EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2012/0029
(On appeal from the Commercial Division)

BETWEEN:

CUKUROVA HOLDING A.S.

Appellant

and

SONERA HOLDING B.V.

Respondent

Before:

The Hon. Mde. Janice M. Pereira — Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal

Appearances:

Mr. Kenneth MacLean, QC with Ms. Arabella di Iorio and Mr. James Nadin for the Appellant
Mr. Ben Valentin with Mr. John Carrington for the Respondent

2012: January 16
2013: May 9.

Civil appeal – Letter Agreement for concluding Share Purchase Agreement – Arbitral tribunal convened pursuant to arbitration agreement in Letter Agreement and not pursuant to Share Purchase Agreement – Whether arbitral tribunal determined issues in excess of its jurisdiction – Whether appellant was denied opportunity to present its case – Evidence of appellant's expert witness not accepted by tribunal – Natural justice – Whether enforcement of award contrary to public policy as violating principles of natural justice, pacta sunt servanda and res judicata

On 27th May 2005, a Request for Arbitration was made by the respondent ("Sonera") pursuant to a Letter Agreement involving three parties: Sonera itself, the appellant ("Cukurova"), and an associated company of Cukurova called Cukurova Investments ("Investments"). This Letter Agreement essentially provided for the sale by Cukurova to Sonera of 52.91% of the issued shares of a Turkish incorporated company ("Turkcell"),

which company in turn owned 51% of Turkey's main GSM operator. On 1st September 2011, an arbitral tribunal convened under ICC rules and sitting in Geneva ("the Tribunal") issued the Final Award in the arbitration brought about by Sonera's Request for Arbitration. Although Investments was party to the Letter Agreement, no substantive award was ever made against it since it had mistakenly been made a party to the Letter Agreement on the basis that it held certain of the shares with which the Letter Agreement was concerned.

The Letter Agreement stated the agreed purchase price of the Turkcell shares and spoke to a Prospective Share Purchase Agreement ("Prospective SPA") which remained open to negotiation and a Final Share Purchase Agreement ("Final SPA") which would be executed and delivered subsequently. The Final SPA was meant to be in the same form as, and to contain substantially the same terms as the Prospective SPA, with such modification as might be agreed pursuant to the Letter Agreement. Both the Letter Agreement and the Prospective SPA were to be governed by Turkish Law.

Sonera delivered to Cukurova 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 with the same terms. Cukurova sent Sonera a letter to similar and corresponding effect the following day. The Prospective SPA was initialled by Sonera and the Cukurova parties.

Both the Letter Agreement and the Prospective SPA contained dispute resolution clauses which were in substantially identical terms and stated that any dispute, controversy or claim arising out of or in connection with the agreements, if not amicably resolved by the parties within a certain time period, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce ("the ICC Rules"). The clauses also stated that: the place of arbitration shall be Geneva, Switzerland; the language of the arbitration shall be English; any award of the arbitral tribunal shall be final and binding on the parties; and 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 (and that applications may be made to such court for judicial recognition of the award and/or an order for enforcement, as the case may be).

The arbitral tribunal made two partial awards in addition to its final award. The first partial award declared: (1) that the Tribunal had jurisdiction to make the award on the application of Sonera; (2) that a Final SPA had been validly concluded between Sonera and Cukurova; (3) that Cukurova was obligated to join Sonera in good faith efforts to bring about closing under the Final SPA; (4) that the Tribunal remained seized of the matter; (5) that Cukurova remained liable in respect of its failure to execute the Final SPA and to proceed to closing; and (6) that Cukurova and Investments were to pay Sonera's costs. Closing did not take place pursuant to the Tribunal's first partial award and the Tribunal subsequently issued its second partial award ordering specific performance of the Final SPA and valuing the Turkcell shares at US$1.809 million. Sonera's claims for costs and damages were reserved.

Sonera later wrote to the Tribunal requesting that its claim for specific performance be waived and electing instead to pursue a claim for damages for non-delivery. The Tribunal

awarded US$932 million to Sonera for Cukurova's failure to transfer the shares as required under the Final SPA, together with interest and costs. On 4th October 2011, Sonera applied to the Court pursuant to the Arbitration Ordinance to enforce the final award and on 24th 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. An order was made on Sonera's application for payment by Cukurova to Sonera of US$1.033 billion together with subsequently accruing interest and costs.

Cukurova applied, on 25th November 2011, to the court below to set aside the order for enforcement of the final award on the grounds that: (1) the Tribunal (which Cukurova alleged was constituted under the Letter Agreement), in excess of its jurisdiction, had determined issues arising under the Final SPA, which issues could only have been made by a Tribunal constituted under the Final SPA; (2) the Tribunal, in its second partial award determined the value of the shares 'at a time when their delivery could have been expected to occur' and assessed damages in its final award on the same basis; (3) pursuant to section 36(2)(c) of the Arbitration Ordinance, Cukurova was denied a fair hearing because (a) the Tribunal rejected an application that one of its witnesses should be permitted to attend before the Tribunal in person and give evidence orally and (b) the Tribunal ignored (i) evidence given on behalf of Cukurova by an expert witness on a point about the quantum of damages and (ii) an argument on mitigation which had been advanced by Cukurova in the hearings leading to the Final award; and finally, (4) 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*. The trial judge dismissed Cukurova's application to set aside the award by holding that none of the Convention Defences set out under section 36 of the Arbitration Ordinance as urged by Cukurova had been made out. Cukurova appealed.

Held: dismissing the appeal, that:

1. The learned trial judge correctly analysed the issues relating to the application of Swiss law to the arbitration agreements. He gave adequate and proper consideration to the evidence presented, particularly that of the expert witnesses provided by the parties in relation to the correct interpretation of the arbitration clause in the Letter Agreement and the Prospective SPA. The judge rightly held that given the very special circumstances of this case, the parties never intended to be bound by two concurrent sets of different contractual obligations and that the wide ambit of the dispute clause in the Letter Agreement was broad enough in scope to allow the Tribunal to decide issues under the entirety of the parties' arrangements.

