HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 43

on appeal from: [2003] EWCA Civ 1159

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Lesotho Highlands Development Authority (Respondents)
v.
Impregilo SpA and others (Appellants)

Appellate Committee

Lord Steyn
Lord Hoffmann
Lord Phillips of Worth Matravers
Lord Scott of Foscote
Lord Rodger of Earlsferry

Counsel

Appellants:
Ian Glick QC
Neil Kitchener
(instructed by Slaughter & May)

Respondents:
Nicholas Dennys QC
James Howells
(instructed by White & Case)

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LORD STEYN

My Lords,

1. This appeal raises issues regarding the jurisdiction of arbitrators under the Arbitration Act 1996 which are of great importance for the effective functioning of the statute.

2. It arises from an award made by three experienced ICC arbitrators, sitting in London as the seat of the arbitration, in disputes under a construction contract governed by the law of Lesotho. The arbitrators exercised or purported to exercise two powers under the Arbitration Act 1996 viz to make an award in any currency in terms of section 48(4) and to grant pre-award interest in terms of section 49(3). The relevant provisions read as follows:

> 48. (1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.
>
> (2) Unless otherwise agreed by the parties, the tribunal has the following powers.
>
> (3) . . .
>
> (4) The tribunal may order the payment of a sum of money, in any currency.
>
> (5) . . .
>
> 49. (1) The parties are free to agree on the powers of the tribunal as regards the award of interest.
>
> (2) Unless otherwise agreed by the parties the following provisions apply.

(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case –

(a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;

(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment."

The central issue before the House is whether the arbitrators exceeded their powers under section 68(2)(b) of the Act.

3. Section 69 provides for a right of appeal on "a question of law", which is defined under section 82(1) as "a question of the law of England". The parties are free to exclude this right of appeal by agreement. They did so by ICC Rule 28.6 in the case before the House. Section 68, so far as material, reads as follows:

"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award . . .

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

. . .

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);"

The question arises how section 68(2)(b) and section 69, so far as the latter excludes a right of appeal on a question of law, are to operate. Specifically, can an alleged error of arbitrators in interpreting the underlying or principal contract be an excess of power under section 68(2)(b), so as to give the court the power to intervene, rather than an

error of law, which can only be challenged under section 69 if the right of appeal has not been excluded?

I. The contract

4. In 1991 the Lesotho Highlands Development Authority engaged a consortium of seven companies from the United Kingdom, South Africa, Italy, Germany and France to construct the Katse Dam in Lesotho. Collectively the contracting companies were referred to as the Highlands Water Venture. The contract was made on 15 February 1991 and was concluded on the standard FIDIC Conditions of Contract (4th edition) with terms and additions. The contract was governed by the law of Lesotho.

5. The contract provided that claims and disputes would in the first instance be determined by the engineer appointed by the employer. If the parties were not satisfied with the engineer's decision, they were entitled to resort to arbitration. The arbitration clause provided for arbitration under the rules of the ICC. Those rules provide that all parties agree, so far as they are allowed to do so, to forego any right of appeal to the courts. This is an effective exclusion agreement of the right of appeal on a point of law under section 69.

II. Performance

6. On 1 February 1991 the works commenced. On 26 February 1998 the taking over certificate for the whole of the contract works was issued.

III. Claims

7. In the course of the contract, the contractors made a number of claims for reimbursement of increased costs and for upwards adjustments to prices and rates. These claims included:

(a) a claim for additional costs incurred due to an increase in Lesotho vehicle licence fees (claim 12);

(b) a claim for reimbursement of consequential costs resulting from the employer's instruction to increase labour wage rates (claim 37);

(c) a claim in respect of variations to the contract works (claim 53/66); and

(d) a claim for reimbursement of additional costs incurred as a result of the engineer's instruction to use increased amounts of shotcrete (claim 62).

The claims were rejected by the employer and were referred to the engineer for decision under the agreed dispute resolution procedure. The engineer rejected the claims. The contractors then referred these claims (and other claims) to ICC arbitration as provided in the contract. On 29 October 1999 the arbitration was commenced.

IV. The terms of reference

8. On 29 September the parties and the arbitrators signed ICC terms of reference. Under paragraph 4 of the terms of reference two issues referred to the tribunal were (1) the currency or currencies of any award and (2) whether any interest should be paid on sums found due. Paragraph 6 of the terms of reference contained the following provision:

> ". . . The arbitrator shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the engineer related to the dispute, provided always that the arbitrator shall be bound to issue in writing to each party, including the engineer, fully documented reasons for and derivation of the said final settlement."

The terms of reference further read as follows:

> "7.1 As the seat of the arbitration is to be London, the dispute is to be finally settled in accordance with the provisions of the Arbitration Act 1996 (UK) (which will apply in lieu of the Arbitration Act No. 12 of 1980 of Lesotho) and the rules of arbitration

of the International Chamber of Commerce in force as from 1 January 1998.

7.2 The law applicable to the substance of the disputes pursuant to clause 5 of the conditions of particular application and the arbitration agreement referred to in paragraph 6.4 is to be that in force in the Kingdom of Lesotho.

. . .

8.1 The tribunal shall have the power to make a partial, or interim, award on any issue or matter before making a final award. Any such award or awards shall to the extent to which the tribunal considers to be appropriate, specify a single net amount (if any) to be paid by one party to the other, having regard both to the claimants' claim[s] and the respondent's counter-claim.

. . ."

