IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)

Claim No. BVIHC(Com) 119/2011

IN THE MATTER OF an application pursuant to the Arbitration Ordinance, 1976

BETWEEN:

SONERA HOLDING BV

Claimant/Respondent

-and-

ÇUKUROVA HOLDING AŞ

Defendant/Applicant

Appearances: Mr Kenneth MacLean QC, Ms Arabella di Iorio and Mr James Nadin for the Applicant
Mr Bankim Thanki QC, Mr John Carrington and Mr Ben Valentin for the Respondent

JUDGMENT

[2012: July 12, 13 and 30; 19 September]

(New York Convention award – s 36 Arbitration Ordinance, 1976 - application to set aside registration as a judgment – agreement to enter into a contract for the sale and purchase of shares – agreement containing arbitration provision – prospective contract to contain similar but not identical arbitration provisions – request for arbitration made under first agreement – tribunal going on to find that contract for sale and purchase had come into existence and to make awards under and in relation to it – no separate request for arbitration under share sale agreement – whether tribunal lacked jurisdiction in consequence – arbitration clause subject to Swiss law – expert evidence of Swiss law considered – whether applicant had been able to make its case before the tribunal – whether enforcement of tribunal's final award contrary to public policy of the Virgin Islands)

[1] **Bannister J: [Ag]:** On 1 September 2011 an arbitral tribunal convened under ICC Rules and sitting in Geneva ('the Tribunal') issued a final award in an arbitration proceeding under a Request for Arbitration made on 27 May 2005 by the Respondent, Sonera Holding BV ('Sonera'). The Request for Arbitration had been made pursuant to Article 5.4 of a Letter Agreement dated 24 March 2005 and made between Sonera (1), the Applicant, Çukurova Holding AŞ ('Çukurova') (2) and an associated company of Çukurova called Çukurova Investments NV ('Investments').

Although it will be necessary to consider the Letter Agreement in more detail in a moment, in very general terms it may be said that it provided for the sale by Çukurova to Sonera of 52.91% of the issued shares of a Turkish incorporated company called Turkcell Holding AŞ ('Turkcell'), which in turn owned 51% of Turksell İletişim Hizmetleri AŞ, Turkey's main GSM operator. Investments was party to the Letter Agreement because it had been mistakenly supposed that it held certain of the shares with which the Letter Agreement was concerned, but no substantive award[1] was ever made against it and the final award was made as if Investments was not party to the arbitration.

The Letter Agreement

[2] As already mentioned, the Letter Agreement is dated 24 March 2005. It was executed by Sonera on the same day and by Çukurova and Investments on the following day. It is addressed by Sonera to Çukurova and its purpose is expressed to be by way of confirmation of Sonera's understanding with Çukurova regarding the prospective purchase by Sonera of interests in the share capital of Turkcell. It went on to say that a draft Share Purchase Agreement (defined as a Prospective Share Purchase Agreement ('Prospective SPA')) was to be delivered to Çukurova and that the Prospective SPA remained open to negotiation. The Letter Agreement then stated that the parties to it, intending to be legally bound, thereby agreed and confirmed (I summarise):

(1) by Article 2.1, that a price of US$3.1 billion had been agreed;
(2) by Article 2.2, that it was agreed that the Final Share Purchase Agreement ('Final SPA') should be executed and delivered promptly after the conditions precedent set out in Article 3 had been satisfied;
(3) by Article 1.1, that Final SPA meant an SPA substantially in the same form and with substantially the same terms as the Prospective SPA, with such modification as might be agreed pursuant to the Letter Agreement;
(4) by Article 3, that execution and delivery of the Final SPA was subject to agreement on the terms of the Final SPA and to Sonera having completed its due diligence, it being agreed pursuant to Article 2.3 that until satisfaction of those conditions there was no obligation to execute and deliver a Final SPA or to transfer or pay for any shares;
(5) by Article 2.4, that the parties would conduct their negotiations for the share purchase in good faith and use reasonable best efforts to seek satisfaction on the conditions precedent set out in Article 3;
(6) by Article 5.1, that the Letter Agreement took effect on execution and delivery and would terminate upon the earliest of (i) mutual agreement in writing to that effect (ii) execution and delivery of the Final SPA or (iii) 12.01 am Istanbul time on 60 days from 24 March 2005 if the Final SPA had not by then been executed and delivered by all parties; and
(7) by Article 5.3, that the Letter Agreement was governed by Turkish law.

[3] By an attachment to a side letter, also dated 24 March 2005 and referring to the Letter Agreement, Sonera delivered to Çukurova a form of Prospective SPA, confirming that it was content with its terms and that it agreed to enter into an agreement in substantially the same form and terms. On

[1] Investments was made jointly liable with Çukurova for the costs of the first partial award

the following day Çukurova sent Sonera a letter to similar and corresponding effect. The Prospective SPA was initialed by Sonera and by the Çukurova parties.

[4] The Tribunal found, in the course of making its first partial award, that the reason for this two stage structure was that the parties were concerned that entry into an immediate concluded final agreement might cause unwanted regulatory issues to arise with the Turkish Capital Market Board.

