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and on Appeal therefrom in the

Court of Appeal

and Decisions in the

Court of Appeal Criminal Division

and

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FOR ENGLAND AND WALES

DALLAL v. BANK MELLAT

1985 June 27; July 1, 2, 3; 26

Hobhouse J.

Estoppel—Per rem judicatam—Issue estoppel—Foreign arbitral tribunal created by international treaty—Subject matter of action previously adjudicated upon by tribunal—Tribunal decisions final—Whether tribunal of competent jurisdiction—Whether action abuse of process

International Law—Recognition—Foreign arbitral tribunal—Foreign governments' agreement to establish tribunal—Agreement in nature of treaty—Tribunal situated in state having no part in treaty—Tribunal's awards invalid by law of that state—Competence of tribunal—Recognition by English court

An international agreement having the effect of a treaty was entered into by the governments of the United States of America and Iran, whereby a tribunal was to be established to determine claims by the nationals of one government against the government or national corporations of the other. Under the terms of the agreement, which were contained in two declarations issued by the government of Algeria (the Algiers declarations), all litigation between one government and the nationals of the other was to cease and such claims were to be settled by binding arbitration before the proposed tribunal, all claims referred to the tribunal were to be considered excluded from the jurisdiction of any other court, and all decisions and awards of the tribunal were expressed to be final and binding. With the agreement of the Dutch government the tribunal was established at The Hague, but the Dutch government never entered into any treaty obligation with the governments of the United States of America or Iran in respect of the tribunal, and the awards of the tribunal were not valid arbitral awards under Dutch law. The President of the United States of America subsequently promulgated a decree which, consistent with the terms of the international agreement, provided that all claims capable of reference to the tribunal were suspended except as they might be presented to the tribunal; and that a determination of the tribunal operated as a final resolution and discharge of a claim for all purposes. The plaintiff, a citizen of the United States of America, referred to the tribunal a claim against an Iranian bank for U.S. $400,000 in respect of two allegedly dishonoured cheques. The claim was defended by the defendants as successors to the respondent bank. Following an award of the tribunal dismissing his claim, the plaintiff commenced an action in England against the defendants who had a place of business and assets within the jurisdiction. The causes of action alleged in the plaintiff's points of claim arose out of the same transaction which had formed the basis of his claim before, and had been the subject of adjudication by, the tribunal.

On the defendants' application for an order striking out the action as an abuse of the process of the court on the ground, inter alia, of issue estoppel:—

Held, granting the application, (1) that to plead issue estoppel was to assert a legal defence and, although a legal defence would usually require the trial of the action or of a preliminary issue, the court treated a plea of issue estoppel

differently and would exercise its discretion to strike out the action for abuse of its process on a plea of res judicata where, in the absence of special circumstances, factual issues were raised in the action which had been raised, or should with reasonable diligence have been raised, in previous litigation that had been adjudicated upon by a court or tribunal of competent jurisdiction (post, pp. 451D–F, G–H, 452G—453A, C–E, 454D–H).

Dicta of Wigram V.-C. in *Henderson v. Henderson* (1843) 3 Hare 100, 115; of Lord Denning M.R. in *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 Q.B. 630, 640, C.A. and *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] A.C. 581, P.C. applied.

(2) That international comity required that English courts should recognise the validity of decisions of foreign arbitral tribunals whose competence was derived from international law and practice; that under international law the competence of such a tribunal might be conferred either by treaty or by some less formal acquiescence in an established practice; that the tribunal in question was therefore to be regarded as competent and the conclusive nature of its decisions recognised in the English courts because it derived its authority and validity from the international agreement in the nature of a treaty between the governments of the United States of America and Iran rather than the municipal law of its locus situs, and because its competence was recognised by the international agreement, by the municipal laws of those states (to which the parties to the arbitration were respectively subject and under which jurisdictions the relevant choses in action arose), by the Dutch government who had acquiesced in the operations of the tribunal within its territory, and by the plaintiff who had voluntarily resorted and submitted to the tribunal's jurisdiction; and that, accordingly, since there were no special circumstances rendering it unjust or inappropriate to dismiss the plaintiff's action, the court would exercise its jurisdiction to strike out the action as an abuse of its process (post, pp. 457F–H, 458C–D, 460C–H, 462A–B, 463F–H).

The Laconia (1863) 2 Moore P.C.(N.S.) 161, P.C. and *Messina v. Petrococchino* (1872) L.R. 4 P.C. 144, P.C. applied.

The following cases are referred to in the judgment:

Bank Mellat v. Helliniki Techniki S.A [1984] Q.B. 291; [1983] 3 W.L.R. 783; [1983] 3 All E.R. 428, C.A.

Brunsden v. Humphrey (1884) 14 Q.B.D. 141, C.A.

Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 3) [1970] Ch. 506; [1969] 3 W.L.R. 991; [1969] 3 All E.R. 897

Dames and More v. Regan, Secretary of Treasury (1981) 453 U.S. 654

Fidelitas Shipping Co. Ltd. v. V/O Exportchleb [1966] 1 Q.B. 630; [1965] 2 W.L.R. 1059; [1965] 2 All E.R. 4, C.A.

Green v. Hampshire County Council [1979] I.C.R. 861

Greenhalgh v. Mallard [1947] 2 All E.R. 255, C.A.

Henderson v. Henderson (1843) 3 Hare 100

Laconia, The (1863) 2 Moo.N.S. 161, P.C.

Messina v. Petrococchino (1872) L.R. 4 P.C. 144, P.C.

Moneypoint Ltd. v. Morse, The Times, 20 July 1985, C.A.

Power v. Whitmore (1815) 4 M. & S. 141, P.C.

Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. [1970] A.C. 583; [1970] 2 W.L.R. 728; [1970] 1 All E.R. 796, H.L.(E.)

Wright v. Bennett [1948] 1 All E.R. 227, C.A.

Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] A.C. 581; [1975] 2 W.L.R. 690, P.C.

The following additional cases, supplied by the courtesy of counsel, were cited in argument:

Altco Ltd. v. Sutherland [1971] 2 Lloyd's Rep. 515

B.P. Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic (1974) 53 I.L.R. 297

Bank voor Handel en Scheepvaart N.V. v. Slatford [1953] 1 Q.B. 248; [1952] 2 All E.R. 956, C.A.

Bankers & Shippers Insurance Co. of New York v. Liverpool Marine & General Insurance Co. Ltd. (1924) 19 Ll.L.Rep. 335; (1925) 24 Ll.L.Rep. 85, H.L.(E.)

Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A. [1971] A.C. 572; [1970] 3 W.L.R. 389; [1970] 3 All E.R. 71, H.L.(E.)

