BANK MELLAT

and

GAA DEVELOPMENT CONSTRUCTION COMPANY

JUDGMENT

STEYN J

At issue is the validity and enforceability of a majority arbitration award, made in London and published on 8 July 1987, in an arbitration conducted under the auspices of the International Chamber of Commerce. The award directed Bank Mellat to pay US$3,655,914 and interest to GAA Development and Construction Company ("GAA"). There are two applications before the Court. The first is an originating notice of motion dated 23 July 1987 which was issued by Bank Mellat. It seeks an order pursuant to section 23(2) of the Arbitration Act 1950 setting aside the award on the ground of the misconduct of the arbitrators who made the majority award. The narrow ground of this challenge is that the draft majority award was returned by the ICC Court of Arbitration for reconsideration of the reasons; that, despite a request by the dissenting arbitrator, the majority declined to convene a further meeting of the tribunal; and that the majority made certain amendments to the reasons contained in their draft award without reference to the dissenting arbitrator. It will be necessary to consider this application first. If it succeeds, the second application falls away. If it is dismissed, it will be necessary to consider the second application. It arises on an originating summons dated 6 August 1987 issued by GAA. It seeks an order pursuant to section 26 (1) of the 1950 Act empowering GAA to enforce the award. This application is resisted on the ground that the majority award was made in excess of jurisdiction. Finally, the question arises whether the terms of the award are such as to take it outside the scope of Section 26(1).

THE BACKGROUND TO THE DISPUTE

The dealings between the parties pre-date the Iranian revolution. The principal contract was concluded in August 1975 between GAA and Bank Omran. GAA is a Liechtenstein company which was formed for the purpose of carrying out the contract. It is of some relevance to an understanding of the subsequent fortunes of the contract to mention that GAA was beneficially owned by Israeli interests. Bank Omran was an Iranian bank which was owned by the Pahlavi Foundation, which in turn was beneficially owned by the Shah and his family. In July 1979, that is in the post revolutionary period, Bank Omran was merged into Bank Mellat by an expropriation decree. For convenience I will throughout refer to the bank as Bank Mellat. The contract was described as the Land Agreement and it envisaged a building project near Tehran. GAA agreed to buy land from Bank Mellat and to build on it apartment units in three phases, each phase covering not less than 200 units. For GAA the incentive was the anticipated profits from the sale of apartment units; for the Bank it was the purchase price of the land together with a 15% participation in the proceeds of the sale of apartment units. The details do not matter. But two clauses are vital to an understanding of the dispute and must be set out in extenso:

"11. FORCE MAJEURE

> If it appears that further performance hereunder is impractical or impossible for either or both Parties by reason of governmental acts, laws, regulations or restrictions of the Government of Iran, then this Agreement and the Project shall be forthwith terminated and a final settlement shall be made so that GAA shall recover from the Bank all of its down-payment made less any amount already amortized and any actual costs incurred by it for the Project, and the Bank shall recover title to the Tract or Tracts of Land referred to herein together with all improvements made thereon. In all other cases of force majeure which prevents performance of this Agreement, the Parties shall be relieved of their obligations to proceed with the implementation of the Project and shall seek to reach agreement on an equitable solution in consideration of all work performed up to that date; but if the Parties are unable to

reach agreement within a reasonable time, either Party may refer the matter to arbitration pursuant to Item 13 hereunder."

"13. ARBITRATION

Any dispute arising between the parties in any way related to the interpretation or implementation of this Agreement, if it cannot be settled amicably shall be finally settled by arbitration by three arbitrators, detailed in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce of Paris. The arbitral award shall be absolute and final. Whether or not the work is continued without the participation of one of the contracting parties herein mentioned, the arbitral tribunal shall take into consideration the losses inflicted by the defaulting party concurrent with other liabilities and rights of such defaulting party ensuing from this Agreement prior to the termination thereof. The venue shall be the City of London. The award shall be final and binding on the parties and the arbitration shall be conducted in the English language. Judgment upon the award rendered may be entered in any court having jurisdiction or an application may be made to such court for judicial acceptance of the award and an order of enforcement, as the case may be."

Clause 14 of the contract provided that the governing law would be Iranian law.

GAA proceeded to form four Iranian subsidiaries to carry out its obligations. One of the subsidiaries concluded a construction contract with an English company, and also entered into a financing agreement with an English merchant bank. Again, the details do not matter. Construction commenced in March 1977. In November 1978, when the building of two tower blocks had been completed up to the 18th and 20th floors, and two thirds of the apartments in these buildings had been sold, work on site ceased. The history of that turbulent period in Iran is too recent to require recapitulation. It is sufficient, in order to place the matter in context, to mention the civil commotion, which preceded and followed the departure of the Shah from Iran in January 1979, and the arrival of the Ayatollah Khomeini in Tehran on 1 February 1979. The Islamic revolution had taken place. The project, with its Israeli involvement, was doomed. In June 1979 GAA gave notice to Bank Mellat that force majeure made it impossible for GAA

to carry out the terms of the Land Agreement.

