Recent Developments in English Law Affecting International Transactions—II

This article brings up to date the author's earlier article with the same title, which was published in the 1981 Fall issue of The International Lawyer (hereinafter the 1981 article). The present article considers developments on two of the topics covered in the 1981 article, namely the Mareva injunction, and international aspects of the Arbitration Act, 1979.

Instead of the topic, judgments in foreign currencies covered in the 1981 article, a new topic, aspects of the Civil Jurisdiction and Judgments Act 1982, is reviewed here.

I. The Mareva Injunction

The introduction into English law of this procedure in 1975 was described and discussed in the 1981 article. The Mareva injunction, as an interlocutory remedy in commercial and shipping cases, to restrain a defendant from removing or disposing of assets out of the jurisdiction until judgment is given in an action on the merits, was already a general doctrine. Since then the Mareva injunction has been expanded and its relationship with other remedies and its effects generally more closely defined. These developments will now be considered.
A. Statutory Force and Its Application

The Mareva injunction was given statutory force by section 37(3) of the Supreme Court Act, 1981, which states:

The power of the High Court . . . to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within the jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

Thus, there is no distinction between a U.K. national or resident on the one hand, and a foreign-based or foreign national, on the other. The position of a plaintiff suing an English defendant is the same as that of a plaintiff suing a foreign defendant.3

The House of Lords had held in The Siskina4 that a substantive cause of action triable in England was essential to support a Mareva injunction unless the injunction was part of the substantive relief sought. Thus, the plaintiff must have a cause of action within the jurisdiction and a good arguable case. A court considering an ex parte application for a Mareva injunction is obliged to consider the likelihood of success of the plaintiff in the main action. It is for the plaintiff to satisfy the court that his chances of success are good and that there is a serious risk that unless the injunction is granted the defendant will take steps to put his assets beyond the reach of the plaintiff when judgment is given for the latter. This must be done by adequate evidence and the mere fact that the defendant is a corporate body with a registered office outside the jurisdiction will not be sufficient. As Lord Justice Kerr said in Z Limited v. A5:

It follows that in my view Mareva injunctions should be granted, but granted only, when it appears to the court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum. Second, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him.

The Commercial Court has held in a recent case that the test to be applied by the court when deciding whether to grant a Mareva injunction is whether, after the plaintiff has shown that he has at least a good arguable case, and after considering the whole of the evidence before the court, the refusal of

3. It has been held that where, on an ex parte application leave has been granted to issue both a writ against a defendant out of the jurisdiction, and a Mareva injunction to preserve assets within the jurisdiction, the defendant is not to be taken as to have submitted to the jurisdiction with regard to the substantive action by reason of a subsequent application to discharge the Mareva injunction. See Halsbury's Laws of England, Annual Abridgment, para. 2624 (1983).
an injunction would involve a real risk that a judgment or award in the plaintiff's favor would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction. A Mareva injunction would not be granted merely for the purpose of providing a plaintiff with security for a claim, even where it appeared likely to succeed and when the granting of the injunction would not cause hardship to the defendant. 6

As stated in the 1981 article,7 the injunction will not merely prevent the defendant from removing assets out of the jurisdiction but will also restrain him from disposing of them within the jurisdiction. This point has been confirmed by the holding of the Court of Appeal in Z Limited v. A that the phrase in section 37(3) of the Supreme Court Act, 1981, "... dealing with, assets located within the jurisdiction,"8 means that the power of the court to grant a Mareva injunction extends to cases in which there is a danger that the assets will be dissipated within the jurisdiction as well as removed out of the jurisdiction.9 It should be especially noted that the courts have so far only been prepared to grant a Mareva injunction with respect to "assets located within the jurisdiction" in accordance with the terms of section 37(3) of the Supreme Court Act, 1981.

The remedy is not only available to litigants but also to provide a claimant in an arbitration with security for the enforcement of any award which he may obtain. A Mareva injunction may be sought even before the arbitration has commenced and the power of the court to grant an injunction is not excluded by the fact that the claim arises under a nondomestic arbitration agreement within the meaning of section 3 (7) of the Arbitration Act, 1979.10

B. NATURE OF ASSETS

In light of the Court of Appeal's decision in Z Limited v. A,11 it appears that the mere nature of the assets covered by a Mareva injunction is no limit

7. See supra note 2.
8. There is a dictum by the Court of Appeal in CBS United Kingdom Limited v. Lambert and another, 3 All E.R. 237 at 241 (1982), to the effect that the words "dealing with" in section 37 (3) of the Supreme Court Act, 1981,

"are wide enough to include disposing of, selling, pledging or charging, and there are no limitations put on the word 'assets' from which it follows that this word includes chattels such as motor vessels, jewellery, objets d'art and other valuables as well as choses in action . . ." 9

9. See supra note 5.
11. See supra note 5.
on its effectiveness. A Mareva injunction has immediate effect on every asset\textsuperscript{12} of the defendant covered by the injunction because it operates \textit{in rem} in the same manner as the arrest of a ship. Any authority given to third parties allowing them to deal with the assets in accordance with the instructions of the defendant is revoked once these third parties have notice of the injunction.

