JUDGMENT : Mr Justice Aikens : Commercial Court. 19th January 2007

I. The parties, the applications and the background to them

1. Elektrim SA ("Elektrim") makes three applications to the Court in relation to an arbitration which is continuing before the London Court of International Arbitration ("LCIA"). The arbitration is between Elektrim and the defendants to the present applications. I will refer to the defendants Vivendi Universal SA and Vivendi Telecom International SA collectively as "Vivendi". I will refer to the other defendants as follows: Elektrim Telekomunikacja Sp. z.o.o. as "Telco" and Carcom Warzsaw Sp. z.o.o. as "Carcom". The arbitration arose out of a contract known as the Third Investment Agreement ("TIA") to which Vivendi, Elektrim, Telco and Carcom were parties. That contract was concluded in September 2001.

2. The first application is made under ***section 68(2)(g)*** of the ***Arbitration Act 1996*** ("***the 1996 Act***" or "***the Act***"). Elektrim seeks an order to set aside a Partial Award of the LCIA tribunal which is dated 22nd May 2006 ("the Partial Award"). The grounds of the application are that the Partial Award was obtained by fraud or, in the alternative, that the way in which the Partial Award was procured is contrary to public policy.

3. The second application is for the court to extend the time for applying under ***section 68(2)(g)*** beyond the permitted 28 day period after publication of the Award. That application is made under ***section 80(5)*** of the 1996 Act and the ***CPR Pt 62.9 (1)(a)***.

4. The third application is for a declaration to the effect that the defendants have collectively repudiated or renounced the arbitration agreement and that an injunction be granted to restrain any further conduct of the arbitration.

5. In the current applications to the Court, the central allegation made by Elektrim is that Vivendi, but not its lawyers, Salans, deliberately concealed a vital Memorandum that had been written by M. Dominique Gibert on 29 August 2001, at a crucial stage of the negotiations for the TIA between Vivendi and Elektrim. These negotiations were themselves at the heart of the disputes in the LCIA arbitration. The Memorandum, which was called "the Gibert Memorandum" in the hearing before me, was addressed to M. Jean – Marie Messier, then the CEO of Vivendi (and on its main board) and other senior executives of Vivendi, including M. Guillaume Hannezo, the Chief Financial Officer. It is alleged that this Memorandum reveals that, contrary to representations made by Vivendi at the time of the negotiations with Elektrim for the TIA, Vivendi were in negotiations with Deutsche Telecom ("DT") about the sale of shares in Telco. It is said that any negotiations with DT would be contrary to Elektrim's rights under the TIA and its expectations about Vivendi's strategic intentions concerning Elektrim, Telco (then owned partly by Vivendi) and through Telco, Vivendi's investment in Polska Telfonia Cyfrowa Sp zo.o, or "PTC", whose shares were partly owned by Telco. PTC is the largest mobile phone network in Poland.

6. Elektrim submits that if this Memorandum had come to light in the course of the arbitration and before the oral hearing in January 2006, then the Partial Award would have upheld Elektrim's case and the arbitrators would have found that Elektrim had entered the TIA as a result of a mistaken view of Vivendi's intentions or as a result of Vivendi's deceit. The arbitrators would have accepted Elektrim's submission that the TIA was void and made a declaration accordingly.

7. The defendants resist all these applications by Elektrim. There was a three day hearing before me on Monday, 4th December to Wednesday, 6th December 2006. Although a great many documents were referred to and although Elektrim made allegations of fraud by Vivendi, there was no oral evidence. At the end of the hearing I reserved judgment.

8. The LCIA arbitration and the present court applications by Elektrim are only two battlegrounds in a complicated and very hard fought corporate campaign in several theatres of war for control of PTC. This campaign has been carried on since 1999. The main protagonists are Elektrim, Vivendi and DT.

9. I need only sketch in an outline of the battles that have taken place in Poland, Austria, France, Switzerland, and England, in order to set the current applications in context. In 1999 Elektrim and Vivendi agreed to use their reasonable efforts to form a long – term equity alliance in the telcom business, particularly in relation to Elektrim's equity holdings in PTC. At this time DT owned 49% of the PTC shares. Elektrim also owned shares in PTC. Some of Elektrim's shares were transferred to Telco, which had been created as a joint – venture company with Vivendi in early 1999 by virtue of the First Investment Agreement between Elektrim and Vivendi. Also under that agreement, Vivendi took a stake in Telco. Two smaller companies, Carcom and Elektrim Autoinvest ("EA") owned 1.9% and 1.1% respectively of PTC's shares.[1] Telco, Carcom and EA were thus all vehicles for Elektrim and Vivendi's holdings in PTC. By the latter half of 1999, Elektrim owned a large minority of the PTC shares, and Vivendi had an interest in PTC via its Telco shares. However, four other companies[2] owned a small but vital tranche of the PTC shares. The initial battle for control of PTC centred on the ownership of the PTC shares owned by these companies. At the same time, Elektrim was in financial difficulties. In October 1999 Elektrim hoped to obtain assistance from Vivendi in its campaign against DT's interest in PTC. Elektrim wished Vivendi to provide funds for the acquisition of the all - important small block of PTC shares. In order to do this Vivendi and Elektrim entered into the Second

[1] 99.04% of EA was owned by Carcom. Before the TIA, Carcom was owned equally by Elektrim and Vivendi. Following the TIA, Carcom was owned 49% by Elektrim, 49% by Vivendi and 2% by a third company, Ymer, whose role in the story is explained below.

[2] These were: Kulczyk Holdings SA, Towazystwo Ubezpieczen I Reasekuacj I "Warta" SA; BTRE Bank SA and Drugi Fundusz Fozwoju – BRE SP.z.o.o. All of these companies were parties to the first Vienna Arbitration – see below – which determined the validity of the transfer of their shares to Elektrim dated October 1999.

Investment Agreement. Vivendi effectively provided US$650 million which would be used to fund the purchase, by Elektrim, of the PTC shares owned by the small shareholders. This purchase was effected in October 1999. Subsequently in December 1999 this block of shares and the remainder of Elektrim's original holding in PTC were all transferred into the joint venture company, Telco. Telco became the registered owner of all those PTC shares. Thus Telco, Carcom and EA together became the owners of 51% of the shares in PTC.[3] (As already noted, DT owned the other 49%). At that stage Elektrim owned 51% of Telco's shares and Vivendi owned 49%.

10. The sale of the PTC shares from the small shareholders to Elektrim and the transfer of these shares and those in Elektrim's original holding in PTC were then challenged by DT. The challenges were made in two separate international arbitrations in Vienna. The challenges were made respectively under the PTC Shareholders' Agreement and a Deed of Formation. The first Vienna arbitration challenged the initial transfer on two grounds. The first was that DT had rights of first refusal over any transfer of PTC shares under the PTC Shareholders' Agreement. The second ground of challenge by DT was that Elektrim's actions constituted a "material breach" of the PTC Shareholders' Agreement, which entitled DT to exercise a call option so as to acquire all of Elektrim's PTC shares at their book value. If DT could make this call then it would obtain those PTC shares at a discount of several hundred million dollars.

11. Vivendi came to the aid of Elektrim in respect of this first Vienna arbitration under the terms of the Second Investment Agreement ("SIA"). Under the SIA Vivendi had agreed to indemnify Elektrim in respect of its potential exposure to DT (but only up to US$ 100 million). In return Vivendi was given the right to select the legal team acting for Elektrim in any challenge by DT. Vivendi chose the legal team in the first Vienna arbitration and it also chose the team acting for Elektrim and Telco in the second Vienna arbitration.

12. In the first Vienna arbitration Elektrim was successful. The tribunal upheld the validity of the transfer of PTC shares from the smaller shareholders. But in the second Vienna arbitration the tribunal held that the transfer of PTC shares from Elektrim to Telco was ineffective. However this declaration was made only so far as Elektrim was concerned. The tribunal held it had no jurisdiction over Telco. Therefore Telco remained the registered owner of the PTC shares. This decision, in Second Partial Award in the second Vienna arbitration, was made on 26th November 2004.

13. This Award of the second Vienna arbitration was then challenged by Telco in the Higher Regional Court of Vienna. On 23rd December 2005 the Vienna Court partially annulled the Award, insofar as the latter declared that the transfer of the shares by Elektrim to Telco was not effective. The Vienna Court held that this conclusion in the Award was inconsistent with the declaration that the Tribunal had no jurisdiction over the legal owner of the PTC Shares (i.e. Telco). In turn, that decision of the Higher Regional Court of Vienna was challenged by both DT and Elektrim. The Court of Appeal of Vienna overturned the lower court's decision on 20 October 2006. It held that the Award was not intrinsically inconsistent since the Award could not have any effect on Telco's rights in the shares given the tribunal's declaration that it had no jurisdiction over Telco. The effect of these decisions of the Austrian courts in Poland is unclear.

14. However, DT and Elektrim have both obtained a partial recognition by the Polish Courts of the Second Partial Award of the second Vienna tribunal. This recognition was granted under the New York Convention 1958. The recognition is partial because it only acknowledges and recognises that part of the Second Partial Award which declares that the transfer of PTC shares to Telco is ineffective. There has been no attempt to obtain recognition of the other part of the Second Partial Award which stated that the arbitral tribunal had no jurisdiction over Telco. The partial recognition of the Award has been challenged in the Court of Appeal in Warsaw. That challenge was unsuccessful but the recognition is currently suspended pending a further challenge before the Supreme Court of Poland.

15. It is in this context that the Third Investment Agreement ("the TIA") becomes relevant. In the summer of 2001, Elektrim was under considerable financial pressure from its bondholders and other creditors. Elektrim was very anxious to have cash. Prior to the TIA Elektrim held 51% of the shares of Telco.[4] Elektrim's aim was to obtain this cash by the sale of a 2% share of its holding in Telco to Vivendi. At the same time, Elektrim intended to sell 1% of its share in Carcom to Vivendi. Elektrim would also sell all its holding in Polish fixed line and internet companies to Telco. A purchase of a further 2% interest in Telco suited Vivendi, because by doing this it would have a controlling interest in Telco and thereby a controlling interest in PTC. It could therefore prevent DT obtaining control of PTC. Vivendi would also be able to maximise the value of its holding in Telco if it had a majority holding, because that would make the holding more liquid and transferable.

16. These aims and intentions were the subject of a Letter of Understanding ("LOU") between the Elektrim and Vivendi parties dated 27 June 2001. The LOU also reflected the ultimate goal of both sides, which was to maximise their stakes in Telco by selling the company at the best possible price. The LOU contemplated an Initial Public Offering of Telco shares within 12 months of closing the deal, on condition that PTC (the principal asset of Telco) would by then have obtained a minimum equity value of US$ 4 billion. The LOU also provided for the preservation of minority shareholder rights in favour of Elektrim on Telco's Supervisory Board.

17. However, it became clear (for reasons that are not presently relevant) that before Vivendi could acquire a majority shareholding in Telco, and thus indirect control of PTC, it would need approval from the Polish

[3] Telco owned 48% of the PTC shares; Carcom owned 1.9% and EA owned 1.1% of them.

[4] It will be recalled that Telco itself held 51% of the shares of PTC and DT held the other 49% of the shares in PTC.

competition authorities. That might take some months and Elektrim's need for cash was urgent. To circumvent this problem it was suggested (by Elektrim) that the 2% of Telco shares should be sold to a third party investor who would hold the shares until the necessary clearance had been obtained, when the shares could be sold on to Vivendi. Elektrim would be paid immediately upon sale to the third party investor, however.

18. The third party investor's identity was settled during July 2001. It was Ymer Finance SA, of Luxemburg ("Ymer"). One of the two central issues that was considered by the LCIA arbitration in London from which the present applications arise was whether Ymer was indeed an independent third party investor or whether it was under the control of Vivendi, through Société Générale Bank & Trust, Luxemburg ("SGBT"), which is a subsidiary of Société Générale ("Soc Gen"), Vivendi's bankers . It was Elektrim's case that it understood and Vivendi represented to it that Ymer was not controlled by Vivendi. The arbitrators concluded that "*…there is a likelihood that there was economic control by Vivendi over Ymer"* and that "*…Vivendi may have been in a position to control Ymer"*. Further, they also concluded that Elektrim either knew of or was unconcerned by this all along. (See paragraphs 305, 306 and 311 of the Award).

