81. SOUTH AFRICA: SUPREME COURT, TRANSVAAL PROVINCIAL DIVISION - 16 June 1977 - *Benidai Trading Co. Ltd. v. Gouws & Gouws (Pty.) Ltd.**

Enforcement of a foreign arbitral award - Arbitral award given abroad

VILJOEN, J.: The appellant appeals against the dismissal, with costs, of an application in the motion Court, Johannesburg, for an order:

1. Recognising the terms of certain arbitrator's award handed down in London, England, on 30 August 1973, being annexure "G" to the accompanying affidavit of Kinya Ohmori.
2. For payment of the sum of R17 555,13 by the respondent to the applicant.
3. For payment of interest on the sum of R17 555,13 from 30 August 1973 to date of payment at the rate of 6 per cent per annum.
4. For costs of suit.
5. For further or alternative relief.

During 1972 the appellant (applicant *a quo*), a Japanese company, entered into two contracts with the respondent company, which carries on business at Krugersdorp as produce, grain and seed merchants. Both contracts were entered into through brokers. There is a copy of a document attached to the papers bearing the heading Frank Nemec, agricultural consultant, with an address at Montreal, Canada. This document reflects a contract to have been entered into by the respondent as seller and the appellant as buyer, through the instrumentality of the broker, Frank Nemec, of 10 metric tons — approximately 22 046 lbs. of Weeping Lovegrass (*erugrostis curvula*) seed at a price of U.S. 580 per 100 lbs. This document contains the following cryptic conditions:

"Rules: F.I.S.
Arbitration: London."

Another document bears the date 18 December 1972. It emanated from

---

* The original text is reproduced from The South African Law Reports (1977) 3, 1021 ff.

the appellant itself. It reflects a purchase order, No. 0738, which was addressed to the respondent and which confirmed the contract entered into through the broker, as follows:

"We confirm our purchase of the undermentioned goods from you through Mr. Frank Nemec, 486 St. John St., Suite 27, Montreal 125, P.Q. Canada."

A description then follows of the Weeping Lovegrass seed, which corresponds to the description contained in Frank Nemec's document, and the price is stated to be the following:

"S. & F. Yokohama per 100 lbs.
US $80.00 US $17,600".

The destination is reflected as Yokohama, Japan. Provision is made for payment, as follows:

"Documents against payment through The Mitsui Bank Ltd., Operation Center, Foreign Department, for the account of Honcho branch in Tokyo."

Under "Remarks" the shipping documents required are specified.

The second contract was entered into on behalf of the appellant by another broker, The Landis Company Inc., of Waupaca, Wisconsin, on 21 December 1972 for another quantity of ten metric tons (22 000 pounds) of South African Grown Weeping Lovegrass Seed for a price of $80 U.S. Funds, per 100 lbs. C.I.F. Nagoya, Japan. The "terms" were:

"Draft with all documents payable on first presentation to: The Mitsui Bank Ltd., Operation Center, Foreign Department for account of Honcho branch in Tokyo."

The following conditions appear:

"Rules: F.I.S.
Arbitration: F.I.S., London."

On 22 December 1972 the appellant, under purchase order No. 0747, confirmed the purchase

"of the undermentioned goods from you through The Landis Co., Inc., P.O. Box 385, Waupaca, W.I. 54981, U.S.A."

A description of the goods, the quantity and the price then follow. The price is:

"C.I.F. Yokohama per 100 lbs. US $ 80
US $17,600."

Both purchase orders (presumably telexed) make provision for the seller to sign it as being accepted and confirmed. The one copy attached to the papers, viz. order No. 0747, was signed on behalf of the respondent. The other copy bears no signature, but it is common cause that these documents represent the contracts between the parties. In view of the fact that both contracts were accepted and confirmed by the respondent as seller, presumably in this country (it is not specified on the contracts where they were signed), South African law could be said, in my view, to be the *lex loci contractus*.

On 31 January 1973 the respondent addressed a letter to Messrs. Frank Nemec, as follows:

"Referring to the above-mentioned contract, we regrettably have to report that the drought in South Africa is still continuing with such severity and destructive effect that the Government was compelled to clamp down and for the time being freeze further exportation of certain essential pasture seeds, amongst other Lovegrass!

From a recent survey it became clear that the present Lovegrass crops did not yield sufficient seed to meet local requirements and, furthermore, that the seed which is available is generally of such a poor quality that it would in any event not qualify to meet international orange certificate standards.

This unfortunate state of affairs which could only be regarded as an act of God

is undoubtedly completely beyond our control, and under the circumstances we are left with no alternative but to suggest cancellation of the above-mentioned contract, to which your early comment would be appreciated."

On the same date the respondent wrote to Messrs. Landis Co., Inc., of Wisconsin, U.S.A. as follows:

"The drought in South Africa is still continuing in all severity and with such destructive effect that the Government considered it necessary to implement some restrictive measures with regard to certain agricultural commodities, particularly pasture seeds.

From a recent survey it became clear that certain of our summer crops, amongst others Lovegrass, did not yield seed in sufficiency to meet requirements, and furthermore that the seed which did become available in general is of such a poor quality that it could hardly meet with international orange certificate standards, and consequently it was decided to freeze all further exportations of Lovegrass for the time being.

This unfortunate state of affairs, which could only be regarded as an act of God, is naturally completely beyond our control, and under the circumstances we are compelled to suggest cancellation of contract No. 39-4456 with Messrs. Benidai for at least until conditions improve and/or restrictions are lifted."

The appellant alleges that the respondent's failure or refusal to perform its obligations under the two contracts caused the appellant to suffer damages amounting to U.S. $27 400 by reason of the appellant's being compelled to buy in 20 metric tons of Weeping Lovegrass (*Eragrostis curvula*) seed at prices higher than those agreed upon by the parties under the two contracts. A dispute arose between the parties as to whether the resondent's failure or refusal to perform its obligations under the two contracts rendered the respondent liable to compensate the appellant for such damages. The respondent proposed a basis for settling the dispute but such proposal was not acceptable to the appellant who, on 10 April 1973, notified the respondent by registered letter that it proposed referring the matter to arbitration in terms of the F.I.S. rules and usages for the International Trade in Herbage Seeds, as follows:

"We received your letter of March 19 regarding the captioned contracts and regret to learn that you do not change your contention to evade responsibility for your non-fulfilment of the contracts on the pretext of special conditions set forth in the contract blanks, against which we must outline our viewpoint on the matter as follows.

(1) Although you insist upon your failure in filling the said contracts just because of drought, we do not think it arose from a cause beyond your control. If such a risk could be presumed at the time of contract, you should have made it clear enough by inserting a clause 'subject to crop' in the contracts. If so, we would have been able to make the contracts with our customers accordingly.

(2) You also insist on the impossibility of obtaining the export permit, but it is an incontestable fact that South African Department of Agriculture have not laid any embargo on 1973 crop of Weeping Lovegrass. As you know full well, several shipments of the seed have actually been made during February and March from Durban to the U.S.A. Besides, no special clause of 'subject to export permit' is specified in the contracts.

(3) If the percentage of germination is lower than the contracted one, it can be adjusted by following the formula used in F.I.S. rules. It has no concern whatever with the export of the seed. In fact, we purchased 1971 crop of American Weeping Lovegrass of low germination such as 60 per cent and we could clear the seed without any trouble.