[5] The material parts of Article 5.4 of the Letter Agreement ('Article 5.4') were in the following terms:

> 'Any dispute, controversy or claim arising out of or in connection with this Agreement, if not amicably resolved by the Parties within 60 days or notification thereof, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules"), except as such ICC Rules may be modified below.
> (a) The place of arbitration shall be Geneva, Switzerland.
> (b) The language of the arbitration shall be English.
> (c) . . .
> (d) Any award of the arbitral tribunal shall be final and binding on the Parties. The Parties hereby waive any rights to appeal any arbitration award to, or seek determination of any question of law arising in the course of arbitration from, jurisdictional courts.
> (e) Any award of the arbitral tribunal may be enforced by judgment or otherwise in any court having jurisdiction over the award or over the person or the assets of the owing Party or Parties. Applications may be made to such court for judicial recognition of the award and/or an order for enforcement, as the case may be.'

[6] The Prospective SPA which the parties initialed was also to be governed by Turkish law. It provided that it would terminate at midnight Istanbul time on 30 July 2005 if closing had not then taken place. It was subject to various regulatory consents and approvals.

[7] The Prospective SPA also contained, as clause 12.8, a dispute resolution clause. For present purposes, it is sufficient to say that it is in identical terms to those of Article 5.4, except that it conferred upon any arbitral tribunal constituted under its terms a power to consolidate or hold concurrent proceedings arising out of or in connection with the SPA, whether such proceedings were between the same or different parties and whether or not they arose at the same time as or subsequently to each other. The power was exercisable by the tribunal on the request of any of the parties to the SPA. If all parties agreed, the tribunal was bound to consolidate and otherwise had a discretion, in appropriate circumstances, to do so.

The three arbitral awards

[8] In the course of the arbitration the Tribunal made two partial awards in addition to its final award. The first partial award, made on 15 January 2007, declared (1) that the Tribunal had jurisdiction (which Çukurova had challenged) to make the award on the application of Sonera; (2) that a Final SPA had been validly concluded between Sonera and Çukurova on 9 May 2005; (3) that Çukurova was obligated to join Sonera in good faith efforts to bring about closing under the Final SPA; that

(4) the Tribunal remained seized of the matter; (5) that Çukurova remained liable in respect of its failure to execute the Final Share Purchase Agreement and to proceed to closing; and (6) that Çukurova and Investments were to pay Sonera's costs.

[9] Closing did not take place pursuant to the Tribunal's first partial award and on 29 July 2009 the Tribunal issued its second partial award ordering specific performance of the Final Share Purchase Agreement and valuing the Turkcell shares as at 30 June 2007 at US$1.809 million. Sonera's claims for damages and costs were reserved.

[10] On 19 November 2011 Sonera wrote to the Tribunal waiving its claim for specific performance and electing instead to pursue a claim for damages for non-delivery. In its final award of 1 September 2009 the Tribunal awarded Sonera US$932 million for Çukurova's failure to transfer the shares as required under the [Final] SPA, together with interest and costs.

[11] On 3 October 2011 Sonera applied to this Court under sections 28 and 34 of the Arbitration Ordinance 1976 ('the Ordinance') to enforce the final award and on 24 October 2011 permission to enforce the final award in the same manner as a judgment of the High Court and to enter judgment in the same terms as the terms of the final award was granted and an order was made on Sonera's application for payment by Çukurova to Sonera of US$1.033 billion together with subsequently accruing interest and costs ('the order').

[12] On 25 November 2011 Çukurova applied to set aside the order. That application came on for hearing on 12 July 2012 and closing submissions were completed, after a short interval, on 30 July 2012.

Çukurova's grounds for setting aside

[13] Çukurova relies on the following grounds for setting aside the order:

(1) pursuant to section 36(2)(d) of the Ordinance, that the Tribunal was constituted under the Letter Agreement, but went on, in alleged excess of its jurisdiction, to determine issues arising under the Share Purchase Agreement, a agreement which contained its own separate dispute resolution clause;

(2) (without prejudice to (1)) that despite having found that Çukurova was bound by the Final Share Purchase Agreement, which had a contractual completion date of 30 June 2005, the Tribunal went on in its second partial award to determine the value of the shares 'at the time when their delivery could have been expected to occur' and for those purposes selected a valuation date of 30 June 2007 and assessed damages in its final award on the same basis. This is categorized variously as having been in excess of jurisdiction; illogical and without basis; and in breach of the *res judicata* principle;

(3) pursuant to section 36(2)(c) of the Ordinance, that Çukurova was denied a fair hearing because (a) the Tribunal rejected an application that one of its witnesses, Mr Berkmen, should be permitted to attend before the Tribunal in person and give evidence orally and because (b) the Tribunal ignored (i)

evidence given on behalf of Çukurova by an expert witness on a point about the quantum of damages and (ii) an argument on mitigation which had been advanced by Çukurova in the hearings leading to the final award;

(4) pursuant to section 36(3) of the Ordinance, that enforcement of the final award in the Virgin Islands would be contrary to public policy as violating principles of natural justice and the fundamental principle of *res judicata*.