THE DISPUTE AND THE ARBITRATION PROCEEDINGS

On the 18th August 1980 GAA submitted a request for arbitration to the ICC under the arbitration clause contained in the Land Agreement. That request in effect sought an award of compensation. In due course GAA and Bank Mellat respectively nominated Mr Patrick Garland, Q.C., and Mr Goodarz Djahromi, an Iranian lawyer, as their arbitrators. The Court of Arbitration the ICC confirmed the appointment of these two party nominated arbitrators. Mrs Birgitta Blom, a Swedish judge, was nominated by the Swedish National Committee of the ICC as the third arbitrator, and she was subsequently appointed by the ICC as chairman of the tribunal. The tribunal was duly constituted. Pleadings were exchanged. In January 1983 the arbitrators settled terms of reference. This controlling document records inter alia GAA's claim for compensation under Article II. It also set forth Bank Mellat's denial that GAA was entitled to initiate arbitration proceedings, as well as Bank Mellat's comprehensive denial of the claim and a counterclaim. In June 1983 the issue as to GAA's right to initiate arbitration was determined in favour of GAA by the majority interim award of the chairman and Mr Patrick Garland, Q.C. Mr Djahromi found in favour of Bank Mellat. That issue is no longer extant. The arbitrators then decided to consider, as a preliminary issue, the question whether, when GAA served its notice of termination in June 1979, the contract was affected by force majeure as contemplated by the last sentence of Article II. That question was resolved by a unanimous interim award, dated 9 January 1986, which answered it in the affirmative. Thereafter Mr Garland, Q.C., was appointed as a High Court Judge. Mr Desmond Wright, Q.C., was nominated by GAA to fill Mr Garland's place, and his appointment was confirmed by the Court of Arbitration of the ICC. The

tribunal was duly reconstituted. The tribunal then fixed the date for the final hearing on the merits of the disputes for September 1986. That hearing duly took place. Subsequently, the parties submitted further written submissions to the tribunal. Eventually, on 22 June 1987, a majority award was made. The chairman and Mr Wright, Q.C constituted the majority, with Mr Djahromi dissenting. The majority award runs to some 52 pages. It directed Bank Mellat to pay US$3,655,914, together with interest, to GAA. But the tribunal also ordered GAA, upon receipt of the sum awarded, to transfer to Bank Mellat the shares in GAA's subsidiary which held the title to the land transferred under the Land Agreement. The dissenting opinion of Mr Djahromi runs to some 66 pages. His views were favourable to Bank Mellat on virtually every extant issue.

THE APPLICATION TO SET ASIDE THE AWARD UNDER SECTION 23(2)

It is now necessary to examine the merits of the application to set aside the award on the ground of misconduct. But before I do so, I must point out that during the hearing a procedural difficulty arose. There is a rule of practice that such an application should be served on the arbitrators in order to enable them to place before the Court evidence relevant to the charge of misconduct if they should consider it appropriate to do so: see Port Sudan Cotton Co v Govindaswamy Chettiar & Sons [1977] 1 Lloyds Rep 166. In the present case the application under Section 23(2) was not served on the arbitrators. Despite this procedural flaw I ruled that the hearing to set aside the award on the ground of misconduct should continue. This ruling was based cumulatively on the expense and delay, which would have been caused by an adjournment, and a provisional view that the application ought not to succeed. Needless to say, if the fluctuating fortunes of adversarial argument had subsequently required an adjournment, I would have been prepared to take a different course.

The thrust of the charge of misconduct is that, when the ICC Court of Arbitration ("the Court") referred the draft majority award back for reconsideration, the majority refused to convene a further meeting and proceeded to make amendments to their reasons for the majority award without reference to the third arbitrator. This charge arises in the context of the Court's power of scrutiny of awards. Article 21 of the ICC Rules provides:

> "Scrutiny of award by the Court
>
> Before signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance. No award shall be signed until it has been approved by the Court as to its form."

Article 21 should be read with Article 22 of the Internal Rules of the Court of Arbitration (which came into force on 1 March 1980). This provision reads as follows:-

> "22. When it scrutinizes draft arbitral awards in accordance with Article 21 of the ICC Rules of Arbitration, the Court of Arbitration pays particular attention to the respect of the formal requirements laid down by the law applicable to the proceedings and, where relevant, by the mandatory rules of the place of arbitration, notably with regard to the reasons for awards, their signature and the admissibility of dissenting opinions."

Since the Court's power of scrutiny of awards is sometimes misunderstood, I propose to describe briefly the relevant function of the Court.

Arbitration under the ICC Rules is a form of institutional arbitration. But it differs from other systems of institutional arbitration. The distinctive feature of ICC arbitration, built into the Rules, is supervision by a permanent body, the ICC Court of Arbitration. Despite its name the Court has no arbitral or adjudicative function. It merely supervises the application of the Rules by the arbitrators. The supervisory function which is germane to the issues in the

present case is the Court's power of scrutiny of awards before they are published. That power exists, because the ICC system, the most truly international of all arbitral systems, provides for the conduct of arbitrations in most countries of the world, and the members of a three man tribunal frequently come from different continents, or at least from different countries, with fundamentally different legal systems. It is regarded as the first imperative of the ICC system that awards rendered under it should be enforceable. It has been pointed out that something like 90% of ICC awards are voluntarily complied with, and that ICC awards have a good record of enforcement in national courts. See Craig, Park and Paulsson, International Chambers of Commerce Arbitration, 1984, par 20.01. The system of scrutiny of awards by the Court contributes to the enforceability of ICC awards. The Court has a mandatory power "to lay down modifications as to the form of the award". An example of such a matter of form may be a case where the damages awarded under different claims do not add up to the aggregate awarded. The Court also has an advisory power. It may, "without affecting the arbitrators liberty of decision", draw the arbitrators' attention to "points of substance". For example, it may draw the attention of the arbitrators to a possible conflict between a particular ruling and an express provision in the contract. The decision remains that of the arbitrators. The Court does not review the evidence or the arguments. The process of scrutiny is directed at the internal coherence and consistency of the award. But it may also sometimes reveal a procedural flaw which can be corrected. Craig, Park & Paulsson, op.cit. points out (par 20.02):

