The Judicial Committee of the Privy Council Decisions

Summary

[2014] UKPC 15
Privy Council Appeal No 0096 of 2013

JUDGMENT

Cukurova Holding A.S (Appellant) *v* Sonera Holding B.V (Respondent)

From the Court of Appeal of the British Virgin Islands
before
Lord Neuberger
Lord Mance
Lord Clarke
Lord Sumption
Lord Hodge
JUDGMENT DELIVERED BY
Lord Clarke
ON

13 May 2014

Heard on 24 and 25 February 2014

Appellant		*Respondent*
Kenneth MacLean QC Arabella di Iorio James Nadin David Caplan (Instructed by White & Case LLP)		Bankim Thanki QC John Carrington QC Ben Valentin (Instructed by Sullivan & Cromwell LLP)

LORD CLARKE:

Introduction

1. **On 1 September 2011 an arbitration Tribunal comprising Mr Michael Schneider as chairman, Dr Pierre Karrer and Professor Dr Christian Rumpf ("the Tribunal") made a final award ("the Final Award") in an ICC arbitration between the respondent ("Sonera") and the appellant ("Cukurova") in which it awarded Sonera damages of US$932 million against Cukurova. On 4 October 2011 Sonera applied to the High Court in the British Virgin Islands ("BVI") for permission to enforce the final award in the same manner as a judgment or order of the High Court. On 24 October 2011 Bannister J ("the judge") granted permission ex parte and judgment was entered for the sum due plus interest according to the method stated in the final award in a total amount of over US$1 billion plus further interest from 4 October 2011. Cukurova applied to set aside the judgment but the application was dismissed by the judge on 19 September 2012. Cukurova appealed to the Court of Appeal but its appeal was dismissed by Pereira CJ, Baptiste JA and Michel JA on 9 May 2013. Cukurova now appeals to the Privy Council pursuant to leave granted by the Court of Appeal.**

2. **Sonera has also sought to enforce the Final Award in a number of other jurisdictions, namely England, New York, Switzerland, the Netherlands and Curaçao. Enforcement proceedings in England raise the same or substantially the same issues as those raised in the BVI and have been stayed by agreement on the express basis that the parties will be bound by the judgment of the Board in respect of all issues determined by the judgment. In New York the United States District Court for the Southern District of New York held on 10 September 2012 that it had personal jurisdiction over Cukurova and made an order confirming the Final Award and on 21 September 2012 entered judgment against Cukurova in accordance with the terms of the Final Award. Cukurova appealed against those decisions. The United States Court of Appeals for the Second Circuit heard argument in the appeal but on 28 October 2013 decided to postpone giving judgment, pending the decision of the United States Supreme Court in *DaimlerChrysler Corporation v Bauman*, in which one of the issues raised in Cukurova's appeal, namely the agency theory of in personam jurisdiction, was to be considered. The Supreme Court has now handed down judgment in *Bauman* 134 SCt 746 (2014), and the Second Circuit, on 25 April 2014, has allowed Cukurova's appeal.**

3. **The appeal to the Board raises three questions defined in the statement of facts and issues: (1) whether the Tribunal had jurisdiction to grant the relief in the Final Award; (2) whether the Court of Appeal was correct to conclude that Cukurova had not been unable to present its case before the Tribunal within the meaning of section 36(2)(c) of the BVI Arbitration Ordinance 1976 ("the Arbitration Ordinance"); and (3) whether the Court of Appeal was correct to conclude that enforcement of the**

Final Award would not be contrary to the public policy of the BVI within the meaning of section 36(3) of the Arbitration Ordinance.

The Arbitration Ordinance 1976

4. **It is important to note the narrow grounds upon which the court can refuse to enforce an award made under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, known as the New York Convention. The Final Award is such an award. In particular the court cannot refuse to enforce an award on the ground of error of law or fact.**

5. **Section 36 of the Arbitration Ordinance provides, so far as relevant, as follows:**

> **"(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.**
>
> **(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves -**
>
> > **….**
> >
> > **(c) … that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;**
> >
> > **(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.**
> >
> > **….**
>
> **(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award."**

The relevant agreements

6. **Turkcell Iletisim Hizmetleri AS ("Turkcell") is the largest mobile phone operator in Turkey. 51% of the shares in Turkcell are held by a Turkish company called Turkcell Holding AS ("Turkcell Holding"). Prior to the events which gave rise to this dispute, 52.91% of the shares in Turkcell Holding were held by the Cukurova group in Turkey. The remaining 47.09% of the shares were held by Sonera.**

7. **On 25 March 2005, Cukurova, Cukurova Investments NV and Sonera entered into a letter agreement dated 24 March 2005, regarding the potential purchase by Sonera of the Cukurova group's entire 52.91% shareholding in Turkcell Holding ("the Letter Agreement"), which provided, so far as relevant, as follows:**

"Article 1. Definitions

1.1 The term 'Final Share Purchase Agreement' shall mean a share purchase agreement substantially in the same form and with substantially the same terms as the Prospective Share Purchase Agreement ... with such modifications, supplements or additions as the Parties may agree pursuant to this Agreement . ...

Article 2. Covenants; Representations

2.1 The Parties have provisionally agreed on the pricing terms for the Transaction (the 'Pricing Terms') as an aggregate purchase price of US$3,103,761,647 for all of the Class B Shares.

2.2 The Parties agree that they shall cause the Final Share Purchase Agreement to be executed and delivered promptly after the conditions precedent set forth in Article 3 hereof have been satisfied or waived.

…

2.4 Each Party shall conduct its negotiations with respect to the Transaction in good faith and shall use its reasonable best efforts to seek satisfaction of the conditions precedent set forth in Article 3 hereof.

…

Article 3. Conditions

3.1 The obligations of the Parties to cause the execution and delivery of the Final Share Purchase Agreement shall be subject to the following conditions:

3.1.1 Each of the Parties shall have reached agreement with the other Parties regarding the terms of the Final Share Purchase Agreement.

3.1.2 The Purchaser and its representatives shall have completed their due diligence review of the Company, Turkcell and certain Turkcell subsidiaries and the results of such due diligence review shall be satisfactory to the Purchaser.

…

Article 5. Effective Time; Termination; Miscellaneous

5.1 This Agreement shall take effect on the date hereof upon the due execution and delivery of this Agreement and shall terminate on the earliest of:

> **(a) at any time by mutual written agreement of all Parties;**
>
> **(b) upon execution and delivery of the Final Share Purchase Agreement; or**
>
> **(c) 12.01 am (Istanbul time) on 60 days from the date hereof … if the Final Share Purchase Agreement has not been executed and delivered by all the parties thereto.**

5.2 If this Agreement is validly terminated pursuant to Section 5.1(a) or Section 5.1(c) hereof, the Transaction contemplated hereby shall be abandoned and this Agreement will forthwith become null and void, and there will be no liability or obligation on the part of the Parties (or any of their respective officers, directors, employees, agents or other representatives or affiliates), except as otherwise expressly provided herein and except for such liabilities as exist at the time of such termination.