   The Ferrotitanium case (Swiss Federal Supreme Court decision of 29th February 2008 (4A_452/2007)) and the Football case (Swiss Federal Supreme Court decision of 9th June 2009 (4A_94/2009)) distinguished.

2. The statements made by the learned trial judge as to Cukurova's odd stance in denying throughout 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, were merely observations as to Cukurova's position and he did not treat this as an additional factor or consideration in construing the arbitration agreements.

3. It was clearly within the Tribunal's discretion to conclude that it was not necessary to hear Dr. Berkmen orally and that his witness statement would be accepted as his testimony, given Cukurova's failure to address the new basis on which they contended Sonera had put its case. It would not have been difficult for Cukurova to have pointed out to the Tribunal that it needed an opportunity to lead specific evidence relating to the issue of the conclusion of the agreement by silence which issue was live as from the first day of the hearing. There was no evidence that any adjournment was sought on this ground or that any objection as to procedural unfairness was taken. Cukurova was afforded the opportunity to address this issue but simply failed to make use of it. The desire of a party to present its case in a different manner in hindsight, can hardly be a ground for complaint of inability to present one's case so as to come within the exception contained in section 36(2)(c) of the Arbitration Ordinance. Accordingly it has not been shown that Cukurova was prevented from presenting its case.

   Ajay Kanoria and Others v Tony Francis Guinness [2006] EWCA Civ 222 distinguished.

4. The Tribunal, on the facts of the case, did not ignore the evidence of Mr. Osborne. They merely preferred the evidence relating to the illiquidity discount given by Sonera's expert over that of Mr. Osborne, Cukurova's expert. In any event, as the trial judge rightly pointed out, this was not a matter with which an enforcing court was to be concerned. The learned judge was correct in holding that Cukurova had not discharged its burden of proving that the Tribunal had conducted the proceedings in a manner which could be said to be in breach of the principles of natural justice as it has not been shown that the Tribunal ignored its case and in that way prevented Cukurova from presenting its case. The challenge on this basis under section 36(2)(c) of the Arbitration Ordinance also fails.

5. The challenge on the grounds of natural justice having failed, there could be no basis on the same grounds for finding that enforcement of the award was contrary to the public policy of the Virgin Islands. The trial judge was right to hold that the challenges in reliance on the principles of *pacta sunt servanda* and res judicata amounted to no more than complaints by Cukurova as to an error by the Tribunal in the assessment of damages which is not a concern of the enforcing court and thus affords no basis for concluding that enforcement of the award would be contrary to the public policy of the Virgin Islands.

JUDGMENT

[1] PEREIRA CJ: The appellant ("Cukurova") appeals the decision of the trial judge made on 19th September 2012 ("the Judgment") dismissing its application to set aside an ex-parte order made on 24th October 2011, giving permission to the respondent ("Sonera") to enforce an ICC arbitration award made on 1st September 2011 ("the Final Award") in the same manner as an order of the High Court. In this judgment, the term "Final SPA" and "SPA" shall be used interchangeably as a reference to the same agreement.

The background

[2] The matters giving rise to the dispute between the parties is common ground and is adequately captured in the background summary contained in the Judgment which I now substantially reproduce.

> "[1] On 1 September 2011 an arbitral tribunal convened under ICC Rules and sitting in Geneva ('the Tribunal') issued [the Final Award] in an arbitration proceeding under a Request for Arbitration made on 27 May 2005 by [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, [Cukurova] (2) and an associated company of Cukurova called Cukurova Investments NV ('Investments'). … [T]he Letter Agreement, … in very general terms, … may be said [to have] provided for the sale by Cukurova to Sonera of 52.91% of the issued shares of a Turkish incorporated company called Turkcell Holding AS ('Turkcell'), which in tum owned 51% of Turksell Iletisim Hizmetleri AS, 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] [*Investments was made jointly liable with Cukurova for the costs of the first partial award*] was ever made against it and the final award was made as if Investments was not party to the arbitration.
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> ### The Letter Agreement
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> "[2] … [T]he Letter Agreement … was executed by Sonera on the same day and by Cukurova and Investments on the following day.

It is addressed by Sonera to Cukurova and its purpose is expressed to be by way of confirmation of Sonera's understanding with Cukurova 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 Cukurova 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 Cukurova 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 the following day Cukurova sent Sonera a letter to similar and corresponding effect. The Prospective SPA was initialed by Sonera and by the Cukurova 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 initialled 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 Cukurova had challenged) to make the award on the application of Sonera; (2) that a Final SPA had been validly concluded between Sonera and Cukurova on 9 May 2005; (3) that Cukurova 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 Cukurova remained liable in respect of its failure to execute the [Final SPA] and to proceed to closing; and (6) that Cukurova 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 SPA] 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 2009 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 2011 the Tribunal awarded Sonera US$932 million for Cukurova's failure to transfer the shares as required under the [Final] SPA, together with interest and costs.

"[11] On 4 October 2011 Sonera applied to the 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 Cukurova to Sonera of US$1.033 billion together with subsequently accruing interest and costs ('the order').

"[12] On 25 November 2011 Cukurova applied to set aside the order. That application came on for hearing on 12 July 2012 …."

Cukurova's grounds for setting aside

[3] Cukurova relied 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 [SPA], [an] agreement which contained its own separate dispute resolution clause;

(2) (without prejudice to (1)) that despite having found that Cukurova was bound by the [Final SPA], 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.