V. The award

9. On 25 January 2002 the tribunal issued a partial award. The effect of the award is summarised as follows in the agreed statement of facts and issues:

> "In their partial award, the arbitrators (Gordon Jaynes, John Blackburn QC and John Uff QC) found that the following sums, 'expressed in Maloti', were due to the appellants in respect of the claims:
>
> Claim 12 - 46,659
>
> Claim 37 - 14,321,105
>
> Claim 53/66 - 3,000,713
>
> Claim 62 - 1,532,522
>
> The arbitrators held that the dates on which payment in respect of the claims were due were as follows:
>
> Claim 12 - 1 January 1997
>
> Claim 37 - 1 July 1996
>
> Claim 53/66 - 1 July 1996
>
> Claim 62 - 1 July 1997

The arbitrators decided that the partial award should be expressed in European currencies in the following proportions:

Currency	%
Italian Lira	26.34
UK Pounds	24.83
French Francs	32.12
Deutsche Marks	16.71
	100

The arbitrators (rightly or wrongly) derived these proportions from the supplement to tender schedules A and O, which form part of the contract. The arbitrators said that, 'sums presently stated in Maloti should be converted in the same ratio, *inter se*, as the four European currencies are stated.' The rates of exchange used by the arbitrators were those set out in clause 72.1 (as amended) and the supplement to tender schedules A and O. European currencies were then converted into Euros where appropriate.

The arbitrators further decided that pre-award simple interest would be awarded on the claims from the dates on which they were due at annual average rates agreed by the parties."

VI The reasons of the tribunal

10. In respect of the currency issue the tribunal relied on section 48(4) of the Act. The tribunal pointed out that the terms of reference expressly provided that the dispute shall be settled in accordance with the provisions of the 1996 Act. They stated [para 13.17]:

". . . section 48 applies 'unless otherwise agreed by the parties'. The respondent contended that the matter of currencies was dealt with under the contract. While this may provide for the currencies in which payment under

> the contract is to be made, the contract is silent as to the currency in which any arbitral award is to be given. The tribunal is of the opinion that the parties have not 'otherwise agreed' on the powers available to the tribunal, and the tribunal accordingly concludes that it has the power to order payment of any sum of money found to be due in any currency. Accordingly, while the tribunal takes careful note of the contract currencies and their stated proportions, the tribunal will express its awards in such currencies as are considered appropriate in the circumstances."

The detailed provisions in the principal contract regarding currencies do not matter but for completeness' sake they are set out in an appendix to this opinion.

11. In respect of pre-award interest the tribunal referred to the provision in the terms of reference that the dispute shall be settled in accordance with the provisions of the Arbitration Act 1996. The tribunal concluded [para 13.16]:

> "The tribunal therefore concludes, *prima facie,* that the power under section 49(3) to award simple or compound interest is available. The respondent, however, contended that the provisions dealing with interest under the contract constitute an agreement 'otherwise' which excludes the tribunal's powers under section 49(3). In the tribunal's opinion, section 60(10) of the contract cannot be read as covering the claimants' entitlement to interest upon an award given in these proceeding. The section expressly covers payments following certification. Necessarily, these proceedings are concerned with sums which have not been certified. The contention that section 60(10) effectively deprives the claimants of any interest on sums ultimately held to be due in arbitration proceedings in so far at variance with any normal commercial practice, that the tribunal could not reach such a conclusion without clear words. No such clear words are to be found in the contract and the tribunal is satisfied that it was not 'otherwise agreed' by the parties for the purpose of section 49(2). Accordingly, the tribunal concludes that the power to award interest under section 49(3) is available."

Section 60(10) of the principal contract is also contained in the Appendix to this opinion.

VII. The commercial context

12. The commercial context in which the award was made is as follows. The tribunal found that the employer had failed to pay to the contractors various sums that had been due under the contract on dates between 1 July 1996 and 1 July 1997. If these payments had been made when they ought to have been made, the employer would have made them in the contractual currencies of payment, largely Lesothan Maloti (a currency tied to the South African Rand). Between 1 July 1997, when the last of the payments should have been made, and the date of the award in January 2002, the value of the Rand, and thus of the Maloti, fell heavily. The case of the contractors was that they had no use for Maloti (other than for conversion into hard currency), because the works had long since been completed. In order to remedy the employer's failure to make the payments when they were due, the tribunal made their award in hard currencies, converted from Maloti at a rate prescribed in the contract which pre-dated the Maloti's collapse. In the result the complaint of the employer against the award relates not to the currencies in which the award is expressed but rather against the rate at which Maloti had been converted into those hard currencies.

13. The tribunal awarded interest on the payments from the times that they were due until the date of the award.

VIII. The decision of Morison J

14. On 22 February 2002 the employer challenged the decisions of the tribunal relating to the currencies of the award and pre-award interest. The challenge was made on the dual basis of lack of substantive jurisdiction under section 67 of the Act and excess of power under section 68(2)(b). Morison J ruled that the tribunal did have substantive jurisdiction. He held, however, that they had exceeded their powers by (a) expressing the award in currencies other than those stipulated for in the contract; and (b) awarding interest in circumstances not permitted under Lesotho law. Accordingly, the judge remitted the decisions on currency and interest to the tribunal with directions as to how they ought to carry out their task afresh: *Lesotho Highlands Development Authority v Impregilo SpA* [2003] 1 All ER (Comm) 22.

IX. The judgment of the Court of Appeal

15. On appeal to the Court of Appeal the employer rightly abandoned its challenge under section 67 to the substantive jurisdiction of the arbitrators. The Court of Appeal, therefore, had to consider whether the decisions of the tribunal on currency and interest were made in excess of power under section 68(2)(b). On 31 July 2003 the Court of Appeal gave its unanimous judgment upholding the decision at first instance on both points. Brooke LJ (with whom Latham LJ and Holman J agreed) concluded on the currency point:

> "[30] It follows that where there is a contract which identifies the currency of account and the currency of payment and specifies the proportions of any debt due under the contract which must be apportioned in different currencies to the different members of an international consortium, section 48(4) of the 1996 Act merely repeats in codified form what had already been established by this court in the *Jugoslavenska Oceanska* case, namely that English procedural law did not require London arbitrators to convert this substantive debt in a foreign currency into English currency for the purpose of making their award. The parties' agreement was clear on the face of their contract, and the arbitrators, standing in the shoes of the engineer, were bound to give effect to it. Section 48(4) does not create a free-standing power to choose whatever currency arbitrators might think appropriate when the terms of a contract are clear.
>
> . . .
>
> [34] In my judgment the arbitrators ought therefore to have interpreted the parties' contract in accordance with the applicable law (and there was no suggestion that the law of the Kingdom of Lesotho was in any material respect different from English law in this regard) and made an award in the currencies which the parties had agreed upon. Section 48(4) of the 1996 Act merely restated what must be taken (in the absence of evidence to the contrary) to be the effect of the substantive law of the Kingdom of Lesotho which the arbitrators were bound to apply. I therefore agree with the judge that the arbitrators exceeded their powers when they thought that section 48(4) of the 1996 Act gave them any power to depart from what the parties had agreed. I would therefore dismiss the appeal on the currency point."