5.3 This Agreement shall be governed by, and construed in accordance with, the laws of the Republic of Turkey...

5.4 Any dispute, controversy or claim arising out of or in connection with this Agreement, if not amicably resolved by the Parties within 60 days of notification thereof, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the 'ICC Rules'), except as such ICC Rules may be modified below.

(a) The place of arbitration shall be Geneva, Switzerland.

(b) The language of the arbitration shall be English.

(c) Each Party to the dispute, controversy or claim in question shall nominate one arbitrator within the time limit fixed by the ICC Rules, and the two-party-nominated arbitrators shall agree on the third arbitrator within 30 days of their appointment by the International Court of Arbitration of the International Chamber of Commerce (the "ICC Court''), failing which the third arbitrator shall be appointed by the ICC Court. Where there are multiple claimants or multiple defendants, said multiple claimants or defendants shall jointly nominate an arbitrator within the time limit fixed by the ICC Rules, and the two party-nominated arbitrators shall agree on the third arbitrator within 30 days of their appointment by the ICC Court; provided, however, that if the multiple claimants or the multiple defendants do not agree on a jointly-nominated arbitrator within the time limit fixed under the ICC Rules, such appointment shall be made by the ICC Court.

(d) Any award of the arbitral Tribunal shall be final and binding on the Parties. The Parties hereby waive any rights to appeal any arbitration award to, or seek determination of any question of law arising in the course of arbitration from, jurisdictional courts.

(e) Any award of the arbitral Tribunal may be enforced by judgment or otherwise in any court having jurisdiction over the award or over the person or the assets of the owing Party or Parties. Applications may be made to such court for judicial recognition of the award and/or an order for enforcement, as the case may be."

8. **It is common ground between the parties that, while the Letter Agreement is in general governed by Turkish law, the arbitration agreement in clause 5.4 is governed by and is to be interpreted in accordance with Swiss law. The introduction to the Letter Agreement, which was sent by Sonera to Cukurova, included the following:**

> **"We are sending to you this letter agreement ... to confirm our understanding with you regarding the prospective purchase by Sonera ... of certain interests in the share capital of Turkcell Holding ... We wish to purchase, subject to negotiation of satisfactory contracts and the other conditions set forth herein, all of the Class B Shares …. The form of a draft Share Purchase Agreement ... will be delivered by us to you (the "Prospective Share Purchase Agreement") and remains subject to negotiation."**

9. **Also on 25 March 2005, the parties initialled a prospective share purchase agreement (the "Prospective SPA"), which included the following:**

> **"12.2 <u>Entire Agreement.</u> This Agreement and the Shareholders Agreement shall supersede all prior discussions and agreements among the Parties with respect to the subject matter hereof and thereof, and contain the sole and entire agreement among the Parties with respect to the subject matter hereof.**
>
> **12.8 <u>Arbitration.</u> Any dispute, controversy or claim arising out of or in connection with this Agreement, if not amicably resolved by the Parties within 60 days of notification thereof, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce in Paris (the "ICC Rules"), except as such ICC Rules may be modified below. For the avoidance of doubt, the Parties agree that in the event of a dispute, controversy or claim relating to any claim by a Party for indemnification pursuant to Article IX hereof, the 60-day period to which the preceding sentence refers shall be the same as (and shall run concurrently with) the 30-day period provided for in Article IX.**
>
> > **(a) The place of arbitration shall be Geneva, Switzerland.**
> >
> > **(b) The language of the arbitration shall be English.**
> >
> > **(c) The number of arbitrators shall be determined in accordance with the ICC Rules.**
> >
> > **(d) Each Party to the dispute, controversy or claim in question shall nominate one arbitrator within the time limit fixed by the ICC Rules, and the two party-nominated arbitrators shall agree on the third arbitrator within 30 days of their appointment by the International Court of Arbitration of the International Chamber of Commerce in Paris (the "ICC Court"), failing which the third arbitrator shall be appointed**

by the ICC Court. Where there are multiple claimants or multiple defendants, said multiple claimants or defendants shall jointly nominate an arbitrator within the time limit fixed by the ICC Rules, and the two party-nominated arbitrators shall agree on the third arbitrator within 30 days of their appointment by the ICC Court; provided, however, that if the multiple claimants or the multiple defendants do not agree on a jointly-nominated arbitrator within the time limit fixed under the ICC Rules, such appointment shall be made by the ICC Court.

(e) The Parties consent to the service of any notice or other document required or authorized to be given or served in connection with or in any way arising from the arbitration or the enforcement of any arbitral award, by use of any of the methods and to the addresses set forth for the giving of notices in Section 12.1.

(f) The Parties expressly confer upon the arbitral Tribunal, the power to consolidate and/or hold concurrent hearings of proceedings arising out of or in connection with this Agreement, whether such proceedings are between the same or different parties and whether or not they arise at the same time as or subsequently to each other. The Parties also expressly agree that such power may be exercised by the arbitral Tribunal upon the request of any Party. The Tribunal shall consolidate where all the parties agree, and may consider consolidation where there are issues of fact or law common to the proceedings and no party would be unduly prejudiced by such consolidation.

(g) Any award of the arbitral Tribunal shall be final and binding on the Parties. The Parties hereby waive any rights to appeal any arbitration award to, or to seek determination of any question of law arising in the course of arbitration from, jurisdictional courts.

(h) Any award of the arbitral Tribunal may be enforced by judgment or otherwise in any court having jurisdiction over the award or over the person or the assets of the owing Party or Parties. Applications may be made to such court for judicial recognition of the award and/or an order for enforcement, as the case may be.

…

12.11 Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the Republic of Turkey ..."

10. It can readily be seen that the arbitration clauses in both agreements are in very similar terms. Like the Letter Agreement, the Prospective SPA is in general governed by Turkish law but the arbitration agreement is governed by Swiss law. Sub-paragraphs (a), (b), (d), (g) and (h) of Section 12.8 are in the same form as in the Letter Agreement but sub-paras (e) and (f) are new.

