In the Supreme Court of South Africa
(Wetwatersrand Local Division)

Before the Honourable Mr. Justice Slomowitz (Acting)

Case No. 11422/81
Date:

In the matter between:

POLYSIUS (PROPRIETARY) LIMITED	Applicant
and	
TRANSVAAL / LLOYS (PROPRIETARY) LIMITED	First Respondent
BENONI ENGINEERING WORKS AND STEEL FOUNDRY (PROPRIETARY) LIMITED	Second Respndent

In re:

TRANSVAAL ALLOYS (PROPRIETARY) LIMITED	Plaintiff
and	
POLYSIUS (PROPRIETARY) LIMITED	First Defendant
BENONI ENGINEERING WORKS AND STEEL FOUNDRY (PROPRIETARY) LIMITED	Second Defendant

/ JUDGMENT

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J U D G M E N T

SLOMOWITZ, A.J.:

I am confronted by a provision in an agreement concluded between the Applicant and the First Respondent which, in unusual terms, requires disputes between them to be referred to the International Chamber of Commerce in Paris, sitting in Berne, Switzerland, for decision by it by means of arbitration.

Needless to say, disputes have arisen and I will delineate them presently. It is common cause that they fall within the purview of the arbitration clause. Despite this, the First Respondent decided to ventilate the issues in this Court rather than submit the matter to arbitration. To this end, it issued summons against the Applicant and the Second Respondent (whose role I will explain later). This in turn moved the Applicant to bring these proceedings in terms of Section 6(2) of the Arbitration Act, No. 42 of 1965, for a stay of the action so that an arbitration can proceed between the Applicant and the First Respondent as envisaged by the agreement.

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A host of points of some delicacy have been raised. In order to expose, and so be able to decide them, it is necessary that I take some trouble with the facts. To make the tale easier to follow, I propose to refer to the Applicant and the two Respondents as "Polysius", "Transvaal Alloys" and "Benoni Engineering" respectively.

Although Transvaal Alloys and Polysius are both incorporated in the Republic, their parent companies are West German corporations. ~~Transvaal Alloys~~ Polysius is a subsidiary of Fried Krupp G.m.b.H. ~~Polysius~~ Transvaal Alloys is controlled by Nord-Deutsche Affinerie A.G. 10

Transvaal Alloys produces a substance called vanadium pentoxide. The means of production is termed a crusher drying plant. An important component of the plant is a "ball mill" that crushes the ore from which vanadium pentoxide is eventually derived. This machine consists of a large drum horizontally mounted, supported at each end on bearings which allow it to rotate. The crushed ore is fed into the drum in which are placed a large number of hardened steel balls that hammer and grind the material as the drum rotates. The 20 source that generates the power necessary to effect the rotary movement is an electric motor. The machine is equipped with gears. Their function is to assist in the transmission of power through a revolving shaft to a pinion. The pinion is toothed. Its teeth mesh with those on a corresponding

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part referred to by Transvaal Alloys as a "girth gear", and by Polysius as a "girth ring". As will be observed shortly, much turns on what this device really is, and in particular whether it is a gear within the meaning of that word where it appears in the agreement. It is the real subject matter of the litigation. For present purposes, it is enough that I say that it consists of four segments and encircles the drum of which I have already spoken. For convenience I will refer to it in this judgment as the "girth gear", but I do not mean thereby to suggest that it is indeed a gear as contemplated by the contract or at all. I am not called upon to decide that issue.

During 1975 negotiations took place between the representatives of Transvaal Alloys and Polysius with a view to the manufacture by Polysius of a crusher drying plant including a ball mill such as I have described, and the sale of it to Transvaal Alloys. It was contemplated that Polysius would see to the erection and commissioning of the plant. The negotiations were conducted mainly in West Germany. The representatives of the parties were German-speaking and they employed that language. Polysius alleges in its founding papers that these persons were in fact familiar with German law and German legal concepts. This is denied by Transvaal Alloys. The culmination of the negotiations was a written order addressed by Transvaal Alloys to Polysius which was

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duly accepted by the latter on the 23rd September, 1975. A contract sprang into being and its terms are to be found in the order. Like the negotiations, the order is in German.

The document is not before me. I am told that it is very lengthy. Parts of it are reproduced in the papers and as I go along I will refer to such of them as seem to me to be relevant. Amongst other things, it sets out specifications for the ball mill to which Polysius was required to conform when manufacturing it. For the moment the point is that in the specifications the girth gear is referred to as a "stahlgusszahnkranz" or simply as a "zahnkranz" while the gears proper are called "getriebe".

A contentious clause in the agreement which is numbered 14.2 is translated by Polysius in the following way:

> "The prescriptive period (gewahrleistungsfrist) for the total plant amounts to 1 year and commences on the day of the provisional commissioning of the plant. Parts that wear out are excluded. For the lining the prescriptive period (gewahrleistungsfrist) amounts to 20,000 working hours. The gears are designed for 100,000 working hours. Should, against expectation, the working hours of the lining not be achieved, the seller shall refund a portion of the delivered value of R36 065, being in relation to the number of the 20,000 working hours not achieved."

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In the original German version of this clause, the phrase "prescriptive period" (which it will be seen occurs twice) is represented by the German word "gewahrleistungsfrist". The word "gears" is represented in German as "getriebe" while "designed" appears as "berechnet". There is great conflict between the parties about the meaning to be assigned to these words and phrases, and Transvaal Alloys has put up its own translation of Clause 14.2 which differs sharply from that which I have quoted above. Before dealing with it, I think it appropriate at this point to leave (momentarily only I am afraid) the murky waters of Teutonic semantics, and look briefly at the litigation. This is best achieved by examining the case made out by Transvaal Alloys in the summons to which I have already referred. What follows appears from that pleading.

Polysius delivered and commissioned the plant during January, 1978. There is some dispute about the exact date but it is not material to this application. On the 21st March, 1979, being more than a year after the plant was commissioned, the ball mill broke down. The immediate cause was fatigue crack propagation in one of the segments of the girth gear. It had to be repaired at a cost of R53 000,00. While the repairs were being carried out, Transvaal Alloys suffered a loss of production at its plant for a period of approximately 28 days, and this in turn caused it a loss

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of R900 000,00. I should say that these are not the figures mentioned in the summons. I was told from the Bar that they emerge from further particulars furnished to the summons after this application was launched.

Transvaal Alloys maintains that the girth gear was "part of the gear mechanism" of the ball mill. Various causes are assigned to the fatigue crack. It is said that the "girth gear segments of the aforesaid gear mechanism" did not comply with the specifications called for in the contract. A number of shortcomings are mentioned. They include inexpert workmanship and the use of inferior steel.

