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Case No: 2005 Folio No. 670

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2006

Before :

MR JUSTICE TOMLINSON

- -

Between :

ABB AG	**Claimant**
- and -	
(1) HOCHTIEF AIRPORT GMBH	**Defendants**
(2) ATHENS INTERNATIONAL AIRPORT S.A.	

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- -

David Waksman QC (instructed by **CMS Cameron McKenna LLP**) for the **Claimant**
Christopher Style, Solicitor-Advocate of Linklaters for the **First Defendant**
The Second Defendant did not appear and was not represented

Hearing dates: 19 and 20 January 2006

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Judgment

Mr Justice Tomlinson :

Introduction

1. The court has before it a challenge to an award made by three professional lawyer arbitrators sitting as a tribunal to resolve an international commercial dispute. The arbitrators described the dispute as "a very high profile case, ….. which will have considerable impact not only on the business of Hochtief and ABB, but will also no doubt have a very considerable impact in Greece." The arbitration was conducted according to the Rules of the London Court of International Arbitration, hereinafter the "LCIA Rules" which in Article 26.9 include an irrevocable waiver of the right to any form of appeal, review or recourse to any State court or other judicial authority, insofar as such waiver may be validly made. The seat of the arbitration was London. The matters referred to arbitration were, so far as now relevant, governed by Greek law. By direction of the tribunal the International Bar Association (hereinafter "IBA") Rules on the Taking of Evidence in International Commercial Arbitrations were to apply. The challenge is made pursuant to s.68 of the Arbitration Act 1996 on the ground of serious irregularity. It is not suggested that the challenge is, by reason of Article 26.9 of the LCIA Rules, incompetent. However the bald recitation of the nature of the arbitration alone indicates that the court is operating in territory in which judicial restraint and sensitivity is required.

2. The Claimant ABB AG is a German company in the electrical industry. It was the First Respondent in the arbitration. The First Defendant Hochtief Airport GMBH to which I shall refer hereafter as "HTA" or "Hochtief" is a German construction company. Strictly it was an associated Hochtief company which carried out the relevant construction work but nothing turns on this. HTA was the Claimant in the arbitration. The Second Defendant Athens International Airport SA hereinafter "AIA" is the company which owns and operates the new Athens International Airport which opened in March 2001. AIA was the Second Respondent in the arbitration. It took no part in the arbitration and no part in the application before the court.

3. The Greek State owns 55% of the shares in AIA. HTA holds 40%. ABB at one time held and if the arbitrators' award stands still holds the remaining 5%. I am told that the holding of 5% of the shares is of great potential significance. There are apparently matters which can be accomplished by a vote of 60% of the shares which cannot be accomplished with only 55%.

4. In 2004 ABB purported to transfer its 5% holding to a Greek company Horizon Air Investments SA, a company in the Copelouzos Group of companies. I shall refer to this company hereinafter as "Horizon." The consideration for the transfer was €23 million. The suggestion is that the Copelouzos Group has close links to the Greek State and might therefore be expected to vote its shares together with the 55% State holding.

5. The arbitration was commenced by HTA in order to challenge the validity of the transfer of the shares. The arbitrators by their award declared that ABB's purported transfer of its shares in AIA to Horizon is null and void and further declared that AIA's purported registration of ABB's purported transfer is null and

void. My understanding is that for the reasons set out above this has considerable implications for the parties and perhaps also for the Greek State.

6. The claim to impugn the transfer was complex and changed significantly part-way through the arbitration which in consequence was conducted in two sessions, 8 and 9 December 2004 and 16 March 2005. The parties then exchanged written Final Submissions in lieu of oral submissions at the conclusion of the evidence. The award is dated 19 July 2005.

7. In order to understand the nature of ABB's challenge to the award it is necessary to understand the issues which arose in the arbitration and the course which the arbitration took. For that purpose I propose substantially to adopt paragraphs 7 – 50 of the First Witness Statement of Guy Pendell, a solicitor acting on behalf of ABB. I believe that account to be largely non-controversial, although HTA would I think say that it is in some respects incomplete. For the purpose of setting the scene it will suffice.

A The Background

8. On 20 June 1991 the Greek State announced its intention to select a project leader, in which it would invest, to undertake and develop a new international airport in Athens. On 15 January 1992 the Greek State distributed a Request for Proposals to prospective Project Leaders, including Hochtief's parent company, Hochtief AG.

9. Following a substantial period of negotiation, including an aborted first agreement in about September 1993 (which was renegotiated by the new Greek Government), on 31 July 1995 an "Airport Development Agreement" hereinafter the "ADA" was signed and the Articles of Association for AIA were agreed. The parties to the ADA were ABB and Hochtief AG, together with Flughafen Athens-Sparta Projektgesellschaft mbh ("FASP," itself a joint venture between Hochtief AG and Flughafen Frankfurt Main AG) and H.Krantz-TKT GmbH ("Krantz") for the one part and, for the other, the Hellenic Republic ("the Greek State.") AIA was established pursuant to the ADA, incorporated in Greece in accordance with the laws of Greece and given the rights for the "design, financing, construction, completion, commissioning, maintenance, operation, management and development of the new Athens international airport." ABB, Hochtief, FASP and Krantz were the parties who built the new airport with the major engineering roles being taken by ABB and Hochtief. The ADA includes, at Article 44.3, provisions to refer certain disputes to arbitration in London in accordance with the LCIA Rules. The ADA was ratified by the Greek Parliament on 31 August 1995 and became part of Greek law. The Airport was completed and opened in March 2001.

10. Following the completion of the Airport, and as noted above, ABB sought to sell its shares in AIA to Horizon, a company belonging to the Copelouzos Group. On 11 November 2003 a notarial declaration was issued by Horizon by which it agreed to observe the terms of the ADA and to perform the obligations imposed on Ordinary Shareholders pursuant to the Articles of AIA. The notarial declaration was provided in order to comply with the requirements of Article 37.10.1 of the ADA which is set out in paragraph 15 below. A Share Sale and Transfer Agreement was signed between ABB and Horizon on 24 May 2004.

11. On 27 January 2004 Hochtief submitted its request for arbitration to the Registrar of the LCIA pursuant to Article 1 of the LCIA Rules seeking, among other things, declarations that:

    (i) the transfer of ABB's shares in AIA to Horizon was null and void; and

    (ii) AIA's subsequent registration of that share transfer was null and void.

12. On 23 March 2004 the LCIA Court appointed the tribunal, which consisted of Christopher Koch, a Swiss lawyer who I understand to practise in Athens, and possibly elsewhere, Professor Klaus Peter Berger, a German lawyer and Peter Leaver QC. Mr Leaver acted as the Chairman of the tribunal.

B The Parties' Positions prior to the First Hearing of 8-9 December 2004

Hochtief's Position

13. In its Statement of Case dated 6 May 2004, Hochtief put forward four principal arguments in support of its claims:

    (i) that ABB, Hochtief, FASP and Krantz had entered into an oral consortium agreement (the "Oral Agreement") which prevented ABB from transferring its shares without Hochtief's consent (paragraph 25.4 of Hochtief's Statement of Case);

    (ii) that such Oral Agreement amounted to a civil partnership pursuant to the Greek and German Civil Codes (paragraph 27 of Hochtief's Statement of Case);

    (iii) that the notarial declaration given by Horizon did not comply with the requirements of Article 37.10.1 of the ADA, which, according to Hochtief, required, among other things, Hochtief's agreement, so that a unilateral declaration made by the proposed transferee of the shares would be insufficient (paragraph 51 of Hochtief's Statement of Case); and

    (iv) that Hochtief made no such agreement with Horizon, and was entitled to withhold any such agreement (paragraph 66 of Hochtief's Statement of Case); this was because, according to Hochtief, it was reasonable for Hochtief to require Horizon to make a separate shareholder's agreement, which went beyond the terms of Horizon's unilateral declaration, in the light of:

        (a) the contractual arrangements implementing the Athens International Airport project and the allegedly delicate balance of power between the Greek State and the Consortium Members; and

        (b) the alleged Oral Agreement.