11. Also on 25 March 2005, the parties exchanged letters which each stated that:

> **"we hereby confirm that we have no material comments or objections to the Prospective Share Purchase Agreement and we agree, subject to the conditions set forth in the Letter Agreement, to enter into ... the Final Share Purchase Agreement substantially in the same form and with substantially the same terms as the Prospective Share Purchase Agreement."**

The chronology

12. On 19 April 2005 Sonera sent Cukurova a draft of the Prospective SPA. Sometime in April Sonera completed its due diligence review in satisfaction of Article 3.1.2 of the Letter Agreement. On 9 May 2005, a telephone conversation took place between a Mr Anders Igel (the President and CEO of TeliaSonera) and a Mr Osman Berkmen (an adviser to the Cukurova group). The Final SPA was not executed within the 60 day period set by the Letter Agreement, that is by the end of 22 May 2005. On 23 May 2005, Cukurova publicly announced that it would not be selling the shares to Sonera. On the same day, Sonera issued a press release announcing that Cukurova had failed to execute the Final SPA by the deadline contemplated in the Letter Agreement. On 27 May 2005, Sonera commenced arbitration proceedings against Cukurova pursuant to the arbitration clause in the Letter Agreement.

The First Partial Award

13. The First Partial Award was dated 15 January 2007. Sonera's case was that the parties should be deemed to have agreed the terms of the Final SPA, that Cukurova was therefore in breach of its obligation under the Letter Agreement to execute and deliver the Final SPA and that Cukurova was in breach of the Final SPA. Sonera sought an award ordering Cukurova (1) to comply with the obligation in the Letter Agreement to execute the Final SPA and (2) to comply with the Final SPA and transfer the Class B shares to Sonera against payment of the purchase price. Sonera also sought an order providing for further proceedings to determine (a) the value of the shares and (b) damages for late performance and other breaches of the Final SPA.

14. By way of defence Cukurova contended that the Tribunal had no jurisdiction to entertain Sonera's claims or to grant such relief because (amongst other things) the arbitration had been commenced under the arbitration clause in the Letter

Agreement yet sought relief under the Final SPA, which was a separate contract which contained its own arbitration clause. Further, Cukurova argued that the terms of the Final SPA were not agreed during the 60 day period provided for in the Letter Agreement and that the Letter Agreement had therefore lapsed and the transaction had been abandoned.

15. **The Tribunal received evidence from (amongst others) Mr Igel on behalf of Sonera and Mr Mehmet Karamehmet on behalf of Cukurova. Mr Berkmen did not attend but submitted a witness statement. In its First Partial Award the Tribunal rejected Cukurova's objections to its jurisdiction and found in favour of Sonera on the merits. The Tribunal found that the parties reached agreement on the terms of the Final SPA on 9 May 2005, that by that date, both conditions set out in Article 3 of the Letter Agreement were met, that from that date Cukurova owed a contractual obligation to execute the SPA and that, although it had not been executed by Cukurova, under Turkish law the Final SPA was concluded in a valid and binding form on 9 May 2005.**

16. **On that basis, the Tribunal made an award which (amongst other things) declared that the Final SPA was validly concluded on 9 May 2005 in the version communicated to Cukurova on 19 April 2005, that that agreement remained in full force and effect and that Cukurova was obliged to join Sonera in making efforts in good faith to bring about closing under the Final SPA.**

The Second Partial Award

17. **Closing under the Final SPA did not occur, but Sonera filed a request for further relief from the Tribunal, in which it sought an award ordering Cukurova to deliver title to and possession of the Class B shares to Sonera against payment of the purchase price and a determination of the value of the shares. Sonera reserved its claim for damages. On 29 July 2009, the Tribunal issued a Second Partial Award in which it rejected Cukurova's jurisdictional objections and held that Cukurova had deliberately disregarded the decision in the First Partial Award, had deliberately taken actions that rendered obtaining regulatory approvals for the transaction impossible and had breached its obligations under the arbitration agreement in the Letter Agreement. It further held that this conduct constituted bad faith. It therefore ordered Cukurova to deliver the shares to Sonera against payment of the purchase price. The award further determined that the value of the shares, as of 30 June 2007, was US$1.809 million.**

The Final Award

18. **On 19 November 2009, Sonera informed the Tribunal that it was waiving its claim for specific performance and, instead, would be pursuing a claim for damages against Cukurova for the non-delivery of the shares for an amount of not less than US$l.809 million plus interest (being the value of the shares as determined by the Tribunal in the Second Partial Award). Sonera filed a request for such relief on**

18 December 2009. In response, Cukurova once again reiterated its objections to the Tribunal's jurisdiction. As to the merits of the claim, Cukurova argued that Sonera's calculations were fundamentally flawed, that Sonera had suffered no loss and that in any event, there was no causation. The Tribunal received expert evidence from Professor Robert Lind on behalf of Sonera and Mr Christopher Osborne on behalf of Cukurova.

19. On 1 September 2011 the Tribunal issued its Final Award which found that Cukurova was liable to pay Sonera damages in the sum of US$932 million. This figure was composed of US$188 million for Sonera's loss of bargain, as the difference between the price payable and the "fundamental value" of the shares on 30 June 2007, and US$744 million for the lost "marriage value" of the shares in the hands of Sonera (as Sonera already owned the other 47.09% of Turkcell Holding). In reaching these findings, the Tribunal held that the reference date for the assessment of damages remained 30 June 2007, on the basis that that was the date on which the Class B shares should have been delivered pursuant to the First Partial Award.

Issue (1): Jurisdiction

20. As stated in para 3 above, the first issue for decision in this appeal is whether the Tribunal had jurisdiction to grant the relief which it granted in the Final Award. Cukurova says that the court should refuse enforcement of the Final Award pursuant to the power contained in section 36(2)(d) of the Arbitration Ordinance quoted above. It is common ground that the court must determine this question for itself, although it must of course have regard to the reasoning and conclusions of the Tribunal: see eg *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, per Lord Mance at para 31 and Lord Saville at para 160.

21. Sonera relies upon these particular undisputed aspects of the context in which Cukurova submits that the Tribunal had no jurisdiction to grant the relief in the Final Award. Cukurova is bound by the terms of the Letter Agreement, including the terms of the arbitration clause at clause 5.4. Both the Letter Agreement and the draft SPA, the terms of which were agreed at the same time, contain arbitration clauses with identical wording as to the scope of the disputes they cover and identical dispute resolution mechanisms, namely arbitration in Geneva in accordance with Swiss law under ICC Rules. As stated in para 10 above, the only material differences between them are paras (e) and (f) of clause 12.8 in the Prospective SPA, notably the power to consolidate.

22. Further, it is Sonera's case that Cukurova was in breach of clause 2.2 of the Letter Agreement when it failed to execute and deliver the SPA. Sonera was therefore entitled to commence the Geneva arbitration pursuant to the arbitration clause in the Letter Agreement. Sonera submits that it was also entitled, in the same reference to arbitration, to enforce Cukurova's obligation under clause 2.2 of

the Letter Agreement to execute and deliver the SPA by specific performance or alternatively to seek damages for breach of that obligation. Throughout the arbitration, over a period of years, Cukurova maintained the position that the parties were never bound by the Final SPA. It did not commence arbitration under the arbitration clause in the Final SPA until April 2012 when, having the lost the Geneva arbitration, it did so seeking a declaration that the parties never entered into the Final SPA. Sonera applied to dismiss the claim on the grounds that it is res judicata in the light of the Final Award. So far as the Board is aware, a decision is still awaited.