The Commercial Court in \textit{Orwell Steel (Errection and Fabrication) Limited v. Asphalt & Tarmac Limited},\textsuperscript{13} in March 1984, extended the Mareva injunction to post-judgment assets, holding that it could be said that there was greater justification for restraining a defendant's use of his property after judgment against him than before. In this case the plaintiff had entered judgment in default of compliance by the defendant with the conditions of its leave to defend, but was unable to levy execution of the judgment and feared that the defendant would transfer its assets to another company thereby avoiding the effect of the judgment completely. The plaintiff sought a Mareva injunction to restrain any such transfer except insofar as the defendant's assets exceeded the amount of the judgment and costs.

C. \textsc{Variation of Injunction}

After a plaintiff has obtained an injunction, he is obliged to give notice thereof to the defendant and to any third parties concerned. Both the defendant and any third parties are entitled to apply to have the injunction varied or discharged. Thus in \textit{PCW (Underwriting Agencies) Limited v. Dixon},\textsuperscript{14} the Commercial Court held that given the purpose of a Mareva injunction (to prevent a plaintiff from being deprived of the proceeds of an action should he be successful by a defendant transferring his assets outside the jurisdiction or dissipating his assets within the jurisdiction), the remedy was, however, not intended to give the plaintiff priority over such assets, to prevent a defendant from paying his debts as they fell due, to "punish him for his alleged misdeeds" or to enable a plaintiff to exert pressure on him to settle an action. Applying these principles to the facts in that case, the Court allowed the injunction to be varied to permit the defendant sufficient funds

\textsuperscript{12} It was held in \textit{Searose Limited v. Seatrain (UK) Limited}, 1 All E.R. 806 (1981), that where a Mareva injunction is sought in respect of an asset which is not identified with precision (e.g., money held in an unidentified bank account), the court may require the plaintiff to give an undertaking to pay the reasonable costs incurred by any person, other than the defendant, to whom notice of the terms of the injunction is given, in ascertaining whether any asset to which the order applies is within his possession or control. Although primarily directed to protecting banks from expenses in tracing unidentified accounts, such an undertaking may be required to protect other third parties similarly affected.


\textsuperscript{14} 2 All E.R. 158 (1983).
to meet his reasonable living expenses, pay his outstanding debts and defend himself in the proceedings brought by the plaintiff. However, the Commercial Court also held in *A and another v. C and others (no.2)*\(^{15}\) that although the court had jurisdiction to qualify a Mareva injunction where the defendant satisfied the court that assets subject to the injunction were required for a purpose which did not conflict with the policy underlying the Mareva injunction, in order to satisfy that burden, the defendant had to go further than merely stating that he owed money to a third party and had to show that he had no other assets available out of which the debt could be paid.

It is worth noting that where an innocent third party, who is affected by a Mareva injunction, successfully applies to the court for a variation of the order, he will be entitled to have all the costs which he has incurred in respect of the application paid by the plaintiff who has obtained the injunction. This is provided that they are not unreasonable in amount or unreasonably incurred.

### D. Proprietary Interest

A Mareva injunction does not confer upon the plaintiff any proprietary rights; nothing in the nature of a lien over the assets is acquired. As held in *Iraqi Ministry of Defence v. Arcepey Shipping Company S.A., The Angel Bell*,\(^{16}\) in the event of the defendant's insolvency, a plaintiff does not acquire a priority by virtue of a Mareva injunction to which he would not otherwise be entitled. As further held by the Court of Appeal in *Campbell Mussels and others v. Thompson and others*,\(^{17}\) the Mareva injunction was never intended to allow a plaintiff to put himself in the position of a secured creditor. Again, the Court of Appeal in *Sanders Lead Co. Inc. v. Entores Metal Brokers Limited*\(^{18}\) held that only in the most exceptional circumstances should a Mareva creditor be permitted to intervene in an action where his interest in the outcome related solely to the fate of his injunction. In that case, a party obtaining a Mareva injunction was not enabled to be joined in an action between the debtor and another alleged creditor.

### E. Abuse

An application for a Mareva injunction is frequently made *ex parte* where there are grounds for believing that were the defendant given advance notice or warning, the latter's assets would be removed from the jurisdic-

---

16. 1 All E.R. 480 (1980).
tion. Thus, the court in *Iraqi Ministry of Defence v. Arcepey* held that "The whole point of the Mareva jurisdiction was to enable the plaintiff to proceed by stealth so as to preempt any action by the defendant to remove his assets from the jurisdiction whether by his own act or by a transfer to a collaborator within the jurisdiction. . . ."19 At the same time, the courts have become increasingly aware of the importance of preventing any abuse of the Mareva procedure and the protection of third parties. Lord Justice Kerr said in *Z Limited v. A*:

However, the jurisdiction must not be abused. In particular, I would regard two types of situations as an abuse of it. First, the increasingly common one, as I believe, of a Mareva injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself judgment-proof; where it may be invoked, almost as a matter of course, by a plaintiff in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action. The second, and fortunately much rarer, illustration of what I would regard as an abuse of this procedure, is where it is used as a means of enabling a person to make a payment under a contract or intended contract to someone in circumstances where he regards the demand for the payment as unjustifiable; or where he actually believes, or even knows, that the demand is unlawful; and where he obtains a Mareva injunction *ex parte* in advance of the payment, which is then immediately served and has the effect of "freezing" the sum paid over.20

