JUDGMENT : Mr Justice Colman : Commercial Court. 14th December 2004

Introduction

1. The primary application before the court is under section 67 of the Arbitration Act 1996 to challenge an arbitration award dated 17 July 2004 made by Mr Richard Briggs FCI Arb. That application is made by a Nigerian company which at the material time was called Econet Wireless Nigeria Limited, to which I refer as "EWN". Disputes had arisen under a Technical Support Agreement ("the TSA") entered into on 25 March 2003 between EWN and Econet Wireless International Ltd ("EWI") a company incorporated in Bermuda. EWN was about to set up a mobile phone service in Nigeria and EWI had significant technical and engineering expertise relevant to the establishment of mobile phone services. Under the TSA EWI was to act as non-exclusive provider of support and technical services to EWN. Those services included under clause 3.2 engineering, including planning, design of the network, installation of equipment and design engineering and construction of buildings and outside plant equipment, marketing services, sales and distribution services, training and development of e-commerce services. EWI was to provide the requisite personnel, some of whom were to be seconded to EWN under employment contracts to which both EWN and EWI were parties. The TSA was terminable by either party on 180 days notice and forthwith under certain default provisions.

2. EWN claimed to terminate the TSA in October 2003. EWI neither accepted that EWN was entitled to do so nor treated EWN as having repudiated it. The dispute was referred to arbitration under the arbitration clause in the TSA. By its statement of claim of 9 February 2004 EWI claimed damages of over $20 million. It subsequently raised an alternative claim that if the TSA was held to be void, it was entitled to recover a like amount by way of restitution or quantum meruit. By its Defence and Counterclaim of 19 April 2004 EWN pleaded that the TSA was void and unenforceable because, under it, EWI was engaged in the business of developing and/or operating and/or advising and/or acting as a technical consultant to EWN's business and enterprise and such business was ultra vires EWI's memorandum of association. In its counterclaim EWN claimed US$856,973 as money paid to EWI under a mistake of fact or as money had and received, alleging that this was the amount of withholding tax which EWN ought to have deducted from monies paid to EWI but had mistakenly failed so to do.

3. On 5 May 2004 the arbitrator directed by consent of the parties that he should hear and determine in a partial award various preliminary issues including:
   i) whether EWN was estopped by convention from asserting that the TSA was ultra vires the powers of EWI;
   ii) I f not, whether the TSA was ultra vires;
   iii) if it was ultra vires, whether any claim for restitution, unjust enrichment or quantum meruit could be advanced in the arbitration or whether the only further order that could be made was as to the costs of the arbitration.

4. Prior to the commencement of the hearing of the arbitration the parties agreed that the statement of the principles of Bermuda law and construction set out by the well-known Bermudan law firm, Conyers Dill and Pearman in a report dated 21 May 2004 was correct.

5. By a partial award dated 17 July 2004, the arbitrator concluded that:
   i) EWN was not estopped from asserting that the TSA was ultra vires the powers of EWI;
   ii) the TSA was not ultra vires EWI's powers;
   iii) it was therefore unnecessary to decide the third issue.

6. By this application under Section 67 of the 1996 Act EWN submits that the partial award should be set aside because the arbitrator ought to have construed the memorandum of association of EWI as not including in the objects the business identified in paragraph (o) of the Second Schedule of the Bermudan Companies Act 1981, namely that of *"developing, operating, advising or acting as technical consultants to any other enterprise or business"*. Mr Simon Browne-Wilkinson QC, on behalf of EWN, argues that this construction leads to the position that if the business in question involved activities within or incidental to any of the list of objects included in EWI's memorandum but the real substance of such activities fell within paragraph (o) of the Second Schedule to the 1981 Act, those activities fell outside the objects of the company. I shall explain this argument more fully later in this judgment.

7. It is then submitted that if the TSA were ultra vires, the arbitrator had no jurisdiction conclusively to determine any of the preliminary issues because his jurisdiction was derived from the arbitration clause in the TSA and he ought to have held that the TSA was void and therefore that the agreement to arbitrate contained within it was void. Accordingly, EWN was entitled to have the whole of the partial award set aside under section 67.

8. In response to the application under section 67, EWI raise a threshold point which is of considerable importance to the scope and application of the jurisdictional provisions of the 1996 Act. In essence, Mr Stephen Moverley-Smith QC submits that this application is fundamentally misconceived in as much as section 67 is inapplicable where, as in the present case, the issue to be determined by the arbitrator is not whether he has substantive jurisdiction but whether the underlying or matrix contract, as distinct from the arbitration agreement contained in the arbitration clause, is invalid.

9. This submission is based on section 7 of the 1996 Act. It is argued that the effect of this section is to preserve the jurisdiction of the arbitrator to determine conclusively whether the underlying contract was ultra vires the powers of EWI notwithstanding that, if it were, the underlying contract containing the arbitration clause would be null and void. The function of section 67, it is submitted, is not to challenge an arbitrator's determination of the issue

whether an underlying contract was void, for whatever reason, but to challenge a determination by an arbitrator as to whether he has "substantive jurisdiction". The determination of substantive jurisdiction involves only the matters set out under section 30(1) of the 1996 Act, namely (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. In the present case, it is submitted, the issue to be determined by the arbitrator was not whether there was a valid arbitration agreement but whether the matrix contract was ultra vires the powers of the company. The effect of section 7 of the 1996 was to give the arbitrator jurisdiction conclusively to determine the latter issue. Therefore, the validity of the arbitration agreement was never in issue and accordingly section 67 had no application.

10. It was further submitted on behalf of EWI that the arbitrator had reached the correct conclusion as to the proper construction of the memorandum and that the activities of the company under the TSA all fell within the objects. The objects were not to be construed as if the memorandum incorporated all the provisions of the Bermudan Companies Act 1981.

11. EWI further submitted that if it were held that the TSA was ultra vires, the effect of Section 7 of the 1996 Act was to preserve the arbitrator's jurisdiction to the effect that he had jurisdiction to determine non-contractual disputes such as its alternative claim for restitution and/or quantum meruit and the counterclaim for money had and received. Seeing that the scope of the arbitration agreement was wide enough to cover such disputes, the arbitrator did have jurisdiction to determine such issues.

12. It was further submitted that there had been an ad hoc submission of the issue of jurisdiction to the arbitrator in the sense that there was agreement by both parties that he should conclusively determine that issue.

13. EWN submit in the alternative that, if the partial award is not set aside under Section 67, it ought to be set aside or remitted to the arbitrator under Section 68 of the 1996 Act on the grounds that he arrived at his conclusion that the TSA was not ultra vires by reliance on an argument, partly of Bermudan law and partly of construction which had not been advanced by either party in the course of the hearing (and which was demonstrably wrong) without warning the parties that he proposed to take this course and without giving EWN the opportunity to deal with the point by adducing further evidence of Bermudan law and making further submissions to him. There had thus been a serious irregularity which had caused substantial injustice to EWN.

14. As to the application under section 68, it was conceded on behalf of EWI that the arbitrator had in a certain passage of his award employed arguments of law and construction which had not been relied upon by EWI at the hearing. However, it was submitted that the steps by which the arbitrator arrived at his conclusion that the TSA was ultra vires did not include this reasoning and accordingly the arbitrator's reliance on these arguments did not cause substantial injustice within the meaning of section 68. There was therefore no serious irregularity.

15. I must first consider the applicability of section 67 to the partial award in this case.

The Function of Section 67 under the 1996 Act

16. The relevant sections of the 1996 Act are as follows:

"*7. Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.*

30. (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to:

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

31(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction. A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may:

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

67(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court:

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order:

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

A party may lose the right to object (see section 73) ……

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:

(a) that the tribunal lacks substantive jurisdiction;

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

82(1) 'substantive jurisdiction', in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.

17. The starting point is Section 7. Its function, as described in the Report of the Departmental Advisory Committee on Arbitration Law ("the DAC Report") paragraph 43, is as follows: "*This clause sets out the principle of separability which is already part of English law (see **Harbour Assurance v. Kansa** [1993] QB 701), which is also to be found in Article 16(1) of the Model Law, and which is regarded internationally as highly desirable. However, it seems to us that the doctrine of separability is quite distinct from the question of the degree to which the tribunal is entitled to rule on its own jurisdiction, so that, unlike the Model Law, we have dealt with the latter elsewhere in the Bill (Clause 30).*"

18. Article 16 of the UNCITRAL Model Law provides:

"(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

19. Prior to the coming into force of the 1996 Act the English courts had worked out a doctrine of separability, as expressed in ***Harbour Assurance Co (UK) Ltd v. Kansa General Insurance Co Ltd*** [1993] QB 701, the substance of which was that, if the scope of an arbitration clause were sufficiently wide to cover the dispute, an arbitrator would, because of the separability of the agreement to arbitrate, have jurisdiction conclusively to determine whether the matrix contract was void ab initio, for example on the grounds of fraud or illegality, or was voidable, for example for misrepresentation or repudiatory breach. This jurisdiction was held to exist provided always that there was a binding agreement to arbitrate. The essence of the separability doctrine was that of insulation of the agreement to arbitrate from the matrix contract to the effect that the agreement to arbitrate would not be rendered void or invalid or avoided solely because the matrix contract was void or invalid or had been avoided. Unless the agreement to arbitrate was independently void or invalid, that agreement would remain in effect and the arbitrator could determine conclusively whether the matrix contract was enforceable. Thus, for example, as in that case, if the matrix contract were illegal and void, that matter of illegality could be conclusively determined by the arbitrator unless the agreement to arbitrate was also independently rendered illegal and void by the legislation in question. However, where one of the parties to the arbitration had not agreed to become a party to the matrix contract it could invariably be said that the party in question was not bound by the arbitration agreement. That, however, is quite different from a case of statutory illegality, which renders the matrix contract void.

20. Section 7 of the 1996 Act reflects this concept of separability. Its effect in substance is to confirm that arbitrators have jurisdiction conclusively to determine issues on the voidness or voidability of the matrix contract to the effect that they do not lose jurisdiction by reason only that the matrix contract may be void or voidable. However, Section 7 leaves intact the requirement that the arbitration agreement should be valid and binding. If it is not valid and binding for reasons other than the bare fact that the matrix contract is not valid and binding, then Section 7 does not enable arbitrators to exercise conclusive jurisdiction in respect of any issue relating to the matrix contract. Thus in ***Harbour Assurance v. Kansa***, supra, the question relevant to the arbitrator's jurisdiction was whether the regulatory legislation which was said to render the matrix contracts of reinsurance illegal and void also independently rendered the agreement to arbitrate illegal and void.

21. If, in accordance with section 7, an arbitrator determines that the matrix contract is, for example, void ab initio by reason of illegality and it is not in issue whether the arbitration agreement is also illegal and void, the tribunal can continue to exercise such jurisdiction under the arbitration agreement as its scope permits. For example, if there were an alternative claim in tort or for restitution which was within the scope of the clause, the tribunal

would continue to have jurisdiction conclusively to determine that claim. The argument, advanced from time to time on behalf of EWN as this matter developed, that, once the tribunal had decided that the matrix contract was void ab initio, the tribunal's jurisdiction to determine other issues was automatically spent save as to orders for costs, is, in my judgment, misconceived. It reflects a misunderstanding of the principle of separability underlying section 7. Neither the inclusion in the last sentence of that section of the words "it shall for that purpose" nor the contents of Article 16 of the UNCITRAL Model Law Support EWN's argument.

22. If it is not only in issue whether the matrix contract is void or otherwise non-existent but also whether the arbitration agreement itself is independently void or non-existent, that issue can be determined by the arbitrator, but not conclusively. This is where section 30 comes into play. The arbitral tribunal is by that provision given *"competence"* to rule on its own "*substantive jurisdiction*". The former word identifies this section effectuating the concept of Kompetenz Kompetenz and the phrase "*substantive jurisdiction*" is thus statutorily defined by section 82(1) as confined to the issues identified in Section 30(1), (a), (b) and (c). The issue identified in (a), "*whether there is a valid arbitration agreement",* has to be understood as referring to an issue as to the validity of the arbitration agreement while giving full effect to the principle of separability under Section 7 which I have already considered. Accordingly, for the purpose of determining an issue as to substantive jurisdiction under Section 30(1) it is not sufficient to proceed from a conclusion that the matrix contract is or is not void or invalid to the conclusion that therefore the arbitration agreement is or is not valid. The relevant issue can only be whether the latter agreement is, independently of the validity or invalidity of the matrix contract, valid or invalid.

23. As appears from Section 31(1), a party who objects that the tribunal lacks substantive jurisdiction must make that objection not later than the time when he takes the first step in the arbitral proceedings to contest the merits which are in issue.

24. If objection to the tribunal's substantive jurisdiction is made in time the tribunal can under section 31(4) either make a separate award on jurisdiction or "deal with the objection in its award on the merits". However, any such award or determination is not conclusive for it is subject to challenge under Section 67.

25. It is important to note that the function of Section 67 is confined to challenging issues of substantive jurisdiction. It operates upon (a) awards as to such issues and (b) awards on the merits where the tribunal has dealt with the objection to substantive jurisdiction in the course of such an award. It does not enable a party to challenge an award on the merits unless that award also determines the objection already raised to substantive jurisdiction.

26. It is of course always open to the parties in effect to contract out of this regime by means of an ad hoc reference to the tribunal of the issue whether it had substantive jurisdiction. That involves conduct amounting to an agreement that the tribunal should be given not merely the competence identified in section 30(1) but jurisdiction conclusively to determine the issue of substantive jurisdiction. The problems involved in identifying such an agreement are exemplified in ***L G Caltex Gas Co Ltd v. China National Petroleum Corp*** [2001] 1WLR 1892. Further, if a party fails to object to the tribunal's substantive jurisdiction in accordance with section 31(1) or (2) the tribunal can admit a later objection under sub-section (3) if it considers the delay justified or, if it does not, it can ignore the objection and proceed to its award on the assumption that it has jurisdiction. If it takes the latter course, it is not subsequently open to the party objecting to challenge the award under Section 67 on the basis of want of substantive jurisdiction.

27. Further, a party who first raises objection after the times indicated in section 31(1), (2) and (3) can only deploy section 67 before the court if he satisfies the court of those matters set out in section 73(1) of the 1996 Act.

Was there an award to which Section 67 is applicable?

28. It is submitted by Mr Browne-Wilkinson QC on behalf of EWN that the partial award was an award as to the substantive jurisdiction of the tribunal under section 67(1)(a). He says that the case presented to the arbitrator on behalf of EWN was that: (i) the TSA was ultra vires the powers of EWI; (ii) the TSA was therefore void; (iii) therefore the arbitration agreement was also ultra vires and void; (iv) if so, the only jurisdiction which the arbitrator had was to determine the ultra vires point in respect of the TSA and the incidence of arbitration costs, (v) his jurisdiction on those points arose from Section 7 of the 1996 Act. Accordingly, when the arbitrator concluded in his partial award that the TSA was not ultra vires the powers of EWI, he was determining that he had substantive jurisdiction. Consequently, the partial award was one to which Section 67(1)(a) applied.

29. The award contained no express indication that the arbitrator had considered and determined the question whether he had substantive jurisdiction. The arbitrator first determined the issue whether EWN was estopped from contending that the TSA was ultra vires. Having decided that it was not, he went on to consider whether the TSA was indeed ultra vires. Having decided that it was not, he stated that the issue whether, if the TSA was void, he had jurisdiction to determine the restitution claims did not have to be determined. The award contained no other express consideration of the arbitrator's jurisdiction.

30. There can be no doubt that an arbitration award which determined an issue which was determinative both of the substantive merits of the claim and of the arbitrator's substantive jurisdiction but which did not expressly indicate that it was determining substantive jurisdiction could in some circumstances amount to an implied award as to substantive jurisdiction. This is clear from the decision of the Court of Appeal in ***L G Caltex Gas v. China National Petroleum,*** supra. In that case the issue with regard to the matrix contracts was whether one contracting party, by which, on the face of it, the contracts had been entered into, was acting as agent of another party. The determination of that issue would also necessarily determine whether the respondent in the arbitration was a

party to the arbitration agreements contained in the arbitration clauses included in the matrix contracts. This obviously went to the arbitrator's substantive jurisdiction. The form of the arbitrator's award was exclusively directed to determining whether the respondent was a party to the matrix contract. It was held on appeal that by the determination of that issue the arbitrator had impliedly determined the issue of his substantive jurisdiction: see Lord Phillips MR at paragraphs 72 to 74.

31. It is clear from the analysis in that case that the implication of a determination by the arbitrator of his substantive jurisdiction depends crucially on whether the issue of substantive jurisdiction has been specifically raised by either of the parties and referred for his decision and whether his decision is in substance, if not in form, directed to that issue: see the judgment of Lord Phillips MR at paragraphs 70-76.

32. This methodology is consistent with Sections 30 and 31 of the 1996 Act, set out at paragraph 16 above. An arbitrator whose substantive jurisdiction is not challenged does not have to determine whether he has that jurisdiction, although it is always open to him to raise the matter. Accordingly, if objection to substantive jurisdiction is not specifically raised in accordance with Section 31, an arbitrator may conclusively determine an issue going to the merits even if such issue would be directly material to whether there was substantive jurisdiction. If the arbitrator adopts that course, section 67 has no part to play for, by definition, the objector has lost the right to object to substantive jurisdiction under Section 73(1). On the other hand, if objection to substantive jurisdiction has been taken and taken at the right time, having regard to sections 31 and 73(1) and the arbitrator determines in his award the issue on the merits which is also determinative of the objection but does not expressly include in the award a determination as to substantive jurisdiction, it would normally be held, by parity of reasoning with ***Caltex v. China Petroleum***, supra, that there had been an implied award or ruling on substantive jurisdiction which could be challenged under Section 67.

33. In order to ascertain whether in the present case there has been an implied award or ruling on substantive jurisdiction in the partial award it is therefore necessary to investigate whether the issue of substantive jurisdiction in relation to the ultra vires point was effectively referred to the arbitrator or, putting it another way, did EWN effectively raise objection to his substantive jurisdiction?

34. A preliminary hearing was held before the arbitrator on 5 February 2004. It was attended by leading counsel for EWI and Mr Osuntukum, a partner in DLA, solicitor for EWN. The order for directions makes no mention of there being raised on behalf of EWN any objection or reservation as to the arbitrator's substantive jurisdiction.

35. EWI served its statement of claim on 9 February 2004. EWN served its defence and counterclaim on about 19 April 2004. In paragraphs 7 and 8 it pleaded as follows:

"7. In providing its services to EWN under the TSMA and the TSA, EWI was engaged in the business of developing and/or operating and/or advising and/or acting as a technical consultant to EWN's business and enterprise.

8. In the premises, the TSMA and TSA were ultra vires EWI's memorandum of association and therefore void and unenforceable. As a consequence, EWI is precluded from bringing any claim against EWN arising out of EWN's alleged breaches of the TSA. EWN will seek restitution from EWI in respect of monies paid under the TSA and TSMA on the basis that they are monies had and received to EWN's use."

36. The counterclaim included the following

"121. Since the termination of the TSA and consequent removal of EWI from de facto control of EWN, EWN's investigation of EWI's breaches of the TSMA and/or TSA and/or its fiduciary or other duties is an ongoing task. EWN expressly reserves the right to amend its Defence and Counterclaim to include fresh causes of action and/or new heads of loss.

Q Overpayment of TSMA management fee

122. EWN paid EWI NGN1,131,204,543.80 in respect of management fees under the TSMA for the period July 2001 to March 2003. Under a mistake of fact EWN did not withhold NGN113,120,454.38 in respect of 10% withholding tax payable by EWI to the Nigerian tax authorities. EWN is obliged to account to the Nigerian tax authorities for the withholding tax due from EWI. EWN seeks restitution of the said sum of NGN113,120,454.38 or US$856,973 (at an exchange rate of NGN 132:US$1) as monies paid under a mistake of fact and/or as monies had and received by EWI to EWN's use.

R Other Contracts

123. In or about February 2001 EWI acted or purported to act on behalf of EWN in negotiating and agreeing:

123. 1 a contract with Ericsson to build certain switches and base stations ("the Ericsson Contract");

123. 2 a contract with CMG Logica for the provision of an Eppix billing system ("the CMG Logica Contract").

124. When acting as aforesaid on behalf of EWN, EWI owed EWN the fiduciary duties referred to in paragraph 18 above, and/or a duty to act in good faith and/or duty to act with reasonable care and skill in providing services to EWN and/or in acting on behalf of EWN.

142. Further, EWN claims damages for loss of opportunity including lost custom arising out of the above breaches. Further particulars of the losses suffered by EWN will be provided by means of an expert report.

AND EWN COUNTERCLAIMS:

(1) Damages for breach of contract;

(2) Damages for negligence;

(3) Equitable compensation;

(4) NGN 113,120,454.38 or US$856,973 as monies had and received;

(5) An account of all sums paid to EWI or its associates pursuant to the breaches of fiduciary duty of EWI and an Order that such sums be paid to EWN;

(6) Interest."

37. The pleading therefore expressly relied upon the ultra vires point by way of defence and pursued the counterclaim without reservation of the position as to the arbitrator's substantive jurisdiction in respect of that point. It is thus to be inferred that EWN already had access to the memorandum of association and the Bermudan Companies Act 1981. In my judgment, a reader of that pleading in the position of EWI could only assume that the defence of ultra vires as well as the other pleaded points were to be referred to the arbitrator for his conclusive determination.

38. Mr Browne-Wilkinson QC submitted that the plea that the TSA was ultra vires was in substance a plea that the arbitration agreement within it was also ultra vires and therefore that the defence did effectively challenge the arbitrator's substantive jurisdiction. In my judgment, this cannot be correct A party who wishes to challenge the substantive jurisdiction of the arbitral tribunal must do so explicitly and, by reason of section 31 and 73, at the time of taking the first step in the arbitral proceedings. Now that the principle of separability is firmly established under section 7, a submission that the matrix contract is void ab initio because it is ultra vires the powers of the company under its memorandum is not an explicit submission that the arbitration clause included within it is also independently void ab initio. That issue would depend on whether on the proper construction of the memorandum it would be ultra vires to enter into an arbitration agreement which could, for example, be utilised to resolve disputes as to whether the matrix contract was ultra vires on the true meaning of that memorandum.

39. On 22 April 2004 EWI wrote to the arbitrator on a number of matters arising from EWN's defence and counterclaim, including its counterclaim in respect of an earlier agreement between the parties known as the TSMA. EWI stated that such claims were outside the scope of the arbitration clause in the TSA and invited the arbitrator to rule on that issue, which clearly went to his substantive jurisdiction.

40. On 23 April 2004 DLA, on behalf of EWN, wrote to the arbitrator by way of response to EWI's letter stating:

"*We must however first draw the Tribunal's attention to EWI's failure to address or acknowledge EWN's primary case, as set out in paragraphs 6 to 8 of its Defence and Counterclaim, that the TSA was ultra vires EWI's memorandum of association, void ab initio and unenforceable, such that EWI is precluded from bringing any claim against EWN arising out of EWN's alleged breaches of the TSA.*

The Tribunal has jurisdiction to determine whether the TSA was void ab initio and unenforceable pursuant to section 7 of the Arbitration Act 1996.

It is EWN's submission that this issue (to the extent that there is one) ought plainly to be dealt with by way of preliminary issue before any consideration of the Tribunal's jurisdiction to hear allegations in respect of EWI's breaches of the TSMA and before EWI submits its Reply and Defence to Counterclaim. The potential issues, which involve discrete questions of fact and law, are as follows:

4.1 whether the TSA is ultra vires EWI's memorandum of association;

4.2 if so, whether EWI's incapacity in that regard renders the TSA void ab initio and unenforceable; and

4.3 if the TSA is void ab initio and unenforceable, whether, as EWN submits, this precludes EWI from bringing its claim in this arbitration for alleged breaches of the TSA by EWN.

It is plainly desirable that the above matters be dealt with by way of preliminary issue as they require little or no factual investigation and are likely to lead to a substantial saving of costs and time."

41. As to the counterclaim in respect of the TSMA, DLA stated: *"Without prejudice to EWN's primary contention that the TSA was void ab initio and unenforceable, EWN's position as regards EWI's letter of 22 April 2004 is that all facts and matters pleaded in EWN's Defence and Counterclaim are within the Tribunal's jurisdiction. As set out at paragraph 5.1 of the Defence and Counterclaim, the TSMA and TSA formed part of a single and continuous transaction between EWN and EWI. The TSA cannot, both as a matter of fact and law, be viewed in isolation."*

42. The letter concluded with a request that the three issues identified above should be heard by the arbitrator as preliminary issues.

43. The letter therefore contains no assertion that the arbitrator lacked substantive jurisdiction to determine any issue on the pleadings. Indeed, by relying on Section 7 as distinct from Section 30 of the 1996 Act as providing the arbitrator with jurisdiction to determine the ultra vires point, the letter was stating in express terms that the arbitrator did have substantive jurisdiction to determine that point conclusively. The principle of separability leads inexorably to that result unless the crucial additional point is raised that the agreement to arbitrate itself is independently invalid.

44. By its letter in response dated 28 April 2004 EWI observed that it was well aware of Section 7 and that it agreed that the arbitration agreement was to be seen as a separate agreement. It requested directions for further pleading and for resolution of the jurisdiction issue as to the TSMA. This letter indicates that EWI understood EWN to be acknowledging that the arbitrator did have substantive jurisdiction to determine whether the TSA was ultra vires.

45. On 30 April 2004 DLA responded, including the following: *"EWN disputes EWI's construction of its memorandum of association and respectfully submits that the matter should be dealt with by way of preliminary issue at the earliest*

opportunity. If, as EWN contends, the TSA was ultra vires, we note that EWI does not dispute that it was as a result void ab initio and unenforceable."

46. On 5 May 2004 the arbitrator informed the parties that he was hoping to hold a hearing on 17 June 2004 and then listed what seemed to him to be the issues then to be determined. I set out his formulation of the issues in full because it was to form the foundation of the reference and of the preliminary issues identified for the purpose of the hearing:

"1. If it is sought so to argue at any point in this Arbitration, are EWN estopped from taking the point that the TSA was ultra vires, void ab initio and unenforceable?

2. Was the TSA ultra vires, void ab initio and unenforceable?

a. Can the Arbitrator decide this on the basis that Bermudan Law is the same as English Law?

b. Is it intended that the Tribunal appoint an expert in Bermudan Law under s.37 of the Arbitration Act 1996? If so, can the parties let me know asap and can they agree an expert who can attend the hearing, please?

3. What Order should follow from the answer to Question 2?

4. If the answer to Question 2 is in the affirmative,

a. are EWI entitled to claim on a quantum meruit/unjust enrichment and would this be within the Arbitration as arising from the terms of the [void] TSA (clause 15);

b. is there nothing left to arbitrate, so there should be no Order save payment of my fees?

5. What issues on the pleadings (if any) are outside the jurisdiction of the Arbitrator?

This appears to raise:

a. The relevant law on set off. I will require to be addressed on this.

b. The Arbitrator's starting point is that only matters within the arbitration agreement can be arbitrated (unless ad hoc jurisdiction is conferred by agreement of the parties). A true set off is, in law, a defence to a claim and the Arbitrator can, and should, award any additional sum found due to the Respondent after the claim is extinguished, if such be the case.

c. Was the TSMA ended by Clause 19 or did it continue?

d. Do the TSMA and TSA form part of a continuous transaction? If so, what is the effect?"

47. The following significant points are to be observed:

i) Issue (4) was concerned with whether the restitution/quantum meruit claim, which had by then been advanced by EWI, fell within the scope of the arbitration clause given that it would be necessary to contend that it "arose from" the TSA which, ex hypothesi, would be void. This issue therefore went to the scope but not to the binding effect of the arbitration agreement.

ii) As to issue (5), the reference to the jurisdiction of the arbitrator to determine the TSMA counterclaim is again a reference to the scope of the agreement to arbitrate and not to the overall binding effect of the arbitration agreement. Indeed, like issue (4), it assumes that, apart from these specific issues as to scope, it was common ground that the arbitrator did have substantive jurisdiction.

48. The arbitrator gave directions including an order that the parties should consider the above questions and observations by 13 May 2004.

49. DLA replied on behalf of EWN on 14 May. The letter first dealt with the ultra vires point, noting that the position in Bermudan Law differed from that under English Law since 1989 and tendering the report from Conyers Dill & Pearman as to relevant Bermudan Law. At paragraph 1.7 the letter stated: *"If, as EWN contends, the TSA was void ab initio and unenforceable, the Tribunal's jurisdiction is, under s7 of the Act, limited to determining the validity of the TSA and liability for the costs of the arbitration (as defined in s59 of the Act) and there is nothing else to arbitrate. It is EWN's submission that the Tribunal has no jurisdiction to hear any claim EWI may make on a quantum meruit or unjust enrichment basis, except where the parties agree that it be dealt with ad hoc (which to date they have not)."*

50. Properly understood in its context this observation made in response to the arbitrators' point (4) means that once the arbitrator had decided in the exercise if his jurisdiction under Section 7 that the TSA was void ab initio it would not be open to him to determine EWI's restitution claim because once the TSA was held to be void, the claim for restitution could not fall within the scope of the arbitration clause because ex hypothesi on the proper construction of that clause, there was no matrix agreement out of which it could "arise". Paragraph 17 does not in context bear the meaning that, if the arbitrator concluded that the TSA was void he lacked any substantive jurisdiction conclusively to decide anything.

51. On 8 June 2004 Leading Counsel for EWI served its outline submissions for the hearing on 17 June 2004. The only passages in this document which deal with jurisdictional issues are paragraphs 23 to 31, relating to restitutionary and quantum meruit claims. In substance, the point made is that, by virtue of Section 7 of the 1996 Act, even if the arbitrator held that the TSA was void, the agreement to arbitrate would survive and whether the arbitrator had jurisdiction over the restitutionary and quantum meruit claims depended on the scope of the arbitration clause. This was such that, even if the TSA was void, the scope was wide enough. Paragraph 24 stated: "It is common ground that even if the TSA is ultra vires and therefore void, the arbitration clause, being treated as a separate agreement, survives (see DLA's letter of 23 April 2004 and s.7 Arbitration Act 1996)." Alternatively,

EWN had by its own pleading advanced claims in restitution to which EWI had not objected and the arbitrator was thereby given jurisdiction generally in relation to claims of that kind.

52. These submissions therefore did not address any argument that the arbitrator lacked substantive jurisdiction on the grounds of the invalidity of the agreement to arbitrate. This is not surprising because EWN had never raised that objection.

53. On the same day EWN's skeleton argument was served. That document began by identifying the issues for the hearing indicated in the arbitrators' 5 May 2004 directions (already set out at paragraph 46 above). These issues were accurately set out. They made no reference to any objection to substantive jurisdiction on the grounds of the invalidity of the arbitration agreement. Then, having advanced argument on (a) the ultra vires issue and (b) the estoppel by convention issue, the skeleton dealt with (c) jurisdiction as to unjust enrichment and quantum meruit if the TSA were held void and there was no available estoppel. This part of the skeleton argument was directed to the arbitrator's point (4). Under the heading "The consequences of a finding that the TSA was ultra vires and that there is no estoppel" there followed:

"*32. In the event that the Tribunal finds (pursuant to Section 30 of the Arbitration Act 1996) that the TSA was ultra vires and void, it is a necessary consequence that it will also find that there is no valid arbitration agreement (see Section 6).*

33. As such in that event there would be no jurisdiction on the part of the Tribunal to consider any restitutionary claim of either party, and the Tribunal's jurisdiction will be limited to making a ruling pursuant to Section 30 of the Act, and dealing with the question of the costs of the arbitration to date."

54. No previous reference had been made by either party or the arbitrator to section 30. Nor had any previous assertion been made by any party that if the TSA were ultra vires and void it would necessarily follow that there would be "*no valid arbitration agreement*". That submission went far beyond what had previously been asserted. Whereas the previous argument had been that, while it was common ground that by virtue of Section 7 of the 1996 Act the arbitrator could conclusively determine whether the TSA was ultra vires and void, his substantive jurisdiction in respect of the restitutionary claims was, according to EWN, excluded by the scope of the arbitration clause. It had not hitherto been submitted that if the TSA was void, the arbitrator lacked such jurisdiction over those claims because the arbitration agreement was invalid.

55. It is to be observed firstly that the reference to Section 6 of the 1996 Act appears to have no direct bearing on the statement in the text. Secondly, the statement that there would be no valid arbitration agreement is not stated to be based on anything except the invalidity of the matrix contract (the TSA). No reason is given why, if the TSA was ultra vires and void, the arbitration agreement would, independently of that conclusion, also be void. The report of Conyers Dill & Pearman contained no such assertion. Thirdly, paragraph 33 shows that EWN was deploying the argument as to the invalidity of the agreement to challenge the arbitrator's jurisdiction conclusively to determine the restitutionary claims. The "ruling pursuant to section 30" envisaged by paragraph 33 appears to be a ruling that the arbitrator lacked substantive jurisdiction conclusively to determine those claims. These paragraphs do not explicitly address the logical consequence of the premise that the arbitration agreement was invalid, namely that neither did the arbitrator have substantive jurisdiction conclusively to determine the ultra vires point. That point had never been taken hitherto and was in any event inconsistent with DLA's express acceptance in its letters of 23 April 2004 and 14 May 2004 that the arbitrator did by reason of Section 7 have substantive jurisdiction conclusively to determine the ultra vires point.

56. Read in its context and against the background of the earlier correspondence, the skeleton argument therefore deployed the point as to the invalidity of the arbitration agreement for the limited purpose of challenging the substantive jurisdiction as to the restitutionary claims but not also for the purpose of challenging substantive jurisdiction as to the ultra vires issue, albeit it was logically equally applicable to that issue.

57. In accordance with paragraph 9 of the arbitrator's directions of 5 May 2004 there was then a discussion between counsel as to whether any matters could be agreed or other steps taken to increase the efficiency of the forthcoming hearing. A joint message dated 10 June 2004 was prepared, approved by Mr Moverley Smith QC and signed by Mr Browne-Wilkinson QC. It included the following passages:

"*We both consider that the skeleton arguments that have been exchanged are helpful in identifying the issues between the parties, and that it is not possible to reach any further agreement at this stage. Nor do we consider that seeking to reformulate the issues would be of assistance.*

I would only add that, as I have explained to Mr Moverley Smith QC, I do not accept that the propositions set out in paragraph 24 of his skeleton argument are 'common ground'. EWN's position on that point is set out in paragraphs 30 and 31 of the Respondent's Skeleton Argument."

58. Since paragraphs 30 and 31 of EWN's skeleton argument are completely irrelevant to paragraph 24 of EWI's submissions set out in paragraph 51 above, I assume that the paragraphs referred to are 32 and 33, set out in paragraph 53 above. Since paragraph 24 of EWI's submissions related exclusively to the restitution and quantum meruit issue, the observation in this message by Mr Browne-Wilkinson must also be read as relating exclusively to the restitutionary and quantum meruit claims.

59. It follows that at the time when the hearing commenced it had at no time been explicitly submitted by or on behalf of EWN that by reason of the invalidity of the arbitration agreement, emanating from the fact that the TSA was ultra vires and void, the arbitrator lacked substantive jurisdiction to determine the ultra vires issue.

Indeed, there was no preliminary issue amongst those listed by the arbitrator in his directions of 5 May which identified this point.

60. I have been shown a manuscript note of the argument before the arbitrator from which the following emerges.
   i) Mr Browne-Wilkinson QC opened the case by reference to four of the five agreed issues. The TSMA point was not to be pursued. He first dealt with ultra vires and estoppel. He then moved to the third point, in essence whether, if there was no estoppel and the TSA was ultra vires and void, the consequence was that there was no further jurisdiction to determine the restitutionary claims. In the course of his submissions on this point he referred the arbitrator to paragraphs 32 and 33 of his skeleton and to Sections 7 and 30 of the 1996 Act.
   ii) Mr Browne-Wilkinson QC developed his argument on Section 7 by reference to Article 16 of the UNCITRAL Model Law, submitting that the effect of the words "and it shall for that purpose be treated as a distinct agreement" (emphasis added) was that once an arbitral tribunal had decided that the matrix agreement was invalid, the function of the arbitration agreement under Section 7 was exhausted and it came to an end. Therefore, the arbitrator had no jurisdiction to determine the restitutionary claims.
   iii) He then submitted that the scope of the arbitration clause was not wide enough to cover the restitutionary claims if the TSA had been void.
   iv) In the course of Mr Moverley Smith QC's submissions he addressed the issue of the meaning of Section 7 and emphasised that, unless it could be shown then the arbitration agreement was independently invalid, there would be jurisdiction. That obviously meant jurisdiction to determine the restitutionary claims point conclusively.
   v) At that point he said that no one had suggested that EWI had no power to enter into the arbitration agreement as a separate agreement. Whereupon Mr Browne-Wilkinson QC intervened to say that it was EWN's case that it was ultra vires to enter into the arbitration agreement.
   vi) The arbitrator then commented: *"The way I see it, the arbitration agreement (a subject of the main agreement) has a life of its own for the purpose of determining a challenge to my jurisdiction. I am not prevented from exercising section 30 jurisdiction by some clever argument that the main agreement has gone."*

61. There the matter rested. There is no note of any further relevant argument on jurisdiction.

62. The partial award concluded that there was no estoppel and that the TSA was not ultra vires. On issue (c), the restitutionary claim point, the award stated: *"This issue does not need to be decided, since the TSA was intra vires."*

63. That conclusion resulted from the fact that the restitutionary claim was advanced in the alternative to the claims under the TSA. If the TSA was valid that claim was redundant. Accordingly, the arbitrator did have to consider any issue as to his substantive jurisdiction in relation to that claim.

64. The essential question is whether the award that the TSA was not ultra vires was impliedly a determination of an issue as to the arbitrator's substantive jurisdiction for the purposes of section 30 of the 1996 Act.

65. I have no doubt whatever that it was not and for the following reasons.
   i) At no stage prior to the skeleton argument for the main hearing had EWN asserted that, the arbitration agreement was invalid because the TSA was ultra vires.
   ii) In relation to the ultra vires point the parties had throughout proceeded on the basis that, by reason of Section 7 of the 1996 Act, the arbitrator had substantive jurisdiction to determine that point conclusively.
   iii) It had therefore never been part of the reference to the arbitrator, which defined the issues that he was invited to decide, whether, because the agreement to arbitrate would be invalid if the TSA were ultra vires, he lacked substantive jurisdiction to determine the ultra vires point. The preliminary issues, derived by agreement between the parties from the arbitrator's directions of 5 May 2004, are conclusive on this.
   iv) Until service of EWN's skeleton argument, nine days before the hearing, it had never been suggested for any purpose that, if the TSA were ultra vires and void, the arbitration agreement was also void and that Section 30 of 1996 Act was thereby engaged. Until then EWN had asserted that the effect of Section 7 was to clothe the arbitrator with jurisdiction to decide the ultra vires point conclusively, but that, once that jurisdiction had been exhausted, he would have no residual jurisdiction to decide the restitutionary claims and quantum meruit points, because of the meaning of the words "for that purpose".
   v) The submission that the arbitration agreement would be void was made as part of EWN's case on the restitutionary claims point only. The skeleton argument did not explain why the arbitration agreement would be invalid. As expressed, paragraphs 32 and 33 are indistinguishable from the "logic" argument comprehensively rejected by the Court of Appeal in ***Harbour Assurance v. Kansa General Insurance***, supra, and which is impermissible under Section 7 by reason of the doctrine of separability.
   vi) It was not until Mr Browne-Wilkinson's intervention in the course of the hearing that it had ever been suggested that the arbitration might be independently ultra vires. Even at that stage counsel for EWN never attempted to articulate why that should be or what the implications would be for the arbitrator's determination of the ultra vires point as distinct from the restitutionary claims and quantum meruit points.
   vii) By the time that the skeleton argument emerged, a fortiori by the time of the hearing itself, it was far too late for EWN to object that the arbitrator lacked substantive jurisdiction to determine any point on the grounds of the arbitration agreement being ultra vires. That is clear from Section 31. The first step in the proceedings by EWN was the service of the defence, but that contains nothing about the arbitrator's jurisdiction. Indeed, it was not until DLA's letter of 14 May 2004 that it was asserted on behalf of EWN that

if the TSA were held to be ultra vires the effect of Section 7 would be to deprive the arbitrator of substantive jurisdiction in relation to the restitutionary claims. There was still no suggestion that the arbitrator would lack jurisdiction on the grounds of the invalidity of the arbitration agreement. Accordingly, EWN did not comply with Section 31(1) or (2).

viii) There is no evidence that the arbitrator ever admitted a late objection under section 31(3) to his substantive jurisdiction to determine the ultra vires point on the grounds of the invalidity of the arbitration agreement. Indeed, he clearly never entertained the point. The 5 May issues were never amended to cover this objection. Had he considered the matter for the purposes of section 31(3) he would surely have stated as much in his award. In any event, he would inevitably have concluded that the delay was not justified since those advising EWN had all the relevant materials at the time when they first took the ultra vires point in the defence.

ix) It follows that EWN never effectively raised objection to the arbitrator's substantive jurisdiction to determine conclusively the ultra vires point and accordingly the determination of the ultra vires point is incapable of amounting to an implied award as to the arbitrator's substantive jurisdiction to determine that point.

x) It follows that this application fails in limine and is rejected.

66. It remains to add that I should in any event have rejected this application on the grounds that EWN cannot satisfy the requirements of Section 73 of the 1996 Act. They have not established that at the time when they took part in the proceedings by serving their defence and acceding to the directions of 5 May 2004 they did not know or could not with reasonable diligence have discovered the grounds for their objection to substantive jurisdiction to determine the ultra vires point. If EWN cannot bring themselves within Section 31 or Section 73, they are precluded from challenging the award under Section 67. The court raised this point with counsel after the conclusion of the main hearing. It was not a point relied upon by EWI, but, as is clear from the wording of Section 73(1), it is open to the Court to satisfy itself that the party challenging the award has complied with that section if it has not brought itself within Section 31(1), (2) or (3).

67. It is therefore unnecessary for the purposes of the Section 67 application that I should decide whether the arbitration agreement was indeed ultra vires and undesirable that I should do so in view of my conclusion on the Section 68 application.

The Section 68 Application

The Structure of the partial award

68. The arbitrator began with the report of CDP on Bermudan Law which represented common ground. He accepted the evidence that if the TSA were outside the objects in the memorandum it would be void ab initio (paragraph 7). The memorandum included the following objects:

"(c) buying, selling and dealing in goods of all kinds

(n) all forms of engineering

(s) Employing, providing, hiring out and acting as agent for … engineers and experts or specialists of any kind."

69. Those were taken out of a list of objects set out in the Second Schedule to the Bermudan Companies Act 1981 in force at the date of incorporation of EWI. That Schedule had the following proviso: *"Provided that none of these objects shall enable the company to carry on restricted business activity as set out in the Ninth Schedule except with the consent of the Minister."*

70. In paragraph 11 the award stated as follows:

"The Companies Act 1981 provided at incorporation that "(o) developing, operating, advising or acting as technical consultants to any other enterprise or business" was a "restricted business activity" which could only be carried on with express Ministerial consent. The purpose of this provision was to seek to ensure that Exempted Companies (such as EWI) did not compete in Bermuda with local Bermudan companies, especially in consultancy work. CDP's letter at paragraph 8 states:

'Under the 1981 Act, the Minister of Finance can regulate the business activities of all Bermuda companies, both exempted and local, by controlling the objects clauses available to them. The policy underlying this regulation was to ensure that exempted companies did not compete in the local market place, especially in consulting work.'

71. The award then notes (paragraph 14) that EWI did not allege before the arbitrator that it had got the consent of the minister to object (o).

72. I interpose that neither the proviso nor object (o) were included in the list of objects set out in the memorandum. Indeed, none of the objects listed was a restricted business activity for which it was necessary to obtain the minister's consent before it could be included as an object.

73. Paragraph 15 stated:

"The Ninth Schedule was amended on 14/02/2003 [see CDP opinion para 15 to read

Restricted business activities are-

(a) operating a financial institution as defined in s1(1) of the Bermudan Monetary Act 1969; or

(b) providing by way of business any of the following services to the general public … [there is then a list which I will paraphrase as 'banking']."

74. In order to understand the basis of the Section 68 application it is necessary to set out in full the next nine paragraphs of the award:

"The TSA was dated 25 March 2003

As a matter of Bermudan law, at the date the TSA was entered into, the Ninth Schedule did not impose an overriding restriction rendering the TSA illegal under Bermudan law.

It is then necessary to construe the Memorandum of Association.

In the proviso set out at paragraph 13 above, what does 'restricted business activity as set out in the Ninth Schedule' mean? EWN effectively contends for 'restricted business activity as set out in the Ninth Schedule wording frozen in time at the date of incorporation'. The alternative is 'restricted business activity as set out in the Ninth Schedule from time to time in force. The second reading is to be preferred. It accords with the purpose of the statutory provision, namely to protect local business in Bermuda, as set out in CDP's opinion at paragraphs 7 and 8.

CDP's paragraph 8 I have set out above. Paragraph 7 (p172) reads:

'Bermuda is major international business centre. International companies or 'exempted companies' (so called because they were historically exempted from Exchange Control) are to be contrasted with local companies. Exempted companies are subject to a number of restrictions and enjoy other benefits. A primary restriction is that exempted companies cannot carry out local business (see section 129(1)(e) of the 1981 Act).'

The matters being arbitrated took place on a different continent. If the Bermudan legislature changed what was legally restricted, it did so for good reason, and there is no purpose served in straining interpretation in the context of two substantial commercial concerns trading with each other on a different continent. CDP at paragraph 5 of their report state:

'The Bermudan Courts in construing a memorandum would be particularly aware of, and taken into account, the regulatory and statutory context.'

I infer that CDP concur with my interpretation, otherwise there would have been no point in referring to the change and annexing the position as it changed on 14/02/2004.

This also recognises the real world.

*English common law principles apply in construing the meaning and effect of EWI's memorandum (paragraphs 1 to 3 of the CDP Report). The overriding principle is that a memorandum of association must be read fairly and its import derived from a reasonable interpretation of the language which it employs (per Lord Macmillan in **Egyptian Salt & Soda Co v. Port Said Salt Association** [1931] AC 677 at 682; see also **Bell Houses Ltd**, at pp 678 et seq).*

EWI says that the TSA falls within Bermudan Companies Act object "o" of the Second Schedule [see paragraph 11 above]. I concur that had the Memorandum included "o" the services supplied under the TSA would clearly have been intra vires. I do not, however, follow EWI's leap in its submissions, that the question turns on what is the correct construction of clause "(o)". It is my job to construe what is in the Memorandum, not what is not there.

So this leads to the question: what was EWI actually doing?"

75. The references in paragraph 23 to EWI should be to EWN whose argument was that:

i) In the schedule of objects incorporated into EWI's memorandum by taking a copy of the Second Schedule of the 1981 Companies Act and deleting the unwanted material in manuscript, object "o" had been deleted.

ii) That object being a restricted business activity, could not be included without ministerial consent.

iii) The proviso to the Second Schedule limited the scope of the overlap from unrestricted objects upon restricted objects such as "o" to the effect that the provision of services within "o", namely "developing, operating, advising or acting as technical consultants to any other enterprise or business" would be ultra vires, although within or incidental to any of the listed unrestricted objects, if the real substance of those services fell within "o".

iv) The real substance of the TSA was the provision of services defined by "o" and that, construing objects (c), (n) and (s) against the statutory background, those services were not within those three objects and the TSA was therefore ultra vires. In other words, (c), (n) and (s) were objects only in so far as the real substance of the relevant business activity did not fall within the restricted zone of "o".

v) I interpose to add that, with reference to paragraph 17 of the award, object "o" ceased to be a restricted business activity from the date of amendment of the Ninth Schedule, namely 14 February 2003.

76. There then follows a statement of EWI's obligations under the TSA and quotations from the evidence of witnesses adduced by EWN and EWI respectively.

77. The award continues:

"I am not interested in what EWI was doing in other parts of the world. The question I must address is what they were doing under the TSA. EWI lays stress on engineering. So much so, that EWN was able to produce an analysis that the case was overstated. I find, however, that this overstatement does not destroy EWI's basic case that it establishes the necessary power to make the TSA intra vires. The rolling out of a GSM network is an engineering exercise. It is not just dominant, it is crucial. Nothing on the mobile telephone network will work, and hence there is nothing which potential customers will buy, if the engineering is not right. I find the subject matter of the TSA was reasonably incidental to object (n) all forms of engineering. I accept the evidence of EWI that in the course of the TSA it also supplied goods, which is within object (b) buying, selling and dealing in goods of all kinds. What the analysis of the seconded personnel shows is that a dominant feature of the service that EWI was providing under the TSA was the supply of personnel. That was how EWI was meeting its obligations under the TSA: see object (s) which includes (s)

employing, providing … engineers and experts or specialists of any kind [emphasis added]. Each of these strands as a main objects clause:

s11(5) of the 1981 Act.

I therefore find that the TSA was not ultra vires the powers of EWI.

It is therefore not necessary for me to make a decision on the submission of EWI that s11(1) of the 1981 Act:

'Subject to any provision of the law, a company limited by shares shall without reference in its Memorandum have the powers set out in the First Schedule unless any such powers are excluded by its Memorandum.'

(p163) incorporated paragraph 13 of the First schedule of the 1981 Act as a freestanding power, and that should determine the issue in its favour. If the matter ended there, I would have held that, although EWI clearly had the power by statute, whether it could use the existence of that power on the facts to make something ultra vires to be intra vires does not follow. A power can only be exercised to advance an object of the company. The First Schedule powers include Paragraphs 27 and 28.

"27. To do any of the things authorised by this sub-section and all things authorised by its Memorandum as principals, agents, contractors, trustees or otherwise, and either alone or in conjunction with others

28. To do all such other things as are incidental or conducive to the attainment of the objects and the exercise of the powers of the company."

Those powers, in conjunction with objects (n), (b) and (o), put the issue beyond doubt. What EWI was (factually) doing was plainly conducive to the attainment of object (n) [engineering]. The TSA was intra vires."

78. The reference to objects (b) and (o) is clearly a mistake for (c) and (s).

Criticism of the Award

79. EWN submits that in paragraphs 16-19 of the award the arbitrator has adopted an argument that was never put to him by EWI and upon which EWN had no opportunity to address him. The arbitrator's reasoning seems to assume that the proviso to the Second Schedule had been incorporated into the objects clause of the Memorandum and further that, therefore, on its proper construction, restricted business activity" in the Ninth Schedule viz any object for which ministerial consent was required, meant *"in the Ninth Schedule from time to time in force"*, as distinct from the Ninth Schedule at the date of incorporation of EWI. On that basis, in paragraph 23 the arbitrator accepted EWN's submission that the business activities under the TSA fell within object (o) but he held that it did not matter that they were because object (o) was not amongst the objects in the memorandum. He then went on to decide whether the TSA was within objects (n), (b) and (s) and, at paragraph 28, decided that they were and applied section 11(5) of the 1981 Act which provides: *"The change of name of a company shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against it, and any legal proceedings that might have been continued or commenced against it in its former name may be continued or commenced against it in its new name."*

80. He concluded therefore that the TSA was not ultra vires.

81. It is accepted by Mr Moverley-Smith QC on behalf of EWI that it was never argued that the 2003 amendments to the 1981 Companies Act were relevant to the construction of the memorandum of association. It is further accepted that the memorandum had to be construed as at the date of incorporation of EWI and that the only relevant legislative background was the 1981 Act.

82. The arbitrator's deviation into what at first sight is an argument based on the 2003 amendments was capable of forming the basis of a serious irregularity under section 68 in as much as it represented a failure by the tribunal to comply with section 33 of the 1996 Act. That provides:

"33(1) The tribunal shall

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."

83. In ***Zermalt Holdings SA v. Nu Life Upholstery Repairs Ltd*** [1985] 2 EGLR 14 Bingham LJ. stated at page 15: *"If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way, then that again is something that he should mention so that it can be explored. It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance, and on the facts of this case I think the Landlord's case is made out."*

84. By advancing the point of construction leading him to the 2003 amendments to the 1981 Act the arbitrator was neither acting fairly nor giving each party a reasonable opportunity of putting its case.

85. However, section 68 provides:

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

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);"

86. Consequently, in order to conclude that there has been a serious irregularity, the court has to consider that the factual basis of the tribunal's conduct has to have caused or must in future cause substantial injustice to the applicant.

87. It is clear from paragraphs 23 to 28 of the award that in construing the memorandum the arbitrator did not regard it as necessary to take into account whether, as he found, the services to be provided under the TSA fell within (o) in the Second Schedule. He concerned himself only with whether the obligations of EWI under the TSA were within the objects (n), (b) and (s). He did not deal explicitly with the argument by EWN that, even if they were, what mattered under the 1981 Act was whether, as well as being within what were the unrestricted business objects, the services also fell within (o) which was a restricted activity. This appears to have been because he was proceeding to construe the objects on the assumption that they had to be construed on the basis that the Ninth Schedule as amended in 2003 made it unnecessary to take into account object (o) as part of the statutory background.

88. Had the arbitrator not deviated into the 2003 amendments and had he considered EWN's submissions on the 1981 statutory background, he might but would not necessarily have reached a conclusion favourable to EWN, for it cannot be said that EWN's arguments are hopeless. Further, if before issuing his award he had drawn that point to the attention of the parties, he would have been told that this line of reasoning had never been advanced and was not relied on.

89. The arbitrator has very properly written an explanatory letter dealing with the section 68 application. In it he clearly states that he proceeded on the basis that counsel for EWI had relied on the 2003 amendment of the 1981 Act. It is common ground that this was a misunderstanding on the part of the arbitrator. The letter suggests that the arbitrator not only accepted what he wrongly believed to be Mr Moverley Smith's submission as to the relevant statutory background being the 2003 amendments, but also for that reason reached the conclusion that he did without ever considering EWN's submission that he should construe the memorandum objects against the statutory background of the unamended 1981 Act and having regard to the fact that object (o) had been deleted, that it represented a restricted business activity under the Ninth Schedule as at the time of incorporation and that accordingly the other stated objects were to be construed as limited by an intention not to permit the conduct by EWI of restricted business activities in respect of which it had never been given ministerial consent.

90. It is unnecessary and in the circumstances undesirable for me to express a view as to whether the arbitrator came to the right conclusion, even if by the wrong route, or whether, had he ignored the 2003 amendments, he should have reached the same or a different conclusion. The element of serious injustice in the context of section 68 does not in such a case depend on the arbitrator having come to the wrong conclusion as a matter of law or fact but whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant. Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process.

91. In my judgment, the argument of EWN on construction of the memorandum of EWI was not so weak that it had no realistic prospect of success. It was a submission which, but for his mistaken understanding of EWI's submissions, he must necessarily have expressly determined. In these circumstances I conclude that there has in the present case been substantial injustice and therefore a serious irregularity and that consequently this application succeeds.

92. The partial award will be remitted to the arbitrator for reconsideration in the light of this judgment.

Mr S Browne-Wilkinson QC (instructed by DLA) for the Applicant
Mr S Moverley-Smith QC (instructed by Kerman & Co) for the Respondent