14. Hochtief thus asserted that the notarial declaration given by Horizon was insufficient to comply with Article 37.10.1 of the ADA.

15. Article 37.10.1 provides:

> "At all times before Listing the Ordinary Shareholders shall ensure that no person other than an Ordinary Shareholder or an existing holder of Ordinary Share-Related Securities acquires Ordinary Shares or Ordinary Share-Related Securities or any interest therein (whether by transfer, issue or otherwise) unless it provides written details of its Ultimate Parent (if any) to the Airport Company and agrees in writing with all the other then Ordinary Shareholders (in a form reasonably acceptable to each of them) to observe the terms of Article 22.4 (Flotation) and Article 37 (Shareholder Conduct before Listing) and to perform all the obligations imposed, as relevant, on Ordinary Shareholders and/or holders of Ordinary Share-Related Securities pursuant to those Articles."
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> For these purposes it should be noted that Hochtief and ABB were "Ordinary Shareholders" while the Greek State was not.

16. It was thus important for Hochtief to be able to establish the existence of the alleged Oral Agreement, which was a form of shareholders agreement, made, it was alleged, between ABB and Hochtief, among others, at the outset.

17. In particular, Hochtief claimed that during the course of the negotiations in 1992 and 1993 the Consortium Members had entered into the Oral Agreement to the effect that until the listing of AIA (paragraph 25 of Hochtief's Statement of Case):

    (i) they would act one towards the other in accordance with obligations of good faith and loyalty;

    (ii) they would consult on matters of common interest;

    (iii) so far as possible they would act in concert so as to protect their common interest; and

    (iv) consistent with and in consequence of all the above they would not sell, transfer or dispose of any interest in their shares in AIA without the consent of a majority by shareholding of the remaining Consortium Members (such consent not to be unreasonably withheld) and without the prospective transferee agreeing with the surviving Consortium Members to adhere to the Oral Agreement on revised terms acceptable to all.

    Hochtief claimed that, among other things, the existence of the Oral Agreement conferred upon Hochtief the right to refuse to enter into an agreement pursuant to Article 37.10.1 of the ADA.

18. Hochtief further argued that such Oral Agreement amounted to a civil partnership pursuant to the Greek or German Civil Codes, which would imply the above obligations in any event (paragraph 27 of Hochtief's Statement of Case.) It was Hochtief's case that the terms of such civil partnership (be they expressed or implied) justified Hochtief's refusal to enter into the sort of agreement offered by Horizon (paragraph 29 of Hochtief's Pre-Hearing Written Submissions.)

ABB's Position

19. In its Statement of Defence dated 2 July 2004, ABB contended that:

    (i) the unilateral notarial declaration given by Horizon fully complied with the conditions set out in Article 37.10.1 of the ADA; accordingly, it was not necessary for Hochtief to enter into a bilateral agreement with Horizon and there was no basis for Hochtief to insist upon such an agreement in order to make the share transfer valid (section D.I.4.).

    (ii) moreover, the Oral Agreement did not exist anyway (section D.I.5c); and

    (iii) no civil partnership was ever entered into between Hochtief and ABB (section D.II.4).

20. ABB thus argued that the notarial declaration was unconditional, binding and enforceable and contained an express declaration that Horizon would comply with the obligations of Articles 22.4 and 37 of the ADA (section D.I.4a of ABB's Statement of Defence). If that was right, then the transfer was valid without more.

21. If, on the other hand, ABB was wrong about the unilateral declaration being enough and a bilateral agreement between Hochtief and Horizon was required by Article 37.10.1 then ABB had an alternative argument. This was broadly to the effect that if the fulfilment of a condition precedent depended on the act of a party and that party refused to act, in bad faith, so that the condition could not be fulfilled, it would nonetheless be deemed to be fulfilled. In that regard, Article 207 Greek Civil Code provides as follows:

    "A condition shall be deemed fulfilled if its fulfilment was impeded contrary to the requirements of good faith by the person who would have suffered a prejudice from its fulfilment.

    "A condition shall be deemed not having been fulfilled if its fulfilment was brought about contrary to the requirements of good faith by the person who would have benefited by its fulfilment…"

22. ABB argued that in this case Hochtief's refusal to enter into a bilateral agreement with Horizon (which, on this scenario, was a condition precedent to the operation of Article 37.10.1) was in bad faith. This argument was set out in section B.II.1b and c of ABB's Pre-Hearing Written Submissions. In essence, the argument was that Hochtief's refusal to agree to the transfer with Horizon was an abuse of its

rights and was unnecessary, given the commitments contained in the unilateral declaration. The lack of good faith on the part of Hochtief also arose from the fact that in demanding a wider agreement from Horizon, Hochtief was relying on the alleged Oral Agreement with ABB and others, which ABB said did not exist. (It should be noted here that it was common ground that the Greek law concept of bad faith was somewhat wider than the expression as used under English law and also that it was an essentially objective concept.)

23. ABB further argued that, as no Oral Agreement existed between Hochtief and ABB, a civil partnership never arose. Thus neither Hochtief nor ABB were subject to any obligations towards each other as might have been imposed were a civil partnership to have existed (paragraph D.II.4 of ABB's Statement of Defence).

Hochtief's Response to the Allegation of Bad faith

24. Hochtief's response to the argument based on its bad faith was that it had been entitled to refuse to agree to the transfer, essentially because of the existence of the Oral Agreement, or a civil partnership in the same terms or what was referred to as a "community of interests" between the parties.

25. Hochtief accepted that if none of these grounds could be made out then it would have been acting in bad faith. See paragraphs 13, 14 and 43 of Hochtief's Pre-Hearing Written Submissions.

C The Hearing of 8 – 9 December 2004

26. Accordingly, and as was expected from the position taken by the parties, the factual evidence concentrated on the existence or otherwise of the alleged Oral Agreement. Also, Hochtief and ABB had each instructed Greek law experts who had submitted expert reports in advance of the hearing. However, their evidence was not reached at the First Hearing.

27. On the second day of the First Hearing of 8 – 9 December, in addition to the detailed examination of witnesses in relation to the existence or otherwise of the alleged Oral Agreement, certain background information was heard by the Tribunal in relation to previous negotiations between ABB and a company of the Copelouzos Group (the "Copelouzos company") regarding the potential transfer of ABB's shares in AIA. In fact, those prior negotiations led to the conclusion of two option agreements and a bailment agreement dated 30 December 1999 ultimately referred to by the Tribunal in the Award as the Three Agreements (paragraph 144 of the Award). Although the Three Agreements had not been disclosed in the Arbitration by the First Hearing, their existence was known, having been referred to in certain documents that had been disclosed by ABB in October 2004.