The Court of Appeal also dealt with the matter of abuse in *Galaxia Maritime S.A. v. Mineralimportexport, The Eleftherios*.21 In that case it was held that where the effect of granting a Mareva injunction would be to interfere substantially with an innocent third party's freedom of action generally or freedom to trade (for example, by interfering with his performance of a contract made between him and the defendant relating to the assets in question), the third party's right to freedom of action and freedom of trade should prevail over the plaintiff's wish to secure the defendant's assets for himself. Accordingly, it was an abuse of the Mareva jurisdiction to allow a plaintiff to serve a shipowner with a Mareva injunction relating to a cargo owned or alleged to be owned by the defendant which was on board the shipowner's vessel in order to prevent the vessel sailing out of the jurisdiction with the cargo. The fact that the plaintiff had undertaken to indemnify the shipowner against loss or damage suffered in consequence of the grant of the injunction was not a sufficient reason to allow the injunction to be served

20. See supra note 5 at 571. Also in order to ensure the Mareva injunction is properly exercised and its purpose secured (i.e., to prevent abuse), the court will, where necessary, exercise its power to order discovery or interrogatories. See A.J. Bakhor & Co. Ltd. v. Bilton, 2 All E.R. 565 (1981).
21. 1 All E.R. 796 (1982). In this case the ship was on a voyage charter and the facts were therefore distinguished from those in Clipper Maritime Co. v. Mineralimportexport, 3 All E.R. 664 (1981), where the ship was on time charter.
on the shipowner if he objected to the injunction, since the mere proffering of an indemnity did not entitle the plaintiff to interfere with the shipowner's business activities and to obtain the advantage of a Mareva injunction at the shipowner's expense. Since the effect of granting the injunction would be to prevent the shipowner sending his ship on a voyage out of the jurisdiction under a previously concluded contract with the defendant, it would be an abuse of the Mareva jurisdiction to allow the injunction to continue. The Court of Appeal therefore granted the application of the shipowner to discharge the Mareva injunction.

F. Effect on Third Parties

There are new developments concerning the effect of the injunction on third parties generally and on banks in particular, upon which the burden of policing Mareva injunctions often falls. The Commercial Court in *Oceanica Castelana Armadora SA v. Mineralimportexport (Barclays Bank International Limited intervening), The Theotokos*[^22^] held that although a bank holding funds subject to a Mareva injunction (having regard to the current wording of such injunctions in January 1983) could not exercise a banker's usual rights of set-off against the funds without first applying to the court to vary the injunction, it was entitled to a variation of the injunction once it had applied. This would enable it to exercise rights of set-off over the funds subject to the injunction, in connection with any facilities it had granted to the defendant before it received notification of the injunction. The court indicated that the Mareva injunction was not intended to interfere with contractual rights between a third party and the defendant, and a bank which held funds subject to such an injunction ought not to be, merely because it held the funds, in a worse position than the defendant's other creditors in respect of whom the defendant could apply for a variation of the injunction to enable him to draw on his bank account to pay them. It was further held that the bank was entitled to a variation of the injunction without having to disclose information about the state of the defendant's accounts with the bank or the existence within the jurisdiction of other free assets of the defendant. The Court acknowledged that to require such disclosures would be to interfere with contractual rights between the bank and the defendant. It followed therefore that a bank holding funds subject to a Mareva injunction was not required to accept, in lieu of the bank's usual rights of set-off, an indemnity from the plaintiff with respect to the sums owing or likely to be owed in the future to the bank from the defendant. It further followed that the bank was entitled to a variation of the injunction issued against the defendant to enable the bank to exercise a right of set-off.

in connection with loans made to the defendant, the right of set-off being exercisable in respect of both the interest on loans already accrued due at the date of notification of the injunction and interest accruing due in the future. In this case, the Court applied the abovementioned decision in *Galaxia Maritime SA*.

The position of third parties and of banks in particular was considered in depth by the Court of Appeal in *Z Limited v. A.* 23 In that case, the plaintiff, a foreign company, had been defrauded of some £2 million by persons in England. Some of this amount was paid into the five major clearing banks and some was used to purchase goods and real property. The plaintiff company obtained a Mareva injunction against both the fraudulent persons and various innocent third parties, including the five clearing banks, restraining them from dealing with the assets. The plaintiff recovered much of its losses and the action itself was settled but the five clearing banks applied for leave to appeal against the Mareva injunction with a view to obtaining clarification of the law as to the obligations of third parties on whom such injunctions were served. Following are the main points on which the Court of Appeal was unanimous; on other points opinions differed.

If a bank or other third party has notice of a Mareva injunction which affects money or other assets in its hands, it is contempt of court knowingly to assist in the disposal of the assets, whether or not the defendant has knowledge of the injunction. Accordingly, as soon as a bank or third party concerned has notice of the injunction it must—pending further order—freeze the defendant’s bank account or other assets held by it, e.g., valuables in a safe deposit box, according to the terms of the injunction. The Court of Appeal followed with practical guidelines for applicants seeking Mareva injunctions and to judges considering applications for such injunctions. Where an application is made for a Mareva injunction which may affect assets held by a bank or other innocent third party, the court should have regard to the following principles:

(a) The plaintiff should normally be required when the injunction is granted to give an undertaking to indemnify against any liability and to pay any expenses reasonably incurred by a bank, or other innocent third party, in complying with the injunction.

(b) The plaintiff should inform the court of the names of banks or other third parties to whom it is proposed to give notice of the injunction.