> "In its review of the award submitted to it, or of correspondence concerning the award, the Court may become aware of a procedural defect not revealed on the face of the award. In other words, the process of scrutiny of the award may bring to light a defect in the arbitral process itself which may yet be curable. The issue most often raised before the Court at this stage is an alleged failure in the process of deliberations by the arbitrators.

> This may occur if one of the arbitrators informs the Court that the draft decision contains elements which were not the subject of a discussion and deliberation among the arbitrators. In one case, the Court returned the award to the arbitrators for deliberation when it appeared that at the first meeting of the arbitrators after the hearing, the minority arbitrator was presented by the chairman with a draft award already signed by the other two arbitrators and prior to discussion of any of the issues."

This is then a general description of the nature of the system of scrutiny of awards which parties accept when they agree on arbitration in accordance with the ICC Rules.

Against this background a closer look at the facts, which bear on the charge of misconduct, is necessary. For this purpose I will draw heavily on a helpful chronology which is contained in a letter dated 31 July 1987 from the ICC Secretariat. From 1 to 11 September 1986 the final oral hearing, lasting 9 working days, took place. On 12 September the arbitrators held a meeting to deliberate on the issues. Between September and December the parties delivered further written submissions to the tribunal. It is to be inferred from Mr Djahromi's reasons that the differences between the majority and minority emerged at a relatively early stage, because he says the first draft of the majority award was dated 16 October. Mr. Djahromi commented on this draft under cover of his letter dated 22 October 1986. On 24 and 25 January 1987 the final meeting between the arbitrators took place in London. Fundamental differences existed between the majority, (consisting of the chairman and Mr Wright) and the minority (Mr Djahromi): the former favouring GAA's position, and the latter favouring Bank Mellat's position. A draft majority award was on the table for discussion. Mr Djahromi's reasons had not yet been prepared but he had an opportunity during the meeting extending over some two days to put forward his views. Judged by the vigour with which he expressed his views in his subsequent dissent, as well as in his 12 pages of subsequent dissenting remarks, it seems probable that he made known his views during these meetings. In any event, at

the end of the meeting it was agreed, and formally recorded, that the deliberations were concluded. And Mr Djahromi promised to furnish his dissenting opinion in writing by 1 March 1987.

On 4 March the chairman sent a reminder to Mr Djahromi and informed him that the majority draft award was about to be submitted to the ICC. On 9 March the ICC Secretariat asked Mr Djahromi to forward his written dissent for consideration at the next session of the Court which was to be held on 25 March. He sent his written dissent. Both the draft majority award, and the dissent, were considered by the Court on 25 March. The Court did not approve the draft majority award. What happened is described in the letter from the ICC Secretariat:

> "The draft award of the majority was, however, not approved at said session. The arbitral tribunal was rather asked by the Court of Arbitration to provide it with a strengthened motivation of two issues raised in the award. This request concerned a matter of form, not of substance. The Court's request fell within the power conferred to it under art. 21 of its Rules which states that it "may lay down modification as to the form of the award". The Court's request was communicated to all three arbitrators by a letter of March 27".

The communication from the ICC Court to the arbitrators was not placed before me, and that is perfectly understandable. But it is clear from secondary evidence that it related to the reasoning of the majority in support of their decision on the merits, and the reasoning in support of the award of interest. All three arbitrators received the communication from the ICC. Factually, it has to be observed that Mr Djahromi, who had the draft majority award and the Court's observations, was in a position to communicate his views to his co-arbitrators by letter or telex. Instead, by telex of 11 April 1987, Mr Djahromi requested the chairman to convene a further meeting. On 13 April 1987 Bank Mellat wrote to the tribunal, reiterating the bank's arguments that it was not open to the tribunal to decide on an equitable solution under the last sentence of Article II of the

Land Agreement. On the same day the chairman sent a revised majority award to the ICC Secretariat. On 20 April the secretary to the tribunal informed Mr Djahromi that the chairman was on holiday, and that the revised draft majority award had been sent to the ICC. Mr Djahromi thereupon telexed the Secretariat of the ICC, stating that he had not been consulted and requesting that the matter should not be placed before the Court until he had an opportunity to comment. On 22 April a member of the ICC Secretariat (Mr. M. Buhler) replied by telex, confirming receipt of the revised majority draft award "for information", and adding that

> "THE REVISED DRAFT WILL ONLY BE SUBMITTED TO THE COURT ONCE I AM INSTRUCTED TO DOING SO BY THE CHAIRMAN OF THE TRIBUNAL. THE NEXT PLENARY SESSION OF THE COURT WILL BE HELD ON MAY 20"

Thereafter, and in April, the dissenting arbitrator received a copy of the revised majority award. On 28 April the Chairman, with the approval of Mr Wright, Q.C, sent a telex to the dissenting arbitrator stating inter alia:

