

THE
LAW REPORTS
1984

Queen's Bench Division

and on Appeal therefrom in the

Court of Appeal

and Decisions in the

Court of Appeal Criminal Division

and

Employment Appeal Tribunal

London

THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES

1 Q.B. **Reg. v. Heston-Francois (C.A.)**

For these reasons this appeal is dismissed.

A

Appeal dismissed.

Certificate under section 33(2) of the Criminal Appeal Act 1968, that a point of law of general public importance was involved in the decision to dismiss the appeal, namely: "Whether, where the seizure and removal of legally privileged documents, relevant to a criminal prosecution, by a police officer from the possession of a defendant without his consent is alleged to constitute an abuse of the process of the court, the duty of the trial judge to prevent unfairness to the defendant includes: (1) a duty to conduct a pre-trial enquiry upon the application of the defendant, and (2) upon a finding of such abuse to exercise a discretion whether or not the proceedings should be stayed."

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Leave to appeal refused.

Legal aid for one counsel to petition the House of Lords for leave to appeal.

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15 March. The Appeal Committee of the House of Lords (Lord Diplock, Lord Keith of Kinkel and Lord Templeman) dismissed a petition by the appellant for leave to appeal.

Solicitors: Mackenzie Patten & Co.; Solicitor, Metropolitan Police.

L. N. W.

E

[COURT OF APPEAL]

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BANK MELLAT v. HELLINIKI TECHNIKI S.A.

[1983 H. No. 730]

1983 June 8, 9; 28

Waller, Kerr and Robert Goff L.JJ.

G

Arbitration—Costs—Security for—Claimants resident abroad—Agreement to arbitrate according to rules of International Chamber of Commerce—Arbitration to be held in London—Respondents' application for security for costs on ground that claimants ordinarily resident abroad—Whether appropriate to make order—Whether I.C.C. Rules intended to be self-sufficient—Whether application inconsistent with scheme and spirit of Rules—Arbitration Act 1950 (14 & 15 Geo. 6, c. 27), s. 12(6)(a)¹—R.S.C., Ord. 23, r.1(1)(a)²

H

A contract between an Iranian bank, the defendants and a Danish company concerning a joint venture for development of

¹ Arbitration Act 1950, s. 12(6)(a): see post, p. 302A–B.

² R.S.C., Ord. 23, r. 1(1)(a): see post, p. 301A–B.

land near Teheran stated that it was to be governed by the laws of Iran and that disputes arising under it should be settled by arbitration in accordance with the rules of the International Chamber of Commerce, Paris ("I.C.C."), the venue to be the City of London and the proceedings to be conducted in English. None of the parties carried on business in England or had any other connection with England. Subsequently, the defendants took over all the rights and liabilities of the Danish company, and in 1979 the Iranian bank was merged into the plaintiffs, who took over all their rights and liabilities under the contract. The plaintiffs were incorporated in Iran but were registered in England under Part X of the Companies Act 1948 and held a full licence under the Banking Act 1979 to carry on banking business in England. By 1980, serious disputes had arisen between the plaintiffs and the defendants, and by request to the I.C.C. dated 20 November 1980 the defendants commenced arbitration proceedings against the plaintiffs. Pursuant to the rules of the I.C.C., each party paid U.S.\$95,000 (half of a total of U.S.\$190,000) towards the I.C.C.'s administration expenses and the arbitrators' fees. On 18 February 1983 the plaintiffs issued a summons for an order that the defendants should provide security for the plaintiffs' costs in the arbitration in a total sum of U.S.\$118,850, including the U.S.\$95,000 paid by the plaintiffs to the I.C.C., on the grounds that the defendants were ordinarily resident outside the jurisdiction and that there was reason to believe that they would be unable to pay the plaintiffs' costs if the plaintiffs were successful in the arbitration. Bingham J. declined to make the order sought.

On appeal by the plaintiffs:—

Held, dismissing the appeal, that (*per* Waller and Kerr L.JJ.) the I.C.C. Rules did not, on their true construction, expressly or by necessary implication exclude all applications to the local courts other than for interim or conservatory measures, but that they did provide a code that was intended to be self-sufficient in the sense that it was capable of covering all aspects of arbitration under the law without the need for recourse to any municipal system of law or any application to the courts of the forum; that, while the grant or refusal of an order for security in international arbitrations must depend on all the circumstances of each case, particular regard would be given to the degree of connection that the parties had with England and its legal system and the English courts should be slow in applying the jurisdiction to order security for costs in international arbitration unless, in the particular circumstances of each case, there was some more specific connection with England than the mere fact that the parties had agreed that any arbitration was to take place there; and that the plaintiffs' application for security for costs was sufficiently inconsistent with the scheme and spirit of the I.C.C. Rules to make it inappropriate in principle for the court to exercise its statutory discretion in favour of the order sought (*post*, pp. 303B–C, H—304C, 308F—309B, 318A); (*per* Robert Goff L.J.) in the case of international commercial arbitrations of the kind in question the court should as a general rule decline to order security for costs against a foreign claimant unless there were special circumstances warranting it (*post*, p. 315G–H).

Per Waller and Kerr L.JJ. Since in an arbitration under the I.C.C. Rules that has no connection with this country other than that it had been agreed between foreign parties that any such

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1 Q.B. Bank Mellat v. Helliniki Techniki (C.A.)

- A** arbitration was to take place here it would be inappropriate in principle to make an order for security for costs on the ground that the claimant is ordinarily resident abroad, it would also be wrong in principle to make any such order on the ground that the claimant may be unable to pay the other party's costs if the award requires him to do so (post, pp. 309H—310A, 318A).
Decision of Bingham J. affirmed.
- B** The following cases are referred to in the judgments:
Hudson Strumpffabrik G.m.b.H. v. Bentley Engineering Co. Ltd. [1962] 2 Q.B. 587; [1962] 3 W.L.R. 758; [1962] 3 All E.R. 460
Mavani v. Ralli Bros. Ltd. [1973] 1 W.L.R. 468; [1973] 1 All E.R. 555
Parkinson (Sir Lindsay) & Co. Ltd. v. Triplan Ltd. [1973] Q.B. 609; [1973] 2 W.L.R. 632; [1973] 2 All E.R. 273, C.A.
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.)
- C** The following additional cases were cited in argument:
Aeronave S.p.A. v. Westland Charters Ltd. [1971] 1 W.L.R. 1445; [1971] 3 All E.R. 531, C.A.
Bilcon Ltd. v. Fegmay Investments Ltd. [1966] 2 Q.B. 221; [1966] 3 W.L.R. 118; [1966] 2 All E.R. 513
- D** *Bjornstad and Ouse Shipping Co. Ltd., In re* [1924] 2 K.B. 673, C.A.
Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.)
Compagnie Française de Télévision v. Thorn Consumer Electronics Ltd. (1981) 7 F.S.R. 306
Hitachi Shipbuilding & Engineering Co. Ltd. v. Viafiel Compania Naviera S.A. [1981] 2 Lloyd's Rep. 498, C.A.
- E** *Hyundai Construction Co. Ltd. v. Enterprise A. Dodin S.A.* (unreported), 29 January 1982, Bingham J.
Rena K, The [1979] Q.B. 377; [1978] 3 W.L.R. 431; [1979] 1 All E.R. 397
Unione Stearinerie Lanza and Weiner, In re [1917] 2 K.B. 558, D.C.
- F** INTERLOCUTORY APPEAL from Bingham J.
By originating summons dated 18 February 1983 the plaintiffs, Bank Mellat, a company incorporated according to the laws of Iran, sought an order that pursuant to section 12(6) of the Arbitration Act 1950 the defendants, Helliniki Techniki S.A., give security for the plaintiffs' costs in an arbitration between the parties before the International Chamber of Commerce ("I.C.C.") Court of Arbitration, TM de H Case No. 3997/RP,
- G** on the grounds that the defendants, the claimants in the arbitration, were (a) a limited company and there was reason to believe that they would be unable to pay the plaintiffs' costs if the plaintiffs were successful in their defence in the arbitration and (b) ordinarily resident outside the jurisdiction.
On 25 March 1983, Bingham J. in chambers in the Commercial Court dismissed the plaintiffs' application, giving them leave to appeal.
- H** The plaintiffs appealed, on the grounds that Bingham J. had erred in law in holding that the rules of the I.C.C. formed a comprehensive code for the conduct of arbitrations referred to that body; that he had erred in law and in the exercise of his discretion in holding that it was generally

necessary for a party seeking security in an I.C.C. arbitration to show that, whether expressly or by implication, the parties to the arbitration had agreed that they would submit to the procedural provisions of the English courts; that he had erred in law and been wrong in fact in failing to find that the parties to the arbitration in question had intended to subject or avail themselves in any way to or of the facilities of the English courts; that he had erred in the exercise of his discretion by placing too great a weight on his failure to find that the parties had agreed to subject themselves to or avail themselves in any way of the facilities of the English courts and placing insufficient weight on the defendants' lack of solvency and their foreign residence; and that, without prejudice to the preceding grounds, he had failed to treat the application as one permitted by the rules of the I.C.C. and, if necessary, article 8.5 thereof.