It is next pleaded that the agreement contained a number of express warranties and that one or more of them were breached. The warranties go in the main to the quality of the materials used and of the workmanship. A breach of Clause 14.2 is also relied upon. The averment is that in terms of that clause "the gear mechanism of the said ball mill was warranted for 100,000 working hours."

In the result, the sum of R953 000,00 is claimed either as damages flowing "directly and naturally" from the breach or as consequential damages which were within the contemplation of the parties as a probable consequence of a breach at the time of the conclusion of the agreement. For the sake of completeness, I should mention that there is an alternative claim based on a breach of the implied ...

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I must now introduce Benoni Engineering into the scheme of things. It turns out that the "gearbox, girth gear and pinion of the ball mill" (again I quote from the summons) were not manufactured by Polysius at all. Instead Polysius or its agent on its behalf (yet another German corporation whose name I will spare from these pages) sub-contracted this part of the work to Benoni Engineering to be done "in accordance with the specifications, terms and requirements of the aforesaid contract." It is averred that Benoni Engineering was aware that if the components did not accord with the contract, a breakdown of the plant was likely to result with consequent loss to Transvaal Alloys. These being the premises, it is said to follow that Benoni Engineering owed Transvaal Alloys a duty of care to manufacture the girth gear segments according to the specifications with proper materials and in a workmanlike way. This duty, so it is alleged, was breached, and Benoni Engineering is sought to be held liable either jointly and severally with or alternatively to Polysius. Neither party to the action has as yet filed a plea. Benoni Engineering has also not lodged affidavits in these proceedings, nor has it appeared to resist the relief sought. It has no real interest in the outcome of the application. On the other hand, the papers reveal the nature of the defences that Polysius is likely to make.

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For the present I will concern myself only with those relating to the defects in the girth gear. It will be common cause at the trial that one of the segments of the girth gear cracked. What will be hotly disputed is the cause. Polysius denies that there was any defect in the material used or poor workmanship. Polysius also disputes that the ball mill broke down (in which event an essential element of the cause of action against Benoni Engineering may fail to be established), and I gather that it will put Transvaal Alloys not only to the proof of its case that damages were caused by the alleged defect but also the quantum of the loss. Presumably Benoni Engineering will make similar denials. There are in addition other defences which Polysius will raise and which are exclusive to it and not available to Benoni Engineering. It was around these that most of the debate before me surged. Indeed these defences are in a sense in limine. If good, they completely dispose of the action against Polysius. They turn on the proper construction of the agreement, and they compel me to return again to Clause 14.2 and one or two other provisions of the contract, including the arbitration clause.

Polysius maintains that by virtue of Clause 14.2 the claims against it are prescribed. This is disputed. The

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meaning of gewahrleistungsfrist for which Transvaal Alloys contends is "warranty period" and not "prescriptive period". Mr. Browde, who appeared for Transvaal Alloys, did not make it clear to me whether anything turns on which of the two it is where the word first appears in Clause 14.2. Whether the year in question is the period of prescription or that of a warranty, it had after all expired prior to both the defects becoming apparent and the service of summons. This was the standpoint of Mr. Schutz who argued Polysius' case. On the other hand, it may be (although Mr. Browde did not say so), if one is concerned only with a warranty period, that a cause of action could be maintained on a breach of warranty if the defect merely occurred or developed within the year as opposed to manifesting itself in that time. In that event, prescription might (depending on the proper construction of the first sentence of the clause) only have begun to run at the end of the warranty period and then for a period of three years thereafter. Cf. Electricity Supply Commission v. Stewarts & Lloyds of South Africa (Pty.) Ltd., 1981 (3) S.A. 340 (A). Neither the affidavits which are of record nor the summons illuminate Transvaal Alloys' case, if any, on this point, and accordingly paying due regard to the incidence of the onus to which I will refer later, it seems to me that I cannot allow this possible construction of the clause to affect the exercise by me of my discretion.

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I should in this regard point out that Counsel were at one that it is no part of my function to construe the contract or even to determine whether any particular construction raised in the papers is more likely than another. As I followed the argument, I am obliged to assume that all such meanings which are assigned to the agreement in the affidavits are fairly arguable. Any one of them may eventually be found to be correct, and I must act on that footing. (See too Hyams v. Docker, (1969) 1 Lloyds Rep. 341 at 344). On the other hand, I cannot take account of possible constructions not raised in the affidavits or even in argument. I must therefore bear in mind that no answer is made to Mr. Schutz's contention that if any warranty is to be found in the first sentence of Clause 14.2 it had lapsed prior to the appearance of the defects. This is an aspect of the case that looms large later in this judgment.

It will be recalled that reliance was placed in the summons on the allegation that "the girth mechanism of the said ball mill was warranted for 100,000 working hours". This harks back to the second appearance in Clause 14.2 of "gewahrleistungsfrist". Now this is a period of several years, and the defects occurred within that time. It follows from what I have said that this part of the cause of action depends on a finding, as a matter of interpretation

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of the agreement, that the girth gear (stahlgusszahnkranz) was in fact one of the gears (getriebe) to which Clause 14.2 refers and on construing that part of the clause which Polysius has translated as:

> "for the lining the prescriptive period amounts to 20,000 working hours. The gears are designed (berechnet) for 100,000 working hours",

to mean:

> "In respect of the steel plating, the warranty period is for 20,000 operating hours, the gear mechanisms for 100,000 operating hours."

Transvaal Alloys contends for the latter meaning, and, as I have indicated, I am bound to assume that the clause may well mean just that. If this is its true construction, then Transvaal Alloys' cause of action against Polysius is not barred at least to the extent that it is based on a breach of the warranty in question, and provided that the girth gear is in truth part of the "gear mechanism".

There is yet another clause of the agreement which the parties read differently. Clause 20 provides for a limitation of liability and according to Polysius it is properly translated as follows:

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> "It is agreed that the Purchaser shall have no claims against the Seller in excess of those agreed upon hereinbefore. The limitation of liability is invalid if the Seller at management level is guilty of dolus or gross negligence."

Transvaal Alloys renders the clause into English in this way:

> "It is agreed that the Purchaser has no further claims against the Seller, save as set out herein.
>
> The limitation of liability does not apply in cases in which intent on the part of the Seller or gross negligence of his leading organs is proved."

Polysius avers that the effect of this provision is to limit Transvaal Alloys to remedies specifically provided for in the contract and in addition to exclude claims for consequential loss. If correct, it will be Polysius' case that all claims against it, and presumably whether for damages or otherwise, arising from a breakdown of the girth gear, are doomed to failure. This follows not only from its contention (on its translation of Clause 14.2) that no warranty is contained in the phrase "the gears are designed (berechnet) for 100,000 hours" but also from the fact that in neither translation of Clause 20 is any special remedy provided.