We repeatedly asked you to execute the contracts through Mr. Frank Nemec and The Landis Co. Inc., but after all you failed to live up to the contracts. To be responsible for the contracts closed with our customers who have dire need for the seed now, we have been obligated to hastily purchase anew 20 tons Weeping Lovegrass without regard to its price. As to how high a price we had to pay through

Mr. Nemec and Mr. Landis again, you already know from our letter telegram dated April 4 1973, for which you have not yet replied how can you compensate the heavy loss we sustained.

Since the time of shipment according to the contract has passed over and it is apparent that there is such a difference between you and our views, we have accordingly to inform you that we shall place the matter in the hands of arbitration according to F.I.S. rules. We are very sorry to have recourse to this way but your attitude does not leave us any choice."

On 17 April 1973 the respondent replied as follows:

"Both your letter of 10 April and cable of 4 April were received in this office, and the reason for not replying thereto sooner than now is because the writer was away from office and none of our staff had sufficient knowledge of the subject under discussion to reply thereto.

Further than what was stated in our letter of 19 March, we cannot add much except perhaps advising you that we had cabled Nemec on March 23 informing him that their covering of the contracts in question from U.S.A. Lovegrass stocks was completely irregular and *ultra vires* and their actions were therefore entirely at their and your risk and responsibility!

Something that really surprised us in your letter of 10 April is your apparent disregard of the 'special conditions' *printed* on both contracts, because if those conditions were just to be disregarded as being of no value, why then would they appear on the contracts at all? Everything typed, written or printed on any contract forms an integral part thereof and no section or part could just be waived for the purpose of suiting anybody's own personal viewpoint and arguments.

Fact remains that we can prove over and over from our own experiences as well as that of several other South African firms that our inability to execute contracts was directly as a result of the severe drought which prevailed in the country during the last spring and summer.

You are also quite correct in your assumption that several shipments of Lovegrass were in fact made from Durban during February and March. We know all about them and we can even tell you how they came about. The first consignment was shipped by a farmer who grows seed under contract for a seed merchant in the U.S.A. The second shipment was seed bought and stored in S. Africa from the previous year's crops by a U.S.A. buyer who only gave shipping instructions during 1973. The third lot was a small balance of an order with the Argentine which was too late for shipment during 1972 and this also was shipped during 1973. Other than this no 1973 new-crop Lovegrass seed was shipped away from South Africa.

This then is our final views and comment and if you wish to proceed further with the matter we certainly cannot stop you."

On 27 April the appellant submitted the dispute with the respondent to the F.I.S. in London for settlement by arbitration. An arbitration chamber was constituted in London and the respondent who was duly notified of the arbitration proceedings nominated one of the three arbitrators for the hearing. On 30 August the following award of the arbitration tribunal was handed down:

"United Kingdom Association of the F.I.S.
30th August 1973.
Cereal House,
58 Mark Lane,
London, EC3R 7NP

Arbitrators' Award.

We the undersigned have been called upon to arbitrate in a dispute that has arisen between Benidai Trading Co. Ltd., of Tokyo, Japan, and Gouws & Gouws (Pty.) Ltd. of Johannesburg, South Africa, in respect of:

Contract No. 2-2936 10 Metric tons Weeping Lovegrass seed dated 15.12.72
Contract No. 39-4456 10 Metric tons Weeping Lovegrass seed dated 21.12.72

Statement of Facts.

Benidai Trading Co. Ltd. claimed arbitration against Gouws & Gouws Ltd. for their failure to deliver Weeping Lovegrass against contracts 2-2936 Nemec and 39-4456 The Landis Co., and their claim for recovery of a total of U.S. $27,400

being the extra cost involved in purchasing American seed against the original contracts.

Decision.

The arbitrators' decision made in favour of Benidai Trading Co. Ltd. was unanimous and was arrived at for the following reasons:—
Gouws & Gouws Ltd. were in default—

(1) They failed to deliver Weeping Lovegrass 10 tons Nemec contract 2-2936 and 10 tons The Landis Co. contract 39-4456.

(2) No embargo was placed on the export of South African Weeping Lovegrass as originally claimed by Gouws & Gouws Ltd. and they subsequently admitted this.

(3) Drought and consequent crop shortage cannot be accepted as a reason for failure to fulfil a contract. Severe though the drought may have been, the evidence indicates that some seed was in fact harvested. In the case of extensive flood or fire the situation could be envisaged where a complete crop in a particular area could be completely wiped out. Regardless of the above, F.I.S. rules include a special paragraph (VIII—Sale Subject to Crop . . .) designed to cater for a situation where the seller is doubtful as to the crop prospects and if Gouws & Gouws had serious doubts about the crop at the time of entering into the contracts they should have insisted in making the sales 'subject to crop'.

(4) At no time did Gouws & Gouws make any attempt to negotiate with Benidai Trading Co. Ltd. or to tender for their consideration either lower germinating seed or seed from an alternative source, e.g. U.S.A., with or without price adjustment.

Award.

The arbitrators agree to the claim made by Benidai but they feel that item 2 in the claim should be slightly reduced as a higher price was paid for a lot with a germination higher than that called for in the original contracts (90 per cent germination instead of 85 per cent). Accordingly this item is reduced from U.S. $29,000 to U.S. $27,388.88. This is calculated at the rate of 85/90ths of the price paid. The total due to Benidai is, therefore, U.S. $25,788.88 with the expenses of arbitration for the account of Messrs. Gouws & Gouws Ltd. The fees and expenses of this arbitration are as under:

Association fee	£15.00
Association expenses	8.00
Arbitrators' fees and expenses	99.25
	£122.25

(Signed) R. K. Clifton)
(Signed) C. R. Coy) Arbitrators."
(Signed) W. S. Holliwell)

The ruling rate for the exchange of U.S. dollars into rand on 30 August 1973 (being the date of the arbitrators' award) was U.S. $1.48622 to the rand (and for the exchange of English pounds into rand was £0.6006 to the rand).

In its answering affidavit the respondent takes the following stance:

(a) It denies that the appellant suffered damages as alleged. Its attitude is that if the appellant did buy the seeds at the prices stated, it concluded sales at a price higher than that prevailing at the relevant time and failed to mitigate its damages.

(b) The arbitration was constituted in London in terms of the F.I.S. Arbitration Procedure Rules because in the Republic of South Africa there is no national association affiliated to the F.I.S. Where this is the position, it is provided by clause 2 of article 2 of the arbitration procedure rules that the general secretary of the F.I.S. shall indicate a third country whose national association is affiliated

to the F.I.S. where the arbitration shall take place. It is in this context that the arbitration was directed to be held in the United Kingdom.

(c) It alleges that the arbitrators failed in their duty to decide on two material aspects which were brought to their attention for decision by the respondent when filing its submission, viz.:

(i) whether the appellant was not at the relevant time already possessed of stocks of seeds which it could have utilised to fulfil any other forward orders to which it was committed, and

(ii) whether, generally, it had suffered any damages whatsoever.

In this respect the respondent says:

"Having decided that respondent had committed a breach of the contracts, the arbitrators only concerned themselves with the fact that applicant had bought in seed at the price it allegedly did and only reduced its claim slightly because of a minor variation in the quality of the seed so bought."

(d) Respondent submits that the Court *a quo* has no jurisdiction to make the arbitration award an order of Court for the following reasons:

"(a) Applicant has referred to the arbitration procedure rules which, according to it, make due provision for the recognition and enforcement of foreign arbitration awards. A reference to these rules will show that such recognition and enforcement in a country other than that in which an arbitration award is made, is only applicable where the country in which the losing party under the arbitration resides is a participant either in the Geneva Convention of 1927 or the New York Convention of 1959.