(c) The plaintiff should, if possible, identify the assets in respect of which the injunction is sought and support his application by a draft order for consideration by the court which embodies, for example, particulars of the banks and branches at which the defendant has accounts and the numbers of the accounts, together with the undertakings to be given by

23. See supra note 5.
the plaintiff as to service and indemnification of a bank or third party.

(d) Although it may be necessary to seek a comprehensive order which freezes all the defendant's assets within the jurisdiction, the injunction may where practicable be restricted to freezing the defendant's assets up to a maximum sum, namely, the amount of the plaintiff's prima facie justifiable claim, leaving the defendant free to deal with the balance. However, because a bank or third party may not know what assets the defendant has elsewhere and therefore may not know the extent to which the assets it holds should be frozen, a maximum sum order may make different provisions in relation to the defendant's assets generally and those assets which are known or believed to be in the hands of a bank or third party and that part of the order directed to a bank or other third party should only require it to freeze the defendant's assets held by it up to a specified maximum sum.

(e) Notice of the injunction must be served by the plaintiff as expeditiously as possible on the defendant as well as on third parties and where such notice is served by telephone or telex, it must be followed as soon as is reasonably practicable, by a written copy of the order.

(f) Where a bank has notice of the granting of a Mareva injunction, it may not honor checks drawn by the defendant but checks supported by credit cards or check cards should be honored. The injunction does not prevent the bank from making payments out of the defendant's bank account which the bank is obliged to honor because they involve obligations to other parties, e.g., payments under a letter of credit or under a bank guarantee or under a bill of exchange of which the defendant is the payee, but the injunction does apply to the proceeds of such commercial obligations if they are paid into an account of the defendant to which the injunction applies.

G. CONSIDERATIONS FOR THE FUTURE

Finally, with regard to the Mareva injunction, the following considerations will be important in the future.

The rules that a Mareva injunction can only be granted when it is ancillary to a substantive matter over which the English courts have jurisdiction, will be modified when the provisions of the Civil Jurisdiction and Judgments Act, 1982 (hereinafter called the 1982 Act), which relate to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (hereinafter called the Brussels Convention), as amended by the Accession Convention of 1978, and the Interpretation Protocol of 1971, enter into effect. This will be timed to coincide with the date on which the Accession Convention comes into force for the United Kingdom. The Brussels Convention and the 1971 Protocol have been
ratified by the six original EEC member states, all of which have, except for Belgium, ratified the Accession Convention. The latter will enter into force for the United Kingdom three months after Belgium and the United Kingdom, as a new EEC member state, will have ratified it. Belgium is now expected to be in a position to ratify in the first half of 1985. The United Kingdom is already in such position having passed the 1982 Act and adopted and published The Rules of the Supreme Court (Amendment No. 2) 1983.

The 1982 Act has been called "perhaps the most important piece of legislation relating to civil procedure enacted in this country this century."\(^{24}\)

For the United Kingdom, the Act brings into effect the rules of jurisdiction\(^{25}\) set out in the Brussels Convention as amended by the Accession Convention, and applies similar, but not identical, rules for allocating jurisdiction between the constituent parts of the United Kingdom. Under section 25 of the 1982 Act, the English High Court will have power to grant a Mareva injunction where proceedings have been or are to be commenced in another EEC member state, or in another part of the United Kingdom, and the proceedings fall within the scope of the Brussels Convention.\(^{26}\) This means that a Mareva injunction will be available in the English courts, even where the courts of another EEC member state have jurisdiction over the substance, although the absence of jurisdiction over the merits will continue to be a factor considered by the English courts in determining whether to grant an injunction.\(^{27}\)

II. International Aspects of the Arbitration Act, 1979

A. Statute

The two main reforms of the Arbitration Act, 1979 (hereinafter called the Act), noted in the 1981 article,\(^{28}\) were; (1) the substitution of a new judicial review procedure for the case stated system; and (2) the establishment of means for contracting out of the new review procedure by exclusion agree-


\(^{25}\) See post.

\(^{26}\) The scope of the 1968 Convention is defined by Article 1, Title I (as amended by the Accession Convention) which reads:

"This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. The Convention shall not apply to: (1) The status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (2) Bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (3) Social security; (4) Arbitration."

\(^{27}\) Section 25 (2) of the 1982 Act.

\(^{28}\) See supra note 1, at 636.
ments particularly for international arbitrations. With regard to the first reform, section 1 of the Act abolished both types of case stated, namely, that of stating an award and that of stating a question of law arising in the course of a reference. This section also abolished the jurisdiction of the High Court to set aside or remit an arbitrator's award on the ground of error of fact or law on the face of the award. Section 1(3) of the Act states that an appeal may be brought by any of the parties to the reference: "(a) with the consent of all the other parties to the reference; or (b) subject to section 3 below,\textsuperscript{29} with the leave of the court." Section 1(4) provides that:

The High Court shall not grant leave under sub-section 3b above unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate.