> "2. IN THE LETTER IS STATED THAT THE COURT HAS FELT - NO DOUBT UNDER THE IMPRESSION OF YOUR DISSENTING OPINION WHICH WE HAD NOT HAD IN OUR HANDS WHEN DRAFTING THE MAJORITY AWARD AND HAD THEREFORE NOT BEEN ABLE TO TAKE INTO ACCOUNT - THAT CERTAIN EXPLANATIONS AND CLARIFICATIONS WERE DESIRABLE. THESE HAVE BEEN GIVEN IN THE AMENDED VERSION OF THE MAJORITY AWARD WHICH SHOULD NOW BE IN YOUR HANDS. AS YOU WILL SEE, THE REASONS HAVE NOT BEEN CHANGED IN SUBSTANCE BUT HAVE BEEN ELABORATED UPON WITH REGARD TO THE TWO POINTS RAISED IN MR BUEHLER'S LETTER
>
> 3. THE VIEWS EXPRESSED IN THE MAJORITY AWARD ARE WELL KNOWN TO YOU AS WELL AS YOUR VIEWS - EXPRESSED DURING OUR DELIBERATIONS, IN THE DISSENTING OPINION AND IN YOUR LAST TELEX - ARE KNOWN TO MR WRIGHT AND MYSELF. I THEREFORE SEE NO NEED TO CONVENE AGAIN THE ARBITRATORS FOR FURTHER DELIBERATIONS
>
> 4. IN CASE YOU HAVE ANY COMMENTS TO MAKE IN REGARD TO THE AMENDED VERSION OF THE MAJORITY AWARD I

WOULD BE GRATEFUL IF YOU WOULD LET ME AND MR WRIGHT HAVE THESE NOT LATER THAN MAY 7"

That was, of course, a clear invitation to Mr Djahromi to comment in writing by 7 May on the revised majority award. He did not respond to that invitation. On 13 May the ICC received Mr Djahromi's "Further dissenting remarks". The ICC sent a facsimile of that document to the chairman and Mr Wright, and Mr. Djahromi was so informed. On 19 May the chairman sent a final telex to Mr Djahromi (and copied it to the ICC). The final part of this telex read as follows:-

> "..... IN THE TELEX OF APRIL 28, I ASKED YOU TO SEND TO MR WRIGHT AND MYSELF ANY COMMENTS YOU MIGHT HAVE NOT LATER THAN MAY 7. I HEARD NOTHING FROM YOU AND THOUGHT THE MATTER WAS CLOSED.
>
> THE REVISED VERSION WAS PREPARED BY MYSELF AND NATURALLY IN THE FIRST INSTANCE SENT TO MR WRIGHT WHO HAD RESOLVED THE CASE IN THE SAME MANNER AS MYSELF. AFTER HAVING TAKEN INTO ACCOUNT SOME OF HIS VIEWS THE REVISED DRAFT WAS AGREED AND TYPED AND SENT TO YOU AND THE COURT. THERE HAS BEEN NO MEETING BETWEEN MR WRIGHT AND MYSELF BUT - AS IS CUSTOMARY IN INTERNATIONAL ARBITRATIONS - THE TEXT WAS PREPARED BY CORRESPONDENCE.
>
> IT WOULD SEEM THAT YOUR "FURTHER DISSENTING REMARKS" ONLY CONTAIN ARGUMENTS AND VIEWS WHICH HAVE ALREADY BEEN DISCUSSED AND CONSIDERED. I HAVE SPOKEN YESTERDAY AFTERNOON WITH MR WRIGHT ON THE TELEPHONE AND HE IS OF THE SAME OPINION. THUS, WE BOTH FIND THAT YOUR FURTHER DISSENTING REMARKS DO NOT CALL FOR ANY ALTERATIONS IN THE DRAFT AWARD.
>
> THIS AWARD IS NOW CONSIDERABLY OVERDUE, AND I THINK THE TIME HAS COME WHEN THE AWARD SHOULD BE CONSIDERED BY THE COURT AND PUBLISHED TO THE PARTIES. I THEREFORE CONSIDER THE DELIBERATIONS CLOSED."

This telex records that Mr Djahromi's "Further dissenting remarks" were considered. And it authorised the ICC secretariat to place the majority award before the Court for approval. It was approved by the Court on 17 June. The letter from the ICC Secretariat dated 31 July 1987 records that the Court took

into account the exchange of correspondence (which included the dissenting arbitrator's request for a meeting), but that the Court was satisfied that "the revised draft award submitted by the majority had been made by the arbitral tribunal in a proper way". In other words, the Court took the view that there was no need for the chairman to convene another meeting.

The question is whether the majority committed misconduct. The principal contract is governed by Iranian law but the law governing the arbitration is English law. It was submitted that the fact that the ICC Court took the view that there was no procedural irregularity is irrelevant. I accept that the view of the ICC Court cannot in any way be determinative of the issue. But it is in my view unrealistic to describe it as entirely irrelevant. For example, it may be helpful as throwing light on the question whether a further face-to-face meeting between the arbitrators was necessary. That question cannot entirely be divorced from what is usual in ICC practice.

