JUDGMENT : Mr Justice Thomas: Commercial Court. 19th April 2000

Introduction

1. There is before the Court an application by the applicants to set aside an arbitration award on the grounds (under s. 67 of the Arbitration Act 1996) that there was no jurisdiction to make an award in favour of the first respondents as they were not a party to the arbitration agreement and on the grounds (under s. 68 of the Act) that there had been serious irregularities. The applicants also seek an order under s. 28 of the Act that the fees and expenses charged by the second, third and fourth respondents who were the arbitrators should be considered and adjusted by the court on the grounds that they were excessive. Before considering the issues raised by these applications, it is necessary to set out the background.

Background

The original agreement

2. The claimants are the successors in title to Hussmann Craig Nicol Limited (HCN). No point arises on the assumption by the claimants of the obligations and liabilities of HCN and I shall therefore refer to them both as HCN. HCN has been part of the Hussmann Corporation International (Hussmann USA) since 1984.

3. On 5 January 1990 HCN entered into a distributorship agreement (called the sales and services agreement) with Al Ameen Development and Trade Establishment of Saudi Arabia appointing them distributors for their products in Saudi Arabia. Under the law of Saudi Arabia, an establishment is in effect a registered trading name; it has no legal personality distinct or separate from its owner. Al Ameen Development and Trade Establishment was the trading name of Mr Ahmed Pharaon and was registered by the number 101007415. I shall refer to this as the Establishment to distinguish it from the first respondents to which the business was subsequently transferred as I shall explain .

4. By May 1991 the Establishment had ordered refrigeration cabinets from HCN for which a balance remained outstanding of about £217,000. On 28 May 1991, HCN agreed to accept £162,297 (amounting to 75% of the balance) paid by instalments. HCN maintained that their agreement to take 75% was conditional on punctual payment. The payments due were made punctually except in November and December 1991 and January 1992 when the payments were late. When the February 1992 payment was not made, HCN sent a chaser to the Establishment. They responded by saying that Hussmann products had been sold to the Al Azizya supermarket chain without their knowledge.

5. Although HCN manufactured refrigeration display cabinets, their parent Hussmann USA also manufactured cabinets, though their lines were different. HCN's position in response to the point taken by the Establishment was that the sales to Al Azizya were sales by Hussmann USA and HCN was not involved. HCN went on to say that although the distributorship agreement was for HCN products, they had agreed with Hussmann USA to reserve a distributorship fee. This was paid by Hussmann USA to HCN who held that sum against what was owed by the Establishment. Matters between the Establishment and HCN continued to be the subject of dispute; one of the disputes related to a contention by the Establishment that it had appointed a sub-distributor, Al Naerabayn, and that entity was responsible for payment of goods supplied to it and not the Establishment. HCN contended that sums were owing and the Establishment maintained commission was due.

The transfer of the business to a limited liability company

6. In May 1994 the Establishment and HCN agreed that the Establishment would pay $57,428 in settlement of the outstanding balance. It was again HCN's contention that it was a condition of this agreement that this sum would be promptly paid. It will be necessary to refer to the circumstances in which that agreement was made in a little more detail in due course; this is because a change was made shortly before this by Mr Pharaon to the ownership of the business. That change can be summarised as follows:

   - By an agreement made on 25 December 1992, Mr Pharaon incorporated the business carried on by him through the Establishment into a limited liability company known as Al Ameen Development and Trading Company with a registration number 1010122156; this entity is the first respondent to this application and to distinguish it from the Establishment, I shall refer to it as the Company. Mr Pharaon's family held 100% of the shares in the Company. After incorporation, the business of the Establishment was transferred to it and on 14 February 1994 the Ministry of Commerce of Saudi Arabia gave approval to the transfer.
   - Mr Pharaon's evidence was that a circular dated 4 April 1994 was sent to all those he did business with including HCN; that letter stated:
     "Memorandum to Whom it may concern
     We hereby inform that the name "Al-Ameen Establishment" is changed to read as "Al-Ameen Dev. & Trade Co.". A copy of the Gazette paper is enclosed herewith.
     Ahmed Pharaon
     Owner & General Manager"
     The copy of the Gazette dated 26 October 1993 enclosed was in Arabic; no translation was then supplied. From a translation that was before the arbitration tribunal, the Gazette notice made clear that the business of the Establishment had been transferred to the Company.
   - HCN did not know whether they had received the notification, but their position was that they did not know of the transfer from the Establishment to the Company.

   As this issue goes to the jurisdiction of the tribunal, it will be necessary to examine the question in greater detail in due course.

The termination of the agreement and the appointment of the arbitration tribunal

7. The payments promised to HCN were not made. HCN decided to terminate the agreement and did so by notice on 23 April 1996, because they wished to appoint a new distributor and recover the sum due. For both these reasons, on 7 February 1997 HCN commenced an arbitration under clause 17 (the arbitration clause) of the distributorship agreement of 5 January 1990 which provided: *"This agreement shall be governed under the commercial agencies regulation of Saudi Arabia, amendment and implementing procedures in accordance with the Royal Decree No. II dated 20.02.1382 Hijra. Any dispute arising out of or in connection with this agreement shall be finally settled in accordance with the arbitration provisions in the Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chamber of Commerce, by one or more arbitrator(s) appointed in accordance with the set rules."*

8. Their notice requesting arbitration was made against Al Ameen Development & Trade Establishment. In the notice Al Ameen was defined as follows: *"Al Ameen" means Al Ameen Development & Trade Establishment (also known as Al Ameen Development & Trade Co.) a limited liability company incorporated under the laws of the Kingdom of Saudi Arabia (Commercial Registration No. 7415) and having a place of business at PO Box 166, Riyadh 11411, Saudi Arabia."*

   Although the definition referred to it being a limited liability company, the number given was the registration number of the Establishment.

9. The arbitration was to take place pursuant to the terms of the arbitration clause of the distributorship agreement under the Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chamber of Commerce to which it will be necessary to refer in greater detail. On 21 May 1997 HCN nominated Mr Anthony Murray as their arbitrator; he was at the time a partner in a firm of solicitors in Glasgow but has since become a partner of a firm of solicitors in London. On 22 July 1997 Dr Nader Gangi was nominated by Pearson Lowe solicitors instructed by Mr Pharaon and the Company as the arbitrator for the respondents to the arbitration; where it is not clear to me whether any distinction was being made between the Establishment, the Company and Mr Pharaon, I shall refer to the other party to the arbitration as the Respondents. Dr Gangi resigned in January 1998 and was replaced by Dr A Anvari, a lawyer practising in London. Thereafter the Euro-Arab Arbitration System appointed His Honour Judge Eugene Cottran as Chairman of the tribunal; he is a Circuit Court Judge who prior to his appointment had in the course of a distinguished career gained considerable expertise in Arab law. Permission was given by the Lord Chancellor to his appointment on terms that he conducted the arbitration in his own time and that any remuneration or fee charged was paid to HM Treasury. I understand that he very generoulsy and conscientiously agreed to the appointment on these terms to try and assist the Euro-Arab Chamber of Commerce and its new arbitral system. This was the first arbitration they had had which proceeded to a full hearing.

The pleadings, the hearing and the award

10. On 10 April 1997, HCN submitted their statement of claim claiming £108,000; they repeated in this pleading their definition of Al Ameen. The Respondents did not submit their defence and the counter claim until 2 February 1998. An objection was taken by HCN to the service of this pleading on the grounds of delay and this question was referred to the arbitrattion tribunal. Submissions were made. On 20 March 1998 the arbitration tribunal gave a detailed ruling running to some 17 pages dismissing the objection. A reply and defence to counter claim was served by HCN and there were directions meetings. The tribunal thereafter appointed its own expert on Saudi Arabian law; it will be necessary to refer to the tribunal's conduct in relation to the expert evidence in greater detail as it forms the basis of one of the allegations of serious irregularity.