B. "\textit{Leave to Appeal}": Judicial Guidance on Section 1(3)(b)

It was not clear for some time after the passing of the Act as to the basis on which the general discretion of the Court should be exercised under Section 1(3)(b) of the Act. Then came the decision by the House of Lords in Pioneer Shipping Limited and others v. BTP Tioxide Limited, The Nema\textsuperscript{30} in which a series of propositions, described as "guidelines" were laid down, which although technically \textit{obiter dicta} were immediately accepted as authoritative statements. In the leading work on commercial arbitration in England,\textsuperscript{31} Mr. Justice Mustill and Stewart Boyd suggest that the judgments delivered in The Nema "disclose a new philosophy of arbitration." They summarize it as follows:

First, even in those cases where Parliament has preserved the jurisdiction to entertain appeals, it is no longer axiomatic that the courts should be alert to protect parties against decisions made contrary to that system of law which they have expressly or impliedly selected as applicable to their disputes. Nor is there any longer a paramount public interest in protecting the community from the growth in particular trades of practices whereby the rights of the parties are determined according to rules peculiar to those trades, and differing from the general law of the land. Instead, the Court will proceed on the assumption that the parties to an arbitration agreement are content to take the risk that the arbitrator will make mistakes of law, just as they have always been understood as willing to take the risk that he will make mistakes of fact. There is now a presumption in favour of the chosen tribunal, not the chosen law.

Second, there are limits to this presumption. The parties are not assumed, in general, to have submitted themselves unequivocally to honour an award which can be shown to be founded upon a manifest error of law.

\textsuperscript{29} Section 3 deals with exclusion agreements.
\textsuperscript{30} 2 All E.R. 1030 (1981).
\textsuperscript{31} See supra note 10.
Third, the strength of the presumption will vary from case to case.

Fourth, there is one consideration of public policy which on occasion will take priority over the wishes of the parties: namely, the need to retain arbitration appeals as a means of providing the raw material for decisions by the Court on matters of general legal import. Arbitration appeals help to ensure that - (a) English law will maintain an up to date repertory of rules, sufficient to deal with the complexities of modern commerce, and (b) the courts can furnish authoritative guidance to arbitrators on the principles by which they should apply their own practical knowledge to individual commercial disputes, enabling them to decide these disputes in a consistent and orderly fashion.

Fifth, the Court regards delay as a prime source of prejudice, both to the efficacy of the arbitration system as a whole, and to the rights of the successful claimant in particular. In the interests of eliminating the delay resulting from an unmeritorious appeal the Court will very often regard it as acceptable to run some risk of lending its own powers of enforcement to an award which the individual judge may consider to be wrong.32

Subsequent to The Nema, the Court of Appeal, in The Antaios,33 a case involving an appeal from an award arising out of a dispute relating to a charterparty, held that on the issue of leave to appeal to the Court of Appeal against a decision granting or refusing leave to appeal to the High Court, the purpose of the 1979 Act was to encourage finality in arbitration and discourage appeals. Therefore a judge ought not to grant leave where the arbitrator's decision although it raised a substantial and arguable point of law, was probably right. The Court of Appeal further held that on the issue of leave to appeal to the High Court under section 1(3)(b) of the Act, a judge ought to refuse leave if he decides that the arbitrator's decision was probably right, regardless of the basis on which the arbitrator reached his decision or whether the Court of Appeal might, simply because it was an appellate court, take a different view. Leave ought to be given if the resolution of this issue would substantially affect the parties' rights and there was a conflict of judicial opinion on the issue.

After The Antaios case, in Finelvet A.G. v. Vinava Shipping Company Limited, The Crystalis,34 Mr. Justice Mustill made "certain comments" concerning the Court's approach to an appeal under the 1979 Act, in light of the guidance given by the House of Lords in The Nema:

In the first place, it must be kept in mind that quite different considerations apply to the question whether, in the exercise of its discretion, the court should grant leave to appeal under § 3 of the 1979 Act from those which are material when the court comes to hear the appeal itself. The first stage is a filtering process, at which the court gives effect to the policy embodied in the 1979 Act and enunciated in The Nema, whereby the interests of finality are placed ahead of the desire to ensure that the arbitrator's decision is strictly in accordance with the law. Some examination of the merits takes place at this stage, because the stronger the

32. Id. at 558–9.
33. 3 All E.R. 777 (1983).
34. 2 All E.R. 658 (1983).
applicant's case for saying that the arbitrator was wrong, the better his prospect of obtaining leave to appeal. But the examination of the law is summary in nature, and does not lead to any definite conclusion.

The exercise is discretionary throughout, the mesh of the filter is fine and it must, I think, be recognised that some cases will be caught in the filter which would, if the appeal had been allowed to go forward, result in a decision that the award could not stand.

The position when the appeal itself is heard is quite different. Here there is no discretion. The only issue is whether it can be shown that the decision of the arbitrator was wrong in law. The court must answer this question yes or no and, if the answer is yes, the appeal must be allowed however finely balanced the issue may be. It is not only unhelpful but positively misleading to introduce at this stage the questions of degree raised by The Nema guidelines, such as whether the award is clearly or obviously wrong, for these are material only to the discretionary process of finding out whether the award should be allowed to come before the court for challenge.

Starting therefore with the proposition that the court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages.

(1) The arbitrator ascertains the facts. This process includes the makings of findings on any facts which are in dispute.

(2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.

(3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.

In some cases, the third stage will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, the third stage involves an element of judgment on the part of the arbitrator. There is no uniquely "right" answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.

The second stage of the process is the proper subject matter of an appeal under the 1979 Act. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another, and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct: for the court is then driven to assume that he did not properly understand the principles which he had stated.