(3) pursuant to section 36(2)(c) of the Ordinance, that Cukurova 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 Cukurova by an expert witness on a point about the quantum of damages and (ii) an argument on mitigation which had been advanced by Cukurova 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.*"[1]

The Determinations by the trial judge

[4] On the jurisdiction challenge, the learned trial judge, accepted, as was common ground, that the approach to be adopted in construing the arbitration agreements

[1] See para. 13 of the learned judge's judgment.

was in accordance with Swiss law.[2] In this regard he was assisted by the evidence of two well respected Swiss law experts, namely Dr. Berger on behalf of Cukurova and Professor Kaufmann-Kohler on behalf of Sonera. After considering their evidence[3] he then conducted an analysis of it and opined as follows:

> "As I understand the position under section 36, however, Cukurova 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.
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> "I do not think that Cukurova 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 [sic] 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."[4]

[5] On the "natural justice"[5] challenge, the main thrust of Cukurova's argument was the Tribunal's denial to hear Mr. Berkmen on behalf of Cukurova in person, and to a lesser extent the Tribunal's failure to have regard to the evidence of Cukurova's

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[2] See paras. 19-21 of the learned judge's judgment.
[3] At paras 22-40.
[4] See paras. 48-49 of learned judge's judgment.
[5] s. 36(2)(c) of the Arbitration Ordinance, Cap. 6, Revised Laws of the Virgin Islands 1991.

valuation expert Mr. Osborne. In this regard the learned trial judge opined as follows:

> "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 Cukurova from presenting its case – at most it prevented it from presenting it in the manner in which Cukurova now says it wished to present it. In fact, the evidence shows that Cukurova 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."[6]

In connection with Mr. Osborne, he had this to say:

> "The complaint here is that having heard the evidence of one of Cukurova's valuation experts on the question of 'illiquidity discount'[11] [*as I understand it, 'marriage value'*] 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."[7]

[6] Finally, on the 'public policy' challenge, the learned trial judge concluded in part*:*

> "… The Tribunal, by its awards, showed that it considered that the Letter Agreement should be complied with. It was Cukurova 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.
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> "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

[6] para. 54 of the learned judge's judgment.
[7] At para. 56.

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."[8]

The Appeal

[7] Cukurova raises some three main grounds of appeal (each of which contains a number of sub grounds) but suffice it to say that it relies on the identical bases as urged before the judge below. In respect of the excess of jurisdiction point, Cukurova argues in a nutshell that the learned judge failed to construe the relevant arbitration agreement in accordance with Swiss law which he was required to do. In respect of the breach of natural justice, Cukurova says that the learned trial judge's finding that Cukurova had not been prevented from presenting its case was incorrect because Sonera had put forward a new case at the hearing different to the one pleaded for advancing that the parties had entered into a binding SPA. In respect of the public policy point Cukurova argues that the learned trial judge was wrong to reject its case in reliance on his findings on the natural justice challenge and the Tribunal's failure to give reasons in respect of the rejection of the evidence of the valuation expert.

[8] Cukurova's main focus at the hearing of the appeal was in respect of the excess of jurisdiction. Counsel Mr. MacLean, QC has made clear that if it is successful on the jurisdiction point then there would be no need to go further as, establishing one Convention Defence[9] would be sufficient to allow the appeal and set aside the order for enforcement. Accordingly, a proper starting point is the consideration of the 'excess of jurisdiction' challenge.

Excess of Jurisdiction – section 36(2)(d)

[9] Cukurova contends that the tribunal made a 'fundamental and fatal jurisdictional error' when it ordered that Cukurova deliver shares to Sonera and also awarded damages for breach of the Final SPA to Sonera. Cukurova argues further that the

[8] At paras. 58-59.

[9] The Defences set out under section 36(2) of the Ordinance which incorporates The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

arbitration clause in the Letter Agreement was the basis upon which the arbitration was initiated and consequently was the basis for the Tribunal's jurisdiction. The tribunal therefore exceeded its jurisdiction as it was not empowered to make the orders above as these could have only been made by a Tribunal constituted under the Final SPA.

[10] The parties agree that the law governing the arbitration agreements is Swiss law and that the function of the enforcement court is to construe the agreements applying Swiss law principles of construction. The learned trial judge was ably assisted by two highly respected Swiss law experts – Dr. Berger on behalf of Cukurova and Professor Kaufmann-Kohler on behalf of Sonera. It is common ground that the learned trial judge had a wealth of evidence in this regard. The parties are also in agreement that the correct approach under Swiss law to contractual interpretation is for the court to first establish the subjective common intention of the parties at the time of conclusion of the contract, which would involve making a finding of fact. That is said to be the first step of the process. It is only if the court is unable to do so must it go on to apply an objective analysis (the second step) to determine the presumed intention of the parties at the time. This would involve making a finding of law. For each approach the court must first consider the wording of the provision before looking at other extrinsic factors. The primary focus of each approach must be on the intention of the parties on the relevant point at the time of conclusion of the contract. It is also agreed that the construction exercise is also context sensitive.

[11] The learned trial judge noted as follows in paragraph 19 of his judgment:

> "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] [*Dallah Real Estate and Holding Company v Ministry of Religious Affairs, Government of Pakistan [2011] 1 AC 763*] … In order to enable the Court to decide the issue, therefore, expert evidence of Swiss law was admitted from Dr Bernhard Berger, for Cukurova, 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."

[12] As an appellate court, the primary task is to see whether it can be said that the learned trial judge erred in his approach to the question of contractual interpretation in accordance with Swiss law principles before this court can be justified in launching into an interpretation exercise of its own. Did he make a finding as to the parties' subjective common intention at the time of conclusion of the contract? Or, failing to find their subjective common intention, did he find their objective or presumed intention at the time of entering into the agreements? In my view this question is addressed at paragraph 49 of his judgment when he stated therein as follows:

> "… 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 [sic] 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."

[13] In respect of the statements made at paragraph 49, reference must also be made to what the learned trial judge had to say at paragraphs 45 and 46. After analysing the evidence of the experts and pointing out the significant differences between them and making his preference on each difference he had this to say:

> "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 [sic] 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.

"Both experts agreed that the construction of contracts under Swiss law is context sensitive. I think that Professor Kauffman-Kohler [sic] 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 Cukurova changed its mind) the parties intended from the outset to be bound. In my judgment, the language used by Professor Kauffman-Kohler [sic] to describe the arrangement is entirely apt."