It will be recalled that in the ICC Secretariat's letter of 31 July 1987 the view was expressed that the amendments to the draft majority award were matters of form rather than substance within the meaning of Article 21 of the ICC Rules. In a careful and helpful speech Mr David Hunt, Q.C., for Bank Mellat, contended that the contrary was the case. It is sometimes difficult to draw the line between amendments of form and substance. Without deciding the question I will assume that the amendments which the majority made to their draft award must rank as matters of substance.

It is not disputed that the parties were given a fair hearing, and that after the hearing the arbitrators fully and fairly considered the issues. The charge of misconduct is that the majority failed to consult Mr Djahromi after the Court of Arbitration referred the draft majority award back for reconsideration. It is submitted, in the first place, that the face-to-face meeting, which Mr Djahromi requested, was essential. Alternatively, it is submitted that the written

communication should have been exchanged before the majority revised their majority award. None of the authorities, cited in argument on behalf of Bank Mellat, afforded any direct support for these particular submissions. Mr Hunt attempted to derive his concrete submissions from the general proposition that all members of an arbitral tribunal must participate jointly in all stages of the arbitral proceedings. That proposition can be accepted. On the other hand, in the terminology of Dworkin, it is clearly a principle rather than a rule. And it is too general to afford the answer to many concrete problems. This is illustrated by the express concession, which was rightly made on behalf of Bank Mellat, that the majority were not obliged, after the close of deliberations, to discuss the draft majority award with Mr Djahromi. And it is perhaps more pertinent to the facts of this case, and more helpful, to say that the governing principle is that, after the end of the hearing, parties are entitled to an impartial and fair consideration and resolution by the arbitrators, acting together, of all the issues in the case.

In my judgment there are several answers to the charge of misconduct. The first question is whether there was any duty, owed by the majority to Mr Djahromi or to the parties, to consult with Mr Djahromi about the revision of the majority award. This question cannot be viewed in the abstract. It has not been suggested at any time that any of the observations of the ICC Court, or amendments to the reasons for the award, involved anything that had not been canvassed at the hearings, and discussed at meetings between the arbitrators. And it is not in every international commercial arbitration of the scale and scope of this arbitration, that the opportunity exists for such extensive oral deliberations as took place in the present case. Moreover, it would be fanciful to suggest that a further meeting or consultation would have afforded Mr Djahromi an opportunity to convert the majority to his point of view. The sole purpose of a further meeting or consultation would have been to enable Mr Djahromi to

discuss with the majority the redrafting of the reasons of their majority award. Mr Djahromi disagreed fundamentally and comprehensively with the majority award and its reasons, and it is difficult to conceive of the utility, at that late stage, of a discussion with him of a drafting exercise which was intended to strengthen those reasons. No doubt courtesy between colleagues required a further reference to him, but in my view the governing principle, which I have stated, did not require it as a matter of law. On this ground alone the application must fail.

On the assumption that the majority ought to have consulted with Mr Djahromi, I turn to what actually happened. The majority declined Mr Djahromi's request for a face-to-face meeting. The chairman pointed out to Mr Djahromi that the revisions were agreed between her and Mr Wright in correspondence. She clearly took the view that Mr Djahromi should be able to explain his views in the same manner. In the real world of international commercial arbitration, and notably in the case of ICC arbitrations with a tribunal drawn from different countries, arbitrators often have to communicate with one another by telephone, telex or letter. That is particularly so after the hearing, after the arbitrators have met to discuss the issues, and in the subsequent process of drafting reasons. A ruling that the chairman should have called such a meeting in April or May 1987, months after the hearing and after lengthy meetings between the arbitrators, would in my judgment impose unrealistic, unworkable and time wasting procedures on ICC arbitrators. While I have independently reached this conclusion, I note that the Court by the clearest implication took this view when it approved the award in June this year. That leaves for consideration the alternative submission that the majority should only have revised the draft majority award, which had previously been submitted for approval, after written consultations between the three arbitrators. In April 1987 the revised majority award was sent to the ICC Secretariat for information,

and Mr Djahromi was informed that it would not be placed before the Court until the chairman had authorised it. In April Mr Djahromi received a copy of the revised majority award. The chairman asked for Mr Djahromi's comments on the revised majority award by 7 May. He failed to respond. But his "Further Dissenting Remarks", commenting on the revised majority award, were seen and taken into account by the majority before the chairman brought matters to a close. The chairman no doubt took the view that while in a judge or arbitrator an open mind is essential, it must also be able to shut eventually. And she brought matters to a close by her telex of 14 May to Mr Djahromi, which was copied to the ICC. In my view Mr Djahromi's views were fully and fairly considered, and no breach of the governing principle has been established. For these reasons too the application must fail.

Finally, if I had been persuaded that there was a procedural flaw in that further consultation with Mr Djahromi should have taken place as submitted by Bank Mellat, I would nevertheless in the particular circumstances of this case have declined to set aside the award on the ground of misconduct. My reason for this conclusion is that, on the stated hypothesis, the flaw was a technical one and the inference is irresistible that such further consultation would not have been productive of any material changes to the revised majority award. In other words, if there was a procedural flaw, I am satisfied beyond any reasonable doubt that no injustice resulted from it. For this further reason the application must be dismissed.