In respect of interest Brooke LJ concluded:

> "[48] Where the law of a different jurisdiction, like the law of the Kingdom of Lesotho, confers a substantive right to interest *ex mora*, there is no room for any discretionary procedural power. The unpaid party to a contract is entitled as of substantive right to interest from the time when payment is contractually due. There was no need for the parties to agree the express exclusion of section 49(3) of the 1996 Act, because of the saving provision in section 49(6): '(6) The above provisions do not affect any other power of the tribunal to award interest.'
>
> [49] By article 7.2 of their terms of reference the arbitrators were bound to apply the law of the Kingdom of Lesotho to the substance of the dispute. That law was the law of the contract, and by that law the contractors were entitled as of substantive right to interest on sums which they ought to have been paid, subject to the '*duplum*' cap. Section 49(6) of the 1996 Act made provision for the power of the tribunal to award interest in these circumstances as a matter of substantive right. The arbitrators therefore exceeded their powers when they had recourse to what would have been their discretionary powers in section 49(3) to resolve a matter to which they should have applied the substantive law of the contract. The opening words of article 10(1)(c) of the Rome Convention, which refer to the limits of the powers conferred on the court by its procedural law, plainly have nothing to do with the situation with which we are concerned.
>
> [50] So far as the rate of interest is concerned, in the absence of express agreement this is a matter for the arbitrators to decide as a matter of the *lex fori* (see *Dicey* and *Morris* para 33-387: I would adopt the editors' reasoning), although they will no doubt be slow to depart from the rates of interest the parties agreed to be appropriate in relation to the non-payment of interim certificates . . ."

X. The Issues

16. The following issues arise:

(1)(a) Did the tribunal have the power to express the award in the currencies they did pursuant to section 48(4) of the Act or was any power that might otherwise have been available under that section excluded or modified by the terms of the principal contract?

(b) If the decision of the tribunal on the currency point amounted to an error of law, did it constitute an excess of jurisdiction under section 68(2)(b)?

(2)(a) Did the tribunal have the power to grant pre-award interest pursuant to section 49 of the Act or was any power that might otherwise have been available under that section excluded or modified by the terms of the principal contract or by operation of Lesotho law as the substantive law of the contract?

(b) If the decision of the tribunal on the interest point amounted to an error of law, did it constitute an excess of jurisdiction under section 68(2)(b)?"

Before I can examine these issues it is necessary to explain several contextual matters.

XI. The Ethos of the 1996 Act

17. It is important to take into account the radical nature of the changes brought about by the Arbitration Act 1996. Lord Mustill and Stewart Boyd QC *Commercial Arbitration* (*2001 Companion Volume to the Second Edition*, preface) stated:

> "The Act has however given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities . . . have been replaced by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature."

These general propositions are correct but do not fully explain the important changes which are relevant to the present case.

18. Lord Wilberforce played a large role in securing the enactment of the Arbitration Bill. During the second reading of the Bill in the House of Lords he explained the essence of the new philosophy enshrined in it: Hansard, col 778, 18 January 1996. He said:

> "I would like to dwell for a moment on one point to which I personally attach some importance. That is the relation between arbitration and the courts. *I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law - yes, its substantive law.* I have always hoped to see arbitration law moving in that direction. That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction and otherwise, and not really defining with any exactitude the relative positions of the arbitrators and the courts.
>
> Other countries adopt a different attitude and so does the UNCITRAL model law. The difference between our system and that of others has been and is, I believe, quite a substantial deterrent to people to sending arbitrations here.
> …
> How then does this Bill stand in that respect? After reading the debates and the various drafts that have been moving from one point to another, I find that on the whole, although not going quite as far as I should personally like, it has moved very substantially in this direction. It has given to the court only those essential powers which I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors."
>
> (My emphasis)

Characteristically, Lord Wilberforce did not express his understanding of the new Arbitration Bill in absolute terms. But the general tendency

of his observations, and what Parliament was being asked to sanction, is clear. It reflects the ethos of the 1996 Act.

XII. Approach to the interpretation of the 1996 Act

19. It is also necessary to consider how the 1996 Act should be interpreted. In his speech already cited Lord Wilberforce pointed out that "Many laymen have to participate in arbitrations and many arbitrations are conducted by people who are not lawyers" (col 777). Can they realistically be asked to interpret the 1996 Act in the light of pre-existing case law? Clearly not. In *Seabridge Shipping AB v AC Orssleff's EFtF's A/S* [1999] 2 Lloyd's Rep 685, 690 Thomas J (now Thomas LJ), a judge with enormous experience in this field, made valuable observations on which I cannot improve. He said, at p 690:

> "One of the major purposes of the Arbitration Act 1996 was to set out most of the important principles of the law of arbitration of England and Wales in a logical order and expressed in a language sufficiently clear and free from technicalities to be readily comprehensible to the layman. It was to be 'in user friendly language'. (See the Report on the Bill and the Act made by the Departmental Advisory Committee, published in Arbitration International, vol 13, at p 275.)
>
> As this has been the actual achievement of the Act, it would in my view be a retrograde step if when a point arose reference had to be made to pre-Act cases. Reference to such cases should only generally be necessary in cases where the Act does not cover a point - as, for example, in relation to confidentiality or where for some other reason it is necessary to refer to the earlier cases. A court should, in general, comply with the guidance given by the Court of Appeal and rely on the language of the Act. International users of London arbitration should, in my view, be able to rely on the clear "user-friendly language" of the Act and should not have to be put to the trouble or expense of having regard to the pre-1996 Act law on issues where the provisions of the Act set out the law. If international users of London arbitration are not able to act in that knowledge, then one of the main objectives of the reform will have been defeated."

