CA on appeal from Commercial Court (Mr Justice Toulson) before Sir Anthony Clarke; Waller LJ; Sedley LJ. 15th November 2007

Lord Justice Waller :

1. By an award dated 25 April 2005 arbitrators ruled in favour of The Commonwealth Secretariat (CMS) that on a proper construction of a contract between them, and Sumukan Ltd (or more accurately their predecessors in title) (Sumukan), the title in certain software had become that of CMS. Sumukan made various attacks on the validity of that award, attacking the substantive jurisdiction of the arbitrators under section 67 of the Arbitration Act 1996 (the Act), attacking the award on the basis of irregularity under section 68 of that Act and in the alternative seeking permission to appeal on a point of law under section 69 of the Act.

2. The matter came on before Colman J who dealt with the section 69 application and adjourned the other applications. He was of the view that if he had jurisdiction to grant permission to appeal on a point of law he would have done so, but ruled that the contract contained a term excluding any right of appeal to the courts. On 21 March 2007 we dismissed Sumukan's appeal from the decision of Colman J.

3. In the meanwhile the applications under section 67 and 68 had come before Toulson J (as he then was). In a judgment handed down on 14 February 2007 he dismissed those applications, and we are now concerned with the appeal against that decision.

4. Putting the matter broadly for the present, Sumukan through Mr Anthony Speaight QC say that the effect of the contract they signed was (if they are bound by it) to compel them to arbitrate before a tribunal effectively appointed by the other contracting party CMS giving rise to a perception of partiality, and that even in the process of that tribunal being appointed the procedures which might have protected them to some extent against any lack of independence or impartiality were not complied with.

5. CMS' answer through Mr Nicholls QC supported by Mr Letman appearing for the Tribunal, again putting the matter broadly, is that Sumukan are bound by the contract they signed; that the suggestion of any perceived lack of independence or impartiality is misplaced since the Tribunal appointed was of the highest calibre and clearly totally impartial; any failure to comply with procedures was not of a character that could undermine the jurisdiction of the Tribunal which sat and heard the arbitration; and in any event they say Sumukan went ahead with the arbitration in circumstances where with reasonable diligence they could have discovered any of the points now taken, and are precluded from complaining now by section 73 of the 1996 Act.

6. Certain of the points involved seem to me to be capable of a short answer in support of the judge's conclusion, and it may be convenient to get such points out of the way so that when tracing the history of the appointment of the Tribunal one can keep ones eye on the points that matter. First there is no doubt in my view as to the contract that was entered into. That contract contained an arbitration clause in the following terms:-

   "The Secretariat and the consultant shall endeavour to settle by negotiation and agreement any dispute which arises in connection with this contract. Failing such agreement the dispute shall be referred to the Commonwealth Secretariat Arbitral Tribunal [CSAT] for settlement by arbitration in accordance with its statute which forms part of this contract and is available on request."

7. That clause referred to "its statute" available on request as forming part of the contract. Sumukan did not request a sight of the statute but the material terms of that statute were:-

   "Article II

   1. The Tribunal shall hear and pass judgment upon any application brought by:
   (a) a member of the staff of the Commonwealth Secretariat,
   (b) the Commonwealth Secretariat
   (c) any person who enters into a contract in writing with the Commonwealth Secretariat
   Which alleges the non-observance of the contract . . .

   Article IV

   1. The Tribunal shall normally be composed of one member who shall be the President or if the President is for any reason unable to sit, some other member of the Tribunal designated by the President.
   2. In exceptional cases where, in the opinion of the President the complexity of the matter requires it, the Tribunal shall sit as a three-member Tribunal empanelled by and including the President but no two members may be nationals of the same country.
   4. The members of the Tribunal, all of whom shall be Commonwealth nationals, shall be of high moral character and must:
   a. Hold or be qualified to hold high judicial office in a Commonwealth country
   b. Be jurisconsults of recognised competence with experience as such for a period of not less than 10 years.
   5. The president of the Tribunal and four other persons shall be appointed by the Commonwealth Secretary General on a regionally representative basis after consultation with governments and the Commonwealth Secretariat Staff Association to be available to serve as members of the Tribunal. Each appointment shall be for a period of three years and may be extended for further periods of three years.
   7. The President of the Tribunal shall hold office until a successor is appointed.

   Article XIII

The present statute may be amended by the Secretary-General. Before making any amendment, the Secretary-General shall seek the views of the President and shall consult with Commonwealth governments and the Commonwealth Secretariat Staff Association."

8. The arbitral rules made by the CSAT were in the following terms:-
"Rule 1
The President shall direct the work of the Tribunal.
Rule 2
If the President should cease to be a member of the Tribunal or should resign the office of President before the expiration of the normal term, the Secretary-General shall appoint a successor for the unexpired portion of the term.
Rule 3
The term of office of the President and members of the Tribunal, unless they sooner resign or for whatever reason cease to be members of the Tribunal, shall continue until the disposal of any applications commenced before them."

