48(4) does not create a freestanding power to choose whatever currency arbitrators might think appropriate when the terms of a contract are clear.

31. Mr Glick drew our attention to a provision of the arbitration clause which gave the arbitrators, by agreement, powers which the engineer did not possess: *"The arbitrator shall, in any award of amounts payable to the Contractor, distinguish between amounts in respect of the source of goods and services (Germany, France, UK, RSA, Italy or elsewhere) and award in the respective currencies."*

32. This submission formed part of a more general submission to the effect that the judge was wrong to find that the function of the arbitrators was to carry out the function previously held by the Engineer, which was to ascertain what sums were due and owing under the contract. So far as that submission is concerned, the arbitrators had to interpret the contract in performing their function, even if this provision gave them an additional power which was not open to the Engineer.

33. As to the terms of the provision itself, it is understandable that the parties should have wished to alter the general contractual provisions about currency apportionment in order to cater for a case in which one of the contractors had to buy in goods or services from an overseas country to remedy a problem that had arisen, but there is no suggestion that this provision had any relevance to the arbitration award with which we are concerned. It appears to represent an endeavour to make express provision for the type of situation which the House of Lords had to resolve in the absence of any such provision in the case of the ***Folias*** **(see *The Despina R)*** [1979] AC 685, 697-699).

34. In my judgment the arbitrators ought therefore to have interpreted the parties' contract in accordance with the applicable law (and there was no suggestion that the law of the Kingdom of Lesotho was in any material respect different from English law in this regard) and made an award in the currencies which the parties had agreed upon. Section 48(4) of the 1996 Act merely restated what must be taken (in the absence of evidence to the contrary) to be the effect of the substantive law of the Kingdom of Lesotho which the arbitrators were bound to apply. I therefore agree with the judge that the arbitrators exceeded their powers when they thought that section 48(4) of the 1996 Act gave them any power to depart from what the parties had agreed. I would therefore dismiss the appeal on the currency point.

8 Interest: English law and civil law contrasted

35. The common law and the civil law followed different paths in relation to awards of interest. So far as the common law is concerned, in ***Page v Newman*** (1829) 9 B&C 378, 381 Lord Tenterden CJ referred to: *"the long-established rule that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments."*

36. In ***London, Chatham and Dover Railway Co v South Eastern Railway Co*** [1893] AC 429 and in ***President of India v La Pintada Compagnia Navigacia SA*** **("*La Pintada*")** [1985] AC 104 the House of Lords made it clear that it had no power to alter this common law rule. Parliament, however, intervened from time to

time to mitigate the unfairness of the rule, most notably in section 28 of the Civil Procedure Act 1833 (Lord Tenterden's Act) and in section 3 of the Law Reform (Miscellaneous Provisions) Act 1934.

37. The civil law viewed the matter from a different standpoint. If money was wrongfully withheld, then the courts had power to award interest during the period of delay between the time the money was legally and ascertainably due and the time when the court ordered that it should be paid. This was known as the ***ex mora*** rule. As Lord Denning MR observed in ***Jefford v Gee*** [1970] 2 QB 130, 144, the courts of Scotland followed the civil law. He gave examples of the way in which they applied the ***ex mora*** rule when calculating the interest payable in a judgment.

38. The courts of the Kingdom of Lesotho also apply the civil law rule. The law of that kingdom is derived from Roman-Dutch law. In addition to the ***ex mora*** rule, there is a further rule there called the ***duplum*** rule. This provides that the total award of interest cannot exceed the amount on which interest is payable.

9 Interest: the powers of English arbitrators

39. It is unnecessary for the purposes of this judgment to delve too deeply into the history relating to awards of interest by English arbitrators. Since 1950 the situation has been governed by the decision of this court in ***Chandris v Isbrandtsen-Moller Co Inc*** [1951] KB 240. In ***La Pintada*** Lord Brandon summarised the effect of that decision in these words: *"[A]lthough section 3(1) of the Act of 1934, by its terms, empowered only courts of record to include interest in sums for which judgment was given for damages or debt, arbitrators were nevertheless empowered by the agreement of reference to apply English law, including so much of that law as is to be found in section 3(1) of the Act of 1934."*

40. In 1982 express reference was made for the first time in an Act of Parliament in relation to English arbitrators' powers to award interest as part of their award.