THE APPLICATION UNDER SECTION 26 OF THE ARBITRATION ACT 1950

GAA now seek an order for enforcement of the award under Section 26(1) of the 1950 Act. On 8 November 1987, that is shortly before the hearing in the Commercial Court, a Tehran Civil Court ordered ex parte that the award should

not be enforced pending determination of Bank Mellat's application for cancellation or annulment of that award. No attempt had been made, or threatened, to enforce the award in Iran. The basis on which the Iranian Court exercised jurisdiction is not clear. In an affidavit served before the Commercial Court hearing it was submitted that this Court should take cognizance of the order of the Iranian Court. In argument, however, Mr Hunt rightly conceded that the order of the Iranian Court cannot have any bearing on the present proceedings. Prima facie the award is final, binding and enforceable. But Bank Mellat resists enforcements on two grounds, namely:-

(a) that the award is invalid inasmuch as it does not comply with Iranian law, alternatively, there must be a trial of the issue whether the award is invalid by Iranian law;

(b) that the terms of the award do not permit enforcement under Section 26(1).

The Iranian law point:

The Land Agreement expressly provided that it was governed by Iranian law. The arbitration clause in the Land Agreement is a separate agreement, and it does not follow that it is also governed by Iranian law. It provided for arbitration, subject to the Rules of the ICC. And it expressly provided that the venue of the arbitration would be London. There may well be a respectable argument that the arbitration agreement was governed by English law. I will assume that it was also governed by Iranian law. But nothing turns on this question. The validity of the arbitration agreement was not in issue, and it was not contended that by reason of Iranian law it should receive any special restrictive construction. The challenges relate to the parties' substantive rights and obligations under Iranian law and those challenges must be considered in the light of the lex fori which is English law.

The cluster of challenges are as follows: the principal complaint was that

the majority "imposed" an "equitable solution". It was said that if the parties failed to agree on an equitable solution under the last sentence of Article II of the Land Agreement, the arbitrators had no jurisdiction to resolve the matter. The Iranian arbitrator, who dissented, and Dr M.A. Movahed, an Iranian lawyer, who acted on behalf of Bank Mellat, contended that in that event GAA was not entitled to compensation. They said that under the Iranian Civil Code there is no liability to pay damages or compensation if a party's failure to carry out his undertaking was due to circumstances beyond his control. The majority came to a contrary conclusion, treating it as a matter of the construction of Article II on which the provisions of the Iranian Civil Code had no bearing. The terms of reference covered this issue and it was canvassed at the oral hearing. There were subsidiary complaints. It is said that the majority wrongly found that Bank Omran was a government owned or government controlled institution. It is conceded, however, that this was an issue in the arbitration. The complaint is about a finding of fact of the tribunal. It is said that the majority wrongly required payment in US dollars in Switzerland. But I was informed by counsel on behalf of both parties that it was common ground at the hearing that the arbitrators had a discretion to fix the currency in which payment should be made. The complaint is about an alleged mistake of law. Finally, there is a complaint about the award of interest. Basing their case on Iranian law, Bank Mellat contended that no interest was payable. After a review inter alia of Iranian law, the tribunal awarded interest at the rate of 6% from the date of commencement of the arbitration proceedings. This is again a complaint that the tribunal erred as to the application of Iranian law. But it is common ground that this was an issue in the arbitration.

The merits of these complaints must, of course, be considered in the light of the fact that there is before the Court an award which is prima facie final and enforceable. The precise nature of the challenges must be identified. Some

passages in the initial dissent of Mr Djahromi, and in his subsequent further dissenting remarks, are capable of being construed as indicating that he was suggesting that the majority consciously and deliberately refused to apply what they knew to be the applicable law. If that were so, a case of misconduct might well be sustainable. On behalf of Bank Mellat Mr Hunt, Q.C. rightly made quite clear that no form of misconduct on the part of the majority (other than in the limited respect which I have dealt with) was alleged. If there had been such a eleventh hour allegation of misconduct, it may well have been necessary to require service on the arbitrators. But such an attack was specifically and expressly disavowed.

The narrow ground on which the attack under this heading was made was that the majority came to the wrong conclusions. The assertion that the majority came to the wrong conclusion, as a matter of fact, as to the link between the government and the bank is so plainly unsustainable as a basis for challenging the validity of the award as to require no comment from me. The general attack based on the assertion that the majority came to the wrong conclusions as a matter of Iranian law can be dealt with shortly. In a recent judgment in K/S A/S Bill Biakh v Hyundai Corporation (unreported, given on 5 October 1987) I said that a mistake by arbitrators in their assessment of the parties' substantive rights and obligations under a contract cannot amount to an excess of jurisdiction. That is so whether the parties' substantive rights or obligations are governed by English or foreign law. The correctness of these propositons was not disputed. Prima facie that provides the complete answer to the challenges based on Iranian law. Subject to one point, no further analysis of those challenges is required.

The qualification relates to the question whether the arbitrators were entitled to impose an equitable solution on the parties under the last sentence of Article II of the Land Agreement. On behalf of Bank Mellat it was contended

that the majority acted in excess of authority, or may have acted in excess of authority, because they awarded to GAA a remedy, viz an equitable solution under the last sentence of Article II of the Land Agreement, which was not available as a matter of Iranian law. In support of this submission reliance was placed on a sentence in Mustill and Boyd, Commercial Arbitration, 1982, at pages 497-498. In order to show the context I cite the relevant paragraph, with the sentence relied on emphasized:

> "It is not always easy to distinguish between instances where there is a want of jurisdiction, and those where there is error of law or fact. A particular difficulty arises where the contract prescribes the remedy which is to be available in the event of breach. In such a case it would appear that if the arbitrator, having found a breach, mistakenly proceeds to award a remedy other than the one prescribed by the contract, he acts in excess of jurisdiction and the award can be set aside. If, however, he applies the correct remedy, but does so in an incorrect way - for example by miscalculating the damages which the submission empowers him to award - then there is no excess of jurisdiction, and the injured party has no remedy unless the error is on the face of the award."