11. The hearing of the arbitration began on Monday 2 November 1998. At the commencement of the hearing HCN raised an objection to the admissibility of the expert evidence; the tribunal in a ruling rejected this. HCN also raised an objection to the Company being party to the arbitration on the basis that it was not party to the distributorship agreement with HCN; they developed this later in the hearing after much more evidence was available. That objection was also rejected by the tribunal. The hearing lasted some 4½ days. On 11 June 1999 the tribunal signed their award. It was a lengthy document of some 68 pages with 9 annexes comprising the preliminary ruling and other documentation. They held:
    - That HCN's claim succeeded to the extent of $57,438.
    - That the counterclaim for commission made by the Company succeeded to the extent of $660,287.32
    - That HCN was therefore to pay the Company $602,859.32
    - That the costs of Pearson Lowe in the amount of £54,310.50 be paid by HCN.
    - That HCN was to pay the amounts paid by Pearson Lowe towards the costs of the Euro-Arab Arbitration System and the arbitrators' fees and expenses which had been fixed by the Arbitration Board in the sum of £85,520.

The issues

12. The application made by HCN raised three main issues:
    (1) Did the tribunal have jurisdiction to make an award in favour of the Company ?
    (2) Did the tribunal's conduct of the proceedings amount to a serious irregularity
        (a) in relation to the expert evidence, or
        (b) by failing to deal with certain issues put to it?
    (3) Does the court have jurisdiction to review the fees and expenses of the tribunal and, if so, should the court direct an adjustment?

The Company, as the first respondent to the application, sought to uphold the award on the first two issues; however, they adopted a neutral position on the third issue. Their solicitor made it clear in his affidavit that they were not suggesting that the fees were excessive, but would have no objection if the court reviewed the fees downwards; they addressed no argument to the court on this issue as ultimately advanced by HCN. The arbitrators, as the second third and fourth respondents to the application took no part in the first two issues; on the third issue they contended that the court had no jurisdiction and that in any event the court should not adjust their fees and expenses. HCN's application also included an application for leave to appeal under s.69 of the Arbitration Act, but this was not before the court and determination of that part of the application is to take place, without an oral hearing in accordance with this court's usual procedures, after the determination of the issues presently before the court.

Issue 1: The jurisdiction of the tribunal to make an award in favour of the Company

13. HCN contended that the tribunal had no jurisdiction to make any award against the Company as the Company had never become party to the distributorship agreement, clause 17 of which contained the arbitration agreement.

14. Under the scheme set out in the Arbitration Act 1996, it is for the tribunal to consider and rule on its own jurisdiction, as it in effect did in this case. However if its decision is challenged, the court must ultimately decide under s.67 whether the tribunal has jurisdiction. The Company contended the tribunal did have jurisdiction as it had become a party to the distributorship agreement and thus to the arbitration agreement in clause 17; that HCN, in any event, had lost its right to object to the jurisdiction of the tribunal under s.73 of the Act, as they had failed to take the objection to jurisdiction forthwith before the tribunal when they knew or ought to have known of the matters relied on for their contention; they had nonetheless continued with the arbitration.

The law of Saudi Arabia

15. It was common ground that the question of whether the Company had become party to the distributorship agreement (and therefore to the arbitration agreement) was governed by Saudi law. It was agreed that the relevant provisions of that law can be summarised as follows:
    (1) Contractual rights can be assigned. The agreement between the Establishment (or Mr Pharaon) and the Company was an effective agreement to assign the rights and obligations under the contract made between the Establishment and HCN.
    (2) An assignment does not become binding on the other party to the contract unless that other party consents. There was no clear evidence as to what constituted consent under Saudi law, but it was agreed that to establish consent under the law of Saudi Arabia it would be necessary to show that HCN knew of the transfer of the agreement from the Establishment to the Company and expressly or impliedly consented to that transfer.

16. There were no witness statements before the tribunal (for reasons which will become apparent) and none before me dealing with the issue of consent save for the witness statement of HCN's solicitor dealing with the position in 1998 when it is said that the position became known to HCN. My task was therefore to draw inferences from documents relating to the events prior to 1998.

HCN's knowledge of the transfer of the business to the limited company

17. As the essential issue both on jurisdiction and the loss of the right to object raised issues of the knowledge of HCN, it is convenient to set out my findings on knowledge in relation to both issues together.
    (1) Prior to April 1994 Mr Pharaon had written to HCN on notepaper which was headed "*Al-Ameen Development & Trade Est.*" in English with the equivalent in Arabic. At the foot of the notepaper, there was a notation in both English and Arabic which set out the commercial registration number of the Establishment and its branches.
    (2) I accept that, on the balance of probabilities, the circular of 4 April 1994 was sent to HCN; they do not deny receiving it. However the notice did nothing more than to state that there had been a change of name. It was signed by Mr Pharaon as "*Owner and General Manager*". It did, however, enclose the Gazette but only in Arabic; all the correspondence between the parties had been in the English language. I therefore cannot accept that the sending to HCN of the document in Arabic was in those circumstances sufficient to give them notice that there had been a change from a sole proprietorship into a limited liability company, particularly when the letter referred to this as a change of name only. The letterhead did contain the new name "*Al-Ameen Dev. & Trade* Co." and at the bottom stated in addition to the address and the list of branches the words "*Limited Liability Company - Paid up Capital S.R. 500,000*". It also gave the new commercial registered number. In view of the text of the letter and the necessity under Saudi law for knowledge of and consent to the transfer, I hold that this letter did not set out the change in a way in which it could be argued that HCN had the necessary knowledge. It certainly did not seek their consent.
    (3) Mr Pharaon said in a statement that was before the tribunal that he told Mr Stowell of HCN at the FMI exhibition in 1993 that the name Al Ameen Est would be changed to read Al Ameen Co; however this evidence was no more than evidence of a change of name and not a change of the legal status of the person with whom HCN had done business and there was no evidence that the consent of HCN had been sought. There was a meeting between Mr Pharaon and Mr Morgenthaler (representing HCN) at the FMI exhibition at Chicago in 1994. That meeting was the subject of evidence by Mr Morgenthaler and Mr Wallace Fairweather (also representing HCN) set out in witness statements served in the arbitration. Those statements dealt solely

with discussions at that meeting relating to settlement of the outstanding balance and the dispute over commission; nothing was said about the change to a limited company. That is not surprising as, at the time the witness statements were prepared, the issue was not a live issue at the arbitration, as HCN did not know of the change. However, when, as I shall explain, the issue became a live one at a late stage at the arbitration hearing, no further evidence was adduced then or was adduced for the purpose of the hearing before me. Instead it was submitted that a letter written by Mr Pharaon on 8 May 1994 confirming the agreement reached at that meeting and the subsequent correspondence demonstrated that HCN knew of the change to a limited liability company. Apart from the use of the new notepaper, there was nothing in that letter, or the subsequent correspondence which, in my view, would have brought the change to the knowledge of HCN. It was argued that, by use of the terms such as "*we agree to settle our account with you concerning the old debt*" and "*Hussmann agreed to co-operate with Al Ameen Co... as before*", the offer was being made by Mr Pharaon that the Company should take on the old debt and that the Company should act as before. It is quite clear however from the context in which this letter was written that these references were to the dispute over the outstanding balances and the desire of Mr Pharaon to continue as the distributor in the light of that dispute. I therefore find nothing in the correspondence at this time to suggest that HCN had knowledge of, let alone consented by their continued dealing to, the assignment.

(4) As I have already set out, when HCN gave notice of arbitration, they referred to the Establishment as a limited liability company. It was submitted this showed they had knowledge of the transfer. I do not accept that submission. It is clear that they were referring to the Establishment by its original number and that at that stage they thought that an Establishment had separate legal personality from its owner. There is nothing to suggest that they knew of the transfer to the Company. They had simply made a mistake as to the legal status of the Establishment; it is clear from their reference to the correct number that they were referring to the original party to the agreement.