The retort to this is extremely difficult to ascertain.

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Whichever translation of Clause 14.2 I look to, I am unable to discern the remedy contemplated by Clause 20 for defects in the girth gear. On the other hand I am equally unable to find in Clause 14.2 any remedy for defects which might have manifested themselves in the plant as a whole during the first year after it was commissioned. Am I to believe that had such an event occurred Transvaal Alloys would have been without a claim, or if not that its claim was to be limited to procuring that Polysius put right the plant? Transvaal Alloys' affidavits are exceedingly unhelpful on the point. All that I am told is that :

> "The First Respondent disputes the contention that the effect of this clause is to deprive the First Respondent of any remedies against the Applicant based on any defects in machinery supplied under the contract other than remedies specifically provided in the contract or that it has the effect of excluding claims for consequential loss. The dispute between the parties on this and other issues falls to be decided according to the law of South Africa."

This amounts to little more than a bald denial. No reference is made to any provision of the agreement supporting it. The factual foundations for the legal conclusions are not apparent. I suppose that it is open to Transvaal Alloys, in due course and when Clause 20 is pleaded by Polysius as a defence, to replicate that the limitation of liability fell away because

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of "intent" or gross negligence on the part of Polysius' "leading organs", but this is not specifically alleged.

Of course there is another possibility (and here, as before, I speculate). It may be that the proper meaning to be assigned to Clause 20, when providing, as it does, that neither party would have claims "in excess of those agreed upon" or "save as set out" in the agreement, is that it was intended thereby merely that neither party could found a cause of action save in respect of a breach of the warranties expressly mentioned in the agreement and in that circumstance damages or specific performance or both could be exacted. Not having the whole agreement before me and being unable to read it even if I had, I am left in the dark.

The fact that the contract seems, on either party's construction of it, to exclude liability for damages, and Transvaal Alloys' omission to properly put up a contrary interpretation would ordinarily materially affect my judgment of the case. I believe, however, that I should, especially bearing in mind what I have said about defects which could have occurred within a year of commissioning, adopt a benevolent attitude to the affidavits. I am bound, I feel, to assume that some remedy in damages must be allowed by the contract, properly construed, for a breach of warranty in respect of a defect in the girth gear, assuming firstly that

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it is indeed a gear, and secondly that Clause 14.2 contains an appropriate warranty. I will therefore, with a good deal of diffidence, approach the matter on the supposition that somewhere in the provisions of the contract, either expressly or by implication, there lies a right vested in Transvaal Alloys to claim the damages referred to in its summons.

Lest it be thought that the problems besetting this matter are sufficiently complex, let me compound them further by referring to the arbitration clause on which I am pleased to say the translators are substantially ad idem. I will leave over for a time the niceties of construction and application that it presents. The material part of it reads:

> "All disputes arising out of this Order or in connection therewith and/or any dispute regarding the interpretation of this written Order, are .... to be referred to an Arbitration Court for final determination in accordance with the provisions for reconciliation and Arbitration proceedings of the International Chamber of Commerce, Paris, France. The Substantive and Procedural Law valid in South Africa shall be applied. The Arbitration Court consists of three Arbitrators of which the President must possess Swiss nationality. The Arbitration proceedings shall take place at Berne. The award shall be binding on both parties. The Arbitration Court shall make an Order as to who shall bear the costs of the proceedings."

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Against this background, the way is now open for me to examine the principles that must guide me across the mine-field that I have sketched. The starting point was eloquently stated by Jessel, M.R. in Printing & Numerical Registering Co. v. Sampson, (1875) L.R. 19 Eq. 462 at 465 in these words:

> "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract."

In a reference more specific to agreements to arbitrate, Wessels, A.C.J. said in The Rhodesian Railways Ltd. v. Mackintosh, 1932 A.D. 359 at 369:

> "There is surely nothing illegal or improper in allowing persons who are sui juris to agree upon a reference to arbitration as a mode of settling their disputes, and if such an agreement is not illegal it surely ought to be enforced, if it is in the power of the Court to enforce it."

On the other hand, Arbitrators have no means of enforcing their

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at common law an agreement to arbitrate did not oust their jurisdiction. In their discretion it delayed it. The Arbitration Act has not violated these principles. It has done no more than provide the procedures which enable a party to call upon the Court to exercise its discretion: Davies v. The South British Insurance Co., (1885) 3 S.C. 416 at 420; The Rhodesian Railways Ltd. v. Mackintosh, supra; Walters v. Allison, 1922 N.P.D. 238. How then is this discretion to be exercised? Judicially of course, but, it seems to me, with the parties' bargain uppermost in one's mind. This is as it should be, not least because they have contractually so bound themselves but also because "there are certain advantages to arbitration such as finality, privacy, a judex of one's own choice and avoiding delays through having to wait one's turn on the roll of trial cases ...": Per Margo, J. in Lancaster v. Wallace, N.O., 1975 (1) S.A. 844 (W) at 847 A. This approach has prompted various Courts, when speaking of the onus or case to be made out by the party resisting an application for a stay, to say that "such an onus is not easily discharged" (Metallurgical and Commercial Consultants (Pty.) Ltd. v. Metal Sales Co. (Pty.) Ltd., 1971 (2) S.A. 388 (W) at 391 E-H) or that a "very strong case" must be made out (The Rhodesian Railways Ltd. v. Mackintosh, supra, at 375), and that there must be "compelling reasons" for refusing to hold a party to the contract (The "Pine Hill", (1958) 2 Lloyds

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List L.R. 146). Some Courts have gone further. The discretion to refuse a stay is one "which will very seldom be exercised": Schietekat v. Naumov, (1936) 1 P.H. A.26 (C). The instances in which the discretion should be exercised are "few and exceptional": Russel v. Russel, (1880) 14 Ch. D. 411; see too the Metallurgical and Commercial Consultants case, supra, at p. 391.

Nor does it make any difference in principle that the chosen tribunal is foreign and beyond the jurisdiction of South African Courts. Cf. The "El Amria", (1981) 2 Lloyds Rep. 119 at 123; Owners of Cargo ex "Athenee v. Athenee", (1922) Lloyds List L.R. 6 (C.A.); The "Panseptos", (1981) 1 Lloyds Rep. 152; Yorigami Maritime Construction v. Nissho-Iwai, 1977 (4) S.A. 682 (C) at 694 A. I may say that I would have thought that this would be even more the case where, as here, the agreement requires the arbitration tribunal to apply not only our substantive law but also our rules of procedure. This does not mean, however, that one must ignore the fact that the tribunal may be sitting in a distant land, unconnected with the parties and the dispute. In certain circumstances these may be proper matters to take into account. This appears from the judgment of Lord Justice Brandon in The "El Amria" to which I have already referred. At page 123 he mentioned his own previous decision in The "Eleftheria", (1969) 1 Lloyds Rep. 237, and having done so summarised the principles in the following way:

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"1. Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

2. The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

3. The burden of proving such strong cause is on the plaintiffs.

4. In exercising its discretion the Court should take into account all the circumstances of the particular case.

5. In particular, but without prejudice to 4, the following matters, where they arise, may properly be regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

(b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, r acial, religious or other reasons be unlikely to get a fair trial."