23. **In these circumstances, Sonera 's case is that its claim, based on Cukurova's failure to execute and deliver the Final SPA and, its consequence, namely Cukurova's liability for damages which is the basis of the Final Award, is made in respect of "any dispute, controversy or claim arising out of or in connection with" the Letter Agreement, within the meaning of clause 5.4. It follows, it is submitted, that the Tribunal had jurisdiction to make the Final Award which it now seeks to enforce. Whether that submission is correct depends upon the application of Swiss law.**

24. **The judge considered the submission with care in the light of written and oral evidence of Swiss law which was tested in cross-examination. Dr Bernhard Berger gave evidence for Cukurova and Professor Gabrielle Kaufmann-Kohler gave evidence for Sonera. At para 19 of his judgment the judge described the evidence of each expert as careful and each of them as a highly qualified academic and practising lawyer in the sphere of international arbitration. He set out and then analysed their evidence with great care at paras 20 to 51. This involved detailed reference to two decisions of the Swiss Federal Court, known as *Ferrotitanium*[1] and *The Boxing Case*[2]. After considering the views of both experts, the judge focused on the correct approach to construction. He said this at paras 45 and 46:**

> **45. "That leaves the question of construction. Dr Berger relies upon the fact that the parties had expressly provided for two separate arbitration clauses and that the Letter Agreement was to expire on conclusion of the Final SPA. He says that that shows that the parties intended that an arbitration for the determination of questions arising under the Final SPA was intended to be conducted under the provisions of that agreement, and not under the provisions of the Letter Agreement. Professor Kaufmann-Kohler says that the language of Article 5.4 is wide enough to cover disputes arising under both. She relies upon the fact that, in her words, the Letter Agreement and the SPA are part of a single economic transaction and the dispute which has arisen is a single dispute about a single economic transaction.**
>
> **46 Both experts agreed that the construction of contracts under Swiss law is context sensitive. I think that Professor Kaufmann-Kohler must therefore be right to point to the highly unusual features of the**

> **contractual arrangements in the present case. The parties only refrained from entering into a single immediately concluded share sale agreement because they considered that by doing things as they did they could avoid regulatory problems. The whole arrangement was therefore highly artificial. It was constructed as a legally binding agreement to agree and its sole object was to cause the conclusion of the very contract by which (until Cukurova changed its mind) the parties intended from the outset to be bound. In my judgment, the language used by Professor Kaufmann-Kohler to describe the arrangement is entirely apt."**

25. The judge then observed that *Ferrotitanium* was high authority for the proposition that the "arising out of or in connection with" formula was ordinarily to be restricted to disputes arising in, with, under or in connection with the contract in which the words are to be found or to which they relate. However, he noted, correctly, that under section 36 Cukurova has the burden of proving that the Tribunal made decisions on matters beyond the scope of the submission to arbitration. He then expressed his ultimate conclusions at paras 49 and 50 as follows:

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

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

26. The Board finds that reasoning persuasive. It is submitted on behalf of Cukurova that the judge failed to have regard to what it called a presumption in Swiss law that, where there are two related contracts which each contain their own arbitration clause, it is presumed that the arbitration clause in contract A does not extend to disputes arising out of contract B. However, that is not quite the way Dr Berger put it in the passage in his evidence which is relied upon to support it. He said:

> **"It is not impossible as a matter of Swiss law for an arbitration agreement in one contract to encompass a dispute arising out of another contract. However, if that other contract contains its own dispute resolution clause, the Swiss Federal Supreme Court has consistently held that the two separate dispute resolution mechanisms must each be given effect."**

That proposition is based to a large extent on the decision in *Ferrotitanium*.

27. It is plain from the passages in the judge's judgment referred to above that he gave detailed consideration to the decision in *Ferrotitanium* and the views of the experts with regard to it. All depends upon the circumstances. This is an unusual case and

the Board sees no reason to interfere with the conclusions reached by the judge and the Court of Appeal. On the contrary, their conclusions seem to the Board to make good sense. As already stated, the clauses in the two contracts were very similar indeed. There is no dispute that, in the circumstances prevailing in May 2005, Sonera was entitled to commence arbitration proceedings under the Letter Agreement. As it is put on behalf of Sonera, the issue is whether the parties intended that, if the Tribunal found, as it did, that the Letter Agreement had been breached, the Tribunal was obliged to draw stumps, requiring Sonera to commence a fresh arbitration under the Final SPA. The Board agrees that there is nothing to suggest that the parties intended such a result. It would make no commercial sense. Contrary to submissions made on behalf of Cukurova, like the judge and the Court of Appeal, the Board takes the view that, by way of contrast with the position in *The Football Case*, the agreements here were component parts of a single transaction.

28. **In addition, although the question of jurisdiction is a matter for the court and not the arbitral Tribunal, the views of the Tribunal are nevertheless relevant. As the judge observed in his para 49 quoted above, his conclusion was pretty much what the Tribunal held in para 6.4 of its First Partial Award. Para 6.4 included the following:**

> **"When parties to international commercial contracts include in the contract an arbitration clause, they normally wish to have all disputes related to the transaction resolved in the same proceedings. Dividing a dispute between the same parties and relating to the same transaction into several proceedings is costly and inefficient; it cannot be assumed to have been the intention of the parties to have intended such a separation of the proceedings.**
>
> **…**
>
> **In the present case the Parties have chosen expressions which are frequently used to achieve this wide scope of the dispute settlement process. The terms of the arbitration clause in the Letter Agreement are indeed cast in wide terms. They are not limited to disputes about rights and obligations specifically created in the Letter Agreement itself. The terms "in connection with" extend beyond these limits. The objective of the Letter Agreement was the purchase of the Shares and the conclusion of an agreement to this effect. The delivery of the shares, if a sales agreement were found to have been concluded, clearly is in connection with this objective."**

The Board agrees.

29. **In all the circumstances, the Board is of the opinion that the judge was correct to hold that the Tribunal had jurisdiction to make the award it did in this case and the Court of Appeal was right to dismiss Cukurova's appeal on this ground. It follows that the Board answers the first question posed in para 3 above, namely whether the**

Tribunal had jurisdiction to grant the relief in the Final Award, in the affirmative. It follows that Cukurova's appeal on jurisdiction should be dismissed.