(5) I do not find it surprising that Mr Pharaon did not draw the matter specifically to the attention of HCN because his own view expressed in November 1998 was the following:

As there were no major change in status and I am holding partner of Al-Ameen Co & other partners were my Sons & Daughters (All Minors). In Sharia (Islamic thoughts) Sons & Daughters will be the successor of their father in terms of Assets, Liabilities & all other obligations. I do not deemed necessary to inform officially to every one about this, in other words we would say that only change was the word "*establishment*" to "*Company*".

That statement goes on to refer to the conversation with Mr Stowell of Hussmann at the FMI exhibition in 1993, but again, as I have set out, that was in terms of merely the change of name from Establishment to Company.

(6) In August 1998, prior to the arbitration hearing, HCN obtained legal advice in relation to the status of the Establishment as set out in the statement of Mr Yousef Al-Jadaan a lawyer practising in Riyadh. Mr Al-Jadaan advised that the Establishment was an individual establishment and had been deleted from the commercial register on 16 February 1994; that the Company had been incorporated as a limited liability company as a separate entity from the Establishment. He added that the Establishment no longer existed as a legal entity and it had had no legal capacity since 16 February 1994. The advice was not accurate in stating the Establishment no long existed as a legal entity and had no legal capacity since 16 February 1994. That is because the Establishment had never had a separate legal personality; it was no different from Mr Pharaon. What obviously must have been meant in the advice was that Mr Pharaon could not trade as a commercial agent under the name of the Establishment as it was not registered in the Commercial Register.

(7) HCN's solicitor stated in his witness statement (which was before the Court) that as soon as the information from Mr Al-Jadaan was drawn to HNC's attention, consideration was given as to whether or not to proceed with the arbitration, as it appeared that the party to the distributorship agreement (the Establishment) was not and could not be a party to the arbitration. His statement explained that the arbitration had been commenced by HCN, not only to recover the substantial sum owed by the Establishment, but also because it wanted to appoint another distributor in Saudi Arabia; there was a real concern on their part that, without a declaration from the tribunal that the agreement had been terminated or was no longer in effect, attempts would be made by Mr Pharaon to prevent the appointment of a new distributor by way of proceedings in Saudi Arabia. Because of this concern, HCN decided it would proceed with the arbitration with a view to getting the matter dealt with in an arbitral award from the tribunal.

(8) In the note of his opening submission handed to the tribunal at the commencement of the hearing on 2 November 1998, counsel for HCN made the point in the first paragraph of that note that the parties to the arbitration were HCN and the Establishment; that no other entity was entitled to be represented or heard or bring any claims or to obtain any relief or to have an award entered against it. A footnote to the paragraph stated:

"*Paragraph 1.2 of the Statement of Claim fails to distinguish between two separate legal entities: Al Ameen (as defined above) which ceased to exist on 16/02/94 (see statement of Mr Al-Jadaan) and Al Ameen Development & Trade Co. Ltd. (Company registration number 1010122156), which came into existence at about the same time. The Statement of Claim is wrong not to make the distinction. The latter entity will be referred to by Hussmann as "Al Ameen Company Limited" to distinguish it from the unincorporated Al Ameen*".

Counsel for HCN was making the clear point that the jurisdiction of the tribunal only extended to disputes between HCN and the Establishment, though he was repeating the incorrect advice of Mr Al-Jadaan that the Establishment had ceased to exist.

(9) It was in this way that the issue before the court which relates to the jurisdiction of the tribunal in respect of the claim by the Company was first raised between the parties and before the tribunal. It must have been this which caused those advising the Respondents to enquire into the transfer and the contention that this had been notified to HCN. This resulted in the provision of much of the information which I have set out above.

(10) At this stage no formal application was made to the tribunal; instead it appears that counsel for HCN pointed out that there were two separate parties and that the Establishment did not appear to exist. The initial reaction of the tribunal was that there was insufficient evidence and the tribunal was not prepared to dismiss the counterclaim based on this submission. However, questions were asked of the expert on Saudi Arabian law in relation to the transfer. These elucidated answers which I have summarised in paragraph 15 above.

(11) After that evidence was given and the further information provided by the Respondents, an application was made by HCN for leave to amend the definition of Al Ameen in their request for arbitration and statement of claim which I have set out in paragraph 8 above so that it was made clear that it referred to Mr Pharaon trading as the Establishment; they also sought leave to amend the defence to the counterclaim to plead that notice of the assignment had not been given to HCN and that therefore the Company had not become a party to the agreement; that the Company was therefore not entitled to claim the commission and the Establishment had disabled itself from performing the agreement in February 1994 and was therefore not entitled to commission after that date. The tribunal refused leave, giving reasons in its award.

The jurisdiction of the tribunal over the Company under the arbitration agreement

18. The tribunal in its award dealt with the question of jurisdiction not as a separate issue but in relation to the application to amend. Although therefore there was no formal decision by the tribunal on the question of its jurisdiction, the issue raised on the amendment was in fact the jurisdiction issue. Although the primary ground on which the tribunal relied was that it was far too late to take the point in relation to the participation by the Company in the arbitration, they found that the point was without merit. They held that the conversion from an establishment to a limited company in February 1994 made the Company the correct party to the arbitration and that the fact of conversion was clearly well known to HCN on the basis of the correspondence to which I have referred, though they made no express finding on consent. They were satisfied from the English and Arabic texts that there had been a proper succession of the rights and obligations to the Company from the Establishment by Saudi law. They concluded by saying: *"We do not know if this point is taken seriously in the context of an Arbitration in the Euro Arab System. ….."*

19. Having had the issue argued fully before me, I am quite satisfied that the tribunal was wrong in the decision to which it came both in respect of its decision that the Company was a party to the arbitration and that it was too late to take the point. I do not consider that any criticism can be made of the tribunal, bearing in mind the way in which the matter was put before them at a very late stage and the evidential problems which that caused. However, whether I approach this question as a review of the decision made by the tribunal (as was suggested by Toulson J in ***Ranko Group v. Antarctic Maritime (The Robin)*** 12 June 1998, briefly reported at Lloyd's Maritime Newsletter 15 September 1998) or as a fresh hearing of the issue on jurisdiction (as was submitted was the proper approach), the decision of the tribunal was plainly wrong.

20. It is clear as a matter of the law of Saudi Arabia that if the assignment was to be effective, HCN had to consent to it. I am satisfied on the materials before me that they had no idea that there might have been any change in the other party to the distributorship agreement until late August 1998; in the context of correspondence carried on in English, the supply of a document in Arabic did not provide the necessary information to HCN. It cannot therefore be argued that they had the requisite knowledge from which an implied consent to the assignment could be inferred at any time prior to late August 1998; at that time their knowledge was incomplete and the full facts were not made known to them until the hearing in November 1998. Therefore when the arbitration was commenced it follows that the parties to the arbitration agreement remained HCN and the Establishment and at no time thereafter did the position change. This had the consequence that the claim of HCN lay against the Establishment and any claim for commission that lay could only be made in arbitral proceedings by the Establishment and not the Company. The tribunal therefore had no jurisdiction to make an award in favour of the Company as it was never a party to the distributorship agreement or to the arbitration agreement. The Company also raised in its skeleton argument for this court the contention that there had been an agreement in writing between the Company and HCN to arbitrate within the terms of s.5 (5) of the Arbitration Act 1996 because of the definition of Al-Ameen in HCN's request for arbitration and statement of case which the Company had not disputed. I do not accept that contention; I have already held that the definition referred to the Establishment.

The loss of the right to object

21. S. 31 of the Arbitration Act 1996 makes it clear that any objection to the substantive jurisdiction of the tribunal arising during the course of arbitral proceedings must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised. S.73 provides that if a party to arbitral proceedings continues to take part in the proceedings, without making forthwith any objection that the tribunal lacks substantive jurisdiction, he cannot raise that objection later before the tribunal or the Court: *"unless he shows that at the time he took part or continued to take part in the proceedings he did not know and could not with reasonable diligence have discovered the grounds for the objection".*

The purpose of the provision is to ensure that a party does not keep a point "*up his sleeve*" and wait and see what happens while considerable expense is incurred. A party cannot be allowed to take part in proceedings and then challenge the award if he is dissatisfied with it on the basis of a point about which he knows or ought with reasonable diligence to have discovered. (see the judgment of Moore-Bick J in ***Rustall v Gill and Duffus*** [2000] 1 Lloyd's Rep 14 at page 20).