(b) I say that the Republic of South Africa is not a party to the Geneva Convention of 1927 and, more specifically neither a party to the New York Convention of 1959. . . .

(c) I specifically deny that there is any basis for applicant's contention that I, on behalf of respondent, agreed that any arbitration award made against respondent would be capable of recognition and enforcement by this honourable Court. On the contrary, I assert that once, in terms of the F.I.S. arbitration rules, it has been lawfully decided that the arbitration should take place in a country other than the Republic of South Africa applicant, if it wishes to make such award an order of Court, must perforce do so in the country where such arbitration was held and that there is no procedure in law for making such a foreign arbitration award an order of this honourable Court.

(d) Should applicant seek to enforce the arbitration award in England, I am advised that respondent would be able to resist its application on the grounds stated above that the arbitrators failed to address their minds to the two specific questions put before them and, in particular, failed to enquire of applicant whether it had taken all reasonable steps in order to mitigate the damages allegedly sustained.

(e) I am advised, further, that in law it would not be competent for this honourable Court to adjudge on the merits of such opposition, more especially as the writ of this honourable Court would have no legal effect if the opposition of respondent were sustained and it be ordered that the matter be referred back to the arbitration chamber."

The respondent submits that by reason of the foregoing it is not obliged in law to pay to the applicant the amount claimed or any other amount.

In its replying affidavit the appellant (applicant *a quo*) denies that the arbitration was constituted in London because there is no national association affiliated to the F.I.S. in the Republic of South Africa, or that the arbitration was "directed" to be held in London in the context of clause

2 of article 2 of the arbitration procedure rules. It says that the arbitration was constituted in London because the parties had agreed that it should be held in London and because the F.I.S. agreed to give effect to the expressed intention of the parties that it should be held there. The initials F.I.S. stand for the Federation Internationale du Commerce des Semences, an international body which governs, among other things, the dealings between seed suppliers and purchasers who emanate from different countries.

The Court *a quo* was not called upon to deal with the correctness or otherwise of the arbitral award. Nor are we. The only issue between the parties was and still is whether an otherwise legally competent Court in this country has jurisdiction to forthwith recognise and enforce the arbitral award made in London. The learned Judge *a quo* held that the Court has no such jurisdiction. He pointed out that the obtaining of recognition for enforcement of the awards is provided for not in the arbitration procedure rules of the F.I.S., but in the provisions of two conventions, known as the Convention of Geneva, 1927, and the Convention of New York, 1959. These conventions, the learned Judge remarked, do not have any legal effect on the present application, because South Africa is not a party to either convention.

The learned Judge said in his judgment:

"Both parties, in the arguments submitted, seem to get down to this fundamental proposition that the recognition and enforcement of the order of Court, of an award made in London, depends really upon the contractual terms which are binding on the parties."

He referred to the decision in *Slotar & Sons* v. *Zuckon*, 1920 C.P.D. 688, where it was held by SEARLE, J., that

"the jurisdiction which this Court exercises in making an award a rule of Court, seems to me derived either from a provision in the deed of submission by the parties or from the award having been made under a statute having the force of law in this Province and containing a provision that the award may be so made a rule of Court."

and proceeded as follows:

"Now the applicant contends that it was intended by the parties that the award should be enforceable and that the enforcement should be made possible in South Africa by the grant of an order as prayed. The respondent does not challenge that enforcement at some stage and in some manner was intended by the parties, but contends that, by agreeing to the arbitration and in selecting London as the place of arbitration, it did not intend that an award made there would be capable of enforcement immediately in South Africa.

Counsel has argued that respondent was within its rights in requiring that enforcement should first be put into effect in England, by recognition in England, and thereafter, once the English Courts have recognised the arbitrators' award and made the award an order of Court, that the parties would then be able to move that the order of Court be recognised and enforced in South Africa."

The final reasoning is the following:

"The contractual provisions relating to the arbitration and the rules are terse and laconic. Can it be said that there is an agreement that, once an award has been made and the time for noting an appeal has passed, there is no question but that the South African Courts have jurisdiction to order the enforcement? Leaving aside the proposition extracted by counsel from *Slotar's* case that the mere agreement between the parties is enough to warrant the South African Courts in recognising and enforcing the award of an arbitrator made by a foreigner, in a foreign country, and I have some hesitation in accepting so wide a proposition, is this a case in which the agreement between the parties fairly carries to that conclusion? There may be many reasons why London was chosen as the place of arbitration.

The agreements are silent on this, but the affidavits indicate the possibility open to the parties of raising certain defences before the English Courts, which might be a bar to the award being enforced in England. Without going into the merits of such defences in England, it is to my mind enough to recognise the possibility of such reasons having inspired the parties to agree to London as the place and English law as the law which would govern the recognition of the award, at least at the first stage of seeking such recognition.

Respondent's counsel pointed to the lack of express indication of the intention of the parties and suggested that the familiar test be applied as to whether a term could be implied in law. It seems to me to be a valid argument that the matter should be tested in this way. Was it implicit in these agreements that both the Japanese and the South African Courts would have jurisdiction to enforce the award forthwith? I must say, on consideration of the matter and on consideration of all the arguments advanced to me, I am unable to reach the conclusion that the contract must be read to include such a term. It seems to me to be sufficiently open to leave considerable uncertainty on the matter.

In all the circumstances I am constrained to find that it has not been shown in this application that the parties intended that recognition and enforcement should be made immediately through the South African Courts, and I therefore conclude that the applicant has not established its case. The application is therefore dismissed with costs."

The premise from which the learned Judge *a quo* proceeded seems to have been that a submission by the parties to arbitration in London was a submission to the jurisdiction of the English Courts. In my view he erred in this respect. I shall revert to this basis for his decision in due course. Secondly, his reasoning that the parties might have chosen London for the purpose of receiving certain benefits of raising defences before the English Courts which might be a bar to the award being enforced in England, seems to me to be somewhat unrealistic. In the first instance, what "defences" would either party contemplate raising if a dispute should arise and an award which is made were sought to be enforced? It seems to me to be unlikely for either party, in deciding upon London as the centre of arbitration, to have been intent more upon raising defences to the award obtained by the other party, than upon having the award, which it might obtain in its favour, recognised and enforced by a court of law. In any event, there is nothing in the papers to indicate that English law offered more defences than either the *lex loci contractus* which is South African law or the *lex solutionis*, the law of the country where performance had to be made both in regard to delivery and payment, which country is Japan. Insofar as the judgment *a quo* has to be read as suggesting that the defaulting party should have the benefit of compelling the other party to overcome two hurdles before enforcing performance against the former, I hardly think that any such intention can be imputed to either party.