Dent v. Smith (1869) L.R. 4 Q.B. 414

E.M.I. Records Ltd. v. Ian Cameron Wallace Ltd. [1983] Ch. 59; [1982] 3 W.L.R. 245; [1982] 2 All E.R. 980

Esphahanian v. Bank Tejarat (1983) 2 Iran-U.S. C.T.R. 157

Gibbs (Antony) & Sons v. La Société Industrielle et Commerciale des Métaux (1890) 25 Q.B.D. 399, C.A.

Hamlyn & Co. v. Talisker Distillery [1894] A.C. 202, H.L.(Sc.)

Helmville Ltd. v. Astilleros Espanoles S.A. (The Jocelyne) [1984] 2 Lloyd's Rep. 569

Hoystead v. Commissioner of Taxation [1926] A.C. 155, P.C.

Koenigsberg, In re [1948] Ch. 727

Lawrance v. Lord Norreys (1890) 15 App.Cas. 210, H.L.(E.)

Libyan American Oil Co. v. Government of the Libyan Arab Republic (1977) 62 I.L.R. 141

Merrifield, Ziegler and Co. v. Liverpool Cotton Association Ltd. (1911) 105 L.T. 97

Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd. (1927) 43 T.L.R. 541

Orion Compania Espanola de Seguros v. Belfort Maatschappij voor Algemene Verzekgringeen [1962] 2 Lloyd's Rep. 257

Reichel v. Magrath (1889) 14 App.Cas. 665, H.L.(E.)

Saudi Arabia v. Arabian American Oil Co. (1958) 27 I.L.R. 117

Sennar, The (No. 2) [1985] 1 W.L.R. 490; [1985] 2 All E.R. 104, H.L.(E.)

Sutherland v. Administrator of German Property [1934] 1 K.B. 423, C.A.

Texaco Overseas Petroleum Co. v. Government of the Libyan Arab Republic (1977) 53 I.L.R. 389

Williams and Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. [1986] A.C. 368; [1986] 2 W.L.R. 24; [1986] 1 All E.R. 129, H.L.(E.); [1985] 3 W.L.R. 501; [1985] 2 All E.R. 208, 619, Nourse J. and C.A.

SUMMONS

By writ dated 27 July 1984, the plaintiff, Mark Dallal, claimed U.S. $400,000 against the defendants, Bank Mellat, as successors to the International Bank of Iran, in respect of two cheques allegedly dishonoured by the International Bank.

By summons dated 30 August 1984, the defendants applied for an order that the writ in the action be struck out and the action be

dismissed or stayed on the grounds that it was frivolous, vexatious and an abuse of the process of the court; that it was the subject of issue estoppel; and that the claim was made contrary to the law of the United States of America by which it was governed. The summons was heard in chambers but judgment was given in open court.

The facts are stated in the judgment.

Nicholas Chambers Q.C. and *David Lloyd Jones* for the defendants.
Ian Glick for the plaintiff.

Cur. adv. vult.

26 July 1985. HOBHOUSE J. handed down the following judgment. On 15 January 1979 Mr. Freydoon Kamyab went to the office in Teheran of the International Bank of Iran. He paid the bank 29,600,000 rials. In return the bank gave him two cheques each for U.S. $200,000. They were drawn on the Chase Manhattan Bank, New York, and named as the payee "Chemical Bank Account No.400-358611M.D.N.S." That account belonged to the plaintiff, Mark Dallal, who is a citizen of the United States of America living in New York. When Mr. Kamyab had obtained the cheques, he handed them to Mr. Azad, a business associate of the plaintiff, who in turn forwarded them to the plaintiff in New York. The Chemical Bank presented the cheques to the Chase Manhattan Bank in New York on behalf of the plaintiff in February and again in early March, but on both occasions they were dishonoured, marked "Insufficient funds." The plaintiff did not take immediate legal proceedings against the International Bank of Iran on the cheques; he waited until 4 June 1980 to do so. On that day he commenced proceedings in the District Court of the Southern District of New York against the Islamic Republic of Iran and the International Bank of Iran. He said the bank was dominated and controlled by the Republic, and therefore the bank was the alter ego of the Republic. He pleaded that he had purchased the two cheques from the International Bank of Iran (presumably treating the actual buyer as his agent for this purpose) and the dishonour of the cheques on due presentation. He claimed against each of the two entities he had sued U.S. $400,000 by way of damages for breach of their respective obligation to honour the cheques. On 23 June 1980 the plaintiff obtained an interim order of attachment on the assets of either the Republic or the bank in the United States. In due course a firm of American attorneys appeared in the action on behalf of the bank.

All these events took place against the background of the upheavals in Iran following the overthrow of the Shah. By November 1979 this had led to the taking of the American hostages in Teheran and the response by the United States' government on 14 November 1979 freezing all Iranian assets. I am told that some U.S. $12,000 million of Iranian assets were frozen. By reason of this interest it had in Iranian assets, the United States' government had formally intervened at the end of July 1980 in the plaintiff's New York action. The impasse between the United States and Iran whereby the former had and was holding the

A latter's assets and the latter was holding United States' citizens as hostages was eventually broken on 19 January 1981 through the mediation of the government of Algeria. On that day the government of Algeria issued two declarations. These recited:

> "on the basis of formal adherences received from Iran and the United States, the government of Algeria now declares that the following inter-dependent commitments have been made by the two governments."

B

These declarations therefore contained international agreements between the United States and Iran and it was common ground before me that they had the effect of an international treaty. The hostages were duly released. The declarations covered a number of matters of international C obligation between the two countries, but this also made provision regarding the numerous claims that had been started by citizens of the United States against Iran or Iranian national corporations. Unless these claims could be disposed of in some other satisfactory fashion it would not be possible for the United States to fulfil the obligation which it was undertaking to "restore the financial position of Iran in so far as possible to that which existed prior to 14 November 1979." Therefore, the D declarations formulated the general principle:

> "B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two declarations of the government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of the other, and to bring about settlement and termination of all E such claims through binding arbitration. Through the procedures provided in the declaration relating to the claims settlement agreement, the United States agrees to terminate all legal proceedings in the United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination F of such claims through binding arbitration."

The declaration therefore went on to set up a fund which would be held by the national bank of an independent third country and out of which claims against Iran or Iranian national corporations could be met. The declarations contemplated that disputes might have to be determined G not only as between the two states themselves but also as between nationals of the states and the opposing state. All such disputes were to be referred to arbitration, and the second declaration contained detailed provision for the settlement of such disputes. Article 17 of the main declaration provided:

> "If any other dispute arises between the parties as to the interpretation or performance of any provision of this declaration, H either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. Any decisions of the tribunal with respect to such dispute, including any award of damages to

compensate for a loss resulting from a breach of this declaration or the claims settlement agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws."