Issues (2) and (3): Was Cukurova able to present its case? Public Policy

30. It is convenient to consider these issues together. Cukurova's case is that enforcement ought to have been refused because the Tribunal violated the rules of natural justice. It says that it was not able to present its case within the meaning of section 36(2)(c) and/or that it would be contrary to public policy to enforce the award under section 36(3) of the Arbitration Ordinance. It takes two points. First, the Tribunal decided the key issue in the dispute (namely, whether the parties had agreed the terms of the SPA) on a basis that had never been put to Cukurova and that Cukurova never had an opportunity to address. Secondly, the Tribunal ignored (and failed to give any reasons for rejecting) Cukurova's evidence and submissions on a key point in relation to the quantification of Sonera 's alleged loss. This resulted in a massive increase in the damages awarded against Cukurova.

Section 36(2)(c) and 36(3)

31. Section 36(2)(c) is in the same terms as section 103(2)(c) of the Arbitration Act 1996 in England. They reflect Article V(1)(b) of the New York Convention. In *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647, 658 Colman J said that the subsection contemplates that the enforcee has been prevented from presenting his case by matters outside his control, which will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. In *Kanoria v Guinness* [2006] EWCA Civ 222 Lord Phillips CJ held in the Court of Appeal that, on the ordinary meaning of section 103(2)(c), a party to an arbitration is unable to present his case if he is never informed of the case he is called upon to meet. He referred to the statements in *Minmetals* referred to above with approval.

32. It is not in dispute that in applying these principles the enforcing court must apply its own concept of natural justice. In this case that is of course the concept of natural justice as understood and applied in the BVI. Section 36(3) reflects Article V(2)(b) of the New York Convention and provides that enforcement may be refused if it would be contrary to public policy, here the public policy of the BVI. It is contrary to public policy in England to enforce a foreign arbitral award where the foreign proceedings violated English principles of natural justice: see eg *Adams v Cape Industries* [1990] Ch 333. The same is true of BVI public policy.

33. The Board accepts Cukurova's submission that, if a particular breach of natural justice does not fall within section 36(2)(c) because it was not one which meant that the party could not present its case, it is in principle open to the court to refuse to enforce the award on the ground of public policy. However, it follows from the above that the question under section 36(2)(c) is whether Cukurova was unable to present its case for reasons which were beyond its control. On the facts here, the

Board is of the view that, only if Cukurova succeeds under section 36(2)(c) should the court refuse to enforce the award. As Sir John Donaldson MR observed in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v R'As al Khaimah National Oil Co* [1990] 1 AC 295, 316 considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution.

34. The general approach to enforcement of an award should be pro-enforcement. See eg *Parsons & Whittemore Overseas Co Inc v Société Générale* 508 F 2d 969 (1974) at 973:

> **"The 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards … [it] clearly shifted the burden of proof to the party defending against enforcement and limited his defences to seven set forth in Article V."**

In *IPCO (Nigeria) v Nigerian National Petroleum* [2005] 2 Lloyd's Rep 326, Gross J said at para 11, when considering the equivalent provision of the English Arbitration Act 1996:

> **"… there can be no realistic doubt that section 103 of the Act embodies a pre-disposition to favour enforcement of New York Convention awards, reflecting the underlying purpose of the New York Convention itself …"**

The Board agrees. There must therefore be good reasons for refusing to enforce a New York Convention award. The Board can see no basis upon which it should refuse to enforce the award here if Cukurova fails to show that it was unable to present its case for reasons beyond its control.

35. As to reasons, it is common ground that a judge owes a duty to give reasons for his decisions: *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409. The same is in general true of arbitrators: *Irvani v Irvani* [2000] 1 Lloyd's Rep 412 per Buxton LJ at 426. However, section 36 does not include a free-standing rule to the effect that a court must refuse to enforce an award for absence of reasons. After all, there is no duty upon an arbitral tribunal to address every point in a case: *English v Emery Reimbold* at paras 17-18. As the Swiss Federal Supreme Court put it in *Ferrotitanium* para 3.3, "It does not mean that the arbitral tribunal must expressly examine every argument the parties present." See also *IPCO* per Gross J at para 48: "No arbitration tribunal should be criticised for succinctness; nor is a tribunal required to set out every point raised before it, still less at length." All depends upon the circumstances.

Mr Osman Berkmen

36. Cukurova complains that the Tribunal refused to allow it to call Mr Osman Berkmen to give oral evidence. It puts its case thus. Under clauses 2.2 and 3.1 of the

Letter Agreement, its obligation to execute and deliver the SPA was conditional on the fulfilment of the conditions precedent in clause 3.1. One of those conditions precedent was that the parties had reached agreement on the terms of the SPA. If Sonera 's case that the condition had been fulfilled failed, it would have no claim whatsoever.

37. **In its Statement of Claim Sonera put its case on this issue on three alternative bases. The first was that, under Turkish law, agreement had been reached on the terms of the SPA on 25 March 2005, when the parties initialled the draft SPA and exchanged letters agreeing (subject to the terms of the Letter Agreement) to enter into a final SPA in substantially the same form. The second, alternative, basis was that agreement was reached when, as it was put in the Statement of Claim "Osman Berkmen, Cukurova's chief negotiator, confirmed that agreement had been reached when he told Sonera 's CEO on 9 May 2005 that the SPA was "totally ready for signing". The third, further alternative, basis was that clause 3.1.1 should be deemed to have been fulfilled under article 154 of the Turkish Civil Code, on the ground that Cukurova had prevented the condition being fulfilled in bad faith.**

38. **It is the second of those cases which is relevant for present purposes. It was based on a short witness statement from Mr Anders Igel, who was CEO of TeliaSonera. Mr Igel said this:**

> **"In early May, I became aware of press reports that Cukurova was negotiating a competing transaction with the Alfa Group of Russia. I called Mr Berkmen to ask if there were any problems and he assured me "SPA totally ready for signing". I made a note of this comment in my diary."**

A copy of the diary note was annexed.

39. **In its Statement of Defence Cukurova denied each of Sonera 's three alternative cases. As to the second, it relied on a witness statement from Mr Osman Berkmen, who was an adviser to Mr Karamehmet. In his statement Mr Berkmen said this with regard to the telephone conversation:**

> **"I know from Cukurova 's counsel in the present arbitration that Mr Igel declared that he called me in early May 2005 and that I would have told him that the 'SPA was totally ready for signing'. While I do not exactly remember the date, I remember a call from Mr Igel. He was complaining that the lawyer advising Cukurova had not returned some documents and he wanted to know whether there were problems on Cukurova's side. I do not remember saying anything about documents ready to be signed by Cukurova. To my recollection, I answered that, to my knowledge, I thought that the deal was not over. Mr Igel, however, knew that I was not the decision maker."**

In its First Partial Award the Tribunal notes (at p 69) that Cukurova relied upon that statement when it contested that the conversation between Mr Berkmen and Mr Igel was correctly reflected in his diary entry. It submitted that Mr Berkmen only advised that the deal was not over but did not give any confirmation about the SPA being ready for signing.