These considerations why I do not agree with the learned Judge *a quo* are, however, negative in nature. There is a more positive consideration (and in this respect I intend to deal with the first basis of the judgment adverted to above), and that is that in the international commercial world it has almost become a universal practice to select London as the seat for arbitration proceedings, not because parties to an international mercantile transaction necessarily have confidence in English law, but for purposes of convenience, because London is an important commercial centre and because of the expertise of London arbitrators. And if they do so they do not, unless there is an express indication in the contract or other cir-

cumstances which point in that direction, submit to the jurisdiction of the English Courts. Not only do the parties not submit to the jurisdiction of the English law but, unless a clear inference is to be drawn to the contrary, they do not even accept English law as the proper law of the contract except for procedural purposes. This was clearly held by the House of Lords in the matter of *Compagnie D'Armement Maritime S.A.* v. *Compagnie Tunisienne de Navigation S.A* 1971 A.C. 572. This case marked the culmination of a long line of cases in which the English Courts were called upon to decide what the proper law of the contract was in the event of parties, who are unconnected with England, agreeing upon London as the seat of the arbitration in any dispute arising between them from an international transaction. Before the decision in the *Compagnie Tunisienne de Navigation* case the weight of the effect of the decided cases, following such text-book writers as *Dicey and Morris* and *Cheshire*, was that a mere selection by parties to an international mercantile contract of London as the place of arbitration, made English law the proper law of the contract. This case, however, marked the turning point in that process of thinking and, with respect, put the matter in the right perspective. The facts appear from the headnote, the relevant portion of which reads as follows:

"In 1967 the claimants, a Tunisian company, and French shipowners negotiated a contract through brokers in Paris for the transport of specified quantities of crude oil from one Tunisian port to another. The form produced by the brokers' English agent was a printed tanker voyage charter in standard English form and language with typed clauses added. The printed form described the shipowners as 'owners of the' (blank) 'vessel' (blank). By clause 13 it was provided that:

'This contract shall be governed by the laws of the flag of the vessel carrying the goods . . .'

Clause 18 of the printed clauses provided that disputes were to be settled by arbitrators in London. The added typed clauses included in clause 28:

'shipments to be effected in tonnage owned, controlled or chartered' by the French shipowners 'of 16,000/25,000 tons at owners' option.'

Disputes arose between the parties, and the Tunisian company claimed damages for repudiation of the contract. The disputes were referred to arbitrators in London who heard argument on the preliminary question as to what system of law was the proper law of the contract and stated their interim award in the form of a special case in which they found, *inter alia*, that the French shipowners had four to five vessels flying the French flag but none large enough to carry 25,000 tons: that three days before the contract was made a Liberian vessel had been nominated for loading: that in the first four months the six ships chartered were respectively Norwegian, Swedish, Liberian, French, Liberian and Bulgarian; and that both parties contemplated at the time the contract was entered into, that vessels owned by the French shipowners would be used 'at least primarily' to perform the contract:

Held, that the proper law of the contract was French law."

After reviewing the circumstances under which the contract was made, Lord Reid held at p. 583 of the report that:

"Clause 13 must, in the circumstances, be regareded as having failed in its purpose to determine the proper law of the contract."

He proceeded to say as follows at p. 583G of the report:

"If that is so, then we are no longer concerned with the parties' intention. In the absence of any positive indication of intention in the contract the law will determine the proper law by deciding with what country or system of law the contract has the closest connection. Here three countries are involved. The contract was negotiated and signed in France and the freight was payable in Paris in French francs. The contract was to be performed in Tunisia. The only connection

with England was that any dispute was to be settled by arbitration in London. The contract is in the English language and in English form, but it was not argued, in my view rightly, that any great importance should be given to this."

On the basis that France and Tunisia had the same system of law, viz. French law, as was assumed, Lord REID held (p. 584A-C):

"On that basis when one comes to weigh the various factors which tell in favour of French or of English law being regarded as the proper law, the fact that Tunisia was to be the place of performance of the contract would be put in the scale for French law. Then it is clear that the balance comes down heavily in favour of French law. On the one hand, there are the place where the contract was negotiated and signed, the place of performance, the place where and the currency in which the freight was to be paid, and the place where the parties resided and carried on business: on the other hand, there is only the place where disputes were to be settled by arbitration. But I wish to reserve an opinion as to how far in a case of this kind it is proper to disregard the fact that two countries are separate and independent countries, each with its own system of law, on the ground that those countries are or have recently been closely associated, or that their systems of law are very similar but both very different from English law."

His conclusion at p. 584D-E was:

"The respondents do not deny that, if we are free to apply the general rule that the proper law is the law of the place with which the contract is most closely associated, then the proper law would be French law. Their case is that that general rule does not apply where there is an arbitration clause requiring disputes to be settled by arbitration in England. They admit that such a clause does not prevent the parties from agreeing that some other law shall be the proper law, but they maintain that, if such an agreement cannot be deduced from the terms of the contract, then the arbitration clause is decisive as to the proper law and requires an English court to hold that the proper law is the law of England.

Of course the fact that the parties have agreed that arbitration shall take place in England is an important factor and in many cases it may be the decisive factor. But it would, in my view, be highly anomalous if our law required the mere fact that arbitration is to take place in England to be decisive as to the proper law of the contract. For the reasons given by others of your Lordships I agree that this is not the law of England."

Lord MORRIS of BORTH-Y-GEST was of the view that the opening words of clause 13 clearly indicated that the intention was that one law was to govern the whole operation of the contract. He proceeded as follows at p. 587E-G:

"If, however, the view is held that the parties did not by clause 13 expressly agree that French law was to govern their contract I would still conclude that that law was the proper law of the contract. The general rule is that the proper law of a contract is that law by which the parties intended that their rights should be determined: see *In re United Railways of Havana and Revla Warehouses Ltd.*, 1961 A.C. 1007. Parties may agree, either in express terms or in terms which can be inferred, to submit themselves to a particular system of law. If they have not done this, then the governing law will be that 'by reference to which the contract was made or that with which the transaction has its closest and most real connection': see *Bunython* v. *Commonwealth of Australia*, 1951 A.C. 201 at p. 219. It is contended by the respondents in the present case that clause 13 achieves nothing and should be disregarded and that there remains an implication, to be drawn from the agreement to settle disputes by arbitration in London, that English law was to govern: it is contended that, in default of an express indication of some other system of law as the proper law of the contract, the choice by the parties of London as the arbitration forum necessarily carries with it an implied choice of English law. I cannot accept these contentions."

At p. 588 of the report (at A-C) the following *dictum* appears:

"An agreement to refer disputes to arbitration in a particular country may carry with it, and is capable of carrying with it, an implication or inference that the parties have further agreed that the law governing the contract (as well as the law governing the arbitration procedure) is to be the law of that country. But

I cannot agree that this is a necessary or irresistible inference or implication: there is no inflexible or conclusive rule to the effect that an agreement to refer disputes to arbitration in a particular country carries with it the additional agreement or necessarily indicates a clear intention that the law governing the matters in dispute is to be the law of that country. There might be such additional agreement or there might not. In many cases there might be. In many cases it will be reasonable to infer that the parties so agreed. In others cases the conclusion may well be that the parties placed confidence in the arbitrament of chosen commercial men in a particular country and in their methods and system, while remembering that arbitrators may be accustomed to and competent to deal with disputes by the application of some system of law other than that of their own country."

The learned Law Lord proceeded to review a number of previous cases. Referring to the case of *N.V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co. Ltd.*, 1927 A.C. 604, he said at p. 589G of the report: "I do not read that case as providing support for the contention that an agreement for arbitration in a particular country carries with it a conclusive implication that the law of that country is to be the substantive law of the contract."