Whether the third stage can ever be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter on which it is necessary to express a view in the present case. The Nema and The Evia show that, where the issue is one of commercial frustration, the court will not intervene, save only to the extent that it will have to form its own view, in order to see whether the arbitrator's decision is out of conformity with the only correct answer or (as the case may be) lies outside the range of correct answers. This is part of the process of investigating whether the arbitrator has gone wrong at the second stage. But once the court has
concluded that a tribunal which correctly understood the law could have arrived at
the same answer as the one reached by the arbitrator, the fact that the individual
judge himself would have come to a different conclusion is no ground for disturb-
ing the award.” 35

C. CONTRACTING OUT BY EXCLUSION AGREEMENTS:
SECTION 3 AND 4

An exclusion agreement excludes the right of appeal with respect to a
question of law arising out of an award and the making of an application
with respect to an award under section 1 of the Act; and excludes an
application to the High Court for the determination of a point of law under
section 2. The effect of an exclusion agreement depends upon the type of
arbitration agreement involved. Thus, section 3(7) of the Act defines a
“domestic arbitration agreement” as follows:

An arbitration agreement which does not provide expressly or by implication, for
arbitration in a State other than the United Kingdom and to which neither-
(a) an individual who is a national of, or habitually resident in, any State other
than the United Kingdom, nor
(b) a body corporate which is incorporated in, or whose central management
and control is exercised in, any State other than the United Kingdom
is a party at the time the arbitration agreement is entered into.

In a “domestic arbitration agreement” an exclusion agreement is only
effective if entered into after the arbitration has begun. There are, however,
certain “excepted categories”. Section 4(1) provides that where the award
or the question of law arising in the course of the reference relates in whole
or in part to: “a question or claim falling within the Admiralty jurisdiction of
the High Court or a dispute arising out of a contract of insurance or a dispute
arising out of a commodity contract”, an exclusion agreement will be
effective only provided it was entered into after the arbitration had com-
menced or the contract is expressed to be governed by a foreign law, that is,
one other than the law of England and Wales. 36

With regard to all other nondomestic arbitration agreements, a valid
exclusion agreement may have been entered into either before or after the
Act entered into force on 1 August 1979 and may or may not form part of an
arbitration agreement. An exclusion agreement may be expressed to relate
to a particular award, awards under a particular reference or to any other
description of awards.

The question of whether the incorporation of an exclusion agreement by
reference is valid under section 3(1) of the Act arose and was decided in a
1983 case. A claim in a contract for the sale and purchase of gas oil provided:

35. Id. at 662–3.
36. Section 4 (3) of the Act allows for the future abolition of these special categories of
arbitration.
“inco terms 1980 English law arbitration, if any, London, according to ICC Rules.” Disputes arose which were referred to arbitration and an award was made in favor of the buyers. The agreement being a non-domestic one, the sellers applied to the English High Court to appeal against the award on the ground that the exclusion agreement constituted by Article 24 of the ICC Rules had not been expressly incorporated into the contract and that therefore section 3(1) of the Act had not been complied with. The court dismissed this application holding that the incorporation of an exclusion agreement by reference did not offend and was not prevented by section 3(1) of the Act.

This ruling has since been upheld by the Court of Appeal in *Marine Contractors Inc. v. Shell Petroleum Development Company of Nigeria Limited* which decided that the adoption of the ICC Rules operates as an exclusion agreement for the purposes of the Act in view of the terms of Article 24 of the Rules. It follows that incorporation by reference does constitute a valid form of an exclusion agreement and that the terms of Article 24 of the ICC Rules are sufficient to exclude an appeal to the English Courts. These decisions accord with the policy of the Act to produce finality in arbitration proceedings.

D. PURPOSE OF ACT SUCCESSFUL

The intent of the Act was to promote the conducting of major international arbitrations in England. The evidence suggests that this purpose has

37. Article 24 of the Rules of the ICC Court of Arbitration provides as follows regarding finality and enforceability of an award:

1. The arbitral award shall be final.
2. By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.

40. Some additional points are worthy of mention: (1) Section 3(2) of the Act provides that with regard to all types of nondomestic arbitration agreements, the jurisdiction of the High Court under section 24 (2) of the Arbitration Act, 1950, to decide questions of fraud has been removed, except insofar as an exclusion agreement otherwise provides.

(2) Overall, it should be stressed that even in cases where the right of appeal exists, it only relates to questions of law and not to questions of fact, and that in the English courts foreign law is a matter of fact.

(3) International arbitrations arising under nonstandard contracts involving large sums of money and to which state-owned agencies may be one of the parties, will normally be subject to an exclusion agreement which will be effective to exclude both appeals against an award and applications to the High Court to determine questions of law. See Brandon, supra note 1, at 638.

been essentially achieved. Thus, to quote D.W. Shenton, London solicitor
and Chairman of the Committee on Procedures for Settling Disputes of the
International Bar Association's Section on Business Law: "It is submitted
that the English Commercial Court has given ample evidence of a change of
heart and a desire to meet international objections and discourage
appeals."42 Professor J.E. Adams of the University of London is somewhat
more cautious:

Arbitration flourishes. The oft-lauded expertise of English arbitrators, counsel,
solicitors and commercial judges enables London to continue to compete with
rival arbitration centres abroad. The protagonists of the 1979 reforms continue to
assert that it has reversed any feared decline and has ended the abuse of appeal
merely to delay payment. . . . The process of elucidating the Act continues. There
is no method of determining how freely the power to contract out of the new rights
of appeal in most non-domestic contracts has been exercised, first because it is too
early for the pattern to have emerged and secondly, because collecting negative
statistics is always a matter of uncertainty."43