[14] The learned trial judge went on to conclude at paragraph 50 thus:

"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 [sic] 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 Cukurova 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."

[15] Cukurova sought to suggest, based on the judge's reference to the fact that Cukurova was denying the existence of a concluded SPA,[10] that this influenced the judge's mind as he treated this fact as a special circumstance and this was a wholly irrelevant consideration. They say that the learned trial judge therefore ignored the principle of separability. Cukurova says that it argued the point that if reliance was being placed on the SPA then reliance must be placed on the arbitration clause contained in the SPA and that Sonera has never explained why it did not do so.

[16] Sonera counters this argument by pointing out:

(a) firstly, that Cukurova's "odd" position[11] was not the reason why the learned trial judge held that Sonera needed not invoke the arbitration agreement in the SPA but rather, it was based on his findings that:

(i) on the assumption that the scope of the arbitration clause was wide enough, as a matter of language and construed in context to cover a dispute under the SPA as well as the Letter Agreement, and that there were no associated procedural difficulties, no up to date system of jurisprudence (including Swiss law) would insist on Sonera's formulaic invocation of the SPA clause as a condition for the assumption of jurisdiction[12];

(ii) both assumptions were well founded because the scope of the clause was wide enough to cover the dispute and there were no procedural difficulties[13]; and

(iii) There was no principle of Swiss law which required Sonera, either at the onset or following the First Partial Award, to go

[10] Also mentioned earlier in the judgment at para. 17.
[11] Described by the judge as "odd" in para. 17.
[12] At para. 44.
[13] At para. 50.

through the empty form of issuing a second request for arbitration under clause 12.8 of the SPA.[14]

(b) Secondly, that the judge's reference to Cukurova's "odd" stance was merely by way of background rather than as a decisive or influential factor on which the learned trial judge placed weight in dismissing Cukurova's challenge.

(c) Thirdly, that the learned trial judge's reference to 'the very special circumstances of this particular case'[15] was predominantly a reference back to his earlier description of the transaction wherein he spoke of the 'highly unusual features of the contractual arrangements in the present case'[16] namely the contextual factors which were clearly of relevance to the construction exercise. Sonera says that the learned trial judge by this reference was not there suggesting that Cukurova's denial of a concluded SPA was an additional factor to be taken into account in the construction exercise.

[17] Having reviewed the relevant paragraphs of the judgment of the learned trial judge, I am satisfied that the statements made by him as to Cukurova's odd stance, in paragraph 17 and again in paragraph 50 were merely observations as to Cukurova's position, and that he did not treat this as an additional factor or consideration in construing the arbitration agreements. The 'very special circumstances' to which he referred was, in my view, a reference back to his earlier description of the transaction as he found in paragraphs 45, 46 and 49 of his judgment.

[18] Cukurova also made the point that the learned trial judge decided the matter by approaching the issue as one relating to the burden of proof. This is because the learned trial judge said that Cukurova had the burden of proving that the Tribunal

[14] At para. 50.
[15] Made at para 50.
[16] At para 46.

made decisions on matters beyond the scope of the submission to arbitration.[17] Cukurova relied on Phipson on Evidence,[18] and Scott and Another v Martin and Others[19] for the proposition that on the construction of an agreement there is no burden of proof, but merely a question of construction which is a question of law. However, in relation to enforcement proceedings, section 36 of the Arbitration Ordinance[20] is cast in precisely those terms. Section 36(2) begins as follows:

> "(2) Enforcement of a Convention Award may be refused if the person against whom it is invoked proves–
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) … that the award deals with a difference …. not falling within the terms of the submission … or contains decisions on matters beyond the scope of the submission to arbitration;" (my emphasis)

In my view, the learned trial judge was saying no more in paragraphs 48, 49 and 51 than that Cukurova had not proved that the Tribunal had exceeded its jurisdiction. The case of Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan[21] is also instructive and proceeds on the basis that the onus is on the person resisting recognition to prove.

[19] Cukurova also took issue with the learned trial judge's finding that Sonera was not required to go through the empty form of invoking the arbitration clause in the SPA. However, I do not consider that there is any merit in this complaint. That conclusion must be placed in the context of the learned trial judge's overall reasoning. He plainly found in paragraph 50 as follows:

> "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."

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[17] At para. 48 of the judgment.
[18] 17th edn., Sweet & Maxwell, p. 154, para. 6–08.
[19] [1987] 1 WLR 841 at 846.
[20] Cap. 6, Revised Laws of the Virgin Islands 1991.
[21] [2011] 1 AC 763 at 812.

It is clear that he found, based on the breadth of the arbitration clause in the Letter Agreement (construed in the contextual features of the parties arrangements') that in the special circumstances (as he found them to be here), to insist upon making a further submission to arbitration (when the earlier submission was broad enough in the context of the parties arrangements to cover the entirety of the issues arising under those arrangements) would, in essence, be duplicitous. I do not consider that the learned trial judge was suggesting that the invocation of an arbitration clause was in any circumstance *a* 'matter of form'. It is substantive, and in my view the learned trial judge treated it as such.