28. During the course of the First Hearing the Three Agreements assumed a greater significance, in the context of ABB and Hochtief's negotiations in 1999, 2002 and 2003 relating to the possible sale of ABB's shares in AIA to Hochtief. Hochtief

subsequently asked for copies of the Three Agreements, which were provided on 15 December 2004. In light of the evidence heard during the First Hearing, the Tribunal indicated that so that it could in due course make a properly informed and properly reasoned award, it might prefer further expert evidence, particularly in relation to issues of good faith pursuant to Greek law. The Chairman said this: -

> "One of the points that has concerned us is that today in particular this case seems to have taken a rather different direction to the direction it had been travelling down before. The claimant's case has been, so far, and may still be, that the PCA or the oral agreement somehow was either incorporated into or was an agreement that was in connection with the transfer of shares under article 37. Our very provisional view, in relation to that, has been that this is a very difficult argument to run. Perhaps I can just indicate that one of the difficulties that we have seen in that argument has been in relation to article 37.6 of the airport development agreement and the impact of that article in relation to the way that the case is put. Today I think that what has happened is that another article of the ADA has come into pretty sharp focus and that is article 3.1.6. We do not have expert evidence from either of the Greek law experts, who are present, in relation either to the effect of article 37.6, whether it is a matter of formality or matter of procedure only, and if so, what its impact may be on the way that the case is presently put. We have no evidence from the Greek law experts on the impact of article 3.1.6. The duty of good faith and fair dealing, if I can put it that way, in relation to the application of article 37.10. It seems to us that it is at least arguable – again we have no concluded view on it, but we think it right that you should know the way our minds are working – that the duty of good faith may be an important consideration, because the way that the case is presently put by ABB is that there is no need for an agreement in writing if the position is that Hochtief are acting in bad faith. Now, it may be that as a result of today and the impact of article 3.1.6, that there is an answer to that. I do not know. We do not know. But we feel uneasy about coming to any conclusion in this case, which we have to accept is a very high profile case, and which will have a very considerable impact, not only on the business of Hochtief and ABB, but will also no doubt have a very considerable impact in Greece. We feel uneasy about coming to a conclusion where there is no expert law evidence which will assist us in relation at least to those two points. Now, I am not expecting either of you to respond on the hoof to that. In addition, it seems to us that there may be some more documents to be disclosed. I do not know. That is a matter for you, Mr Style and Mr Waksman, to deal with, if you want to. But it may be that there is a need for some more factual evidence in this case. I am not inviting you to go down that road. That is a possibility that occurred to us. But the real concern that we have is in relation to the Greek law evidence. It seems to us that it may be in everyone's interests if instead of having the Greek law evidence straightaway today, we have further reports from the two witnesses to deal at least with the two points that I have raised and any more that my colleagues may wish to raise in a moment, so that we can in due course make a properly informed and properly reasoned award. Neither of my colleagues want to add anything to that. As I say, I do not expect to you make a decision on the hoof. But it

does seem to me that those matters are something for the two of you to consider and what I would propose to do now is that we will give you a time to think about it. If we do have - - if you do decide that we should have further reports from the Greek law experts or there is to be further discovery and/or a further hearing, a day or more than a day, then obviously we will have to discuss timetable at that stage. But I thought it right to give you that indication as to what was concerning us and the way our minds were working, so that you can all take instructions from your respective clients."

29. Accordingly, a second hearing was scheduled to enable the parties to address the new issues raised and to hear the expert evidence on Greek law. Hochtief was permitted to serve a Supplemental Statement of Case, which it did on 18 January 2005 and ABB was permitted to respond to that Statement of Case, which it did by its Supplemental Statement of Case dated 14 February 2005. In addition, Hochtief was allowed to serve a Second Request to ABB to Produce Documents, which it did on 15 December 2004 ("Hochtief's Second Request"). In Hochtief's Second Request, Hochtief requested production of eight categories of documents including requests 4 and 8 which provided as follows:

> "12. To the extent that such documents are not produced pursuant to Requests 2 and 3 above, HTA requests ABB to produce any and all documents, including communications, correspondence (including correspondence between ABB and any officer of or any company in the Copelouzos Group) and internal notes within its possession, custody or control produced in preparation for, during or following the discussions between ABB and HTA held in December 1999 and January 2000 relating to the possibility that ABB would transfer its AIA shares to HTA.
>
> 13. These documents are relevant because they will go to show whether, and if so the extent to which, ABB acted in the second half of 1999 and early 2000 in breach of the Good Faith Obligations and Restrictions."
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> 24. [Hochtief] requests ABB to produce any and all documents within its possession, custody or control purchased between 1 July 2002 and 31 March 2003, including communications and evidence of communications, correspondence and internal notes, in preparation for, during or following the discussions held in and around January 2003 between ABB and [Hochtief] relating to the possibility that ABB would transfer its AIA shares to [Hochtief], including but not limited to documents evidencing related communications between ABB and any company or officer of the Copelouzos Group.
>
> 25. These documents are relevant because they will go to show whether and if so the extent to which, ABB acted in the second half of 2002 and early 2003 in breach of the Good Faith Obligations and Restrictions."

30. ABB objected to Requests 1 to 6 and Request 8 of Hochtief's Second Request on 22 December 2004. The Tribunal considered Hochtief's and ABB representations relating to Hochtief's Second Request and ordered the disclosure of five of the remaining seven categories of documents requested, including request 8. The categories of documents that were not ordered to be disclosed related to material that ABB asserted was privileged.

31. Further, the Tribunal ordered the parties to serve Supplemental Expert Reports to address the following issues:

> "(i) We do not have expert evidence from either of the Greek law experts, who are present, in relation either to the effect of article 37.6, whether it is a matter of formality or mater of procedure only, and if so, what its impact may be on the way that the case is presently put. We have no evidence from the Greek law experts on the impact of article 3.1.6. The duty of good faith and fair dealing, if I can put it that way, in relation to the application of article 37.10.
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> (ii) The issues on which we think it would be worthwhile, important to have further reports on Greek law, first of all, the impact of article 3.1.6…. Finally, in relation to the whole area of duty of good faith, the impact of Articles 160,165 and 207 if the Greek Civil Code. That is not intended to be exhaustive" (pages 161-162 of the Transcript of Proceedings 09.12.04).

Hochtief and ABB served Supplemental Expert Reports on 28 February 2005.

32. Following the service of Hochtief's Supplemental Statement of Case on 18 January 2005, ABB wrote to the Tribunal requesting the production of certain documents from Hochtief. This request is considered in more detail at paragraphs 44 and 48 below. Such request was refused by the Tribunal.

33. On 1 March 2005, the parties took part in a telephone hearing with certain members of the Tribunal. As a result of an invitation from the Tribunal, a list of issues or route map was produced by ABB in advance of the hearing on 16 March 2005 which set out the principal issues of Greek law. This is considered in more detail at paragraphs 49 and 74 – 81 below.

D The Parties' Positions prior to the Second Hearing on 16 March 2005

Hochtief's Position

34. In its Supplemental Statement of Case of 18 January 2005 (paragraph 13) Hochtief maintained its primary position which was that a bilateral agreement was required by Article 37.10.1 and that it had not acted in bad faith when requiring Horizon to enter into a wider agreement.

35. However, the new element in Hochtief's case was that even if it had itself acted in bad faith in refusing consent to the transfer to Horizon, this no longer mattered because ABB had also acted in bad faith, at an earlier stage.

36. In particular, Hochtief alleged that the parties had an obligation to act in good faith arising from:

    (i) Article 3.1.6 of the ADA; and

    (ii) Articles 197, 200, 281 and 288 of the Greek Civil Code.

    Hochtief contended that the effect of Article 3.1.6 and Articles 197,200,281 and 288 of the Greek Civil Code was that every right under the ADA and Articles of Association had to be exercised and every obligation complied with in a spirit of cooperation and good faith (paragraph 14 to 15 of Hochtief's Supplemental Statement of Case).

37. Hochtief alleged that ABB was only entitled to seek from Hochtief the agreement with Horizon required by Article 37.10.1 of the ADA if it was itself acting in good faith and in compliance with Article 3.1.6 of the ADA in relation to the proposed sale to Horizon. Hochtief further contended that a party to a contract who is in breach of an obligation of good faith is not allowed in Greek law to complain of a breach of good faith on the part of another party. Therefore, so Hochtief alleged, if ABB was acting in breach of Article 3.1.6 it could not allege a breach of that same obligation on the part of Hochtief (paragraph 16 of Hochtief's Supplemental Statement of Case.) This was said to be a rule deduced from the principle of good faith.