Section 36 of the Ordinance

[14] Section 36 of the Ordinance mirrors Article V of the New York Convention. Its material parts, for present purposes, are as follows:

> 'Refusal of enforcement
>
> 36. (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
>
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves –
>
> (a) that a party to the arbitration agreement was, under the law applicable to him, under some incapacity;
>
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or failing any indication thereon, under the law of the country where the award was made;
>
> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
>
> (d) subject to subsection (4), that the award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;
>
> (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
>
> (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
>
> (3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.'

[15] It is accepted that the final award is a Convention award within the meaning of section 36 of the Ordinance ('section 36'). As section 36 makes clear, the Court has no discretion to refuse to enforce a Convention award unless the other party proves that one or more of the provisions of section 36(2) or (3) is satisfied, in which case the Court has a discretion whether or not to permit enforcement. The burden of proving that one or more of those provisions is satisfied is upon the person resisting or seeking to set aside an order for enforcement.

Excess of jurisdiction

A Subject matter jurisdiction

[16] Put very shortly, Çukurova's principal argument on the jurisdiction issue is that the only arbitration agreement to which Çukurova has ever been a party in relation to this dispute is that contained in Article 5.4; that Article 5.4 was the only provision relied upon by Sonera in its Request for Arbitration; that in the context within which it came to be agreed Article 5.4 confined the subject matter of disputes falling within its purview to disputes 'arising out of or connected with' the Letter Agreement itself and does not extend to disputes arising out of some other agreement, such as any Final SPA; that the relief granted by the Tribunal in each of its three awards was relief about the existence of and performance of the Final SPA and should, if it were to be properly awarded, have been awarded in the course of an arbitration constituted under the Final SPA.

[17] It may be thought odd for Çukurova to have denied throughout, as a matter of fact, that any Final SPA was ever concluded while at the same time complaining that Sonera should have invoked its arbitration clause in its Request for Arbitration, but it is clear, and Mr Kenneth MacLean QC, who appeared, together with Ms Arabella di Iorio and Mr James Nadin, for Çukurova repeated it more than once, that it is Çukurova's case that for the Tribunal to have had jurisdiction to decide matters relative to the Final SPA, clause 12.8 of the Final SPA ought to have been invoked in the Request for Arbitration, or in some subsequent Request for Arbitration.

[18] The tribunal dealt with the question of jurisdiction in the course of its first partial award. Some of the issues on jurisdiction with which the Tribunal had to deal were not live before me, but the question of subject matter jurisdiction, which is squarely raised by the present application, was considered by the Tribunal. Their conclusions, set out in section 6.4 of the first partial award, were that:

> (1) parties to international commercial contracts containing arbitration provisions are to be taken to have intended all disputes relating to the transaction in question to be dealt with under one umbrella;
> (2) to proceed on any other basis involves adopting a piecemeal approach with the attendant risk of conflicting decisions;
> (3) the expression 'in connection with' in Articles 5.4 was not limited to rights and obligations specifically created in the Letter Agreement itself;
> (4) the objective of the Letter Agreement was the purchase of the shares and the conclusion of an agreement to that effect; and
> (5) once such an agreement was proved, then delivery of the shares was clearly in connection with that objective.

[19] It was common ground that in deciding an issue under section 36(2)(d) of the Ordinance the Court may have regard to the reasons given by the Tribunal for assuming jurisdiction, but the decision is one for the enforcing Court alone.[2] It was also common ground that the question whether Article 5.4 extended to confer jurisdiction upon the Tribunal to decide whether a Final SPA had ever been concluded and, if so, to make consequential orders in relation to it, was a matter to be determined by reference to Swiss federal law. In order to enable the Court to decide the issue, therefore, expert evidence of Swiss law was admitted from Dr Bernhard Berger, for Çukurova, and from Professor Gabrielle Kaufmann-Kohler, for Sonera. Each of these witnesses, for whose careful evidence the Court is profoundly grateful, is a highly qualified academic and practicing lawyer in the sphere of international arbitration.

The expert evidence

[20] The experts were agreed upon a number of points. They agreed that the Swiss Federal Supreme Court ('the Supreme Court') uses general principles of substantive contract law in determining the validity and scope of an arbitration agreement. They agreed that under Swiss law contractual interpretation is a two-step process: the first stage is to attempt to establish the subjective intentions of the parties to the agreement. The starting point, if the agreement is in writing, is the language itself, but evidence of intention deduced, for example, from the parties' prior or subsequent conduct is admissible as an aid to establishing the parties' subjective intentions. The subjective intention of the parties, established in this way, is treated as a finding of fact. If it is not possible for the Court to ascertain what the parties' subjective intentions were, then the Court will deduce them objectively from the wording used in the relevant contract according the meaning that parties acting in good faith would have accorded to it in the circumstances under which it was concluded.

[21] The experts also agreed that in deciding whether parties are bound by an alleged arbitration clause, the Swiss Courts adopt a strict approach – the policy reason being caution about finding that persons have waived their right of access to the courts in favour of arbitration. Once an arbitration agreement has been proved to bind the parties, however, the Swiss Court's approach is to be liberal (consistently with its terms) in determining its scope.