The overlapping arbitration clauses

[20] Cukurova poses the question whether the arbitration clause in the Letter Agreement overlaps with the arbitration clause in the SPA and submits that the remedy for damages and specific performance falls under the SPA and not the Letter Agreement, whereas Sonera argues that those remedies also fall under the Letter Agreement. This, Cukurova says, amounts to a case of overlapping clauses, which creates an inherent problem such as the possibility of conflicting awards. Furthermore, it is argued that under Swiss law there is a presumption against overlapping arbitral jurisdiction clauses as this could lead to the possibility of parallel proceedings and inconsistent awards, and that there was nothing on the facts of this case to disturb the presumption. Cukurova says that the arbitration clauses do not overlap and there was the unchallenged evidence that the parties did not intend for there to be overlapping jurisdiction given by Dr. Berger and that this should have been the learned trial judge's starting point. Counsel argues that if the parties had intended that the same clause would cover both agreements then it would have been easy to say so. This he says begs the question as to why the parties went to the trouble of inserting a separate arbitration clause in each agreement. He submits therefore that the fact that the parties put two different arbitration clauses – one in each agreement – was evidence suggesting that the parties intended that each agreement would have its own scope under the

respective agreement. He relies on the Ferrotitanium[22] case and the Football[23] case in which he says that the Swiss Supreme Court has held that notwithstanding the wide language of an arbitration clause, one clause did not cover disputes in the other contract with its own dispute clause. He further argued that the cases cited by Professor Kohler dealt with one dispute resolution clause and accordingly the proposition put forward by Sonera is not supported by Swiss law. Reliance is also placed on comments from Andréas Bûcher in the book Law on Private International Law – Lugano Convention which states:

> "In the case of a succession of contracts which do not constitute an extension of the initial contract with new terms, but the execution of a new contract that institutes if applicable a new mechanism for resolving disputes, the dispute resolution mechanism stipulated in the new contract governs disputes that arise and are related to the new contract, and the mechanism stipulated in the initial contract is limited to the disputes that arise in relationship to the initial contract."[24]

[21] In Ferrotitanium[25] the parties entered into a number of related contracts. First, they entered into two exclusivity contracts which provided for disputes to be resolved by the Swiss Courts. They then entered into a number of supply contracts each of which provided for disputes to be resolved by arbitration in Moscow. They then entered into an addendum to the exclusivity contracts, which amended those agreements by replacing the jurisdiction clause with an arbitration clause providing for arbitration in Zurich. It was argued by one of the parties that the Moscow contracts could be determined in a Zurich arbitration because the wording used in the Zurich contracts was expansive. 'Disputes … or claims from or in connection with this contract, including its validity … to be decided through arbitration.' The Swiss Federal Court rejected this argument and held that it is possible that the formulation 'from or in connection with' could refer to other contracts. The Court then said 'however, this cannot apply if these other contracts contained other clear dispute resolution clauses and the intent of the party to replace these has not been established.' This holding however appears to be on

[22] Swiss Federal Supreme Court decision of 29th February 2008 (4A_452/2007).
[23] Swiss Federal Supreme Court decision of 9th June 2009 (4A_94/2009).
[24] Chap. 12 at para. 133.
[25] Record of Appeal, Bundle 5A, p. 1433 (Doc 4A_452/2007).

the basis that the court had been unable to determine the parties' subjective common intention and was deciding the matter on the basis of objective common intention.

[22] In the Football case the agreement concerned advertising rights in respect of football matches. The agreement contained an arbitration clause providing for arbitration in Zurich of *all* disputes 'arising out of or in connection with' the agreement. Clause 11 of the agreement provided for a procedure by which the parties could enter into a new agreement in respect of future football matches. Disputes arose on a number of issues including whether the parties had entered into a new contract under the clause 11 procedure. An arbitral tribunal held that they had done so but that the new contract contained a jurisdiction clause rather than an arbitration clause and thus the arbitral tribunal had no jurisdiction to determine issues under the new contract as the jurisdiction clause prevailed.

[23] The learned trial judge in paragraph 49 distinguished both cases relied on by Cukurova. He found that the facts of the Ferrotitanium case were miles away from the facts of the instant case. In relation to the Football case he opined that part of the ratio of the Supreme Court in that case was the fact that there were irreconcilable dispute resolution provisions in the expired and in new licence agreements. He then concluded that in any event 'the agreements there were not and were held not to be component parts of a single seamless transaction, which is the position in [this] case.' (my emphasis) He then concluded as he did in paragraph 50. I can find no fault with the learned trial judge's treatment of the two cases. Indeed their factual and contextual circumstances are clearly not the same as here. Accordingly, having concluded that the agreements were 'component parts of a single seamless transaction' and taking into account that the Swiss Supreme Court had not considered a case such as the present and that 'it expressly left open the possibility that the formula in question might in another case embrace disputes under more than one contract', he clearly found, 'given the very special circumstances of this particular case' that this was such a case where

the wide dispute clause in the Letter Agreement was broad enough in scope to allow the Tribunal 'to decide issues under the entirety of those arrangements.'

[24] Another factor is that the learned trial judge found that the two arbitration clauses in the two agreements were identical except for the Tribunal's power in certain circumstances to consolidate proceedings. This power to consolidate was given in the SPA. Cukurova argues that the presence of the clause in the SPA should be taken to mean that the parties intended each clause to cover that agreement only and not extend to matters in the other agreement, whilst Sonera argues that the clause in both agreements are in identical terms without limitations in either and agreed contemporaneously, points the other way – to a single economic transaction. Having considered the arbitration clauses in both agreements, I share the learned trial judge's view of them.

[25] Cukurova also makes reference to the fact that the contracting parties in respect of the two agreements were different as Cukurova Investments was a party to the Letter Agreement but not to the SPA. The learned trial judge dealt with this in paragraph 1 of his judgment and said in part:

> "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] [*Investments was made jointly liable with Cukurova for the costs of the first partial award*] was ever made against it and the final award was made as if Investments was not party to the arbitration."

I agree with counsel for Sonera that this point is not material for establishing any difference or distinction of substance given the explanation accepted by the learned trial judge.

[26] Sonera puts forward the following other arguments:

(1) that there was material on which the learned trial judge could justifiably find that the agreements were part of a single seamless transaction. He had evidence from Sonera's expert to this effect which he accepted having regard to 'the highly unusual features of the contractual

arrangements' between the parties. This, it is said, was a significant aspect of the context against which the arbitration clause in the Letter Agreement should be construed.[26]

(2) that when the Letter Agreement was entered into the parties agreed to be bound by the arbitration clause therein. Coupled with this is the fact that the parties also initialed identical terms in the SPA and never was there any attempt to limit or qualify the scope of either of the clauses leading to the inference that they deliberately decided not to do so.