41. The Arbitration Act 1950 ("the 1950 Act"), for instance, had made no reference to interest other than interest from the date of the award (see section 20). The Arbitration Act 1979 was similarly silent. Part IV of Schedule 1 of the Administration of Justice Act 1982 ("the 1982 Act"), however, inserted a new section 19A into the 1950 Act. This gave an arbitrator or umpire an express power, unless a contrary intention was expressed, to award simple interest in the circumstances set out in section 19A(1). Section 19A(2), however, preserved arbitrators' existing powers to award interest:

> *"(2) The power to award interest conferred on an arbitrator or umpire by subsection (1) above is without prejudice to any other power of an arbitrator or umpire to award interest."*

This saving provision is reproduced in section 49(6) of the 1996 Act (see para 15 above), to which our attention was not drawn by either side during the course of the hearing.

42. In the ***Trade Fortitude*** [1986] 2 Lloyd's Rep 209, 213RHC Dillon LJ observed that the purpose of section 19A was to make explicit powers to award interest which had previously rested on implication, as Lord Brandon had pointed out in ***La Pintada*** (see the citation in para 36 above). In other words, when Parliament enlarged the courts' powers to award interest by section 15 of the 1982 Act (which inserted a new section 35A into the Supreme Court Act 1981) English arbitrators would have had the same power by implication, even if the new section 19A had never been introduced into the 1950 Act. It is noteworthy that for the same reason in its 1978 *Report on Interest* (Law Com No 88) the Law Commission considered (at para 175) that there was no need to make special provision for arbitrators when it was recommending changes to the statutory provisions as to interest, some of which found their way into the 1982 Act.

10 Are awards of interest governed by substantive or procedural law?

43. In the present case we are concerned with a contract governed by the law of the Kingdom of Lesotho, a jurisdiction in which there was no need to introduce statutory add-ons, in the form of discretionary powers, to award interest, because interest was payable *ex mora* from the time when a debt was due and payable (subject to the *duplum* rule). In their contract the parties made express provision for the rate at which interest was payable on unpaid interim certificates (see para 8 above). They made no similar express provision in relation to the rate of interest payable on final certificates.

44. Counsel drew our attention to an ongoing difference of opinion between the editors of *Dicey & Morris* on the one hand and two commercial judges in unreported decisions at first instance on the other on the question whether awards of interest are governed by the *lex fori* or the *lex causae*: for this difference of

opinion see *Dicey & Morris* on the *Conflict of Laws* (13th Edition), Vol 2, pp 1459-1461, and Second Cumulative Supplement to the 13th Edition, paras 33-385. In ***Midland International Trade Services v Sudairy*** (11th April 1990) Hobhouse J held that he had power to order the payment of interest on a judgment of a court in Saudi Arabia even though a Saudi court would have applied Sharia law. That law follows the teaching in the Koran forbidding the payment or receipt of interest. In ***Kuwait Oil Tanker Co SAK v Al Bader*** (16th November 1998) Moore-Bick J found Hobhouse J's reasons for regarding the court's power to award interest under section 35A as procedural to be compelling, and he therefore decided to award interest on an award of damages for conspiracy whatever might be the position under Kuwaiti law (the *lex causae*). On the appeal in that case this court did not find it necessary to resolve the difference of opinion to which I have referred (see the judgment of Nourse LJ reported in [2000] 2 All ER Comm 271 at paras 206-208).

45. On the present occasion it is unnecessary for us to resolve that dispute. In the ***Sudairy*** case Hobhouse J recognised that interest payable under a contract was a question of substantive law. In the ***Al Bader*** case Moore-Bick J said in terms that in the case of obligations he could see the force of the argument that the existence of a right to recover interest was governed by the proper law of the contract. And by Article 10(1)(c) of the Rome Convention, implemented in this country by Contracts (Applicable Law) Act 1990, the consequences of a breach of contract, which must surely include questions relating to the entitlement to interest if sums are wrongfully withheld by a party in breach, are to be determined by the applicable law of the contract.

46. Mr Glick sought to avoid this conclusion by the following route. He said that the parties had agreed to submit their dispute to an arbitration in London governed by the Arbitration Act 1996 so that English law was the *lex fori*. Section 49(3) of the 1996 Act gives the arbitrators complete power to award interest as they think fit (see para 15 above), and a general choice of the law of the substance of the dispute does not constitute an agreement within the meaning of section 4 of that Act (see para 13 above) to choose a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of the matter provided for by the non-mandatory provision in section 49(3).