By a respondents' notice, the defendants contended that Bingham J.'s decision should be affirmed on the additional grounds that by submitting to the rules of the I.C.C. Court of Arbitration the parties had agreed, by necessary implication, not to apply to the court for security for costs, notwithstanding that they had agreed on the City of London as the place of arbitration; that by submitting to those rules, and in particular article 8.5 thereof, the parties had expressly agreed not to apply to the court, save in exceptional circumstances (of which there were none in the present case), for security for costs after transmission of the file to the arbitrators; and that, in a case where the parties had expressly submitted to the rules, it could be inferred from the fact that they had chosen London as the place of arbitration, whether at the time of making the arbitration agreement or subsequently, that they had agreed to vary or waive the contractual obligation that would otherwise lie on them not to apply to the court for security for costs. They further contended by way of cross-appeal that the plaintiffs' claim for security was excessive and sought an order that the defendants give security for the plaintiffs' costs in the arbitration for the period to March 4, 1983, in the sum of U.S.\$9,367 (or the sterling equivalent at the time when the security was provided) and that in the meantime all further proceedings in the arbitration be stayed.

The facts are stated in the judgment of Kerr L.J.

Mark Littman Q.C. and *Nicholas Chambers* for the plaintiffs. The plaintiffs stress that this was not only a case of a foreign claimant resident outside the jurisdiction but also a case of one that is unable to meet its debts and whose solvency is highly doubtful. Fresh evidence is now available, but the position has not really changed.

The correct principles of law applicable to the present case are as follows. The parties having chosen the City of London as a venue of the arbitration, the Arbitration Acts 1950, 1975 and 1979 are applicable thereto, on the principle that the procedural law of the arbitration is covered by the *lex fori*: see *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583, 608G and 616A; *Russell on Arbitration*, 20th ed. (1982), pp. 243-249 and *Dicey & Morris, Conflict of Laws*, 10th ed. (1980), p. 1128. [Reference was made to the Act of 1950, s.12(6); R.S.C., Ord. 23 and the Companies Act 1948, s.447.] There has been for many years an established practice applicable to both actions

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- A and arbitrations that on facts such as those prevailing in the present case security should be ordered: see *In re Unione Stearinerie Lanza and Weiner* [1917] 2 K.B. 558 (arbitrator has no power to order security); *In re Bjornstad and Ouse Shipping Co.* [1924] 2 K.B. 673, 680 (order nisi before statutory power); *Hudson Strumpffabrik G.m.b.H. v. Bentley Engineering Co. Ltd.* [1962] 2 Q.B. 587, 590, 592, 593 (inflexible practice in action held applicable to arbitration; same principles apply); *Bilcon Ltd. v. Fegmay Investments Ltd.* [1966] 2 Q.B. 221 (section 447 held applicable in English arbitration); *Aeronave S.p.A. v. Westland Charters Ltd.* [1971] 1 W.L.R. 1445, 1449D (approving *Hudson*); *Mavani v. Ralli Bros. Ltd.* [1973] 1 W.L.R. 468, 476 (Kerr J.) (order against foreign claimant despite rule of Refined Sugar Association); *The Rena K* [1979] Q.B. 377, 407E (*Mareva* injunction and arbitration); *Compagnie Française de Télévision v. Thorn Consumer Electronics Ltd.* (1981) 7 F.S.R. 306 and *Hyundai Construction Co. Ltd. v. Enterprise A. Dodin S.A.* (unreported), 29 January 1982, Bingham J. The jurisdiction to make an order will not be excluded by an agreement, but it is accepted that, as no question of public policy arises, it is open to the parties to make such an agreement and that if they do so this will be a powerful element in the exercise of discretion. The I.C.C. Rules on their true construction do not either expressly or by necessary implication exclude the parties from applying to the court.
- D The arrangements for a deposit are intended as security for the I.C.C. and the arbitrators since the deposit is restricted to the I.C.C.'s administrative costs and the arbitrators' fees (see also *Mavani v. Ralli Bros. Ltd.*, at p. 476). Accordingly, applying the above principles to the facts, security should be ordered.
- E Bingham J., although purporting to exercise discretion, misdirected himself in the following respects. He held that there was some doubt whether the choice of the City of London venue involved a subjection of the arbitration to the procedural provisions of this country so far as the relationship of the court to the conduct of arbitrations is concerned. It is submitted that there is no doubt on this point, or that, if there is, it should be resolved in the manner submitted above. He misdirected himself that it was a relevant matter that the I.C.C. Rules contained no express provision for the parties to make such an application. In the absence of an express provision, the English statutory rules apply. He misdirected himself that the detailed provisions of the Rules "probably by implication envisaged that applications of that kind will not be made." In the absence of a necessary implication excluding such applications, the ordinary statutory provisions apply.
- F G Bingham J. referred to a contention by the defendants that the application was excluded by article 8.15 of the Rules but did not appear to found his judgment on that contention. Article 8.15 has no application to the present case. [Reference was made to article 8.5.]
- H The court has drawn attention to concern that has been expressed about one or more decisions of the Commercial Court ordering security in cases where both parties were foreign and where the dispute had no connection with England. Broadly, if any change is required this could best be done by a change in the rules of court as there are policy considerations involved and a number of possible solutions. However, in

response to the court's intervention, consideration has been given to the question of whether such a change of policy could be effected by judicial decision. A possible line of approach is discussed below. However, it is emphasised that this only deals with the case where the only basis for seeking security is residence abroad. In the present case, there is an additional element represented by the financial condition of the defendants, and the following argument would not touch that in any way. This aspect should be definitive in any event in the present case.

Although the Act of 1950 gives the court the same *power* in relation to arbitrations as it has in relation to actions, it does not necessarily follow that the Order 23 discretion must always be exercised in the same way. In *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909, 964, attention was drawn to manifold and radical differences between actions and arbitrations. Moreover, recent legislation has drawn a distinction between the attitude of the English courts to "international" as compared to "domestic" arbitration, i.e. (i) stay compulsory for international but not domestic (Act of 1975); (ii) more limited defences to actions on international awards (Act of 1975); (iii) appeals may be excluded in international but not domestic arbitrations (Act of 1979). Public knowledge of this (at any rate of (iii)) reflects a policy of making England even more attractive to international arbitrations.

It could perhaps be argued that this would justify the court (if it were so minded) in holding that, in the changed climate, the *mere* fact that the claimant in an arbitration in England but otherwise wholly unconnected with this country and in which *both* parties were resident abroad should not be accepted *by itself* as sufficient ground for an order. Arguments against even this solution have already been submitted and will not be repeated. In any event, even if such a principle were accepted, the court should exercise its discretion in this case in favour of an order, having regard to the probability that the plaintiffs would experience difficulty, or at least delay, in recovering awarded costs.

Ian Glick for the defendants. 1. See the Arbitration Act 1950, s. 12(6)(a). 2. Whether to order security is a matter entirely of discretion. (a) See R.S.C., Ord. 23, r. 1 and *The Supreme Court Practice* (1982), para. 23/1-3/2. (b) Under the Companies Act 1948, s.447, see *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] Q.B. 609, 626A-F (Lord Denning M.R.) and 628F-629B (Lawton L.J.). 3. The jurisdiction cannot be ousted by agreement of the parties: see *Mavani v. Ralli Bros. Ltd.* [1973] 1 W.L.R. 468, 473H. Though it would be a good idea if future legislation permitted this: see *Hitachi Shipbuilding & Engineering Co. Ltd. v. Viafiel Compania Naviera S.A.* [1981] 2 Lloyd's Rep. 498, 505, *per* Donaldson L.J. 4. The parties can, however, incorporate into their agreement or submission to arbitration provisions that would make it obviously unjust in all the circumstances to order security, e.g. if they agree not to apply for it or application would be inconsistent with the spirit of the provisions: see *Mavani*, *per* Kerr J. at pp. 473H and 474B (and also at pp. 474E-F, H); *Mustill & Boyd, Commercial Arbitration* (1982), p. 296; *Russell on Arbitration*, 20th ed., p. 227. 5. Such an agreement may be express or implied. Moreover, it would be unjust in all the circum-