(3) the fact that the SPA arbitration clause included the ability for the Tribunal to consolidate proceedings was another factor weighing in favour of a single seamless transaction as it was always intended that the SPA would be entered into subsequent to the Letter Agreement and it was the SPA which would create the possibility of overlapping jurisdictions hence the consolidation provision therein. Cukurova asserts that this does not adequately deal with the problem as the power to consolidate is not automatic. But the fact that it is not automatic does not, in my view, take away from it being an indication as to the parties' intention as to how they wished to resolve their disputes arising in relation to the entire transaction. There was no need for the Letter Agreement to contain a similar consolidation provision given that the Letter Agreement was to come to an end upon entry into the SPA. It is plain that the entire purpose of the Letter Agreement was to bring about the SPA.

[27] Cukurova raised various other challenges, none of which, in my view, are substantial as to warrant detailed consideration. Suffice it to say that:

(a) at no time did the learned trial judge decide or state that there was 'a single unified contract'. Rather he adopted the description of the transaction given by Professor Kaufmann-Kohler as being 'a single economic transaction'.

[26] See paras. 45 and 46 of the learned judge's judgment.

(b) The learned trial judge was justified in stating why the parties had refrained from entering into a single contract and which provided the context in terms of the connectivity between the Letter Agreement and SPA as this was already stated by the Tribunal in its First Partial Award.

(c) The learned trial judge did not mis-state Dr. Berger's evidence in paragraph 41 of his judgment when read in context of his overall judgment. In any event nothing turned on this point as the learned trial judge was well seized in respect of the concept of separability in respect of the arbitration clause which he stated was 'common ground' at the hearing.

(d) Based on the findings made by the learned trial judge he was justified in not making a finding on the issue of compatibility of the arbitration clauses as this clearly was not the basis for his conclusion that Cukurova had failed to prove that the Tribunal had exceeded its jurisdiction.

(e) The judge had regard to the evidence of both experts and had the advantage of seeing and hearing them (an opportunity which this court does not have) and concluded at paragraph 19 that each had given 'careful evidence'. It would be quite wrong for this court in the light of that finding to seek to characterise Sonera's expert in the manner now being urged by Cukurova unless some good basis is put forward which it has not.

Conclusion on jurisdiction

[28] I am of the view that the learned trial judge correctly analysed the issues relating to the application of Swiss law to the arbitration agreements. He gave adequate and proper consideration to the evidence presented, particularly that of the expert witnesses provided by the parties in relation to the correct interpretation of the arbitration clause in the Letter Agreement and that of the SPA. As the trial judge correctly held, there was no Swiss authority presented by either party which

directly supported their opposing positions. The trial judge was therefore required to analyse the evidence given to determine whether the language of the Letter Agreement was broad enough to include disputes under the Final SPA. That he did so is plain from a reading of the relevant paragraphs of the judgment to which reference has repeatedly been made. Accordingly, I am not persuaded that the learned trial judge made the errors complained of by Cukurova and therefore the jurisdiction challenge fails.

The Natural Justice challenge – section 36(2)(c)

[29] Cukurova contends that it was unable to present its case within the meaning of section 36(2)(c) of the Arbitration Ordinance which states:

> "(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves –
>
> (a) …
>
> (b) …
>
> (c) that he was … otherwise unable to present his case;"(my emphasis)

[30] The meaning of the inability to present a case was captured adequately in Minmetals Germany GmbH v Ferco Steel Ltd.[27] Colman J, when considering the equivalent provision in the Arbitration Act 1996 [UK], stated it thus:

> "In my judgment, the inability to present a case to arbitrators within s. 103(2)(c) contemplates at least that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcee has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment, bring himself within that exception to enforcement under the convention."[28] (my emphasis)

It is common ground that the Court applies BVI notions of fairness in determining this issue in taking into account the rules governing the arbitration and the seat of the arbitration as agreed to by the parties.

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[27] [1999] CLC 647.

[28] At p. 658B-C.

[31] One of Cukurova's main contentions under this heading is the failure of the Tribunal to (i) accept the submission by Cukurova to hold an additional hearing to accommodate one of Cukurova's witnesses Mr. Berkmen who was unable to attend the hearing as he was recovering from surgery and (ii) the allegation that the Tribunal ignored a particular aspect of Mr. Osborne's expert evidence. I will deal with each in turn.

The Berkmen Issue

[32] At the hearing of the appeal, Cukurova, in reliance on a passage in Ajay Kanoria and Others v Tony Francis Guinness,[29] pitched its argument this way: That the key issue was whether there had been a concluded SPA and Cukurova had been denied an opportunity to present its case on this issue because:

(a) Sonera, in their statement of claim, advanced three bases[30] for a concluded SPA and this was based on the positive assertion made in the witness statement of Mr. Igel (on behalf of Sonera) to the effect that Cukurova (through Mr. Berkmen) had stated that the SPA was 'totally ready for signing';

(b) Cukurova, in its defence and in the witness statement of Mr. Berkmen denied making this statement and further stated that he had no authority to speak in terms of the readiness of the SPA nor did he have authority to sign the same;

(c) On the first day of hearing however, a new case emerged where Sonera then put its case on the basis that Cukurova had not said that it had not agreed to the draft SPA – in essence, that the SPA had been agreed by virtue of silence;

(d) The Tribunal did not make Cukurova aware that the case was being decided on this basis and thus Cukurova did not have the opportunity to

[29] [2006] EWCA Civ. 222 at para. 22.
[30] See Record of Appeal, Bundle 7A, Tab 29, p. 2446.

deal with the point of its alleged silence at all which was the basis for the Tribunal finding that the SPA had been concluded; that accordingly even if Mr. Berkmen's evidence was accepted as true, it mattered not as his evidence had not addressed this point but only the three bases advanced by Sonera in its stated case;

(e) That if the Tribunal accepted Mr. Berkmen's statement as accurate then it could not have arrived at the finding it did. I must make clear at once, that this complaint is not permissible as it seeks to challenge the merits of the Tribunal's decision.