[22] Dr Berger, for Çukurova, gave it as his opinion that the Tribunal had no jurisdiction to award relief which had its legal basis in the Final SPA. For that reason, it could not order specific performance or award damages. He does not specifically state in his report that the Tribunal had no jurisdiction to find that a Final SPA had been concluded, but I think that that is implicit in what he says.

[23] In approaching a subjective construction of Article 5.4, Dr Berger starts by saying that its wording appears to support the proposition that the parties' common and true intention was to enter into an arbitration agreement with a broad scope. Having said that, however, he gives it as his view that the wording of Article 5.4, taken alone or in its context, does not evince an intention to give the Article a scope which would extend to disputes about or arising under the Final SPA.

---

[2] **Dallah Real Estate and Holding Company v Ministry of Religious Affairs, Government of Pakistan** [2011] 1 AC 763

[24] Dr Berger's first reason for this conclusion is that the Swiss Federal Supreme Court had considered a similarly worded clause in a case which has been referred to in these proceedings as **Ferrotitanium.**[3] The parties had entered into two exclusivity agreements for the supply of ferrotitanium, which specified Zurich as the court of jurisdiction. Thereafter the parties entered into a number of supply contracts providing for arbitration at the Chamber for Trade and Industry of the Russian Federation in Moscow. Subsequently, the parties amended the exclusivity contracts to provide for arbitration in Zurich. The amendment provided that

> Disputes, controversies or claims from or in connection with this contract, including its validity, invalidity, breach or termination thereof are to be decided through arbitration in accordance with the Swiss Rules of International Arbitration.

[25] A dispute arose under one or other of the exclusivity agreements and an arbitration was commenced in Zurich. The claimant attempted to have claims arising from the supply agreements dealt with in the same arbitration, relying upon the provisions of the amendment to the exclusivity agreements. The arbitral tribunal made an objective assessment of the meaning of the amendment. It noted, first, that the amendment made no reference to the supply contracts and gave no indication that it was supposed to apply to those contracts. The tribunal said that if the parties had wanted to replace the arbitration clauses in the supply contracts, that could have been readily made explicit in the amendment. The tribunal accepted that the words 'from or in connection with this contract' could, as a matter of language, have included other contracts, but not in circumstances where from the outset the two sets of agreements had contained different dispute resolution mechanisms.

[26] The appellant in the Supreme Court complained that the tribunal had overlooked the plain meaning of the words 'claims from or in connection with this contract.' The Supreme Court held that those words did not have to be construed as extending to contracts which had differing arbitration agreements. Instead, they were to be read as extending the scope of any arbitration to disputes over formation, validity and termination as well as any related [tortious or restitutionary][4] claims. In support of the latter proposition the Supreme Court relied, *inter alia*, on published work of Dr Berger himself. As for the appellant's reliance upon the interrelationship ('connectivity') between the exclusivity agreements and the supply contracts, the Supreme Court said that even accepting such interrelationship, the formulation ('from or in connection with') was to be construed as embracing non-contractual but related claims in addition to run of the mill claims for debt, damages, etc in the ordinary course of business, but 'not necessarily' claims under other contracts, even if connected in certain specific ways – especially, the Supreme Court added, at the end of paragraph 2.5.2 of the report, if the connecting [sic] contracts stipulate 'clearly different' arbitration agreements (which of course was the position in the case under consideration). The Court therefore upheld the tribunal's decision as to jurisdiction and went on to reject a submission that the risk of conflicting decisions from different arbitral tribunals required a different interpretation.

[27] Dr Berger says that this decision reflects Swiss legal writing propounding the view that the words 'disputes arising out of or relating to this contract' are intended to confer jurisdiction to determine

---

[3] Decision of the Federal Supreme Court, 4A_452/2007 of 29 February 2008

[4] I take that to be the meaning

both contractual and non contractual claims under the particular contract within which the arbitration provision is contained. Dr Berger accepts that an arbitration clause may be so worded as to embrace claims arising under contracts other than that within which it is contained, but his view is that wording of the sort to be found in Article 5.4 is not sufficient on its own to achieve that result.

[28] Dr Berger was cross examined about this case and in particular about the observation of the Supreme Court that the principles expressed in paragraphs 2.5.1 and 2.5.2 of the report applied 'especially' where there were two clearly divergent arbitration provisions in the different contracts. Dr Berger rejected any suggestion that this phrase formed part of the Supreme Court's *ratio*. In his firmly expressed view the point was merely *a fortiori*. Nor did the fact that the Supreme Court had relied upon the **Ferrotitanium** case in subsequent decisions cause him to modify his opinion.