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- A stances to order security in a case where the application for security is inconsistent with the contractual arrangements made by the parties even if it is not a case where the law would imply into those contractual arrangements a term that security should not be applied for. 6. Rules of arbitration under which the parties agree to arbitrate form part of the contract between the parties: see *Mavani*, per Kerr J., at p. 470G–H. 7. In this case, the I.C.C. Rules form part of the contract between the parties.
- B 8. They form a complete code of conduct of arbitration. 9. They make express provision for (a) the costs of the award: see article 9; (b) applications to municipal courts: see article 8(5). 10. Article 9(1) provides for a deposit “in a sum likely to cover the costs of arbitration of the claims which have been referred to it.” 11. These costs are at paragraph 2 of Appendix III to the Rules and are: (1) arbitrators’ fees (on scale basis);
- C (2) administrative fees (on scale basis); (3) arbitrators’ personal expenses; (4) cost of expertise (see also article 14(2)); (5) “similar expenses.” In English terms, these are costs of the award. 12. As a general rule, the deposit is to be paid in equal shares by claimants and respondents: see article 9(2). This has been done in this case. 13. There is no provision for security for costs of the reference. 14. This is not an accidental omission. Costs of the reference have not been forgotten: the arbitrators are given
- D express power to award them when they make their award: see article 20(1) and (2). 15. Under the rules, (1) costs of the award are to be secured, by the parties, usually in equal shares; by clear implication costs of the reference are not to be secured; and (2) certain applications are to be made to municipal courts. If applications for security for costs are permitted, then the application is too late; if, more probably, they are not permitted, then by clear implication such applications are not to be made
- E at all. 16. In any event, the court should not substitute its own system for providing security for that agreed by the parties. 17. The plaintiffs’ position is absurd. They have not sought to distinguish their share of the deposit from the rest of the costs in respect of which they seek security. Indeed, this is the largest single item in the calculation of the sum to be secured: \$95,000. 18. The plaintiffs are right not to distinguish the deposit
- F in the sense that it forms part of the costs that will be dealt with by the arbitrators under article 20. 19. Under article 9(2), however, the parties have expressly agreed to share responsibility for the deposit equally. 20. It would be wholly contrary to the rules for the plaintiffs to seek to have their share of the deposit put up under the Rules (which is security for the award) itself secured by the defendant. 21. Moreover, if, as the plaintiffs suggest, the costs covered by the deposit should not be distinguished from
- G the other costs, security should be granted for none. 22. If the parties have agreed, expressly or impliedly, not to apply for security, the choice of London as the place of arbitration is immaterial. There is no suggestion otherwise in *Mavani*. 23. The I.C.C. Rules cannot mean different things according to whether: (a) the parties chose London at the outset; (b) they chose London after the dispute arose; (c) The I.C.C., or the arbitrators,
- H chose London; or (d) the parties ever applied their minds to the procedures available under English law, and no inference can be drawn from the choice of London that the Rules should be read so as to vary what would otherwise be their true construction. The court would not be inferring the

intention of the parties; it would be speculating as to it. 24. Even if inferences could ever be drawn from the choice of London, there is no evidence in this case to suggest an intention or argument to allow the parties to apply for security. Indeed, fresh evidence is available to the contrary if the court will admit it. In this case, bearing in mind that the original parties were Iranian, Danish and Greek, Bingham J. was right. 25. The I.C.C. Rules form a complete code in relation to, inter alia, security and costs. It is the agreement of the parties, and the court should not regard it as just to depart from that code. As a system, it is by no means unusual. 26. Moreover, one of the remaining disincentives to London as a centre for international arbitrations is the possibility that a party may find itself having to put up large sums by way of security. This risk should not be there where the parties have submitted to rules that make their own (albeit quite different) arrangements for security and where they have already had to furnish quite substantial sums under those rules. There cannot be a free-for-all depending on what the local law provides. The Rules envisage that no advantage is to be given to either side (half each). It is an even-handed approach. It is clear from the Rules that there is no intention to allow the parties to take advantage of such local procedural rules as those relating to security for costs. The court should infer from the fact that the omission of provision for security for the parties' costs of the reference is not accidental that, if the Rules had intended that the parties should be able to go to national courts to ask for security, they would have said so.

Evidence is now available (if the court will admit it) to demonstrate the solvency of the defendants. The object of security for costs is not to test the faith of the plaintiff/claimant. It is to ensure that the defendant is not going to be put before a court by a foreigner, win and then not get his costs. The defendants concede that the court cannot ignore, in the case of a corporation at any rate, its financial state, but it is not a very major consideration.

Littman Q.C. replied.

Cur. adv. vult.

28 June. The following judgments were handed down.

KERR L.J. This is an appeal from a judgment of Bingham J., given on 25 March 1983, which raises an important question on orders for security for costs in relation to international arbitrations held in this country. In the present case this question arises in the context of the Rules of the Court of Arbitration of the International Chamber of Commerce in Paris, to which I will refer generally as "the I.C.C. Rules."

The facts

The arbitration arises out of a contract in the form of a tripartite "participation agreement" concluded on 29 September 1974 between Bank Omran of Teheran, the defendants, Helliniki Techniki S.A. of Athens, and a Danish company, Larsen and Nielsen. The contract concerned a joint venture for the development of certain land near Teheran. The land

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A was to be provided by Bank Omran, and the defendants and the Danish company were to provide the necessary design and construction services for its development. The contract stated that it was to be governed by the laws of Iran and contained an arbitration clause of which the following terms are material:

B “Any dispute arising between the parties hereto in any way related to or connected with the interpretation or implementation of this agreement shall be finally settled by arbitration, by an arbitral tribunal composed of three arbitrators, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris. . . . The venue shall be the City of London, and the arbitration proceedings shall be conducted in the English language.”

C None of the parties carried on business in England or had any other connection with this country. Subsequently the defendants took over all rights and liabilities of the Danish company, which disappears from the scene for present purposes. In June 1979 Bank Omran was merged, together with other banks, into the plaintiffs, Bank Mellat, which took over all the rights and liabilities of Bank Omran under the contract. The plaintiffs are registered here under Part X of the Companies Act 1948 and hold a full licence under the Banking Act 1979 to carry on banking business in this country, but their place of incorporation is Iran.

D By 1980 serious disputes had arisen between the plaintiffs and the defendants under the contract. On 26 July 1980 the defendants served a notice of default and commenced the present arbitration proceedings against the plaintiffs by a request addressed to the I.C.C. dated 20 November 1980. Three arbitrators were thereupon appointed: an English barrister by the defendants, an Iranian lawyer by the plaintiffs and a Swedish lawyer appointed by the Swedish National Committee of the I.C.C. I shall have to deal with the I.C.C. Rules in some detail hereafter, but meanwhile it is convenient to refer to certain payments made by both parties to the I.C.C. under the I.C.C. Rules at the request of the Court of Arbitration in Paris. Initially each party paid U.S.\$500 by way of an advance towards the I.C.C.’s administrative expenses. Thereafter each party paid a further sum of \$95,000 following a request from the I.C.C. dated 28 July 1981, in the following terms:

G “The deposit to cover the administrative expenses and the arbitrators’ fees has been fixed at U.S.\$190,000. In accordance with the spirit of arbitration and the customs of the court, each party is therefore requested to forward to us within 30 days one half of this sum, i.e. U.S.\$95,000 in the manner set out in the enclosed circular (in deducting the sum of U.S.\$500 when already paid to the court).”

H The matter was then referred to the three arbitrators who drew up the necessary terms of reference pursuant to the I.C.C. Rules on 6 October 1982 in agreement with the parties. These defined the issues in dispute. The defendants claim damages in the sum of \$6,753,200 and reimbursement of a further sum alleged to be in excess of \$1,000,000, and the plaintiffs counterclaim damages of about \$30,000,000. As regards the conduct of the arbitration, the terms of reference merely recite the

provisions of the contract concerning the application of the I.C.C. Rules, as set out above, and that the contract is governed by the law of Iran.

Having considered the terms of reference and the amounts in dispute, the I.C.C. increased the deposit by a letter of 22 October 1982 requiring each of the parties to pay a further sum of \$50,000 within 30 days. Since the letter also stated that "failure to effectuate payment in a timely manner may result in the halting of the instruction of this case," it appears that these payments have also been made, but, since the increase was largely attributable to the plaintiffs' counterclaim, nothing turns on this further deposit for present purposes.

The arbitration is at present listed to commence on 5 September 1983 and the hearing is estimated to take about four weeks. Meanwhile, however, the plaintiffs issued a summons on 18 February 1983 for an order that the defendants should provide security for the plaintiffs' costs in a total sum of \$118,850. By far the largest item of this amount is the deposit of \$95,000 paid by the plaintiffs to the I.C.C.; the remainder relates to legal fees and other costs that have so far been incurred. For present purposes it is unnecessary to consider these in detail, although some of them have also been challenged by the defendants on particular grounds, save to say that they appear to be reasonable, and indeed modest, since each of these items other than the deposit of \$95,000 has been reduced to take account of the counterclaim. There is no cross-application by the defendants for security for costs in relation to the counterclaim, which we understand to raise substantially the same issues as the defendants' claim. The grounds of the plaintiffs' application are that the defendants are ordinarily resident outside the jurisdiction and also that there is reason to believe that they will be unable to pay the costs of the plaintiffs if the latter are successful in the arbitration. The submission of the defendants is that any order for security would be inappropriate under the I.C.C. Rules and generally in relation to an arbitration of this kind. Bingham J. declined to make any order, and the plaintiffs are now appealing against this decision. I will deal first with the ground that the defendants are resident outside the jurisdiction, the I.C.C. Rules and the problems concerning international arbitrations generally, which appear to me to raise questions of principle, and then at the end with the additional factor of the defendants' financial position.