[33] Counsel conceded however, that Cukurova did not specifically say to the Tribunal that Cukurova needed to address this new case now based on 'an agreement by silence'. In Kanoria, Lord Chief Justice Phillips said in part:

> "This evidence greatly alters the nature of the case to be advanced on behalf of Mr. Guinness that he was unable to present his case. It seems to me quite clear on the wording of that clause that a party to an arbitration is unable to present his case if he is never informed of the case that he is called upon to meet. … There appeared to be an allegation that he was liable for the debt of a company, and he sought to meet that allegation by writing a simple letter, drawing attention to what appeared to be the obvious fact that he was not liable for the debt of the company. That, as we now see, was not the case that he had to meet."[31]

[34] That passage however must be placed in the context of the peculiar facts in Kanoria which are captured in the preceding paragraph 21:

> "Mr Flannery accepted that this document[32] evidenced submissions that were put before the arbitrator, and also that this document provided for the first time an explanation for what on the face of it was the surprising result reached by the arbitrator. What Mr. Flannery could not explain was how it was that this document has been placed before this court for the first time and that Gloster J was not informed of it. He has also accepted, as he must, that no notice of these allegations was given to Mr. Guinness at any stage – neither in time for him to meet them in the arbitration, nor

[31] At para. 22.

[32] Referring to a document headed "Oral Submissions" made on behalf of Kanoria at the time of hearing of the arbitration proceedings before the sole arbitrator.

> afterwards by way of explanation for the award made against him, nor indeed at any moment up to this day"

It was also the case that Mr. Guinness, having written his 'simple letter, drawing attention to what appeared to be the obvious fact that he was not liable for the debt of the company' was absent from the arbitration proceedings and thus was totally unaware of the statements made in the oral submissions made before the arbitrator by Kanoria which in essence suggested a different basis as to why he was to be held personally liable for the debt.

[35] The position here is considerably different. Firstly, this assertion was advanced on the first day of the hearing. Cukurova participated in the proceedings throughout, and never suggested or, it seems, objected to the new basis on which Sonera was now being said to be putting its case. Mr. Berkmen had given testimony in the form of a witness statement in relation to a telephone conversation that he had with the CEO of Sonera, Mr. Anders Igel. Mr. Igel had stated in his witness statement that he telephoned Mr. Berkmen to find out whether there were any problems after being made aware of press reports that Cukurova was negotiating a competing transaction with the Alfa Group of companies of Russia. He related that Mr. Berkmen's response was that the SPA was totally ready for signing.

Mr. Berkmen, in his witness statement, recalled the telephone call from Mr. Igel inquiring whether there were problems on Cukurova's end, but denied saying to Mr. Igel, that the SPA was 'totally ready for signing'. He said that his indication to Mr. Igel was that to his knowledge the deal was not over. He also deposed that he did not have the authority to bind Cukurova to the terms of the SPA and was not involved in the negotiations concerning the terms of the Final SPA as these issues were left to the lawyers.

[36] Secondly, the Tribunal, invited the parties to present submissions as to whether it was necessary to convene another hearing to hear Mr. Berkmen's oral evidence. The Tribunal directed the parties to 'identify those points of fact on which they

considered [Mr. Berkmen's testimony] decisive for their case'[33] Cukurova put in further submissions but despite the Tribunal's directive, failed to identify specific issues where it considered Mr. Berkmen's oral evidence to be decisive but merely suggested in the vaguest terms that Mr. Berkmen should be heard as a witness 'in connection with the further issues discussed by Sonera's witnesses at the [evidential] hearing some of which could be rebutted by Mr. Berkmen.' The end result was that the Tribunal indicated that no further hearing would be convened and that Mr. Berkmen's evidence would be taken as his testimony. Given Cukurova's failure to address any specific issue as directed, it is not surprising that the Tribunal concluded that it was not necessary to hear Dr. Berkmen orally, his witness statement having been accepted. This was clearly within their discretion so to decide. Certainly, it could not be difficult for Cukurova to have pointed out to the Tribunal that it needed an opportunity to lead specific evidence relating to the issue of the conclusion of the agreement by silence, which was now live as from the first day of hearing. There is no evidence that any adjournment was sought on this ground or that indeed any objection as to procedural unfairness taken. Clearly, then, Cukurova was afforded the opportunity to address this issue but failed to make use of it.

[37] The circumstances here are miles away from the circumstances in Kanoria. They do not meet the bar as set out in Minmetals[34] where it can be said that Cukurova was prevented from presenting its case. The learned trial judge, in my view rightly, concluded that 'the refusal on the part of the Tribunal to hear oral evidence from Mr. Berkmen did not prevent Cukurova from presenting its case – at most it prevented it from presenting it in the manner in which Cukurova now says it wished to present it.' The natural justice challenge on this point accordingly fails.

[33] See Record of Appeal, Bundle 7B, Tab 30, p. 3450.
[34] See this judgment also.

Failure to recognise the evidence of Mr. Osborne.

[38] The second argument advanced by Cukurova on the natural justice point is that the learned trial judge erred by failing to hold that the Tribunal ignored the evidence of Cukurova's expert, Mr. Osborne, and accepted the evidence of Sonera's expert, Professor Lind. Professor Lind in his report placed the illiquidity discount at 20%. This was refuted by Cukurova's expert who felt that the percentage should be reduced to a figure of no more than 10% as this was more suitable to the total impact of illiquidity on the value of the shareholding. Cukurova contends that Professor Lind overstated the discount as Sonera had not suffered such loss.