40. In November 2005, the Tribunal scheduled an evidentiary hearing for 1 and 2 February 2006, at which the parties were to present their evidence on the issue of whether the conditions in the Letter Agreement had been satisfied. On 5 January 2006, Cukurova informed the Tribunal that Mr Berkmen could not attend the hearing because he was scheduled to have an operation. It did not however then seek an adjournment but submitted a detailed witness statement dated 11 January 2006. An oral hearing took place on 1 and 2 February 2006, at which witnesses gave evidence and were cross-examined. However, Mr Berkmen was unable to attend the hearing because he was recovering from serious surgery in New York. Cukurova's case is that during the first day of the hearing, a case was raised for the first time that the terms of the SPA had been agreed by silence, on the basis that Sonera had provided a draft SPA to Cukurova and Cukurova had not said that it did not agree with it. It is said that there had been no previous suggestion in either the pleadings or the evidence filed by Sonera that such an argument formed any part of Sonera's case. Even at that stage there was no suggestion that the terms of the SPA had been agreed on 9 May 2005 as a result of the silence of Mr Berkmen during the telephone call on that day.

41. At the end of the hearing, the Tribunal sought the parties' proposals as to how to deal with the absence of Mr Berkmen. The transcript shows (at 3/1385-7) that the Chairman suggested that the parties make their post-hearing briefs without the (oral) evidence of Mr Berkmen and that both sides (and in particular Cukurova) "identify in their post-hearing [briefs] those areas on which they consider that the evidence of Mr Berkmen is decisive for their case". He added that the Tribunal would then be in a position to decide whether the evidence of Mr Berkmen was decisive or not. He asked the parties whether they agreed. Mr Tschanz expressly agreed on behalf of Cukurova. He said (at 3/1387/16-22):

> **"In the interests of time and expense, what you have described would be that in the post-hearing brief we identify those issues where to discharge our burden of proof we need to refer to Mr Berkmen. Then if you think none of those issues are relevant, you do not need to call him."**

The Chairman reiterated his point, concluding that before deciding how to proceed they needed "the summation of the case as it stands now". Mr Tschanz said: "We think this is a worthwhile proposal that we could agree to proceed".

42. It was thus agreed that the parties would make submissions as to the need to hear Mr Berkmen in person in their post-hearing briefs and the Tribunal would then

decide whether a further hearing was necessary or not. The agreed procedure was reflected in the Tribunal's Order No 8 dated 22 March 2006, which included the following:

> **"(i) … In their Post-Hearing Briefs the Parties shall identify those points of fact on which they consider the testimony of Mr Osman Berkmen decisive for their case.**
>
> **…**
>
> **(iv) If the Tribunal finds that an additional hearing is necessary, 9 May 2006 is fixed as the date for that hearing at which Mr Berkmen would testify. …"**

43. The parties filed post-hearing briefs on 4 April 2006. Unfortunately, for whatever reason, as is pointed out on behalf of Sonera, Cukurova did not identify those points of fact on which it considered that the testimony of Mr Berkmen was decisive for its case. It simply stated (at 4/1467) under the heading "Preliminary Procedural Matters":

> **"4. It is respectfully submitted that the Tribunal will need to hear Mr Berkmen as a witness. If Mr Berkmen is not heard and his written witness statement is accepted as being his testimony, this would still deprive the Tribunal of Mr Berkmen's evidence in connection with the further areas discussed by Sonera's witnesses at the previous hearing, some of which could be rebutted by Mr Berkmen."**

44. On the next day, 5 April 2006, the tribunal issued Order No 9 which included the following:

> **"3. Upon receipt of the First Post-Hearing Briefs, the Tribunal immediately examined them and deliberated about the necessity of hearing the testimony of Mr Berkmen in person. It noted [Sonera's] view 'that the Tribunal could decide this case based on the current record', thus not requiring the personal appearance of Mr Berkmen. It also noted [Cukurova's] explanations concerning the possible usefulness of Mr Berkmen's rebuttal testimony. Having examined in [Cukurova's] Post-Hearing Brief all allegations of fact in which [Cukurova] rely on Mr Berkmen's testimony, the Tribunal concluded that, in the light of the case as it was presented by the Parties, it was not necessary for it to hear Mr Berkmen in person."**

The Tribunal then directed in para 4 that Mr Berkmen would not be heard in person and that the hearing reserved for 9 May 2006 would not take place. On 3 May 2006, the parties filed their second post-hearing briefs. In its brief Cukurova again reiterated (at para 107) its position that it was necessary for the Tribunal to hear Mr Berkmen. However, Cukurova complains that the Tribunal refused to change its position, and no further hearing took place.

45. The Tribunal explained its reasons for not requiring Mr Berkmen to give oral evidence at pages 69 to 71 of its First Partial Award. It expressly considered whether, in view of the contradiction between the testimony of Mr Igel and Mr Berkmen about the substance of their telephone conversation in early May 2005, a possible confrontation with Mr Igel should be ordered. It assumed that Mr Berkmen's written testimony was correct and that, if he gave oral evidence, he would confirm the evidence in his witness statement. On the basis of those assumptions, the Tribunal noted that it was uncontested that there was a telephone conversation on or about 9 May 2005, which was almost three weeks after Sonera had sent to Cukurova a completed version of the SPA, containing its requested modifications. In the circumstances it concluded that it would be most surprising if the conversation would not have addressed the state of the preparation of the SPA and the completion of the transaction.

46. The Tribunal then set out some of the evidence (at p 70):

> **"Indeed, Mr Berkmen records that Mr Igel complained about Cukurova's lawyer having failed to return 'some documents' and that Mr Igel 'wanted to know whether there were problems on Cukurova's side'. While contesting that Mr Berkmen declared the SPA as 'totally ready for signing', neither Mr Berkmen himself nor [Cukurova] state that Mr Berkmen raised objections to any of the modifications in the 19 April 2005 draft, nor for that matter that he put into question any of the terms of the SPA in the version initialled on 25 March 2005 and requested modifications to it.**
>
> **In other words, if Mr Berkmen's written testimony is fully accurate and assuming that he did not make the statement recorded by Mr Igel, his conduct, as it emerges from his own testimony, must be considered."**