On the other hand, Sir John Donaldson, P.C., Master of the Rolls, said in
February 1983:

When the Act was passed one or two American lawyers expressed doubts as to
whether English judges would not seek to avoid the effect of the reforms. Section
23 of the Arbitration Act, 1950, contains wide and necessary powers enabling the
court to set an award aside where an arbitrator has misconducted himself or the
proceedings, and section 22 contains an almost unfettered discretion to remit an
award to the arbitrator for further consideration. The Americans' suggestion was
that the judges would seek to hold that for an arbitrator to make an error of law,
even if it did not emerge on the face of the award but was only proved by extrinsic
evidence, constituted misconduct and so entitled the court to set the award aside.
Alternatively, they would remit the award with a direction on the law.

A variant of this suggestion was that the judges would use what has been
referred to as the Anisminic doctrine and hold that since the parties in agreeing to
arbitration conferred authority on the arbitrator to decide the dispute in accord-
ance with the law and not otherwise, any error of law constituted an excess of
jurisdiction. The judges would then restrain enforcement of the award, thus
producing the same result as if the award had been set aside, save that the parties
would be unable to begin again. I am happy, but not in the least surprised, to be
able to report that no such thing has happened.44

A good decision for London as a main centre for international commercial
arbitration was reached by the Court of Appeal in Bank Mellat v. Helliniki
Techniki S.A.45 In that case the claimant was a Greek company and the

42. Shenton, Attachments and Other Interim Court Remedies in Support of Arbitration—The
45. 3 All E.R. 428 (1983). See also comments by Sigvard Jarvin, General Counsel for the
respondent an Iranian bank, and they had entered into a contract concern-
ing the development of land in Iran which contract was governed by Iranian
law. Although neither party carried on business or had any connection with
England, the contract contained an arbitration clause providing for arbitra-
tion in London in accordance with the ICC Rules. A dispute in connection
with the contract arose and the claimant commenced arbitration proceed-
ings in London against the respondent. The latter then applied to the High
Court for an order for security for costs under section 12(6)(a) of the
Arbitration Act, 1950, on the grounds that claimant was a resident out of the
jurisdiction and that there was reason to believe that the claimant would be
unable to pay the respondent's costs if the latter received an arbitral award.
The claimant argued that such an order would be inconsistent with the terms
of the ICC Rules and inappropriate in an international arbitration which
took place in London between parties neither of whom had any other
connection with England.

The Court of Appeal, the High Court judge having refused to make the
order, confirmed that decision holding that as a general rule in international
arbitrations, the English courts would decline to exercise their jurisdiction
under section 12(6)(a) of the 1950 Act to order security for costs, unless
there were a more specific connection with England than the mere fact that
the parties had agreed that an arbitration was to take place there. The fact
that the claimant was ordinarily resident outside the jurisdiction was in
principle not a special circumstance which would justify the court ordering
security for costs.46

---

46. Mention should be made of the formation in 1981 of The London International Arbitra-
tion Trust Limited, located at Stone House, 128 Bishopsgate, London EC2M 4JP. As stated in a
brochure issued by the Trust:

The Arbitration Act 1979 was the first step towards removing the anomalies and difficulties
arising from the old special case procedure and at the same time strengthening the control
exercisable by arbitrators over cases referred to them for determination.

It is appreciated that there remains room for improvement and one purpose for the formation
in 1981 of The London International Arbitration Trust Limited was to seek to secure any
required further changes. The membership of the Trust currently consists of English and
overseas lawyers and arbitrators. Another purpose is to encourage and promote the use of
facilities in London for arbitration proceedings in commercial disputes of all kinds, especially
those of international character. (London International Arbitration Trust Ltd., "Arbitration
in London," Preface (July 1983)).
III. Aspects of The Civil Jurisdiction and Judgments Act, 1982

A. Description

The provisions of the 1982 Act which relate to the Brussels Convention of 1968, as amended by the Accession Convention of 1978 (hereinafter called the Convention), will enter into effect, probably on a date near mid-1985, when the Accession Convention comes into force for the United Kingdom. Pertinent to this description of developments are the jurisdiction and enforcement of judgments issues which will arise in practice when these provisions of the 1982 Act enter into force. Under section 2(1) of the 1982 Act, the Convention and the Protocol of 1971 shall have the force of law in the United Kingdom.

Section 1 of Title II of the Convention establishes the domicile of the defendant as the primary basis of jurisdiction and bars certain long arm bases of jurisdiction against defendants domiciled in EEC member states. Thus, persons domiciled in a member state must, whatever their nationality, be sued in the courts of that state. Persons domiciled in, but not nationals of a member state, will have the benefit and burden of the rules of jurisdiction in that state applying to nationals. This means that by reason of the Convention any individual or corporation—irrespective of nationality, and wherever resident, domiciled or registered—may commence legal proceedings in any member state provided the jurisdictional grounds set out in the Convention are satisfied.