The reference to an earlier decision of the Court of Appeal is to *Patel v Patel* [2000] QB 551. I would respectfully endorse the observation in *Seabridge.*

XIII. The seat of the arbitration

20. The Act is engaged where the "seat" of the arbitration is in England and Wales or Northern Ireland: sections 2(1). This is a reference to "the juridical seat" of the arbitration designated, inter alia, by the parties to the arbitration agreement: section 2. The determination of the juridical seat of the arbitration as England (as was done in the present case) is the gateway to the powers of the tribunal spelled out in many provisions of the Act. In setting out the powers of a tribunal the 1996 Act often uses the permissive expression "the parties are free to agree". Subject agreements to the contrary, the relevant powers in the present case are section 48(4) (currency) and section 49(3) (pre-award interest.)

XIV. The independence of the arbitration agreement

21. It is part of the very alphabet of arbitration law, as explained in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, 724-725, per Hoffmann LJ (now Lord Hoffmann) and spelled out in section 7 of the Act, that the arbitration agreement is a distinct and separable agreement from the underlying or principal contract. It is in the arbitration agreement, read with the curial law, in this case the Arbitration Act 1996, that the powers of the tribunal are to be found and not in the underlying contract. In the present case one is dealing with an ICC arbitration agreement. In such a case the terms of reference which under article 18 of the ICC rules are invariably settled may, of course, amend or supplement the terms of the arbitration agreement. The terms of reference too are a source of the powers of the arbitrator. This is the context in which the terms of reference in the present case expressly provided for the dispute to be settled in accordance with the provisions of the 1996 Act.

XV. The currency point

22. Section 48 provides that unless otherwise agreed by the parties, the tribunal may order the payment of a sum of money, in any currency.

Any agreement to the contrary is only effective if in writing: section 5(1). The Court of Appeal did not take into account the radical nature of the alteration of our arbitration law brought about by the 1996 Act. Moreover, the Court of Appeal approached the construction of section 48(4) through the lens of case law pre-dating the 1996 Act. The Court of Appeal cited *In re United Railways of Havana and Regla Warehouses Ltd* [1961] AC 1007; *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1974] QB 292; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443; and *Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag Svea* [1979] AC 685. But for this approach the Court of Appeal would have had no reason to disagree with the natural and commercially sensible construction of the wide words of section 48(4) which the tribunal adopted. I would hold that the power of the tribunal under section 48(4) was unconstrained and was available to the tribunal. If this view is correct, section 48(4) has a businesslike meaning which will assist the arbitral process. I would rule that it is the correct view. On this simple basis I would reverse the Court of Appeal on the currency point.

23. Contrary to the view I have expressed, I will now assume that the tribunal committed an error of law. That error of law could have taken more than one form. The judge (para 25) and the Court of Appeal (para 35) approached the matter on the basis that the tribunal erred in the interpretation of the underlying contract. Another possibility is that the tribunal misinterpreted its powers, under section 48(4) to express the award in any currency. Let me approach the matter on the basis that there was a mistake by the tribunal in one of these forms. Whichever is the case, the highest the case can be put is that the tribunal committed an error of law.

24. But the issue was whether the tribunal "exceeded its powers" within the meaning of section 68(2)(b). This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under section 48(4). The jurisdictional challenge must therefore fail.

25. Given the general importance of the point it is necessary to explain it in a little more detail. The reasoning of the lower courts,

categorising an error of law as an excess of jurisdiction, has overtones of the doctrine in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 which is so well known to the public law field. It is, however, important to emphasise again that the powers of the court in public law and arbitration law are quite different. This has been clear for many years, and is now even more manifest as a result of the enactment of the 1996 Act. Sir Michael J Mustill (now Lord Mustill) and Steward Boyd QC (*Law and Practice of Commercial Arbitration in England,* 2nd ed (1989) p 555) explained:

> "If . . . [the arbitrator] applies the correct remedy, but does so in an incorrect way - for example by miscalculating the damages which the submission empowers him to award - then there is no excess of jurisdiction. An error, however gross, in the exercise of his powers does not take an arbitrator outside his jurisdiction and this is so whether his decision is on a matter of substance or procedure."

See also my judgments in K/S A/S *Bill Biakh v Hyundai Corporation* [1988] 1 Lloyd's Rep 187, 190; *Bank Mellat v GAA Development and Construction Co* [1988] 2 Lloyd's Rep 44, 52.

26. In order to understand the radical nature of the alteration of our arbitration law brought about by section 68 of the 1996 Act it is necessary to refer to the pre-existing law. Section 68 replaced sections 22 and 23 of the Arbitration Act 1950. Section 22(1) of the 1950 Act provided:

> "In all cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire."

The sweeping generality of this provision is clear. In the case law the remedy of remission was held to be available on the grounds of "procedural mishap" or "misunderstanding." Section 23 provided:

> "(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.

> (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside."

In the eighties and nineties there was persistent criticism about the excessive reach of these powers of intervention. The Departmental Advisory Committee on Arbitration Law ("The DAC") under the chairmanship of Lord Justice Saville (now Lord Saville of Newdigate) explained in its Report on the Arbitration Bill, at p 11, paras 21-22:

> ". . . there is no doubt that our law has been subject to international criticism that the courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes.
>
> Nowadays the courts are much less inclined to intervene in the arbitral process than used to be the case. The limitation on the right of appeal to the courts from awards brought into effect by the Arbitration Act 1979, and changing attitudes generally, have meant that the courts nowadays generally only intervene in order to support rather than displace the arbitral process. We are very much in favour of this modern approach . . ."