47. The Tribunal expressed its conclusions in this way:

> **"Applying principles of good faith in the relations between contracting parties, this conduct had to be understood by [Sonera] in the sense that [Cukurova] did not have any points that needed to be considered or even renegotiated. Thus, Mr Berkmen's conduct had to be understood in the sense which Mr Igel gave to it: the SPA was 'totally ready for signing'. The Tribunal holds that, had there been any reservations about [Sonera 's] modifications of 19 April 2005 or any objections by [Cukurova] to the SPA or any requests for modification, Mr Berkmen had the duty to mention them at that occasion. If he did not do so, Mr Igel and with him [Sonera] was entitled to conclude that there were none.**
>
> **The modifications which [Sonera] had requested by the revised SPA of 19 April 2005 brought no substantial change to the earlier version but simply completed it along lines which can be assumed to**

have been the joint intention of the Parties. The Tribunal, therefore, considers Article 6 TCO as applicable to the modifications requested by [Sonera] and concludes that the modifications proposed by the communication of the Working Draft of 19 April 2005 were tacitly agreed. Thus, the Tribunal finds that the SPA was agreed in the version of 19 April 2005. The telephone conversation at which, according to Mr Igel, Mr Berkmen declared that the SPA was 'totally ready for signing' occurred on or around 9 May 2005…Since no observations and objections had been communicated by that time, the Tribunal concludes that agreement on the 19 April version of the SPA occurred on 9 May 2005."

48. **The Tribunal stressed at p 71 that its conclusion that there was a tacit agreement was limited to the conclusion that it was tacitly agreed that there were no modifications to the terms of the SPA as agreed on 19 April 2005. It did not assume tacit agreement on the terms of the SPA in its 24/25 March 2005 version. The agreement on those terms had been explicitly reached by 25 March but was subject to possible requests for modification. In the absence of any such request, other than the Sonera's completed version of 19 April 2005, and in the absence of any objections to that version, the Tribunal concluded that the terms of the SPA were agreed as set out in the 19 April 2005 text.**

49. **The Tribunal further concluded that, in any event, if it was not permissible under Turkish law to assume tacit agreement of the modifications, in the absence of agreement between the parties, the modifications sought by Sonera to the 25 March agreement were ancillary points, which the Tribunal was entitled to adopt under Article 2 of the Turkish Code of Obligations ("TCO"), which provides, so far as relevant:**

> **"(1) When both parties have agreed with regard to the essential points, it is presumed that a reservation of ancillary points is not meant to affect the binding nature of the contract.**
>
> **(2) Where agreement with regard to such ancillary points so reserved is not reached, the judge shall determine them in accordance with the nature of the transaction."**

50. **The Tribunal summarised its conclusions at pp 71-72 as follows:**

> **"[Cukurova] did not contest at the time and do not contest in this arbitration that the terms added in the 19 April 2005 version were reasonable, nor do they propose any other terms that should have been set in completing the Prospective SPA. Rather, the Respondents argue that, in the present case, the Parties had agreed that all terms of the Final SPA were essential terms and agreement had to be reached on each of them, even on terms which ordinarily would be considered as ancillary.**

For the reasons explained above, the Tribunal has found that agreement on the terms of the SPA had been reached by 25 March 2005, subject to renegotiation of terms raised subsequently by any of the Parties. Consequently, the Tribunal does not accept that the terms that remained to be settled were essential by agreement of the Parties and irrespective of their objective characterisation.

In conclusion, the Prospective SPA was completed by the modifications set out in the 19 April 2005 version. The Parties agreed tacitly on these modifications. If no such tacit agreement were admitted, these modifications were reasonable terms for completing the agreement and represented those which the Tribunal would fix in the exercise of its power under Article 2 TCO to complete the agreement."

51. **Both the judge and the Court of Appeal rejected Cukurova's case, both that it was not able to present its case within the meaning of section 36(2)(c) of the Arbitration Ordinance, and that it would be contrary to public policy to enforce the award under section 36(3). In the opinion of the Board they were correct to do so. The Board detects no breach of the rules of natural justice. The account set out above shows that Cukurova had every opportunity to present its case. It did not originally seek an adjournment of the hearing on 1 and 2 February 2006 in order to enable it to call Mr Berkmen. It submitted a detailed witness statement. Cukurova accepts that during the first day of the hearing Sonera made it clear that it was part of its case that the terms of the SPA had been agreed tacitly, or by silence, on the basis that Sonera had provided a draft SPA to Cukurova and Cukurova had not said that it did not agree with it. The Board accepts the submission that that must have included silence on the part of Mr Berkmen. It therefore rejects the submission that Cukurova did not know the nature of Sonera's case until it received the First Partial Award.**

52. **After the hearing, although Cukurova agreed the substance of the Tribunal's Order No 8, it did not comply with the direction that in their post-hearing briefs the parties must identify those points of fact on which they considered the evidence of Mr Berkmen to be decisive of their case. It merely said that some of the evidence of Sonera's witnesses could be rebutted by Mr Berkmen, without giving any particulars. In these circumstances the Tribunal was justified in declining to hear his oral evidence. Moreover, Cukurova did not thereafter seek to produce a further statement from Mr Berkmen identifying what further evidence he would wish to give. There is no reason to think that the Tribunal would not have considered such a statement if he had made one. Even now, it is not clear what further evidence Mr Berkmen could have given.**

53. **The approach of the Tribunal described above and the reasoning in the First Partial Award shows that it gave Cukurova every opportunity to develop its case. The basis upon which the Tribunal reached its conclusions is clear. As stated above, the Tribunal indicated that it assumed Mr Berkmen's evidence to be true. It is therefore**

difficult to see on what grounds Cukurova can properly complain. It is not suggested that the Tribunal deliberately ignored Mr Berkmen's evidence. Although Cukurova submits that the outcome of the arbitration would have been different if Mr Berkmen had had an opportunity to be heard, it does not identify on what basis. It is of course no part of the role of the enforcing court to consider whether the decision was correct either in law or on the facts.

54. In these circumstances the Board rejects the submission that there was a fundamental breach of natural justice on the ground that the Tribunal decided the key issue in the dispute (namely, whether the parties had agreed the terms of the SPA) on a basis that had never been put to Cukurova and that Cukurova never had an opportunity to address. This aspect of the appeal therefore fails.

Mr Christopher Osborne

55. Cukurova relies upon the Tribunal's treatment or lack of treatment of the expert evidence of Mr Christopher Osborne of FTI Consulting, who gave expert evidence of quantum on Cukurova's behalf. It submits that the Tribunal ignored evidence which would have reduced the damages by about 40 per cent and that, by doing so, it placed Cukurova in the same position as if it had not been permitted to adduce any evidence at all, contrary to the rules of natural justice. It again relies upon sections 36(2)(c) and 36(3) of the Arbitration Ordinance quoted above.