9. Mr Speaight in his submissions suggested that "it would be an unusual and onerous term in a contract that an arbitration be conducted by a panel wholly appointed by one side and under statutes capable of being changed at any time by that one side". He suggested that such terms would not be of contractual affect if they were not drawn to Sumukan's attention on the *Interfoto* principle as explained in our previous judgment paras 44 to 50. I am doubtful whether Mr Speaight is right in suggesting that CMS could have changed the statute in a way which was adverse to Sumukan post- contract, (and they certainly did not purport to do so), but in any event in my view the argument based on the *Interfoto* principle disapplying terms of the contract as opposed possibly to adopting a strict construction of the same could not succeed as it did not succeed previously. This was a commercial contract. True, Sumukan had no choice as to the terms of the contract so far as arbitration was concerned but that is a common feature of and the reality of many commercial contracts. Sumukan are not a consumer with the protection of consumer legislation and are bound by the terms of the contract they made. It follows they were bound to accept a Tribunal appointed in accordance with the relevant statute to which the term refers. As we will see there may be room for argument as to which that statute was, and what it requires. I will come to that. But what seems to me to flow from that first point is important. If and in so far as Sumukan would seek to attack the award on the basis that a procedure in accordance with the statute could not produce an impartial tribunal, and that on that basis there was a serious irregularity (relying on Section 68 (2)(a) taken together with section 33 of the 1996 Act), that attack is doomed to failure. Having agreed to it, they must be taken to have waived any objection.

10. But that does not necessarily mean that all arguments about a perception of lack of independence or impartiality are irrelevant when one comes to consider the most difficult part of the case. The most difficult part of the case arises out of the fact that it is accepted that there was a degree of non-compliance with the relevant statute in the appointment both as a member and then as President of the CMS arbitral panel, Professor Chappel. It was he that presided over the Tribunal of three which sat and made the award.

11. The key issues on the appeal are (1) whether any non-compliance with the relevant statute was such as to affect the substantive jurisdiction of the panel that sat and made its award; and (2) if so, whether CMS can succeed in their arguments that any failures to comply with the statute was cured in some way, or that the failures could with reasonable diligence have been discovered by Sumukan, so as preclude reliance on them by virtue of section 73.

12. In essence the judge was in CMS' favour on the issue relating to jurisdiction albeit (as I shall indicate below) without considering the questions quite as set out above, and on this aspect Sumukan are the appellants. If the judge had been in Sumukan's favour on that issue he would have been in their favour on the section 73 point, and on that issue CMS are the appellants.

13. In relation to the above issues the provisions of the statutes and indeed the Rules are important. In that context, when the contract between CMS and Sumukan was made, the statute was the 1999 statute. This was not it should be said a parliamentary statute. It was something agreed between members of the Commonwealth. The 1999 statute was a successor to a statute originally made in 1995, and it was itself succeeded by a statute made in February 2004. The contract was made on 6th July 2001 and thus the 1999 statute the material provisions of which I have already set out was the statute applicable at the time of the contract.

14. Sumukan commenced the arbitration in 2003. Indeed Professor Chappell held a hearing at which CMS sought to strike out Sumukan's claim in 2003 all therefore at a time when the 1999 statute was the only statute in being. But it was only after the coming into force of the 2004 statute that the panel were appointed in July 2004, and indeed when Clifford Chance asked for a copy of the relevant statute when advising Sumukan in 2004 on questions relating to the jurisdiction of the arbitration Tribunal, they were sent a copy of the 2004 statute. Directions hearings took place in September and November 2004, and the hearing of the arbitration itself took place in London between 8-11 February2005. There is thus room for debate as to which is the relevant statute – the one when the contract was made, the one when the arbitration was commenced or the one when the Tribunal was empanelled and the hearing took place. It seems that there was an intention to agree *"transitional provisions to deal with the terms of current members*" of the panel [see letter to Professor Chappell of 26 June 2003] but none were ever produced.

15. The judge did not think it would make much difference which statute applied and he may be right, but there is no doubt that slightly different considerations would apply depending on which is the right statute. That is because the critical provision said not to have been complied with if the 1999 statute was the applicable statute was the

term requiring consultation. The question is whether that lack of consultation affects the validity of Professor Chappell's appointment either as a member of the Panel or as President.

16. That Article was replaced in the 2004 statute by an Article IV containing these terms:-

"5. (a) The Secretary-General shall appoint as the President and four other members of the Tribunal those persons selected by Commonwealth governments on a regionally representative basis.

(b) The President and members shall be appointed for four year terms provided that governments may agree, in the interests of continuity of Tribunal membership, that the Secretary-General should appoint not more than three of the five members initially for periods of two years only.

(c) Governments may re-select members for one additional term.

6. Before selecting a person for appointment as the President or as a member of the Tribunal, Commonwealth governments shall consider any views expressed by the Secretary-General and the Commonwealth Secretariat Staff Association."

17. It would seem from a circular letter to governments dated 29 October 2003 that one reason for changing the wording of Article IV was to give a greater degree of independence to the appointment procedure. If Article IV of the 2004 statute was the applicable provision, that provision was clearly not complied with so far as the President of the tribunal was concerned. Whatever the strength of Sumukan's argument as to a failure to consult to which I will come, its argument would appear to be stronger if the Commonwealth government should have actually done the appointing. But as I understand Sumukan's case, they concentrate on the 1999 statute as being the statute referred to in the contract.