A major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process.

27. The legislative technique adopted to achieve this purpose was spelled out explicitly in the Report on the Arbitration Bill and in particular in discussion of clause 68, which became section 68 of the 1996 Act. The DAC observed about clause 68 that it "is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected": p 58, para 280. On the other hand, the DAC recommended adoption of "the internationally accepted view that the court should be able to correct serious failure to comply with the 'due process' of arbitral proceedings: cf article 34 of the Model Law:" p 59, para 282. The ethos of the DAC report was that parties are entitled to a fair hearing leading to an impartial adjudication. But the idea that

section 68 contemplated an adjudication which arrives at the "right" conclusion would have been wholly out of place in these recommendations. The DAC report was the matrix of the Parliamentary debates.

28. It is now necessary to examine section 68 in its textual setting. For this purpose it is necessary to set out section 68 more fully than I have done earlier in this judgment. Section 68 reads as follows:

> "(1) A party to arbitral proceedings may . . . apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> . . .
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
>
> (d) failure by the tribunal to deal with all the issues that were put to it;
>
> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
>
> (f) uncertainty or ambiguity as to the effect of the award;
>
> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
>
> (h) failure to comply with the requirements as to the form of the award; or
>
> (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with

powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

This is a mandatory provision. The policy in favour of party autonomy does not permit derogation from the provisions of section 68. A number of preliminary observations about section 68 are pertinent. First, unlike the position under the old law, intervention under section 68 is only permissible *after* an award has been made. Secondly, the requirement is a serious irregularity. It is a new concept in English arbitration law. Plainly a high threshold must be satisfied. Thirdly, it must be established that the irregularity caused or will cause substantial injustice to the applicant. This is designed to eliminate technical and unmeritorious challenges. It is also a new requirement in English arbitration law. Fourthly, the irregularity must fall within the closed list of categories set out in paragraphs (a) to (i).

29. It will be observed that the list of irregularities under section 68 may be divided into those which affect the arbitral procedure, and those which affect the award. But nowhere in section 68 is there any hint that a failure by the tribunal to arrive at the "correct decision" could afford a ground for challenge under section 68. On the other hand, section 68 has a meaningful role to play. An example of an excess of power under section 68(2)(b) may be where, in conflict with an agreement in writing of the parties under section 37, the tribunal appointed an expert to report to it. At the hearing of the appeal my noble and learned friend, Lord Phillips of Worth Matravers MR, also gave the example where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard of the agreement awarded compound interest. There is a close affinity between section 68(2)(b) and section 68(2)(e). The latter provision deals with the position when an arbitral institution vested by the parties with powers in relation to the proceedings or an award exceeds its powers. The institution would

exceed its power of appointment by appointing a tribunal of three persons where the arbitration agreement specified a sole arbitrator.

30. The New York Convention on the recognition and enforcement of Foreign arbitral awards 1958 and article 34 of the UNCITRAL Model Law on International Commercial Arbitration were in part a provenance of section 68: see General Note to section 68 of the Arbitration Act 1996 as published in Current Law Statutes 1996, p 23-46. Specifically, it is likely that the inspiration of the words "the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)" in section 68 are the terms of article V(1)(c) of the New York Convention and the jurisprudence on it. The context is that article V(1)(a) stipulates that the invalidity of the arbitration agreement is a ground for non enforcement of an award: it involves the competence of the arbitrator. Article V(1)(c) relates to matters beyond the scope of the submission to arbitration. It deals with cases of excess of power or authority of the arbitrator. It is well established that article V(1)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award: *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir 1974); Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (1981), pp 311-318; Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001), pp 158-162. By citing the *Parsons* decision counsel for the contractors alerted the House to this analogy. It points to a narrow interpretation of section 68(2)(b). The policy underlying section 68(2)(b) as set out in the DAC report similarly points to a restrictive interpretation.

31. By its very terms section 68(2)(b) assumes that the tribunal acted within its substantive jurisdiction. It is aimed at the tribunal *exceeding its powers* under the arbitration agreement, terms of reference or the 1996 Act. Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It is not apt to cover a mere error of law. This view is reinforced if one takes into account that a mistake in interpreting the contract is the paradigm of a "question of law" which may in the circumstances specified in section 69 be appealed unless the parties have excluded that right by agreement. In cases where the right of appeal has by agreement, sanctioned by the Act, been excluded, it would be curious to allow a challenge under section 68(2)(b) to be based on a mistaken interpretation of the underlying contract. Moreover, it would be strange where there is no exclusion agreement, to allow parallel challenges under section 68(2)(b) and section 69.

32. In order to decide whether section 68(2)(b) is engaged it will be necessary to focus intensely on the particular power under an arbitration agreement, the terms of reference, or the 1996 Act which is involved, judged in all the circumstances of the case. In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under section 68(2)(b).

33. For these reasons the Court of Appeal erred in concluding that the tribunal exceeded its powers on the currency point. If the tribunal erred in any way, it was an error within its power.

34. I am glad to have arrived at this conclusion. It is consistent with the legislative purpose of the 1996 Act, which is intended to promote one-stop adjudication. If the contrary view of the Court of Appeal had prevailed, it would have opened up many opportunities for challenging awards on the basis that the tribunal exceeded its powers in ruling on the currency of the award. Such decisions are an everyday occurrence in the arbitral world. If the view of the Court of Appeal had been upheld, a very serious defect in the machinery of the 1996 Act would have been revealed. The fact that this case has been before courts at three levels and that enforcement of the award has been delayed for more than three years reinforces the importance of the point.