38. Hochtief claimed that ABB had acted in bad faith in five distinct respects. In order to make intelligible these allegations I must first set out Article 37.8 of the ADA. That provides:

    "Transfer of Shares

    Save as contemplated in Article 22.1 (Airport Company financing) or Article 37.6 (Shareholders Agreements) or as required pursuant to Article 37.11.2 (Shareholder Default), no person shall at any time before the earlier of Listing and second anniversary of Airport Opening: -

    (a) grant any Security over its holding of Ordinary Shares or Ordinary Share-Related Securities (or any interest in any of them);

    (b) sell, transfer or otherwise dispose of any Ordinary Shares or Ordinary Share-Related Securities (or any interest in any of them);

    (c) enter into any agreement in respect of the votes attached to its Ordinary Shares; or

(d) agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing;

otherwise than in accordance with this Article 37.8 (Transfer of Shares) and the Article of Association."

This effectively required any share transfer to have the approval of all the ordinary shareholders, but only operated for the period ending 2 years after the airport opened which was in March 2001. Article 37.8 was therefore operative in 1999 when the Three Agreements were made but not in 2004 when ABB made the purported transfer to Horizon. By that time, the only governing position was the less restrictive Article 37.10.1.

In the light of the provisions of that Article, and the conclusion by ABB of the Three Agreements in 1999, Hochtief contended that ABB had acted in bad faith in the following respects: -

(i) that it had entered into the Three Agreements in breach of Article 37.8 and 37.10 and was fully aware that it might be considered a Defaulting Shareholder and be forced to sell its shares if the other Ordinary Shareholders became aware of the Three Agreements (paragraph 31.1 of Hochtief's Supplemental Statement of Case);

(ii) that it failed to tell Hochtief (or, to Hochtief's knowledge, any other Ordinary Shareholder) at any time prior to December 2004 that it had agreed to the sale of its shares to the Copelouzos company in 1999 (paragraph 31.2 of Hochtief's Supplemental Statement of Case);

(iii) that it failed to tell Hochtief that from 1999 to 2004 it was voting its shares in accordance with directions from the Copelouzos company (paragraph 31.3 of Hochtief's Supplemental Statement of Case);

(iv) that it purported to negotiate with Hochtief in 1999 and 2003 a possible sale of its shares without disclosing the negotiation and agreement with the Copelouzos company and when it had no intention to sell its shares to Hochtief (paragraph 31.4 of Hochtief's Supplemental Statement of Case); and

(v) that on 19 September 2003 it falsely represented that it had negotiated the sale to Horizon after the failure of the negotiations in January 2003 (paragraph 31.5 of Hochtief's Supplemental Statement of Case).

39. Hochtief asserted that ABB's case that it had fulfilled the requirements of Article 37.10.1 was invalidated by its alleged bad faith and that, in any event, being in breach of its obligation of good faith, ABB would not be allowed in Greek law to complain of a breach of good faith on the part of Hochtief. Hochtief asserted that this was the case notwithstanding the fact that Hochtief was unaware of the Three Agreements when in 2004 it declined to sign the agreement offered by Horizon.

ABB's Position

40. In its Supplemental Statement of Defence dated 14 February 2005 ABB maintained that it was Hochtief that had acted in bad faith in its refusal to accept the notarial declaration of Horizon (section E.1.2b of ABB's Supplemental of Defence). ABB further asserted that Hochtief was in breach of its obligation under Article 281 of the Greek Civil Code which provides as follows:

> "The exercise of a right shall be prohibited if such exercise obviously exceeds the limits imposed by good faith or morality or by the social or economic purpose of the right."

41. ABB argued that Hochtief's refusal was solely motivated by its own interests and that Hochtief acted in an abusive way when it refused to accept the notarial declaration because the exercise of the right exceeded the limits imposed by the purpose of Article 37.10.1 of the ADA (E.1.3a-d of ABB's Supplemental Statement of Defence).

42. In relation to the new argument raised by Hochtief, that ABB had itself been in bad faith in 1999, ABB responded as follows:

(i) neither the ADA nor the Articles of Association of AIA obliged a shareholder to reveal (confidential) negotiations with a third party to the other shareholders. Therefore, ABB was not in breach of good faith in not expressly informing Hochtief about its negotiations with Mr Copelouzos as it was under no obligation to do so (section D.I.2b of the Supplemental Statement of Defence);

(ii) there existed no voting agreement between ABB and the Copelouzos company and ABB did not exercise its voting rights in AIA in a manner "directed" by the Copelouzos company (section D III 1 to 3 of ABB's Supplemental Statement of Defence);

(iii) ABB had seriously and honestly wanted to sell its AIA shares to Hochtief. ABB said that Hochtief's allegation that ABB only *purported* to negotiate the sale of the AIA with Hochtief in 1999 was ill-founded (section D.I.2a of ABB's Supplemental Statement of Defence). ABB said that Hochtief had been unwilling to offer a fair market price for the shares despite ABB's negotiations with Hochtief. Such refusal on the part of Hochtief could not, ABB argued, amount to bad faith on the part of ABB.

43. ABB refuted the allegation that there was in Greek law any principle that would in effect allow Hochtief to act in bad faith because ABB had itself previously acted in bad faith (section E.I.2c of ABB's Supplemental Statement of Defence). The Greek law on this issue became a key issue at the Second Hearing on which Hochtief's and ABB's experts gave extensive evidence to the Tribunal.

E ABB's Second Request for Documents

44. On 16 February 2005 following the service of Hochtief's Supplemental Statement of Case on 18 January 2005, ABB requested the production of certain documents from Hochtief. ABB explained that Hochtief's Supplemental Statement of Case contained new allegations arising from the information relating to the 1999 negotiations between ABB and the Copelouzos company. Hochtief had alleged in its Supplemental Statement of Case that given the content of the Copelouzos negotiations, ABB only purported to negotiate the sale of the shares with Hochtief in December 1999 and January 2003, and that ABB never had any intention to sell the shares to Hochtief. Hochtief further alleged ABB's negotiations with Hochtief were "nothing more than a sham" and that ABB had acted in breach of good faith.

45. It was ABB's case that ABB had been prepared to sell the shares to Hochtief in both December 1999 and January 2003, but that Hochtief was unwilling to pay an adequate price and made use of its dominant position in making only derisory offers. Further, it was ABB's contention that Hochtief was aware in December 1999 and January 2003 that the actual value of the shares was considerably higher than the price offered by Hochtief to ABB.

46. ABB's request for documents was intended to reveal the full extent of ABB's and Hochtief's negotiations in relation to the sale of the shares (including their notes on the meeting held between the parties in December 1999), Hochtief's interest in the shares and its willingness or otherwise to pay an adequate price for them. ABB explained that neither ABB nor the Tribunal had seen any internal document from Hochtief giving any indication as to its attitude towards ABB's shares or the price it was prepared to pay or the value it ascribed to the shares. Further, ABB claimed that the requested documents would prove whether Hochtief's offers in December 1999 and January 2003 were reasonable and fair. ABB asserted that such documents were material and relevant to the outcome of the case.

47. Hochtief's response of 17 February 2005 was that its approach to the negotiations of 1999 and 2003 was entirely irrelevant. Hochtief's case was that it was ABB's bad faith that was in issue and that because ABB had breached its obligations of good faith, according to Greek law, ABB would not be allowed to complain of a breach of good faith on the part of Hochtief. Hochtief, therefore, asserted that it did not need to advance a positive case that it had acted in good faith. ABB's view was that this was incorrect because, in assessing whether or not one party has acted in bad faith, the actions of the other party must necessarily be taken into account.

48. However the Tribunal refused ABB's request on 18 February 2005 on the basis that Hochtief had given what appeared to be cogent grounds. On 22 February 2005 ABB wrote to the Tribunal objecting to its refusal. The Tribunal again declined ABB's request on 28 February 2005. I shall have to return to this in the light of one of ABB's grounds of challenge to the Award.

F The Telephone Hearing of 1 March 2005

49. During a telephone conference of 1 March 2005, in which representatives for ABB and Hochtief addressed the Chairman of the Tribunal, the tribunal invited the parties to prepare a roadmap of the expert issues. The tribunal did not order the roadmap to be provided. Rather the parties were invited to do so if they considered that it would assist the tribunal in dealing with the complex issues of Greek law to be determined. ABB duly prepared such a list and served it on the Tribunal and the parties on 11 March 2005. The Tribunal acknowledged the list during the hearing on 16 March 2005 (page 71 of the Transcript of Proceedings 16.03.05), and Hochtief did not at any time raise any challenge to the list.

G The Second Hearing of 16 March 2005

50. The Second Hearing particularly focussed on the issues of good faith that were outlined in Hochtief's and ABB's Supplemental Statements of Case, and addressed issues of Greek law in connection therewith. The expert evidence on this issue from both sides was voluminous and the hearing transcript is evidence of the extent to which this issue was addressed (pages 70 to 275 of the Transcript of Proceedings 16.03.05). In particular there was a fundamental disagreement between the experts as to whether there was any relevant principle of Greek law of the kind relied upon by Hochtief. This was reflected in the Post Hearing Written Submissions of Hochtief and ABB.

H The Award

51. The arbitrators first dealt with the alleged oral consortium agreement or civil partnership. In that regard I should set out one further provision of the ADA. Atricle 37.6 provides, under the rubric "SHAREHOLDER CONDUCT BEFORE LISTING" as follows: -

> "37.6 ShareholderAgreements: Ordinary Shareholders and holders of Ordinary Share-Related Securities may, at any time prior to Listing, be parties to agreements or arrangements relating to the exercise of rights attaching to Ordinary Shares and/or Ordinary Share-Related Securities and any other agreements or arrangements provided that: -
>
> 37.6.1 no such agreements or arrangement shall require or cause any Ordinary Shareholder or other Person to act in a manner contrary to the provisions of this Agreement or the Articles of Association or require or cause any Director to act in a manner contrary to the duties set out in Article 12.1 (Board of Directors); and
>
> 37.6.2 any such agreement or arrangement relating to the exercise of rights attaching to Ordinary Shares and/or Ordinary Share-Related Securities is disclosed, and a copy given, to the Greek State forthwith after the entry into thereof."

The arbitrators found that there had indeed been an oral agreement as alleged by Hochtief concluded in connection with the aborted first agreement of September 1993. This oral agreement was reduced into writing in the shape of a draft Project Consortium Agreement and submitted to the Greek State in July 1993. However the 1993 negotiations came to nothing when the Greek Government fell. Thereafter new negotiations took place which led to the making of the ADA on 31 July 1995. The arbitrators continued: -

> "134. It was Dr Kalenda's evidence that there was no further discussion about the oral consortium agreement or the draft Project Consortium Agreement during the negotiations which took place prior to the making of the ADA. He assumed that the earlier oral consortium agreement and the earlier draft Project Consortium Agreement had simply been carried over, and he, therefore, decided not to have a written consortium agreement because this would have to be disclosed to the Greek State under the terms of the 1995 ADA: see Transcript 8 December 2004/107-108.
>
> 135. Article 37.6 of the ADA expressly allows shareholders to enter into agreements and arrangements relating to the exercise of rights attaching to shares provided that "any such agreement or arrangement relating to the exercise of rights attaching to Ordinary Shares and Ordinary Share-Related Securities is disclosed, and a copy given, to the Greek State forthwith after the entry into thereof." By requiring that a "copy" of any such agreements be given to the Greek State, the ADA implicitly also requires such agreements to be in writing. Thus, the tribunal concludes that of an oral consortium agreement had existed in 1995, but had not been put into writing and disclosed to the Greek State, it would not be valid, because it did not conform to the formal requirements laid down in the ADA.
>
> 136. Moreover, between 1993 and 1995 the terms of the agreement between the Consortium and the Greek State underwent substantial change. The principal changes were in respect of the shareholdings of the Greek State, which became a majority shareholder of AIA, with a corresponding reduction of the Consortium Members' shares, and a reduction of the concession period from fifty to thirty years. In the absence of any discussion between the parties about the terms upon which they were to remain members of the Consortium, the Tribunal has concluded that Hochtief's claim that either the oral consortium agreement or the draft Project Consortium Agreement were carried forward from 1993, and, sub silentio, remained in existence in the new arrangements incorporated in the ADA, must fail.
>
> 137. Alternatively, Hochtief contends that if the members of the Consortium agreed to form a Consortium a civil partnership arose as a matter of Greek law. It appears to be common ground between Dr Koutalidis and Professor Spyridakis that a civil partnership could be created orally.

> 138. The Tribunal does not doubt that a civil partnership could have been created between Hochtief and ABB, and the other members of the Consortium. It may well be that there was a civil partnership in 1993 when, as the Tribunal has found, the parties had made an oral agreement and agreed the terms of the draft Project Consortium Agreement. However, before there can be a civil partnership there must be an agreement. For the reasons given above in rejecting Hochtief's claim that the oral agreement made in 1993 or the draft Project Consortium Agreement, the terms of which had been agreed in 1993, had been carried forward, sub silentio, to 1995, the Tribunal also rejects Hochtief's claim that there was a civil partnership in 1995."

52. The arbitrators turn next to the validity of the share transfer from ABB to Horizon. They set out the operative parts of the Three Agreements made on 30 December 1999, the first two of which were entitled "Memorandum of Transfer of Shares Agreement (Vorvertrag)." The first agreement was between ABB as seller and an associated company of ABB, ABB Robotersysteme GmBH ("ABBRS"), as buyer. The arbitrators summarised the effect of this first agreement as follows: -

> "145. In summary, the First Memorandum of Transfer provided for the sale by ABB to ABBRS of its shares to AIA for DM 45 million. The sale was to be completed when the restrictions on transfer of shares provided for in Article 37 of the ADA, and in AIA's Article of Association, were no longer applicable. It was a specific provision of the First Memorandum of Transfer that the rights of ABB in respect of the AIA shares were to be exercised by ABB but "without disregarding in any reasonable way" the interests and rights of ABBRS."

53. The second agreement was between ABB as seller and a party as buyer whose name was redacted from the documents disclosed by ABB. The tribunal was informed by ABB that it was a Copelouzos Group company, the identity of which Dr Göttler, a lawyer in the Legal Department of ABB, declined in his oral evidence to divulge. For the purposes of the argument in the arbitration the tribunal was prepared to accept ABB's obviously unsubstantiated contention that the Copelouzos company involved in the Three Agreements was not Horizon.

54. The tribunal summarised the effect of the Second Memorandum of Transfer in this way: -

> "146. The Second Memorandum of Transfer provided for the sale by ABB to the Copelouzos Company of the shares in ABBRS, again for DM 45 million. The same provision for completion as appears in the First Memorandum of Transfer appeared in the Second Memorandum of Transfer (mutatis mutandis), but ABB also undertook that, prior to completion, ABBRS would have acquired the shares in AIA. It was also provided that the shares in AIA "possessed by" ABBRS should be deposited with a Bailee. There was a specific provision of the Second Memorandum of Transfer

> that the rights of ABB in respect of the shares in ABBRS, as well as the rights in AIA's shares "possessed by" ABBRS, were to be exercised by ABB, but "without disregarding in any reasonable way" the interests and rights of the Copelouzos company."

55. It was a feature of both agreements that the buyer had a "power to sell and to transfer to itself, by a self-agreement, the herewith promised to be sold shares" of, in the first case, AIA and, in the second case, ABBRS.

56. The third of the Three Agreements was a Bailment Agreement. Two of the parties thereto were again unidentified, one of which, the Third Bailor, the tribunal inferred was also a Copelouzos company. This agreement provided for the deposit of the 1,500,000 shares in AIA, representing 5% of the share capital in AIA, with the Bailee. The tribunal summarised the effect of the Three Agreements as follows: -

> "148. It is clear to the Tribunal, which so finds, that the Three Agreements, when considered together, were simply a device or mechanism for the sale and transfer by ABB of its 5% stake in AIA to the Copelouzos company. The mechanism put in place for the sale was to give to ABBRS the right to acquire all of ABB's shares in AIA after the date upon which the transfer restrictions stated in the ADA expired. The Copelouzos company was given the right to acquire all of the shares of ABBRS, and so to acquire control of the 5% stake in AIA. The performance of ABB, ABBRS and the Copelouzos company of their respective obligations under the First and Second Memoranda of Transfer was secured by the Bailment Agreement. The Bailee was to deliver the shares to the Copelouzos company immediately upon presentation of evidence of payment by the Copelouzos company to ABB of the balance of the purchase price of DM 25 million, DM 20 million having been paid on the 11th January 2000."

57. The arbitrators then continued as follows: -

> "149. Sometime prior to the making of the Three Agreements, on the 30th September 1999, ABB had obtained a Legal Opinion from Mr Alexander Vassardanis on "the margin allowed by the ADA to Ordinary Shareholder to transfer, sell, or otherwise dispose of the Ordinary Shares" in AIA. In addition to giving his Legal Opinion, Mr Vassardanis also appears to have drafted an agreement, which is substantially reproduced in the First Memorandum of Transfer: Bundle 4/945h-m and 945r-s.
>
> 150. Although ABBRS had not been identified by the date upon which he gave his Legal Opinion, Mr Vassardanis expressed the view that the transfer of ordinary shares by ABB to ABBRS ("a related transferee") followed by a "pre-agreement" or "prosymfono", or a promise to sell in the future, would not be in breach of the ADA, provided that the prosymfono did not contain a provision relating to the voting of the

shares during the period before the sale envisaged by the prosymfono was completed. Mr Vassardanis also stressed the view that a prosymfono was an agreement which fell within Article 37.6 of the ADA, which, as has been seen, requires an agreement or arrangement "relating to the exercise of rights attaching to Ordinary Shares" to be disclosed, and a copy given, to the Greek State "forthwith after the entry into thereof." He went on to say that provided that (a) there was no provision in the prosymfono as to voting and (b) the prosymfono was disclosed to the AIA Board of Directors, there would be no breach of the ADA. So far as the Tribunal was aware, the prosymfono was not disclosed to the Board of Directors of AIA.

151. The Tribunal is satisfied that, when looked at in the round, the Three Agreements did relate "to the exercise of rights attaching to the Ordinary Shares" in AIA. The rights "attaching" to the Ordinary Shares were, first, the unencumbered ownership of the shares and, secondly, the rights which went with such unencumbered ownership, for example, the right to vote. The effect of the Three Agreements was to preserve ABB's voting rights, but to require it, when exercising those rights, to have regard to the rights and interests of the Copelouzos company.

152. In addition, the Tribunal is satisfied that the effect of the Three Agreements was to grant "security" over the AIA shares, and that the grant of security was a breach of ABB of Article 37.8.1(a) of the ADA. "Security" is defined as including "any mortgage, pledge, lien, security interest or other charge or encumbrance and any other agreement or arrangement having substantially the same economic effect." Both the First and Second Memoranda of Transfer provided for payment for the shares. There can be no doubt that, once payment of the first instalment had been made by the buyer, the Copelouzos company, under the Second Memorandum of Transfer, it had a security interest over the shares on ABBRS, and, consequently over the shares to which ABBRS was entitled in AIA. The Copelouzos company's "security" was reinforced by the Bailment Agreement, which removed the relevant shares from ABB's immediate possession and gave the Copelouzos company certain rights in determining how the Bailee could dispose of the shares.

153. The Three agreements were amended by an agreement entitled "Amendment No.1" and dated the 18th January 2001: Bundle 4/9450bo-bs. The amendment was required because the Copelouzos company had failed to pay the second instalment of the purchase price for the ABBRS shares. In order to preserve the agreement, ABB entered into a Loan Agreement with the Copelouzos company by which ABB lent the Copelouzos company €12,782,297, a sum which was intended to pay the second instalment due under the Second Memorandum of Transfer. The loan was interest free, and was repayable on the 31st December 2002:Bundle 4/945bl-bn. Clause 2 of the Loan Agreement made the repayment of the loan a term of agreement.

154. It is observed that nowhere in Mr Vassardanis' Legal Opinion is there a reference to the obligation of good faith, whether under Article 3.1.6 of the ADA or as implied by Greek law. The Tribunal finds this a surprising omission because it finds that the Three Agreements were collectively a device to circumvent the provisions of Article 37.8 of the ADA.

155. It could be argued that there is no reason why ABB should not have taken steps to find out how it could transfer its shares in AIA before the Listing of those shares, or the second anniversary of the opening of the airport. The Tribunal sees the force of such an argument, particularly if the agreement had been negotiated at arms' length. However, on the facts of the present case, when one looks at the structure put in place of a sale to a wholly-owned subsidiary, and then an agreement to sell the wholly-owned subsidiary to the third party, with a bailment of the shares until payment had been made for them, one is left with the strong impression of the creation of a mechanism to circumvent rather than of an arms' length transaction. When there is added to the impression the fact that the purchaser of the AIA shares and of the shares in the subsidiary company are one and the same, that impression becomes stronger. Furthermore, it is necessary to take into consideration the fact that (a) ABB did not disclose the existence of the Three Agreements to Hochtief and (b) at or about the time when the Three Agreements were made, ABB purported to be in discussion with Hochtief about the possibility of Hochtief acquiring its shares in AIA.

156. When all of the various factors stated above are added together, the Tribunal has no hesitation in finding that

    (i) the Three Agreements were a device or mechanism to circumvent the alienation provisions in the ADA;

    (ii) the Three Agreements should have been disclosed to the Greek State pursuant to Article 37.6 of the ADA, but were not disclosed;

    (iii) the effect of the Three Agreements was that ABB was in breach of Article 37.8 of the ADA;

    (iv) in addition, to purport to negotiate with Hochtief for the purchase of its shares at or about the same time as concluding the Three Agreements, amounted to a breach by ABB of Article 3.1.6 of the ADA and of the implied duty to deal in good faith.

157. If the matter had ended there, the Tribunal would have found, without hesitation, that ABB was in breach of the various terms of the ADA, so that the purported transfer to Horizon should not have been approved under Article 37.10.2 of the ADA.

158. Before arriving at such a conclusion, however, it is necessary to consider the events which subsequently led to the transfer of the shares to Horizon rather than to the Copelouzos company.

159. ABB's shareholding in AIA was finally transferred by a Share Sale and Transfer Agreement dated the 24th May 2004. By the Share Sale and Transfer Agreement ABB sold its shares in AIA directly to Horizon Investments SA, a company belonging to the Copelouzos Group. It is ABB's contention that the Share Sale and Transfer Agreement had the effect of rescinding the Three Agreements. Thus, it is contended by ABB that any possible violation of the ADA by the Three Agreements could not affect the validity of the Share Sale and Transfer Agreement

160. Although the Share Sale and Transfer Agreement is dated the 24th May 2004, it is expressly stated in the Agreement that the parties "confirm that the Agreement for the transfer of the [AIA] Shares was made by and between them, the 3rd day of December 2003."

161. The Share Sale and Transfer Agreement recites that ABB has "in its sole, absolute and undisputed ownership, possession and use" the 1,500,000 shares in AIA, and that "it sells, transfers and delivers" those shares for €23,800,134 "which is deemed by the parties as a reasonable and justified price, fully corresponding to the market value of the [AIA] Shares." In addition, ABB guaranteed to Horizon that the shares were free of, inter alia, any lien, encumbrance, debt, pledge, attachment, receivership or pre-emption right.