18. As I understand it CMS also now through their counsel contend for the 1999 statute, although at one time they might not have done so (see para 9 of the witness statement of Ms Mould-Iddrisu CMS' Director of Legal Affairs). Perhaps this is unsurprising if as I have suggested a failure to comply with those provisions is more difficult to portray as lacking in relevance.

19. The point also has a bearing in the waiver context. Clifford Chance were given the 2004 statute by fax dated 4 November 2004 at a time when Sumukan were considering whether to object to the jurisdiction of the tribunal in 2004. If the 1999 statute is the relevant statute it could be said to be harsh on Sumukan that CMS can now say that Sumukan should have raised any questions on lack of consultation. CMS in answer rely on the fact that Ms Jan Jananayagam in her statement says after Sumukan commenced the arbitration in April 2003, she had a copy of the 1999 statute [see paragraph 8 of her statement]. Furthermore it is right to say (as I understand paragraph 111(d) of CMS' skeleton) that CMS' case is that on looking at the terms of the 2004 statute one question which should have been asked was whether the members of the panel had been duly appointed by member states. If that question had been asked they say (I assume), it is likely that the lack of consultation (if the 1999 statute was relevant), as well as the lack of appointment (if it was the 2004 statute), would have been revealed.

20. In any event although it may not make any difference to the result, it might not be totally irrelevant which statute applies. But since both sides seem to contend for the 1999 statute being the relevant statute, and since there is a strong argument that they are right about that and CMS' original view as expressed in their witness statements was wrong, like the judge I will concentrate on that statute.

21. The chronology and findings of the judge in relation to Professor Chappell's appointment both as a member of the Panel and as President thereof is unchallenged, and it is convenient to incorporate it verbatim into this judgement.

"32. In 1999 the director of the Secretariat's Legal and Constitutional Affairs Division ("LCAD") put forward to the Secretary-General various names for possible appointment as members of the CSAT. The LCAD acts for the Secretariat in all arbitration proceedings, but it appears at this time also to have played a prominent role in organising the appointment of members of CSAT. The name of Professor Chappell was put forward by a senior member of the staff of the LCAD, Ms Dianne Stafford. She is an Australian lawyer and had first met Professor Chappell when she was employed in the Criminal Law Division of the Attorney-General's Department in Australia and he was chairman of the Institute of Criminology. She suggested his name because of his legal skills, his experience on the Administrative Appeals Tribunal in Australia and his lengthy experience in Commonwealth and international matters.

33. Without consulting Commonwealth governments as required by Article 4(5) of the 1999 statute, on 3 November 1999 the Secretary-General wrote to Professor Chappell:

"I believe that the legal and constitutional affairs division of the Secretariat has been in touch with you regarding the possibility of your being available to serve as a member of the Commonwealth Secretariat Arbitral Tribunal and I understand that you will be willing to do so.

I am therefore pleased to send you this formal letter of appointment as a member of the Tribunal in terms of Article 4.5 of the statute of the Tribunal."

34. In 2001 the President of the CSAT wished to retire without completing his full term of office for health reasons.

35. On 26 June 2001 Ms Stafford, now herself the Director of the LCAD, sent a memo to the Secretary-General suggesting that he could appoint as a replacement one of the existing Tribunal members, of whom there were three including Professor Chappell. She also suggested reasons for not appointing either of the other two. She added that whatever action was taken required consultation with the staff association and endorsement by governments. This was incorrect advice. The statute required consultation both with governments and with the staff association.

36. *Ms Stafford must have sounded out Professor Chappell about his willingness to accept the Presidency, because on 17 July 2001 he sent her a fax from Sydney to say that his minister was happy for him to serve in the proposed position.*
37. *A handwritten note of Ms Stafford dated 19 July 2001 records that the Secretary-General had spoken to the chair of the staff association about his intention to appoint Professor Chappell.*
38. *On 20 July 2001 Ms Stafford wrote on behalf of the Secretary-General to the Australian High Commissioner in London (but not to other Commonwealth governments) to advise him of the Secretary-General's wish to appoint Professor Chappell as President of the CSAT.*
39. *On 30 July 2001 the Secretary-General wrote to Professor Chappell formally asking him to accept the position of President until January 2002, when his predecessor's term of office was due to expire.*
40. *On 31 July 2001 the Secretary-General issued a circular letter, no. 17/2001, to Commonwealth governments stating:*

    "The rules of the Tribunal require that when a President resigns mid-term I shall appoint a successor for the remainder of the term of the President. Accordingly I have asked Professor Duncan Chappell of Australia who himself was appointed a member of the Tribunal in November 1998, to take over as President of the Tribunal until the expiry of the term of the President in January 2002."
41. *Mr Nicholls QC invited me to view this letter as a form of consultation but he did not press the argument. In reality it was a notification of action taken rather than consultation about a possible course of action.*
42. *By January 2002, when Professor Chappell's appointment was due to end, no steps had been taken either to reappoint him, after proper consultation, or to appoint another person as President.*
43. *The next relevant event was a meeting on 29 May 2002 between Mr Winston Cox, Deputy Secretary-General, and the Chair and Vice-Chair of the Staff Association. A minute of the meeting recorded:*

    "2. Mr Cox informed the CSSA representatives that the Secretary-General had delegated to him the authority to appoint a chair of the CSAT pursuant to Article 4 of the CSAT statute. The Secretary-General was named in a matter before the CSAT and wished to avoid any conflict of interest in CSAT appointments.