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There is one other matter to which I should advert, and that is that the factors operating against a stay must be weighed cumulatively. No single factor may be sufficient. Together they may be enough: The "Pine Hill" (supra); Metallurgical and Commercial Consultants (Pty.) Ltd. v. Metal Sales Co. (Pty.) Ltd., (supra) at 393-394.

As I see it then, the sanctity of contract lies heavy on the scale beam, and much must be placed on the other end of that beam to tip the scale against a stay.

Mr. Browde advanced a variety of grounds upon which he urged me to refuse the application. One of them relates to the choice in the agreement of South African law as the proper law of the contract. Counsel's contention was that Polysius is bent on subverting this stipulation and unwittingly the tribunal will be drawn into assisting that end.

The foundation for the submission lies in the dispute about the meaning of the German words and phrases to which I have already referred. It will be recalled that Polysius maintains that a gewahrleistungsfrist is a prescriptive period, and not a warranty period. On the other hand, it concedes that on a literal translation a warranty period is indicated. But, so the affidavits go, the word has a special meaning in German, which is derived from a German legal concep

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relating to contracts for the manufacture and supply of works or the sale of goods, and when used in this sense prescribes the time during which claims based on defects exist. Consequently Polysius "considers it important that the tribunal charged with resolving the said disputes should include persons having knowledge of the German language and German legal concepts which form the background to the negotiations leading to the conclusion of the contract ... and which would have been in the minds of the persons who agreed and settled the wording of the contract and who may therefore be considered relevant to the proper interpretation thereof."

In terms of the Rules of the ArbitrationCourt of the International Chamber of Commerce ("ICC"), each party has the right to nominate one of the arbitrators. Polysius will therefore be able to and will ensure the appointment of at least one person who has knowledge of the German language and of German law. It alleges further that since the president of the panel must be a Swiss, it is likely that the ICC appointee will be someone who also has knowledge of both the German language and law. This is said to follow from the fact that Berne is located in the German-speaking part of Switzerland and that Swiss law is much like the German. The point made is that the foreign tribunal is likely to be able to ascertain the true meaning of the agreement more speedily and with less cost to the parties than if the matter were to be heard in a South African Court. On the other hand even were the matter

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to be tried here, Polysius would want to employ German experts having a knowledge of philology and of law, and Mr. Schutz submitted that evidence of the relevant German legal concepts would be both relevant and admissible.

To these contentions Transvaal Alloys takes the strongest exception. The matter is put this way by the deponent to its answering affidavit:

> "I deny that knowledge of German law on the part of any of the representatives of the First Respondent and the Applicant who concluded the contract is in any way relevant. South African law is the proper law of the contract and therefore regulates all matters relating to the intrinsic validity, interpretation and consequences thereof. It is submitted that German law is relevant neither to the translation of the contract from German into English nor to the interpretation thereof. I submit further that any introduction by the tribunal hearing the case of its own knowledge of German law or legal concepts would be highly undesirable, to say the least. The suggestion that the parties intended to have the contract interpreted according to German legal concepts is at variance with the plain language of the arbitration agreement. Nor was it said or intended that the tribunal should consist of German lawyers. On the contrary the application of 'German legal concepts' (whatever this may be) would frustrate the agreement that the contract was to be interpreted according to South African law."

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In developing his argument, Mr. Browde said that what Polysius was seeking to do was no less than to introduce German law "via the back door". Polysius, he said, was in reality seeking to have the contract construed according to German law. He submitted that the correct approach by a South African Court to ascertaining the meaning of the agreement would be a two-fold one: In the first place, the contract would have to be translated from German to English, and in the second place, the contract so translated would have to be construed. Any difficulties then encountered in discovering its meaning would have to be resolved by the application of the relevant South African rules of contractual interpretation. German law or German legal concepts, so the argument ran, have no place in this scheme of things.

It seems to me that the argument founds on a number of misconceptions. Implicit in the approach suggested by Mr. Browde is the notion that according to our law, the ascertainment of the true meaning of a contract which is in a foreign language involves the distinct processes of translation, which he would be bound to say is a factual enquiry, and interpretation which perhaps he would regard as being a matter of law. I do not see things in this way. While of course a South African Court would require a correct translation of a document which is in a foreign language, it is wrong to think

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that its purpose would be to enable it thereafter to construe it. To my way of thinking, the very translation of a contract of this nature, which consists in the selection of the correct English words that properly symbolize the intent of the parties as expressed in foreign words, necessarily involves the process of construction. In other words, what a South African Court does when faced with interpreting a document which is in a foreign language is to construe it and thereby find the intention of the parties as expressed in that language. What, after all, will the Court be obliged to do if this matter ever comes before it? It will certainly not be concerned to find out the meaning of a contract which has been written into English after translation. The contract was not drawn in English. It is in German. The proper business of the Court will be to discover the meaning of a contract written in German and not an English contract translated from German. Because our proceedings are in English translation is necessary, but translation is only part of one single factual enquiry which in turn is the process of interpretation. As Lindley, L.J. explained in Chatenay v. Brazilian Submarine Telegraph Co., (1891) 1 Q.B. 79:

> "The expression 'construction' as applied to a document, at all events as used by English lawyers, includes two things; first, the meaning of the words; and secondly their legal effect or the effect which is to be given to them. The meaning of the words

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> I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law."

See too Cheshire's Private International Law, 8th Edition, at page 236. I do not mean to say that there are no substantive legal rules relevant to the ascertainment of the fact. I understand the rules of construction to be employed in discovering the true meaning of a contract to be, no less than the rules relating to the admissibility of evidence, the province of substantive law. But like the latter rules, the former exist merely as the signposts by which we are, as a matter of law, to abide in the search for factual truth which in this case is the meaning of the contract. Once having ascertained that meaning, other rules of law come into play. They are those that tell us what legal effect, if any, we are to assign to the words that the parties have chosen to express their meaning. Whether the parties *in casu* intended a prescriptive period or a warranty period is a matter of fact. What the legal effect of those phrases is, is a question of law to be decided by the proper law of the contract which is South African law, even if some other law, such as German law, would attribute a different legal effect to them: Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd., (1911) 105 L.T. 846; Indian & Industrial Trust Ltd. v. Borax Consolidated Ltd., (1920) 1 K.B. 539; St. Pierre v. South American Stores (Gath and Chaves) Ltd., (1937) 3 All E.R. 349, 354.