19. The TIA was concluded on 3rd September 2001 between the two Vivendi companies who are defendants in the current applications, Elektrim, Telco and Carcom. The TIA provided for 2% of the shares in Telco, owned by Elektrim, to be transferred into the name of Ymer. The TIA also provided that, upon the transfer of the 2% shareholding in Telco to Vivendi, protections in favour of Elektrim, as a minority shareholder in Telco, would come into force. These rights concerned the appointment of members to the Supervisory and Management Boards of Telco and the rules applicable in case of "Material Actions". Elektrim asserted in the LCIA arbitration that these minority rights were important to it and that they were subverted by the fact that Ymer was not an independent investor, but under the control of Vivendi, which was, of course, the holder of the other 49% shareholding in Telco.

20. The TIA recorded, in the recitals, that Elektrim wished "to establish a strategic partnership with a suitable partner" for its telecommunications business in Poland, with a view to obtaining a listing on the Warsaw Stock Exchange and an Initial Public Offering. The recital also referred to the Letter of Understanding ("LOU") between Elektrim and Vivendi, dated 27th June 2001.

21. The TIA also provided, in essence, as follows:

    (1) The parties undertook to each other to do various things immediately and other things at a subsequent date called "the Effective Date". The later date was the date on which Vivendi would have obtained the Polish Governmental Approvals for the transfers of shares in Telco to it.

    (2) Elektrim agreed to enter into a purchase agreement with Ymer by which Ymer would purchase 2% of the share capital of Telco, then owned by Elektrim.

    (3) Prior to the Effective Date, there were to be changes on the PTC Supervisory Board. This would alter the representation of Telco (which owned 51% of the shares of PTC) so that Elektrim would lose one representative on the PTC Supervisory Board and that person would be replaced by an Ymer representative. Secondly, there would be a change in the composition of the Supervisory Board of Telco itself, such that three members would be appointed by Elektrim, three by Vivendi and one by Ymer. Thirdly, the Management Board would be changed to have a composition of two members nominated by Elektrim, two by Vivendi and one by Ymer.

    (4) Section 3.9 of the TIA set out detailed requirements for the Elektrim representative on the PTC Supervisory Board to vote with the other Telco representatives on that Board. If he failed to do that then Elektrim would lose its right to nominate a representative on the PTC Supervisory Board.

    (5) Elektrim and Vivendi had the ability to sell all their shareholding in Telco to a third party, but had to offer the shares to the other holder first. If the other holder did not take up the shares and they were transferred to a third party, then the third party had to conclude an "assumption agreement" in a specified form, whereupon the transferee would assume all the transferors' rights and obligations under the TIA. (see section 4).

    (6) Vivendi granted the right to Elektrim to share in a portion of any "upside" that Vivendi might realise on the disposal of all or part of its stake in Telco and/or Carcom to a third party. (see section 4.6).

    (7) The parties agreed that Telco should proceed with an Initial Public Offering ("IPO") and listing of the Telco shares on the Warsaw Stock Exchange within 12 months following "the Effective Date". However this IPO would only be made if PTC had obtained a total minimum equity valuation of US$4 billion as determined by an independent body.

    (8) The applicable law to the TIA was agreed as Polish law: (see section 5.11). The parties agreed to submit disputes to arbitration in accordance with the arbitration rules of the LCIA before three arbitrators. The seat of any such arbitration was to be London and the language of the arbitration should be English: (see section 5.11(c)).

22. After the TIA was signed, the transfer of the Telco and Carcom shares to Ymer was effected. But Vivendi did not then seek any government approvals for the transfer of shares from Ymer to it. Nor did it attempt to do so for some 20 months afterwards.

23. On 7 May 2003, Elektrim wrote to Vivendi requesting that Vivendi apply for Government Approval for merger clearance. The letter also stated that the "post Effective Date" provisions of the TIA should be regarded as being in full force. Vivendi responded, effectively denying that it was obliged at that point to apply for Government Approvals in respect of the proposed transfer of shares from Ymer to Vivendi. On 22nd August 2003 Vivendi filed

a request for arbitration pursuant to the terms of section 5.11.(b) of the TIA. Vivendi sought a declaration that it was not obliged under the TIA to apply for Governmental Approvals and that the "Effective Date" had not occurred. Elektrim wrote to Vivendi on 12th December 2003, stating that Vivendi had not complied with its obligation under the TIA to apply for Government Approvals for merger clearance. The letter also asserted that the execution of the TIA had taken place in violation of Polish law and international regulations: (see Partial Award, para 103).

24. On 20th February 2004 Elektrim sent Vivendi a letter declaring the avoidance of the TIA.

II. The Arbitration proceedings up to the Award

25. Vivendi nominated Mr Alan Redfern as arbitrator. Elektrim nominated Professor Jerzy Rajski. The third arbitrator and Chairman of the tribunal is Mr Wolfgang Peter. The tribunal was formally appointed by the LCIA on 23 October 2004. All three arbitrators are very experienced and highly respected international arbitrators.

26. By its Procedural Order No 2, published on 25th May 2005, the tribunal fixed the timetable for the arbitration. It decided that the first phase of the proceedings would focus on: (i) the validity of the TIA; (ii) whether Vivendi was obliged to apply for Governmental Approvals under the TIA and (iii) whether the "Effective Date" had occurred. In the same Order, the tribunal also set out the procedure to be adopted for production of documents. The parties were to present their requests for production of documents in accordance with a procedure known in international arbitration as "the Redfern Schedule". The routine is that the party requesting the documents identifies the documents requested and the reasons for the request. The opposing party then sets out its reasons for its opposition to production (if any). The schedule then sets out the decision of the tribunal.[5]

27. The parties here did submit specific requests for documents which were then considered by the arbitrators. Their decision on which documents should be produced are set out in Procedural Order No. 3 dated 29th June 2005 and also Procedural Order No 5 dated 20 September 2005.

28. The only request for disclosure that is relevant to the current proceedings is Elektrim's Request No. 16. This sought the following classes of documents:

"Agendas, presentations, submissions, memos, reports and other documents concerning (i) Ymer; and/or (ii) Nymphe; and/or (iii) acquisition or sale of shares in Telco; and/or (iv) negotiations, execution and performance of the Third Investment Agreement which were produced for, or circulated to, members of Vivendi's Supervisory Board and/or Management Board and/or Board of Directors in the relevant period (including any updates thereof, in particular, any such documents prepared by Mr Dominique Gibert (or other persons responsible for Vivendi's investment in Poland) describing:-

> *Vivendi's position in Telco resulting from the contemplated conclusions of the TIA; - Vivendi's stake in Telco for the purpose of a potential sale thereof to City Group (2002) Polsat (2002/2003), or others; - the intended timing of filing by Vivendi for Governmental Approval required by the TIA; the intended timing of performance of Vivendi of its obligation to proceed with an IPO of Telco".*

29. In Procedural Order No. 3, published to the parties on 29 June 2005, the arbitrators ruled that this request was "*over broad*" and not directly relevant. The tribunal narrowed down the request so as to order Vivendi to produce the following:

"Agendas, presentations, submissions, memos, reports and other documents which were produced for, or circulated to, members of Vivendi's Supervisory Board and/or Management Board and/or Board of Directors in the relevant period, including any updates thereof) concerning: (i) Vivendi's position in Telco resulting from the contemplated conclusion of the TIA; (ii) the intended timing of filing by Vivendi for Governmental Approval required by the TIA; (iii) the intended timing of performance by Vivendi of its obligation to proceed with an IPO of Telco".

30. At a hearing before the tribunal on 8th September 2005, Elektrim sought to amend its Request No 16. It was said that the object was to narrow the request. In oral submissions on behalf of Elektrim the modification sought was put in the following terms:

"Any reports, notes, memoranda, decision memoranda and analysis, whether prepared by Vivendi or for Vivendi and in particular reports prepared by Mr Gibert, Mr Picot and/or Mr Houdouin to any of Messrs Messier, Hannezo, Germond, de Lamaze, Gros or Reis.

And we can even further narrow it down to

Documents described Vivendi's position or intended position within Telco and/or viz a viz Elektrim as a Telco-shareholder in connection with the execution of the Third Investment Agreement, and we would limit this to a range of dates between August 24, 2001 and September 10, 2001 so a week before the execution of the Third Investment Agreement and a week after the execution of the Third Investment Agreement".

31. This modified request was repeated in writing by Elektrim in a letter from its Polish lawyers, Soltysinski Kawecki and Szlezak ("SKS") dated 18th October 2005. SKS wrote again on 25th October 2005, confirming that this reformulated request fell within the ambit of the existing order made by the tribunal in respect of Request No. 16. That letter also asked the tribunal to order that Vivendi produce documents within the particularised request.

[5] See eg. the orders set out in Procedural Order No. 2 (25 May 2005), paras. 10 to 15.

32. The tribunal's response to these requests on behalf of Elektrim was contained in a letter dated 26th October 2005. This set out the tribunal's conclusion as follows: (the use of bold type is that of the tribunal):

"Elektrim's request in its letter of 18th October 2005, regarding the request for production of documents no. 16 as narrowed down by the arbitral tribunal in its procedural order no. 3 and further narrowed down by Elektrim during the September hearing (first proposal). For the avoidance of doubt, this is how the arbitral tribunal understands Elektrim's further narrowed down request:

*Agendas, presentations, submissions, memos, reports and other documents (**in particular reports prepared by Mr Gibert, Mr Picot and/or Mr Houdouin)** which were produced **for** or circulated to members of Vivendi's Supervisory Board and/or Management Board and/.or Board of Directors **(in particular to any of Messrs. Messier, Hannezo, Germond, de Lamaze, Gros or Reis, to the extent that these persons were members of the above mentioned Boards) between 24th August and 10 September 2001** concerning: (i) Vivendi's position in Telco resulting from the contemplated conclusion of the TIA; (ii) the intended timing of filing by Vivendi for Governmental Approval required by the TIA; (iii) the intended timing of performance of Vivendi of its obligation to proceed with an IPO of Telco.*

This reformulation corresponds simply to a narrowing down of request no. 16 as ordered by the arbitral tribunal in its Procedural Order no. 3. Consequently, should Vivendi's counsel receive confirmation from its clients that no such documents exist, claimants are invited to present a firm and unqualified statement of Vivendi's authorised representatives that no document falling within the scope of request no. 16 (as formulated above) exists nor existed."

33. On 10 November 2005 Salans, the lawyers for Vivendi, wrote to the tribunal saying that they considered that they had complied with the initial Request No 16. The letter stated:

"*For the sake of clarity, we would note that it was and remains Claimants' understanding that the language underlined in the two iterations of the Order concerning Request No 16 set forth above [ie as reformulated by the tribunal on 26 October] concerned a defined category of documents that were produced for and circulated to members of Vivendi'as Boards of Directors with a view to informing the Board concerning subjects (i),(ii) and (iii).*

A statement of Jean François Dubos, VU's Secrétaire Général, confirming the foregoing is attached".

34. The statement of M. Dubos, also dated 10 November 2005, says:

"…….

I am aware that the Tribunal in Arbitration ordered the production of various categories of documents in a series of Orders issued in the Arbitration. I can confirm that instructions were given to members of Vivendi's legal department responsible for the LCIA Arbitration, to the executives at Vivendi who had been involved in the Elektrim transactions, to Vivendi's IT staff, and to Vivendi's outside Counsel to review their files or provide their files to our lawyers for review of all documents which might be responsive to the Ores and to produce such documents in the Arbitration. As regards the Order concerning Request No. 16, as narrowed by Elektrim and the Tribunal, namely:

…….