    3. Mr Cox advised the CSSA that, after giving due consideration to the members of the CSAT, it was his intention to appoint Mr Duncan Chappell as the Chair."
44. *A comment was also noted that some staff had expressed concern about Professor Chappell's association with the Director of LCAD, who was the Secretariat's chief in-house counsel. For the avoidance of doubt, I stress that whatever might or might not be read into the comment there is now no suggestion of personal intimacy; they were professional colleagues who had come to know each other socially. After further informal discussions, the representatives of the staff association confirmed to Mr Cox that they had no objections to Professor Chappell's appointment. However, no such further appointment of Professor Chappell was made at that stage or thereafter.*
45. *On 8 July 2002 Mr Cox issued a circular letter stating:*

    "The Secretary-General's circular letter no. 17/2001 advised you that upon the mid-term resignation of the founding President of the Commonwealth Secretariat Arbitral Tribunal he had, in reliance on the rules of the Tribunal, appointed Professor Duncan Chappell of Australia to serve as President of the Tribunal for the remainder of the original term of appointment of Justice Cross. That term of office has now expired and the Secretary-General has authorised me to deal with matters relating to the Tribunal.

    Professor Chappell is in the course of handling three cases one of which has been set down for hearing and two other applications have commenced. Accordingly it is my view that it would be inappropriate to seek to make any new appointment at this time.

    The statute of the Tribunal states that 'the President of the Tribunal shall hold office until a successor is appointed'. The rules of the Tribunal expressly provide for a situation where the term of office of the President or a member expires when applications have commenced before them. I therefore propose that Professor Chappell remain as President of the Tribunal. I will consult with governments, as is required by the statute of the Tribunal when circumstances permit the making of a new appointment as President of the Tribunal.

    I am sure that you will agree that the course of action I propose is the only possible one in the circumstances. If I do not receive opinions to the contrary by 15 August 2002 I shall advise Professor Chappell accordingly."
46. *It was not argued on behalf of the Secretariat that this process constituted an appointment of Professor Chappell. Rather, Mr Cox was giving his reasons for not considering it necessary or appropriate to make an appointment (as he had been intending to do at the time of his meeting with representatives of the Staff Association two months earlier).*
47. *Professor Chappell's status therefore depended on Article 4.7 and/or Rule 3 (to which Mr Cox referred in the third paragraph of the circular).*
48. *Article 4.7 has in my view to be read with the remainder of the article. Under Article 4.5 the President was to be appointed for a period of three years after consultation with governments. It would be inconsistent with the object of that provision for the Secretary-General to extend indefinitely the President's term by simply taking no steps to initiate the appointment of a successor. I would read the purpose of Article 4.7 as being to prevent an interregnum if, despite proper efforts being made to appoint a President in accordance with Article 4.5, an interregnum would otherwise have occurred (for example, because of a short delay in a new appointee's availability to take up office).*

49. The rules are subject to the statute, and I would read Rule 3 as having an interim purpose, i.e. of permitting members of a tribunal to continue to hear an application once they had embarked on it, but not as a basis for deferring the entire appointment process under Article 4 of the statute.

50. In any event, the cases referred to in the second paragraph of Mr Cox's circular were concluded by November 2002, at which point the CSAT had no outstanding cases.

51. Still nothing was done to regularise Professor Chappell's position or to appoint a successor.

52. Sumukan began its arbitration on 28 April 2003.

53. On 26 June 2003 Mr Cox wrote to Professor Chappell apologising for not having answered letters from him and saying:

"We share your concern that action be taken to place the membership of the Tribunal on a firm footing and are conscious that your own position as President rests, at this time, on Article 4.7…I see the way forward now as having a revised statute for the Tribunal approved by Commonwealth governments in the next few months and hopefully well before heads of government meet in Nigeria late this year.

As you will see from the draft statute with this letter, the system of appointment by the Secretary-General is to be replaced by a system of selection by member governments. We have not yet drafted the transitional provisions that will be needed to deal with the terms of current members….

If you are agreeable to remaining as President until governments select new candidates for appointment I would be most grateful."

54. On 29 October 2003 the Secretary-General issued a circular letter about proposed changes to the statute. The letter stated:

"The major revision proposed is to the selection process for the Tribunal members. I am currently responsible to appoint the Tribunal members on a regionally representative basis, after consulting with governments and the Commonwealth Secretariat Staff Association (CSSA). With the proposed amendments to Article 4, the responsibility for the selection of Tribunal members would rest with governments. My views, as well as those of the CSSA, would be considered by governments before the selections would be made. This change is generally consistent with the approach adopted by other international organisations and would allow member governments, who are independent from the Tribunal proceedings, to have a more direct role in selecting the appropriate jurists to serve on the Tribunal…

I am keen that we expedite the process of amending the statute so that it is universally accepted as fully consistent with the principles of fairness, transparency and international human rights law…"

55. As already recorded, the new statute was finally approved and came into force on 18 February 2004.

56. In July 2004 Professor Chappell determined that the constitution of the Tribunal to hear Sumukan's claim should be himself, Ms Weekes and Dame Joan Sawyer, and Sumukan was notified accordingly. At that stage the hearing was set to begin on 23 August but it later had to be postponed.