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What I therefore have to decide in the first instance is whether it is more convenient for a South African Court, with no knowledge of German, to determine as a question of fact, making use of the conflicting evidence of translators and its own knowledge of our rules of construction, the meaning of the words contained in a German contract, and hence the true intention of the parties, or whether this should not be left to a tribunal having a sound knowledge of German, making use of the conflicting evidence of South African lawyers in order to find as a fact what rules of substantive law it is allowed to apply in the search for the fact in issue. 10

This is a thorny problem, but not one on which, to my mind, opinions may legitimately differ. It follows from what I have already said that I set no store by the complaint that a German-speaking tribunal consisting of German lawyers, would, because of its knowledge of German legal concepts, apply that knowledge in finding the true meaning of the contract. The legal effect of that meaning, once ascertained, is another matter. In ascertaining the plain meaning of the words in context, the Arbitrators would be entitled to have regard to all of the facets of their language no less than we ourselves do. In Sassoon Confirming and Acceptance Co. (Pty.) Ltd. v. Barclays National Bank Ltd., 1974 (1) S.A. 641 (A), Jansen, J.A. said (at 646 B-D): 2

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"The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties (Joubert v. Anglo-African Shipping Co. (1936) Ltd., 1972 (2) S.A. 827 (A)D at 834E). Very few words, however, bear a single meaning, and the 'ordinary' meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their inter-relation, and the nature of the transaction as it appears from the entire contract. It may, for example, be quite plain from reading the contract as a whole that a certain word or words are not used in their popular everyday meaning, but are employed in a somewhat exceptional, or even technical sense. The meaning of a contract is, therefore, not necessarily determined by merely taking each individual word and applying to it one of its ordinary meanings."

The words which I have underlined show that in the application of what has come to be known as the golden rule of interpretation (Grey v. Pearson, (1857) 10 E.R. 1216 at 1234), the contract when read as a whole may reveal that words which have a literal or ordinary or popular meaning were intended to be read in another and more unusual or technical sense whether legal or otherwise. In that case, that sense is taken to be "the grammatical and ordinary meaning for the purposes of the golden rule": Christie, The Law of Contract in South Africa, at 202. Now in order that a Court may determine whether that is what has occurred in any given case, it is necessary that it be apprised in one way or another of the unusual or technical senses of the word, and if those technical

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senses involve "legal concepts", then it is quite proper for it to look to its legal knowledge and there is no harm in it. Nor is there any subversion thereby of what may be the proper law of the contract. When one looks to the fact that some of the words about which dispute rages may bear a technical meaning other than a legal one, and I refer in this connection to getriebe and berechnet, then it seems to me that the point becomes obvious.

I was a little troubled by the statement in Polysius' founding affidavit that the foreign tribunal would be asked to have regard to the German legal concepts "which form the background of the negotiations leading to the conclusion of the contract ... and which would have been in the minds of the persons who agreed and settled the wording of the contract ...". According to our law, a process of this nature is impermissible if the contract can be grammatically or linguistically construed. As Christie (supra) points out, Solomon, J. in Hansen, Schrader & Co. v. De Gasperi, 1903 T.H. 100 at 103 makes this very clear:

> "Now it is not for this Court to speculate as to what the intentions of the parties were when they entered into the contract. That must be gathered from their language, and it is the duty of the Court as far as possible to give to the language used by the parties its ordinary grammatical meaning."

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Only once the process of linguistic construction fails and ambiguity raises its hydra-like head may resort be had to surrounding circumstances such as the extent of the parties' knowledge of the language of the contract and matters technical and legal.

The real question that Mr. Browde's argument poses can therefore be simply stated, and it is this: Can the chosen tribunal be trusted to understand these matters? In the search for the facts and in the application of the law to them once found, will it correctly apply the principles of the proper law of the contract? No case to the contrary has been made out. It is true that the application of legal doctrines is more properly the province of Courts of law: Sera v. De Wet, 1974 (2) S.A. 645 (T) at 654 F. It is equally true that South African law is best applied and administered by a South African Court. On the other hand, the possibility of legal points arising affords by itself no reason for refusing an arbitration: Elcbelle (Pty.) Ltd. v. Szynkarski, 1966 (1) S.A. 592 (W); Lancaster v. Wallace, N.O., supra. But each case goes off on its own facts. The head-note to East Rand Proprietary Mines Ltd. v. Cinderella Consolidated Gold Mine Co. Ltd., 1922 W.L.D. 122 makes this plain:

> "Where there is a submission to arbitration, the Court has a discretion to

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> refuse to stay an action in a case where the issue between the parties is merely a question of law; but the Court will be guided in each case by all the circumstances, and the mere fact that there is a point of law to be determined, if there are other matters to be decided, is not sufficient."

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The Arbitration Court contemplated by the agreement will consist of at least two and probably three trained lawyers. There is no reason to suppose that they will not do or will be incapable of doing their duty. Moreover Transvaal Alloys will, so it has told me on oath, plump for a South African lawyer to be a member of the trio. This will ameliorate such risk as may exist. I have already indicated that in the correct context a knowledge of German language and law will be an asset and its use proper. When it comes to the application of South African law to the contract properly construed in order to ascertain its effect, the suggestion that the tribunal will, because of its knowledge of German law, be biased in favour of its application, is speculative. In addition Transvaal Alloys itself denies the allegation that it is likely that the president will necessarily be German-speaking or know German law. To my way of thinking, Transvaal Alloys' fears are more apparent than real, especially when weighed against its own clear choice of a forum sitting in a neutral country with a neutral president to determine a matter expressly reserved in the arbitration clause for that forum and which the parties must necessarily have contemplated would involve the application of South African law.