[29] Dr Berger's second objection to the construction for which Sonera contends is that the Prospective SPA which the parties had initialed envisaged that the Final SPA would have its own arbitration clause. He says that this is contemporaneous evidence which contradicts the suggestion that the parties, when entering into the Letter Agreement, intended Article 5.4 to cover possible disputes arising out of the Final SPA. On the contrary, he says that it shows that the parties contemplated that disputes arising from it would be dealt with under the separate arbitration clause. He points out that the Letter Agreement was to expire upon conclusion of the Final SPA, with the consequence that thenceforward the only contract between the parties would be the Final SPA. He is criticized by Professor Kauffman-Kohler for ignoring the doctrine of separability in making this observation and I shall have to come back and consider that criticism later.

[30] In support of his opinion about the need to treat the Letter Agreement as distinct from the Final SPA, Dr Berger relied upon another decision of the Swiss Federal Supreme Court, referred to at the hearing as **The Football Case**.[5] In that case a national football federation conferred certain advertising and other rights upon the claimant for a period of five years. The agreement provided for arbitration in Zurich under ICC Rules. As here, the provision was expressed to embrace all disputes arising out of or in connection with the agreement. The parties entered into a new contract on 4 September 2007. The new contract contained no arbitration provision, instead containing a jurisdiction clause. The claimant instituted arbitration proceedings against the federation, contending that the new contract was a mere extension of the original one, so that it could rely upon the original arbitration clause. The tribunal refused jurisdiction. The claimant appealed, arguing among other things that the original arbitration clause had been wide. The Supreme Court upheld the tribunal's decision, observing that the point for determination in the case was the question how claims under different contracts with different dispute resolution clauses were to be assigned.

[31] Dr Berger also referred to a decision of the Cour d'Appel de Paris given on 16 November 2006, but the report is insufficiently detailed to enable me to derive much in the way of assistance from it.

[32] Relying on these matters, Dr Berger took the view that the material facts tended to show that the actual subjective intention of the parties was that Article 5.4 was not to extend to disputes arising under the Final SPA.

[5] Federal Supreme Court 4A 942009, 4A 96/2009, 9 June 2009

[33] Dr Berger then turned to consider objective construction. After repeating some of the material used by him to deal with the subjective construction, Dr Berger accepts, once again, that it is not impossible as a matter of Swiss law for an arbitration agreement in one contract to cover disputes arising under another. Although noticing the different wording between Article 5.4 and the corresponding provision in the Final SPA, together with the fact that Investments was a party to the Letter Agreement but would not be party to any Final SPA, Dr Berger says that his conclusion would be the same had these differences not existed. Dr Berger then refers to the Tribunal's conclusion that agreement on the terms of the Final SPA had been reached on or before 9 May 2005. The Tribunal had given it as their view that at that time a new agreement became effective between the Parties which henceforth controlled the relations between the Parties, unaffected by the termination of the Letter Agreement. Dr Berger refers to clause 12.2 of the Final SPA, providing that it was to supersede all other agreements and says that that makes it all the more difficult to see how the Tribunal reached the conclusion that it had jurisdiction under the Letter Agreement to decide disputes arising under the Final SPA, which on the Tribunal's findings of fact had been concluded before Sonera submitted its Request for Arbitration on 27 May 2005.

[34] Professor Kauffman-Kohler starts her opinion on this part of the case by stressing the liberal pro-arbitration of the Swiss Courts when considering the scope of an arbitration provision and points to the wide language of Article 5.4. In cross examination Dr Berger said that this approach was confined to the situation where the Court was construing an arbitration clause on an objective basis, but I do not think that this was ever put to Professor Kauffman-Kohler in cross examination.

[35] Professor Kauffman-Kohler relied upon another decision of the Swiss Supreme Court, referred to at the hearing as **The Boxing Case**.[6] An arbitral tribunal had construed the relevant arbitration provision in a licensing agreement made by a boxing association as meaning that it extended to any dispute related to the licensing agreement and, in particular, to a claim by the claimant for the unpaid price of goods which it had sold to the association pursuant to contracts containing no dispute resolution provisions. The association appealed on the grounds that the supply claim was not within the scope of the arbitration provisions. The Supreme Court held that there could be no appeal against the tribunal's construction of the arbitration provision, since that was a matter of fact decided by the tribunal on a subjective basis. It was apparently conceded, on the basis of certain passages in a book co-authored by Professor Kauffman-Kohler herself, that provisions so worded could extend to additional or accessory contracts unless they contained their own dispute resolution clauses 'of different content.' The Supreme Court went on to hold that, while the provision appeared to restrict its scope to claims directly based upon the licensing agreement itself, that was too restrictive an approach in the light of (a) the case law in the field and (b) the particular circumstances of the case. Having considered those circumstances, the Supreme Court held that despite the apparently restrictive wording of the clause, it did extend to cover the associated supply agreements. Professor Kauffman-Kohler relied strongly upon this authority as support for her opinion.