XIII. The pre-award interest point

35. Counsel for the employer submitted that the arbitrators exceeded their power by awarding interest pursuant to section 49(3). But counsel advanced his challenge in respect of pre-award interest in an almost apologetic way. He said this aspect was parasitic on the currency point. It is easy to follow why he approached the matter in this fashion. For this ground to get anywhere the employer had to show that the decision in question caused or will cause a substantial injustice to the employer. To make good this proposition in causative terms a comparison needs to be made with either the regime of interest under the underlying contract or under the applicable law of Lesotho. It is clear, however, as the tribunal observed, that the proceedings are concerned with sums that have not been certified under clause 60(10) of the contract. A comparison with the position under clause 60(10) is therefore irrelevant. The only other possibility is to have regard to the law of Lesotho so far

as it governs the substance of the dispute between the parties. There is, however, no finding about the law of Lesotho in the judgments of either Morison J or the Court of Appeal. Counsel observed that it must have been assumed that there was a substantial injustice. This is not good enough. The burden is squarely on the applicant, who invokes the exceptional remedy under section 68, to secure (if he can) findings of fact which establish the pre-condition of substantial injustice. The employer did not satisfy this requirement. In these circumstances I would rule that the precondition of substantial injustice has not been established and that on this ground alone the challenge to pre-award interest should fail.

36. The ground of appeal relating to pre-award interest is, however, faced with other formidable difficulties. The tribunal held that the power under section 49(3) to award interest is *prima facie* available. This conclusion was inescapable. The only question is whether the provisions of clause 60(10) of the contract could amount to an agreement to the contrary. The tribunal pointed out that clause 60(10) only relates to certified payments. The arbitration proceedings were concerned with sums which had not been certified. There was no agreement to the contrary under section 49 of the Act. The grounds relied on before the tribunal to say that the tribunal had no power to act under section 49 collapsed.

37. Morison J appeared to take the view that the law of Lesotho, as the law applicable to the construction contract, may be relevant. This presumably is on the basis that it constitutes an agreement to the contrary under section 49. Ignoring for the moment the fact that one does not know what the law of Lesotho is, this view comes up against the difficulty that only an agreement in writing as defined in the Act can qualify as an agreement to the contrary under section 49: section 5(1). This is no mere technicality. In the words of the DAC (p 14, para 35) "By introducing some formality with respect to all agreements, the possibility of subsequent disputes (e.g. at the enforcement stage) is greatly diminished." The law of Lesotho is not an agreement to the contrary in writing.

38. The Court of Appeal apparently accepted the submission of the contractors that the parties did not expressly agree pursuant to section 49(3) to exclude the arbitrators' power to award interest: paragraph 48 of the judgment. Having come to this conclusion the Court of Appeal ought to have held that the arbitrators had the power to award interest under section 49(3). It did not do so. For reasons which are difficult to

follow (and which were not argued before the Court of Appeal), the Court of Appeal held that (1) Lesotho law itself gives a substantive right to interest; (2) The tribunal was entitled to grant substantive interest pursuant to section 49(6) of the Act; (3) accordingly, there is no room for any discretionary procedural power under section 49(1). The conclusion does not flow from the premise. Section 49(6) does not state that any other power to award interest shall exclude the operation of section 49(3). Section 49(6) provides that the powers conferred by sections 49(1)-(5) do not necessarily oust any other power to award interest. It is no more than a saving provision. It does not confer priority on any such "other power".

39. Rightly counsel for the employer found himself unable to support the reasoning of the Court of Appeal. He did, however, attempt to support the conclusion of the Court of Appeal on other grounds. Counsel submitted that the law to be applied to the entitlement of the contractors was the law of Lesotho. This submission founders on two separate grounds. The law of Lesotho cannot be an agreement to the contrary under section 49(2). The power to award simple or compound interests as the tribunal "considers meets the justice of the case" was therefore available to the tribunal. In any event, for reasons already discussed under the currency point, if it is assumed for the sake of argument that the tribunal awarded interest which ought not to have been awarded as a matter of Lesotho law, it may have made an error of law. But the tribunal certainly did not act in excess of power within the meaning of section 68(2)(b).

40. I would therefore reject the submissions of counsel for the employer in respect of pre-award interest.

XV. Disposal

41. I would allow the appeal, set aside the order for remission of the award, and dismiss the employer's application. The employer must pay the costs of the contractors in the lower courts and in the House of Lords.

APPENDIX to the opinion of Lord Steyn

A. Provisions in Principal Contract (including Part II Conditions of Particular Application) Relating to the Currency of Contractual Payments

CLAUSE PROVISION

60.11 ***The currency of account shall be Maloti and for the purposes of payment, conversion between Maloti and the currencies stated in the Contract shall be made in accordance with the rates of exchange determined in accordance with Clause 72.***

60.12 ***All payments to the Contractor by the Employer shall be made:***

(a) In the case of a claim for additional payment under the Contract where the Contractor is due reimbursement of cost, in the currencies stated in the Contract but in the proportions as far as possible in which the costs were incurred as agreed with the Engineer;

(b) In the case of payment for any Provisional Sum item, in the currencies stated in the Contract but in the proportions applicable to the item as agreed with the Engineer at the time when the Engineer gives instructions for the work covered by the item to be carried out;

(c) For increase or decrease in price, in accordance with Sub-Clause 70.1;

(d) In any other case, in the currencies and proportions stated in the Contract, except that Interim Certificates may be valued in differing currency proportions provided always that the final amounts payable by the Employer to the Contractor in the various currencies shall be in the proportions given in Tender Schedule A, subject to approved variations, escalation factors and other matters agreed between the parties; …

72.1 ***Payments to the Contractor shall not be subject to variations in the rates of exchange between Maloti and the foreign currencies that have been stated in the Contract. The rates of exchange to be used for the Contract shall be the selling rates applicable at close of business of the Central Bank of Lesotho 42 days before the closing date for submission of tenders, which rates shall have been notified to the Contractor by the Employer prior to the submission of tenders and included in the Contract.***

72.2 ***Payments shall be made to the Contractor by the Employer in the currency proportions stated in the Contract subject to the provisions of Sub-Clause 60.12.***