I must now revert to the question of convenience. In terms of the Rules of the ICC, the tribunal will determine the language of the arbitration, "due regard being paid to all the relevant circumstances and in particular to the language of the contract." It is more than likely that it will fix on German. If Transvaal Alloys does indeed select a South African lawyer to sit on the tribunal, this will no doubt prove inconvenient to him and swell the costs. He may require assistance from an interpreter, and being a member of the Court, the latter may need expert evidence from philologists. If one reckons in the not inconsiderable cost of employing South African lawyers to inform Counsel and the Court of the state of South African law, the expense of the litigation may well become exorbitant. It may also be that the presence of a South African lawyer on a tribunal of three, two of whose members may be bound together by common legal experience and language, may serve to stultify the purpose of having three arbitrators. In an illuminating article on the workings of the ICC entitled "International Arbitration v. Litigation" in The Journal of Business Law, 1980, page 164, Kerr, J. an English Judge with wide experience of such matters, wrote (at page 177):

> "It should also be remembered that a tribunal of three is in the result hardly ever likely to produce a better solution than a tribunal of one, though it will lead to greatly increased costs and delays. In this connection I strongly

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> suspect that most international tribunals, with two of the arbitrators appointed by the respective parties, ultimately decide by a majority, whether or not this is revealed. A tribunal of one may have the apparent unattractiveness of 'sudden death', a tennis expression which has now been replaced by a 'tie break'. But in practice the unattractiveness of this feature may be illusory; the most important point is invariably the quality and experience of the chairman."

But all of this is largely conjecture, and even if it and the other matters to which he refers in his article are the experience of Kerr, J. they may not be the experience of the parties. It must not be forgotten that the parties are dominated by their parent companies which are substantial German concerns. No doubt they have a wealth of experience of litigation in various countries and different fora. I must assume at the least that they weighed these considerations when contracting as they did. More importantly, if any of the matters that I have described should come to pass, the misfortunes mentioned will be of Transvaal Alloys' own making. It is not bound to select a South African lawyer to join the tribunal and it cannot make a virtue out of necessity. It ought not to be permitted to frustrate its bargain by its selection of a judex. The other side of the coin is the expense to which Polysius will be put in bringing to South Africa experts on the German language and law were the matter to be tried here.

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In his article Kerr, J. refers to many unsatisfactory features concerning international arbitration tribunals in general and the ICC in particular. He points out that the concept of neutrality is illusory and often serves only to increase costs. Parties used to our adversary system may find foreign the continental inquisitorial procedures sometimes adopted. Fees are extremely high. So far from being speedy, cases have been known to take up to fifteen years. Foreign Courts may intervene and impose the rules of the lex fori, at least as to procedural matters. But in the ordinary case and unless one can bring it within the boundaries of the considerations laid out by Brandon, L.J. in The "El Amria", I do not think that matters such as these can or ought properly to be taken into account in the exercise of my discretion. Every forum has disadvantages of one kind or another which are intrinsic to it and not to be found in other fora where different problems will be encountered. In selecting their jurisdiction, contracting parties and especially international or multinational conglomerates no doubt believe that the devil they know is to be preferred to the one that they do not. This belief is to be respected unless there are compelling reasons for not doing so and these are not to be found in a general comparison between arbitration and litigation as a method of resolving lawsuits.

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It may be of some significance in this context that the Republic has by Instrument of Accession entered into the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on the 10th June, 1958. Article II, sub-paragraph 3, provides:

> "The Court of a Contracting State when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

It is apparent from the Afrikaans version that the word "refer" should be read as "refers". Whether or not it is so read, it is not at all clear to me that it was intended that it should be peremptory if the circumstances to which it refers do not occur. If so, it constitutes a remarkable intrusion on the Court's common law and statutory discretion. Be this as it may, for reasons which are not apparent to me, the necessary legislation requisite to make it operative and binding on me has apparently not been passed. In these circumstances, and although Mr. Schutz placed some reliance on it, I cannot allow it to weigh with me.

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Having paid due regard to all of the matters advanced by the parties and argued by Counsel and to others besides,

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Transvaal Alloys has failed to satisfy me on this part of the case either that the agreement as to the proper law of the contract is likely to be subverted by a reference to arbitration, or that there is a cognisable balance of convenience in its favour in retaining the proceedings in this Court.

The next main ground on which Mr. Browde based his argument against the motion relates to the presence in the litigation of Benoni Engineering who is not obliged to arbitrate. There were two aspects to his point. He said firstly that there would be manifest inconvenience and expense to Transvaal Alloys were it to be obliged to prepare and present its case on two occasions. Secondly, he maintained that there was a possibility of inconsistent findings of fact by the two tribunals were I to accede to the application. If this happened, then, so he said, the prejudice to Transvaal Alloys would be enormous, and the administration of justice, at least in regard to this case, would be brought into disrepute. Counsel instanced in this regard the circumstance that the Arbitration Tribunal might reject what may be called Polysius' "contractual defences", and find that the girth gear was not defective, while this Court, when trying the case against Benoni Engineering, might on similar evidence find that it was indeed defective and that Polysius had breached the contract. Transvaal Alloys would then be out of Court against Polysius while its ability to recover from Benoni Engineering

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would be solely dependent on whether it could succeed in establishing the alleged duty of care and its breach. If this failed, the effect would be to deprive Transvaal Alloys of relief altogether.

The argument is seductive and caused me not a little trouble. The principle underlying it is supported by weighty authority. Cf. The "Pine Hill", supra; The "Eschersheim", (1974) All E.R. 307 at 322 B-C; Taunton-Collins v. Cromie & Another, (1964) 2 All E.R. 332 (C.A.) at 333 D. - 334 B.; Metallurgical & Commercial Consultants (Pty.) Ltd. v. Metal Sales Co. (Pty.) Ltd., supra; Yorigami Maritime Construction v. Nissho-Iwai, supra. As Brandon, L.J. observed in The "El Amria", supra, at 128:

> "I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries."

But trenchant though these remarks may be, it must not be thought as a closer examination of the books shows, that the principle is either inflexible or of universal application.

In the first instance it will not be applied where a party who might be liable has been joined, not because the

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plaintiff is primarily interested in litigating with him but rather to avoid the operation of the arbitration provision or to gain some other tactical advantage: Taunton-Collins v. Cromie & Another, supra, at 334 F-H. Secondly, as McNair, J. pointed out in The "Pine Hill":

> "It amounts to no more than one of the factors which falls for consideration in the exercise of one's discretion, the weight to be accorded it varying with the circumstances."

In the third place, as Brandon, L.J. hinted in the passage from The "El Amria" which I cited above, it really only assumes importance where all or substantially all of the same issues fall for determination by both tribunals. This, so it seems to me, is manifest from the Metallurgical & Commercial Consultants Ltd. case. One of the issues between the parties apparently bound by the arbitration clause was whether or not there had been an election to continue with a contract notwithstanding an alleged fraud on the part of a certain Mainz. Other litigation not involving arbitration was envisaged against Mainz. Colman, J. pointed to the fact that the applicant in that matter might in the arbitration succeed in establishing the election contended for:

> "And the course of events in the arbitration may be such that a decision in that regard will render the investigation of the alleged misconduct unnecessary.

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> It is, therefore, by no means certain that the issues to be investigated before an Arbitrator would be substantially identical with those to be investigated in the threatened Supreme Court ligitation."
>
> (at 395 F).

In my judgment this passage is of particular point in the present matter for a number of reasons. The most obvious is that there are the various "contractual defences" available to Polysius which, if determined in its favour in the arbitration proceedings were they to proceed, would put an end to the litigation against it. By the same token, were I to refuse to stay the action, many matters would be tried as between Transvaal Alloys and Benoni Engineering which do not concern Polysius. Not least amongst these are those relating to the duty of care for which Transvaal Alloys contends and its breach. But there are more fundamental considerations which serve to distinguish this case from the authorities on which Mr. Browde placed great reliance. A proper appreciation of them requires me to examine Mr. Browde's contentions against the background of the allegations contained in the summons which I detailed at the outset of his judgment.

It will be recalled that I drew attention to the reliance placed by Transvaal Alloys in its case against both Polysius and Benoni Engineering on the existence in the agreement of a number of express warranties as to quality and workmanship. In addition a breach of Clause 14.2 is relied on. The

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warranties in question, of which it is said, so as to found the duty of care, that Benoni Engineering was aware, are these:

(a) The material for the girth gear of the ball mill incorporated in the crusher drying plant was to comply with the specifications;

(b) The gear mechanism of the ball mill was warranted for 100,000 working hours (Clause 14.2);

(c) The work would be of the quality warranted in the agreement and would be free of defects which would diminish or destroy the suitability of the article for ordinary use or for the purpose contemplated;

(d) The plant and components thereof would show no detrimental defects for the duration of the warranty period;

(e) The plant and the components thereof would comply with the latest technical standards and would perform under continuous running in the manner set out in the agreement.

Now <u>Mr. Browde's</u> argument is that in the [illegible] of the breach of these warranties his client founds on what are as

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between it on the one hand and Polysius and Benoni Engineering on the other substantially the same issues of fact. He conceded that there are differences in the two actions. One is framed in delict, the other in contract. Similarly, as I have already said, the existence of a duty of care owed by Benoni Engineering is of no moment to Polysius. What is plain, however, so he said, is that at any trial of the issues relating to the failure of the girth gear, Transvaal Alloys would be bound to utilise the same documents and panoply of witnesses, including experts in fields such as metallurgy and mechanical engineering, whoever the Defendant might be. He argued that the Defendants would find themselves in a similar situation and he employed a similar argument in relation to the proof of quantum of damages. Mr. Schutz on the other hand disputed these contentions. He maintained that Transvaal Alloys' sole purpose in joining Benoni Engineering to the litigation was to gain a procedural advantage in that by having both Defendants before the same tribunal it could obtain the inestimable benefit of discovery from both simultaneously and then use the documents and witnesses of one Defendant to prove its case against the other. While I have no doubt that were the matter to proceed against both Defendants simultaneously Transvaal Alloys would make full use of this advantage, I hesitate on the material before me to find that this was its purpose in effecting the joinder and that it does not regard

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itself as having a good cause of action, albeit one fraught with difficulties, against Benoni Engineering. In the light particularly of what follows, there is much to be said for Mr. Schutz's point but I do not propose to give it any consideration. Similarly Mr. Schutz's argument that I should not pay regard to the presence of Benoni Engineering in the litigation because it was at the election of Transvaal Alloys that it was introduced to the case, does not weigh with me. If indeed both cases depend upon the determination of substantially the same issues of fact, it was a proper course for Transvaal Alloys to follow. Equally it does not count against Transvaal Alloys that the causes of action have different legal bases and that the Defendants are neither joint contracting parties nor joint wrongdoers in delict. The question is always whether the matters to be investigated before the Arbitration Tribunal would be substantially identical to those in the litigation. In my opinion they are not. I say this not only for the reasons given earlier but also for those which now follow.

I pointed out earlier that it was Mr. Schutz's case that whether a Gewährleistungsfrist is a warranty period or a prescriptive period, the year in question had in either event expired prior to the manifestation of the defects and the institution of action. I also drew attention to the fact that I would have to bear in mind that no answer was made to Mr. Schutz on this point. Because of the lapse of the

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relevant period, be it prescriptive or that of a warranty, it seems to me on the summons as it stands that the only warranty on which Transvaal Alloys can found against Polysius is that specifically referred to in Clause 14.2 which, on Transvaal Alloys' translation, is that the girth gear was warranted for 100,000 operating hours. Whatever else may lurk in the contract and notwithstanding the wide variety of averments contained in the summons, when all of the papers before me, including the affidavits, are read together, it is only that claim that remains should Transvaal Alloys overcome the problems thrown up by the proper construction of the agreement.

Assuming then that the contract in fact contains a term that "the gear mechanism of the ball mill was warranted for 100,000 working hours", what legal implications flow? The meaning of the warranty is not pleaded. It is not said, for instance, whether the warranty was absolute, in the sense that if the gear mechanism broke down for any reason Polysius would be liable or whether the warranty was limited to defects arising from particular causes only, such as inferior materials or workmanship. The breach of the warranty is pleaded in this way in the summons:

> "The aforesaid crack propagation in the segments in question amounted to a breach ..... of the warranty, inasmuch as the gear mechanism including the girth gear segments had not been in operation for 100,000 hours at the time of the aforesaid breakdown."

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I take this to mean that it is Transvaal Alloys' case against Polysius that the plant was operated in the manner contemplated by the agreement and without misuse and during that operation the fatigue crack appeared with a consequent breakdown of the plant. This being so, it seems to follow that it will not be necessary in the action against Polysius based on a breach of the warranty said to be contained in Clause 14.2 for Transvaal Alloys to assign any cause to the cracking of the segments. The mere fact that they cracked while in ordinary use would establish the cause of action. If this is right, then it 10 will be immediately apparent that the issues of fact as against the two Defendants are not the same at all. At its highest, from the vast array of warranties and their breach to be presented in the case against Benoni Engineering, there can be abstracted only one which is really common to both cases, and that is whether the warranty said to be contained in Clause 14.2 of the agreement was breached.

In the result I have come to the conclusion that even if there may be some force in Mr. Browde's second submission (and I am not satisfied that there is), it is insufficient 20 standing by itself to tip the scale. I must now see whether when weighed cumulatively with such other factors as may exist it becomes decisive.