57. On 9 September 2004 Ms Weekes conducted a directions hearing. Among other things, she directed that on the first day of the oral hearing (which was then due to be 3 November 2004) the Tribunal would rule on the Secretariat's submission that it had no jurisdiction to deal with part of Sumukan's claim which alleged slander and negligent misrepresentation.

58. In October 2004 Mr Justice Banda was appointed to be the President of the CSAT. He took up his duties on 1 January 2005.

59. Mr Cox's letter to Professor Chappell dated 26 June 2003 had referred to the need to draft transitional provisions to deal with the terms of current members, but none were drafted. There was some discussion in argument about the effect of the change in statute in terms of the contract between the parties. It does not seem to me to be critical, but I would construe the reference to the statute in the contract as a reference to the statute in force at the relevant time. In other words, I would accept (and Mr Speaight does not dispute) that Dame Joan Sawyer was validly appointed for the purposes of the contract, although she was appointed under the terms of the 2004 statute.

60. The full hearing did not commence on 3 November 2004. Instead there was a further directions hearing at which it was ordered, among other things, that the parties were to file written submissions on the jurisdiction issue identified in Ms Weekes' directions by 15 December 2004, after which the Tribunal would aim to give a written ruling by 21 January 2005. The substantive hearing was re-fixed for dates in February 2005, when it duly took place."

What is the result of a failure to consult? Was it cured? Does it affect the substantive jurisdiction of the panel that made the award?

22. A distinction is drawn particularly in the skeleton of Mr Letman between an appointment to the Panel from whom arbitrators would be drawn and the actual appointment of the tribunal which ultimately made the award in this case. I will use the word Panel and the word Tribunal to differentiate, but I do not myself think there is any material distinction for the following reason. Any arbitration tribunal was to be presided over by the President of the Panel, and indeed the persons to sit on the Tribunal were selected by that President. If therefore there was a defect in the appointment of the President so as to make his appointment to the Panel invalid, that would as it seems to me have an effect on the substantive jurisdiction of the arbitrators.

23. Furthermore if the arbitrators were to be selected from a Panel, and if there was a procedure for the appointment of the Panel aimed at guarding against any apparent lack of independence, it seems to me right

that a substantial failure to comply with that procedure should have an effect on the jurisdiction of the tribunal itself.

24. It is accepted by CMS that prior to Professor Chappell being appointed as a member of the Panel there was no consultation with member states under Article IV(4) of the 1999 statute; it is accepted that prior to his appointment as President in 2001 there was no consultation with member states under Article IV (4).[It is also accepted as I have said that he was certainly never appointed in compliance with the 2004 statute i.e. actually appointed by member states].

25. It follows there has been non-compliance with the appointment procedure. As already indicated the statutes were not parliamentary but they were incorporated into the contract between Sumukan and the CMS, and Sumukan are prima facie entitled to have the agreed procedure for appointment of any arbitrator complied with. Thus once non-compliance is established it is for CMS to show that a failure to comply with the relevant statute was either inconsequential in some way or cured by the fact that the States clearly knew he was acting as a member and as a President and made no protest; or to show that the procedural failure was of a kind which did not lead to an invalid appointment. This latter they seek to do in reliance on the nature of the provision as surplusage or because they submit that a de facto principle applies in arbitration so as to cloak the tribunal that sat with jurisdiction.

26. With the greatest respect to the judge, I am not sure he fully faced up to the above points. In paragraph 65 he simply assumes albeit having noted that the consultation procedure had not been complied with that Prof Chappell's appointment as a member of the Tribunal and as President was effective. He also seems unhappy about Article IV (7) being capable of being used in the way it was, but holds that since it was used, it was effective.

27. I would accept that Article IV (7) was not intended to allow a long term holding over but agree with the judge that if a holding over occurred, Article IV (7) would apply to preserve a President as President until another was appointed. But in my view it could only have that effect on a President validly appointed. I thus would reject the judge's reliance on Article IV(7) as providing an answer. The prior question is whether the Professor was validly appointed as President or whether any defect was cured or irrelevant. It is to that question which I now turn.

28. We were referred to a number of cases ***Finzel, Berry & Co v Eastcheap Dried Fruit Co*** [1962] 2 Lloyd's Rep 11, ***Presbyterian Church (NSW) Property Trust v Rodean Construction pty Ltd*** [1982] 2 NSWLR 398, ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 at 381-390, ***Australian Foods v Pars Ram*** [2002] NSWSC 1180. They assist in demonstrating that the court will wrestle to avoid setting aside an otherwise perfectly good decision by virtue of non-compliance with a provision which really does not matter. In the instant case it seems to me that the correct question is whether, as a matter of contract, compliance with the obligation to consult member states was a provision simply for the benefit of the Commonwealth Governments so that they could check whether a fair balance between different parts of the world was being kept, or whether the provision was also for the benefit of those who might become involved in arbitration with CMS in the sense that the requirement to consult might assist in promoting the independence of panellists from whom arbitrators were to be drawn.