I can confirm that, based on my understanding of the Order and to the best of my knowledge, no documents responsive to this request, other than those produced by our counsel on August 5, 2005 and submitted in the Arbitration, exist or existed. "

35. SKS responded the same day, indicating that it did not agree with Salans' attempt to narrow the scope of the documents to be produced to those "*with a view to informing the Board*". The letter also said that M. Dubos' statement was insufficiently firm and unqualified. Salans responded on 15 November with its understanding of what was entailed by the tribunal's order of 26 October 2005. The tribunal sent a letter to the parties dated 8 December 2005, in which it concluded that the order of 26 October was sufficiently clear to need no further interpretation. It invited Vivendi to check again whether any documents falling within the scope of the order, as formulated in the letter of 26 October 2005, existed and if they did, to produce them. But if there were none, then the tribunal invited Vivendi to:

"*…present a firm and unqualified statement of their authorised representative(s) that no such document exists nor existed. Claimants are invited to comply with the abovementioned invitation at the latest by 19 December 2005".*

36. On 19 December 2005 Salans sent the tribunal a letter stating that they had discussed the matter with M. Dubos and he had confirmed the previous statement that he had made on 10 November 2005. But on 23 December 2005, the tribunal wrote to the parties about several matters, including Salans' response on the issue of Request No 16. The tribunal's letter stated:

"*The Arbitral Tribunal is not satisfied with the statement in Claimants Counsel's letter of 19 December 2005. Vivendi is asked to comply with the Arbitral Tribunal's invitation contained in its letter of 8 December 2005 at the latest by 6 January 2006. Should Vivendi fail to do so, the Arbitral Tribunal may draw adverse inference". [sic]*

37. There was no further refinement of Vivendi's position before the hearing in January 2006. After the hearing, the tribunal wrote to the parties on this topic on 7 February 2006. Salans responded in a letter dated 20 February 2006, which simply reconfirmed the view it had taken about the scope of the order made by the tribunal on 26 October 2005.

38. It is convenient at this point in the story to set out the evidence of what searches had in fact been undertaken by Salans, on behalf of Vivendi, in response to the tribunal's Procedural Order No 3 as originally framed and then

as modified by the letter of 26 October 2005. This issue was dealt with in a witness statement of Mme Sarah François – Poncet that was prepared by Salans in response to Elektrim's Application under ***section 68(2)(g)***.[6] She explains in her statement that she has considerable experience in international arbitration and has been the Chairman of Salans' International Arbitration Practice Group for three years. At paragraph 14 of her statement she says that Salans considered the demand for production of documents contained in Request No 16, as ordered by the tribunal, to be "*very clear*".

39. As soon as the Order was made on 29 June 2005, Salans constituted a team of lawyers to deal with the matter, under her supervision. The Order had provided that there be production within three weeks. Salans' offices in Paris and Warsaw were involved, as well as M. Edouard de Chavagnac, the Vice – President of Vivendi's Legal Department. M. de Chavagnac was responsible for coordinating the document collection, review and production efforts within the Vivendi organisation. He liaised directly with the various relevant Vivendi employees in performing the discovery exercise, including M. Dominique Gibert, who had been the Senior Vice President of Finance and Deputy Chief Financial Officer of Vivendi in September 2001. (M. Gibert retained that office up until the time of the arbitration hearing in January 2006.) However, M. Gibert was not himself involved in the conduct of the document collection and production exercise by Vivendi or Salans. Nor did Salans either give to M. Gibert or take from him any instructions on the question of document production. The whole process was co-ordinated through M. de Chavagnac.

40. Salans realised that it had to investigate both hard copy documents and also e-mails. Mlle Caline Mouawad, of Salans, Paris, reviewed over 60 lever arch files of hard copy documents dating from 1998 to late 2004. These had been previously collected from the offices of Vivendi and its former Paris lawyers, Orrick. M. de Chavagnac was responsible for organising the collection of hard copy documents within Vivendi and for doing so within the time limits imposed by the Tribunal.

41. Mme François - Poncet's statement continues:

> **"** ..... *It is important to note that, as explained further below, notwithstanding the fact that there were no objective reasons to believe that any of the recipients of the Gibert Memo (besides Messrs. Messier and Hannezo) were relevant individuals for the purposes of our document collection exercise and the fact that I had never previously heard or come across the names of the other recipients, none of the recipients of the Gibert Memo (including Messier and Hannezo) was employed by Vivendi at the time we carried out the collection exercise (see 56-57 and 85 below).*
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> ***24.*** *Mr. de Chavagnac learned that documents of former employees had been sent to archive vaults in Denmark and that they could not be retrieved in time to comply with the LCIA Tribunal's deadline. We thus focused on collecting and reviewing documents from Vivendi's current employees, including Mr Gibert, the executive who negotiated the TIA on behalf of Vivendi and who is still employed by Vivendi. Mr de Chavagnac thus met with each such person at Vivendi and requested all documents, if any, regarding Vivendi's Polish telecommunications investment.*
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> *25. When he asked Mr Gibert about such documents, Mr Gibert informed him that he had no hard copy documents because his hard documents had been seized by Commission des Opérations de Bourse (COB) in July 2002 and by the French Financial Police (Brigade Financiére) in December 12, 2002, as further detailed below. Accordingly, if a copy of the Gibert Memo had beeni n these seized files, the copy would be with COB (today known as the Autorité des Marchés Fiannciers (AMF)or the French Financial Police. Indeed, most of the relevant hard copy documents at Vivendi's premises in Paris had been seized in the context of the investigations conducted in 2002.[6] Nonetheless, Mr. de Chavagnac was able to locate and to review some hard copy documents from other Vivendi employees, and in particular those of Mr Pierre Le Rouzic, who is in charge of Group Consolidation and Financial reporting (i.e. of preparing Vivendi's financial statements) and regularly works with Vivendi's statutory auditors (Elektrim had specifically requested various communications between Vivendi and its auditors). Mr de Chavagnac obtained all such documents from Mr. Le Rouzic and reviewed them himself to identify the responsive documents. In any event, this document collection exercise was intended to complement the large volume of documents already collected and contained in the sixty binders reviewed by Ms. Mouawad, and, indeed the separate exercise by Mr. de Chavagnac resulted in the identification of very few new documents.*
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> ……."

42. With regard to emails, on 12 December 2002, the *Brigade Financière* had seized the computers of several Vivendi employees, including M. Gibert, and also the backup tapes of Vivendi's systems that might have contained copies of deleted emails. These computers and tapes have not been returned. Salans reviewed the email boxes of various Vivendi employees that could be reached. These included the email boxes of Messieurs Gibert, Messier and Hannezo, insofar as they were relevant to Vivendi's Polish telecommunications investment.

43. The hearing of Phase One of the arbitration took place in London between 23 and 27 January 2006. Several witnesses, including M. Gibert, and Mr Waldemar Siwak, the Chairman of the Supervisory Board of Elektrim between May 2001 and February 2002, gave oral evidence.

44. In the course of his evidence, M. Gibert stated that Vivendi did not control Ymer in any way. He also stated that he was away on holiday from 27 July 2001 up until either 28 August or possibly until the very end of August 2001. He insisted that Vivendi had at no time committed itself to acquiring the 2% interest in Telco that had been sold by Elektrim to Ymer. Therefore there was no question of Vivendi changing its intention (from that of

[6] Mme François – Poncet did not give oral evidence at the hearing before me.

purchasing the shares from Ymer) once the TIA had been completed. M. Gibert was not cross examined on the question of discovery of documents by Vivendi generally, nor on whether he had any documents that might fall within the tribunal's Order concerning Elektrim's Request No 16.

45. Mr Siwak, (of Elektrim) gave evidence to the effect that even if Vivendi had told Elektrim that it had no intention of proceeding with the purchase of the 2% interest in Telco, Elektrim would still have concluded the TIA. That was because the main object of the TIA, in his view, was to obtain funds for Elektrim to repay its bondholders so as to be able to survive. He also stated that he appreciated that an IPO of PTC shares was not a practical possibility as it was never going to be valued at or above US$ 4 billion. Further, his evidence was that if he had appreciated at the time that Ymer was controlled by Vivendi he would still have signed the TIA, because of the urgent need to get cash from Vivendi which would be provided under the TIA. He said that the fact that Ymer was controlled by Vivendi did not make any difference to Elektrim.

III. The Partial Award

46. The tribunal was split in its conclusions. The majority consisted of Mr Redfern and Dr Peter. They gave their Partial Award and Professor Rajski set out a Dissenting Opinion. At paragraphs 41 and 42 of the majority's Partial Award the tribunal sets out the scope of the Award. In summary it deals with four particular matters. First, Vivendi's application for a Declaration that Vivendi was not obliged under the TIA to apply for Polish Governmental Approvals, or that an application for Governmental Approvals need not be made within any prescribed time limit, and that there are no sanctions in the TIA for any failure by Vivendi to apply. Secondly, Vivendi's application for a Declaration that "the Effective Date", as variously defined, only occurred in November or December 2005, so that various provisions in the TIA only became effective on one or other of those dates. Thirdly, Vivendi's application for a Declaration that the TIA was and always had been valid, so that Elektrim's "Notice of Avoidance" was ineffective and null and void ab initio. Fourthly, the obverse of the third point, that is, Elektrim's claim for a Declaration that the TIA was null and void with retroactive effect on the grounds of (a) deceit by Vivendi as understood by Article 8(6) of the Polish Civil Code, or (b) mistake as understood by Article 8(4) of the Polish Civil Code. Elektrim also claimed damages resulting from "Elektrim's execution of the TIA deceitfully induced by Vivendi".

47. The majority's main findings of facts are as follows:

(1) Vivendi did intend, at the time of signing the TIA, to apply for Governmental Approval in relation to the 2% shareholding in Telco that was acquired by Ymer. However, such intention "*may have changed subsequently*". (Para 211).

(2) When Elektrim signed the TIA, its main concern was not to safeguard its rights as a minority shareholder of Telco, as it would become following the conclusion of the TIA. Elektrim's main concern was its desperate need of cash and it was, in fact, preparing an exit from its investment in Telco (para 233).

(3) There was a likelihood that there was economic control by Vivendi over Ymer. Moreover, Elektrim knew that Vivendi "*may have been in a position to control Ymer and Telco*". (Paras 305 and 306).

(4) The evidence showed that representatives of Elektrim were aware of a special relationship of trust between Vivendi and SGBT. (Para 307).

(5) Elektrim would have entered into the TIA even if it had known that Vivendi controlled Ymer. The evidence of Mr Siwak that he would have signed the TIA even if he had known that Ymer was controlled by Vivendi was accepted as being "*objective and credible*". (Paras. 318 and 319).

48. The conclusions of the majority of the arbitral tribunal on the validity of the TIA were as follows:

(1) There was no error, or mistake, on the part of Elektrim regarding the issue of Ymer's independence at the time it entered into the TIA. Even if there was an error, the issue of Ymer's independence was of no real concern to Elektrim. Further, even if there was a mistake, it was not caused by Vivendi's bad faith. Therefore, there was no deceit regarding the control of Vivendi over Ymer and Telco and so Elektrim was not entitled to avoid the TIA on this ground. (para. 234).

(2) As the majority had concluded that, at the time of execution of the TIA, Vivendi did intend to apply for the Governmental Approvals, there was no mistake on Elektrim's part with regard to this matter at the time that the TIA was signed (para. 327).

(3) Even if there was a mistake, it was irrelevant because Elektrim would have signed the TIA even if Vivendi's intentions had changed before signing the TIA (see para. 334).

(4) In the absence of error or causality, the requirements regarding deceit were not met (para. 336).

(5) Accordingly the TIA was and always had been valid since it was executed.

49. The majority also commented in the Award on how Vivendi had dealt with the issue of disclosure of documents under Request No 16, at paragraphs 142 – 4. The majority view, expressed at paragraph 143 of the Award, is that only documents that were addressed to Board members in their capacity as such were the object of Request No 16. Therefore the tribunal gave Vivendi "*the benefit of the doubt regarding their explanations and to consider that [Vivendi] have confirmed that there are no documents falling within the scope of Request No 16 and therefore have complied with the Arbitral Tribunal's Order*".

IV. The Discovery of the Gibert Memorandum, its contents and the aftermath of its production to Elektrim

50. On 8 June 2006 Elektrim received from someone called Mr Klaus Hofman a photocopy of the Gibert Memorandum, which is dated 29 August 2001. It is, of course, written in French. It is addressed to M. Jean – Marie Messier, (then CEO of Vivendi) with copies to Messrs. Hannezo, Germond, de Lamaze and Mme Gros. Mr Richard Black, a partner of Barlow Lyde & Gilbert ("BLG") who now act as solicitors for Elektrim, states in his first witness statement that Mr Hofman is not known to Elektrim. All attempts to contact him have been unsuccessful. M. Gibert still works for Vivendi. He has not give any statement in the current proceedings.