[36] So far as **Ferrotitanium** is concerned, Professor Kauffman-Kohler maintains in her report that the *ratio* for the decision was that the supply contracts contained 'clearly divergent' dispute resolution clauses – stipulating for arbitration in Zurich rather than Moscow and under different rules. From

[6] Decision of the Swiss Federal Court 4A_103/2011 of 20 September 2011

this she draws the conclusion that an arbitration clause in language similar to that used in Article 5.4 will be held by the Swiss Courts to extend to connected contracts provided that those connected contracts do not embody incompatible dispute resolution provisions. She accepts that the Swiss Federal Supreme Court has never defined what makes two arbitration clauses compatible or incompatible, but she says that when, as in this case, two clauses provide for the same seat, the same number of arbitrators and the same governing rules, they will be compatible and she says that that is in line with published work by Dr Berger. For these reasons Professor Kauffman-Kohler distinguishes **Ferrotitanium** and **The Football Case.**

[37] Professor Kauffman-Kohler accepted, however, that she had been unable to find any Swiss authority in which the Court had held that disputes arising in respect of two different contracts could be heard together under an arbitration clause contained in only one of the contracts in a case where the other contract had its own arbitration clause. But she said that this was possible provided (a) that the scope of the first arbitration provision was wide enough to embrace disputes under both contracts and (b) that the two arbitration provisions were, according to her definition, compatible. Dr Berger accepted that it might be possible on the facts of any given case to have a single arbitration dealing with claims covered by arbitration clauses in more than one contract, but only if the arbitration provision in each separate contract was explicitly invoked when the arbitration was constituted.

[38] Professor Kauffman-Kohler concludes that Article 5.4 is compatible with clause 12.8 of the Final SPA and says that 'given the undisputed connection' between the Letter Agreement and the Final SPA the Tribunal was correct to determine the issues which it did in its three awards. In this respect Professor Kauffman-Kohler relies upon the fact that the parties belonged to the same group of companies[7] and that the Letter Agreement and the Prospective SPA were each signed or initialed by the same parties. She contends that this conclusion is consistent with the Swiss Courts' *effect utile* approach to arbitration case law. By that I understand her to mean that the Swiss Courts will strive to give a dispute resolution clause as wide an ambit as its terms will permit wherever possible.

[39] Professor Kauffman-Kohler takes issue with Dr Berger's view that the words 'arising out of or in connection with' have been treated in text books as only going so far as to encompass claims other than merely contractual ones.[8] She says that in the passages relied upon the writers are not considering what is the effect of the words where there are two contracts in play, but deal only with their impact within the context of a single contract.

[40] Finally, Professor Kauffman-Kohler says that the Letter Agreement and the SPA should be regarded as parts of a single transaction, both agreements being very closely connected. She returned to this point in cross examination, describing the dispute as being a single dispute about a single economic transaction and the Final SPA as being connected to the Letter Agreement.

[7] I am not at all sure what she meant by that

[8] see paragraph [26] above

Analysis of the expert evidence

[41] On the first important difference between the experts, whether expiry of the Letter Agreement upon conclusion, on 9 May 2005, of the Final SPA meant that it was no longer possible to commence an arbitration under the Letter Agreement after that date, I prefer the evidence of Professor Kauffman-Kohler. It was in fact common ground at the hearing that the separability of Article 5.4 meant that it could survive termination of the Letter Agreement itself – the question being whether any dispute referred under it was within its scope.

[42] On the next important difference between the two experts – what was the *ratio* of the **Ferrotitanium** case – I prefer the evidence of Dr Berger. It seems to me that his analysis of the Supreme Court's decision that the arbitral tribunal in that case had been right to refuse jurisdiction is to be preferred because that is what, in plain terms, the Supreme Court actually said. It construed the words 'from or in connection with the contract' as extending the scope of the provision to non contractual claims arising out of the parties' dealings under the exclusivity contract. It is true that the Supreme Court left open the possibility ('but *not necessarily*[9] claims under other contracts') that such or similar wording might in other circumstances be found or held to cover claims under other contracts, but as I read the translation of the judgment it was expressing the clear view that on the facts of that case the language was insufficient on its own to cover claims arising under other contracts. I therefore think that Dr Berger is right when he says that the decision in **Ferrotitanium** did not turn upon the additional fact that in that particular case the arbitration agreements were inconsistent in providing for arbitration under different rules and with different seats.

[43] The next significant difference between the experts was expressed by them in slightly different ways but deals, in my judgment, with the same issue. Professor Kauffman-Kohler says that if an arbitration agreement is wide enough as a matter of language, construed in context, to cover a dispute under another contract as well as under the contract in which it is contained or to which it relates, then provided that there is no procedural obstacle preventing the disputes from being dealt with by the same tribunal, there is no reason why an arbitration covering disputes under both contracts should not proceed under a request for arbitration invoking the provisions only of the first contract. Dr Berger accepts that it is possible to hear disputes under different contracts at a joint hearing if those conditions are met, but only if the hearing is convened under a request or requests specifically invoking each separate arbitration clause.

[44] Neither opinion was supported by authority. Although, as will appear, I do not regard it as material to my decision on this part of the case, I prefer that of Professor Kauffman Kohler, on the grounds that it appears to me that *on the assumptions which it makes* – that the language of the first arbitration provision does as a matter of subjective or objective construction embrace disputes under the second and that there are no procedural difficulties in both claims being heard together – it is more consistent with the flavor one derives from the Swiss authorities to which the Court was referred about the approach of the Swiss Courts to arbitration, whereas Dr Berger's insistence on a matter of pure form seems to me to sit less well with them. It seems to me to be inherently improbable that if the facts upon which Professor Kauffman-Kohler's hypothesis is based were found to obtain, any up to date system of jurisprudence would insist upon what in those

[9] emphasis added

circumstances would be a merely formulaic invocation as a condition for the assumption of jurisdiction.