In a footnote the authors draw attention to two decisions which appear to cast doubt on their proposition: Roth, Schmidt & Co v D. Nagase & Co Ltd (1920) 2 Ll L Rep 36; African and Eastern (Malaya) Ltd v White Palmer & Co Ltd (1930) 36 Ll L Rep 113. Both cases concerned the validity of awards under the arbitration rules of the General Produce Brokers Association of London. At issue was an obscure clause defining the buyers' rights in the event of a breach of the contract of sale by the sellers. In the first case the question of excess of jurisdiction was directly in issue. Lord Justice Bankes, giving the judgment of the Court of Appeal, with the concurrence of Lord Justices Scrutton and Atkin, held that it would not be a proper challenge to the validity of the award simply to say "that the arbitrator went wrong in law because he took a wrong view of the clause which was inserted into the contract as to what should be the measure of damages": at page 36. Support for the same view is also to be found in the

second case: per Romer LJ, at pages 115 - 116. In the footnote, to which I have referred, Mustill & Boyd comment that these two decisions cannot be read as deciding that even if the contract had, on its true construction, excluded the remedy in question (i.e. rejection of defective goods), the arbitrators would have acted within their jurisdiction in awarding it. That view is apparently put forward even if the question as to the appropriate remedy under the contract was a contested issue in the arbitration.

For my part I find the distinction between an arbitrator's mistake as to primary rights and obligations (which cannot per se amount to an excess of jurisdiction) and mistakes as to remedies prescribed by the contract (which will amount to an excess of jurisdiction) less than compelling. The distinction between substance and procedure is, of course, not unfamiliar. Thus the conflicts rule is that the nature of a plaintiff's remedy is a matter of procedure which is governed by the lex fori, e.g. an arbitrator ought not to grant specific performance of a contract where to do so is contrary to English law: see Dicey & Morris, The Conflict of Laws, 11th edn., Vol I, pages 175 - 176. But that is not the point which the authors make, and it is not germane in the present case. Regard must be had to the precise purpose for which the distinction is advanced: the only relevance can be for the purpose of drawing a line between matters which do and do not fall within the consensually conferred authority of an arbitrator. In the rare case where the arbitration agreement, the source of the arbitrator's authority, excludes a certain remedy, it is clear that the award of such an excluded remedy would amount to an excess of jurisdiction. That too is not what the authors have in mind, and it is also not relevant to the present dispute. The authors' point is apparently that a mere mistaken interpretation of the principal contract, leading to the award of a remedy, which a court of law subsequently decides is not the remedy prescribed by the contract, constitutes an excess of jurisdiction. In the absence of binding authority I am not prepared to assent to

that proposition. The proper interpretation of all clauses in a contract, whether spelling out primary rights and obligations, exceptions to liability or limitations of liability, are matters falling within the jurisdiction of an arbitrator. A mistake made by an arbitrator as to the construction of any such clause in a contract cannot amount to an excess of jurisdiction. And that is so whether the proper law of the contract is English law or foreign law. If that is so, why should a mistake as to the applicability of a contractual remedy (which is not excluded by the lex fori, the arbitration agreement or the terms of reference) amount to an excess of jurisdiction? Suppose, for example, an issue as to whether liquidated damages are payable for a breach of the contract, the issue being the question of breach. A mistake as to this issue cannot amount to an excess of jurisdiction. Suppose then a different issue, namely whether on an admitted breach of contract a liquidated damages provision applies or whether unliquidated damages are recoverable. In any relevant sense this must be an issue as to the applicable remedy. But what merit is there in saying that such a mistake falls beyond the consensually conferred authority of an arbitrator? If one puts to one side the arbitration clause itself, which is in a special position because it is the source of the arbitrator's power, it seems to me that the arbitrator's authority extends to the interpretation of all clauses in the contract. In characteristically terse terms Lord Justice Scrutton once said: "if the arbitrator whom you choose makes a mistake in law that is your lookout for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment": African & Eastern (Malaya) Ltd v White, Palmer & Co Ltd supra, at page 114. Less trenchantly I would add that, if the observation of Mustill & Boyd were to be accepted, it would afford an undesirable new route to attacking awards, domestic and foreign, and notably so because the distinction between substance and remedy will sometimes be elusive. And there is no need for such a power because the concept of misconduct is broad enough to cover

bizarre interpretations where arbitrators have consciously and deliberately refused to apply a clearly applicable provision of a contract, e.g. a limitation of liability for consequential loss.