The applicable law

It is convenient to begin by summarising the general law which provides the background to the issues, even though there is substantially no controversy about it between the parties. Before the Arbitration Act 1934, the power to order security for costs in favour of a defendant (or a plaintiff as defendant to a counterclaim) only existed in relation to actions in the courts, but since 1934 this power has been extended to arbitrations, as explained below. Although always discretionary, such orders have been the norm if a defendant to an action is resident here and the plaintiff is a non-resident with no assets within the jurisdiction. The reason, obviously, is that, in the event of the English defendant winning the action and being awarded his costs, he should not be exposed to the difficulties, expense and delay of seeking to enforce the order for costs against the plaintiff

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- A somewhere abroad. The fact that the grant or refusal of an order for security for costs against non-resident plaintiffs is discretionary has been made explicit by a change in the wording of the present R.S.C., Ord. 23 in comparison with the former Order 65. Order 23 provides expressly that the court may make an order for security for costs against (inter alios) plaintiffs who are ordinarily resident outside the jurisdiction "if, having regard to all the circumstances of the case, the court thinks it just to do so." But the recent decisions do not suggest that there has been any change in the normal practice of making such orders in favour of English defendants against foreign plaintiffs who are outside the jurisdiction and have no assets in this country.

- C This is the position in relation to actions in the courts. However, the problem in the present case—if one has regard to the position of the original contracting party, Bank Omran, which had no connection with, or assets in, this country—is unlikely to arise in litigation. Defendants in this position are unlikely to be sued here in practice, even though leave to serve them out of the jurisdiction may be given pursuant to R.S.C., Ord. 11. However, such situations frequently arise in relation to arbitrations, since foreign parties frequently contract on the basis that any disputes arising out of their contracts should be resolved by arbitration in this country, as in the present case. Such agreements may take different forms, to which I turn in a moment. First, it is necessary to summarise the position concerning the procedural law applicable to arbitrations held in this country.

- E The fundamental principle in this connection is that under our rules of private international law, in the absence of any contractual provision to the contrary, the procedural (or curial) law governing arbitrations is that of the forum of the arbitration, whether this be England, Scotland or some foreign country, since this is the system of law with which the agreement to arbitrate in the particular forum will have its closest connections: see *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583. Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law: see, e.g., Dr. F. A. Mann, "Lex Facit Arbitrum," *International Arbitration (Liber Amicorum for Martin Domke)* (ed. Sanders) (1967), p. 157, pp. 167 et seq. A particular feature of English law, however, is the relationship between the courts and arbitrations, which is well known to be considerably closer than in most civil law jurisdictions, as well as in the United States. This involves a measure of control or supervision by the courts over arbitrations, as well as various means whereby the courts assist references to arbitration and the conduct of arbitrations. Thus, our courts exercise a measure of control over the awards of arbitrators on questions of law, although this aspect has been deliberately and significantly curtailed by the Arbitration Act 1979 and we are not concerned with it here. The relevant aspect of the relationship between the courts and arbitral tribunals, proceeding on parallel lines, is that the courts are empowered by statute to lend their assistance to arbitrations in different ways. For present purposes the relevant powers are those listed in section 12(6) of

the Arbitration Act 1950. This provides that in respect of certain matters, as referred to below:

“The High Court shall have, for the purpose of and in relation to a reference [to arbitration], the same power of making orders in respect of—(a) security for costs . . . as it has for the purpose of and in relation to an action or matter in the High Court: Provided that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.”

For present purposes the only such relevant power is in paragraph (a) which simply contains the words “security for costs,” re-enacting a provision of the Act of 1934. However, the other powers in this connection should also briefly be noted. Paragraph (f) of subsection (6) relates to “securing the amount in dispute in the reference,” and paragraph (h) provides for “interim injunctions or the appointment of a receiver”; indeed, it is now settled law that *Mareva* injunctions may issue in aid of arbitrations. The other powers, in summary form, concern orders for discovery of documents and interrogatories, the giving of evidence by affidavit, the examination of witnesses in England or before an examiner abroad and the preservation or sale of any goods, or the detention, preservation or inspection of any property; and other measures concerning the subject matter of the dispute.

Most of the reported cases on the exercise of these powers by the courts have arisen, as here, in connection with applications for security for costs. However, before dealing with the main situations that fall to be considered in this regard, it is convenient to state or re-state certain general propositions in the context of section 12(6).

First, as already mentioned, by agreeing to arbitrate in England the parties will, in the absence of any express or implied agreement to the contrary, be deemed to have subjected themselves to the English rules of procedure as those of the forum that they have selected, including the jurisdictions conferred on the English courts by section 12(6). Secondly, while some of the powers mentioned in section 12(6) can clearly only be exercised by the courts, such as the summoning of witnesses or the grant of injunctions, others may also be conferred upon the arbitral tribunal by agreement between the parties. These include the power to make orders for security for costs: see *Mustill & Boyd, Commercial Arbitration* (1983), p. 296. Thirdly, however, and of overriding importance, it must be borne in mind that all the powers of the courts under section 12(6) are wholly discretionary, and that their grant or refusal will take account of the applicable contractual provisions and of the requirements of justice in the circumstances of each particular case. Thus, although the parties to an English arbitration cannot exclude the statutory jurisdiction of the court, they may agree in advance that neither will apply for an order for security for costs against the other. In such cases no security will be ordered, because it would clearly be unjust to do so: *Mavani v. Ralli Bros. Ltd.* [1973] 1 W.L.R. 468. For present purposes it is unnecessary to go further by considering whether the same conclusion would necessarily also apply to other powers of the court under section 12(6), for instance to make

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A orders for discovery when the parties have agreed to a procedure that does not provide for this, if the court is nevertheless convinced that such orders have become necessary to do justice between the parties. All that needs to be said in this connection for present purposes is that the decision whether or not to make one of the various discretionary orders will always take account of the terms of the parties' contract, since the basis of arbitration rests upon consensus.

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The exercise of the discretion concerning orders for security for costs

Leaving aside cases of express or clearly implied agreement between the parties that neither should apply for security, the grant or refusal of an order for security in international arbitrations must depend upon all the circumstances of each case. However, particular regard would, I think, be given to the degree of connection that the parties or the arbitration have with this country and its legal system. Thus, if the respondent is English and the claimant is foreign, and there is no agreement that any particular rules are to apply, then an order for security is likely to be the norm, in the same way as in actions: cf. *Hudson Strumpffabrik G.m.b.H. v. Bentley Engineering Co. Ltd.* [1962] 2 Q.B. 587. On the other hand, if the parties have agreed that a particular set of rules is to apply, then the choice of rules may well be relevant in deciding how the court's discretion is to be exercised. Thus, an agreement to arbitrate here under some English arbitral rules, such as those of an English trade association, or under the terms of an English standard form of contract, with the consequence that the substantive law will also be English, may well carry weight in favour of the exercise of the discretion, even if both parties are foreign and the contract has no other connection with this country. This was the position in *Mavani v. Ralli Bros Ltd.* [1973] 1 W.L.R. 468. Per contra, if foreign parties have agreed to arbitrate in this country under some foreign or international set of rules, such as those of the I.C.C., the case for the exercise of a purely English discretionary jurisdiction must inevitably be weakened.

F All such situations involve questions of degree, depending on the circumstances of each case, which will be relevant to the exercise of the discretion. The particular combination of circumstances in the present case is that the contract provided that the arbitration should take place in the City of London, albeit that the substantive law was to be foreign, that the original contracting parties and the subject matter of the contract had no connection with this country and that the arbitration was to be conducted under the I.C.C. Rules. It is the latter factor, the parties' agreement to subject themselves to the I.C.C. Rules, that is in my view ultimately the most important one in considering the exercise of the court's discretion in this combination of circumstances, and I therefore now turn to these rules.

H *The I.C.C. Rules*

On behalf of the defendants, Mr. Glick submitted that the I.C.C. Rules are an exhaustive code covering every aspect of arbitrations conducted under their terms, and that, on their true construction, they

expressly or by necessary implication exclude all applications to the local courts other than “for interim or conservatory measures,” as explained below. For the reasons discussed later I cannot accept these submissions, and I do not think that they were accepted by Bingham J. A less extreme submission, however, which was—I think—accepted by the judge, is that the rules provide a code that is intended to be self-sufficient, in the sense that it is capable of covering all aspects of arbitrations conducted under the rules, without the need for any recourse to any municipal system of law or any application to the courts of the forum. On this basis Mr. Glick submitted that the scheme of the rules, broadly speaking, is inconsistent with the application for security for costs made by the plaintiffs against the defendants in the present case and with the exercise of the court’s discretion in favour of the order which is sought. It is this submission that in my view requires careful examination.