B. Individuals' Domicile

With regard to the domicile of individuals, Article 52 of the Convention provides:

In order to determine whether a party is domiciled in the Contracting State whose courts are seised of the matter the court shall apply its internal law. If a party is not domiciled in the State whose courts are seised of the matter, then in order to determine whether the party is domiciled in another Contracting State, the court shall apply the law of that State. The domicile of a party shall, however, be determined in accordance with his national law if, by that law, his domicile depends on that of another person or on the seat of an authority.

Where a United Kingdom court is seised, the relevant internal law will be found in section 41 of the 1982 Act. This provides that an individual is domiciled in the United Kingdom if and only if he is resident in the United Kingdom and the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom. If an individual is resident in the United Kingdom for the last three months or more, the

47. However, the Convention contains no definition of domicile.
requirement of substantial connection is presumed to be fulfilled unless the contrary is proved. Moreover, an individual is domiciled in a particular place in the United Kingdom if and only if he is domiciled in the part of the United Kingdom in which that place is situated and he is resident in that place. He is domiciled in a particular part of the United Kingdom if and only if he is resident in that part and the nature and circumstances of his residence indicate that he has a substantial connection with that part. It should be noted that the provisions of section 41 of the 1982 Act differ substantially from the ordinary English law rules relating to domicile, whereunder there are the concepts of domicile of origin and domicile of dependancy, of only one domicile and the requirement of a "permanent home."\footnote{\textit{See DICEY \& MORRIS, THE CONFLICT OF LAWS}, 100–148 (10th ed. 1980).}

Section 1, Article 3 of Title II of the Convention bars long-arm rules of jurisdiction with respect to persons domiciled in a member state since the jurisdictional rules in the Convention are all embracing from the standpoint of suits against such persons. This means, insofar as the United Kingdom is concerned that the following rules \textit{inter alia} which otherwise would enable the courts to take jurisdiction will be inapplicable against persons domiciled in a Member State, namely, the fact that the document instituting the proceedings was served on the defendant during his temporary presence in the United Kingdom; the fact of the presence within the United Kingdom of property belonging to the defendant or the seizure by the plaintiff of property situated in the United Kingdom. However, section 1, Article 4 of Title II, which deals with suits against persons who are not domiciled in a member state, provides that the jurisdiction of the courts of each member state shall be determined by its domestic law,\footnote{Subject only to Article 16 of the Convention which deals with the granting of exclusive jurisdiction to specified courts regarding certain subject matters, notably real property, certain proceedings involving companies, industrial property rights, and others.} including the long-arm rules, the benefit of which is given to a plaintiff, who is domiciled in a member state, irrespective of nationality.

Following from the above rules, the liability to suit in the United Kingdom of a U.S. citizen from California who resides in London may be considered. If he has resided in London for three months, he will be deemed to have a substantial connection with the United Kingdom, and therefore considered as domiciled in the United Kingdom and subject to the jurisdiction of the English courts. If he has not been resident in London for three months, and also resides in Paris, it will be for the English courts to apply French law to determine whether he is domiciled in France. If the court found that he was not domiciled in the United Kingdom or in France, it would still be able to apply its long arm jurisdiction rules. Moreover, because of Article 4 of the Convention any plaintiff of any nationality domiciled in France would gain

\textbf{FALL 1984}
the benefit of the French long-arm rule permitting a plaintiff to sue a foreign person in France irrespective of whether the case has any connection with that country.

C. CORPORATE DOMICILE AND JURISDICTION

Corporations are provided for in Article 53(1) of Title V of the Convention:

For the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law.

To implement this provision, it was necessary to provide in section 42 of the 1982 Act that a corporation or association has its seat in the United Kingdom, if and only if it was incorporated or formed under the law of a part of the United Kingdom and has its registered office or some other official address there or its central management and control is exercised in the United Kingdom. It follows that a corporation registered in the United States will only be considered to be domiciled in the United Kingdom and liable to suit there under the Convention's jurisdictional rules, if its central management and control is exercised in the United Kingdom.

In addition to the basic jurisdictional principle of domicile, the Convention in Title I, section 2, Article 5 contains complicated special bases for jurisdiction such as the place of performance of obligations in relation to a contract and the place where a branch agency or similar establishment is located in relation to disputes concerning such a branch agency or establishment. Furthermore, the Convention sets up various exclusive grounds of jurisdiction relating to intellectual property, consumer contracts and insurance contracts, under section 5, Article 16.

D. ENFORCEMENT OF JUDGMENTS

The Convention provides that the enforcement procedure shall apply to all judgments (not limited to money judgments or to final judgments) and whether or not they are against persons domiciled in a Member State. A judgment against a person not domiciled in a Member State under the
long-arm jurisdiction of the English courts would be enforceable in all other member states. This would apply, *inter alia*, to the U.S. citizen in the aforementioned example, if such a judgment were rendered against him. Article 59 of the Convention, however, permits a Member State to enter into a bilateral agreement on the recognition and enforcement of judgments with, for example, the United States or other third country, whereby the former would agree not to recognize judgments given by the courts of other Member States against defendants "domiciled or habitually resident" in the United States or other third country, where jurisdiction was taken on a long-arm basis. The enforcement of judgments given in civil and commercial matters will follow automatically, provided they are not contrary to public policy and that the defendant's rights have been respected. Enforcement requires a registration of the judgment in the enforcing jurisdiction by *ex parte* procedure.

The scope of the Convention and of the 1982 Act indicates that the latter will have a wider effect upon the assets of non-EEC nationals than under existing English law.