Supplement to Tender Schedules A and O

CURRENCY REQUIREMENTS						
	TOTAL EQUIV MALOTI	***MALOTI/RAND***	***DEUTSCHE MARKS***	***FRENCH FRANCS***	***ITALIAN LIRA***	***STERLING POUNDS***
1. CURRENCY PROPORTIONS OF PAYMENT	***100.00%***	***58.35%***	***5.95%***	***13.38%***	***10.97%***	***10.34%***
2. CLAUSE 72.1 EXCHANGE RATES		***1.0000***	***0.8571***	***2.2206***	***484.8843***	***0.2355***

B. Provisions in Principal Contract (including Part II Conditions of Particular Application) Relating to the pre-Award Interest

CLAUSE		PROVISION
60.10		***The amount due to the Contractor under any interim certificate issued by the Engineer pursuant to this Clause, or to any other term of the Contract, shall, subject to Clause 47, be paid by the Employer to the Contractor within 28 days after such interim certificate has been delivered to the Employer, or, in the case of the Final Certificate referred to in Sub-Clause 60.8, within 56 days, after such Final Certificate has been delivered to the Employer. Provided that any amount in respect of any claim as certified by the Engineer pursuant to Sub-Clause 53.5 shall be paid by the Employer to the Contractor within 182 days after the interim certificate has been delivered to the Employer. In the event of the failure of the Employer to make payment within the times stated, the Employer shall pay to the Contractor interest at the rate stated in the Appendix to Tender upon all sums unpaid from the date by which the same should have been paid, excepting in the case of any unpaid sums in respect of any claim where such interest shall be paid from 56 days after the delivery of the Interim certificate to the Employer. The provisions of this Sub-Clause are without prejudice to the Contractor's entitlement under Clause 69.***
Tender Schedule A – Financial Requirements – Part I: Currency Requirements	*Note (2)*	***The rate of interest applicable to unpaid sums in local currency in terms of Sub-Clause 60.10 of the Conditions of Contract shall be 1% (one percent) in excess of the prime overdraft rate charged by the First National Bank of Southern Africa Limited of Johannesburg on the due date.***
	Note (3)	***The rate of interest applicable to unpaid sums in foreign currency in terms of Sub-Clause 60.10 of the Conditions of Contract shall be at the rate of 2% (two percent) in excess of the Commercial Interest Reference Rate (CIRR) applicable on the due date to the respective currencies in which payment is due.***

LORD HOFFMANN

My Lords,

42. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Steyn. Subject to one reservation, I agree with it and would allow the appeal. My reservation concerns paragraph 22. For the reasons given by my noble and learned friend, Lord Phillips of Worth Matravers, I think it is very likely that the arbitrators did make an error of law in calculating the sums awarded in the way in which they did. I prefer to express no opinion on the point. But for the reasons given by Lord Steyn, I think that this was at worst an error of law and not an excess of power.

LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

43. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. I agree without reservation with his conclusions in relation to the arbitrators' award of interest. Section 49 of the Arbitration Act 1996 is in very wide terms. They give to arbitrators the power to compensate the successful party for the delay in receiving and enjoying the use of the money awarded. The terms are, however, wide enough to enable arbitrators to compensate for the decline in value of the currency in which the award is made if, between the date at which the award falls to be assessed and the date of the award, that currency has diminished in value in comparison to other currencies. It follows that in a case such as this, where the parties have not by agreement excluded the application of section 49, the scope of the power afforded by section 48(4) may not be of great significance. Nonetheless I am unable to agree with either the arbitrators or Lord Steyn as to the ambit of that power.

44. When sterling was a strong currency it was accepted that, as a matter of procedure, courts were obliged to give judgment and arbitrators to make awards in sterling. If a debt was a foreign currency debt, or damages were sustained in a foreign currency, conversion into

sterling took place at the date that the cause of action arose. The effect of this was to shelter plaintiffs or claimants from the risk of a decline in relative value of other currencies.

45. When sterling lost its stability and declined in value against other relevant currencies the approach described above was seen to result in injustice to plaintiffs or claimants, who received their judgments or awards in a devalued currency. Arbitrators reacted by introducing and following a practice of making awards in foreign currencies instead of converting into sterling. That practice was upheld by the Court of Appeal as falling within the powers of arbitrators in *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1974] QB 292. In *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 this House followed suit in holding that the English court could give judgment in a foreign currency.

46. *Jugoslavenska* and *Miliangos* removed the procedural bars to awards or judgments in a foreign currency. It did not follow that arbitrators or the courts had a free discretion as to the currency in which awards should be made or judgment given. As Roskill LJ remarked in *Jugoslavenska*, at p 305

> "…this decision does not amount to a general licence to arbitrators and umpires to make awards in any currency they choose heedless of the provisions of the contract with which they are concerned. The currency of account and the currency of payment will in most cases be easily ascertainable just as the proper law of a contract is in most cases easily ascertainable."

47. The English courts proceeded to develop a substantial body of jurisprudence dealing with the principles that governed the power of the court or an arbitrator – no distinction was drawn between the two – to award in a foreign currency and the dates at which foreign currency obligations should be converted, when conversion was appropriate. The development of this jurisprudence is well set out in chapter 16 of the 17th edition (2003) of *McGregor on Damages*. It includes two subsequent decisions of this House: *Services Europe Atlantique Sud (SEAS v Stockholms Rederiaktiebolag Svea; The Despina R* [1979] AC 685 and *Attorney General of the Republic of Ghana v Texaco Overseas Tankships Ltd* [1994] 1 Lloyd's Rep 473. Broadly speaking, where a contract does not expressly cover the situation, the approach is to give

judgment or make the award in the currency in which the loss was felt. This may or may not prove advantageous to the claimant.