22. It was contended before me by the Respondents that HCN had lost its right to object. The principles applicable are not in doubt and the question for determination is whether on the facts HCN had failed to act forthwith, but continued their participation in the arbitration at the time they knew of the objection or could with reasonable diligence have discovered it.

23. It is clear from the facts which I have set out that until late August 1998 HCN knew only of the Establishment and that the party against which they had commenced the arbitration was the original party to the distributorship agreement – the Establishment. At that time they learnt from the advice of Mr Al-Jadaan that the Establishment had ceased to be registered and that there was a separate entity - the Company. However the advice they had received from Mr Al-Jadaan in relation to the status of the Establishment was not correct, as I have explained; the Establishment had no separate personality from Mr Pharaon and therefore the Establishment still existed. Moreover the Respondents had not, at that stage, produced any information about the transfer; the statement of Mr Pharaon served in early September 1998 did not deal with the transfer; it merely stated that he was the sole owner of Al Ameen which was a limited liability company until 25 December 1992 when four new partners joined the company; however, at that stage HCN were not aware from the advice of Mr Al-Jadaan that the Establishment was not a trading name for Mr Pharaon with no separate legal personality; his advice clearly gave the impression that it was a separate legal entity. The suggestion that the Respondents had made the position clear in their pleading is fanciful; at paragraph 4.5 of the defence served in the arbitration by the Respondents, there was a reference to the commercial registration form of Al Ameen which was exhibited; however that was in the context of drawing a distinction between "Al Ameen" and "Al Naerabayn" in the context of a plea that Al Ameen was not responsible for payment of supplies made to Al Naerabayn.

24. In my view the position taken by the legal advisers to HCN (who are very experienced in conducting arbitrations) was one they were entitled to take. On the first day of the hearing, they put the point clearly before the tribunal and did not take part in the hearing keeping the point "up their sleeve". It was only after the first day that information was provided by the Respondents and the law of Saudi Arabia elucidated; given all the preparation that had to take place for the arbitration, I do not consider they were to be criticised for waiting until the first day of the hearing, particularly given the fact that the Respondents had failed themselves to provide any information about the transfer or to plead it. Moreover, had they taken the point that they believed was correct that the Establishment did not exist, they would have in fact been wrong. The Establishment did exist and, in fact, they were right in their decision to continue with the arbitration. The tribunal did in fact have jurisdiction over its claim for the moneys claimed to be due from the Establishment and to decide on the termination of the distributorship agreement. Having put the issue before the arbitrators on the first day, they had in my judgement acted very promptly. It was only after the first day that the necessary information about the transfer was supplied; they then sought leave to raise the submission which I have found to be correct.

25. I am satisfied that in these circumstances they did act forthwith and they had not lost their right to object, under the provisions of s.73, to the substantive jurisdiction which the tribunal has exercised in relation to the claim by the Company which was not a party to the arbitration agreement and never became one. On the incomplete information they had, they put the issue before the tribunal on the first day of the hearing and as soon as they had complete information, they made the submission in full.

Issue 2 (a): Serious procedural irregularity; the tribunal's handling of the expert evidence on Saudi Arabian law

26. HCN sought an order under s.68 of the Arbitration Act setting aside the award on the counterclaim or in its entirety. S.68 entitles the court to do so, if there has been a serious irregularity affecting the tribunal, the proceedings or the award. The principal ground on which HCN relied was the way in which expert evidence was dealt with by the tribunal; it also said there had been a serious irregularity as a result of the tribunal's failure to deal with the issues put to it. It is convenient to consider these two matters separately and first to set out the facts relating to the expert evidence before turning to the question of whether what happened amounted to a serious irregularity within the definition set out in s.68(2) of the Act.

The appointment by the tribunal of the expert

27. Although the contract between the Establishment and HCN was clearly governed by the law of Saudi Arabia, none of the pleadings in the case suggested that the law of Saudi Arabia was in any material respect different from the law of England and Wales. For example, although the Respondents' defence and counterclaim stated that the proper law of the distributorship agreement was the law of Saudi Arabia and should be construed accordingly and referred in general terms to local custom, far from pleading any provisions of Saudi Arabian law in relation to the construction of the agreement, it suggested, for example, that the agreement was to be construed c*ontra proferentem*.

28. On 26 June 1998, there was a directions meeting held by the chairman of the tribunal. There was no clear evidence before me as to what happened at that meeting, but in written directions sent on 29 June 1998, the tribunal directed that the "law to be applied" (other than the Saudi Commercial Agency law referred to in clause 17 of the distributorship agreement) was to be submitted within 14 days of 26 June 1998. They also ordered

that experts on Saudi law were to be asked to report on each issue on Saudi law as agreed by the parties and to be determined by the tribunal; the reports were to be submitted by 14 September 1998.

29. In response to these directions, HCN's solicitors wrote to the clerk to the tribunal stating that their position was that, although the law to be applied under clause 17 of the agreement was Saudi law, except insofar as evidence was led and accepted by the tribunal on Saudi law, the law to be applied was English law. The letter went on to state that their understanding was that both parties had agreed that the tribunal should take whatever expert advice on Saudi or other law which it thought appropriate and that the parties would not have separate expert reports on Saudi law.

30. The chairman of the tribunal then telephoned HCN's solicitors and told them that the tribunal did not accept that the law to be applied was English law and there was an issue as to whether Saudi law applied to matters such as the interpretation of the agreement. That position was subsequently confirmed by the chairman in a letter dated 3 August 1998 sent to both solicitors. In response to that the Respondents' solicitors stated that in January 1998 they had raised with the clerk to the tribunal the question as to whether a preliminary ruling needed to be made on the applicable law and had been told that the clerk had spoken to the chairman who had said that the chairman had confirmed that Saudi law was applicable to the proceedings. In any event after this exchange, sometime in August 1998 it was agreed between the solicitors that it would be sensible to ask the tribunal to appoint their own expert to advise on Saudi law.

31. On 21 September 1998 the tribunal suggested that they should appoint Dr Anis Al-Qasem as the expert on Saudi law. He has had a career of immense distinction, first in Libya then in Egypt and Palestine and finally in London. He has given expert evidence in a number of cases in these courts. The parties agreed to his appointment.

The instructions given by the tribunal to the expert

32. No written instructions were provided to Dr Al-Qasem; instead the chairman of the tribunal had a meeting with him on about 24 September 1998 at which he gave him instructions. Those instructions were given on the basis of draft terms of reference (which were never signed as it was decided at the directions hearing on 26 June 1998 that they were not essential in the light of the detailed pleadings). The draft terms of reference set out the background facts and summarised the claims made by the parties; paragraph 4 of the draft terms of reference summarised each of the points in dispute and the issues in the case in terms such as "was Al Ameen in breach of the agreement in failing to promote sales?". It is significant that the draft terms of reference did not identify any specific points of Saudi law.

33. Shortly before 12 October 1998, Dr Al-Qasem sent a draft report to the tribunal. Without informing the parties, the tribunal had a meeting with him. According to the witness statement of the chairman of the tribunal, the intention of the meeting was to clarify matters of Saudi law and to cover any matter which had not been dealt with. No changes were made to the draft as a result of the meeting, save that the tribunal asked Dr Al-Qasem to produce a further report on trade marks and labelling. Dr Al-Qasem submitted his report on 12 October 1998 and it was sent by the tribunal to the parties on 19 October 1998. He submitted a further report on labelling and trade marks on 19 October 1998.

The content of the expert's report

34. The main report of Dr Al-Qasem first set out the documents he had seen. Then, with great clarity, he set out the principles of Saudi law relating to construction, the rules as to liability, evidence and commercial agency regulation. That part of the report showed that there is one significant difference between the law of England and Wales and that of Saudi Arabia in relation to construction of agreements; under Saudi law evidence of the subsequent conduct of the parties is admissible to assist in construction.