I think that it is true that the rules provide a code that is intended to be self-sufficient in the sense explained above. The detailed provisions of the rules are designed to cover every step in an arbitration conducted under their terms, from the inception of the arbitration to the issue of a final award that is designed to be enforceable against the unsuccessful party. If one traces these steps through the rules, they proceed (though not always in numerical order) from the original request for arbitration and the answer to the request to the appointment of the tribunal; then to the pleadings, including counterclaims; then to the conduct of the proceedings and the procedural rules to be applied; and finally to all aspects of the award. They also deal with the costs of the arbitration in two distinct respects. First, there is that part of the costs that is payable to the I.C.C. In the terminology current in relation to English arbitrations, these costs can broadly be described as “the costs of the award,” i.e. those that are secured to the I.C.C., and through the I.C.C. to the arbitral tribunal and its experts, by advance deposit. Secondly, there are the respective legal costs of the parties arising out of the arbitration apart from the costs of the award. In relation to the latter there is no provision for the giving of any security in advance, and this is clearly significant. However, it is also significant that, in the same way as under section 18 of the Act of 1950, the arbitrators are expressly required by the rules to deal with these costs in their final award; and I return to this aspect later.

This is the general picture. However, in order to analyse the scheme of the rules in the context of the courts’ discretion to make orders for security for costs pursuant to section 12(6)(a) of the Act of 1950, it is necessary to set out a number of their provisions and to discuss these in some detail:

“Article 8. *Effect of the agreement to arbitrate.* (1) Where the parties have agreed to submit to arbitration by the International Chamber of Commerce, they shall be deemed thereby to have submitted ipso facto to the present Rules.”

This requires no further comment.

“(5) Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory

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A measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator. Any such application and any such measures taken by the judicial authority must be notified without delay to the Secretariat of the Court of the Arbitration. The Secretariat shall inform the arbitrator thereof."

B This is the provision upon which Mr. Glick mainly relies for the submission that the present application for security for costs is excluded under the I.C.C. Rules, either expressly or by necessary implication. He submits that an application for security for costs is not one "for interim or conservatory measures." Alternatively, if such an application is covered by these words, then he submits that there were no "exceptional circumstances" in the present case that justified such an application as late as February 1983, since the file had been transmitted to the tribunal many months previously and the terms of reference had been settled and agreed in October 1982. As regards the financial position of the defendants, to which I refer later in this judgment, he submitted in this connection—and Bingham J. rightly accepted—that there had been no relevant change, and therefore no exceptional circumstances, to justify the lateness of the application.

D For the plaintiffs, Mr. Littman Q.C. was inclined to agree that an application for security for costs is not one "for interim or conservatory measures." Similar words appear in sections 25 and 27 of the Civil Jurisdiction and Judgments Act 1982, and in particular in article 24 of the E.E.C. Judgments Convention that is scheduled to it. I share both parties' doubts as to whether the peculiarly English procedure of providing for security for costs is intended to be covered by these words, which stem from the context of other systems of law. However, I find it unnecessary to express any concluded view on this point, since I agree with Mr. Littman's submission that article 8(5) cannot in any event be construed as excluding such applications by necessary implication; and it clearly does not exclude any such application expressly. Thus, depending on the law of the forum, there are no doubt various kinds of application that may be made by one of the parties to the courts of the forum in connection with an arbitration that would go beyond applications for "interim or conservatory measures." In England, for instance, applications may be made to remove an arbitrator for misconduct by virtue of section 23 of the Act of 1950, and similar—though perhaps less far-reaching—powers of intervention no doubt exist in other systems. These can hardly have been intended to be excluded by article 8(5) as a matter of necessary implication.

G Nevertheless, since article 8(5) is the only provision in the rules that expressly refers to applications to the courts of the forum, and since the present application does not fall within its scope for one or other of the reasons put forward by Mr. Glick, it seems to me that this provision must on balance weigh against the exercise of the court's discretion in the present case.

H There then follows article 9, the first of the provisions dealing with costs, which is in the following terms:

“Deposit to cover costs of arbitration. (1) The court” i.e., the I.C.C. Court of Arbitration “shall fix the amount of the deposit in a sum likely to cover the costs of arbitration of the claims which have been referred to it. Where, apart from the principal claim, one or more counterclaims are submitted, the court may fix separate deposits for the principal claim and the counterclaim or counterclaims. (2) As a general rule, the deposits shall be paid in equal shares by the claimant or claimants and the defendant or defendants. However, any one party shall be free to pay the whole deposit in respect of the claim or the counterclaims should the other party fail to pay a share. (3) The Secretariat may make the transmission of the file to the arbitrator conditional upon the payment by the parties or one of them of the whole or part of the deposit to the International Chamber of Commerce. (4) . . . The terms of reference shall only become operative and the arbitrator shall only proceed in respect of those claims for which the deposit has been duly paid to the International Chamber of Commerce.”

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These provisions of course only deal with those aspects of the costs to which I have referred compendiously as the costs of the award. They do not deal with the ordinary legal costs of the parties. Nevertheless, I think that these provisions weigh against the exercise of the court’s discretion to make an order for security for costs for at least two reasons.

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First, article 9 envisages that the costs of the award will in the first place be borne equally between the parties, even though—as appears later on in the rules—the ultimate award of costs in favour of one of the parties should include the amount deposited by it. In the present case, however, the main item claimed by the plaintiffs by way of advance security is the deposit of \$95,000 which it has paid to the I.C.C. pursuant to article 9. This, as it seems to me, is clearly inconsistent with the even-handed scheme that the rules envisage in this regard. An order for security for costs against the defendants would have the effect of compelling them to make a double deposit of this sum, first to the I.C.C., and secondly by way of security in favour of the plaintiffs.

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Secondly, though perhaps of lesser significance, there is the fact that article 9 makes provision for the giving of security in advance in relation to one part of the costs, albeit only the costs of the award, in favour of the I.C.C. and the arbitral tribunal. It makes no provision for any security in favour of either of the parties. This express provision for a prepayment of part of the costs of the arbitration by way of security appears to me to militate against any intention, in the scheme of the rules, concerning the provision of security in relation to any party’s own legal costs, even though these may ultimately turn out to be considerably greater.

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The next relevant provision is article 11.

“Rules governing the proceedings. The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to any municipal procedural law to be applied to the arbitration.”

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- A Since this provision refers expressly to the possibility of the proceedings being governed by some municipal system of law, and primarily no doubt that of the forum, and since English law, the *lex fori* in the present case, provides for application to the court under section 12(6) of the Act of 1950, it appears to me that for present purposes this provision is neutral in its effect. It is also neutral because, in the present case, the arbitrators and parties have not gone further in the terms of reference than to recite the relevant provision of the contract as already set out, which in its turn merely takes one back to the I.C.C. Rules. However, I think that article 11 is of some significance in showing that the rules were intended to be, if not exhaustive, at any rate self-sufficient in the sense indicated above, viz. in the same sense that they do not envisage the necessity for any recourse to any municipal system of law, or to the courts of the forum, in order to enable all aspects of an arbitration conducted under the I.C.C. Rules to be dealt with under the terms of the rules themselves.
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- D Article 12, headed "*Place of Arbitration*," provides that the place of arbitration "shall be fixed by the court, unless agreed upon by the parties." The only comment that I would make on this is that, where England has been selected by the parties as the contractual forum in advance, as in the present case, there would no doubt be a substantially stronger case for exercising the statutory discretion to make an order for security for costs than if this selection had been made subsequently by the I.C.C.

Next, article 20 deals with costs generally and is of considerable importance:

- E "*Decision as to costs of arbitration.* (1) The arbitrator's award shall, in addition to dealing with the merits of the case, fix the costs of the arbitration and decide which of the parties shall bear the costs or in what proportions the costs shall be borne by the parties. (2) The costs of the arbitration shall include the arbitrator's fees and the administrative costs fixed by the court in accordance with the scale annexed to the present Rules, the expenses, if any, of the arbitrator, the fees and expenses of any experts, and the normal legal costs incurred by the parties."
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- G Appendix III to the rules contains a schedule of costs, but it is unnecessary to refer to it further for present purposes. The importance of article 20 is, as already mentioned, that it expressly requires the arbitral tribunal to deal with both aspects of the costs of the arbitration in its awards, viz. the costs to which I have referred as the costs of the award, which will have been secured by way of deposit to the I.C.C., as well as the parties' other legal costs.

Lastly, it is perhaps appropriate to quote article 26, the final provision:

- H "*General rule.* In all matters not expressly provided for in these Rules, the Court of Arbitration and the arbitrator shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law."