51. Mme François – Poncet says in her witness statement that she had never seen this Memorandum before it was sent to her by BLG on 19 June 2006. She also states that all of those who had been conducting the discovery exercise on behalf of Vivendi have told her that they also had not seen it before. There is nothing to challenge that evidence. I accept that neither Mme François – Poncet nor M. de Chavagnac nor any of the team in Vivendi and its lawyers that were responsible for the discovery exercise following the tribunal's order on 29 June 2005, had seen the Memorandum before 19 June 2006. I note that neither Vivendi nor Elektrim challenges the authenticity of the document and so I will treat it as a genuine document that was produced on the date stated on it, viz. 29 August 2001.

52. Mme François – Poncet also says in her witness statement (paragraph 78) that a copy of the Memorandum had been produced in the United States document production exercise that was underway, in the summer of 2006, in a related class action brought in connection with an SEC investigation against Vivendi. It appears that the document was produced from M. Hannezo's files found in Vivendi's New York offices. Mme François – Poncet has confirmed that, after the tribunal made Procedural Order No 3 on 29 June 2005, no request was made to the Vivendi office in New York to look for documents within the scope of the Request No 16, because "*the persons involved with the Elektrim deal were in Paris*". Another reason for not searching in the Vivendi New York office was, she noted, that the tribunal had rejected Elektrim's request for disclosure of Vivendi's documents relating to the SEC investigation.

53. I accept this evidence. However that does not entirely explain why the Gibert Memorandum remained undiscovered in June – November 2005. M. de Chavagnac was asked by Mme François – Poncet to request M. Gibert for "*all documents, if any, regarding Vivendi's Polish telecommunications investment*". M. Gibert told M. de Chavagnac that all his files had been taken by the French authorities. But there is no evidence from Vivendi to say whether M. Gibert gave any indication to M. de Chavagnac that he had produced a memorandum around the end of August 2001 and that it ought still to be in his files. M. Gibert might have forgotten all about it; or he may have remembered its existence but decided not to tell M. de Chavagnac anything about it, despite the fact that the document would have clearly fallen within Mme François – Poncet's request for documents to M. de Chavagnac as described above. M. Gibert may not have bothered to consider the matter at all, having told M. de Chavagnac that all his documents had been seized by the French authorities. But that is all speculation. The only finding I am prepared to make is that M. de Chavagnac asked M. Gibert for all documents, if any, regarding Vivendi's Polish telecommunications investment, and that M. Gibert said that he had no documents to produce because the French authorities had taken them all.

54. The version of the Memorandum that was sent to Elektrim has a manuscript note at the top of the document. At the hearing before me it was agreed that this is a response to the Memorandum by M. Hannezo. The Memorandum itself is headed "*Elektrim*" and is sub - divided into four sections, although there are also further subdivisions.

55. It is not necessary to set out all of the document. The key parts, in translation (with some minor alterations by me to the two versions produced by the parties), are as follows:

> "*1. In theory the final closing of the transaction with Elektrim is scheduled for tomorrow. This signature is in line with the MOU signed last June, which contemplated a definitive closing of the transaction no later than 30 September 2001.*
>
> *2. Organisation.*
>
> *As a result of the closing we will control 51% of the holding company (Telco) which holds 51% of the Polish mobile [company] (PTC) and 100% of the fixed – line (Elnet)….*
>
> *3.*
>
> *…*
>
> *Note*
>
> *I remind you that, whilst waiting for the agreement of the Polish competition authorities, Société Générale Luxemburg will carry the 2% of Telco bought for €100 million for our account. Nevertheless, all the management organisation described above will be put in place immediately upon closing. This structure will eventually permit us to dispose of our participation to Deutsche Telekom even before getting authorisation from the Polish monopolies commission.*
>
> *In total, Vivendi Universal will therefore have paid €100 million directly to acquire control over PTC plus €489 million which will be paid by Telco (51% Vivendi and 49% Elektrim) to acquire the fixed line business of Elektrim and control of the mobile business. This €489 million can be directly financed by Telco with the aid of a bank, with a limited recourse against Telco, or through a current account of Vivendi Universal for which the spread above*

Euribor is already fixed at 4%. If this latter method is adopted, Vivendi Universal would also have the right to capitalise its current account above €300 million in Telco, whenever it wishes.

Remember that Deutsche Telekom was ready to pay $489 million for the same transaction alone.

4. Other points on the transaction

I remind [you] also that in this transaction Elektrim does not have a tag – along with Vivendi Universal. The only option for getting out of its minority participation is the commitment of Vivendi Universal to carry out an IPO of Telco in the 24 months following the closing, on the condition that the equity value of PTC is above €4.5 million.

Once the transaction is definitely completed between now and the end of the week, we will be able to renew the contact with Deutsche Telekom initiated at the end of July, to try to maximise the value of our new position of control of PTC.

As far as the arbitration in Vienna is concerned, this is only scheduled for the end of December 2001".

56. The Gibert Memorandum was received by Elektrim on 8 June 2006. On 9 June 2006 Elektrim instructed its English lawyers, BLG, in relation to this matter. As the Partial Award had been published on 22 May 2006, any application to challenge the award under ***section 68*** of the ***1996 Act*** had to be made by 19 June 2006. Mr Black, the partner in charge of the matter at BLG, has stated (at paragraph 68.1 of his witness statement) that it was necessary to arrange a visit to Poland to meet Elektrim's Polish advisers who had, until that time, had sole conduct of the arbitration proceedings. That visit took place on 21 – 23 June 2006. In the meantime, BLG considered some 20 lever arch files of materials on the history of the Vivendi/Elektrim dispute that had been sent to BLG by Elektrim's Polish lawyers. Mr Black states that at the same time as considering whether an application should be made to the English court under ***section 68,*** BLG was instructed to become involved in the continuing LCIA arbitration in London. Mr Black states that all this has necessitated work on the case by himself, two counsel and four associates of BLG. He says that "*…it is for these reasons that Elektrim was unable to serve the challenge application in time*". The application was served on 8 July 2006, that is two and a half weeks after the 28 day time period expired and a month after Elektrim received the Gibert Memorandum.

57. On 26 June 2006, BLG sent a letter to Salans and to the tribunal. This letter asserted that Vivendi had failed in its duties under ***section 40*** of the ***Arbitration Act 1996,*** because it had failed to "*do all things necessary for the proper and expeditious conduct of the arbitral proceedings*" and had failed to comply "*without delay with any determination of the tribunal as to procedural or evidential matters or with any order or directions of the tribunal*". The letter stated that, as a consequence of this "*breach*" of ***section 40,*** Vivendi was "*in repudiation of the arbitration agreement in the TIA*". The letter continued:

"*Our clients accept that repudiation, and in consequence stand henceforth discharged from any further performance of that agreement, which is from this moment terminated.*

Please confirm that you will take no further steps in this arbitration. Should you fail to do so, our clients intend to apply to the appropriate court or courts as soon as possible for appropriate declaratory, injunctive or other relief…

Any further steps that our clients do take hereafter in this arbitration are without prejudice to their position as stated above and are not to be taken as affirmation of the arbitration agreement or waiver of your clients' repudiatory breach".

V. The relevant statutory provisions

58. The relevant provisions of the ***Arbitration Act 1996*** which deal with challenges to an award on the grounds of "serious irregularity" affecting the tribunal, proceedings or award are found in ***sections 68, 70, 73 and 80(5).*** These provide:

> ***"68.*** *(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.*
>
> *A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*
>
> *(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –*
>
> *……*
>
> *(b) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;*
>
> *(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may-*
> *(a) remit the award to the tribunal, in whole or in part, for reconsideration,*
> *(b) set the award aside in whole or in part, or*
> *(c) declare the award to be of no effect, in whole or in part.*
>
> *The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."*

70. *(3) Any application or appeal must be brought within 28 days of the date of the award…..*

73. *(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection –*

……..

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time the took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

80. *(5) Where any provisions of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement".*

The relevant provision of the CPR for the purposes of ***section 80(5)*** is ***CPR Pt 62.9.*** This states:

"(1) The court may vary the period of 28 days fixed by section 70(3) of the 1996 Act for-

(a) challenging the award under section 67 or 68 of the Act…"

59. In relation to Elektrim's application for a declaration that the arbitration agreement in the TIA has been repudiated or renounced by Vivendi, Elektrim relies on ***section 40*** of the Act. This provides:

"(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

(2) This includes –

(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and

(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45)".

VI. The arguments of the parties and the issues for decision

60. **The argument of Elektrim on the s.*68(2)(g)* application**

Mr Millett QC, for Elektrim, submits that Vivendi deliberately concealed or recklessly failed to disclose a crucial document, viz. the Gibert Memorandum. This document plainly falls within the ambit of Request No 16 and so within the tribunal's order for disclosure in Procedural Order Number 3 dated 29 June 2005. If the document had been disclosed and the tribunal had been shown that document (and others whose existence was strongly suggested by the terms of the Gibert Memorandum itself), then there would have been three consequences. First, it would have enabled Elektrim to cross examine M. Gibert more pointedly on four important issues. These were: (a) whether (contrary to M. Gibert's evidence) Vivendi controlled Ymer when the 2% shareholding in Telco was sold to Ymer; (b) whether, (as M. Gibert stated in evidence) at the time of the TIA, Vivendi did intend to apply to the Polish competition authority for approval to buy the 2% shareholding from Ymer; (c) whether it was the case (as M. Gibert said) that Ymer was free to sell the 2% shareholding to any third party at any time; and (d) whether (contrary to M. Gibert's evidence) Vivendi had committed itself to buying the 2% shareholding from Ymer.

61. Mr Millett submits that the second consequence of having the Gibert Memorandum would have been that Elektrim would have been able to demonstrate that the written and oral evidence of M. Gibert on these four issues was false and deliberately so and that this must have been known and appreciated by Vivendi at the time of the hearing before the tribunal. If this had been demonstrated it would have meant that the majority tribunal would have reached the opposite conclusions to those it did reach on those vital issues of fact. That would have led to the third consequence, which was that the Partial Award would have come to the opposite conclusion on the question of whether Elektrim was entitled to avoid the TIA for mistake or deceit by Vivendi.

62. Therefore, Mr Millett submits, the Partial Award was obtained by the fraud of Vivendi, or the Partial Award was procured contrary to public policy. This has caused Elektrim to suffer substantial injustice as a result, because the Partial Award would be, or was likely to have been, to the opposite effect of that stated in the majority Award.

63. Mr Millett submits that time to make the application under ***section 68(2)(g)*** should be extended. He was prepared to accept that the factors to be considered were those set out at paragraph 59 of the judgment of Colman J in ***Kalmneft JSC v Glencore International AG [2001] 2 All ER (Comm) 577.*** He submitted that the delay was only two and a half weeks and the application had been made just over one month after the discovery of the Memorandum itself. The actions that Elektrim and its lawyers, BLG, had taken after the Memorandum had come to light were reasonable and expeditious. Vivendi would not suffer irremediable prejudice if the application were permitted to succeed. Although the arbitration was proceeding and a further hearing is fixed for March 2007, if Elektrim is correct in its submissions about the effect of the non – production of the Memorandum, then it would be just to delay that hearing. But if it is wrong, then the hearing can go ahead anyway. He submits that the application is a strong one and it would be most unfair for the applicant, Elektrim, not to be permitted to make the application when the basis for it was the deliberate concealment of a vital document that had only come to light some time after the Partial Award had been made and the perjured evidence of M. Gibert.