35. The second part of his report then addressed the issues in dispute as set out in the draft terms of reference. In this part of the report, he proceeded to give his opinion as to all the points in issue before the tribunal, applying the principles of law to the facts as he saw them and reaching various conclusions on the matters that had been submitted to the tribunal for their decision.

HCN's objection

36. After having had a proper opportunity of considering the report, HCN's solicitors wrote to the tribunal on 27 October 1998 suggesting that the report should be ruled inadmissible and excluded. They enclosed an extract from *Mustill and Boyd: Commercial Arbitration* (second edition)(to which I shall refer) and drew the attention of the tribunal to the fact that the parties had proceeded on the basis that for the purpose of the dispute between the parties, there was no material issue on Saudi law; they had agreed to the retention by the tribunal of an expert on Saudi law on the basis that queries might have arisen as to Saudi law and someone should be available. They went on to point out that the report in any event went considerably beyond what should have been within an expert report. A response was sent on behalf of the tribunal expressing surprise at the position taken by HCN.

The ruling by the tribunal

37. At the outset of the arbitration HCN made an application that the tribunal should disqualify itself on the basis that it had been coloured or irreversibly influenced by the opinion of Dr Al-Qasem, alternatively that they should rule the report inadmissible or should excise part of the report.

38. The tribunal rejected that application in its entirety. In a written ruling handed to the parties during the course of the arbitration, the tribunal made it clear that they were not coloured or influenced by Dr Al-Qasem's views. Dr

Al-Qasem accordingly was asked to give evidence to the tribunal; when he did so, he was asked (as I have mentioned) for his views in relation to the transfer of liabilities from the Establishment to the Company and in the course of that examination the fact that he had met with the tribunal emerged.

39. It is clear that although the tribunal relied in their award upon the views of Dr Al-Qasem that Saudi law permitted reliance on post contractual conduct as an aid to the construction of the agreement, their decisions on the issues generally followed a different approach to that of Dr Al-Qasem.

The allegation of serious procedural irregularities

40. HCN made three principal allegations:

(1) The tribunal should not of its own motion and without consulting the parties have instructed Dr Al-Qasem in the terms they did.

(2) They should not have instructed him to cover the issues raised in the terms of reference but only deal with Saudi law.

(3) They should not have met with him and discussed the report in the absence of the parties without obtaining their consent.

The manner of giving instructions

41. It is convenient to deal with the first two allegations together. As I have already pointed out, the pleadings raised no issues of Saudi law. In those circumstances a passage in *Mustill and Boyd* Second Edition at page 72 (which was sent to the tribunal) gives clear and pragmatic advice:

First the arbitrator should recall that it is for the parties to allege that the foreign law differs from English law. If they are content to have their disputes decided according to English law, it is no part of his function to multiply trouble and expense by suggesting that the two laws differ. Furthermore, when it has become plain that one or other party had raised a serious issue as to foreign law, the arbitrator will be well advised to adopt a rigorous attitude towards the particularisation of the claim however informal the remainder of the proceedings may be....

The obvious good sense of this needs no elaboration. Experience has shown that in many cases, recourse to foreign law adds very considerably to the expense of an arbitration and in very many cases makes little difference; where there are genuine points of difference (as in this case in relation to the admissibility of evidence of post contractual conduct as an aid to construction), the point can generally be isolated and often be agreed. A general request to a foreign lawyer to review the entire case and opine on the principles of foreign law where the parties have not raised specific issues is a course that a prudent tribunal should not embark on without considerable hesitation.

42. It was suggested that, as s.46(1)(a) of the Arbitration Act 1996 requires the arbitral tribunal to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, a mandatory requirement was imposed on a tribunal sitting in London where the proper law was a law other than the law of England and Wales to obtain general evidence and guidance in relation to that foreign law. I do not accept that construction of the Act. If there is no suggestion by the parties that there is an issue under the applicable system of law which is different from the law of England and Wales, or the tribunal does not itself raise a specific issue, then the tribunal is free to decide the matter on the basis of the presumption that the applicable system of law is the same as the law of England and Wales. To hold otherwise would mean that international arbitrations held in London would be encumbered with the considerable extra expense of obtaining general evidence of foreign law relevant to the matters in issue in every case where the proper law of the contract was not the law of England and Wales.

43. In my view the correct course to have been followed by the tribunal was to have asked the parties whether there were any points where the law of Saudi Arabia differed from the law of England and Wales or to have itself raised with the parties specific points on which they might need assistance. Certainly it would have been better if the tribunal had sought the views of the parties on the issues raised before instructing Dr Al-Qasem and discussed with the parties the terms in which he should be instructed.

44. However, on the facts of this case, the parties themselves left to the tribunal a considerable latitude in the way in which the expert was to be instructed and, in those circumstances, I do not consider that it can be said that there was an irregularity in instructing the expert without reference to the parties. It would have been desirable for any instructions given to have been in accordance with the pragmatic advice given in *Mustill and Boyd*. But again what happened cannot have amounted to an irregularity; the tribunal were left to instruct the expert and they adopted a course which was perhaps understandable given what had happened.

Meeting with Dr Al-Qasem to discuss his draft report

45. Under s.37(1) of the Arbitration Act 1996 the tribunal may, unless the parties have agreed otherwise, appoint an expert and may allow an expert to attend proceedings. However section 37(1)(b) provides: *"The parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person."*

The terms of the provision are clear. A tribunal should generally not hear evidence in the absence of the parties. As the Act sets out the principle in clear user-friendly language, it is therefore not necessary any longer to refer to the number of cases decided prior to the Act which made that principle clear: ***Giacomo Costa Fu Andrea v. British Italian Trading Co.*** [1961] 2 Lloyd's Rep 392, ***Royal Commission on the Sugar Supply v. Trading Society Kwik-Hoo-Tong*** (1922) 38 T.L.R. 684, ***London Export Corporation v. Jubilee Coffee Roasting Company*** [1958] 1 Lloyd's Rep 197 and ***Mediterranean & Eastern Export Co Ltd v Fortress Fabrics (Manchester) Ltd*** [1948] 2 All ER 186. I agree with the observation of Professor Merkin in his work on Arbitration at paragraph 13.46(e): *"…. consultation with*

the experts should not take place after the close of the hearing or otherwise in the absence of the parties as this deprives the parties of their right to comment".

The point was taken that in the meeting with Dr Al-Qasem, the tribunal was not taking evidence and so the provisions of s 37(1)(b) did not apply; I do not agree. They were plainly discussing with him the law of Saudi Arabia and the content of his report; in my judgment the provisions of the section were applicable to this meeting at which his evidence was discussed.

46. There are no details in the affidavits before the court as to precisely what happened when the arbitrators met with Dr Al-Qasem after the submission of his draft report. No note of that meeting was made. It is clear however that some information must have been imparted to the tribunal and his evidence discussed. The parties were never told of the meeting in advance of it taking place nor were they told of it subsequently; they only learnt of it when Dr Al-Qasem was cross-examined. Although it was accepted on behalf of the Respondents that to have this meeting had been unwise on the part of the tribunal, they submitted it was not an irregularity. I do not agree. It seems to me that on this occasion the conduct of the tribunal in holding this private meeting with the expert to discuss his draft report without obtaining the consent of the parties to such a course fell below the standards ordinarily to be expected of arbitrators. Their failure to inform the parties of the fact of the meeting immediately after was also, in my view, an irregularity. Mr Mark Cato in his "*Arbitration Practice and Procedure: Interlocutory and Hearing Problems*" at para 14.5.2 gives the sensible and highly practical advice that an arbitrator who finds himself in this position should tell the parties about what he has done and give them a full opportunity to test the evidence by way of cross examination or by calling evidence in rebuttal. They did not do so, but fortunately the fact of the meeting did emerge when Dr Al-Qasem was examined.