The significance of articles 20 and 26 for present purposes, in addition to the matters already mentioned when article 20 is read in the context of article 9, is that these provisions require all costs to be dealt with by the

arbitral tribunal in their award, and that they expressly envisage that the award should, so far as possible, be made enforceable at law in favour of the successful party. I think that this is significant, not only in the context of the I.C.C. Rules but also in the context of international arbitrations generally, where questions of enforcement are always a primary preoccupation of all the participants. Most of the important trading nations are now parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), and many of those that are not remain parties to the Convention on the Execution of Foreign Arbitral Awards concluded at Geneva in 1927. It is to this international network of enforceability of arbitral awards that parties mainly have regard when they enter into arbitration under international contracts. I do not think that they differentiate in this respect between the enforceability of the substantive award and that of the award as to costs. The parties hope that, if an arbitration should ensue, they will be successful, and that the ultimate award, dealing both with the claim or counterclaim and the legal costs, will prove to be enforceable. However, I do not think that they envisage any advance provision being made by way of security, whether for or against them, in relation to any of the matters to be dealt with in the award, unless they agree to arbitrate under rules that make express provision in this regard or possibly under rules governed by some municipal system of law which expressly provides for such security.

In this connection there is the additional factor that the power of the English courts under section 12(6)(a) of the Act of 1950 is a somewhat exceptional procedure in comparison with most systems of law. There was evidence on the present appeal that no similar power exists either in Iran or in Greece, and also indirect evidence that in the experience of a well known Swiss international lawyer "such a security is not given by the court in any Western European jurisdiction or in the United States." Mr. Littman understandably challenged this statement as being too generalised to constitute any reliable evidence. It may well be too wide, particularly in relation to other common law jurisdictions. However, I do not think that there can be any doubt that, broadly speaking, the power of our courts under section 12(6)(a) of the Act of 1950 is exceptional on the international arbitral scene.

Conclusion in principle

As it seems to me, the English courts should be slow in applying the jurisdiction to order security for costs in international arbitration unless, in the particular circumstances of each case, there is some more specific connection with this country, as discussed earlier in this judgment, than the mere fact that the parties have agreed that any arbitration is to take place in England. In the present case we are concerned with such an arbitration under the I.C.C. Rules. The judge's conclusion in this connection is mainly contained in the following passages of his judgment:

"But what is quite clear is that the detailed provisions of the Rules with respect to the giving of deposits, the payment of costs and the question of applications to local courts contain no express permission for the parties to make such application and probably by implication envisage that applications of that kind will not be made."

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- A This language may not be very precise, but I am wholly in agreement with the thought that underlies it. As I see it, the application for security for costs in the present case is one that is inconsistent with the scheme and spirit of the I.C.C. Rules: not literally inconsistent, either expressly or even by necessary implication, but sufficiently inconsistent, for the reasons explained above, to make it inappropriate in principle for the court to exercise its statutory discretion in favour of the order sought in this case.
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The financial position of the defendants

- C The final question that remains is whether the evidence as to the defendants' financial position should affect the foregoing conclusion. The plaintiffs allege, as one of their grounds for the application, that there is reason to believe that the defendants will be unable to pay the plaintiffs' costs if the plaintiffs are successful in their defence of the arbitration. By virtue of section 447 of the Companies Act 1948 this is a ground for ordering an English limited company to give security for costs. The court's jurisdiction under this section is discretionary, in the same way as under R.S.C., Ord. 23, and its exercise will depend on all the circumstances of the particular case: see *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] Q.B. 609. However, since the defendants are a foreign company, it is common ground that the plaintiff cannot rely on this provision directly but only by way of analogy. In effect their reliance on this ground can only constitute a makeweight to the exercise of the court's discretionary power that is derived from the defendants being resident outside the jurisdiction.
- E The evidence before Bingham J. indicated that the defendants appeared to be in a parlous financial position and that they might well be insolvent. He considered that this evidence was relevant to the exercise of the discretion, but he nevertheless declined to make the order. On this appeal a good deal of further evidence was adduced on behalf of the defendants by way of riposte and admitted by consent. This strongly denies that the defendants are insolvent and shows that they are engaged upon a number of important contracts in the Middle East. It also claims that part of the defendants' past financial difficulties were due to the plaintiffs' alleged repudiation of the present contract. On the other hand, the evidence before the judge also indicated that, in effect, the defendants may be in the hands of the National Bank of Greece, to which they are heavily indebted, and this picture has not been changed by the evidence admitted on appeal to this court.
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- G I agree with the judge that in considering whether or not to make an order for security for costs, in circumstances where, as here, the court has jurisdiction to do so, it is relevant to take account of the financial position of the party against whom the order is sought. But I equally agree with him that in the present case this is not a sufficient factor to outweigh the considerations that led him to the conclusion that no such order should be made. Indeed, I would go further. Since I consider that in an arbitration under the I.C.C. Rules that has no connection with this country other than that it had been agreed between foreign parties that any such arbitration was to take place here it would be inappropriate in principle
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to make an order for security for costs on the ground that the claimant is ordinarily resident abroad, I would also regard it as wrong in principle to make any such order on the ground that the claimant may be unable to pay the other party's costs if the award requires him to do so.

For all these reasons I would dismiss this appeal.

ROBERT GOFF L.J. In this case the plaintiffs are appealing against a decision of Bingham J. by which, in the exercise of his discretion, he refused to make an order under section 12(6)(a) of the Arbitration Act 1950 that the defendants, Helliniki Techniki S.A., furnish security for costs in an arbitration pending between the parties in London. The application for security was made on two grounds: (1) that the defendants, who are the claimants in the arbitration, are a company resident outside the jurisdiction (in Greece) and have no assets within the jurisdiction, and (2) that there is reason to believe that the defendants, whose solvency is said to be in question, will be unable to pay the plaintiffs' costs if they are successful in their defence in the arbitration.

The background of the matter has been set out in detail in the judgment of Kerr L.J., and I am therefore relieved of the burden of setting it out myself. As regards the applicable principles, there is a considerable amount of common ground between the parties. First, the curial law of the arbitration is English: see *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583. Secondly, the court has, by virtue of section 12(6)(a) of the Act of 1950, the same power to make an order in respect of security for costs in the arbitration as it has for the purpose of and in relation to an action or matter in the High Court. Thirdly, having regard to the provision of R.S.C., Ord. 23, r. 1 and to *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] Q.B. 609, the power to make an order for security for costs is discretionary. Fourthly, the court's discretion to exercise that power cannot (having regard to the provisions of section 12 of the Act of 1950) be ousted by agreement; but any agreement between the parties not to apply for security for costs will be a matter that can properly be taken into account by the court in exercising its discretion whether to make an order for security, and indeed will constitute a powerful argument against the making of any such order since in such circumstances it may be unjust to do so: *Mavani v. Ralli Bros. Ltd.* [1973] 1 W.L.R. 468.

Before the judge, the plaintiffs' application for security was based, as I have stated, on two very common grounds, the first being founded on R.S.C., Ord. 23, r. 1(1)(a) and the second on section 447 of the Companies Act 1948—not directly, because the defendants are not an English company, but by analogy. I shall refer later in this judgment to the evidence relating to the alleged insolvency of the defendants. The submission of the defendants was that, since the parties had by their contract agreed to arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("the I.C.C. Rules"), they had thereby agreed, expressly or impliedly, that there should be no order for security for costs. The express agreement was said to be derived from article 8(5) of the I.C.C. Rules, and the implied agreement from the I.C.C. Rules as a whole, though primarily from

A article 9 and also, I understand, from article 20. The judge accepted the latter submission. He said:

B “what is quite clear is that the detailed provisions of the Rules with respect to the giving of deposits, the payment of costs and the question of applications to local courts contains no express permission for the parties to make such application and probably by implication envisages that applications of that kind will not be made. That being so, there seems to me to be in such a case very great force in the submission made by Mr. Glick, in reliance both on the express terms of the Rules and on the implications to be drawn from them, that the court should be very slow to exercise its discretion in favour of making an order for security.”

C Later, he said:

D “the question is, I think, one of balancing the argument based by Helliniki Techniki on the language of the Rules against the grounds advanced by Mr. Chambers both on the grounds of foreign residence and insolvency, but I find that on weighing these matters up as best I can the balance comes down in favour of what I take to have been the intention of the parties as expressed in their express subjection to or choice of the rules of the I.C.C. Accordingly, and despite the arguments advanced by Mr. Chambers, I think that the proper course in this case is not to make the order for security which is sought.”