64. **The arguments of Elektrim on the application for a Declaration that the arbitration agreement in the TIA had been repudiated/renounced.**

On this part of the case Mr Millett makes the following points. First, he submits that the arbitration agreement in the TIA was a contract between the parties. Because the parties had chosen London as the seat of any arbitration that was to take place and had also agreed that it would be conducted according to LCIA Rules, the applicable law of that agreement is English law. It followed that when the parties did actually submit the present disputes to LCIA arbitration, that specific arbitration agreement was and is also subject to English law. Although Mr Millettt did not specifically refer to it, this analysis of the contractual position is consistent with that of Mustill J (as he then was), in ***Black Clawson International Ltd v Papierwerke Waldhof – Aschaffenburg AG [1981] 2 Lloyd's Rep 446,*** particularly at ***page 455***. Secondly, therefore, the parties were at all times subject to Part 1 of the 1996 Act, in particular the obligations set out in ***section 40*** of the Act. Thirdly, that section is imported into the arbitration agreement between the parties as an implied term. Therefore, if a party is in breach of the obligations set out in section 40, then it is in breach of an implied term of the contract of arbitration. If the breach is sufficiently grave, it could amount to a repudiation of the contract to arbitrate or a renunciation of it. Fourthly, in this case Vivendi's deliberate concealment of the Gibert Memorandum amounts to a repudiation or renunciation of the arbitration agreement. Alternatively, the perjured evidence of M. Gibert, of which Vivendi had knowledge, is also a repudiation or renunciation of the arbitration agreement. Fifthly, Elektrim is entitled to accept that repudiation or renunciation and it has done so by the letter of 29 June 2006 to Salans, thereby bringing the whole arbitration agreement and the current arbitration to an end. If it has been brought to an end, then there should be both a declaration to say so and an injunction to restrain the defendants (in particular Vivendi) from attempting to pursue the arbitration further.

65. Mr Millett submits that the consequence of this was that if the court acceded to Elektrim's submissions on its ***section 68(2)(g)*** application (and the application for an extension of time) then the Partial Award must be set aside. The Partial Award cannot be remitted to the tribunal because that no longer has any jurisdiction because the agreement to arbitrate the current disputes has come to an end.

66. **The arguments of Vivendi on the *section 68(2)(g)* application.**

Mr Landau submits Elektrim can only succeed in its application under paragraph (g) of ***section 68(2)*** of the Act if it can show that the Gibert Memorandum was deliberately concealed by Vivendi itself, or that it was deliberately concealed by someone else with Vivendi's knowledge and approval. However, there is no evidence on which to make such a finding against Vivendi or even against M. Gibert. Even if that could be proved, Elektrim would have to demonstrate that production of the document would have had a material effect as to the terms of the Partial Award, otherwise it cannot be demonstrated that the award had been "*obtained*" by fraud. In Mr Landau's submission, if the Memorandum had been produced and used in the arbitration it would not have made any difference at all in the relevant findings of fact and conclusions of law of the majority. Therefore, it cannot be demonstrated that either the award was obtained by fraud or that it was procured contrary to public policy. This is because there is no causal link between the (assumed) deliberate suppression of the Memorandum and the conclusions reached in the Partial Award.

67. Mr Landau submits that because the tribunal would have arrived at the same results even if the Memorandum had been produced, therefore Elektrim cannot demonstrate that the Memorandum's concealment has resulted in substantial injustice. So the application under ***section 68(2)(g)*** must fail.

68. Mr Landau also submits that the court should not entertain the application at all for two other reasons. The first is that no extension of time should be granted. When the factors set out by Colman J in the ***Kalmneft case*** are considered, the balance falls against Elektrim and its solicitors, BLG. In particular, they have not explained satisfactorily why it took so long to make the ***section 68*** application after the Gibert Memorandum came to light.

69. The second basis, which was not argued with much enthusiasm by Mr Landau, is that Elektrim has lost the right to object to any irregularity, within the terms of ***section 73(1)*** of the Act. Mr Landau submits that Elektrim must have known of the existence of the Gibert Memorandum at the time of the hearing before the arbitrators on 8 September 2005. He argues that Elektrim's knowledge of the existence of the Memorandum is the only explanation for the very precise formulation of the request for documents made by Elektrim at that hearing (see paragraph 30 above). If Elektrim did know of the Memorandum's existence, then it failed to grasp the nettle then and there and say to the arbitrators that the Memorandum existed and Vivendi were deliberately concealing its existence for their own ends.

70. I can deal with this latter point now. If Mr Landau were right about this submission, it would mean that Elektrim itself would be committing a fraud on the court by virtue of the assertion by its witnesses, without qualification, that it only knew of the document when it was sent to it on 8 June 2006. But there is no evidence on which I can possibly conclude that Elektrim, or its Polish lawyers, SKS, knew of the existence of the Gibert Memorandum in September 2005. There is also no evidence that Elektrim and its Polish lawyers are now lying to the court in saying that they only knew of the Memorandum's existence after they received the letter from Mr Klaus Hofman. So I reject this submission of Mr Landau. I think it is unfortunate that this point was pursued at all at the hearing.

71. In relation to Elektrim's application for a declaration that the arbitration agreement in the TIA has been repudiated or renounced, Mr Landau submits that Mr Millettt's argument is based on a fundamental misreading of the 1996 Act. He points out that ***section 40*** is one of the "mandatory" provisions in Part One of the Act, which

means that it has effect, notwithstanding any agreement to the contrary by parties to an arbitration agreement: see ***section 4(1)*** and ***Schedule 1*** of the Act. Therefore the obligations of the parties set out in ***section 40*** are statutory obligations, not obligations that could be an implied term in the contract to arbitrate contained in the arbitration agreement in the TIA or any agreement to arbitrate a particular dispute, which could be displaced by any express agreement in different terms. Therefore the concepts of "breach" of "implied terms" and "repudiation/renunciation" of the contract to arbitrate, are inapposite. If a party fails to fulfil its obligations under ***section 40,*** the answer is to use the statutory remedies, as set out in ***sections 41*** and ***42*** of the Act. But there are no contractual consequences as suggested by Elektrim. Therefore the application for a declaration is misconceived.

The Issues for Decision

72. Logically, the first question that arises is whether an extension of time should be granted under ***section 80(5)*** and ***CPR Pt 62.9(1) and (3).*** I will deal with that straight away. The only substantial argument of Mr Landau on this topic was that Elektrim and BLG had not explained the delay between 8 June and 12 July 2006, when the application was issued. Having read and considered the evidence of Mr Black, I am satisfied that Elektrim and BLG acted reasonably and sensibly after the Gibert Memorandum was received on 8 June 2006. There was not an undue delay in issuing the application on 12 July 2006. The CPR provide that if an application to extend time is made before the expiry of the 28 day period, then an application must be made using the procedure set out in ***CPR Pt 23,*** although it can be made without notice being given to the potential defendant. But it is still necessary to set out the grounds of the application. In order to do that properly, the matter had to be investigated by Elektrim's English lawyers, BLG, who were new to the case. It was reasonable to wait until the matter had been investigated, then to make the application to extend time on the same arbitration claim form as that for relief under ***section 68(2)(g),*** as provided for by ***CPR Pt 62.9(3).*** I am satisfied that there is sufficient in the merits of the application for it to be proper to extend time and I so order.

73. The next issues arise on the substantive application under ***section 68(2)(g).*** In my view the questions for decision are: (i) in the context of this case, what actions or inactions of Vivendi (or those for whom it is answerable) are within the ambit of the phrases "*obtained by fraud*" and "*procured contrary to public policy*" within ***section 68(2)(g)*** of the 1996 Act. Depending on the answers to that question: (ii) is it demonstrated that Vivendi, or someone for whom Vivendi is answerable, deliberately concealed the Gibert Memorandum or, if relevant, was reckless as to whether it should be produced or not? If so, then (iii) did that deliberate concealment or reckless action (or inaction) result in the Partial Award being "*obtained by fraud*"? If so, then (iv) has Elektrim suffered "*substantial injustice*" as a consequence? If it has, then (v) what remedy should be granted to Elektrim?

74. The questions of whether the Partial Award has been obtained by fraud (or procured contrary to public policy) and the remedy to be granted if so, are also relevant to the next group of issues, which arise on Elektrim's application for a declaration that the arbitration agreement in the TIA has been ended. On that the questions for decision are: (i) do the obligations imposed on parties to an arbitration by ***section 40*** of the Act constitute an implied term in the agreement to arbitrate contained in the terms of the TIA? If they do, then (ii) do the actions (or inactions) of Vivendi amount to a repudiatory breach or a renunciation of the arbitration agreement? If so, then (iii) has Elektrim accepted that repudiation/renunciation by Vivendi. If it has, then (iv) what relief should Elektrim be granted, both on this application and also the application under ***section 68(2)(g)*** of the Act?

VII. Application under section 68(2)(g): Issue One: in the context of this case, what actions or inactions are within the ambit of the phrases "*obtained by fraud*" and/or "*procured contrary to public policy*" in that sub - section?

75. First, it is important to remember the basis on which ***section 68(2)(g)*** of the Act must be interpreted and applied. In ***Lesotho Developments v Impregilo SpA [2006] 1 AC 221,*** the House of Lords had to analyse in particular the scope of ***section 68(2)(b)*** of the ***1996 Act.*** In the course of giving the leading speech in the case, Lord Steyn commented on the ethos of the Act and the correct approach to its interpretation. He said, first, that the 1996 Act constituted a radical change to English law on the relationship between the courts and arbitral proceedings. Secondly, he stated that the general approach of the Act is to give the courts only a very limited role to interfere in arbitrations.[7] Thirdly, he endorsed the view (previously expressed by Thomas J in ***Seabridge AB v AC Orssleff's Eftf's AS [1999] 2 Lloyd's Rep 685 at 690)*** that the Act should be interpreted without reference to the pre-existing law on arbitration, unless the Act did not cover a specific point.[8]

76. In my view it is important to recall, in this regard, that under the ***Arbitration Act 1950*** (and its predecessors going back to the 1889 Act), the court had frequently held that it had power to remit an award in cases where fresh evidence came to light after the award, if the new evidence *might* have affected the decision of the arbitrator if it had been adduced at the hearing.[9] The ***1996 Act*** gives the court no such power. This omission is clearly intended to mark a deliberate change in the court's role and approach in relation to "fresh evidence" that comes to light after an award has been made.

77. Lord Steyn then examined ***section 68*** of the Act. He pointed out that the concept of "*serious irregularity*" set out in ***section 68*** is a new one in English arbitration law. A high threshold has to be satisfied before it can be held that there has been a "*serious irregularity*". He also emphasised that relief cannot be given under ***section 68*** unless the applicant can demonstrate that the "*serious irregularity*" fell squarely within one of the categories as defined in

[7] See paras 17 and 18 of Lord Steyn's speech.
[8] See para 19.
[9] See *Mustill & Boyd: Commercial Arbitration 1st Ed. page 505*

section 68. Moreover, an applicant must demonstrate not only *"serious irregularity"*, but also that this has caused or will cause him "*substantial injustice*". Lord Steyn said that the aim of this wording was to eliminate "*technical and unmeritorious challenges*"[10]

78. This, therefore, is the approach to the construction of ***section 68*** and to applications made under that section which must be adopted by judges at first instance.

79. I next consider the question: what actions or inactions are within the ambit of the phrase *"obtained by fraud"* in the context of the facts in this case? Neither side drew my attention to any cases where the English courts have considered the ambit of the phrase "*..the award being obtained by fraud"* in ***section 68(2)(g)***[11] Therefore I have to consider the phraseology in principle and attempt to construe it in accordance with ***section 1*** of the Act. I agree with Moore – Bick J (as he then was) who stated in ***Profilati Italia SRL v Paine Webber Inc [2001] 1 All ER (Comm) 1065 at paragraph 17***, that it would be unwise to attempt to define all the circumstances when an award is "*obtained by fraud"* or "*procured contrary to public policy"* within ***section 68(2)(g)***. However, I note that ***section 68(2)(g)*** does not refer to the fraud of a party to the arbitration. On the face of the wording it would seem that the "fraud" referred to in the paragraph can be committed by anyone who is connected with the arbitration process. If this were right, then (for example) if it were proved that a witness for one side or another has committed perjury when giving evidence before the tribunal, that would be a "fraud" within paragraph (g). If so then, if it were also proved that the perjured evidence resulted in the award being in favour of that party then, logically, the award would have been "*obtained by fraud"*.

80. But I have concluded that this is not the correct construction of the words "*obtained by fraud"*. It is a party to an arbitration that obtains an award in its favour or has one made against it. The words "*obtained by fraud*" must refer to an award being obtained by the fraud of a party to the arbitration or by the fraud of another to which a party to the arbitration was privy. This fits in with the general ethos of the Act, which is to give the courts as little chance to interfere with arbitrations as possible. If this wording referred to the fraud of anyone that was involved in the arbitral process, whether or not the fraud was committed with the knowledge of the relevant party to the arbitration, then that would give unsuccessful parties *carte blanche* to apply to the court to set aside or remit an award. The unsuccessful party need only assert (for example) that a witness of the successful party had committed perjury (even without the knowledge of the successful party)[12] and the award had as a result been in the favour of that party. It could then be asserted that the award had been "obtained by fraud", resulting in "substantial injustice"; therefore the award must be set aside or remitted.