48. Lord Steyn considers that section 48(4) replaces this body of substantive law, leaving it open to arbitrators to approach the currency of their awards, and any questions of currency conversion, in accordance with their discretion as to what is appropriate in all the circumstances. This is what the arbitrators in the present case have done. They stated in paragraph 13.17 of their award that section 48 gave them the power:

> "to order payment of any sum of money found to be due in any currency. Accordingly while the tribunal takes careful note of the contract currencies and their stated proportions, the tribunal will express its awards in such currencies as are considered appropriate in the circumstances"

I read this statement as indicating that the arbitrators believed that they had a discretion to deal with currencies in whatever way they felt appropriate, and this conclusion is reinforced by the manner in which the arbitrators dealt with the currencies, as I shall indicate in due course.

49. There are two possible ways of interpreting section 48(4). On one interpretation it does no more than make it plain that arbitrators have the procedural power to make an award in any currency. If that is the correct interpretation, section 48(4) reproduces in statutory form the position that already prevailed under English law. The alternative interpretation, that of the arbitrators and Lord Steyn, makes a radical change to English substantive law. No decided case was cited to us in support of either interpretation. *Merkin on The Arbitration Act 1996* observes at p 112 that it is unclear from the Act whether section 48(4) gives the arbitrators an absolute discretion. Mustill & Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition,* p 330 on that section 48(4) "restate[s] the old law". *Russell on Arbitration*, 22nd ed (2003) takes the same view, stating at p 263:

> "**Currency of payment.** As section 48(4) of the Arbitration Act 1996 makes clear, an award may order payment to be made in any currency. An award in a foreign currency may be enforced in England without the need to convert it to sterling. The tribunal should make the award in the proper currency of the contract under which

> the dispute arose unless the parties have expressly or impliedly agreed otherwise in writing. The proper currency of the contract is the currency with which payments under the contract have the closest and most real connection or, if there is none, the currency which most truly expresses the claimant's loss."

50. I am not able to accept that section 48(4) has had the radical effect of empowering arbitrators to disregard the substantive law in relation to foreign currency obligations. I find the difference in wording between section 48(4) and section 49 significant. Had the draftsmen intended to give arbitrators the power to deal with foreign currency obligations according to a broad discretion, I would have expected them to make this plain by the use of language such as the phrase "as it considers meets the justice of the case" that is found in section 49.

51. As I shall shortly show, the arbitrators have adopted an approach to currencies that departs from English law which, we are required to assume in the absence of evidence to the contrary, is the same as the law of Lesotho. Was this simply an error of law, excluded from court review by section 69 of the 1996 Act together with the ICC rules, or was this an example of a "tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)", so as to be capable of amounting to a "serious irregularity" under section 68? I have come to the conclusion that the latter is the true position. The concept of an excess of power that is not an excess of jurisdiction is not an easy one, but I find that it applies to the arbitrators' conduct in this case. They expressly stated that section 48(4) gave them a discretionary power which they did not in fact enjoy and then proceeded to purport to exercise that power. It follows that the arbitrators were guilty of a serious irregularity under section 68(2) provided that their conduct resulted in "substantial injustice" to the respondents. That question requires one to consider the effect of the arbitrators' approach to currencies.

52. Had the respondents received payment in accordance with the provisions of the contract they would have received payments in Maloti. The arbitrators converted the Maloti into European currencies. Had they done so at the rates prevailing when the Maloti payments should have been made they would have protected the respondents from the loss that they would otherwise have experienced as a result of the collapse of the Maloti between the time when the sums should have been paid and the date of the award. Even if this would have been beyond their power

under section 48(4) I doubt whether it would have caused the respondents substantial injustice. Had the arbitrators not achieved this result by invoking section 48(4) it seems to me likely that they would have sought to achieve the same result by appropriate adjustment to their award of interest under section 49.

53. The arbitrators went further than this, however. The rates that they adopted for converting Maloti into the European currencies were the rates prevailing 42 days before the closing date for submission of tenders. The evidence before us does not show how the Maloti had moved against the European currencies between that date and the date when the Maloti payments should have been made. If the Maloti had lost significant value during this period, the appellants received a windfall for which I can see no justification.

54. Had I been in the majority in concluding that the arbitrators had exceeded their powers under section 68 it would have been necessary to give further consideration to the question of whether this had caused substantial injustice to the respondents. As, however, I am in a minority, this question does not arise and both limbs of the appeal will be allowed.

LORD SCOTT OF FOSCOTE

My Lords,

55. I have had the advantage of reading in advance the opinion prepared by my noble and learned friend, Lord Steyn and agree that, for the reasons he has given, this appeal should be allowed with costs. I too, however, prefer the approach adopted by my noble and learned friend in paragraph 23 of his opinion rather than that in paragraph 22. The arbitrators calculated in Maloti the sums due to the appellants but expressed their award in various European currencies. There is no dispute but that they were entitled under section 48(4) of the 1996 Act to do so. But they directed that the Maloti should be converted into the European currencies at the exchange rates set out in clause 72.1 (as amended) of the contract. The contract was dated 15 February 1991 and the award was made in 2002. Over that period there had been a substantial shift in exchange rates. Maloti had lost value in relation to the European currencies. The Maloti that represented the appellants' entitlement under the award were, therefore, converted into greater sums

in the European currencies than would have been the case if the conversion had been at the exchange rates applicable when the award was made. It might well be that the selection by the arbitrators of historic exchange rates rather than the current ones constituted an error of law. But, for the reasons given by my noble and learned friend, I am unable to regard the selection of the wrong exchange rates as constituting an excess of jurisdiction under section 68(2)(b) of the Act.

LORD RODGER OF EARLSFERRY

My Lords,

56. I have had the advantage of considering the speech of my noble and learned friend, Lord Steyn, in draft. For the reasons given by my noble and learned friend, Lord Phillips of Worth Matravers in paragraphs 44 to 50 of his speech, I would prefer to adopt the approach in paragraph 23 of Lord Steyn's speech, rather than that in paragraph 22. Subject to that qualification, I agree with his speech and would accordingly allow the appeal and make the order which he proposes.