29. I accept as Mr Nicholls and Mr Letman contend that the main point of the requirement to consult was probably to enable member states to see that the balance of representation on the panel between different parts of the world was maintained. However CMS have difficulty in arguing that the provision had nothing to do with promoting the independence of the arbitrators or the President. Their own skeleton argument paragraph 63 says that one aim was to promote "independence". Furthermore when CMS came to alter the statute from 1999 to 2004, it would seem the alteration to the requirement that states should actually appoint persons to the panel had the perception of independence or lack thereof in mind [see again the letter of 29 October 2003].

30. In my view Sumukan are entitled to say that even if they must be taken to have agreed to a tribunal appointed without any input from them, and with a major influence of the party with whom they were contracting, they were at least entitled to rely on compliance with any measure that might protect even to a small degree the independence of the panel or the President. I should add, although the statute contemplated appointees of very high calibre that fact does not preclude Sumukan being entitled to so insist. I would thus hold unless the lack of consultation was cured or was something which Sumukan are precluded by section 73 from relying on, Sumukan should succeed in their appeal.

31. Was any lack of consultation cured? As the judge recognised there were circulars informing member states as to the position, but in one instance Mr Nicholls did not before us I think press at all and before the judge did not press strongly that the circular could be described as consultation (see paragraph 40 of the judge's judgment quoted above).

32. The only other contender which Mr Nicholls did seek to rely on before us as consultation appears not to have been relied on before the judge [see paragraphs 45 and 46 of the judge's judgment quoted above].

33. In truth when one examines the skeleton arguments of Mr Nicholls and Mr Letman, curing the lack of consultation is not pressed with any vigour and rightly. Informing the member states of a fait accompli cannot equate with consultation intended to take place before an appointment has been made. I would not hold that any failure to consult had been cured.

34. Does the *de facto* concept apply? I do not think it does in the arbitration context. The question is whether the agreement under which the arbitrators have been appointed has been complied with. Where one party has

failed to abide by the procedure required for appointing the President it lies ill in his mouth to seek to rely on any de facto arguments. I understand an argument that it is unsatisfactory to allow an arbitration to go ahead with the costs incurred, and indeed the more unsatisfactory for the person who loses only to take a point on jurisdiction once they have lost, but it is section 73 which will assist in that regard if it applies and not an appeal to a de facto principle.

35. I turn therefore to section 73. Was the judge entitled to find that Sumukan could not with reasonable diligence have discovered the lack of validity? This again is not straightforward. As one sees from the language of the 1996 Act e.g. section 31, the Act is concerned that substantive jurisdiction points should be taken before expense and time is incurred. It could be said to be an obvious point to check whether the appointment procedures have been complied with. As already indicated while those representing Sumukan were considering challenges to the arbitration panel, Clifford Chance were sent the 2004 statute as the relevant statute, and although at first sight that might be said to be a point in Sumukan's favour to my mind it is not because by that statute the requirement was that the arbitrators had to have been appointed by member governments. If it was an obvious question to ask whether the appointment procedure had been followed, no doubt the position of what had actually happened would have become clear.

36. However the judge has found that it would be wrong to construe section 73 so as to hold that Sumukan could with reasonable diligence have discovered facts which it neither knew nor believed nor had grounds to suspect. Indeed since CMS were under the statute to be instrumental in carrying out the requisite procedures, and since it seems CMS did appreciate that the procedures had not been gone through, it can be said with some force it was for CMS to draw the matters to Sumukan's attention and seek a waiver. Sumukan were (it might legitimately be said) entitled to rely on the fact that CMS would not be suggesting a particular Tribunal unless the procedures had been complied with.

37. Furthermore the judge quotes Lord Hope's observation in ***Miller v Dixon*** [2002] 1 WLR 1615:-

"the Strasbourg jurisprudence shows that, unless the person is in full possession of all the facts, an alleged waiver of the right to an independent and impartial tribunal must be rejected as not being unequivocal"

38. I would uphold the judge's decision on this aspect. It thus follows that this award must be set aside and the matter remitted to a differently and properly constituted tribunal under the 2004 statute unless of course a sensible compromise can now be reached.

Lord Justice Sedley :

39. I respectfully agree with both the reasoning and the conclusion of Lord Justice Waller. I take the liberty of adding to his judgment only because the case throws up at least two issues of general importance. One is the potential significance of a failure to follow appointment procedures in a situation such as the one before us; the other is the ambit of the de facto doctrine of jurisdiction.

40. The background to both issues is that the Commonwealth Secretariat was created by the Commonwealth Secretariat Act 1966, which gave it corporate status with immunity from suit, save in arbitrations under s.1(3). This subsection, as amended by the Arbitration Act 1996, deemed every contract entered into by the Secretariat and not containing an express arbitration clause to contain such a clause.

41. The contract with Sumukan contained an express provision for arbitration before the Commonwealth Secretariat Arbitral Tribunal pursuant to the tribunal's statute, an internal document which thereby acquired contractual force. Its detail, described by Lord Justice Waller, included provision for the appointment of the president and members. In relation to Professor Chappell's appointment as president, the prescribed procedure was not followed. In particular the Commonwealth governments were not consulted about it.

When is a procedurally incorrect appointment invalid?

42. The significance of a departure from a prescribed process has been bedevilled in modern public law by an opaque distinction between mandatory and directory requirements. A departure from the former vitiates a decision; a departure from the latter does not; but deciding which class any particular requirement falls into has been frequently as much a matter of impression as of law. Wade and Forsyth *Administrative Law* (9th edition, p.223-5) gives an account of the unhappy state of the decided cases.