The failure to excise part of Dr Al-Qasem's report

47. It is not the infrequent experience of the courts that experts opine on the matter that it is for the tribunal to decide. Although in some cases an application is made to excise part of the report, the more common course is for a tribunal to say that it will pay no attention to the passages in which the expert opines upon such matters. In this case, the tribunal summarised its position: *"It would be almost impossible for any expert on foreign law to give his opinion on law divorced from the facts and issues in the case. We are of the view that this is precisely what Dr Anis Al-Qasem has done giving his views on the law in the light of the issues and written materials with which he was supplied. Of course Dr Anis Al-Qasem's opinion on factual matters will have no room in our deliberations. These will be the subject of submissions in the light of the evidence and both his factual and legal views can be, and no doubt will be, if the Claimant wished to cross examine him before us. At the end of the day the tribunal will come to their own conclusions on the evidence as a whole and make their own findings on Saudi law without we hope being coloured in any way by the views of Dr Anis Al-Qasem or anyone else."*

It is clear from reading the report of Dr Al-Qasem and the award that the tribunal followed a process of reasoning that is quite different to the reasoning which Dr Al-Qasem had set out in his report. Thus, in my view not only did the tribunal state that they would reach their own decision, but they in fact did so. I cannot therefore discern any irregularity in what the tribunal did in this respect, though it may have been more prudent for them to have made clear that they would totally ignore that part of his report where he expressed his views on the very issues which the tribunal had to determine.

Was there a serious irregularity?

48. S.68(2) defines serious irregularity as:

"An irregularity of one or more of the following kinds which the Court considers has caused or will cause substantial injustice to the Applicant -

(a) Failure by the tribunal to comply with section 33 (general duty of tribunal).

(d) Failure by the tribunal to deal with all the issues that were put to it."

49. The intention behind this sub-section is clearly set out in paragraph 58 of the Report of the Departmental Advisory Committee (DAC) where they stated: *"The Court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this Clause. The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice."*

50. The sub-section has also been considered in a number of cases since the passing of the Act: **Conder Structures v. Kvaerner Construction Limited** [1999] ADRLJ 305, ***Egmatra A.G v. Marco Trading Corporation*** [1999] 1 Lloyd's Rep 862 and ***Pacol v. Joint Stock Co. Rossakhar*** [2000] 1 Lloyd's Rep 109. Although in my view the clear language of the Act needs no elaboration, there is in the first of those cases a helpful observation by Dyson J: *"It is not sufficient to show that the irregularity has demonstrated incompetence on the part of the arbitrator and has undermined the confidence of the applicant in the ability of the arbitrator. Loss of confidence is neither a sufficient nor a necessary condition of substantial injustice. It is simply not the test. It is possible for an arbitrator to commit an irregularity which raises a question as to his competence and yet which causes no injustice to either party, still less any substantial injustice."*

Conversely it is possible for a competent arbitrator to make a mistake which causes substantial injustice and which needs to be put right by the court but in circumstances where, in the general sense, the applicant retains full confidence in the arbitrator. After all, Homer does sometimes nod.

The tribunal made, in the circumstances of this case, an error in meeting with Dr Al-Qasem and in failing to tell the parties, but that is all. The conduct goes no further than that and certainly does not raise a question about the competence of the tribunal. Furthermore no prejudice or injustice flowed in fact from their error as the fact of the meeting became known to the parties during the evidence of Dr Al-Qasem.

Conclusion

51. It was the contention of HCN that the irregularities upon which they relied should be looked at cumulatively. I agree with that approach and to the extent I have found there were irregularities I will consider their cumulative effect. However, I am entirely satisfied that the irregularities were not serious irregularities within the meaning of s.68(2). As I have already stated, it is clear that the tribunal reached their own decision by a process of reasoning quite distinct from that of Dr Al-Qasem. HCN submitted that the reasoning of Dr Al-Qasem in that part of his report which is complained of must have caused substantial prejudice because there was no rational basis upon which the tribunal could have found for HCN on the issue of commission. I do not agree. Although there are very powerful and persuasive arguments that, if the contract is construed in accordance with the principles of Saudi law, it is clear that no commission was due under the distributorship agreement in the circumstances; however, I cannot say that no tribunal could have reached a different view. Furthermore the irregularity in relation to the meeting with the expert in the absence of the parties or without their knowledge was, as I have stated, brought to the attention of the parties during the course of Dr Al-Qasem's oral evidence and HCN had an opportunity of cross examining him. Considering the matter as a whole, I am entirely satisfied that there was no serious irregularity.

Issue 2 (b): Serious procedural irregularity: failure by the tribunal to deal with the issues that were put to it

52. In their application to the court, HCN put forward seven issues which they contended the tribunal had not dealt with. One of these matters concerned the question of the assignment between the Establishment and the Company. I have already considered that matter and the way in which the tribunal dealt with it under issue 1. It cannot give rise to any question of any irregularity, as the tribunal dealt with the matter in the way in which it was put to them. The other six matters can be grouped under three headings.

The issue of whether the Establishment was entitled to the discount for prompt payment.

53. As I have set out at paragraph 4 above, a settlement of outstanding balances was made in May 1991 under which HCN agreed to accept 75% of the balance then outstanding to be paid by instalments. It was HCN's contention that its agreement to take 75% was conditional on punctual payment. It was their contention before the Court that the tribunal did not consider and adjudicate upon the question whether the payments were made punctually, and, if they were not, whether the amount due should have been the original amount without the discount.

54. It is clear, however, from the section of the award dealing with the amount of the debt that the tribunal concluded on the evidence before them that the sum due was the balance as discounted. They concluded that the matter was settled at the Chicago meeting in 1994 and the subsequent exchange of correspondence in which the parties agreed that the net outstanding balance was $57,428. It is implicit in their findings in the award that they decided that the original amount without the discount was not due and the matter was therefore dealt with by them; it is also implicit in their findings that the agreement made in 1994 was not conditional on prompt payment of that amount.

The products on which commission was payable

55. HCN argued that under the introductory wording of the distributorship agreement, HCN were not bound to pay commission on goods which were not manufactured by HCN themselves. They contend that the award never dealt with this point. However it is clear from the section of the award dealing with direct sales that the tribunal did have regard to this point and decided it against HCN. It is plain that they appreciated this argument was being made to them and that their decision was that commission was payable on goods manufactured not only by HCN but also Hussmann USA. They may not have dealt with the argument as clearly as might have been anticipated, but in my view they comprehensively dealt with it in the result.

The identification of the fact subsequent to the agreement which imposed upon HCN an obligation to pay commission on sales made by Hussmann USA.

56. It is clear from the same section of the award that the tribunal came to the clear view, as I have set out, that commission was payable on goods manufactured by Hussmann USA; the point therefore did not arise. Again their reasoning might not be as clear as might have been anticipated, but their decision was clear in the result. I do not consider that s.68(2)(d) requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning, but it is no more than that.

Conclusion on this issue

57. Even if I had considered that all of these points amounted to irregularities (which I do not) I would not have considered them, even cumulatively, as amounting to a serious irregularity. The arbitration award did deal with the two main issues that were put to the tribunal, namely the amount due from the Establishment or the Company

to HCN and the amount of commission payable by HCN. Those were the fundamental issues in the arbitration and they are comprehensively dealt with in the award. I therefore conclude that this ground of the application fails.

Issue 3: The fees of the tribunal

58. HCN sought an order under s.28(2) of the Act that the amount of the arbitrators' fee and expenses be considered and adjusted by the court. The ground set out in the arbitration application was: *"The fees of £85,520 charged by the tribunal are excessive."*

The fees charged

59. HCN became concerned about the fees when they were told of the proposed fees prior to the issue of the award. On 1 April 1999 the secretary to the Euro-Arab Arbitration System wrote to the parties to tell them that the Board had examined the award and approved it and had fixed the administrative charges and costs incurred by the System and the arbitrators' fees in accordance with the rules:

(1) The administrative charges and costs were fixed at £15,520

(2) The arbitrators fees were fixed at £70,000.