81. In my view the strict approach to the construction of the words "*obtained by fraud"* that I have adopted must also be applied in relation to the disclosure of documents in an arbitration. If a party to the arbitration is ordered to produce a document (or a class of documents) that is relevant to the arbitration and the party, through its directors, its employees or its lawyers, in the knowledge that the document exists, decides deliberately to conceal it, with the intention of inducing the tribunal and the other side into the belief that the document does not exist, then that must be a "*fraud*" for the purposes of ***section 68(2)(g)***. However, because an allegation of fraud is being asserted, the accuser will have to demonstrate its case to a high standard of proof.

82. But an award will only be "*obtained by fraud"* if the party which has deliberately concealed the document has, as a consequence of that concealment, obtained an award in its favour. The party relying on ***section 68(2)(g)*** must therefore also prove a causative link between the deliberate concealment of the document and the decision in the award in favour of the other, successful, party.

83. If there has been a failure to disclose a document as a result of either negligence, or an error of judgment, concerning the interpretation of an order for production or the scope of the obligation to search for a document following an order of the tribunal, that is not "*fraud"* for the purposes of the paragraph. In this regard I respectfully agree with the comments of Moore – Bick J in the ***Profilati case*** at ***paragraph 19***, although those comments were made in relation to the words "*procured contrary to public policy"* in the section.

84. I asked both counsel whether recklessness had any relevance in connection with the phrase "*obtained by fraud*" in ***section 68(2)(g)***. Both Mr Millettt and Mr Landau were somewhat reluctant to be drawn into that debate. That was probably sensible, because Elektrim's case has been that Vivendi (in particular M. Gibert himself) deliberately suppressed the Gibert Memorandum. Although Mr Millettt did argue that Mme François – Poncet deliberately misinterpreted the Third Procedural Order, Request No 16 (as redefined) so that it would exclude a class of documents which would have included one such as the Gibert Memorandum, I did not understand him specifically to advance any further argument based on "reckless fraud". It would be difficult to formulate the right test on the facts of this case.

85. Neither side sought to argue that the position would be any different if the phrase *"procured contrary to public policy"* is applied to the facts of this case. In the ***Profilati case***, the allegation was that a party to an arbitration had wrongly failed to disclose two material documents and that this failure had led to an award being made in favour of one party that would have been made in favour of the other party had the documents been disclosed. It was not alleged that the two documents were deliberately withheld by either the party concerned or its

[10] See para 28 of the speech.

[11] In the ***Profilati case*** *(infra)*, Moore Bick J was primarily concerned with the scope of the phrase "*procured contrary to public policy"* in *section 68(2)(g)*.

[12] What constitutes "knowledge of the successful party" must be left for another case to consider.

solicitors. However, it was argued that if a document is wrongfully withheld as a result of either negligence or an error of judgment, and it is demonstrated that the award is different in consequence, then the award has been "*procured contrary to public policy"* within ***section 68(2)(g)***.

86. Moore – Bick J did not accept this argument. He concluded that, in the context of disclosure, documents had to be deliberately withheld to the knowledge of a party to the arbitration (or its solicitors), before it could be said that the award had been procured contrary to public policy. He said that normally it would have to be shown that there had been some "*reprehensible or unconscionable conduct"* by the party concerned, that had contributed in a substantial way to obtaining an award in that party's favour: ***see para 17***.

87. I respectfully agree with that analysis. Thus, at least in the context of allegations of perjury and deliberate concealment of relevant documents, the phrase "*an award procured contrary to public policy"* goes no wider than the phrase "*an award obtained by fraud"* for the purposes of ***section 68(2)(g)***.

VIII. Application under section 68(2)(g): Issue Two: is it demonstrated that Vivendi, or someone for whom it is answerable, deliberately concealed the Gibert Memorandum?[13]

88. There was no direct evidence that could establish that someone connected with Vivendi and the arbitration knew of the Gibert Memorandum in the summer and autumn of 2005, but deliberately withheld it from production to Elektrim and the tribunal, with the intention that both Elektrim and the tribunal should conclude that no such Memorandum existed. But Mr Millett did submit that this is the conclusion that I should infer from the evidence. I cannot accept that submission. Mr Millettt's attack concentrated on four people within Vivendi and Salans, its lawyers: M. Gibert, M. de Chavagnac, M. Debos and Vivendi's lawyer, Mme François – Poncet. I must consider separately the position of each of them.

89. Mr Millettt's submission is that M. Gibert must have remembered writing the Memorandum when he was asked by M. de Chavagnac to produce all documents relating to Vivendi's Polish telecommunications investments. The argument is that because M. Gibert's evidence to the tribunal was going to be that Vivendi did not have any control over Ymer and that Vivendi always intended to apply for Governmental Approval, he had to suppress knowledge of the existence of the Memorandum, its whereabouts and its contents, because if the Memorandum had been disclosed it would have demonstrated that this evidence would have been false.

90. I am not prepared to make such a finding on the basis of the evidence before me. The Memorandum was written in August 2001. Nearly four years elapsed until M. Gibert was asked about document production for the purpose of the LCIA arbitration in about July 2005. In the meantime all M. Gibert's documents (in hard copy) and his computer, back up tapes and hard drives had all been seized by the French authorities. M. de Chavagnac's request was in very general terms; he asked M. Gibert for all his documents relating to Vivendi's Polish telecommunications investments. There was nothing specific in the request of M. de Chavagnac that might jolt M. Gibert's memory specifically about any Memoranda he might have written concerning the TIA, particularly during the period 24 August to 10 September 2001. If M. Gibert had been asked about memoranda in the terms of the tribunal's letter of 26 October 2005, then he may have responded differently. I do not know. But, on the evidence before me, I cannot possibly find it proved, to the necessary high standard, that M. Gibert recalled writing the Memorandum, but deliberately decided not to give any information about it to M. de Chavagnac (or others) when asked about documents. In this regard I note that M. Gibert was not cross – examined about Request No 16 at the arbitration hearing in January 2006, despite the fact that Elektrim's lawyers had been accusing Vivendi of failing to comply with the tribunal's orders on discovery. I assume that this lack of cross examination was because there was no basis on which to accuse M. Gibert of concealing relevant documents. If the matter was not put to him squarely then, it seems to me all the more difficult now conclude, as a matter of inference, that he deliberately concealed the Memorandum on the basis of the current evidence.

91. As for M. de Chavagnac, there is no evidence from which to infer that he knew of the Gibert Memorandum. Nor is there any evidence to suggest that he ought to have appreciated that the Memorandum existed. There is no basis on which to question his conclusion that M. Gibert had no relevant documents to disclose once M. Gibert told him that the French authorities had taken all M. Gibert's files in December 2002, as well as Vivendi's back up tapes, M. Gibert's computer and his hard drives. Therefore, M. de Chavagnac cannot be guilty of deliberately concealing the Gibert Memorandum from either Elektrim or the tribunal.

92. M. Dubos was M. de Chavagnac's superior. As such he made the two statements (on 10 November and 19 December 2005) to the tribunal declaring that, to his knowledge, there had been compliance with Request No 16. The tribunal indicated its dissatisfaction with both statements. But this cannot support an argument that M. Dubos was a party to a deliberate concealment of the Gibert Memorandum. There is no evidence from which to infer that he knew of the Gibert Memorandum at any stage or that he should have appreciated that such a Memorandum existed.

93. Lastly, I must consider the position of Mme François – Poncet, who was head of Vivendi's team of lawyers at Salans and who took personal charge of the discovery process as well as all other aspects of the arbitration proceedings. As I have already noted, it is expressly accepted by Elektrim that Mme François – Poncet did not know of or conceal the Gibert Memorandum. Because it is accepted that she did not know of the document's existence, it is not possible to argue that her reason for construing the ambit of the tribunal's order in relation to

[13] I have reformulated the question in the light of my conclusions that "reckless fraud" is irrelevant on the facts of this case; and that "procured contrary to public policy" does not add anything to the argument on the facts of this case.

Request No 16 was specifically to ensure that the Memorandum would not have to be disclosed to Elektrim and the tribunal.

94. But Mr Millettt did argue that Mme François – Poncet's interpretation of the ambit of the tribunal's order in relation to Request No 16 was so narrow as to be perverse, with the result that the scope of the search for documents by Salans and Vivendi was also perversely narrow. As I understood it, Mr Millett argues that this is enough to constitute "fraud" on the part of Vivendi (within the meaning of the word in ***section 68(2)(g))*** and that the Partial Award in Vivendi's favour was obtained as a consequence of this approach to Request No 16 and (as he would put it) the resulting non – production of the Gibert Memorandum. Alternatively, if the Partial Award was procured as a result of the non – production of the Gibert Memorandum by reason of this approach to the disclosure exercise by Mme François – Poncet, this means that the award was procured contrary to public policy within ***section 68(2)g)***.

95. In my view of the correct construction of ***section 68(2)(g)***, Mr Millettt's argument cannot begin to succeed unless he demonstrates two things, to the necessary high standard of proof required for an allegation of fraud or similar reprehensible or unconscionable misconduct. First, that Mme François – Poncet deliberately took a perversely narrow view of the scope of the order of the tribunal in relation to Request No 16. Secondly, that she did so with the intent of ensuring that any document of a kind such as the Gibert Memorandum would not have to be disclosed if it did, indeed, exist – as to which she had no specific knowledge.

96. It is clear that Mme François – Poncet interpreted Request No 16 as requiring the disclosure of all documents produced for or circulated to Vivendi's Board of Directors[14] concerning (i) Vivendi's position in Telco resulting from the contemplated conclusion of the TIA; (ii) the intended timing of the filing for Governmental Approval, in accordance with the TIA; (iii) the intended timing of Vivendi's obligation to move to an IPO of Telco shares: see her witness statement paragraphs 13 and 14. Mme François – Poncet has stated that she believed that this required production of documents sent to and from board members, but only in their position as board members. She compared Request 16 with that of Request No 15 (extracts of the resolutions of Vivendi's Board of Directors) and interpreted Request No 16 as an extension of Request No 15: see paragraph 14 of her witness statement.

97. There is no evidence to undermine Mme François – Poncet's statements as to her interpretation of the scope of Request No 16. I might not have regarded it as being the correct one. But I am not concerned with the precise scope of the somewhat elaborate terms of Request 16. The only question is whether Mme François – Poncet's interpretation was perverse. Given her evidence, I am not satisfied that it was an interpretation that "no reasonable lawyer" could come to in the circumstances that existed when the order was made.

98. Mr Millett also argues that the geographical and physical ambit of the disclosure exercise conducted under Mme François – Poncet's direction was so narrow as to be perverse, because of her decision not to examine the archives of files (including those of former Vivendi employees) held at Dunquerque or in the Vivendi New York office. (It was in this latter office that the Memorandum eventually came to light, of course). Given that Vivendi had just three weeks to comply with the order of the tribunal concerning Request No 16, in my view the decision of Mme François – Poncet to restrict the scope of the disclosure exercise was reasonable. There is no evidence, either direct or by inference, that the geographical ambit of the search was reduced in bad faith or that it was ordered in the knowledge or even on the suspicion that there were relevant or embarrassing documents that might be found at those locations.

99. As it turned out, the discovery exercise for Request No 16 was on a very large scale. 100 lever arch files were reviewed and some 56,000 emails and 200,000 pages of hard copy documents were considered. All of the emails in the mailboxes of Messrs Gibert, Messier and Hannezo that were recoverable and were "*relevant to Vivendi's Polish telecommunications investment"* were reviewed.[15] Furthermore, a CD – Rom containing certain back – up information from before July 2002 was also reviewed. These reviews may have been rushed, or even inadequate given the short period given for the discovery exercise;[16] but there is no evidence to suggest that the reviews were conducted in a perverse way, let alone carried out with an intention to conceal documents. Nor can it be inferred that the discovery exercise was carried out in a manner indicating that Vivendi and its lawyers did not care whether documents existed or not; or did not care whether documents were relevant or not. In so far as Mr Millettt made submissions to that effect, I reject them.