43. In ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 the High Court of Australia abandoned this dichotomy. A majority (at §93) held:

"The classification is the end of the inquiry, not the beginning (73). That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales (74). In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute" (75)

44. It is true that the ***Blue Sky*** formula is also to an extent question-begging. Legislative purpose may be a mare's nest where it is probable that the legislature never considered the issue at all. Any such purpose has to be imputed to the legislature by reference to what the court judges to be the significance of the requirement. It may be, therefore, that whatever test is adopted – even a simple vernacular test such as whether the departure matters –

it will return to two of the key questions canvassed under the old law: does the decision concern a procedural safeguard for persons affected by the scheme, and does it affect private rights (see Wade and Forsyth, loc. cit.)?

45. The error in the appointment of Professor Chappell has both features; but because it affects Sumukan's private rights only at two removes, it is preferable to focus on its relationship to procedural safeguards.

46. In my judgment the requirement for consultation with the Commonwealth governments about the appointment of the president and members of the arbitral tribunal is a real and important safeguard for anyone with a claim against the Commonwealth Secretariat. The unusual set-up is dictated by the need to provide a forum which will impartially and bindingly adjudicate on disputes involving the London-based Secretariat without requiring the sovereign states which make up the Commonwealth to submit to the jurisdiction of the ordinary courts. The solution, underpinned by legislation, is an arbitral tribunal appointed entirely by the Secretariat, to which anyone who contracts with the Secretariat must agree to submit disputes. This makes the suitability and impartiality of the tribunal a critical safeguard for a party who of necessity has no say in its constitution.

47. How then could consultation with the governments make any difference to an appointment? Mr Nicholls QC submits that it is tokenism and of no material consequence. At most, he suggests, it affords an opportunity to promote regional interests. I strongly disagree. No doubt each government's response will depend in the first instance on whose in-tray the proposal arrives in. But while some officials in government service may nod it through without further debate, others may very well want to consider, first, the suitability of the particular candidate and, secondly and in any event, whether there is someone preferable. Take Professor Chappell. His integrity and ability are undoubted, but his CV shows him to be a criminologist with no background in contract law or arbitration, albeit strong recent experience as deputy president of the Australian Federal Administrative Appeals Tribunal. While it would have been noted that the CMS tribunal's workload to date had concerned only staff issues, it might also have been noted that it potentially included anyone who had a contractual dispute with the Secretariat.

48. It is therefore perfectly possible that, had the governments been consulted, someone with more experience of arbitration and contract law might have been proposed and, if proposed, appointed as president. While this in no way undermines the standing of Professor Chappell had he been duly appointed, it illustrates how important it is from the point of view of those who have no choice about the arbitration procedure or its personnel that the prescribed filters on appointment are used, so that the best candidate whom the collective knowledge of the member states can suggest is approached and, if willing, appointed.

49. I would therefore hold that the appointment procedure exists at least in part for the protection of parties to arbitrations against the Secretariat. The departure from it rendered Professor Chappell's participation as president in Sumukan's arbitration unlawful and the award a nullity.

Can there be a de facto arbitrator?

50. I respectfully agree with Lord Justice Waller that there is no room in the arbitration field for the common law doctrine which, in some circumstances, validates the acts of an apparent and reputed judge.

51. The de facto doctrine is an escape from the ordinary consequences of a defective or non-existent judicial appointment, adopted by the common law in the interests of legal certainty. It has been applied at least three times in recent years by this court (***Fawdry v Murfitt*** [2003] QB 104; ***Coppard v Customs and Excise Commissioners*** [2003] QB 1428; ***Baldock v Webster*** [2006] QB 315); but it is a remedy of last resort. It sails close to the wind of article 6(1) of the European Convention on Human Rights, which entitles litigants to "an independent and impartial tribunal established by law". The (non-binding) EU Charter of Fundamental Rights, art. 47(2), it is worth noting, expands this to "*previously* established by law", a provision which, as noted in ***Coppard***, §38, could, if made binding, spell the end of the de facto doctrine.

52. Even with its statutory foundation, the Commonwealth Secretariat's arbitral tribunal is not a court of law or otherwise part of the system of public justice. It is in essence, like any other arbitral tribunal, a contractual arrangement, and the validity of things purportedly done in setting it up is to be gauged by the contractual terms, wherever they are found, as construed by the courts. These leave no space in which the common law can make good a want of power.

Sir Anthony Clarke MR:

53. I agree that this appeal should be allowed, substantially for the reasons given by Waller and Sedley LJJ. I add a few words of my own because we are differing from the judge and because the effect of our decision will be that, in the absence of compromise, there will have to be a fresh arbitration before a new tribunal appointed under the 2004 statute with the result that large amounts of costs have been thrown away and more costs are likely to be incurred in the future. I summarise the reasons which have led me to the conclusion that the appeal must be allowed in this way.

The arbitration agreement

54. By the express terms of the arbitration clause the parties agreed that, failing agreement, *"the dispute shall be referred for settlement by arbitration in accordance with its statute*". By Article IV.5 of the 1999 statute,

"the president of the Tribunal and four other persons shall be appointed by the Commonwealth Secretary-General on a regionally representative basis after consultation with governments …".