162. There are three important facts to note about the Share Sale and Transfer Agreement. First, the price, expressed in the Share Sale and Transfer Agreement in Euros, corresponds to the sum of DM 45 million which was the sale price in the Three Agreements. Secondly, the object of the transaction was obviously the same in both cases, and, thirdly, the parties to the agreement were also broadly the same, namely, ABB and Copelouzos Group.

163. As has been seen, the identity of the Copelouzos Group Company which was involved in the Three Agreements was redacted from the documents in the Bundle before the Tribunal. In cross-examination, Dr Göttler refused to divulge the identity of the Copelouzos company involved in the Three Agreements: see Transcript 9th December 2004/44:21-45:2.

164. ABB contends that the Copelouzos company involved in the Three Agreements was not Horizon. For the purposes of argument, the Tribunal is prepared to accept that submission. However, it does not appear to the Tribunal that the exact identity of the company within the Copelouzos Group is of any significance in determining whether the Share Sale and Transfer Agreement was, in reality, an entirely new agreement, or whether it was, in reality, all part and parcel of the same transaction as had been provided for in the Three Agreements.

165. It would appear that ABB's shares in AIA were still held by the Bailee on the 3rd December 2003. In an internal email dated the 1st December 2003 (Bundle 4/1044) a Mr Costas Cosmadakis of ABB Greece said in relation to Mr Copelouzos:

> "He considers that ABB should transfer to Horizon the shares immediately. He has waited two weeks now to help ABB clear up the situation with HVB but he now sees there is no end to this. An option he has is to take the shares from Switcherland (sic) (a right he has after payment was effected) but this will then expose both ABB and him as the notification to all authorities and the Airport is the transfer to Horizon and not to somebody else."

166. On the 3rd December 2003 Hochtief obtained from the Landgericht Duesseldorf an ex parte injunction against ABB, which prohibited ABB from transferring the shareholding in AIA to a third party without the prior consent of Hochtief: Bundle 4(4)/1102-3.

167. On that same day, Horizon filed a Declaration for Transfer of Taxes for the AIA shares with the Athens Tax Office: Bundle 4(4)/1104-5.

168. The evidence has not made it clear to the Tribunal exactly when the AIA shares were transferred by ABB to Horizon. However, it seems possible that the transfer was effected at a time when the injunction was in force. At the time when the transfer was made, the Bailment Agreement was still in force. So far as the Tribunal is aware, at the time of the transfer, the AIA shares were still in the custody of the Bailee who could only hand them over to the Copelouzos Group upon proof of the repayment of the loan made by ABB.

169. In those circumstances, the Tribunal infers that the Share Sale and Transfer Agreement was itself simply part and parcel of the device to evade the alienation provision in the ADA, and that it is, therefore, equally a breach of Article 37.8.2 of the ADA in that there was a failure to seek and obtain the consent of all ordinary shareholders to the proposed transfer as was required under Article 37.8.2(d) of the ADA.

(c) <u>The registration of the share transfer to Horizon</u>

170. Hochtief also seeks a declaration that the registration of the transfer is null and void. AIA's Board resolved to register Horizon as the new shareholder on the 26th February 2004.

171. Article 5.7(a) of AIA's Article of Association permits the transfer of shares, subject to the limitations contained in the ADA. Article 37 of the ADA, which regulates shareholder conduct before listing, also contains a provision which regulates the registration of new shareholders. Article 37.10.2 provides:

> "No transfer or issue of Ordinary Shares or Ordinary Share-Related Securities shall be approved by the Ordinary Shareholders, and no registration of any Person as a holder of Ordinary Shares or Ordinary Share-Related Securities upon a transfer or issue of Ordinary Shares (including on exercise of rights attaching to Ordinary Share-Related Securities) or Ordinary Share-Related Securities shall be effected, other than in each case in accordance with the provisions of this Article 37 (Shareholder Conduct Before Listing)."

172. The Tribunal has found that the transfer of shares to Horizon was, on the facts of the present case, a breach of Article 37.8 of the ADA. As the ADA is not merely a private contract but a public law, the breach of its provisions is not only a breach of contract but is also a breach of Greek law. It follows that the purported registration of Horizon as transferee of ABB's shares on AIA is both a breach of contract as well as a breach of Greek law, and is, therefore, null and void. In the circumstances, the transfer could be neither approved nor registered."

58. Pausing there I should mention that, as I recorded in paragraph 9 above, the ADA was ratified by the Greek Parliament and became part of Greek law. The proposition of Greek law upon which the arbitrators' conclusion in paragraph 172 depends was common ground between the Greek lawyers who gave expert evidence as to the content of Greek law.

59. The conclusion in paragraph 172 was itself conclusive of the dispute in Hochtief's favour. However the relevant part of the award continues for three more paragraphs as follows: -

> "173. As has been mentioned above, Hochtief submits that, in order for the share transfer from ABB to Horizon to be valid under Greek law (as contained in Article 37.10.1 of the ADA), a written, multi-lateral agreement, or a series of bilateral agreements, should have been concluded between Horizon and each of the existing ordinary shareholders of AIA. The Tribunal accepts that submission. It follows that the Tribunal is satisfied that neither ABB nor Horizon satisfied the provisions of Article 37.10.1 of the ADA by agreeing in writing with all of the other ordinary shareholders of AIA "in a form reasonably acceptable to each of them."
>
> 174. For its part, ABB submits that Hochtief was in breach of its duty of good faith in refusing to accept Horizon's unilateral notarial declaration. The Tribunal rejects that submission. The Tribunal has found that it was ABB that was in breach of the duty of good faith. In the light of that finding, the Tribunal concludes that it was not unreasonable for Hochtief to refuse to accept the proffered declaration, which did not comply with the requirements of Article 37.10.1 of the ADA.
>
> 175. In summary, therefore, the Tribunal concludes that (a) ABB was in breach of Article 37.8 of the ADA, and further acted in breach of Article

3.1.6 of the ADA and of the general obligation of good faith in Greek law when making the Three Agreements; (b) there was a failure to comply with Article 37.10.1 of the ADA; (c) the purported transfer of ABB's shares to Horizon was null and void; and (d) the transfer and registration of shares to Horizon could not be approved under Article 37.10.2 of the ADA so that each of the purported registration and approval was null and void."

I ABB's Challenge to the Award

60. ABB complains that there are serious irregularities affecting the proceedings and/or the award giving rise to substantial injustice in three respects: -

(i) ABB points out, and Hochtief accepts, that Hochtief did not in terms contend that the purported transfer of shares in AIA to Horizon took place pursuant to the Three Agreements. The arbitrators therefore decided the case on a basis not argued and/or without giving to ABB a reasonable opportunity of dealing with the point. Article 37.8 was only operative until March 2003 – how then could it invalidate a transfer made later in 2003 or in 2004?

(ii) ABB contends that the Tribunal failed to decide or even to refer to the Greek law issue. This was critical to a finding that ABB could not be permitted to maintain that HTA had acted in bad faith in 2004 in refusing to accept Horizon's unilateral notarial declaration.

(iii) In finding on the facts that ABB had acted in bad faith in 1999 by purporting to negotiate with HTA when in truth it had no intention of dealing with it seriously or transferring shares to HTA, the tribunal acted unfairly and unjustly to ABB. This was because on two occasions it had refused ABB's request that HTA disclose its documents relating to the meetings in 1999 between HTA and ABB and relating to HTA's own position about the shares i.e. whether it was ever prepared really to buy them and what was its financial limit if it had been. ABB's evidence was that HTA had made it clear in negotiations that it was only prepared to make a low offer and would not increase it. Accordingly, ABB did not pursue the negotiations further with HTA, not because it was being sharp or deceitful towards HTA but because there was no point in having further negotiations. HTA produced no documents relating to these matters at all and adduced no witness evidence either. But it still maintained that ABB's stance was not a genuine one and asked the tribunal so to find – which it did.