[39] The trial judge in his judgment found as follows:

> "The complaint here is that having heard the evidence of one of Cukurova's valuation experts on the question of 'illiquidity discount'[11] [*as I understand it, 'marriage value'*] 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."[35]

[40] The Tribunal noted that Cukurova's expert failed to provide a definite alternative rate, despite its attempts to have him do so. Cukurova argues that Mr. Osborne in his evidence indicated that the loss would be 'around 10%' but if the change in liquidity were more modest the impact would be below 10%. When probed Mr. Osborne noted that 7% was referred to in his report and when asked to confirm, his response was that it would be no more than 10% and then later he said that it would be 'materially lower than 10'. In the end Mr. Osborne failed to give a definite figure.

[35] At para. 56.

[41] In my view, the Tribunal did not ignore the evidence of Mr. Osborne. They certainly considered it but simply preferred (given Mr. Osborne's lack of definitiveness) the rate given by Sonera's expert and the reasoning for it. The tribunal was clearly within its rights to do so. In any event, I agree with the trial judge that this was not a matter on which an enforcing court is to be concerned. Furthermore, I am not persuaded that this complaint gives rise to a natural justice challenge. In my view it is misconceived as a basis for challenge under this ground. The learned trial judge was quite right in holding that Cukurova had not discharged its burden of proving that the Tribunal had conducted the proceedings in a manner which could be said to be in breach of the principles of natural justice as it had not been shown that the Tribunal ignored any part of Cukurova's case by which it can be said that Cukurova was prevented from presenting its case. The desire to present acase in a different manner in hindsight, can hardly be a ground for complaint of inability to present one's case so as to come within the exception contained in section 36(2)(c) of the Arbitration Ordinance. For these reasons I would uphold the learned trial judge's conclusion on this ground also.

Cukurova's Public Policy Challenge – Section 36(3)

[42] Cukurova's final ground is that the learned trial judge erred by rejecting their case based on his findings on the natural justice challenge and for failing to give reasons in respect of the rejection of the evidence of the valuation expert.

[43] Cukurova has put forth the alternative argument that should the natural justice challenge fail under section 36(2)(c) of the Arbitration Ordinance, as I have found that it does, the court can nonetheless refuse to enforce under section 36(3). Section 36(3) of the Ordinance states:

> "Enforcement of a Convention award may also be refused if …or if it would be contrary to public policy to enforce the award."

[44] The public policy ground is commonly considered to be a ground of last resort.

Sir John Donaldson MR in Deutsche Schachtbau-Und Tiefbohrgesellschaft m.b.h. v Ras Al Khaimah National Oil Co and Another,[36] had this to say:

> "Consideration's of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Mr. Justice Burrough remarked in *Richardson v Mellish*, (1842) 2 Bing. 229 at p. 252 'It is never argued at all, but when other points fail'. It has to be shown that there is some element of illegality, or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised."[37]

It is settled that the public policy referenced in the section is confined to the public policy of the country where enforcement is sought, 'in maintaining the fair and orderly administration of justice'[38].

[45] To the extent that Cukurova's natural justice complaints fall to be considered under this ground, the learned trial judge was quite correct in not seeking to trawl through the complaints in respect of the evidence of Mr. Berkmen and Mr. Osborne, having found that there was no breach of the *audi alteram partem* principle and given the fact that evidence of Mr. Osborne on the illiquidity discount had plainly been considered but not relied on for the reasons given by the Tribunal. It was clearly not for the enforcing judge to carry out his own independent assessment in deciding whose expert evidence the Tribunal ought to have accorded more weight. In any event the approach taken by the Tribunal could not be said to be contrary to the public policy of the Virgin Islands which required the learned trial judge to so find.

[46] In relation to the public policy challenge based on alleged breaches of the principles *pacta sunt servanda* and *res judicata*, the learned trial judge found as follows:

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[36] [1987] 2 Lloyd's Rep 246.

[37] Ibid at p. 254.

[38] See Mustill & Boyd: Commercial Arbitration at pp. 91-92; IPOC International Growth Fund Limited v LV Finance Group Limited, Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2006/0030 (delivered 18th June 2007, unreported); IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn [2005] 2 Lloyd's Rep. 326 per Gross J.

> "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 Cukurova 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."[39]

At paragraph 59 he stated:

> "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 9th May 2005 and that the closure had to take place by 30 July 2005."

[47] The Tribunal in its award selected a date of 30th June 2007 to value the Class B shares, as opposed to the 30 July 2005 which was the date that the Tribunal held the shares would have been delivered if the Final SPA had been performed in accordance with its terms. Cukurova argues that the issue does not go to the merits of the case as the judge held. This the appellant contends was a clear breach of the principles of BVI public policy as the Tribunal by their determination found that the contract said one thing and then made an award as if it had said something else. This vast difference in the time negatively affected Cukurova as the damages awarded to Sonera increased by US$186 million. Cukurova argues that to enforce the Tribunal's award would violate the principles of *pacta sunt servanda* and *res judicata* and would be contrary to the public policy of England and by extension, the Virgin Islands.

[48] Cukurova submits that contrary to what the judged opined, it was not their contention that the Letter Agreement should not be complied with. Rather their contention was that the condition precedent to the execution of the Final SPA had not been met. Further, this was irrelevant as it had nothing to do with whether the

[39] At para. 58 of the judgment.

Tribunal breached the principles of *pacta sunt servanda* and *res judicata* and consequently the judge ought not to have allowed this to have an impact on his determination.

[49] I disagree with the arguments put forth by Cukurova on this issue. I agree with Sonera that the relevant question on this issue is whether the Tribunal had jurisdiction to award damages for breach of the Letter Agreement or the Final SPA. Having agreed that the Tribunal had jurisdiction, the challenge as to the basis on which damages were assessed is not a matter for inquiry by the enforcing court. I accordingly agree with the conclusions of the learned trial judge for the reasons which he gave, that the grounds regarding *pacta sunt servanda* and *res judicata* are merely complaints by Cukurova that the Tribunal erred in assessing the damages awarded to Sonera and affords no basis for saying that this was contrary to the public policy of the Virgin Islands. As a result, this ground also fails.

Conclusion

[50] For the reasons stated above I would dismiss the appeal.

Janice M. Pereira
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal