JUDGMENT : Mr Justice Tomlinson: Commercial Court. 18th March 2008

Introduction

1. The Claimant to which I shall refer as "Entico" is an English company carrying on business as a publisher. The Defendant, to which I will refer by its well known acronym "UNESCO", is an international organisation which is one of the specialised agencies of the United Nations, hereinafter the "UN". It was created in November 1945. The United Kingdom, as one of the founding members of the United Nations, has been a member of UNESCO since its establishment, with the exception of a period between 31 December 1985, when it withdrew from membership, and 1 July 1997, when it rejoined. As of October 2007 UNESCO had 193 Member States and six Associate Members. Under international law, international organisations are granted immunities and privileges before the courts of their member states to enable them effectively to pursue their functions and to operate free from control by any individual Member State (see M. Shaw, *International Law* (5th Edition, 2003), p.1207 and ***Mendaro v. World Bank***, 99 ILR 92 at 97-99 (US Court of Appeals, DC Circuit, 1983).

2. This case concerns a challenge to UNESCO's immunity from legal process, bestowed upon it by United Kingdom legislation pursuant to the UK's obligation undertaken by accession to the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, "*the 1947 Convention*", which has 115 parties, including the UK, which became a party on 16 August 1949. Article III, Section 4 of the Convention provides that—

   "The specialised agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

   In addition, Article III, Section 5, provides that—

   "The premises of the specialised agencies shall be inviolable. The property and assets of the specialised agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action."

   These provisions apply to UNESCO under Annex IV of the 1947 Convention, to which the United Kingdom has notified its acceptance as a member of UNESCO, in accordance with Article XI, Section 43 of the 1947 Convention.

3. Entico alleges that in October 2005 it concluded with UNESCO a contract pursuant to which Entico was to produce for UNESCO a calendar for 2006. Entico further alleges that in due course UNESCO failed and refused to perform the contract in consequence of which Entico has suffered loss and damage in the shape of costs and wasted expenditure. Entico quantifies its loss as £86,484. In this action Entico claims that amount from UNESCO.

4. The headquarters of UNESCO are in Paris. The relevant French authorities declined to effect service of these proceedings upon UNESCO, observing that UNESCO enjoys diplomatic immunity in that country. Colman J permitted service to be effected by an alternative method, i.e. first class post, which was done but UNESCO has not acknowledged service. Entico by this application seeks judgment in default of acknowledgement of service. Since however as stated above UNESCO enjoys in this jurisdiction as elsewhere immunity from suit and legal process, Entico must first persuade the court to set aside that immunity. To that end it is asserted that UNESCO's immunity violates Entico's rights under Article 6(1) of the European Convention on Human Rights, hereinafter the "ECHR", which may broadly be summarised as access to fair and public judicial processes. That challenge to the relevant UK legislation having been intimated, the Secretary of State for Foreign and Commonwealth Affairs intervenes pursuant to CPR 19.4A and submits that there is no incompatibility. The Secretary of State takes no position regarding the underlying dispute between Entico and UNESCO. UNESCO has taken no part in the proceedings although it has on three occasions written to the court to explain its position. It denies that a contract was ever concluded between Entico and UNESCO.

The underlying dispute

5. Entico's case as to the manner in which a contract was concluded is succinctly set out in its Particulars of Claim. After describing the parties and explaining that at all material times Entico's Managing Director, Mr James Ramsey, acted on its behalf and that Ms Michiko Tanaka, Chief of UNESCO Publishing, acted on UNESCO's behalf, the Statement of Case continues:

   "3. *By a contract, whose initial/draft terms were set out by Entico in writing (as set out in paragraph 4 below) and which terms were accepted by the subsequent conduct of UNESCO (as set out in paragraphs 6-7 below), made in or around late September-early October 2005 ('the Contract'), Entico and UNESCO agreed that Entico would provide a calendar for the year 2006 for UNESCO and in this context, and in particular to assist Entico in raising funds sufficient to pay the estimated £150,000-£180,000 cost to Entico of the production and distribution of the calendar, UNESCO gave permission to Entico to use the 'UNESCO' name and logo in the said calendar. These were the core terms of the relationship between the parties. The contract was made as follows:*

   3.1 By an email dated 20 September 2005 Mr Ramsey wrote to Ms Tanaka stating, 'Thank you for making it possible for us to put together a calendar for UNESCO. Attached is the contract agreed between Entico and UN/ISDR [UN International Strategy for Disaster reduction]. It could form the basis of a contract between our organisations as well. I am keen to begin finding sponsors as soon as possible and as soon as we agree the contract I will send you a PDF of the proposal we send to sponsors for our approval.'

   3.2 Ms Tanaka replied later the same day, stating 'The terms of the agreement seem to us correct. UNESCO will make small modifications to the terms in order to fit out [sic] own legal standards (please note that it is basically a

matter of wording and not contents). Our legal service will prepare a draft which will be forwarded to you within this week.'

Copies of the emails and the Entico/ISDR Contract ('the Draft Contract') are attached as annexure 1 hereto.

4. *The following were, among others, express terms of the Contract, as set out in the Draft Contract (substituting 'UNESCO' in the place of 'ISDR/ISDR Secretariat', '2006' in the place of '2005' and '£150,000-£180,000' in the place of '£200,000'):*

'THE 2005 CALENDAR…

1. In accordance with the terms and conditions of this Licensing Agreement, the Parties shall produce the 2005 Calendar. The 2005 Calendar comprised [sic] of the following elements (the '2005 Calendar'), are information products aimed at raising public awareness.

LICENSE

2. The ISDR Secretariat permits ENRICO [sic] the limited right to use its name and logo solely in connection with the production and distribution of the 2005 Calendar.

3. Pursuant to the license granted by the ISDR Secretariat as set forth in paragraph 2 above, ENTICO is permitted to use the ISDR Secretariat name and logo to raise funds sufficient to pay the estimated GBP£200,000 cost to ENTICO for the production and distribution of the 2005 Calendar.

…

SETTLEMENT OF DISPUTES

[6]. Any matter for which no provision is made in this Licensing Agreement or any controversy between the ISDR Secretariat and ENTICO shall be settled by negotiation between the parties. Any controversy or claim arising out of or in connection with this Licensing Agreement shall, if attempts at settlement by negotiation have failed, be submitted to one single arbitrator agreed upon by both parties in accordance with the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules) arbitration in Geneva by the single arbitrator agreed upon by all parties. The decision rendered in the arbitration. Including [sic] any division or allocation of costs, shall constitute the final adjudication of the dispute.

NON-WAIVER OF IMMUNITY

7. Nothing in this agreement shall signify, express or imply, a waiver of the immunity and privileges enjoyed by the United Nations pursuant to the 1946 Convention on Privileges and Immunities of the UN.

ENTRY INTO FORCE, MODIFICATIONS AND TERMINATION

8. This Licensing Agreement shall enter into force upon signature by authorized officials representing the ISDR Secretariat and ENTICO, and shall continue in full force and effect until the expiration of all rights and obligations arising hereunder or its termination in accordance with the terms hereof.'

5. *After 20 September 2005, Entico and UNESCO began the practical implementation of the Contract terms. Thus,*

5.1 On 5 October Mr Ramsey sent Ms Tanaka a draft of the promotional letter that Entico wished to send out to potential sponsors of the calendar. Ms Tanaka replied on 7 October.

5.2 Thereafter, at a point in time shortly after 10 October 2005, Mr Ramsey spoke to Ms Tanaka, by telephone. In this conversation Ms Tanaka agreed that Entico could start work on the calendar.

5.3 Entico started work in earnest on the calendar on or around 10 October 2005.

6. *UNESCO did not, as was mentioned in Ms Tanaka's email of 20 September 2005, avail itself of the opportunity to revert to Entico with a re-drafted contract. In the premises, it is to be inferred from UNESCO's conduct, as particularised above in paragraph 5, that it (a) unilaterally waived the possibility of re-drafting the Draft Contract and (b) was satisfied to proceed on the basis of the Draft Contract as emailed by Mr Ramsey to Ms Tanaka (and with the substitutions set out above in paragraph 4).*

7. *Entico and UNESCO did not sign the Contract. It is to be inferred from the parties' conduct, as particularised above in paragraph 5, that they mutually waived that part of Clause 8 which required the parties' signature before the Contract could enter into force."*

6. Performance of the contract and the nature of UNESCO's obligations is described at paragraphs 9 and 10 of the Particulars of Claim as follows:

"9. Pursuant to the Contract/Agreement, and from 10 October 2005 onwards, Entico carried out the work required to design, produce and distribute the calendar, including researching and contacting potential sponsors, negotiating terms with them, undertaking graphic design work, researching photographs, compiling a database for the mailing/distribution and organising and booking the printing.

10. In the premises, and pursuant to the Contract/Agreement, UNESCO was obliged to permit Entico to use the 'UNESCO' name and logo to raise funds sufficient to pay the cost to ENTICO for the production and distribution of the 2006 Calendar. UNESCO has failed and/or refused to do so (see paragraph 18 below)."

7. Entico alleges that on 2 November 2005 Ms Tanaka telephoned Mr Ramsey and asked him to put the project on hold since a potential sponsor, contacted by Entico, had complained to UNESCO about the request for sponsorship. On the next day Mr Ramsey sent Ms Tanaka an e-mail which began "*I would ask you to reconsider your decision to cancel this project…*". There followed several weeks of discussions at the culmination of which, Entico alleges, it became clear that UNESCO did not wish to proceed with the calendar. Finally, by letter dated 19 December 2005 UNESCO asked Entico "*to halt immediately the use of the UNESCO logos and of the Organisation's name*".

8. By letter dated 21 April 2006 Entico's solicitors invoked the arbitration clause and invited UNESCO's agreement to proceed to arbitration under UNCITRAL Rules.

9. UNESCO replied on 22 May 2006. UNESCO again denied that any contract had been concluded. It said that invocation of the arbitration clause "*must fail because that clause is part of a draft contract that did not enter into force*".

10. Entico alleges at paragraph 24 of its Particulars of Claim that UNESCO thereby repudiated the arbitration clause, that that repudiation has been accepted by Entico and that the arbitration clause is in consequence inoperative.

11. At the hearing I expressed doubt whether this analysis is correct and doubt whether it was in any event in Entico's best interests to pursue it. Entico's arguments on incompatibility with Article 6 and in particular on proportionality depend in part upon the assertion that there is available to Entico no alternative reasonable means of redress. It seemed to me that the court might on this ground be reluctant to strike down UK legislation giving effect to obligations owed under international law at the suit of a party which had voluntarily divested itself of an opportunity to pursue relief by way of arbitration. Upon reflection Ms Fatima, for Entico, whilst denying that arbitration here represented a reasonable means of redress, nonetheless for the purposes of this application dropped her insistence upon the argument that Entico had accepted UNESCO's repudiation of the arbitration clause. She maintained her argument that UNESCO had indeed repudiated that agreement. I do not need to decide whether that point is correct, although I would require some persuasion that it is. The letter relied upon did no more than to deny the existence of an agreement to arbitrate in consequence of there never having been an agreement of which such a provision could form part. UNESCO denied that it had reached agreement with Entico on anything. The letter of 22 May 2006 needs also to be read in the light of the correspondence which preceded it. Ms Fatima relied upon the decision of the Court of Appeal in ***Downing v. Al Tameer Establishment*** [2002] 2 All E.R. (Comm) 545, [2002] EWCA Civ 721. As the Court of Appeal there stressed however, that case turned upon an analysis of its own facts which included both denial by the defendant that a signed agreement bound it and assertions that, if there was a contract, the claimant was himself in breach of it. Subsequently the principle of separability of an arbitration agreement enshrined in section 7 of the Arbitration Act 1996 has been the subject of consideration by the House of Lords in ***Fiona Trust and Holding Corporation v. Privalov*** [2007] UKHL 40; [2007] Bus LR 1719. That case was of course concerned with a different problem which arises where there is a challenge to the validity of an apparent agreement, rather than a denial that there was ever agreement to anything, including consequentially a denial that there was an agreement to arbitrate. Nonetheless in the light of that discussion the court is in my view likely to be slow to characterise denial of the existence of a contract as necessarily repudiatory of an agreement to arbitrate which, if the main contract was agreed, is included within it. At any rate for the purposes of the present application it is sufficient for me to record that in extensive correspondence UNESCO has never suggested that, if a contract was concluded with Entico, it did not include an arbitration clause in the form proposed by Mr Ramsey in his e-mail of 20 September 2005 and as set out in the attached contract between Entico and UN/ISDR.

12. Although Entico is reluctant to use it, the UNCITRAL Rules, unsurprisingly, provide a mechanism to deal with the situation where the parties are unable, for whatever reason, to decide upon the identity of a sole arbitrator. Article 6(2) provides:

"If within 30 days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party's request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority."

13. Once constituted, the tribunal has by reason of Article 21 of the UNCITRAL Rules and the principle of Compétence de la compétence or, as it is more often rendered in German, Kompetenz/Kompetenz, a power itself to determine whether an agreement was concluded. Article 21 of the UNCITRAL Rules provides:

"1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of [this article], an arbitration clause which forms part of a contract and which provides for arbitration under these Rules 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."

14. Entico submits that an arbitration in which UNESCO does not participate will be a meaningless process. I cannot accept that submission. Arbitrations regularly proceed without the active participation of one party or alleged party thereto. The UNCITRAL Rules make express provision for just such a case. Entico itself proposed the incorporation of that machinery and, if it concluded a contract with UNESCO, its contract by definition envisaged the possibility that arbitration of a dispute arising therefrom might proceed without the co-operation of one party. The point has not yet been put to the test since Entico has so far declined to invoke the default procedure. It alleges that it is unreasonable to expect it to resort to "*unilateral arbitration*". However it is by no means certain that UNESCO would not in fact participate, albeit under protest, in an UNCITRAL arbitration were a tribunal to

be constituted. UNESCO's stance in correspondence has so far been that Entico's reluctance to initiate arbitration is itself indicative of an absence in Entico of a belief that a contract was in fact concluded. However in its letter to the court of 27 June 2007, copied to Entico's solicitors, UNESCO "*reserve[d] its right, should such arbitration proceedings be initiated, to raise the issue of the non-existence of a contract between the parties*". The inference is obvious that the forum in which such issue might be raised is the arbitration itself, as is in fact borne out by the manner in which UNESCO expressed themselves in a subsequent letter of 11 July 2007:

"Consequently, if Entico truly believes that it has a valid contract with UNESCO, then Entico could unilaterally invoke the UNCITRAL procedure to have an arbitrator appointed.

UNESCO has no objection to Entico doing so, but UNESCO reserves it right to raise in that context its strongly-held view that there is no contractual relationship between Entico and UNESCO."

UNESCO has in fact on more than one occasion since Entico issued these proceedings stated that it "has no objection" if Entico wishes to have recourse to arbitration under the UNCITRAL Rules. It could of course have no such objection. Finally and perhaps more relevantly UNESCO has also confirmed, by letter of 8 October 2007 to Entico's solicitors, "that should an arbitral tribunal (scilicet, constituted pursuant to the UNCITRAL Rules) make[s] an award against UNESCO, the latter would always respect and comply with such an award, whatever may be the case concerned." I must naturally proceed upon the basis that this organisation, of which the UK is a member, will act in good faith and indeed comply with the terms of an award ordering the payment of damages or compensation to Entico. If UNESCO participated in an arbitration under protest, it would be likely to comply with any direction of the tribunal as to documentary disclosure. If it did not so participate it may be an open question to what extent it would comply with such a direction made prior to determination that a contract, including an agreement to arbitrate, was indeed concluded. It is also an open question to what extent Entico could obtain assistance from the supervisory court of the forum, i.e. the Swiss Court. This and other issues are discussed in an article by Professors Emmanuel Gaillard and Isabelle Pingel-Lenuzza at [2002] 51 ICLQ pages 1-15, in which the learned authors bemoan the conservative approach of the European Court of Human Rights, hereinafter "ECt.HR" and criticise a regime which accords to international organisations an immunity which goes beyond that habitually accorded to States.

15. Entico submits that resort to arbitration must nonetheless not be regarded as a reasonable option because the tribunal would lack the competence conclusively to determine, if it be the case, that whereas a contract was indeed concluded between Entico and UNESCO, it did not include as a term thereof an agreement to arbitrate. Whilst it is not for me finally to determine whether a contract was concluded, I have to say that I regard the prospect of a finding along the lines suggested as vanishingly small. Whilst this is a possibility that Entico has raised from the outset of the dispute, it is not currently part of its pleaded case in this action. In order to render it so Entico seeks leave to introduce into the Particulars of Claim a new paragraph 8 as follows:

"Alternatively, insofar as the Contract was not agreed between the parties as pleaded above, the Claimant avers that an agreement ('the Agreement') was reached between the parties with the core terms being those pleaded above at paragraph 3. The Agreement was concluded partly orally, partly in writing and partly be the conduct of the parties: as is evident from the facts pleaded herein."

Although UNESCO stated that it did not object to this amendment, there is a case for disallowing it on the grounds that it is inconceivable that there could be spelled out of the e-mail exchanges, oral exchanges and conduct pleaded an agreement as alleged. I must record my view that I do indeed regard such an outcome as inconceivable. It seems to me that, on the basis of the case as pleaded, either there was a contract which included the "Settlement of Disputes" clause or there was no contract at all. That is the form of contract which Entico proposed. That proposal would have been understood by UNESCO as made with an eye to the immunity enjoyed by it and comparable organisations. Indeed I would think it right to impute to both parties, if they so conducted themselves as evincing to the other an intention to be bound, an intention to do so on terms which included the Settlement of Disputes provision. It is both reasonable and necessary to impute such an intention since without it the parties must necessarily have been intending to conclude an arrangement which they either knew or ought to have known would be unenforceable. Because of UNESCO's immunity, in order to be enforceable an agreement had to include the arbitration provision. For all these reasons a conclusion that the parties reached an enforceable agreement which did not include the proffered arbitration clause does not seem to me possible.

16. The possibility of such a conclusion being reached is a slender basis upon which to embark upon a consideration whether UK legislation should be struck down. Nonetheless I shall allow the amendment since, the Article 6 point having been fully argued, both Entico and the Secretary of State are anxious that I should decide it. Without the amendment I do not consider that the point strictly arises. If, contrary to my expectation, an arbitral tribunal were to come to the conclusion which I regard as inconceivable, it would be most unfortunate if there remained the possibility of yet further expensive resort to this court to determine an argument which can be resolved now.

UNESCO's immunity

17. At the outset it should be stressed that the immunity given to UNESCO in this jurisdiction has been given solely in order to comply with the UK's obligations under public international law. I have already set out the source of this obligation at paragraph 2 above, the 1947 Convention. It is an obligation owed to virtually the entire international community. I have already set out Sections 4 and 5 of Article III which is headed "PROPERTY, FUNDS AND ASSETS". It should be noted that Section 4 makes no provision for any waiver whatsoever so far as concerns the immunity from execution. Article IX, headed "SETTLEMENT OF DISPUTES" includes Section 31 which provides:

"Each specialised agency shall make provision for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of private character to which the specialised agency is a party;

(b) Disputes involving any official of a specialised agency who by reason of his official position enjoys immunity, if immunity has not been waived in accordance with the provisions of section 22."

It necessarily follows that an "appropriate" mode of settlement does not include within it submission to the process of execution. A specialised agency cannot waive its immunity in that regard. There is nothing in the Convention to make enjoyment of the privileges and immunities conferred by Sections 4 and 5 dependent upon compliance with section 31. Section 31 itself offers no criteria pursuant to which the appropriateness of a mode of settlement is to be judged. Importantly, section 31 does not say that the mode of settlement for which provision is made must be effective. It would be wholly inimical to the international scheme envisaged if individual States party arrogated to themselves the power to determine whether the provision made by each specialised agency for the settlement of disputes is adequate, whether considered generally or by reference to the facts of a particular case.

18. The 1947 Convention must be interpreted in accordance with the principles codified in Articles 31-33 of the Vienna Convention on the Law of Treaties, 1969, which require that a treaty be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose. Sections 4 and 5 of the 1947 Convention are clear, unequivocal and unconditional. They plainly require the parties to recognise and to give effect to a broad jurisdictional immunity possessed by each specialised agency. There is in my judgment no room for "reading down" the provisions of the 1947 Convention in order to take account of the provisions of the subsequent ECHR, a treaty which is binding upon only a minority of the parties to the 1947 Convention.

19. Article 31.3(c) of the Vienna Convention provides:

"There shall be taken into account, together with the context:

(c) any relevant rules of international law applicable in the relations between the parties."

As was pointed out by the ECt.HR in ***Bankovic v. Belgium*** 123 ILR 94 at paragraph 57 of the judgment, the ECHR is itself an instrument which must be construed in the light of this article. Moreover Article 30.4(b) of the Vienna Convention has the effect that the need to comply with the requirements of the ECHR does not excuse compliance with an earlier convention to which more states are party than are party to the ECHR. As Mr Greenwood QC, for the Secretary of State, submitted, it is in the highest degree implausible that when the states party drafted and acceded to the ECHR they intended thereby to place themselves in violation of their existing international obligations. Their existing international obligations, owed to many more states than were or are party to the ECHR, required them to recognise and to give effect to a broad and unqualified jurisdictional immunity enjoyed by each specialised agency. It would therefore be surprising if Article 6 of the ECHR was intended to render this regime non-compliant, thereby plunging all states party to both the ECHR and the 1947 Convention into a position in which their obligations conflicted.

20. Since 1968 the immunity of international organisations in English law has been governed by the provisions of the International Organisations Act 1968. Section 1 of the Act provides, in relevant part:

"(1) This section shall apply to any organisation declared by Order in Council to be an organisation of which—

(a) the United Kingdom, or Her Majesty's Government in the United Kingdom, and

(b) any other sovereign Power or the Government of any other sovereign Power

are members.

(2) Subject to subsection (6) of this section, Her Majesty may by Order in Council made under this subsection specify an organisation to which this section applies and make any one or more of the following provisions in respect of the organisation so specified (in the following provisions of this section referred to as 'the organisation'), that is to say-

(a) confer on the organisation the capacities of a body corporate;

(b) provide that the organisation shall, to such extent as may be specified in the Order, have the privileges and immunities set out in Part I of Schedule 1 to this Act;

..."

Part I, Section 1 of Schedule 1 includes "immunity from suit and legal process" among the privileges and immunities which may be accorded by Order in Council. Section 1(6) of the Act provides that:

"Any Order in Council made under subsection (2) or subsection (5) of this section shall be so framed as to secure—

(a) that the privileges and immunities conferred by the Order are not greater in extent than those which, at the time when the Order takes effect, are required to be conferred in accordance with any agreement to which the United Kingdom or Her Majesty's Government in the United Kingdom is then a party (whether made with any other sovereign Power or Government or made with one or more organisations such as are mentioned in subsection (1) of this section);

..."

21. The Specialised Agencies of the United Nations (Immunities and Privileges) Order, SI 1974/1260, was adopted under the 1968 Act. Section 6 provides that:

"Except in so far as in any particular case it has expressly waived its immunity, the Organisation shall have immunity from suit and legal process. No waiver of immunity shall be deemed to extend to any measure of execution."

The Specialised Agencies of the United Nations (Immunities and Privileges of UNESCO) Order, SI 2001/2560, states that "UNESCO is an organisation of which the United Kingdom and other sovereign powers are members" (Section 2) and that "*the Specialised Agencies of the United Nations (Immunities and Privileges) Order 1974 shall apply to UNESCO … in accordance with its terms"* (Section 3).

22. Ms Fatima has suggested that in compliance with its interpretative obligation imposed by section 3 of the Human Rights Act 1998 the court should read section 6 of the 1974 Order in relation to UNESCO as containing a proviso to the effect that UNESCO shall have immunity from suit and legal process "*provided Article IX, Section 31 of the [1947] Convention is satisfied*" and that it should then go on to declare that as regards this claim UNESCO has failed to satisfy the requirements of Article IX Section 31 and is not as regards this claim immune from suit and legal process. I have already given my reasons for regarding it as impossible to read the 1947 Convention as securing the result that the enjoyment of immunity is conditional or qualified in this way, and for thinking it impossible and unprincipled for this court to adjudicate upon whether there has been compliance with Section 31. However as Mr Greenwood points out the logical conclusion to be drawn from Ms Fatima's argument is that the 1974 Order is in any event *ultra vires* without need to resort to the ECHR because contrary to section 1(6) of the 1968 Act it confers privileges and immunities greater in extent than those required by the 1947 Convention.

23. It is unnecessary for me to decide whether Article 6 of the ECHR is in these circumstances in fact engaged at all. In the context of State immunity Lord Millett in ***Holland v. Lampen-Wolfe*** [2000] 1 WLR 1573 at 1588 pointed out that while Article 6 "*forbids a contracting state from denying individuals the benefit of its powers of adjudication it does not extend those powers*". In ***Jones v. Saudi Arabia*** [2007] 1 AC 270 both Lord Bingham at paragraph 14 and Lord Hoffmann at paragraph 64 expressed their agreement with Lord Millett's approach. As Lord Hoffmann put it, "*there is not even a prima facie breach of Article 6 if a State fails to make available a jurisdiction which it does not possess.*" When the UK became party to the ECHR it possessed no jurisdiction over UNESCO unless UNESCO chose to waive its immunity.

24. Since recognition of the immunity of an international organisation is equally required by international law, there can be no reason for regarding this approach as not equally applicable to recognition of organisational immunity as it is to recognition of State immunity. Certainly when considering whether the grant of immunity to an international organisation pursues a legitimate aim, the ECt.HR has drawn no distinction – see ***Waite and Kennedy v. Germany*** [1999] 30 EHRR 261 at paragraph 63. In that case however Germany conceded that Article 6 was engaged and the court proceeded on the basis that it was applicable. That case was moreover concerned with the European Space Agency ("the ESA"), an international organisation created by a small group of European States all of which were parties to the ECHR and had been so for some years before the establishment of the ESA.

25. In the present case it makes no difference to the outcome of this application whether Article 6 is regarded as engaged or not. I turn therefore to consider whether, on the assumption that Article 6 is engaged, the grant of immunity to UNESCO pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

26. In relation to the first question, it was as I understood it the submission of Ms Fatima that the court is concerned with the question whether the grant of immunity to UNESCO and similar organisations is itself a legitimate aim in the sense of being necessary to its or their proper functioning. In my judgment jurisprudence of which I must take account demonstrates that this is not the appropriate question. In its separate judgments in the trilogy of cases ***Al-Adsani v. United Kingdom*** (2001) 34 EHRR 273, ***Fogarty v. United Kingdom*** (2001) 34 EHRR 302, and ***McElhinney v. Ireland*** (2001) 34 EHRR 323, the Grand Chamber of the ECt.HR included, in identical terms, the following passage:

"The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle par ***in parem non habet imperium,*** *by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.*

The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31(3)(c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties.' The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 section 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity."

It follows in my judgment that compliance with obligations owed in international law is of itself pursuit of a legitimate aim. Furthermore, insofar as the 1974 Order reflects generally recognised rules of public international law on organisational immunity, which in my judgment it does, it cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1).

27. It is true that in the earlier case of ***Waite and Kennedy***, which was concerned with organisational rather than State immunity, the ECt.HR did not express itself in quite such stark terms. However as I have also already pointed out, there can in fact be no principled basis upon which the approach can in the two situations be different. The Commission was in that case almost equally divided, a bare majority, 17-15, finding that Germany had not exceeded its margin of appreciation in limiting the applicants' rights of access to the national courts in relation to an employment dispute with the ESA. The dissentients pointed out that the Commission was there concerned only with the immunities of international organisations created after the coming into force of the ECHR – see page 281. It is true that in considering proportionality the Court said that it regarded as a material factor whether the applicants had available to them means of redress which were a reasonable alternative to access to the German national courts – see paragraph 68 at page 287. At paragraph 73 of the judgment the Court said that it took into account in particular the alternative means of legal process available to the applicants, which involved an internal tribunal. However I note that the Court did not approach the matter upon the basis that it is a pre-requisite to the compatibility with Article 6 of organisational immunity that the organisation provide an alternative forum for dispute resolution. Furthermore the conceded applicability of Article 6 in that case to disputes involving the ESA created no possibility of conflict of international obligations. The Court was concerned only with the obligations of an ECHR State owed to other ECHR States and to an organisation created by such States long after they had acceded to the ECHR. In the light of the approach of the ECt.HR in the subsequent trilogy of State immunity cases it is not in my judgment safe to assume that the ECt.HR would in a case involving the immunity of a global organisation created prior to the ECHR adopt reasoning similar to that to be found in *Waite and Kennedy*. Indeed it is worth setting out in full what the Court did on that occasion say about the immunity of international organisations in the context of legitimate aim. At paragraph 63, a passage to which I have already drawn attention above, the Court said this:

"Like the Commission, the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.

The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international co-operation in all domains of modern society.

Against this background, the Court finds that the rule of immunity from jurisdiction, which the German courts applied to ESA in the present case, has a legitimate objective."

One can understand why in that case there was an argument for the applicability of Article 6, which was of course conceded. By contrast I can find no justification for reading a convention concluded some years before the ECHR, the majority of whose parties are not bound by that later Convention, in the light of the later principles espoused by only a small sub-set of the parties to the earlier convention.

28. If however, contrary to my view, it is relevant to take into account the availability of an alternative forum, it is clear that there is in the present case an available mode of dispute resolution, i.e. arbitration under UNCITRAL Rules. For the reasons already stated I find it inappropriate to assess its adequacy and likely efficacy, although I should record that it has certainly not been established that it is an inadequate remedy. It is the remedy which Entico itself put forward for acceptance. The immunity from execution of UNESCO is not incompatible with Article 6 – see ***Kalogeropolou v. Greece*** 129 ILR 537, and is in any event irrelevant, UNESCO having stated that it will comply with any award. As Mr Greenwood pointed out the ability of either party to compel the attendance of the now retired Ms Tanaka in any forum must be open to question, particularly if she has returned to her native country. Her absence would be likely to inconvenience UNESCO more than Entico. I accept that it may be open to question whether Entico will obtain documentary disclosure from UNESCO. However voluntary disclosure of documents other than those upon which a party wishes to rely is not a feature of litigation or arbitration in jurisdictions which do not follow the common law tradition.

29. In my judgment therefore if Article 6 is engaged there is no violation of Entico's Article 6 rights. It has of course already been held by the Court of Appeal in ***Stretford v. The Football Association*** [2007] 2 Lloyds Rep 31, that voluntarily entering into an arbitration agreement amounts to a waiver of rights under Article 6. However my principal conclusion is that the 1974 Order is not incompatible with Article 6. In those circumstances it is unnecessary for me to consider the various heads of relief pursued by Entico. I grant leave to Entico to amend its Particulars of Claim in terms of the draft placed before the court, so that those various heads of relief set out in the latest amendment may be regarded as having been open to and sought by Entico on this application. It follows however that it is inappropriate to grant to Entico any further relief and in particular I dismiss its application that judgment be entered in its favour against UNESCO in default of acknowledgement of service.

Ms Shaheed Fatima (instructed by Messrs Gaby Hardwicke) for the Claimant
Christopher Greenwood QC and Jemima Stratford (instructed by The Treasury Solicitor) for the Intervener
The Defendant did not appear and was not represented