E In his argument before this court, Mr. Glick (in my judgment rightly) abandoned the argument that the parties had, by virtue of article 8(5) of the I.C.C. Rules, expressly agreed that no order should be made. He however maintained his submission that it was implicit in the I.C.C. Rules that no such order should be made; alternatively, as he put it before this court, it was inconsistent with the rules that any such order should be made. His argument ran as follows. The I.C.C. Rules provide a complete code of conduct for the arbitration. In the I.C.C. Rules, there is to be found in article 9 provision for a deposit in a sum likely to cover the costs of the arbitration, and for a separate deposit where there is a counterclaim, such deposit to be paid as a general rule by both parties in equal shares. From paragraph 2 of Appendix III to the I.C.C. Rules it appears that the costs of the arbitration in this context comprise what may broadly be called the costs of the award, viz. the arbitrators’ fees, administrative expenses, the arbitrators’ personal expenses and costs of “expertise” (i.e., costs of experts appointed by the arbitrators). Furthermore, although by article 20 the arbitrators’ award shall fix the costs of the arbitration (which in this context includes not only the matters in respect of which the deposit has been made but also the normal legal costs incurred by the parties) and decide which of the parties shall bear such costs, and in what proportion, nevertheless there is no provision in the rules for ordering either party to furnish security for the other party’s costs. It is therefore, submitted Mr. Glick, a clear implication that neither party’s costs are to be secured.

H In support of this submission, Mr. Glick also relied upon article 8(5) of the I.C.C. Rules, which provides:

"Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator. . . ."

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It was on this provision that Mr. Glick had founded his argument before the judge that the parties had expressly agreed that neither should make an application for security for costs. The argument had been to the effect that (1) an application for security for costs was an application for an interim measure; (2) such an application was only authorised under article 8(5) before the file had been transmitted to the arbitrator, or in exceptional circumstances thereafter; (3) the defendants' application was made after the file had been transmitted to the arbitrator and there were no exceptional circumstances justifying the application; therefore (4) the application was contrary to the provisions of article 8(5). This argument was abandoned, it being accepted that an application for security for costs was not an application for an interim measure within the meaning of those words in article 8(5). Nevertheless, submitted Mr. Glick, article 8(5) at least indicated the circumstances in which an application to the court was contemplated by the rules; and these did not include an application for security for costs.

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Unlike the judge, I find myself unable to accept this submission. It is of course true that the I.C.C. Rules, while providing for deposits to be made in equal shares covering the costs of the award, are silent on the question of either party providing security for the other party's legal costs. I cannot infer from that, or indeed from the I.C.C. Rules as a whole, any implicit agreement that neither party should be free to take advantage of any provision of the curial law of the arbitration under which security for costs may be applied for. In truth, the silence of the I.C.C. Rules on that matter in all probability reflects no more than that the experience of those who drew up the rules was of systems of law under which security of that kind is not ordered. The fact that the I.C.C. Rules provide for deposits to cover the costs of the award reflects only the intention that those persons for whom the I.C.C. is responsible shall have their remuneration and expenses secured; and, since the outcome of the arbitration is unknown, it is obviously sensible and just that such deposits should in general be furnished by both parties in equal shares. But the fact that security in the form of deposits for costs of that kind is required by the rules is, in my judgment, in no way inconsistent with either party taking advantage of a provision of the curial law under which security for a party's legal costs may be ordered. Indeed, the readiness of the I.C.C., as envisaged in their own rules, to extract from the parties security (in the onerous form of a deposit) for their own costs can arguably be regarded as entirely consistent with a party taking advantage of an opportunity available to him under the curial law to obtain, where appropriate, an order for security for his own legal costs. I was equally unimpressed by a submission by Mr. Glick that an award for security of costs embracing the plaintiffs' deposit to the I.C.C. was inconsistent with the "even-handed"

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- A approach to such deposits demonstrated in the I.C.C. Rules. Obviously, the rules are “even-handed” in relation to such deposits: it is only right that security given by the parties to the I.C.C. for the costs of the award should prima facie be borne by them in equal shares. But I can see no inconsistency between that requirement and the possibility that, if under the curial law one party is ordered to provide security for the other’s legal costs (which obviously, in relation to those different costs, may very well not be an “even-handed” order), such security should include security for the other party’s deposit with the I.C.C. There is of course no question of the party who furnishes such security having to duplicate his security: he simply makes his own deposit to the I.C.C., and secures the other party’s costs including the amount of that party’s deposit. Nor can I see any force in the argument founded upon article 8(5). The mere fact that reference is made in that article to a particular form of application to the court (which is in fact a form of application well known under continental systems of law) cannot impliedly exclude other forms of application available under the curial law; indeed, if that argument were right, it could likewise be argued that an application under section 12(6)(b) of the Act of 1950 for an order for discovery of documents should be inhibited by reason of the implied agreement of the parties not to make any such application.
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- E I do not consider that the argument can be made any more persuasive by advancing it not on the basis of an implication but on the basis of “inconsistency with the rules.” Indeed there is a certain imprecision in this submission which demands that the submission itself should be analysed and defined. As I see it, the submission can only mean one of two things. It can mean first that an application for security for costs is inconsistent with the rules in the sense that it would be inconsistent with the agreement of the parties, as contained in the rules as incorporated in their contract, to make any such application: but that is no more than saying that the parties have, by incorporating the rules in their contract, expressly or impliedly agreed not to make any such application—which is precisely the same as the argument that I have already considered and rejected.
- F Alternatively, it can mean that the rules, being silent on the matter, do not envisage any such application being made. That however cannot of itself inhibit any application for security for costs. As I have already indicated, the reason for this silence is in all likelihood to be found in the simple historical fact that those who framed the I.C.C. Rules were familiar only with systems of law under which such security is not ordered. At the most, this silence in the I.C.C. Rules may be regarded as a factor (though, in my judgment, taken by itself a very minor factor) to be taken into account when the court considers whether to exercise its discretion to make an order for security for costs. It is important, however, that the court should not be tempted to elide the two separate meanings that may be attributed to this submission, with the effect that the one derives, illegitimately, colour from the other. Either the parties have, by incorporating the I.C.C. Rules in their contract, expressly or impliedly agreed not to apply for security for costs, or they have not. In my judgment, plainly they have not.
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It follows that, in my view, the judge erred in the exercise of his discretion, since he proceeded on the basis of a construction of the I.C.C. Rules, as incorporated in the contract between the parties, that I am unable to accept. I therefore proceed to consider how, in my judgment, the discretion should be exercised. I shall consider first the application for security on the basis that the defendants—the claimants in the arbitration—are resident outside the jurisdiction and have no assets within the jurisdiction.

Now I wish to say at once that I do not consider it right that nowadays a court, in considering such an application, should always approach the matter in the same way as it approaches an application by a defendant in an action in the High Court. Historically, the basis of an application by such a defendant has been that if he were not provided with security for his costs by a plaintiff resident outside the jurisdiction who had no assets here, he might if successful in his defence be unable to recover his costs from the plaintiff; the order for security for costs is intended to prevent the occurrence of any such injustice and so put him in at least as strong a position in that respect as if he had been sued by a party who was resident within the jurisdiction. But it by no means follows that the same practice should invariably be followed in international arbitrations which, because held in England, are subject to English law as the curial law. I appreciate that in the case of many arbitrations held in this country the practice is at present to award security for costs; but these are in general commercial arbitrations of a type that are regularly held in London under standard English forms of contract generally governed by English law, and so have a very close connection with the English jurisdiction. Since the war, however, we have seen the development of a different type of commercial arbitration. A typical example is an arbitration arising out of a substantial construction or civil engineering contract, under which the contractor undertakes to carry out works in a foreign country. Such contracts commonly contain an arbitration clause providing for arbitration in a neutral forum (i.e., in a country other than the country of either contracting party), and for a neutral arbitrator or chairman of the arbitral tribunal. Such contracts may incorporate arbitration rules of a body such as the I.C.C. to govern the conduct of the arbitration. If the contract is silent on the forum, that body may itself select a neutral forum where the arbitration will be held.

Side by side with the growth of this type of international arbitration, there have been developments in the provisions made for enforceability of awards in international arbitrations. Before the war, there was the Geneva Convention of 1927. Now there is the New York Convention of 1958. The latter convention provides, in article III, that each contracting state shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the convention. Many important states are now parties to the New York Convention; and in this country the Arbitration Act 1975 was enacted to give effect to the convention, to which this country is a party. Parties to international arbitrations must nowadays frequently rely upon the convention for the purpose of enforcing awards; and when the award contains (as it will, for

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example, where the arbitration is conducted in accordance with the I.C.C. Rules) an order for costs, the enforcement of the award will include enforcement of an order for costs comprised in the award.

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Parties to such an arbitration may well choose London as a convenient neutral forum. There are now excellent, and rapidly developing, services available in London for the conduct of such arbitrations. The English language is frequently a language familiar to both parties, and often too the language of the contract: for that reason, too, London may be a suitable forum. The services of very experienced solicitors, counsel, experts and arbitrators are readily available here. So London may be chosen as a convenient neutral forum; or it may be nominated as such by a body such as the I.C.C.