As I see it, it follows that a party contracting with CMS, like Sumukan, was entitled to have the dispute resolved by a panel appointed in accordance with the statute.

55. While it might be argued that the sole purpose of the consultation with governments was to ensure that the Tribunal would consist of arbitrators appointed on a regionally representative basis, I do not think that it can have been intended that that should be the sole purpose. In circumstances in which one of the parties to contemplated arbitrations was appointing the potential members of future arbitration panels, the statute should be construed as requiring consultation with Commonwealth governments in order to ensure (no doubt among other things) the impartiality and independence of the arbitrators on the panel. I should add that I agree with the reasoning of both Waller and Sedley LJJ in this regard. Thus, Sumukan was entitled to a panel consisting of arbitrators who had been appointed only after such consultation.

Jurisdiction

56. The Commonwealth governments were not consulted before Professor Chappell was appointed a member of the Tribunal in 1999. It follows that he was not properly so appointed. If he had been appointed to a panel in 1999 that appointment would not have been valid. A decision by such a panel would in my opinion have lacked substantive jurisdiction and Sumukan would (subject to the effect of section 73) have been entitled to have an award set aside for want of substantive jurisdiction under section 67 of the 1996 Act. It is to be noted that, in order to be entitled to relief under section 67 (as opposed to section 68), it is not necessary to show that the lack of jurisdiction "has caused or will cause substantial injustice to the applicant".

57. On 30 July 2001 the Secretary-General formally asked Professor Chappell to accept the position of president until January 2002, when the term of the previous president had been due to expire. The circular letter dated 31 July sent to governments by the Secretary-General made it clear that he was appointing Professor Chappell as president pursuant to the Rules of the Tribunal, which required that when a president resigns mid-term, he was to appoint a new president for the remainder of the term. He added that he would later consult governments with regard to two new members, one of whom was to replace Professor Chappell as an ordinary member of the Tribunal. It is thus clear that there was no consultation when Professor Chappell was first appointed president.

58. I do not think that the Rules of the Tribunal can alter the effect of the statute. Thus, the purported appointment of Professor Chappell as president under the Rules did not cure the Secretariat's failure to consult before his initial appointment in 1999. Then, in September 2001 there was a consultation process in respect of the replacement of both Professor Chappell and another ordinary member but not in respect of the president. Next, as the judge held at [42], by January 2002, when Professor Chappell's appointment was due to end, no steps had been taken either to reappoint him after proper consultation or to appoint someone else as president.

59. On 8 July 2002 the Deputy Secretary-General sent a further circular to Commonwealth governments drawing attention to Article IV.7 of the statute, which provides that the president shall hold office until a successor has been appointed. He also drew attention to rule 3 of the Rules, which is quoted by Waller LJ, and observed that Professor Chappell was in the course of handling three cases. He proposed that Professor Chappell remain as president and added:

"I will consult with Governments, as is required by the Statute of the Tribunal when circumstances permit the making of a new appointment as President of the Tribunal."

He added that he was sure that governments would agree that his course of action was the only possible one in the circumstances and that if he did not receive opinions to the contrary by 15 August 2002 he would proceed accordingly.

60. It was not argued before the judge that there was consultation at that time. It would have been difficult to do so in the light of the statement that there would be consultation in the future. In any event, as the judge said at [50], the ongoing cases were concluded by November 2002, at which point the Tribunal had no outstanding cases. In short, at the time that Sumukan began its arbitration on 28 April 2003 nothing had been done to regularise Professor Chappell's appointment as president. Moreover, nothing was done thereafter and, so far as it may be relevant, he was never appointed in accordance with the 2004 statute, which required those appointed to be selected by the governments.

61. In these circumstances, as I see it, the defects in the original appointment of Professor Chappell as a member of the Tribunal were never cured throughout the time he acted as president of the Tribunal and, indeed, as president of the panel hearing this arbitration. In these circumstances I do not feel able to accept the judge's analysis in [61-63] of his judgment. In my opinion it follows that, subject to section 73 of the 1996 Act, the panel lacked substantive jurisdiction. Before turning to section 73 I should add that I agree with both Waller and Sedley LJ that, for the reasons they give, there is no room for the concept of the *de facto* arbitrator in the context of a private arbitration like this.

Section 73

62. The question under section 73 is whether Sumukan has shown that, at the time that it took part in the arbitration, it could not with reasonable diligence have ascertained that the Tribunal lacked substantive jurisdiction. In this regard I agree with the judge and Waller LJ. Sumukan could reasonably think that the Secretariat, whose responsibility it was, had taken all appropriate steps to ensure that the members of the Tribunal (and therefore the panel) had been appointed in accordance with the relevant statute.

Conclusion

63. The above conclusions make it unnecessary to consider the issues under section 68 of the 1996 Act. It follows that, unfortunate though it is, I agree that this appeal must be allowed.

Anthony Speaight QC and Kate Livesey (instructed by Sumukan Ltd) for the Appellant
Colin Nicholls QC and Tom Poole (instructed by Messrs Speechly Bircham LLP) for the Respondent
Paul Letman (instructed by Messrs Charles Russell LLP) for the Commonwealth Secretariat Arbitral Tribunal as Intervener