100. After the initial search (following the order for production of documents covered by Request No 16 made by the tribunal on 29 June 2005), Elektrim "narrowed" its request at the oral hearing on 8 September 2005. The refined demand sought, amongst other documents, "*…memoranda…whether prepared by Vivendi or for Vivendi….in particular reports prepared by M. Gibert…".* The tribunal viewed this request as being narrower than the original Request No 16, as ordered by the tribunal on 29 June 2005, because it only referred to the individuals mentioned in Elektrim's oral submissions on 8 September "*to the extent that these persons were members of the Boards…between 24 August and 10 September 2001…".*

101. The search process was not reopened by Salans after this "narrowing" or "clarification". However, Mme François – Poncet has said in her witness statement[17] that, given the initial view of the scope of the exercise and that this new

[14] That is the boards of both Vivendi companies concerned.

[15] The words in italics are those used in para 32 of Mme François – Ponçet's witness statement.

[16] The exercise in fact took 5 weeks, so that the documents disclosed pursuant to the tribunal's order of 29 June 2005 were produced to it by 5 August 2005.

[17] Paragraph 64.

formulation was said to be narrower than the initial one, she was concerned to ensure that she had not misinterpreted the scope of the discovery exercise. That led to Salans letter to the tribunal of 10 November 2005, seeking reassurance that Salans had correctly interpreted the reformulation of the tribunal's order. The tribunal replied on 8 December saying that the reformulation did not require any interpretation and that Vivendi should not substitute its understanding of the request for the clear words of the request. The tribunal asked Vivendi to check again to see if there were any documents in its possession within the terms of the order.

102. That response of the tribunal was, if I may say so, both Delphic and unhelpful. In my view it is hardly surprising that Salans responded as it did on 19 December 2005 with a further statement from M. Dubos confirming his earlier statement of 10 November. That led to the tribunal's further letter of 23 December, asking Vivendi to comply with the invitation contained in the letter of 8 December, with the addition of a threat that if Vivendi did not, then the tribunal might draw "*adverse inference*".

103. Did Mme François – Poncet's attitude to the scope of the discovery exercise become perverse, given the attitude of the tribunal to the scope of the discovery exercise required by its order on Request No 16, in particular its letter of 26 October 2005 and its indication (in the 23 December letter) that the discovery efforts of Vivendi and its lawyers were unsatisfactory? I would accept that Mme François – Poncet ought to have been prepared to reconsider the scope of the discovery exercise in the light of the tribunal's letter of 23 December 2005. But instead there was further discussion between the parties and the tribunal both during and after the January 2006 hearing. On 20 February 2006 Salans wrote to the tribunal to explain in detail the rationale of Vivendi's approach to the disclosure exercise for Request No 16 in its various formulations. In the light of paragraphs 142 and 143[18] of the Partial Award, Mme François – Poncet's decision not to reopen the discovery process was justified. It certainly cannot be regarded as perverse or deliberately obstructive. It is equally impossible to reach a conclusion that the reason for not reopening the discovery exercise was to ensure that relevant documents which may or may not have existed, were thereby not disclosed to the tribunal and Elektrim.

104. I have noted that Mme François – Poncet has stated, at paragraph 79 of her witness statement, that in her view the Gibert Memorandum does not fall within the scope of Request No 16, both originally and as reformulated. That required the production of materials that were "*prepared for*" or "*circulated to*" Vivendi's Board during a certain period[19] by M. Gibert, amongst others. Her view is that the Memorandum was:

"*..not a document that was "prepared for" or "circulated to" Vivendi's Board. It was communicated to a number of employees of Vivendi holding a variety of positions, ranging from Director of the Investor Relations Department to CFO, as well as to the President of a Vivendi subsidiary, and, as such, was clearly not a document "addressed to Board members in their capacity as Board members" (as clarified by the LCIA tribunal in paragraph 143 of the Patial Award…)".*

105. After some amplification of her reasoning in paragraph 80, Mme François – Poncet goes on to conclude, in paragraph 81 of her statement, that the Gibert Memorandum was:

"*…simply an internal memorandum from its Senior Vice President of Finance and Deputy Chief Financial Officer, M. Gibert, to his hierarchical superiors, as well as other employees of Vivendi or its affiliates who might be concerned by the information contained therein, informing them of a transaction to be executed.*"

Therefore, Mme François – Poncet concludes, if the Gibert Memorandum had come to light in the discovery process, she would not have disclosed it to the tribunal and Elektrim.

106. Mr Millettt has, effectively made an attack on the good faith of Mme François – Poncet's evidence by arguing that her interpretation of the tribunal's order in relation to Request No 16 was perverse, either initially or subsequently after the "clarifications" to it. I reject this attack on Mme François – Poncet's good faith; there is no evidence on which to conclude that her statement was made in bad faith. I might disagree with her interpretation of the scope of the disclosure required by Request No 16 and I might disagree with her analysis of whether the Gibert Memorandum was within its ambit. But her reasoning is not perverse.

107. Therefore I have concluded that it is not demonstrated that anyone in Vivendi, or Salans, deliberately concealed the Gibert Memorandum. Nor, if it be relevant, is it demonstrated that the discovery exercise conducted by Vivendi and Salans following the tribunal's Procedural Order number 3 (on 29 June 2005) and its further orders relating to discovery Request No 16 was deliberately narrow or perverse. There is no evidence from which to infer that any of the actions (or inactions) by relevant people were done with the intent to conceal either the Gibert Memorandum specifically, or with an intent to ensure that possibly damaging memoranda would not come to light.

IX. Application under section 68(2)(g): Issue Three: did the deliberate concealment of the Gibert Memorandum result in the Partial Award being obtained by fraud?

108. Given my conclusion on Issue Two, this point does not arise for decision. However, at various points in his argument, Mr Millettt did appear to submit that he could use the Gibert Memorandum in another way, that is to show that M. Gibert's oral and written evidence to the tribunal was false and he must have known it was so and that this constituted a fraud by Vivendi. Moreover, he also argued that if the Gibert Memorandum had been available at the time of the hearing, this would have enabled Elektrim to run a further, new, defence based on false and deliberate misrepresentation by Vivendi. As I understood it, Mr Millettt argues that production of the

[18] Referred to at para 49 above.

[19] In the 26 October 2005 reformulation this was limited to the period 24 August to 10 September 2001.

Gibert Memorandum would have enabled Elektrim to argue that Vivendi falsely and deliberately misrepresented to Elektrim (at the time of the TIA) that it intended to enter into a relationship with Elektrim leading to an IPO of Telco shares; whereas that was not the case. Instead, Vivendi intended to sell its Telco shareholding well before that. Elektrim now says that if it had known the true position at the time of the TIA then it would have demanded further safeguards in the TIA, in particular a "tag along" clause to enable Elektrim to take advantage of any sale of Telco shares by Vivendi to DT.[20] Therefore, the terms of the TIA were concluded on the basis of a fraudulent misrepresentation by Vivendi, which would give Elektrim the right to avoid the TIA. Thus, the Partial Award was obtained by fraud or procured contrary to public policy.

109. Mr Millett concentrated on five aspects of M. Gibert's evidence (particularly that given orally), which he said were plainly contradicted by the terms of the Gibert Memorandum. First, M. Gibert stated that Ymer was not controlled by Vivendi. But, Mr Millettt argues, this is effectively contradicted by the statement in the Gibert Memorandum[21] that after the "closing" of the TIA, Vivendi would control 51% of Telco which holds 51% of PTC. In fact, at that stage, 2% of the shareholding of Telco would be with Ymer, so that the Memorandum was effectively saying that Vivendi had control over Ymer.

110. I will assume that this evidence of M. Gibert to the tribunal was false. But that evidence was rejected by the tribunal. In paragraph 305 of the majority award it states that it is likely that Vivendi had economic control over Ymer. Moreover, in paragraph 306 it is stated that the fact that Vivendi may have been in a position to control Ymer and Telco " …*was known to Elektrim; indeed, without such control, Ymer would have not have acquired the Telco shares in such a short time and Vivendi would not have been able to obtain ownership of Telco, which was what both Vivendi and Elektrim intended should happen".* In paragraph 311, the majority award states that, at the time of the TIA, the issue of Ymer's independence "…*was of no real concern to Elektrim".* The majority of the tribunal accepted the evidence of Mr Siwak that the independence of Ymer or otherwise was irrelevant to Elektrim and that it would have entered the TIA even if it had known that Vivendi controlled Ymer.[22] Furthermore, at several points in the majority award, it is emphasised that Elektrim was so desperate for funds that it had to enter into the TIA and would have done so on almost any terms.[23] I have concluded that if the tribunal had seen the Gibert Memorandum, it would simply have reinforced the conclusion of the majority on this issue. The suggestion that the Memorandum might somehow have given the minority arbitrator, Professor Rajski, some ammunition with which to persuade the majority to his view is unrealistic.

111. Secondly, Mr Millettt attacked the evidence of M. Gibert that, at the time the TIA was concluded, Vivendi had not changed its mind about seeking Government Approval and acquiring control of Telco; because there had never been an intention by Vivendi to buy the 2% shareholding anyway.[24] The implication M. Gibert wished the tribunal to draw from this evidence was (presumably) that there was no false implied representation by Vivendi that its intention at that time was to obtain Government Approval so as to acquire the 2% shareholding, because it never intended to purchase that shareholding anyway. Mr Millett pointed to the statement in the Gibert Memorandum[25] which says that the structure of Telco after the TIA would permit Vivendi to sell its shareholding in Telco to DT, even before obtaining Polish Government Approval. Mr Millettt argues that this indicates that, as at 29 August 2001, Vivendi did not, in fact, intend to obtain Polish Government Approval. Furthermore, he submits that it is clear from the Memorandum's terms that it was Vivendi's intention to sell out to DT before any IPO of Telco shares some 12 to 18 months after the TIA was signed. Mr Millettt says that this was contrary to representations made by Vivendi that it intended to enter into a relationship with Elektrim leading to an IPO of the Telco shares. Therefore, Mr Millettt argues, the Gibert Memorandum would have enabled Elektrim to show M. Gibert's evidence on this point was false. It would also have enabled Elektrim to run a new, further, argument on deceit, viz. as to Vivendi's intentions regarding the IPO.

112. Again, I will assume that this evidence of M. Gibert was false, in the sense that although Vivendi did want to take control of Telco, it would do so without the need for Government Approval, because it did, in fact control Ymer.[26] But even on this assumption, the evidence of M. Gibert did not and could not affect the conclusion of the majority. M. Gibert's "*explanations*" on this topic are clearly rejected at paragraph 202 of the majority award. The majority held that it was clear, from the time of the LOU, that Vivendi intended to sell its holding in Telco. (It is clear from clause 4 of the TIA that Vivendi had the right to make a sale of Telco shares to a third party before an IPO).

113. Moreover, at paragraph 328 of the majority award, it is held that: "*assuming Vivendi did not have the intention to apply for the required governmental approval already at the time of the execution of the TIA, the Arbitral Tribunal considers that there was no mistake, even following a broad definition of such concept under Polish law".*

114. As to the suggestion that the Gibert Memorandum would have enabled Elektrim to run a new, distinct argument in favour of rescission of the TIA, I find this unconvincing, for several reasons. First, as I have pointed out, the majority award held (at paragraph 202) that Vivendi had an intention to sell its holding in Telco from the time of the execution of the LOU. It also held that M. Gibert had told Mr Siwak of Elektrim that Vivendi intended to acquire

[20] See, eg. the witness statement of Ms Kaminska, para 10; and the witness statement of Mr Walczykowski at para 12
[21] The first sentence of the paragraph headed "Organisation".
[22] See paragraphs 3313 and 318 of the majority award.
[23] See, eg. paras 188; 194; 233; 235; 301; 311; 313; 318 and 319.
[24] This evidence of M. Gibert is recorded at paragraph 201 of the majority award.
[25] The third sentence in the paragraph which is headed "Note".
[26] (blank)

control of Telco so as to be in a better position to "exit" its investments at a fair market value. Secondly, Elektrim knew, from the terms of the TIA itself, that Vivendi could sell its shares in Telco in advance of an IPO. Thirdly, as I have already pointed out, the majority award makes clear that Elektrim was desperate for cash at the time of the TIA and that was its main concern, rather than trying to safeguard its position as a minority shareholder in Telco. Given these findings, I would hold that the tribunal (or the majority at any rate) would have rejected any argument that, had Elektrim known Vivendi's "true" intentions to sell out to DT, Elektrim would have been able to negotiate further safeguards in the TIA, particularly a "tag – along" provision so far as its own shares in Telco are concerned. Fourthly , there is no evidence before me from Elektrim on Polish law to show what new argument could have been made on the basis of deceit or mistake that would have given Elektrim the right to avoid the TIA.