The claims settlement agreement set up a tribunal of nine members, three of whom were to be American, three Iranian and three from third party countries. The seat of the tribunal was to be The Hague in the Netherlands or any other place agreed by Iran and the United States. The members of the tribunal were to be appointed and the tribunal was to conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the tribunal to ensure that the agreement could be carried out. It was expressly provided:

"The tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."

and that "All decisions and awards of the tribunal shall be final and binding." The tribunal was established:

"for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of the national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights . . ."

"Claims of nationals" of the United States (and of Iran) were further defined in a later article in terms which clearly included any relevant claim that the plaintiff might want to bring. That same provision continued:

"Claims referred to the arbitration tribunal shall, as of the date of filing of such claims with the tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court."

Iran was also defined so as to include any entity controlled by the Government of Iran. The International Bank of Iran was such an entity as is its successor, the defendants, the Bank Mellat. Article 1 of the claim settlement declaration required that any claims not settled amicably within a stated period should "be submitted to binding third party arbitration in accordance with the terms of this agreement." The period was in fact extended to October 1981 by agreement between the two states.

The tribunal provided for was in due course established and chose to have its seat at The Hague in the Netherlands. The fund out of which claims would be met was also set up in the Netherlands and held by the

National Bank of the Netherlands. Rules for the tribunal were prepared and went through a number of versions. The relevant version for the purposes with which I am concerned has been agreed to be that of 10 March 1982. The UNCITRAL rules both in their original and in their adapted form broadly follow a scheme which is typical of the rules of a tribunal which is having to arbitrate upon the private law rights and liabilities of the nationals of differing states.

The Dutch government agreed to the setting up of the tribunal within its territory and the depositing of the relevant fund with its central bank. The Dutch government, however, did not ever enter into any treaty or similar obligation to the United States or the Iranian governments, nor did it pass any domestic legislation to deal with or regulate the tribunal or the rights of the parties to disputes referred to the tribunal. In November 1983 a Bill was presented to the Dutch Parliament which would have gone some way to providing a relationship between Dutch law and the activities of the tribunal, but this Bill was never proceeded with and never became law. At all material times Dutch law has included in its Code of Civil Procedure a provision:

> "623. 1. The arbitration agreement concluded after a dispute has arisen (submission) must be made in writing and signed by the parties; if the parties are unable to sign, submissions should be drawn up before a notary and witnessed. 2. The submissions shall contain the subject matter of the dispute, the names, surnames and domiciles of the parties, as well as the surnames and domiciles of the arbitrator or arbitrators of whom there must always be an uneven number. 3. All of the above is prescribed on pain of nullity."

On 24 February 1981 the President of the United States promulgated a presidential decree. This decree referred to the Algerian declarations and the agreement between the United States and Iranian governments and the obligations of the United States regarding the resolution of claims of its nationals against Iran. Section 1 of the decree provided:

> "All claims which may be presented to the Iran-United States Claims Tribunal . . . and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States, including the courts of any state or any locality thereof, the District of Columbia and Puerto Rico, or in any action commenced in any such court after the effective date of this order . . ."

Section 4 provided:

> "A determination by the Iran-United States Claims Tribunal on the merits that the claimant is not entitled to recover on a claim shall operate as a final resolution and discharge of the claim for all purposes. A determination by the tribunal that a claimant shall have recovery on a claim in a specified amount shall operate as a final resolution and discharge of the claim for all purposes upon payment

to the claimant of the full amount of the award, including any interest awarded by the tribunal." A

The constitutional validity of the decree was challenged in the United States' Supreme Court in *Dames and More v. Regan, Secretary of Treasury* (1981) 453 U.S. 654, argued on the 24 June and decided on 2 July 1981. The Supreme Court upheld the constitutional validity of the decree. They held that the President did have power to nullify the B attachments that had been made of Iranian assets and to order their transfer. It also held that Congress had implicitly approved the practice of claim settlement by executive agreement. In answer to the argument that the suspension of claims was an ouster of the jurisdiction of the United States' courts contrary to article 3 of the Constitution, the court said that a suspension did not involve a divesting of the Federal Courts of their jurisdiction but "simply effected a change in the substantive law C governing the lawsuit . . ." He was "directing the courts to apply a different rule of law:" see p. 685. Having concluded that the President was authorised to suspend pending claims pursuant to the executive order, the court continued, at pp. 686–687:

"Our conclusion is buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an D alternative forum, the claims tribunal, which is capable of providing meaningful relief. The Solicitor General also suggests that the provision of the claims tribunal will actually *enhance* the opportunity for claimants to recover their claims, in that the agreement removes a number of jurisdictional and procedural impediments faced by claimants in United States courts. . . . Although being overly E sanguine about the chances of United States claimants before the claims tribunal would require a degree of naiveté which should not be demanded even of judges, the Solicitor General's point cannot be discounted. Moreover, it is important to remember that we have already held that the President has the *statutory* authority to nullify attachments and to transfer the assets out of the country. The President's power to do so does not depend on his provision of a F forum whereby claimants can recover on those claims. The fact that the President has provided such a forum here means that the claimants are receiving something in return for the suspension of their claims, namely, access to an international tribunal before which they may well recover something on their claims."

The plaintiff decided to pursue his claim before the tribunal at The G Hague. On 11 December 1981 he served a notice of claim to which he named as respondents the Islamic Republic of Iran and the International Bank of Iran. He referred to the Algiers declarations of 19 January 1981 and his own residence in the United States and the residence and status of the respondents in Iran, and stated: "Claimant hereby demands that this dispute be referred to arbitration before the Iran/United States claims tribunal." He claimed U.S. $400,000 being the face amount of the H two dishonoured cheques of which he said he was the lawful holder; he also claimed costs and interest. On 31 March 1982 a defence was put in by the defendants as the successors of the International Bank of Iran.

A They relied upon various defences, including disputing that the plaintiff had any title to the cheques. They also pleaded illegality of the cheques under Iranian law, including specifically:

> "On the date of the payment order, too, the relevant binding regulations forbade the transfer of foreign exchange from Iran. Therefore, if the claimant can produce valid documents to prove
B that it has made payments for the said payment orders, it should thence refer directly to the bank concerned to retrieve its payments."

A panel of three arbitrators was selected to deal with this dispute; it consisted of one Iranian and one American arbitrator, with a third arbitrator as chairman from an independent country. The parties submitted evidence in support of their cases and attended a hearing on
C 10 September 1982. Following the hearing each party submitted post-hearing briefs. The Government of Iran was also represented at the hearing and there was an observer on behalf of the United States' government. It is clear that at the hearing the issues of illegality were rather more fully explored, and in his post-hearing brief the plaintiff developed a number of answers to the defendants' case. He relied on principles of conflicts of laws as making illegality under Iranian law
D irrelevant and he also relied upon arguments of estoppel. He asserted that the parties were not in pari delicto and pointed out:

> "Respondent was paid rials for the dollars it contracted to pay claimant, and if it is discharged of its undertaking to pay claimant, it will be unjustly enriched."

E In the post-trial brief of the defendants the whole of the plaintiff's case was commented upon, including the unjust enrichment argument.

The arbitrators published their award on 10 June 1983. It was a majority award by the chairman and the Iranian arbitrator, with the American arbitrator dissenting. They awarded that "the claim of Mr. Dallal against the Government of the Islamic Republic of Iran and Bank Mellat is dismissed." The reasoning of the majority shows the wisdom of
F the note of caution sounded by the Supreme Court. The majority upheld the plaintiff's title to the cheque, but held that his claim must fail upon the grounds that the transaction was contrary to Iranian foreign exchange law which must, under the Bretton Woods Agreement, be recognised by the tribunal. The majority reached this conclusion not because they were satisfied that the requisite illegality had been proved,
G but because they considered the burden of proof to be upon the plaintiff and that he had failed to satisfy them that the transaction was not illegal. They said:

> "The tribunal therefore reaches the conclusion that the two cheques must be assumed to have been issued as part of a capital transfer, intended merely to exchange rials for dollars and to transfer the
H dollar amount to the United States."

As regards the unjust enrichment argument, the majority considered that to admit this argument would involve allowing the plaintiff to amend his claim and concluded that it would be inappropriate to allow

him to do so. They also commented that the defendants had declared that the rials could be recovered directly from the bank in Iran by whoever was entitled to them.

The plaintiff was highly dissatisfied with this award and the reasons for it, and, having read the reasons of the dissenting arbitrator, one can well have sympathy with the plaintiff's dissatisfaction. He tried to persuade the tribunal to re-open the matter but they unanimously declined to do so. He did not challenge the award before the courts of the Netherlands and in view of the state of Dutch law at the time it is probable that any such attempt would have been abortive as the Dutch courts would probably have wholly declined to recognise the validity in Dutch law of the arbitration proceedings and the award. Despite his sense of grievance the plaintiff has not before me, nor, so far as the evidence goes, at any time, alleged that the proceedings in the arbitration were contrary to natural justice. All he says is that the tribunal clearly arrived at a wrong decision and that he is now in a position to present further evidence and arguments which would demonstrate that he ought to succeed on his claims.

Following his failure in the arbitration proceedings it would have been useless for the plaintiff to pursue his claims further in the United States or in Iran. In the United States his claim has been discharged by virtue of the presidential decree. Under Iranian law once a claim within the jurisdiction of the tribunal has been referred to the tribunal, Iranian law considers that it is excluded from the jurisdiction of the court of Iran (or, for that matter, of the United States or any other country). If the plaintiff were now to file a claim in an Iranian court, the Iranian court would dismiss the claim immediately. However, the defendants have a place of business in the City of London and have assets within the jurisdiction of the English High Court. On 27 July 1984, the plaintiff commenced proceedings by way of specially endorsed writ against the defendants.

His points of claim are remarkable for their ingenuity. In 37 paragraphs he successively alleges many different causes of action, some of which will be governed by the law of New York, but most of which would be governed by the law of Iran. They fall into three categories. The first is claims which arise from obligations contained in the cheques themselves or representations made by virtue of the issue of the cheques. The second category consist of claims arising from the payment of the 29,600,000 rials to the bank in Teheran and broadly involve concepts of restitution or unjust enrichment. The third category asserts that by issuing the cheques the bank has taken over the liability of Mr. Azad or an Iranian company, The Lucky Co. Ltd., to the plaintiff for a debt of U.S. $400,000 owing to the plaintiff, in attempted discharge of which liability the cheques had been transferred to the plaintiff. All these causes of action and ways of putting his claim derive from the transaction whereby the bank issued the cheques in the first place in January 1979 in return for the payment of the sum in rials. The transaction is the same; it is only the legal clothing which varies. Also, the legality of that original transaction is a central element in the evaluation of any of the causes of action upon which the plaintiff relies. The prayer asks variously

for sums in dollars and/or in rials and/or by way of damages and interest.

The defendants having been served with this writ have applied by summons for an order:

> "the writ in the action be struck out and this action dismissed or stayed on the grounds that (i) it is frivolous vexatious and an abuse of the process of the court; (ii) the subject of issue estoppel; (iii) the claim is made contrary to law of the United States of America by which it is governed."

The answer which the plaintiff makes to this summons is in its essentials, first, that the award of the arbitral tribunal in The Hague does not satisfy the requirements for recognition in English law and, secondly, that in so far as the law of the United States might prohibit the bringing of these proceedings in the United Kingdom or have discharged the plaintiff's rights, English law should not recognise any extra-territorial effect of United States law, nor should it allow United States law to discharge causes of action of which the lex situs or the proper law is not that of the United States. The questions raised by this summons, therefore, involve the interaction of English rules of private international law and the rules of estoppel per rem judicatam. It is, however, not the trial of an action but the hearing of a summons to strike out an action without permitting it to go to trial. It is, therefore, necessary to start by defining the correct approach of a court to an application of this kind.

The allegation that an action is an abuse of the process of the court is a complaint of a procedural rather than a substantive character, and the remedy of striking out is likewise a procedural remedy and is always subject to the discretion of the court in deciding whether or not it will grant that procedural remedy. The allegation by a defendant that a plaintiff is estopped from relying on a particular cause of action or making a certain allegation is to assert a legal defence. In the ordinary course the availability of a defence to a claim does not give rise to an entitlement to a summary procedural remedy by the defendant, but rather requires a trial, either of the whole action or of some preliminary issue: see, for example, *Moneypoint Ltd. v. Morse,* The Times, 20 July 1985. Thus where a defendant seeks to set up a time-bar defence, he must plead it, and a court at a trial must adjudicate upon its merits; it is only where the statement of claim of the plaintiff is in its own terms so manifestly defective as not to disclose any reasonable cause of action that it can be struck out. However, the availability of a defence of res judicata has been treated differently. Thus, if there is an obviously available defence of res judicata to either a part or the whole of the plaintiff's action, then the courts are willing to exercise the remedy of striking out notwithstanding that the defence would be pleadable and triable, albeit with an entirely predictable outcome. The reason for this is that the attempt to relitigate issues or causes of action that have already been the subject of judicial decision between the same parties gives rise to dual consequences. These consequences are of a different character even though they both originate from the same considerations

of policy which must be basic to any developed legal system. On the one hand, the giving of a judgment by a court alters the rights of the parties in that their rights thereafter derive from, or can be based upon, that judgment rather than upon the right which they had before the giving of that judgment and which gave rise to that judgment. In this respect the legal consequences of a judgment are more properly categorised as substantive than procedural. An action can be brought upon a judgment; a judgment can be pleaded as a defence to a claim. The other consequence is procedural. The legal system does not permit its judicial procedure to be used to relitigate matters which have already been litigated between the same parties. There must be an end to litigation. A defendant must be protected against the repeated bringing of actions by the same person in respect of substantially the same subject matter. Therefore, where this procedural abuse is identified, the courts provide the defendant with the procedural remedy of striking out. Since the complaint of the defendant is that he should not have to face another trial at the suit of the plaintiff, the nature of the remedy is perfectly properly one which precludes a trial.

The correct approach of a court to an application of the present kind—that is to say, an application to strike out under R.S.C., Ord. 18, r. 19, on account of an asserted abuse of the process of the court—has been the subject of a passage in the judgment of Buckley J. in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 3)* [1970] Ch. 506, 537–538. To summarise the position: the court should consider whether or not it has before it the relevant and necessary information and other material to enable it to decide whether there has been an abuse and whether or not to exercise its discretion to strike out; if the court considers it has not got the relevant and necessary information and material, the application is premature; the burden is upon the party asserting that there has been an abuse of process to satisfy the court that such is the case; if it is satisfied that there is an abuse, then the court should ordinarily exercise its discretion to strike out unless there is some good reason for not doing so. If the defendant's assertions that the matter is covered by res judicata give rise to triable issues before it can be said that those assertions are to be sustained, then, of course, it follows that those assertions do not alone show that there is an abuse of the process of the court. Litigation which raises triable issues is prima facie not an abuse of the process of the court; it is for the determination of such issues that the trial procedure exists.

However, as I have already pointed out, the question whether an action is an abuse of the process of the court, although closely related to the question whether or not a defence of res judicata exists, is not the same question. Thus the legal defence may be subject to or circumscribed by strict legal criteria whereas the complaint that an action is an abuse of the process of the court does not solely depend on the availability of such a defence and, therefore, broader criteria can be applied. It does not follow from the proposition that the defence of res judicata would not succeed that the action cannot be an abuse of the process of the court. This was conceded by counsel for the plaintiff before me and can

be illustrated from the authorities which have been cited to me and which are applicable to the present type of case.

The leading modern authority is *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] A.C. 581, a decision of the Privy Council on appeal from the Supreme Court of Hong Kong; the opinion of the Board was delivered by Lord Kilbrandon. The history of the various previous proceedings was complicated and it was recognised that "The true doctrine" of res judicata "in its narrower sense" could not be discerned in them. Lord Kilbrandon continued, at p. 590:

> "But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V.-C. in *Henderson v. Henderson* (1843) 3 Hare 100, 115, where the judge says: 'where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject to litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' The shutting out of a 'subject of litigation'—a power which no court should exercise but after a scrupulous examination of all the circumstances—is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule."

Wigram V.-C.'s phrase "every point which properly belonged to the subject of litigation" was expanded in *Greenhalgh v. Mallard* [1947] 2 All E.R. 255, 257, by Somervell L.J.:

> "Res judicata for this purpose is not confined to issues which the court is actually asked to decide, but . . . covers issues of facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

The *Yat Tung* case was a case where the relief sought and granted was the striking out of the plaintiff's action.

In 1884 in *Brunsden v. Humphrey* (1884) 14 Q.B.D. 141, the Court of Appeal had to consider a similar question of successive actions, but

purely as a matter of the availability of the substantive defence. The substantive defence failed on the grounds that the plaintiff had not been under any obligation to include the claim which he was making in the second action in his first action. However, Bowen L.J., at p. 151, expressly referred to the inherent power of the High Court to prevent vexation or oppression. In that case the plaintiff had two distinct causes of action; he had succeeded in the first action and the second action was in no way an attempt to relitigate any issue in the first action. In *Greenhalgh v. Mallard* [1947] 2 All E.R. 255, Evershed L.J. who was the second member of the Court of Appeal and who agreed with Somervell L.J. from whose judgment Lord Kilbrandon in the *Yat Tung* case quoted, said, at p. 259:

> "In my view, therefore, and without the need for further analysis, if in one action for damages for conspiracy acts done in combination are alleged, it is an abuse of the process of the court, and contrary to the principle that in the public interest there should be an end to litigation which may be regarded as an extension of the strict rule of res judicata, to rely in the second action on the same concerted acts, even though in the first action the claim was formulated on [a different] basis . . ."

In the *Greenhalgh* case the action was struck out. A similar decision was made in *Wright v. Bennett* [1948] 1 All E.R. 227, specifically on the grounds of abuse of process. The same principles have been applied so as to prevent the relitigation of matters determined by a previous judicial decision even though the tribunal concerned was not a court (*Green v. Hampshire County Council* [1979] I.C.R. 861), as they have been in relation to successive arbitrations.

In *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 Q.B. 630, with regard to such arbitrations, Lord Denning M.R. said, at p. 640:

> "The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances . . . And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances. . . ."

This citation also demonstrates that notwithstanding the width of the principle in *Henderson v. Henderson,* 3 Hare 100, it includes, among others, two clearly identifiable criteria. The first is that there must have

A been a previous adjudication by "a court of competent jurisdiction," and, secondly, there must not be "special circumstances" which make it unjust or inappropriate to apply the principle. It is these two factors which have been the subject of argument and examination on the hearing of this summons. Was the arbitral tribunal at The Hague a tribunal of competent jurisdiction? Were there here special circumstances?

In examining the competence of the tribunal at The Hague it was not B suggested that any of the claims made by the plaintiff in the present action fell outside the definition of the claims which he was permitted to raise before the tribunal. Therefore, on its own terms of reference, the tribunal had the competence to adjudicate on all the relevant matters. It was also accepted that it was open to the tribunal on the rules which governed its procedure to disallow amendments to the claim or defence C of the parties before it; thus it was open to the tribunal to disallow the plaintiff's attempt in his post-hearing brief to introduce a claim for unjust enrichment. It is also clear to me that it cannot be disputed that the tribunal did have to reach a determination on the question of legality under Iranian law of the transaction whereby the two dollar cheques were brought from the bank in exchange for a sum in rials. Unless the tribunal had been willing to determine that issue against the D plaintiff there was on their reasoning no defence to his claim because they accepted his title to the cheques. The fact that the tribunal decided the issue as a matter of burden of proof (and in a somewhat idiosyncratic manner) does not any the less mean that there was a determination of that issue which can potentially give rise to an issue estoppel against the plaintiff, provided that the other requirements for such an estoppel are E satisfied.

As regards Dutch law it is clear on the evidence before me that there is at the very least a triable issue whether the arbitral proceedings at The Hague were under Dutch law anything other than a nullity by reason of the non-compliance with article 623 of the Dutch code of civil procedure. If it were necessary for me to decide the question at this stage, I would decide that the proceedings were a nullity in Dutch law. F It was argued before me by the defendants that the conduct of the parties in the arbitration and, in particular, their written pleadings, which included the demand of the plaintiff that the dispute be referred to the arbitration of the tribunal, amounted to an agreement that the dispute should be arbitrated before and determined by the tribunal. If such arbitration agreement was governed by English law, there would be G no difficulty about this submission, but it cannot be contended, and it was not, that any such arbitration agreement between these parties was governed by English law. On the material before me it appears to me inescapable that the proper law of any such agreement would have been the law of the Netherlands. If I were wrong about this there would at the least be a triable issue as to what was the proper law of any such agreement. If, as I consider, the proper law of the agreement was Dutch H law, then the agreement was a nullity because it did not comply with the requirements of the Dutch code. It follows that if the award of the tribunal at The Hague is to be recognised in England as an arbitral award, it cannot satisfy the requirements of the New York Convention,

or the Recognition and Enforcement of Foreign Arbitral Awards (Cmnd. 6419), or English conflict of laws rules. Both the New York Convention and the English rules that would apply independently of that convention require that the arbitrators shall have acquired their jurisdiction pursuant to an arbitration agreement which is valid according to its proper law. The defendants here cannot point to any such agreement.

The defendants sought to argue further that the proper law of the arbitration agreement might be public international law. But what I am concerned with here at this point of the argument is not an agreement between states but an agreement between private law individuals who are nationals of those states. If private law rights are to exist, they must exist as part of some municipal legal system, and public international law is not such a system. If public international law is to play a rôle in providing the governing law which gives an agreement between private law individuals legal force, it has to do so by having been absorbed into some system of municipal law. Therefore, the defendants' argument did not provide them with an escape from the necessity to identify the municipal legal system which was the proper law of the agreement to arbitrate.

It follows that, if the sole justification for the recognition of the proceedings and award of the tribunal at The Hague has to be derived from the application of the ordinary principles applicable to consensual arbitration, then the foundation of the defendants' case based upon those proceedings is effectively destroyed. The plaintiff's first proposition before me was "The proceedings in The Hague between the plaintiff and the defendants constituted a private law arbitration." In support of this the plaintiff's counsel referred to the rules under which the tribunal operated. These, as I have already commented, follow a scheme which is consistent with that of a private law arbitration. For example, the amended rule 13 (which was not yet in force at the time that the plaintiff lodged his claim) says:

> "The claim settlement declaration constitutes an agreement in writing by Iran and United States [the two governments], on their own behalfs and on behalf of their nationals submitting to arbitration within the framework of the Algiers declarations and in accordance with the tribunal rules."

Article 32(7) provides:

> "If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law."

It is submitted by the plaintiff that these rules read together with the use of the word "arbitration" in the Algiers declarations show that, anyway as far as private individuals were concerned, what was set up was a scheme for consensual private law arbitration. By way of example of another such scheme, I was referred to the Arbitration (International Investment Disputes) Act 1966 which, pursuant to an international convention, sets up an arbitral tribunal of such a character.

A I do not find the plaintiff's argument persuasive. Merely because one route of founding a tribunal's jurisdiction cannot be made good, it does not follow that there may not be another route by which the same result may be achieved. It would have been convenient and advantageous if the awards of The Hague tribunal had satisfied the requirements for recognition under the New York Convention. It would have avoided arguments of the type which I am now having to consider. Enforcement B in other countries, if necessary, would have been simplified. However, tribunals can achieve their competence in a number of ways. In origin the arbitration bore a closer resemblance to what in municipal law would be described as a statutory arbitration. The arbitral tribunal and its jurisdiction is defined not by any choice or agreement of the parties but by the statute itself. The element of choice is simply the choice of C the claimant who chooses to make a claim before the arbitral tribunal. Such a situation is, therefore, more accurately described as one where the claimant invokes the jurisdiction of the tribunal and the respondent submits to it. That is in fact what happened before the tribunal at The Hague in the present matter.

If then the proceedings at The Hague are to be regarded as proceedings in a "statutory" arbitration, the question arises: what is the D "statute?" The plaintiff submits that such an arbitration can still only validly exist under the law of the jurisdiction within which it takes place; that is to say, the law of the seat of the arbitration, in this case the law of the Netherlands. If this is right, it must follow that the invalidity of these arbitration proceedings under Dutch law closes this door as well. Whether or not some principle of Dutch law could be invoked to give a E validity to these arbitration proceedings as analogous to a "statutory" arbitration is at the best an open question; I am not presently satisfied that there is any such principle of Dutch law. It is beyond argument that there is no legislative or other authority under Dutch municipal law for these arbitration proceedings.

The plaintiff then says that the statutory authority, or authority analogous to statute, cannot be looked for elsewhere, and certainly F cannot be looked for in international law. I do not accept this argument. The jurisdiction and authority of the tribunal at The Hague was created by an international treaty between the United States and the Republic of Iran, and was within the treaty-making powers of the governments of each of those two countries. Each of the parties was respectively within the jurisdiction and subject to the law-making power of one of the G parties to the treaty. Further, the situs of all the relevant choses in action are within the jurisdiction of one or other of the two states which are parties to the treaty. Again, the municipal legal systems of each of the relevant states recognise the competence of the tribunal at The Hague to decide the relevant disputes. Accordingly, the arbitration proceedings at The Hague are recognised as competent not only by competent international agreement between the relevant states, but also H by the municipal laws of those states. It would be a surprising result if the courts of this country felt constrained to hold that the proceedings were nevertheless incompetent. I do not consider that one is forced to that conclusion.

It is a fallacy to suppose that arbitral proceedings must take their authority from the local municipal law of the country within which they take place. It is, or course, overwhelmingly the normal position that they do acquire their validity and competence from that source. The curial law is normally, but not necessarily, the law of the place where the arbitration proceedings are held: *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583. Whilst English law, like most foreign legal systems, may seek to exercise some measure of control over arbitration proceedings taking place in this country whatever their curial law, English law does not deny the possibility of a different curial law. There is no reason in principle why the curial law of a tribunal cannot derive concurrently from more than one system of municipal law. There may be problems involved in the municipal law recognition as between private parties of proceedings which exist solely at a supranational level and have no relationship at all to any system of municipal law: see *Bank Mellat v. Helliniki Techniki* S.A. [1984] 1 Q.B. 291, 301, *per* Kerr L.J. In the present case there are two systems of municipal law with the requisite international competence which give validity to the arbitration proceedings. There is no reason in principle why that validity should not be recognised by the English courts.

There have, of course, been many precedents for two states setting up within the territory of a third state arbitral or other tribunals to settle and resolve disputes between their respective nationals or between themselves and the nationals of the other. The evidence from Holland before me included a reference to two such examples. In 1648 the Treaty of Munster, which ended the 80 years war between Spain and the Netherlands, set up a bipartite tribunal to deal with disputes between the two states and also with claims made by private parties. In 1794 the peace treaty between the United Kingdom and the United States set up a similar tribunal. International practice also gave rise to tribunals which sat in territories over which the sovereign setting up the tribunal had no jurisdiction. The clearest example of this is probably the practice of the Christian European countries setting up consular courts within the Ottoman Empire. The competence of the decisions of such courts was the subject matter of a number of decisions of the English courts in the 19th century, of which the two which provide the clearest guidance for the present case are *The Laconia* (1863) 2 Moo.N.S. 161, a decision of the Privy Council on appeal from a judgment of the judge of the Supreme Consular Court at Constantinople, and *Messina v. Petrococchino* (1872) L.R. 4 P.C. 144, a decision of the Privy Council on appeal from the Court of Appeal for the Island of Malta, which concerned the competence and the effect of a judgment of the Greek Consular Court at Constantinople. In the former case Dr. Lushington, who delivered the opinion of the Board, expressly recognised, at p. 161:

> "It is true beyond all doubt that, as a matter of right, no state can claim jurisdiction of any kind within the territorial limits of another independent state."

The cases were not decided on any basis of treating the seat of the court as British (or Greek) territory. The competence of the consular courts

had to be found in some international recognition and acceptance of that competence. In the latter case Sir Robert Phillimore, delivering the opinion of the Board, quoted the principle recognised by Lord Ellenborough in *Power v. Whitmore* (1815) 4 M. & S. 141, 150:

> "by the comity which is paid by us to the judgment of other courts abroad of competent jurisdiction we give a full and binding effect to such judgments, as far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate, . . ."

Thus in each case the Privy Council had to consider whether the consular court was competent in relation to the persons and the property immediately before it and whether or not it was proper for that court to adjudicate on the relevant matters.

In *The Laconia,* 2 Moo.N.S. 161 there had been a collision in the Sea of Marmora between two vessels, one Russian, the other British. The Russian shipowners sued the British shipowners before the British Consular Court in Constantinople. The Britons objected to the jurisdiction of the court. The judge decided that he had jurisdiction and the action then proceeded, including a cross-claim by the Britons against the Russians in respect of the same collision. Having tried the merits of the dispute, the consular court held both parties equally to blame. The Britons appealed, challenging both aspects of the decision of the consular court. The Privy Council upheld the consular court, both on jurisdiction and on the merits. The complication in the case so far as jurisdiction was concerned was that although there was a treaty between the British Crown and the Ottoman Porte for the establishment of consular courts, that treaty only authorised courts to decide disputes between British subjects; further, it was recognised that English law gave British subjects no right to implead foreigners before the consular court.

In the course of his opinion Dr. Lushington said, at p. 182:

> "It is true, as we have said, that if you inquire as to the existence of any particular privileges conceded to one state in the dominions of another, you would, amongst European nations, look to the subsisting treaties; but this mode of incurring obligations, or of investigating what has been conceded, is a matter of custom and not of natural justice. Any mode of proof by which it is shown that a privilege is conceded is, according to the principles of natural justice, sufficient for that purpose. The formality of a treaty is the best proof of the consent and acquiescence of parties, but it is not the only proof, nor does it exclude other proof; and more especially in transactions with oriental states. Consent may be expressed in various ways; by constant usage permitted and acquiesced in by the authorities of the state, active assent, or silent acquiescence, where there must be full knowledge. We, having considered the materials before us, entertain no doubt that, so far as relates to the Ottoman government, no objection is tenable against the exercise of jurisdiction between British and Russian subjects. Indeed, the objection, if any such could properly be urged, should come from the Ottoman government rather than a British suitor, who, in this

> case, is bound by the law established by his own country . . . Though the Ottoman Porte could give and has given to the Christian powers of Europe authority to administer justice to their own subjects according to their own laws, it neither has professed to give nor could give to one such power any jurisdiction over the subjects of another power. But it has left those powers at liberty to deal with each other as they may think fit, and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own sovereign and that of the sovereign to whose tribunals they resort. There is no compulsory power in an English court in Turkey over any but English subjects; but a Russian or any other foreigner may, if he pleases, voluntarily resort to it with the consent of his sovereign and thereby submit himself to its jurisdiction."

This decision and the reasons for it which I have quoted illustrate a number of points which are relevant to the present case. First, the competence of a tribunal can be looked for and found in international law and practice. If under international law such a tribunal is competent, its competence ought to be recognised by the English courts.

Second, under international law, competence is most often to be found to have been conferred by some treaty. But this is not invariably the case and some less formal acquiescence in an established practice may suffice to demonstrate the competence in international law. The Ottoman Porte had acquiesced in the jurisdiction of the consular courts within Ottoman territory. So also in the present matter has the Dutch Government acquiesced in the operations of the arbitral tribunal within the territory of the Netherlands.

Thirdly, where a court or other tribunal has been set up by a subject's own sovereign government, albeit within the territory of another state, that subject cannot be heard to say that the act of his own government was incompetent. So far as the Briton was concerned, his own government had set up the consular court; and so far as the Russian was concerned, a representative of his government had authorised his commencing proceedings in the British consular court. In the present case the governments of both the United States and Iran have authorised their respective nationals to arbitrate before the tribunal at The Hague and regard the decisions of that tribunal as competent.

Fourthly, a person can make such a tribunal competent by voluntarily resorting to it (with the consent of his sovereign). By doing so he submits himself to the jurisdiction of the tribunal. In that case the Russian submitted to the jurisdiction of the consular court and, as a result, the jurisdiction of the court existed with regard to both parties before it, and no objection could be taken on the ground of lack of reciprocity. Similarly, in the present case the plaintiff chose to resort to the tribunal at The Hague, and thereby submitted to its jurisdiction; it is not now open to him to say that it was incompetent. It was his voluntary act to commence the proceedings before the tribunal. It is true that he may have had no other alternative under the law of the United States if he wished to pursue his rights as he saw them. But that does not make it

any the less a voluntary act. Most plaintiffs who commence proceedings are in a similar position. They have to commence proceedings before the appropriate municipal court or else be without legal remedy. It can also be commented that before me the plaintiff has submitted that there is nothing in United States law which prevents him from litigating the present matters in the courts of the United Kingdom. He says that is the position now and, as I understand his case, he does not suggest that the position was any different at the time that he chose to go to the tribunal. It may be that at that time the defendants had no assets within the jurisdiction of the English courts, but that, of course, is beside the point.

Messina v. Petrococchino, L.R. 4 P.C. 144 illustrates the application of the principle of res judicata in respect of the decision of a foreign consular court. Messina was a merchant residing in Malta who was the consignee of a cargo of wheat which had been loaded at Berdiansk on board a Greek vessel for carriage to Malta. At time of shipment the cargo was apparently owned by another Greek, although it had actually been shipped by a merchant called Negroponte and had been consigned to Messina. During her voyage through the Black Sea the vessel encountered bad weather and on two occasions had to jettison cargo. She arrived in damaged condition at Constantinople, where the master of the vessel invoked the jurisdiction of the Greek consular court, which appointed a curator of the cargo. The court decided that the cargo should be transshipped and oncarried to Malta in another vessel, and it directed the curator to issue a bottomry bond on the cargo to cover the cost. When the cargo arrived in Malta, Messina sought by proceedings before the courts in Malta to have the bottomry bond set aside. Messina won before the court of first instance, but lost on appeal in the Court of Appeal of Malta and before the Privy Council.

The argument of the bond holder before the Privy Council, at p. 151, was:

> "The act of the Greek consular court at Constantinople was a judicial and not a ministerial act, and that court being a court of competent jurisdiction, such judgment was a binding judgment and would be recognised by the comity of nations by any court in which an action on that judgment was brought: *Castrique v. Imrie* (1870) L.R. 4 H.L. 414. Therefore, the bottomry bond taken in pursuance of such judgment is a valid bond."

Sir Robert Phillimore accepted this argument and followed and applied the decision in *The Laconia,* 2 Moo.N.S. 161 clearly recognising that it would be wrong for a British court to recognise the decisions of its own consular court without being prepared to recognise the comparable decisions of the consular courts of other countries, particularly where both the vessel and the cargo were at the material time (in his opinion) owned by Greek subjects. The judgment of the Greek consular court was, therefore, treated as conclusive of the validity of the bond.

These decisions clearly illustrate that competence can be derived from international law and that international comity requires that the

courts of England should recognise the validity of the decisions of foreign tribunals whose competence is so derived. It would be anomalous and contrary to justice and comity if I were to decline to recognise the decision of the tribunal between the present parties. In my judgment, where two sovereign states have chosen to set up a tribunal to determine disputes between the nationals of their respective states in respect of choses in action for which the situs lies within the jurisdiction of those two states, there can be no warrant for the courts of this country to fail to recognise and treat as fully competent the decisions of that tribunal. It is an a fortiori case where the party who is seeking to go behind the decision of such a tribunal is the party who has himself invoked the jurisdiction of that tribunal. I hold that the tribunal was a competent tribunal in respect of the present parties and the present matters. I do not have further to decide whether or not that decision gave rise to substantive rights between the parties; if I were to do so, I would have to say under what municipal legal system those rights, which must by definition be private law rights, would exist. It may be that those rights could exist both under the law of the United States and under the law of Iran. The present evidence does not suffice for me to decide whether relevant substantive rights exist under both those legal systems so as to be conclusive of the present matter. I have not had to embark on that inquiry because what I am doing on the present summons is giving effect to an English law procedural remedy in respect of a procedural complaint that is recognised by English law. It is the determination of the relevant disputes on the previous occasion by a tribunal of competent jurisdiction which gives rise to and justifies that procedural complaint.

In the present case the considerations of comity apply with particular force since the Algiers declarations were part of an international agreement by which assets of Iran or Iranian national entities which were situate in foreign countries and were the subject of claims and/or attachment or execution proceedings by the United States or nationals of the United States were to be released and returned to Iran and for the setting up of the tribunal at The Hague and a fund out of which awards made by the tribunal would be satisfied. It would frustrate that agreement if funds of an Iranian national enterprise which had since been brought within the jurisdiction of the English courts were to be made available to satisfy those claims. This is, in effect, what the plaintiff is trying to do, and the English courts should not give him their assistance. This conclusion is reinforced when one takes into account that prior to invoking the jurisdiction of the tribunal the plaintiff had been the plaintiff in proceedings in the United States and had, as part of those proceedings, attached Iranian assets.

It is therefore the more, not the less, vexatious that the plaintiff following his successive proceedings before a court in the United States and before the tribunal should now attempt to start yet further proceedings in respect of substantially the same subject matter.

This leaves for consideration the question of whether or not there are present here special circumstances why the principle in *Henderson v. Henderson,* 3 Hare 115 should not be applied. I am not satisfied that there are any such special circumstances; indeed, as will be clear from

what I have already said, I consider that it is entirely appropriate that the *Henderson* principle should be applied to the present case. The proceedings before the tribunal were proceedings of the character of an arbitration in which the disputes of the parties were being decided in accordance with a proper scheme of procedure and in accordance with the application of appropriate rules of law. Although the decision and the reasons that the majority gave for it are criticised by the plaintiff, his criticisms do not go so far as even to allege any breach of the principles of natural justice, nor any conduct of the tribunal or of the respondents to the arbitration which would justify a court of this country in declining to recognise the award. Further, the proceedings before the tribunal were intended to be the proceedings in which the plaintiff's rights in respect of all material matters were to be decided, the plaintiff hoped, in his favour. It was not a situation where the tribunal was to do anything other than exhaustively and finally determine the rights and liabilities of the respective parties.

Maybe, as the arbitration progressed and since the award was published, the plaintiff has though of better ways in which to formulate and present his claim, but that is beside the point. In the arbitration he ought to have presented all the ways in which he sought to sustain his claims. If he omitted to include some of them or left the presentation of some of them too late so that the points he could take were limited by the tribunal, that does not amount to a special circumstance; it is precisely the type of situation for which the *Henderson* principle exists. Nor, on the evidence before me, is there any basis for saying that the plaintiff was unable to present his case effectively due to circumstances beyond his control. He does say that he did not wish to disclose to the tribunal the names of some of the individuals with whom he was dealing in Iran. But, nevertheless, it was open to him to satisfy the tribunal (which included only one Iranian member) of his bona fides and of the reasons why he was wishing to keep the identity of some potential witnesses private. It was the plaintiff's choice how he chose to conduct his case before the tribunal and the type of evidential difficulty upon which he has relied in the affidavits he has sworn on the summons would, if accepted as constituting special circumstances, largely nullify the *Henderson* principle. I am satisfied that the present case falls squarely within the type of mischief to which the *Henderson* principle applies and that there are no special circumstances present which would make it appropriate to exclude it in the present case or to make any exception in favour of the plaintiff.

It follows that, in my judgment, the present proceedings are, and must be recognised as, an abuse of the process of the court which this court should not allow to continue. Accordingly, I exercise my discretion to strike out the plaintiff's writ and statement of claim.

Order accordingly.
Defendant's costs.

Solicitors: Stephenson Harwood; Teacher Stern Selby.

I. C.