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The holding of such an arbitration in London appears to me to be a far cry from litigation where a foreign litigant comes to this country to sue an English resident in the English courts. Even in such litigation, the case for the exercise of the discretionary power to award security for costs is perhaps weakening, as judgments and orders become more readily enforceable overseas. But if parties simply choose to arbitrate here as a matter of convenience, in the circumstances that I have described, the policy that historically underlies an order for security for costs by a foreign litigant appears to me to be, in most cases, inapplicable. It is of course true that English law will, as the curial law, apply to the conduct of the arbitration; and the parties will, by holding their arbitration here, subject themselves for that purpose to English law, which confers upon them the right to invoke the discretionary power of the court to award security for costs. But it does not follow that, in such cases as I have described, it would be right for the court to exercise its discretion to award security in any particular case. It is not only that the choice of England as a forum is a mutual, not a unilateral, choice. In addition, the parties will in most cases both be resident outside the jurisdiction; England will generally have been chosen as a neutral forum on pure grounds of convenience; in some cases it may be pure accident which party is claimant and which respondent; and it may very readily be inferred in most cases that the parties will be proceeding in reliance upon the ordinary procedure for enforcement of awards (including awards as to costs), often under the provisions of the New York Convention. The force of these points must be even greater where it is not the parties who have selected England as a forum but a body such as the I.C.C. acting on the parties' behalf.

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Of course, in considering whether to exercise its discretion to make an order for the provision of security for costs by a foreign claimant in an international arbitration, the court must consider all the circumstances of the particular case. But in the case of international arbitrations of the kind that I have described the court should, in my judgment, as a general rule decline to make an order for security for costs against a foreign claimant unless there are special circumstances that warrant it; because the policy underlying an order for the provision of security for costs by a foreign claimant is not generally applicable in such cases.

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In reaching this conclusion, I wish to state first that I should not be understood to be expressing any view about awards of security for costs in the case of ordinary commercial arbitrations of the type that have for

many years been regularly held in this country, in particular arbitrations on maritime disputes and in the commodity trades. I mention in parenthesis that a comparable distinction has been drawn between different types of arbitration, for the purposes of appeals to the court, in the Arbitration Act 1979. Nor should I be understood as suggesting that there is any special barrier against parties in international arbitrations taking advantage of other provisions of English law as the curial law relating, for example, to the conduct of the arbitrations (including discovery of documents) or to interim measures and orders. My observations should be understood as concerned only with the exercise of the court's discretion to award security for costs.

It follows from what I have said that, in my judgment, this being a typical international arbitration of the kind I have described, *prima facie* no order for security for costs should be made against the defendants as foreign claimants unless there are special circumstances justifying such an order. I add in parenthesis that, since Greece is a party to the New York Convention, there seems to be no reason why an award in the arbitration in favour of the plaintiffs, including any award as to costs, should not be enforceable by them against the defendants in Greece under the provisions of that convention. I also add that, in reaching this conclusion, I do not attach any particular weight to the fact that the parties have agreed to arbitration in accordance with the I.C.C. Rules, save that that fact serves to emphasise the character of the international arbitration with which we are here concerned. A similar conclusion could well have been reached in this case if the parties had agreed to incorporate some other set of rules, or indeed no rules at all. The solution to the present problem must, I consider, lie in a realistic appreciation of the character of the relevant arbitrations and the circumstances in which England comes to be chosen as the forum, rather than in squeezing indications, often with great difficulty, out of rules the draftsman of which in all probability never even addressed his mind to the question of security for costs. Indeed, it is theoretically possible that there could be arbitrations under the I.C.C. Rules that are not of the character that I have described, in which it might be proper to make an award for security. But in practical terms, having regard to the character of arbitrations conducted under the I.C.C. Rules, I cannot myself conceive of any such case.

For the plaintiffs, however, it is submitted that there are in the present case special circumstances arising from the suspected insolvency of the defendants. In my judgment, if a claimant in an international arbitration held in this country is an English or foreign company as to which it appears by credible testimony that there is reason to believe that it will be unable to pay the costs of the respondent if successful in his defence, then it would be proper for the court, in an appropriate case, by virtue of section 447 of the Companies Act 1948 or by analogy with that section, to exercise its discretion to order the claimant to furnish security for the respondent's costs. The policy underlying an order for security in such a case is untouched by the considerations that I have mentioned, which in my judgment negative the policy of ordering security for costs on the ground only that the claimant is resident outside the jurisdiction. It follows that I am unable to accept the view expressed by the judge that the

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- A insolvency of a claimant company (if such be the case) is a matter to be weighed in the balance with the effect of incorporation of the I.C.C. Rules. Such matters are not, I consider, comparable. It is necessary to decide, as a matter of policy, whether in an international arbitration of the kind that I have described it may be proper for the court to exercise its discretion to order an insolvent claimant company to furnish security. In my judgment, it may be proper to do so. It must, however, be borne in mind that the making of an order for security for costs under section 447, directly or by analogy, is discretionary and that security will not be ordered as a matter of course: see *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] Q.B. 609, 626, where various matters that may be taken into consideration are listed by Lord Denning M.R.
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- C I turn, then, to consider the evidence about the financial state of the defendants. The plaintiffs relied upon a Dun & Bradstreet report that referred (on the basis of reports by informants) to many protested bills, payment orders and seizures, and some bankruptcy petitions, in the years 1978–82, and to information that “due to the political situation in Iran (the construction work there has ceased) and delay in payment from the Greek Government for public works” the defendants had experienced severe difficulties, and further stated that the defendants were now under the management of the National Bank of Greece, due to debts owed to the bank reported to amount to approximately 2.5 billion drachmas. In answer to this evidence, the defendants submitted evidence before the judge (1) identifying petitions for bankruptcy that had been made, and stating that all had been settled; (2) stating that “it is usual and standard practice for lawyers in Greece to file petitions for bankruptcy against debtors even for very small and insignificant amounts,” and that “the same procedure is also adopted for short time delays of payment which may arise from temporary cash flow difficulties,” the procedure being adopted by Greek lawyers in order to exercise maximum pressure on debtors to settle debts immediately as a declaration of bankruptcy involves serious consequences; (3) further stating that the Dun & Bradstreet report was wrong in referring to the defendants as being under the management of the National Bank of Greece, though the shares of the defendants had been pledged to the bank—we were told, to secure a debt of 3.5 billion drachmas owed by the defendants to the bank. The evidence also showed the defendants to be involved in a number of substantial construction projects in Greece and Iraq, which were progressing towards completion, and stated that the net worth of the defendants in 1981 was about 2.25 billion drachmas, excluding the value of the defendants’ claim against the plaintiffs. This evidence was supplemented by further evidence before this court, including financial statements relating to the affairs of the defendants. The overall picture to be derived from this evidence is of a substantial construction company which has indeed experienced financial difficulties, primarily in relation to its work in Iran under its contract with the plaintiffs, no doubt due to the political difficulties in that country; but which is very much a going concern, apparently with financial support from the National Bank of Greece. This evidence, in my judgment, falls short of evidence necessary to establish the basis for an order for security for costs under section 447 of the Act of 1948, directly or by analogy.
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In all the circumstances, therefore, I do not consider this to be an appropriate case for the court to exercise its discretion to order security for costs. For these reasons, I would dismiss the appeal. A

WALLER L.J. I would dismiss this appeal for the reasons given by Kerr L.J.

Appeal dismissed with costs. B
Leave to appeal refused.

Solicitors: Stephenson Harwood; Denton Hall & Burgin.

M. G. C

WHITTAKER AND ANOTHER v. CAMPBELL

1983 May 3; 20

Robert Goff L.J. and Glidewell J. D

Crime—Theft—Taking conveyance without authority—Owner's consent obtained by means of fraudulent misrepresentation—Whether "consent" vitiated—Theft Act 1968 (c. 60), s. 12(1)

The defendants, neither of whom held a full driving licence, represented to a director of a vehicle-hire firm that the first defendant was D., the holder of a full driving licence, and produced D.'s licence. Acting upon that misrepresentation, the director agreed to their hiring a van, and the first defendant signed D.'s name on the hire agreement. The director would not have agreed to the hire had he known that neither defendant held a full driving licence and that they would consequently not be insured to drive the van. The defendants were convicted before justices of taking the van without the owner's consent or other lawful authority, contrary to section 12(1) of the Theft Act 1968.¹ Their appeals to the Crown Court were dismissed on the ground that the director of the hire firm had not in law consented to their taking the van since the deception as to the first defendant's identity had vitiated his de facto consent. E

On appeal to the Divisional Court by way of case stated:—
Held, allowing the appeal, that there was no general principle of law that fraud vitiated consent; that on the true construction of section 12(1) of the Theft Act 1968, and in view of the mischief to which it was directed, where a person had given de facto consent to another to drive a conveyance owned by him, that consent was not vitiated by reason of its having been obtained by means of a fraudulent deception perpetrated by the other and F G H

¹ Theft Act 1968, s.12(1): "... a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use . . ."