115. Therefore, even if the Memorandum had been available, I am clear it could not have made any difference to the majority decisions on these areas that were argued at the hearing. I am also not satisfied that it would have made any difference to the overall conclusions of the Partial Award, as I am not convinced any "new" case could been have successfully argued.

116. Mr Millettt's third point on the evidence of M. Gibert is allied to the second. M. Gibert's evidence was that Ymer was free to sell the 2% shareholding in Telco to a third party at any time, subject to Vivendi's and Elektrim's rights of pre- emption. This contrasted with the statement in the Memorandum that Vivendi had control of the 2% shareholding. But (as already noted) M. Gibert's evidence was rejected by the majority tribunal, who concluded that there was a likelihood that Vivendi had economic control over Ymer.

117. Therefore the production of the Memorandum would have made no difference to the conclusion that the majority reached on this issue; they had reached it anyway.

118. The fourth point on M. Gibert's evidence is linked to both the second and the third point. M. Gibert said in evidence that there was nothing in writing to show that Vivendi had committed itself to acquiring the 2% shareholding that Ymer had. Mr Millettt says this contrasts with the statement in the Gibert Memorandum that Vivendi controls the 2% shareholding. But, as is clear from the extracts of the majority award already set out above, this evidence of M. Gibert was not accepted and, in any event, the majority did not regard it is material to its decision on the question of whether there had been any material mistake or deceit by Vivendi.

119. Lastly, Mr Millettt emphasised the fact that M. Gibert said in evidence that he was away on holiday until either the end of August 2001 or 3 September 2001. Mr Millettt says that this is clearly not so, as the Gibert Memorandum is dated 29 August 2001.[27] This does not really help Mr Millettt. The evidence is equally consistent with a conclusion that either M. Gibert had forgotten when he returned to work that year, or he was deliberately telling a lie to cover up the fact that he had remembered writing the Memorandum, but wished to distance himself from any possibility that he had done so or been involved in the final negotiations for the TIA, which were concluded on 3 September. There is no basis on which I can say that the basis for M. Gibert's evidence must have been the second of these two possibilities.

120. Overall, even if it is assumed that the Gibert Memorandum was deliberately concealed by Vivendi or the "failure" to produce it was a fraud, and even assuming it could be shown that some of M. Gibert's evidence was false and he knew that it was and that his fraud must be regarded as Vivendi's fraud, it cannot be shown that the Partial Award in favour of Vivendi on the relevant points was obtained by fraud. By the same token, it cannot be shown that the award was "*procured contrary to public policy*". The necessary causative links between the (assumed) deliberate concealment of the Memorandum or fraudulent failure to produce it, the (assumed) perjured evidence and the conclusions in the Award are not present.

X. Application under section 68(2)(g): Issues Four and Five: has Elektrim suffered any "substantial injustice" as a result of any breach within s.68(2)(g); and if so, what remedy should be granted?

121. In the light of my conclusions on Issues Two and Three, these questions do not arise and I need say no more on them.

122. It follows that Elektrim's application under ***section 68(2)(g)*** must be dismissed.

XI. Elektrim's application for a Declaration that the arbitration agreement has been repudiated/renounced and so is at an end. Issue One: do the obligations placed on parties by section 40 of the 1996 Act constitute an implied term in the agreement to arbitrate contained in the terms of the TIA or this particular arbitration?

123. It will be recalled that Mr Landau asked the court to note a preliminary objection to this application. He said that this was a matter that went to the continuing jurisdiction of the arbitrators and so should have been dealt with by the arbitration tribunal itself, under ***section 30*** of the ***1996 Act***. He said that the court had no power to determine this issue under ***section 32*** (or otherwise), unless the conditions set out in ***section 32(2)*** were fulfilled. However, in order to avoid wasting time, Mr Landau said that Vivendi was prepared to give its consent to the court dealing with the matter, so that, effectively, the application was to be treated as being made with the agreement of both parties. I have not seen any formal written agreement to that effect,[28] but I will assume that one has either been concluded or will be concluded before the court order is drawn up.[29]

[27] In 2001, 29 August fell on a Wednesday; 3 September fell on the following Monday.

[28] *Section 32(2)(a)* provides that "*An application under this section shall not be considered unless (a) it is made with the agreement in writing of all the other parties to the proceedings,…*"

[29] A formal agreement was signed by both parties' solicitors on 18 January 2007.

124. My answer to the question posed under this heading is: "no, they do not". Mr Millettt frankly admitted that the origin of his submission that ***section 40*** created duties on one party to an arbitration which were owed to the other party as an implied term in the arbitration agreement lay in some tentative comments in the ***2001 Companion*** to the second edition of ***Mustill &Boyd*** on ***Commercial Arbitration.***[30] I must respectfully disagree with the suggestion that the effect of ***section 40*** is to create duties on parties to an arbitration by way of implied terms in the arbitration agreement between them, with contractual consequences if there is a breach of the duty/term. There are three principal reasons for my conclusion.

125. First, the way that ***section 40*** of the ***1996 Act*** imposes "*general duties"* on the parties in relation to the conduct of an arbitration is quite different from the statutory method used in the ***Arbitration Act 1950. Section 12(1) and (2)*** of that Act imposed duties upon the parties to arbitrations but it did so by using the formula "*…unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that….".* This makes it clear that the duties set out in ***section 12(1)*** and ***(2)*** of the ***1950 Act*** are in the form of terms to be implied by statute into the arbitration agreement between the parties. And, like all implied terms, they can be altered by an express agreement to the contrary by the parties to the agreement. That is clearly the effect of the wording used by the old ***section 12.*** That drafting technique was common in the ***1950 Act,*** as can be seen, for example, from the adjacent sections 13, 14, 15, 16, 17 and 18.

126. The drafting technique used in the ***1996 Act*** is very different. ***Section 1*** of the Act sets out its aims. ***Section 1(c)*** provides that the court will not intervene except as provided for in Part One of the Act. ***Section 4*** states that there is to be a distinction between "*mandatory"* and "*non – mandatory"* provisions. ***Section 4(1)*** states that the mandatory provisions of this Part of the Act that are listed in Schedule 1 will "*…have effect notwithstanding any agreement to the contrary".* By contrast, ***section 4(2)*** provides that non – mandatory provisions "*…allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement".* That wording, especially when contrasted with the wording of ***section 12*** of the ***1950 Act,*** indicates that the mandatory provisions apply as statutory obligations, not as implied terms of the arbitration agreement between the parties. I do not need to consider what the position is with regard to non – mandatory provisions which apply to an arbitration because the parties have not made their own arrangements by agreement and I make no comment on that issue.

127. ***Section 40*** is a "*mandatory"* provision. It imposes general duties on the parties "*for the proper and expeditious conduct of the arbitral proceedings".* If a party fails in its duty under ***section 40,*** then the possible remedies are set out in ***sections 41*** and ***42.*** Neither of these sections is "*mandatory".* The parties are thus free to give the tribunal more, or less, powers to deal with one party's failure to comply with the duties imposed by ***section 40.*** Moreover, the parties are free to contract out of ***section 42,*** which gives the court power to enforce a peremptory order made by an arbitral tribunal under ***section 41(5).*** The fact that the parties can shape the powers of the arbitral tribunal to deal with breaches of the duties under ***section 40,*** and the parties can agree that the court shall not have the power to enforce a tribunal's peremptory order does not, in my view, turn the nature of the duty imposed by ***section 40*** into an implied term in the arbitration agreement. That duty remains fixed and is unalterable by agreement, which is the very opposite of a contractual term. All that ***sections 41*** and ***42*** do is to give the parties the chance to limit (or expand) by agreement the remedies that could be available if there is a breach of the statutory duties imposed by ***section 40.***

128. The second reason for saying that ***section 40*** does not impose duties on the parties as an implied term of the arbitration agreement is the wording of ***section 1(c)*** of the ***1996 Act:*** *"..in matters governed by this Part the court should not intervene except as provided by this part".* ***Section 42*** sets out the way that the court can intervene and deal with breaches of the duty imposed on parties to an arbitration by ***section 40.*** The court will not intervene until the arbitral tribunal has made a peremptory order, there has been a further failure by the party concerned to abide by that order and, further, that the conditions set out in ***section 42(2)*** and ***(3)*** have been fulfilled.[31] But the ***1996 Act*** does not give the court any other express power to intervene to deal with breaches of the duties imposed by ***section 40.*** If the duties were imposed as implied terms, then, as the ***2001 Companion*** volume of ***Mustill & Boyd*** points out,[32] it must follow logically that one party can be in breach of those terms; if so there must be the theoretical possibility of an action for any damages suffered as a consequence of such a breach. But the ***1996 Act*** gives the court no express power in Part One to intervene to give damages for such "breaches". Given the clear wording of ***section 1(c),*** none can be implied.

129. Nor can the court's general or inherent powers be used to obtain damages or other forms of relief for a "contractual breach" of the ***section 40*** duties. ***Section 81(1)*** of the ***1996 Act*** provides that "*Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part,…".* That must mean that the court can have no powers in relation to breaches of the duties imposed under ***section 40,*** if they would be inconsistent with those expressed in Part One of the Act itself. To my mind a power to award damages or grant other relief for a breach of the ***section 40*** duties as if that were a breach of contract would be inconsistent with the provisions of ***sections 41*** and ***42.*** That militates against an interpretation of the ***section 40*** as imposing duties on the parties as implied terms to the arbitration agreement.

[30] See the comments under *section 40* at *pages 316 – 7* of the *2001 Companion* volume.

[31] And, of course, if the parties have expressly agreed to opt out of *section 42,* then there can be no application to the court to enforce a peremptory order.

[32] At *page 317.*

130. The third reason for concluding that the ***section 40*** duties are statutory and not imposed as implied terms in the arbitration agreement is that a contrary analysis would be inconsistent with other parts of the structure of Part One of the ***1996 Act***. Part One provides remedies both before and after the award in respect of breaches of the ***section 40*** duty. Before an award the remedies for a breach of the statutory duty imposed by ***section 40*** are those set out in ***sections 41*** and ***42***, unless the parties have agreed to the contrary. The remedies available after the award are those in respect of serious irregularities which are set out in ***section 68***. Lastly, the enforcement of an award under ***section 66*** or ***section 101*** might possibly be resisted on the ground that one party had failed in its duties under ***section 40*** and the tribunal had not adequately dealt with that failure.

131. So the ***1996 Act*** provides a comprehensive code for dealing with breaches of the ***section 40*** duty, both before and after the award. There is no scope for making the duty an implied term in the arbitration agreement with the concomitant rights to go to court to obtain relief for breach of the implied term.

XII. Elektrim's application for a Declaration that the arbitration agreement has been repudiated/renounced and so is at an end. Issues two, three and four.

132. Given my answer to the first issue, the remaining issues do not arise for decision. If I had had to deal with them I would have concluded that Vivendi had not, in any event, so conducted itself as to repudiate or renounce the arbitration agreement between it and Elektrim to deal with the current disputes. To reach that conclusion I would have had to find that Vivendi, or someone for whom it was answerable, had committed a fraud in relation to the Gibert Memorandum or M. Gibert's evidence to the tribunal. I have not made those findings. There is no other basis on which I could conclude that the actions of Vivendi were such as to go to the "root" of the arbitration agreement, so indicating that Vivendi did not regard itself as bound by it any longer. A finding that Vivendi or its lawyers misinterpreted (even negligently) the Procedural Order No 3 (or its subsequent modifications) could not amount to such a serious breach of the (assumed) implied term. Therefore Elektrim's "acceptance" of the purported renunciation/repudiation is irrelevant. So, too, is the question of remedies.

XIII. Conclusions.

133. For the reasons I have set out, both the applications of Elektrim must be dismissed. I am most grateful to counsel for their helpful arguments.

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Mr Toby Landau (instructed by Watson Farley & Williams, Solicitors, London) for the Defendants