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The last ground upon which Mr. Browde advanced his case was that there were compelling considerations of fairness and convenience in retaining the matter in this Court. I have dealt with many of them. I turn to such that remain. It was submitted that the girth gear is an item of considerable bulk and therefore not easily transportable overseas for the purpose of an arbitration. This was said to be important because of the necessity for further tests prior to any hearing on the merits. In addition it was contended that an inspection of Transvaal Alloys' works and evidence of the procedures followed therein are likely to be required during the hearing. Moreover, the bulk, if not all of the evidence, is in this country and this includes all of the expert witnesses consulted by Transvaal Alloys, as also the witnesses relating to the question of damages. The short answer to these contentions is the following: Polysius' experts, particularly the persons who installed the girth gear, are no longer in the Republic. They are in Germany. If the girth gear has to be examined by them, they will have to come here. The same inconvenience complained of by Transvaal Alloys is attendant upon the presentation by Polysius of its case if the trial takes place in South Africa. Insofar as the Arbitrators are concerned, who, as I have said, are likely to be trained lawyers, I have little doubt that

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they will not require to inspect the girth gear or Transvaal Alloys' works. I can see no reason why the case cannot be conveyed to them by means of photographs, plans and oral evidence. I do not say that Transvaal Alloys will not find some inconvenience and perhaps a good deal of inconvenience in litigating in Switzerland. It may have to transport to and house in Berne experts on the merits, accountants in relation to damages and experts on legal issues, but all of these are matters which must necessarily have been foreseen when the contract was concluded. Again, it has only itself to blame for employing experts who are resident in the Republic.

The cases to which Mr. Browde referred me in which matter of this nature were regarded as compelling reasons for refusing to stay an action were largely, if not exclusively, cases involving the collision of ships at sea. I can well understand that where in such a case an arbitration clause exists, a Court might be inclined to ignore it because at the time that the agreement was made it could not be foreseen in what way, through the concatenation of which circumstances and in what part of the world the dispute giving rise to the arbitration would arise. The parties did not know where the facts in issue would occur and would have to be investigated. Here the position is different. When the parties contracted, they were fully alive to the nature of the issues that were likely to arise

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and to the fact that the plant would be installed and commissioned at Transvaal Alloys' works in South Africa from parts manufactured presumably in Germany and South Africa. With this in mind, they stipulated for an arbitration in Switzerland and should be held to it.

Next Mr. Browde mentioned the waste of costs attendant on two sets of proceedings, particularly as the same evidence on complex aspects of metallurgy and mechanical engineering would have to be prepared and presented twice over. I have already dealt with this in another context. The issues of fact are not so substantially similar in the two cases as to compel me to say that only one action in South Africa should take place.

General considerations inherent in arbitration proceedings overseas were mentioned in argument. Amongst these was said to be the fact that both companies involved in the arbitration are South African. In addition reference was made to the fees and charges of the Arbitrators. That Polysius and Transvaal Alloys are incorporated in South Africa is illusory. They are subsidiaries of German corporations and the mere fact that the contract was concluded in German reveals their strong connection with that country. As to the second consideration, I have already made some mention of it and others which are advanced for decrying the notion that an arbitration by a

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foreign tribunal such as the ICC consisting of three Arbitrators is expeditious, inexpensive or able to achieve the results desired of it. In my opinion, however, these are, if anything at all, makeweights. It may well be that an objective analysis of the advantages of municipal litigation against those of foreign arbitration will show that the former outweigh the latter. It appears to me though that however much this may objectively be made manifest, the subjective decision of the parties who chose arbitration in preference to litigation must rule. Were I to hold otherwise, I would come very close to undermining the parties' bargain for no reason other than that I myself would not have entered into the contract.

A factor which caused me some small difficulty is the provision in the arbitration clause that not only are the substantive rules of South African law to prevail, its procedural provisions are also to be applied. I am not at all certain what the parties intended by this provision, especially in view of those words in the arbitration clause which require the Arbitration Court to determine the matter "in accordance with the provisions for reconciliation and arbitration proceedings of the International Chamber of Commerce ....". Mr. Schutz pointed out that the rules of the ICC are of a very rudimentary nature and that there is no reason why the two apparently conflicting requirements of the clause

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cannot be read together. He suggested that the procedures applicable in South Africa are to apply only to the extent that they are not repugnant to the rules of the ICC which in various respects provide for agreement between the parties as to the manner in which the arbitration is to take place. Those rules also provide for matters not covered in our procedure such as the language of the proceedings. I take his point to be correct. I must also bear in mind that in terms of the Arbitration Act, the procedure to be followed at arbitrations is left largely in the hands of the Arbitrator, and arbitrations can take place on a very informal basis indeed. Of concern to me too is the fact that the proposed arbitration tribunal is beyond my jurisdiction and it may be that should it decline to do what is required of it in terms of the arbitration clause, disputes might arise over which this Court has no control. It is conceivable that during the course of the arbitration, directions might have to be sought from a Court as to the conduct of the proceedings. If that Court is a Court in Switzerland, it might well be inclined to follow its own curial provisions. Again, however, this is largely speculative and sight must not be lost of the fact that all that is sought of me is a stay of the action. Eventually the proceedings have to be returned to this Court if only to turn an award into a final judgment. At that point, if substantial injustice has been done, no doubt a failure by the arbitrators to comply with the agreement would

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be brought to the attention of the Court. Cf. Benidai Trading Co. Ltd. v. Gouws & Gouws (Pty.) Ltd., 1977 (3) S.A. 1020 (T). The question of conflicting procedural rules has arisen before. I refer in particular to International Tank & Pipe S.A.K. v. Kuwait Aviation Fuelling Co. K.S.C., (1974) 3 W.L.R. 721. That was a case which decided a point of jurisdiction of importance especially in relation to arbitrations governed by the rules of the ICC. It illustrates the kind of adjectival issues that can arise. A note may be found on the judgment in The Journal of Business Law, 1976, at page 44. It does not really carry this matter any further.

Taking due account of everything that has been said to me, I remain unconvinced that this is a proper case for directing the parties to trial in South Africa. I may say that I toyed with the idea of staying only some of the issues and directing in particular that those issues relating to the construction of the contract be tried by way of arbitration leaving the other issues to be determined in this forum. In an appropriate case this is a permissible course: Valkin v. Valkin, 1953 (4) S.A. 510 (W) at 513 H. - 514 C.; Russell on Arbitration, 19th Edition, 202; Parekh v. Shah Jehan Cinemas (Pty.) Ltd. & Others, 1980 (1) S.A. 300 (D); Hyams v. Docker, supra. But, by reason of the conclusions to which I have come my course is clear and I must accede to Polysius' application.

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In the final analysis therefore I make the following Order:

(a) The action instituted by the First Respondent against the Applicant by combined summons dated the 15th June, 1981, under Case No. 81/9570 is stayed in terms of Section 6(2) of the Arbitration Act, 42 of 1965;

(b) The First Respondent must pay the Applicant's costs including the costs consequent upon the employment of two Counsel.

ACTING JUDGE OF THE SUPREME COURT

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