A reference to the case of *Tzortzis* v. *Monark Line A/B*, 1968 1 W.L.R. 406, appears at p. 590 of the report and there is the following comment on that decision at the same page, F-G:

"The conclusion that English law was the proper law of the contract may well have been a reasonable one (though no occasion now arises to form any opinion as to this) but some of the statements concerning the inferences to be drawn from an arbitration provision are, in my view, expressed much too positively. The circumstance that parties agree that any differences are to be settled by arbitration in a certain country may and very likely will lead to an inference that they intend the law of that country to apply. But it is not a necessary inference or an inevitable one though it will often be the reasonable and sensible one. Before drawing it, all the relevant circumstances are to be considered."

Lord MORRIS finally held at pp. 590H-591A-B:

"My conclusion, therefore, is that clause 13 should be interpreted as containing an agreement that French law is to govern. If the clause has failed to be positive its existence at least negatives any inference that might otherwise have arisen from the terms of the arbitration clause. On that basis and upon a consideration of all the relevant circumstances it should be held that French law is the governing law. The transaction had a much closer and more real connection with French law than with English law. The contract was negotiated in France in the French language through a French firm of brokers and was made in France. There was to be payment in France and in French currency. One party was a company incorporated in Tunisia. The other party was a company incorporated under French law which at the time was registered as a French company.

If I had been of the view that clause 13 ought to be regarded as non-existent, then it would have been a matter for decision as to whether these and the other considerations already noted were not so weighty as to negative and supersede any inference that might be drawn from the terms of the arbitration clause if considered alone."

The last paragraph of Viscount DILHORNE's judgment at p. 593G reads as follows:

"I have had the advantage of reading the opinion of my noble and learned friend, Lord WILBERFORCE, on these contentions. I entirely agree with it. I only desire to say in conclusion that it is, in my view, inconceivable that a French company registered in French Somaliland and a Tunisian company where the law is based on the Code Napoléon, having negotiated in French in Paris, could have intended that a contract for the carriage of oil between two Tunisian ports with the freight payable in francs should be governed by English law."

Lord WILBERFORCE referred to the decision appealed against. He said at p. 594E-H and top of p. 595:

"How, then, was a decision reached in favour of English law? Some reliance was placed on the use in the contract of English expressions, but this can be

of little weight since in general they relate to maritime situations well known under all systems and, indeed, referred to in the Hague rules. The main argument was based on clause 18 of the contract which, as stated, provides for arbitration in London. The existence of such a clause, failing an express choice of any other law, is said to give rise to a conclusive presumption that the parties intended English law to govern, however strongly other factors may point away from it. In so holding, the Court of Appeal was following its earlier decision in *Tzortzis* v. *Monark Line A/B*, (1968) 1 W.L.R. 406, where, though the contract was closely connected with Swedish law the presumption in favour of English law arising from the arbitration clause was described by SALMON, L.J., at p. 413, as 'irresistible'. There is no doubt that the strength of this so-called presumption has increased both in recent decisions at first instance and in certain, but not all, text-books. Thus Professor Cheshire in his *Private International Law*, 8th ed. (1970), says that 'for better or for worse English law is committed to the view that *qui elegit judicem elegit jus*. An express choice of a tribunal is an implied choice of the proper law'. The editors of Dicey and Morris, *The Conflict of Laws*, are more circumspect: 'usually permits the inference' — 8th ed., (1967), p. 705). So, too, Professor Wolff in his *Private International Law*, 2nd ed. (1950), p. 437."

Lord WILBERFORCE could not find in clause 13 the solution to the case. Dealing with the issue as to what law is the proper law of the contract he said at pp. 595F-596A-D:

"My Lords, I am still of opinion that it is not necessary to embark on a citation of authorities in order to establish how the proper law of a contract is to be arrived at. The law has been more than once in recent times stated in this House and if one desires a summary of the main principles the rules in Dicey & Morris, *The Conflict of Laws*, 8th ed., are convenient. For myself I prefer the formulation in the 7th ed. (1958), p. 731, which I find clearer and simpler. In the absence of an express choice of law, rule 127, sub-rule 2, applies as follows:

> 'Where the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.'

Whether the result is a matter of 'inferred intention' or not may be open to jurisprudential discussion; but the advantage of this formulation is that (correctly in my opinion) it requires consideration together of the terms and nature of the contract and the general circumstances of the case. In certain recent judgments, particularly in relation to arbitration clauses, there is a tendency to split this into two stages: first, see if there is an arbitration clause; if so, that is conclusive, and the general circumstances (place of performance, money of payment, etc.) are irrelevant. I think that this is wrong; all should be considered together as elements relevant to intention, inferred or presumed. I see no justification for giving a pre-emptive effect to one of these elements, to the extent of refusing even to consider others, whether within or outside the contract, which are just as relevant (though not necessarily as weighty) to the parties' intention.

How strong, then, is the inference to be drawn from a (London) arbitration clause? That the selection of a certain place for arbitration and, by inference, of nationals or residents of that place as arbitrators, is an indication that the parties intended the law of that place to govern is a sound general rule. But it should not be treated as giving rise to a conclusive or irresistible inference, as recent pronouncements appear to suggest. One of the reasons commonly given for attributing overwhelming force to the clause is that arbitrators in London are only to be supposed to be conversant with English law (*N.V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co.*, 1927 A.C. 604, *per* Viscount DUNEDIN) but I venture to think that in commercial matters, at the present time, this may give insufficient recognition to the international character of the City of London as a commercial centre — the reason, rather than any preference for English rules, for which arbitration in London is selected. In this case the arbitrators had no difficulty in finding for French law and I do not suppose they would find ascertainment of the French law as to damages any more difficult than the English law of anticipatory breach. So, unless otherwise constrained, I would regard the clause as a weighty indication, but one which may yield to others."

He proceeded to discuss a number of the leading cases, both old and modern, and referred finally to the *Tzortzis* case, *supra*, in which Lord DENNING, M.R., seems to have regarded the arbitration clause as a "very strong indication" that English law was the proper law of the contract though he later quotes Professor *Cheshire* who puts the matter more strongly still. He also referred to the judgment of SALMON, L.J., who said firmly that the choice of an English arbitration "raises an irresistible inference which overrides all the other factors", and said at p. 600C-E of the report:

"My Lords, for the reasons given I am of opinion that this language is too strong, too absolute. Neither authority nor commercial reality supports the necessity for so rigid a rule. An arbitration clause must be treated as an indication, to be considered together with the rest of the contract and relevant surrounding facts. Always it will be a strong indication; often, especially where there are parties of different nationality or a variety of transactions which may arise under the contract, it will be the only clear indication. But in some cases it must give way where other indications are clear. It is not necessary to express an opinion as to the correctness of the result in the *Tzortzis* case; it is the process with which it is necessary to disagree. The right result was to be arrived at by weighing the important indications in favour of Swedish law against the indication from the arbitration clause and the different nationality of the parties. It is necessary to disagree with the result in the present case, where every indication points so strongly to French law, that this law must govern unless the inference from London arbitration is irresistible or conclusive."

Lord DIPLOCK makes a clear distinction between the procedural or curial system of law of a country and the substantive law. At p. 603C of the report the following *dictum* is to be found:

"When parties enter into an agreement which they intend to give rise to legally enforceable rights and liabilities, they must *ex hypothesi* contemplate that there will be some system of law by reference to which their mutual rights and liabilities will be determined, i.e., the substantive or 'proper' law of their agreement; and also that the procedure by which disputes about their rights and liabilities will be resolved will also be regulated by some system of law, i.e., the curial law of their agreement."

At p. 604C he is reported to have said:

"My Lords, it is possible for parties to a contract to choose one system of law as the proper law of their contract and a different system of law as the curial law. Although they may want their mutual rights and obligations under the contract be ascertained by reference to the system of law of a country with which the transaction has some close and real connection, they may nonetheless consider that the arbitral procedure adopted in some other country, or the high reputation and commercial expertise of arbitrators available there, makes the curial law of that country preferable to the curial law of the country whose system of law they have chosen as the proper law."

At the same page, G-H, Lord DIPLOCK said:

"Where the only express choice of law in a contract is that of curial law, resulting from the inclusion in the contract of a provision for arbitration in a particular country, an intention of the parties to exercise their right also to choose the proper law of the contract and, if so, the proper law which they have chosen, can only be deduced by implication from what they have expressly agreed and the circumstances in and in relation to which their agreement was made. The fact that they have expressly chosen to submit their disputes under the contract to a particular arbitral forum of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the arbitration takes place, since this is the law with which arbitrators sitting there may be supposed to be most familiar. But this is an inference only. It may be destroyed by inferences to the contrary to be drawn from other express provisions of the

contract or relevant surrounding circumstances, and those inferences may be so compelling as to lead to the identification of another system of law which the parties must have intended to be the proper law of the contract."

It was held, finally, by Lord DIPLOCK that strong as the implication may be that the arbitration clause was intended to operate as a choice of proper law as distinct from curial law it can be rebutted as other implications of intention can be rebutted. It is not a positive rule of law which is independent of the intentions of the parties. In the case under consideration he was satisfied that the inference had been rebutted.

In the present case no inference can be drawn that the parties selected English law as the proper law of the contract. Other than agreeing upon an arbitral tribunal in London, there is no real or close connection with England. The parties are not domiciled there; the brokers have their offices in Canada and the United States respectively; the purchase price was to have been paid in American currency in Japan and the purchased goods were to have been shipped from South Africa to Japan. It seems that in the present case not even the curial law of England applied (save to a limited extent), because the F.I.S. has its own procedural rules. The limited extent relates to the challenge of arbitrators. Article 5 of the F.I.S. arbitration procedure rules for the International Seed Trade provides:

"1. An arbitrator can be challenged under the law of the country in which the arbitration is to be held.
2. If a party wishes to challenge an arbitrator, he must as soon as possible address in writing a reasoned request to the competent arbitration chamber.
3. The decision as to whether the challenge is justified shall be given after consideration of the reasons by the arbitration chamber.
4. If the challenge is accepted, the party who had nominated the challenged arbitrator shall nominate a new arbitrator within 15 working days after the challenge has been accepted."

Save for this one instance, I can find nothing in the "Rules and Usages for the International Trade in Herbage Seeds" nor in the procedural rules referred to above which indicates that the law of the country where the arbitration is held would be the law of the contract or, which is a completely different consideration, that the parties submitted to the jurisdiction of the Courts of that country. See *Dicey and Morris, op. cit.*, pp. 181 and 999 (n. 92); Cheshire, *Private International Law*, pp. 83 (n. 9), 635 (n. 6) and 641 (n. 6); *Dunbee Ltd. v. Gilman & Co. (Australia) (Pty.) Ltd.* (1968) 2 Lloyd's Rep. 394; *Mattar and Suba v. Public Trustee*, (1952) 3 D.L.R. 399. Clause I of the former set of rules makes provision for a sale or contract of sale of seeds for sowing purposes to incorporate "these F.I.S. rules for the international trade" as terms and conditions of such sale and further provides that these rules, when so embodied, shall apply in their entirety unless specific written exceptions are expressed in the contract. Clause II makes provision for the completion and confirmation of a transaction. Other clauses regulate sales subject to import/export permits and contain rules providing for quantity, quality, analysis, sales by sample or type sample, sales subject to crop (art. VIII, which is referred to in the arbitral award), shipping instructions, notification of shipment, time of shipment, general trading terms, insurance, packing, time limits, holidays, statutory regulations, documents to be presented, payment (the most important provision being that the terms of payment shall be specified in the contract), default of shipment or shipping instruc-

tions, *force majeure*, compensation (including a provision that against the assessment by the claimant the defaulting party has the right to demand that the agreed arbitration body fixes the amount of the damages), quality checks, complaints on quality aspects, assessment of damages in every case of inferiority and expiry of the contract in the event of its remaining unfulfilled. Article XXVI makes provision for arbitration. Clause 99 under this article provides that all differences, even if only one of the parties declares that there is a difference between the two parties, arising from a transaction concluded or started "under these rules" must be settled by arbitration and not by law, and subject to any special written agreement to the contrary the F.I.S. arbitration procedure rules were expressly made applicable. Article 1 of these rules provides that in each country arbitration shall take place under the control of the appropriate national member association of the F.I.S. and this association may charge an arbitration chamber with the organisation of the arbitration cases or it may organise them itself. If it organises arbitrations itself it is considered under the rules an arbitration chamber. Each member association shall inform the general secretariat of the F.I.S. of the name and address of the arbitration chamber which it has designated to conduct arbitrations in its country in accordance with the rules and usages of the F.I.S. and the rules of procedure. Each member association shall draw up a list of arbitrators in its country. These must be proprietors, directors, managers or authorised representatives of firms which are members of the said association. The list of arbitrators of each country shall be sent to the general secretariat of the F.I.S. and communicated by the latter to all the other member associations.

In terms of article 2 applications for arbitration, as well as all other correspondence concerning the arbitration, must be prepared in seven copies and must be sent by registered post to the arbitration chamber of the seller's country (clause 1). If there is in the seller's country no national association affiliated to the F.I.S., the application for arbitration must be addressed to the general secretary of F.I.S. who shall indicate a third country whose national association is affiliated to the F.I.S., where the arbitration shall take place (clause 2).

As appears from all the allegations summarised above, the respondent avers that London was in terms of this clause indicated as the seat of the arbitration. It is obvious, however, that in this regard the averment of the appellant read with the terms of the contract, is correct, viz. that London was agreed upon in the contract. Article 3 makes provision for a deposit to be paid and article 4 for the nomination of the arbitrators. Article 5 dealing with the challenge of arbitrators, has been referred to above. Article 6 prescribes the procedure to be followed with regard to notifying the parties, inviting the parties to attend, the nature of the hearing — whether oral or not — and the responsibility to draw up the award, the number of sessions to be held, the summoning of witnesses or experts, the discussions of the dispute, and finally it is provided:

"11. Any judicial function which the arbitrators are not authorised to perform must be carried out by a competent court of law."

What is significant about this rule is that it does not require the judicial function to be carried out by a court of law of the country where the arbi-

tration is held.

Article 7 provides for the parties to attend personally or to be represented and to put forward further explanations of their case, and article 8 for the award to be given on the basis of available documents if the parties do not comply with requests by the arbitrators for further explanations. Article 9 deals with counterclaims and article 10 with withdrawal of the arbitration and settlement. Clause 1 of article 11 provides for the arbitration award as follows:

"The arbitrators shall make their award to the best of their knowledge and belief in accordance with the rules and usages of the F.I.S. and other conditions which may have been agreed by the parties to the contract and without favour to either party."

Clauses 6, 7 and 8 of article 11 are to the following effect:

"6. The arbitrators shall draw up the award in such a way that it complies with the provisions of the Conventions of Geneva and New York (Cf. Annex. I and II).