In the present case the relevant issue was a narrow one. The tribunal, as initially constituted, unanimously found in the second interim award (the validity of which is not in issue) that when GAA served its force majeure notice in June 1979 "the situation of force majeure was such as foreseen in Article II para 2 last sentence." That ruling was predicated on the understanding that the tribunal would proceed to determine what was an equitable solution. Until a very late stage in the arbitration it was common ground that the principal task of the tribunal was to decide on an equitable solution under Article II, each side contending that the other should pay compensation to it. At the eleventh hour, and possibly due to the intervention of an Iranian lawyer, Dr Movahed, the contention was raised by Bank Mellat that in the absence of agreement between the parties on an equitable solution, Iranian law precluded an award based on an equitable solution. GAA submitted that on a proper construction of Article II the gap is filled by the arbitration clause. The terms of reference were wide enough to cover this issue, and the tribunal was specifically called on to decide it. The majority decided that if parties fail to agree, the arbitrators must decide. That is a conclusion which is consistent with English authority: F & G Sykes (Eessex) Ltd v Fine Fare (1967) 1 Ll Rep 53. But the contract was governed by Iranian law which had to be proved to the satisfaction of the tribunal. In relation to a plea of excess of jurisdiction, the Court is entitled to look at the evidence. Bank Mellat relied on provisions of the Iranian Civil Code which deal generally with the legal consequences which arise if a contract is discharged by impossibility of performance. That was hardly helpful in relation to the interpretation of the critical part of Article II. In Iranian law the phrase "equitable solution" bears no technical meaning. The interpretation which the

majority adopted was therefore one that was manifestly open on the evidence and arguments before the tribunal. Indeed, it was plainly the correct interpretation. In any event, if the majority erred in their interpretation of Article II, and their assessment of Iranian law, their mistake in respect of a matter which they were called on to decide cannot amount to an excess of jurisdiction.

It follows that in my judgment the challenges fail and the award is final, binding and enforceable.

Enforcement of the award under Section 26.

The award was made in England. The lex fori was English law. Bank Mellat has assets within the jurisdiction. Bank Mellat has its head office in Iran, but Iran is not a signatory to the 1958 New York Covention. GAA therefore wants to enforce the award in England. It had a choice of remedies: summary enforcement under Section 26(1) of the 1950 Act, or an action commenced by writ on the award. The former is the right course only where there is no doubt about the enforceability of the award. On that aspect I have already ruled in favour of GAA. But Bank Mellat contends that the terms of this particular award do not permit enforcement under Section 26(1). If that submission is right, GAA will have to sue on the award, and seek judgment under Order XIV. The question to be decided is simply whether the terms of this final, binding and enforceable award, takes it outside the scope of Section 26(1). Section 26(1) reads as follows:

> "An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

The dispositive part of the majority award, in so far as it is material, recites the reasons of the majority and then provides that the majority -

"AWARD AND ADJUDGE that Bank Mellat shall pay to GAA

> Development & Construction Company US$-3,655,914 and interest at the rate of six per cent per annum on that amount from 22 July 1980 until the date of this award."

But Bank Mellat points out that in their reasons the majority stated:

> ".... the Bank should pay the awarded sum in Switzerland. This ruling is intended not to prejudice any action for enforcement of the arbitral award."

It is submitted that this ruling is an operative part of the award of the majority. Reliance is placed on Dalmia Cement v National Bank of Pakistan [1975] 1 Q.B. 9 where Kerr J held that awards which in their operative parts directed payment "in India" could not summarily be enforced under Section 26(1) because an English court could not give judgment in such terms. On behalf of GAA Mr Akenhead reserved the right to argue elsewhere that on this point Dalmia Cement was wrongly decided. I will proceed on the assumption that it was correctly decided.

The question is whether the award, in its dispositive provisions, directed payment by Bank Mellat of the sum awarded in Switzerland. Conventionally, in England, the dispositive part of an award is introduced by the words "We award and adjudge". That, in England, is the arbitral equivalent of a judgment or order by a court of law, as opposed to the reasons for it. No doubt other words may be used to serve the same purpose. But here the majority did use the conventional words to introduce the dispositive part of the award. That part of the award did not direct that payment should be made in Switzerland. And it is not necessary, or even usual, for an award in its dispositive part to specify the place of payment. The recital in the dispositive part of the award did not incorporate by reference the ruling in the reasons that payment should be made in Switzerland. It is also not a necessary implication of the award read as a whole that the relevant ruling was intended to form part of the dispostive provisions of the award. The ruling was based on the general principle that, in the absence of agreement to the contrary, the debtor should seek out the creditor for purposes

of a payment. The real relevance of the point was in relation to the issue as to currency: given that ruling Bank Mellat's contention that the currency should be rials failed becauses there was no official exchange rate for rials in Switzerland. A ruling of law contained in the reasons for an award does not ipso jure form part of the dispositive provisions of the award. And here the majority expressly added: "This ruling is intended not to prejudice any action for enforcement of the award". That tends to indicate that the majority (one of whom was a distinguished English Queen's Counsel) did not omit the ruling from the dispositive part of the award by mistake. In any event, reading the ruling in the reasons as part of the dispositive provisions of the award, involves in my judgment a rewriting of the award which is contrary to principle and practice. The foundation of the argument that the terms of the award do not allow enforcement under Section 26(1) therefore falls away.

In my view there is no other reasons why the award should not be enforced under Section 26(1).

CONCLUSION

Bank Mellat's application to set aside the award on the grounds of misconduct under Section 23(2) is dismissed. GAA's application for summary enforcement of the award under Section 26(1) is granted.