Correspondence followed in which HCN's solicitors attempted to obtain a breakdown of the fees; explanations were given. On 19 April 1999, the Legal Advisor to the Euro- Arab Arbitration System gave the following explanation of the arbitrators' fees:

As you know, the Rules provide that these shall be fixed by the Board taking into account the complexity of the case, the amount in dispute and the hourly rates of £150-£200 per hour stipulated in Appendix II.

For your information, each of the arbitrators spent a total of over 150 hours on this case. Having regard to this and other criteria, the Board fixed the Arbitrators' fees at the total sum stipulated in my letter of 1 April 1999 of £70,000

Further information was provided; in a letter of 28 April 1999, the Legal Advisor stated that although the Arbitrators' fee was fixed by the Board, it was the minimum that could have been fixed having regard to the Rules. Further correspondence ensued. This did not satisfy HCN's solicitors. The total fees were, however, paid by the Respondents' solicitors and the award made available to the parties on 9 September 1999.

60. From the evidence filed for the purpose of the application and from the correspondence that had taken place prior to the issue of the award, the basis upon which the fees were charged can be summarised:

Charge based on the value of the matters in issue based on the scale of charges	£3,588.00
Costs incurred by the system (including hire of rooms, photocopying, secretarial costs, fax, lunch and beverages)	£8,079.00
Out of pocket expenses of Mr Murray	£ 190.80
Out of pocket expenses of Dr Anvari	£ 162.26
Chairman's expenses (largely related to word processing and typing)	£3,500.00

The fees of the arbitrators of £70,000 were made up of £30,000 paid to the chairman and £20,000 paid to each of the other two arbitrators. The total number of hours spent by the arbitrators were: the chairman 185 hours, Mr Murray 160 hours and Dr Anvari 150 hours. On this basis the average hourly rate was just over £140 per hour. In a witness statement jointly signed by the members of the tribunal they explained that the numerous hours were spent over four periods:

(1) Pre-hearing between November 1997 and November 1998 in correspondence, considering the documents and pleadings, dealing with the preliminary objection in relation to the service of the defence and ruling on it, settling the terms of reference, framing issues, directions, discovery of documents, witness statements and the appointment of the expert.

(2) Five days for the hearing.

(3) Post hearing they had several meetings, and the chairman drafted the award; they considered the award and its annexes and sent it to the Board. In a further statement, the Chairman explained that although the decision of the tribunal was unanimous, it was reached after necessary deliberation and minute and thorough examination and discussion of the evidence, documentation, correspondence, arguments of counsel and Saudi law. They had several meetings; drafts were discussed with the arbitrators and sent back to the Chairman with comments. Where agreement could not be reached, a meeting was held. The final award took time and careful reasoning.

(4) The cost problems between March and May 1999.

The letters written by the officers of the Euro-Arab Arbitration System and the witness statements of the tribunal made it clear that the expenses of the arbitrators had been approved by the Board of the Euro-Arab Arbitration System and the Board had fixed the arbitrators' fees.

The challenge made by HCN

61. HCN confined their challenge (after considering all the evidence) to two matters:

(1) the sum paid to the chairman by way of expenses in respect of typing and word processing and

(2) the overall amount of the fee paid to the arbitrators.

62. In response the tribunal who were represented by counsel advanced two principal arguments:

(1) The court had no jurisdiction under the Arbitration Act 1996 to review the amounts as the fees had been fixed by the Euro-Arab Arbitration System under the terms of their Rules.

(2) The court ought not to adjust the fees in any event.

They also contended that it would in any event be unjust to order repayment of the fees as two of the arbitrators had been paid and had expended the sums.

The rules of the Euro-Arab Arbitration System

63. It is necessary therefore to refer first to the Rules of the Euro-Arab Arbitration System which, as I have already set out, were incorporated into the distributorship agreement by clause 17. The main body within the Euro-Arab Arbitration System relevant to this arbitration is the Arbitration Board; it is comprised of 10-20 persons who are to act independently and impartially; it has the powers in respect of arbitrations set out in the Rules . Under Article 21.3, for example, the Board has power to nominate an arbitrator if the parties fail to agree. Under Article 24.4, the arbitrators have to submit the award to the Board in draft for examination before signing it; although the Board has no power to intervene in the arbitration proceedings, the Board can draw the attention of the arbitrators to questions of substance or form so that the award may be given full effect.

64. The powers in respect of expenses and fees are contained in specific rules:

Article 23.4 provides:

23.4 No application for arbitration shall be submitted to the arbitrator unless it is preceded or accompanied by payment of a deposit on account of costs, expenses and fees, as determined in accordance with Article 29.

Article 29 then provides:

The charges, costs and fees payable on an arbitration under Article 23.4 and 23.5 of the Rules shall include:-

(a) Administration costs, including the fee for registration for the application.

(b) Arbitrators' fees, together with their costs and expenses.

65. It is not necessary to set out the details in relation to the registration fee and administrative costs as no challenge was ultimately made to these, but it is necessary to refer to the provisions in respect of arbitrators' fees set out in article 29.4:

29.4.1 Each arbitrator's fees shall be fixed according to the amounts in dispute, by reference to the scale applicable to the date on which the request for arbitration is submitted.

Where the parties have not specified the amounts in dispute when submitting their requests, the Board shall fix the amount of the advance to be paid on account of fees at its discretion.

29.4.2 As an exception to the above provisions, the arbitrators' fees may be calculated at an hourly rate, according to the amount of time spent by them in the matter, provided that the parties so request the Board at the commencement of the arbitral proceedings and likewise at the time of the appointment of the sole arbitrator or the arbitrators appointed by each of them, or on their behalf, in accordance with Article 21 of the Rules.

29.4.3 These fees shall be determined by taking into account, in particular, the complexity of the case and any other significant factors.

29.5 Reimbursement of the arbitrators' personal expenses:

Expenses incurred by the arbitrators' relating directly to the arbitral proceedings shall be reimbursed by deducting them from the sums advanced by the parties or from the inclusive amount, calculated as above, on presentation of proof of expenditure and in accordance with the guidelines given by the Secretariat/Registry, which the arbitrator will receive on his appointment.

66. The provisions of article 29.7 contained the general provisions relating to fees; article 29.7.1 provided that the Board would fix the amount of the advance for costs and fees. Article 26.7.6 made it clear that the parties would be jointly and individually liable for payment of all costs and fees arising out of the arbitration proceedings.

67. Appendix II set out the fees for arbitrators in the following terms:

The fees of Conciliators, Arbitrators or Experts appointed or nominated under these Rules shall be based upon hourly rates of £150 - £200 per hour plus a percentage of the value of the subject-matter.

Value of the sum in dispute $ (IN US DOLLARS)	MINIMUN % Percentage	MAXIMUM % Percentage
$300,001 to $500,000	0.60%	2.50%
$500,001 to $1,000,000	0.40%	2.00%

68. When the arbitrators were appointed by the Euro-Arbitration System by a letter to them in November 1997, no fee was fixed. The letter recorded that the fee would be fixed at the end of the proceedings on the basis of the fee scale annexed to the Rules, also taking into account the complexity of the case and other significant factors.

The power of the Court to review fees

69. The power of the courts to review the fees of the arbitrators is set out in s.28 of the Arbitration Act 1996. The material parts of the section are as follows:

(1) The parties are jointly and severally liable to pay to the arbitrators such reasonable fees and expenses (if any) as are appropriate in the circumstances.

(2) Any party may apply to the Court ... which may order that the amount of the arbitrators' fees and expenses shall be considered and adjusted by such means and upon such terms as it may direct.

(3) If the application is made after any amount has been paid to the arbitrators by way of fees or expenses, the Court may order the repayment of such amounts (if any) as is shown to be excessive, but shall not do so unless it is shown that it is reasonable in the circumstances to order repayment ...

(4) Nothing in this section affects ...any contractual right of an arbitrator to payment of his fees and expenses.