7. Arbitration awards which have not been the subject of appeal and appeal awards are legally binding on the parties and are enforceable.

8. The arbitrators shall make their award in at least five signed copies. The arbitration chamber shall send as soon as possible one copy by registered letter to each of the parties and also to the general secretary of the F.I.S. One copy shall be used to satisfy the legal requirements of the country where the arbitration has been held, another copy staying in the files of the arbitration chamber."

What is meant by satisfying the legal requirements of the country where the arbitration has been held, is difficult to determine. Various countries may have different requirements. This provision is, in any event, so general in terms that it cannot be said to warrant an inference that the substantive law of that country should be the law of the contract or that the parties have submitted to the jurisdicton of that country. Certain countries may have formal requirements as, for instance, the registration, for statistical or other purposes, of all the arbitrations held in that country.

Article 12 provides that each party may lodge an appeal addressed to the general secretary of F.I.S. subject to the furnishing of security. In terms of article 13 the general secretary of F.I.S. shall charge a national association affiliated to the F.I.S. with the hearing of the appeal. This association may not be the association of the appellant's or the respondent's country or of the country where the arbitration of the first instance has been heard. The appeal shall be heard by at least three arbitrators designated by the arbitration chamber dealing with the case. The arbitrators who have been arbitrators in the first instance shall not be appeal arbitrators. This appeal is virtually a re-hearing because clause 5 of article 13 provides:

"As well as the provisions of this article, articles 5 to 11 of these rules are similarly applicable."

The appeal may, therefore, be heard in a country other than the country in which the arbitration was held. The fact that articles 5-11 apply *mutatis mutandis* to the appeal means, in my view, that the curial law of the country in which the appeal is heard, shall apply. The fact that the appeal may be heard in a different country leads to the inescapable inference that the parties to the contract did not submit to the jurisdiction of the country where the arbitration of first instance was held.

Article 14 prescribes the manner in which an appeal award is to be

published. Articles 15, 16 and 17 contain provisions relating to arbitration costs. In terms of article 18 default by the party against whom an award has been made to fulfil his obligations shall be circulated amongst member associations. Article 19 provides for the rules, subject to any special written agreement, to be binding on all parties and article 20 is a clause indemnifying the arbitration chamber, the arbitrators, the member associations and the general secretary of the F.I.S. from liability towards the parties for any damage whatsoever arising from the application of the rules.

The F.I.S. rules and usages for the International Trade in Herbage Seeds were adopted in Brussels on 3 June 1970. The F.I.S. procedure rules for the International Seed Trade were adopted in New York on 29 May 1968. Annexed to the latter set of rules, in the booklet made available to the Court, are certain important provisions of the Conventions of Geneva and New York. According to the booklets made available to us the Geneva Convention is dated 1927 and the New York Convention 1969. South Africa has now acceded to the New York Convention. See *Government Notice* 1028 dated 18 June 1976. According to this notice the Convention is dated 10 June 1958. Both the F.I.S. rules and the F.I.S. procedure rules are therefore of later date than the two conventions. The Republic of South Africa was not a signatory to either convention and the conventions have not been specifically included in the contract entered into between the parties. Nor have they, on the other hand, been specifically excluded. These conventions have the effect, in my view, of stabilising and standardising international trade practice among the signatories thereto. It can safely be inferred, I think, that the draftsmen of the rules and the procedure rules made certain that these rules would not only not be in conflict with those conventions but that they would, in fact, be consistent with them. In my view, therefore, one may look at these conventions in interpreting the rules. I need not go into great detail. Suffice it to say that these conventions make it clear that, generally speaking, the curial law of the country where the arbitration is held, applies, but that enforcement and recognition of an arbitral award may be sought in a country other than that in which the award was made.

In the present matter not much law was involved. It was a simple matter of calculating damages. The method of determination of the damages applied by the arbitrators is consistent with South African law, and in the absence of any indication to the contrary it must be deemed, in my view, to be consistent with private international law as recognised, not only by the signatories to the two conventions refered to, but also by South African law.

Whether the arbitration tribunal meant to apply South African law does not appear. Regard being had to the terms of the contract and the surrounding circumstances adverted to above, I am convinced, however, that the parties never intended English substantive law to be the proper law of the contract. That being so, it follows, in my view, that they never intended to seek recognition and enforcement in an English Court. Had the parties contemplated that, they would, in my view, expressly have submitted to the jurisdiction of the English Court. It is likely that if the present appellant had sought recognition and enforcement of the arbitral

award in an English Court, such Court would have declined to entertain the application on the ground that it had no jurisdiction because there was no explicit submission to the jurisdiction of the Court, and that neither of the parties could be said to be resident or domiciled there (in other words, they are *peregrini*), and because the contract was not made there or made through an agent trading or residing there. See Dicey and Morris, *The Conflict of Laws*, 9th ed., at pp. 178-9.

But even if the English Court did have jurisdiction and the applicant sought to have the English Court's order recognising the London arbitral award recognised and enforced in this country, a South African Court may take up the attitude that, according to principles of private international law recognised in South Africa, the English Court has no jurisdiction and it may refuse to enforce a judgment of the English Court here. See *Borough of Finsbury Permanent Investment Building Society* v. *Vogel*, 1910 N.P.D. 402. The case of *Sirdar Gurdyal N. The Rajah of Faridkote*, 1894 A.C. 670, referred to with approval by DOVE-WILSON, A.J.P., is still good law. See *Dicey and Morris*, *op. cit.*, pp. 995-6; Cheshire, *Private International Law*, 9th ed., p. 633. What follows is a portion of the *dictum* from the *Faridkote* case quoted by DOVE-WILSON, A.J.P. at p. 405 of the report of the *Borough of Finsbury* case:

"In a personal action to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation except when authorised by special local legislation in the country of the forum by which it was pronounced."

See also *De Naamloze Vennootschap Alintex* v. *Von Gerlach*, 1958 (1) S.A. 13 (T).

The state of the law as expressed in the *Borough of Finsbury* and the *Faridkote* cases, *supra*, may be the reason why it was found necessary to enact the Reciprocal Enforcement of Civil Judgements Act, 9 of 1966. The date of the commencement of this Act has, however, not been proclaimed and it is, therefore, not in force yet.

The respondent does not take up the attitude that, as a matter of subjective intention, it submitted to the jurisdiction of the English Courts. As appears from the affidavit of Hendrik Andries Gouws it relies on the law in asserting that once, in terms of the F.I.S. arbitration rules, it has been lawfully decided that the arbitration should take place in a country other than the Republic of South Africa the appellant (applicant *a quo*), if it wished to make such award an order of Court, must perforce do so in the country where such arbitraton was held, and that there is no procedure in law for making such a foreign arbitration award an order of this Court. This is, as I have endeavoured to show, an erroneous view. The parties must have intended the contract to be enforceable and, in my view, the only proper course to adopt in the present case was for the appellant as claimant to seek recognition of the award in the Court to which the respondent as defendant was amenable (*actor sequitur forum rei*).

On behalf of the appellant it was submitted that the cases of *Slotar & Sons* v. *Zuckon*, 1920 C.P.D. 688; *Leviseur* v. *Abrahamson*, 1921 W.L.D. 53; *O'Connor-Harold* v. *Visser and Another*, 1939 C.P.D. 492, were

wrongly decided. In support of this contention we were referred to the following *obiter dictum* of INNES, C.J., at pp. 395-396 in the matter of *Botha* v. *Reitz Ko-operatieve Landbouw Vereeniging*, 1924 A.D. 391:

"It is clear that when the parties have agreed to submit a dispute to arbitration, the obligation to abide by the due decision of the arbitrators is one which can be enforced in a court of law. That follows from the nature and scope of the agreement. And there is authority for the proposition that the award may be rendered executable by an order of Court."