[45] That leaves the question of construction. Dr Berger relies upon the fact that the parties had expressly provided for two separate arbitration clauses and that the Letter Agreement was to expire on conclusion of the Final SPA. He says that that shows that the parties intended that an arbitration for the determination of questions arising under the Final SPA was intended to be conducted under the provisions of that agreement, and not under the provisions of the Letter Agreement. Professor Kauffman-Kohler says that the language of Article 5.4 is wide enough to cover disputes arising under both. She relies upon the fact that, in her words, the Letter Agreement and the SPA are part of a single economic transaction and the dispute which has arisen is a single dispute about a single economic transaction.

[46] Both experts agreed that the construction of contracts under Swiss law is context sensitive. I think that Professor Kauffman-Kohler must therefore be right to point to the highly unusual features of the contractual arrangements in the present case. The parties only refrained from entering into a single immediately concluded share sale agreement because they considered that by doing things as they did they could avoid regulatory problems. The whole arrangement was therefore highly artificial. It was constructed as a legally binding agreement to agree and its sole object was to cause the conclusion of the very contract by which (until Çukurova changed its mind) the parties intended from the outset to be bound. In my judgment, the language used by Professor Kauffman-Kohler to describe the arrangement is entirely apt.

[47] **Ferrotitanium** is high authority for the proposition that the 'arising out of or in connection with' formula is ordinarily to be restricted to disputes arising under or in connection with the contract in which the words are to be found or to which they relate.

[48] As I understand the position under section 36, however, Çukurova has the burden of proving that the Tribunal made decisions on matters beyond the scope of the submission to arbitration. It is not sufficient for it to show that arguments can be advanced why it exceeded its jurisdiction. It must show that it did so.

[49] I do not think that Çukurova has done that. The high point of its argument is **Ferrotitanium**, but the facts of that case are miles away from the facts of this one. In **Ferrotitanium** the Supreme Court was dealing with a case in which there were in existence two concurrent sets of contracts, each set self standing and autonomous from the outset, each dealing with different subject matters and governing separate incidents of the parties' ongoing relationships. Against that background the Court held that disputes arising out of one such set of contracts could not be dealt with under the machinery of the other. In the present case it was never intended that the parties should be bound by two concurrent sets of differing contractual obligations. The Final SPA was prospective and inert until the obligations and conditions contained in the Letter Agreement were fulfilled and performed, upon which the operative provisions of the Letter Agreement would self destruct under Article 5.1 and the parties' commercial relationship would flow seamlessly on into one governed by the Final SPA alone. That was the sense of Professor Kauffman-Kohler's analysis of the contractual position and that is pretty much what the Tribunal itself held in section 6.4 of its first partial award. It is true that in **The Football Case** the contracts were not concurrent, but it was indeed part of the *ratio* of the Supreme Court in that case that there were irreconcilable dispute

resolution provisions in the expired and in the new licence agreements and in any case the agreements there were not and were held not to be component parts of a single seamless transaction, which is the position in the present case.

[50] In my judgment neither **Ferrotitanium** itself, nor Dr Berger's persuasive comments upon it and upon the principles which it expounds, enable me to reach the conclusion that the Tribunal exceeded its jurisdiction in deciding the issues which it did. The Supreme Court was not considering a case such as the present and it expressly left open the possibility that the formula in question might in another case embrace disputes under more than one contract. I am unable to find, on the material with which I have been presented, that in the context of the parties' arrangements the invocation of Article 5.4 was not sufficient to allow the Tribunal to decide issues under the entirety of those arrangements. It is not necessary for me to decide that Professor Kauffman-Kohler's views on compatibility are an answer to this part of this application and I refrain from doing so. My position is simply that I do not consider that I have been shown any authority, judicial or academic, which entitles me to conclude that in the very special circumstances of this particular case, where Çukurova was denying the existence of a concluded SPA, there was any impediment in Swiss law to prevent Sonera from having the whole dispute between the parties dealt with under Article 5.4 alone, or any principle of Swiss law which required Sonera, either at the outset or following the making of the first partial award, to go through the empty form of issuing a second letter of request under clause 12.8 of the Final SPA. Dr Berger's opinion to the contrary rests upon cases decided on quite different factual situations and fails to persuade me that the Tribunal in this particular *case* proceeded in excess of jurisdiction.

[51] In my judgment, therefore, Çukurova fails to discharge the burden of proving that the Tribunal exceeded its jurisdiction in deciding issues arising in connection with or under the Final SPA.