S.28 is a mandatory provision listed in Schedule 1 and takes effect by reason of s.4(1) notwithstanding any agreement to the contrary.

70. It was the contention of the tribunal that the court had no jurisdiction to consider their fees under s.28(2). These had been fixed by the Board of the Euro-Arab Arbitration System and the parties were bound to pay to the Euro-Arab Arbitration System whatever the Board fixed in accordance with the Rules. The arbitrators were entitled to be paid their fees by the Euro-Arab Arbitration System and not by the parties. In these circumstances, the terms of s.28(5) took effect.

71. Although s.28 is a mandatory provision, I will accept (for the purposes of this application) that both parties are free by the terms of s.28(5) to agree the fee payable to an arbitrator for the conduct of an arbitration; and that if they do so in clear terms (including the eventuality in which it is payable) the court cannot review that fee under s.28(2). The tribunal relied on the view to this effect expressed by Professor Merkin in his commentary on s.28:

"The starting point is section 28(5), which recognises that the arbitrators are entitled to be paid, by way of fees and expenses, the amount (or on the basis) agreed by them with the parties, thereby following section 19(2) of the Arbitration Act 1950 in preventing that agreement from being challenged by the parties. The Arbitration Act 1996, unlike the July 1995 Bill, does not refer expressly to fees as determined by an arbitral body, but it must be assumed that acceptance of the terms of such a body amounts to an agreement to pay fees and expenses in accordance with those terms. "

The DAC Report, however, contains no direct observations. It is plainly an important point for arbitral bodies and arbitrators appointed under their rules, but it is not necessary for me to decide whether this view is right.

72. This is because any such agreement with an arbitrator or an arbitral body has to be clear. In my view the Rules of the Euro-Arab Arbitration System do not have that clear effect and there is nothing express in those rules which provides an obligation to pay the fees in whatever amount the Board decides at the end of the proceedings; nothing in Article 29 gives the Board that power. It seems to me implicit in Article 29.4.1(read in the light of Article 29.4.2) that the Board was to fix the fee on appointment so that the parties would know where they stood; were it otherwise, they were entering into an open ended commitment constrained only by the very broad terms of Appendix II. The Board did not fix the fees when the arbitrators were appointed. In my view therefore there was no contractual agreement to pay whatever the Board demanded within the range of Appendix II.

73. Furthermore, it is clear on the rules that although the mechanism of payment was to be through the Euro-Arab Arbitration System, the fees payable to the arbitrators were fees that the parties were directly charged for arbitrators' fees and expenses. In my view these fees and expenses were plainly fees and expenses to which s.28 of the Act applied as they were arbitrators' fees and expenses within the meaning of that section. The arbitrators have in my view taken the mistaken position that the fees charged were determined by the Board and they are therefore not responsible for their reasonableness. In my view they are; the provisions of s.28 are applicable and for the reasons given s.28(5) is not applicable in the particular circumstances of this case. Furthermore, it is in such circumstances important for the good name of arbitration that arbitrators should bear some responsibility for the fees that they will themselves receive and not adopt the position that the amount charged was not their decision. This is important to ensure that in accordance with the principles set out in s.1 and s.33 of the Act, an arbitration is a fair resolution of a dispute without unnecessary expense.

Should the fees be adjusted by the Court?

74. HCN accepted that the hourly rates (of just over £140 per hour) charged by the arbitrators were reasonable and had no objection to them; their challenge was directed at the amount of time they had spent. In summary they contended that the reasonable amount of time would have been:

(1) As the hearing lasted 4½ days, the time occupied by each would have been 27 hours, allowing for dealing with the applications that took place during it.

(2) The Chairman dealt with the interlocutory matters prior to the hearing and it would be reasonable to allow 12 hours for that.

(3) The documentation before the tribunal was limited and a reasonable amount of time to allow was 24 hours.

(4) It would be reasonable to allow 4 hours discussion between the arbitrators and then a further 10 hours for the Chairman to draft the award.

They therefore contended that the Chairman should have spent 77 hours and the other members 55 hours each, as opposed to the 185, 160 and 155 hours actually spent. On the basis of an 8 hour day (which is generally accepted to be the working day for fees charged at these rates), this represented an average of about 20 days spent by each arbitrator, only 4½ of which they had spent at the hearing in November 1998.

75. I have set out in paragraph 60 the evidence of the tribunal as to the hours they spent; it was, of course, accepted that they did in fact spend those hours. The complaint of HCN was that they should not have spent as long and when the overall fee was looked at, it was excessive in relation to the complexity of the arbitration and the time which it should have taken. Although I accept that the fees are quite extraordinarily high for what was, in my judgment, a straight forward arbitration, nonetheless the arbitrators did spend a very large number of hours and their rate for those hours is not challenged. Although I have very considerable sympathy with the submission that arbitrators should have been able to deal with what was involved in this arbitration in substantially less time than these arbitrators in fact spent, it is clear from the affidavit of the chairman that a unanimous award only followed on from discussion between the arbitrators. The time those discussions took and their course is a matter of confidentiality between the arbitrators and is not a matter that can be enquired into. Furthermore there can be little doubt that they were all extremely conscientious; it must be remembered that the chairman gave of his own free time to undertake the work and derived no financial benefit at all; that benefit will go to HM Treasury. A suggestion was made that the tribunal had unnecessarily spent time with Dr Al-Qasem; I have considered the issue relating to the tribunal's conduct in relation to his evidence as issue 2(a). Although I consider that the tribunal was in error in the respects I have identified, this is not, in the circumstances relevant; the fact that an arbitrator makes an error is not ordinarily a ground for an adjustment to his fee for the time taken as a result of that error.

76. Given the fact that there is no challenge to the arbitrators' evidence that they did spend the amount of time they say they spent, that they have explained the time spent, that a material amount of time was spent in the confidential discussions leading to the award and that the time spent had been spent in a conscientious attempt to produce a detailed award, I have, in all the circumstances come to the view that I should not adjust the fees of £70,000 charged.

77. However, it is inconceivable that a professional person charging at a rate of £140 per hour would charge extra for typing services; he would be expected to provide typing facilities as part of the rate charged. The chairman did not have those facilities available to him, as he is a serving judge and was to do the work in his own time. However, I have no doubt that this was an expense that should have been set against the fee charged in respect of his work at professional rates; it would have been part of the ordinary expenditure of a professional man charging those rates and not an extra expense. I therefore propose to adjust the fees and expenses by reference to the sum claimed for typing expenses - £3,500 - either by way of reduction of the fee of £30,000 or by disallowing the expense. This will result in no personal loss to the chairman as it must be set off against the amount to be paid to HM Treasury.

Would it have been reasonable to order repayment by Mr Murray and Dr Anvari?

78. Both Mr Murray and Dr Anvari were paid their fees on 27 September 1999 and their evidence was that they had expended them in the discharge of their personal and business expenditure. It was contended that in the circumstances it would not be reasonable to order repayment. This point was not taken on behalf of the chairman as his fee is held by the Euro-Arab Arbitration System and has not been paid over to HM Treasury.

79. I consider the argument to be misconceived. It must have been obvious to these arbitrators from the fact that HCN did not pay their proportion of the fees claimed that they were not content with the explanations given. The award was only made available to the parties on 9 September and the application to the Court made on 5 October 1999. In the circumstances, if they each expended the sum of £20,000 paid to them on 27 September 1999, that was their risk. Moreover there is no suggestion that they would suffer any hardship (as professional men) in being ordered to repay these sums, had I made such an order.

Conclusion

80. I therefore conclude that the tribunal had no jurisdiction to make an award in favour of the Company but dismiss the application based on the allegations of serious irregularities. I allow to the limited extent I have set out the application to adjust the fees and expenses of the arbitrators.

Mr Cyril Kinsky (instructed by Messrs McClue Naismith) for the Applicants
Mr Andrew Bird (instructed by Messrs Pearson Lowe) for the First Respondents
Mr Mark Pelling (instructed by Messrs Edwin Coe) for the Second, Third and Fourth Respondents