56. Sonera's claim for damages consisted of two elements: (1) a claim for loss of bargain, that is the difference between the value of the B shares in Turkcell Holding owned by Cukurova and the price Sonera would have had to pay to receive them; and (2) a claim for the lost opportunity to remove what is known as the illiquidity discount from the A shares in Turkcell Holding which Sonera already held. The issue in this appeal relates only to the illiquidity discount. In this regard Sonera's argument before the Tribunal was that because its minority shareholding in Turkcell Holding (an unlisted company) was unmarketable and illiquid, the value of those shares was less than the market price of the proportionate shareholding in Turkcell (24.02%) which they represented. That is that the A shares were subject to an illiquidity discount when compared to the market price of the underlying Turkcell shares. Sonera's argument was that if it had bought the B Shares from Cukurova, it would have acquired 100% of the shares in Turkcell Holding, the interest in Turkcell held through Turkcell Holding would no longer have been unmarketable and illiquid and the value of Sonera's A shares in Turkcell Holding would have increased because the illiquidity discount had been removed. Sonera relied on an expert report from Professor Robert Lind who suggested that the appropriate illiquidity discount was a rate of 20% to the quoted share price of Turkcell.

57. Cukurova argued that Professor Lind had substantially overstated the applicable discount. It relied on an expert report from Mr Osborne, who identified what he said were a number of errors in Professor Lind's report. They included two

particular points relied upon in Cukurova's case. The first was Professor Lind's assumption that the acquisition of the B shares would transform Sonera's existing illiquid shareholding into an entirely liquid and marketable interest in a listed company, whereas, in fact, it would have caused a much more modest improvement in liquidity. The second was that Professor Lind's opinion was based on outdated research which overstated the illiquidity discounts observed in the transactions studied, not least because they failed to control for other relevant factors.

58. In his report Mr Osborne expressed the view that Professor Lind's figure of 20% was too high and that a figure of around 10% would be more in line with later empirical evidence as to the total impact of illiquidity on the value of a shareholding. He said that in this case the increase in liquidity achieved through a change in control was likely to be small and therefore the impact must be materially lower than 10%. He said much the same in the course of his oral evidence. In its post-hearing brief Cukurova contended that Professor Lind had over-stated the applicable discount and that a discount in the order of 5 to 7% would be more appropriate. In its post-hearing brief Sonera referred to Mr Osborne's evidence that the discount should be no higher than 10% or materially lower than 10%.

59. Cukurova recognises that in its Final Award the Tribunal expressly recognised that there was a dispute between the experts as to the appropriate illiquidity discount but complains about the following passage in para 225 of the final Award:

> **"As to the percentage of the discount, Professor Lind has explained in detail the range that is discussed in the literature, in some cases from 13% to 45%. He has explained why he considered the 20% as the proper rate. Mr Osborne has not provided an alternative rate and the Tribunal sees no reason for picking a rate different from that proposed by Professor Lind. It accepts this percentage."**

The sentence underlined was underlined, not by the Tribunal, but by Cukurova in its case. On the basis of it Cukurova submits that the Tribunal ignored the evidence of Mr Osborne that the maximum the discount could possibly be was 10%, which (if accepted) would reduce the damages by 40%. It submits that, by ignoring Mr Osborne's evidence as to the rate, the Tribunal placed Cukurova in the same position as if it had not been permitted to adduce any evidence at all, contrary to the rules of natural justice.

60. It is submitted on behalf of Sonera, on the other hand, that Cukurova's complaint cannot be that Cukurova was unable to present its case because it is not in dispute that it was able to (and did) adduce the evidence of Mr Osborne. In these circumstances the Board accepts Sonera's submission that this is not a case within section 36(2)(c) of the Arbitration Ordinance. There was no breach of the rules of natural justice because Cukurova was heard in full on this part of the case. This was essentially the view formed by the judge.

61. The Court of Appeal reached the same conclusion but considered the point in more detail at para 41 of the judgment of Pereira CJ, with whom Baptiste and Michel JAA agreed. In addition to the above, the Court of Appeal held that the Tribunal did not ignore the evidence of Mr Osborne but, given Mr Osborne's lack of definitiveness, simply preferred the rate given by Sonera 's expert, Professor Lind, and the reasoning for it.

62. In the opinion of the Board the Court of Appeal was correct. The Tribunal considered the topic "Removal of the Illiquidity Discount and Control Premium" in detail between paras 211 and 225 of the Final Award. In doing so it considered the evidence of Mr Osborne in some detail. It is true that it did not spell out the evidence of Mr Osborne summarised above, but it appears to the Board that it was well aware of that evidence. In para 223 it noted that one of the grounds on which Mr Osborne disagreed with the evidence of Professor Lind was that "he considered that the illiquidity discount is too high". Para 225 must be read in the light of that. Also, in para 263, which is in the part of the Final Award in which the Tribunal considers "the failed removal of the illiquidity discount" the Tribunal said:

> **"The experts also disagreed on the percentage which had to be taken to express the value of the illiquidity discount. The Tribunal has concluded that it has no basis for fixing a rate other than 20%."**

63. In the opinion of the Board, there is no reason to think that the underlined sentence complained of, namely "Mr Osborne has not provided an alternative rate", is evidence that the Tribunal was not aware of the evidence given by Mr Osborne set out above. He did not give a rate in the way that Professor Lind did but said that it should be a maximum of 10%. It seems to the Board that on this part of the case the Tribunal was accepting Professor Lind's evidence for the reasons he gave, just as (at paras 247 to 258) it accepted Mr Osborne's opinion in preference to that of Professor Lind in arriving at the figure of US$188 million in respect of the loss of bargain.

64. There may be grounds for saying that the Tribunal was wrong to accept the evidence of Professor Lind and to reject that of Mr Osborne with regard to the appropriate figure to take in respect of the illiquidity discount. However those grounds would involve saying that the Tribunal erred on the facts, or perhaps in law. As explained at the outset, the enforcing court is not concerned with such issues. The Board concludes that there is no basis upon which the decision of the judge or the Court of Appeal can or should be reversed, so far as the Tribunal's treatment of the evidence of Mr Osborne is concerned. Cukurova cannot succeed under section 36(2)(c). Nor can it succeed on the basis that enforcement would be contrary to public policy or on the basis of any infringement of the rules of natural justice. Finally, the Tribunal gave reasons for its decision. Whether those reasons were convincing or not is not a matter for the enforcing court.

Conclusion

65. For the reasons given above, all Cukurova's grounds of appeal fail and the Board will humbly advise Her Majesty that the appeal should be dismissed. The Board's provisional view is that Cukurova must pay Sonera 's costs of the appeal but, if it wishes to say that some other order should be made, it should do so in writing within 21 days of the date on which this judgment is handed down.

Note 1 **4A_452/2007, of 29 February 2008.** **[Back]**

Note 2 **4A_103/2011, of 20 September 2011.** **[Back]**