Other authorities refered to were Voet, *Comm. ad Pandectas*, 4.8.23, and Huber, *Heedendaegse Rechtsgeleertheyt*, 4.12.17.

In *O'Connor-Harold's* case the Cape Court was moved to appoint an arbitrator for the purposes of an arbitration to be held in the Transvaal under the Transvaal Ordinance, 24 of 1904, in which "Court" was defined as the Supreme Court of the Transvaal. In this regard HOWES, J., said:

"I do not form any of those Courts, nor am I in any way a successor to those Courts, and it seems to me therefore that the jurisdiction specially given by para. 8 of that Ordinance is not given to me but only to one of those Transvaal Courts. It is, I think, clear that specific performance cannot be obtained in common law of an agreement to refer to arbitration."

The last sentence in the quotation above is relied on by the respondent. But, in my view, it does not assist the respondent. In the first instance the jurisdiction conferred to appoint an arbitrator seems to me to relate to curial law only, and, secondly, to hold that specific performance cannot be obtained in common law of an agreement to refer to arbitration is completely different from holding that the Cape Court did not have jurisdiction to recognise and enforce an arbitral award.

It may be that in *Slotar's* case too narrow a view was taken by the Cape Court and that it should have decided, because the defendant was, by virtue of the agreement, amenable to its jurisdiction, that a direct approach to it for the recognition of the arbitral award made in the Transvaal was in order. I do not deem it necessary to decide this point because that case is distinguishable on the basis that in that case the Transvaal Court had jurisdiction, which the English Courts in the present case have not.

The parties must have intended the arbitral award to be effective. In *Slotar's* case it could have been effective if the Transvaal Court had been approached first for recognition of the award and if, thereafter, the Cape Court was approached *ex comitate* or *ex necessitate*, for recognition and enforcement of the Transvaal judgment. Conversely, in the *Borough of Finsbury* case, the plaintiff should have instituted action directly against the defendant in the Natal Court because that Court, as the *forum rei*, alone had jurisdiction and could effectively have enforced any judgment obtained against the defendant.

It was contended on behalf of the respondent that, if it was correctly held in the cases of *Slotar & Son* v. *Zackon*, *supra*, and *O'Connor-Harold* v. *Visser and Another*, *supra*, that there is no procedure at common law for the enforcement of a foreign arbitral award, this *lacuna* in the common law may well be a pointer as to why the Legislature has now enacted the Recognition of Foreign Arbitral Awards Act, 40 of 1977. It was pointed out that the definition of "foreign arbitral award" includes an arbitral award made outside the Republic, without specifying the type of award made. It is true that the definition would seem to include all arbitral awards made outside the Republic, including one of the nature of the pre-

sent award which is, as I have found, subject to the jurisdiction of the South African Courts and capable of immediate recognition and enforcement here. It may be asked why such award was included if it was not necessary to make statutory provision for its direct enforcement and recognition in the Republic. There is some force in this consideration, but, on the other hand, it might have been found necessary to pass the Act after the accession of the Republic to the New York Convention, to confer jurisdiction on the Courts which they did not otherwise possess, by making provision for the direct recognition and enforcement of arbitral awards and to enjoy reciprocity. Cf. the situation relating to the Foreign Judgments (Reciprocal Enforcement) Act, 1933, of the United Kingdom. See *Cheshire, op. cit.*, pp. 667-672; *Dicey and Morris, op. cit.*, pp. 1050-1055. The greater includes the lesser and once it was decided to make statutory provision for the recognition and enforcement of foreign awards, there was no necessity to exclude the type of foreign arbitral award in question.

Act 40 of 1977 was relied upon by counsel for the respondent in another respect. That was in answer to an alternative argument advanced on behalf of the appellant which was that, apart from the common law, the award made against the respondent is an award within the meaning of sec. 31 of the Arbitration Act, 42 of 1965, and that the Court below therefore had jurisdiction to make the award an order of Court in terms of sec. 31 (1). It was submitted that the reasoning of KERR, J., in *Dalmia Cement Ltd.* v. *National Bank of Pakistan*, (1975) 1 Q.B. 9 at pp. 20-23, in relation to the United Kingdom Arbitration Act, 1950, is equally applicable to our Arbitration Act, 42 of 1965. In answer to this argument counsel for the respondent contended that, if counsel for the appellant was correct in contending that the Arbitration Act permits the enforcement of the award in question, the provisions of the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977, would be redundant. In view of my conclusion expressed above it is not necessary to consider whether sec. 31 of the Arbitration Act, 1965, is applicable to the arbitral award in question.

The respondent has not appealed against the award made by the arbitrators in London and such award, subject to certain defences both *in rem* and *in personam* which may be available to the respondent, is conclusive against the respondent. The defences I have in mind which may be open to the respondent include:

(i) a defence that the arbitrators disregarded the requirements of natural justice;

(ii) a defence that the arbitral award is repugnant to public policy as understood in South Africa;

(iii) a defence that the arbitral award was obtained by fraud.

See *Dicey and Morris, op. cit.*, pp. 1075-1077; *Cheshire, op. cit.*, p. 676; Pollak, *The South African Law of Jurisdiction*, pp. 228-233. Cf. the provisions of sec. 4 of Act 40 of 1977.

Since the respondent does not rely on any of the defences enumerated the award made in London should therefore, for the reasons stated, be recognised and enforced by a competent Court in this country.

In terms of para. 3 of the notice of motion interest is claimed at the rate of 6 per cent per annum from 30 August 1973 (the date of the award)

a tempore morae to date
of motion, viz. 3 Septer
of 1975, had not been p
on 10.5.76. Had the lea
he would probably ha
annum. In upholding
order made by the lea
Such an order cannot
terest to 11 per cent

The appeal succeed
order dismissing the a
order is substituted:

1. The arbitral a
August, 1973, b
is recognized.
2. The responden
R17 553,13, wit
30 August 197
3. The responden

FRANKLIN, J., and

a tempore morae to date of payment. At the date of signature of the notice of motion, viz. 3 September 1975, the Prescribed Rate of Interest Act, 55 of 1975, had not been passed. Judgment was delivered by the Court *a quo* on 10.5.76. Had the learned Judge granted an order recognising the award, he would probably have granted interest at the rate of 6 per cent per annum. In upholding the appeal we have to substitute an order for the order made by the learned Judge *a quo* as at the date of the judgment. Such an order cannot be affected by the increase of the rate of *mora* interest to 11 per cent by *Government Notice* R1217 dated 16 July 1976.

The appeal succeeds with costs, including the costs of two counsel. The order dismissing the application with costs is set aside and the following order is substituted:

1. The arbitral award handed down in London, England, on 30 August, 1973, being annexure "G" to the affidavit of Kinya Ohmori, is recognized.
2. The respondent is ordered to pay to the applicant the sum of R17 553,13, with interest at the rate of 6 per cent per annum as from 30 August 1973, to date of payment.
3. The respondent is ordered to pay the applicant's costs.

FRANKLIN, J., and LE GRANGE, J., concurred.