B No jurisdiction to award damages on the basis of a delivery date of 30 June 2007

[52] The argument here is founded on the fact that the Tribunal, having held that Çukurova was bound by the Final SPA, which provided for closing by at the latest 30 July 2005, went on to assess damages for non-delivery based upon a failure to deliver by 30 June 2007. The reason why this argument is categorized as an argument on want of jurisdiction is said to arise from the fact that having found when the contractual closing date occurred, it had fettered itself from awarding damages based upon any other delivery date. An appeal was made to the doctrine of *res judicata,* but this part of the case seems to me to amount to no more than a complaint that the Tribunal was in error is assessing damages for non-delivery as at 30 June 2007. It also assumes, which was not proved before me, that the Tribunal was bound to apply BVI/English rules as to the time by reference to which damages for non delivery of shares are to be assessed. It is notorious that the enforcing court may not concern itself with the correctness or otherwise of a tribunal's award and that is sufficient to dispose of this issue.

Inability to present case – section 36(2)(c)

A The oral testimony of Mr Berkmen

[53] The argument here is that the Tribunal denied a request on the part of Çukurova that one of its witnesses, Mr Berkmen, whose silence (or rather lack of reaction) was relied upon by the Tribunal

for its finding that the Final SPA had been concluded on or around 9 May 2005, should be allowed to give evidence in person.

[54] The obvious objection to this argument is that the refusal on the part of the Tribunal to hear oral evidence from Mr Berkmen did not prevent Çukurova from presenting its case – at most it prevented it from presenting it in the manner in which Çukurova now says it wished to present it. In fact, the evidence shows that Çukurova was offered, but declined to exploit, an opportunity to explain why there should be a further hearing in order to hear Mr Berkmen in person. The Tribunal therefore was entirely within its rights to refuse to convene a further hearing to enable him to do so. In any case, the Tribunal decided the point on the basis that what Mr Berkmen had said in his witness statement was true. It is hard to see what injustice can have resulted from a refusal to hear him repeat it.

[55] The parties put in lengthy submissions dealing with what Mr Berkmen might or might not have said and what impact what he might or might not have said might or might not have had on the deliberations of the Tribunal. I do not think that the enforcing Court is concerned with matter like that and I gratefully adopt the reasoning of the US Court of Appeals, Second Circuit, on a similar contention raised under Article V(1)(b) of the New York Convention.[10] In the passage cited the Court of Appeals of the Second Circuit dismissed an objection by the unsuccessful party that the tribunal had refused to alter the arbitration timetable to accommodate the speaking schedule of one of its witnesses. The Court pointed out that the tribunal had had before it an affidavit by the witness in which he had set out 'a good deal of the information' about which he would have testified and expressed the view that there was no infringement of due process rights if an arbitral tribunal, concerned about the logistical problems of arranging hearings in a cross border dispute, declined to alter its timetable to suit the convenience of a witness who wished to give evidence in person.

B Mr Osborne

[56] The complaint here is that having heard the evidence of one of Çukurova's valuation experts on the question of 'illiquidity discount'[11] the Tribunal made no reference to that evidence in its award. In fact, the witness in question, Mr Osborne, gave 'evidence' of so guarded and hesitant a nature that on at least one view it was not of a nature capable of being taken into account, but that is very firmly not something for me. If the Tribunal wrongly ignored Mr Osborne's evidence, the consequence may (or may not) have been that its assessment of damages was wrong. Whether or not that was so is not something with which an enforcing Court can be concerned.

C Ignoring Çukurova's evidence on mitigation

[57] Çukurova says that the Tribunal ignored or failed to take into account Çukurova's submission that Sonera failed to mitigate its loss. This point is covered by the reasoning set out in the preceding paragraphs of this section of this judgment.

---

[10] **Parsons & Whittemore Overseas Co Inc v Societé Générale de l'Industrie du Papier** 508 F2d 969 at [8]-[10]

[11] as I understand it, 'marriage value'

Violation of public policy of the Virgin Islands – section 36(3)

[58] Çukurova offers two reasons why the Court should decline to enforce the final award on public policy grounds. The first is that the state should not do anything to offend the principle *pacta sunt servanda*. On this point it is said that by using 30 June 2007 as the reference date for its assessment of damages, the Tribunal violated the contractual provisions of the Final SPA, which provided for closing not later than 30 July 2005. The selection of a date for the assessment of damages has nothing to do with the principle of *pacta sunt servanda* and I repeat here what I said in paragraph [52] above. The Tribunal, by its awards, showed that it considered that the Letter Agreement should be complied with. It was Çukurova which contended otherwise. The damages award may or may not have been correctly calculated, but that does not mean that the parties' bargain is not being enforced – it means merely that it may be open to argument on the merits that the quantum of the award is wrong. That is something which the enforcing Court may not inquire into – not least because it is part of the public policy of the Virgin Islands, enshrined in section 36 of the Ordinance, that it should not.

[59] No different considerations arise if the point is put on the basis that the Tribunal offended the *res judicata* principle in selecting a date for assessment which differed from what was implicit in their decision, in their first partial award, that the Final SPA was validly concluded on 9 May 2005 and that closure had to take place by 30 July 2005.

Conclusion

[60] For these reasons this application fails.

Commercial Court Judge
19 September 2012