47. The trouble with this argument is that it is because English substantive law was different from the substantive law of a civil law country that Parliament had to give English courts and arbitrators the power as a matter of procedure to make awards of interest in the exercise of their discretion on sums which were legally due and payable according to the principles, if any, set out in the statutes which gave them their procedural power. This was the reason why Hobhouse J decided the ***Sudairy*** case in the way he did. He said: *"The reasons why s 35A [of the Supreme Court Act 1981] should not be characterised as substantive can be summarised under three heads:*

(1) There is no right in English law to be paid general damages by way of interest or otherwise for the late payment of money. This rule has been recently reaffirmed by the House of Lords in ***President of India v La Pintada*** *[1985] AC 104: '****The common law does not award general damages for delay in payment of a debt beyond the date when it is contractually due [per Lord Bridge at p 112****].'*

Accordingly, the position in English law is the same as in Saudi law. There is no right to interest. It is this gap which s 35A and its predecessor have filled. It is clear both from the ***La Pintada*** *decision and from* ***President of India v Lips Maritime*** *[1988] AC 395 (Court of Appeal and House of Lords) that the statutory provision is an alternative to the substantive right, not a reflexion of it; the law might have recognised a general substantive right but has not done so because there is now a remedial power granted by statute. This situation undercuts a vital part of the reasoning in Dicey and of the argument of the first defendant before me. It is irrelevant that the foreign law gives no right to interest on an unpaid debt; English law does not do so either. It is against this background that the statutory power is given to the court.*

(2) The statutory power only relates to legal proceedings. It is not a provision which alters the contractual rights of parties. It does not bring into contracts any terms by way of statutory implication. The opening words of s 35A are 'subject to rules of court, in proceedings (whenever instituted) before the High Court …'. This power is an incident of procedure and is not a matter of substantive law.

(3) The power given to the court under s 35A is discretionary. It does not have the character of a substantive right. In the ***La Pintada*** *case, at p 131 Lord Brandon summarised this (and this is also relevant to what I have said in the*

previous paragraph): '… he already has a statutory remedy. What is more, the new cause of action [argued for] … would constitute a remedy as of right for a creditor whereas the statutory remedy would remain discretionary only. There would accordingly exist … two parallel remedies, one as of right and the other discretionary. It is, in my view, plainly to be inferred, from the form of the relevant provisions of the Acts of 1934 and 1982 that Parliament has consistently regarded the award of interest on debts as a remedy to which creditors should not be entitled as of right, but only as a matter of discretion. That being the manifest policy of the legislature, I do not consider that your Lordships should create … a rival system of remedies, which because they would be remedies as of right, would be inconsistent with that manifest policy.'

What Lord Brandon is here describing is a statutory scheme that is essentially procedural and remedial in character and does not depend upon any substantive right."

11 Interest: Conclusion

48. Where the law of a different jurisdiction, like the law of the Kingdom of Lesotho, confers a substantive right to interest *ex mora*, there is no room for any discretionary procedural power. The unpaid party to a contract is entitled as of substantive right to interest from the time when payment is contractually due. There was no need for the parties to agree the express exclusion of section 49(3) of the 1996 Act, because of the saving provision in section 49(6) (see para 40 above):

"(6) The above provisions do not affect any other power of the tribunal to award interest."

49. By Article 7.2 of their Terms of Reference (see para 12 above) the arbitrators were bound to apply the law of the Kingdom of Lesotho to the substance of the dispute. That law was the law of the contract (see para 6 above), and by that law HWV were entitled as of substantive right to interest on sums which they ought to have been paid, subject to the "*duplum*" cap. Section 49(6) of the 1996 Act made provision for the power of the tribunal to award interest in these circumstances as a matter of substantive right. The arbitrators therefore exceeded their powers when they had recourse to what would have been their discretionary powers in section 49(3) to resolve a matter to which they should have applied the substantive law of the contract. The opening words of Article 10 (1)(c) of the Rome Convention, which refer to the limits of the powers conferred on the court by its procedural law, plainly have nothing to do with the situation with which we are concerned.

50. So far as the rate of interest is concerned, in the absence of express agreement this is a matter for the arbitrators to decide as a matter of the *lex fori* (see *Dicey & Morris* (13th Edition) para 33-387: I would adopt the editors' reasoning), although they will no doubt be slow to depart from the rates of interest the parties agreed to be appropriate in relation to the non-payment of interim certificates (see para 8 above).

51. I would therefore dismiss the appeal on the interest point as well.

Lord Justice Latham:

52. I agree.

Mr Justice Holman:

53. I also agree.

Order: Appeal dismissed with the costs save counsels fees to be considered by the costs judge. (Order does not form part of the approved judgment)

Ian Glick QC & Neil Kitchener (instructed by Slaughter & May) for the Appellants
Andrew White QC & James Howells (instructed by White & Case) for the Respondents