J The Legal Framework

61. The relevant provisions of the Arbitration Act 1996 are as follows: -

> "68. – (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see s.73) and the right to apply is subject to the restrictions in s.70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –
>
> (a) failure by the tribunal to comply with s.33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: (see s.67);
>
> …….
>
> (d) failure by the tribunal to deal with all the issues that were put to it."
>
> "33 – (1) The tribunal shall –
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

62. Mr Waksman QC for ABB relied upon what he said were plain breaches of these provisions in the manner described. He accepted that the purpose of an application under s.68 is not to provide relief where the tribunal has failed to come to the "correct decision," a point emphasised by the House of Lords in Lesotho Highlands Development Authority v. Impregilo SpA [2005] 3 WLR 129. He accepted, naturally, that what was required to be shown was serious irregularity resulting in substantial injustice. However in determining whether there had been

substantial injustice the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. Provided that the point is one where the tribunal might well have reached a different view, the court should enquire no further – see in particular per Colman J in Vee Networks v. Econet Wireless International Limited [2004] EWHC 2909 (COMM) at paragraph 90: -

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

63. In short, Mr Waksman submitted that this was just such a case as the Departmental Advisory Committee had in mind when, at paragraph 280 of its Report on the Arbitration Bill which became the 1996 Act it referred to a case where "the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected." However I think it important to put that observation in the context of the whole paragraph in which it appears which reads as follows: -

> "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 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. In short, Clause 68 is really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."

Plainly those who subscribed to this passage envisaged that the hurdle to be overcome would be a high one – something "so far removed from what could reasonably be expected of the arbitral process," as opposed to an "acceptable

consequence" of the choice of arbitration. In Lesotho Lord Steyn said of the requirement to show that there has been a "serious irregularity": -

> "It is a new concept in English arbitration law. Plainly a high threshold must be satisfied."

There are many other judicial pronouncements to similar effect: Fidelity Management v. Myriad International Holdings [2005] 2 All ER (Comm) 312, 314 (Morison J: a "long stop" to deal with "extreme cases where…… something….went seriously wrong with the arbitral process"); World Trade Corporation v. Czarnikow Sugar [2004] 2 All ER (Com) 813,816 (Colman J); Cameroon Airlines v. Transnet [2004] EWHC 1829 (Comm) at para 94 (Langley J: "the test is indeed an extreme case"); The Pamphilos [2002] 2 Lloyds Rep 681,687 (Colman J: "the substance and nature of the injustice goes well beyond what could reasonably be expected as an ordinary incident of arbitration."); Profilati Italia v. PaineWebber [2001] 1 All ER (Comm) 1065, 1071 (Moore-Bick J: "it is intended to operate only in extreme cases"); The Petro Ranger [2001] 2 Lloyds Rep 348, 351 (Cresswell J); Egmatra v. Marco Trading [1999] 1 Lloyds Rep 862, 865 (Tuckey J: "no soft option clause as an alternative for a failed application for leave to appeal").

64. In the present case I derive particular assistance from two further judgments of this court, one delivered long before the 1996 Act introduced the new concept of serious irregularity and one dealing expressly with it. Thus in 1985 Bingham J described what should be the court's normal approach to arbitration awards in these terms: -

> "……. As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will no substantial fault that can be found with it." (Zermalt Holdings v. Nu-Life Upholstery Repairs [1985] 2 EGLR 14.

In Bulfracht (Cyprus) Ltd v. Boneset Shipping Co. Ltd [The "Pamphilos"] [2002] 2 Lloyd's Rep. 681 Colman J was concerned with findings of fact of which the arbitrators did not forewarn the parties and for which there was said to be no evidential basis. His starting point, at p.686, was that: -

> "The arbitrators' duty was to give the parties a fair opportunity of addressing them on all factual issues material to their intended decision as to which there had been no reasonable opportunity to address them during the hearings."

He went on as follows (at p.687):

> "It has to be emphasized, however, that the duty to act fairly is quite distinct from the autonomous power of the arbitrators to make findings

> of fact. Thus, whereas it may normally be contrary to the arbitrator's duty to fail to give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings, it will not usually be necessary to refer back to the parties for further submissions every single inference of fact from the primary facts which arbitrators intend to draw, even if such inferences may not have been previously anticipated in the course of the arbitration. Particularly where there are complex factual issues it may often be impossible to anticipate by the end of the hearing exactly what inferences of fact should be drawn from the findings of primary fact which have been in issue. In such a case the tribunal does not have to refer back its evidential analysis for further submissions. A typical situation is where arbitrators arrive at a conclusion on an issue of expert evidence which differs to some extent from that put forward by either opposing expert. In many cases, such as this, the arbitrators have been appointed because of their professional, legal, commercial or technical experience and the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning. It needs to be emphasised that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's power to make findings of fact relevant to the issues between the parties."

65. A not dissimilar approach was taken by Lawrence Collins J and the Court of Appeal in the context of a rent review arbitration. Warborough Investments v. Robinson [2003] 2 EGLR 149 was a rent review case in which the landlord contended that the arbitrator: -

> "took an approach (1) which neither surveyor advocated; (2) of which neither surveyor was aware when preparing either submissions or counter-submissions; and (3) on which neither surveyor was given an opportunity to comment. The arbitrator did so on the basis of evidence he appears to have supplied or inferred for himself." Judgment of Lawrence Collins J, para 31.

The judge rejected the landlord's argument that the arbitrator had supplied evidence or inferred it for himself. The issues in question had been put "into the arena." There was no serious irregularity in extracting an alternative case from the submissions of the parties (para 64). The Court of Appeal dismissed the appeal; there was no breach of s.33 because "the judge was right to conclude…..that the matters had been put into the arena." (see per Jonathan Parker LJ at para 54, p.155 -156 of the report.)

66. In Hussman (Europe) Ltd v. Al Ameen Development and Trade Co [2000] 2 Lloyd's Rep. 83 at 97 Thomas J observed: -

> "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 about the reasoning, but it is no more than that."

As Colman J observed in Margulead Ltd v. Exide Technologies [2004] 2 All ER (Comm) 727 deficiency in reasoning in an award is the subject of a specific remedy under the 1996 Act, s.70(4). He went on, at paragraph 42 of his judgment:-

> "It is accordingly self-evident that: (i) failure to deal with an "issue" under s.68(2)(d) is not equivalent to failure to deal with an argument that had been advanced at the hearing and therefore to have omitted the reasons for rejecting it; (ii) Parliament cannot have intended to create co-extensive remedies for deficiency of reasons one of which (s.68) was a general remedy which might involve setting aside or remitting the award in a case of serious injustice and one of which (s.70(4)) was designed to provide a specific remedy for a specific problem; (iii) the court's powers under s.68(2) being engaged only in a case where the serious irregularity has caused substantial injustice, the availability of the facility to apply for reasons or further reasons under s.70(4) would make it impossible to contend that any "substantial injustice" had been caused by deficiency of reason."

S.68 (2) is, as Colman J decided in World Trade Corporation Ltd v. C Czarnikow Sugar Ltd [2004] 2 All ER (Comm) 813, confined in its application to essential issues as distinct from the reasons for determining them. What is required is that "an award should deal, however concisely, with all essential issues" – see per Toulson J in Ascot Commodities NV v. Olam International Limited [2002] CLC 277 at 284.

67. All of these authorities and judicial observations emphasise the restricted ambit of the jurisdiction under s.68. It is not a ground for intervention that the court considers that it might have done things differently or expressed its conclusions on the essential issues at greater length. Furthermore it is particularly to be borne in mind in the context of international arbitrations that the arbitrators may not all have been brought up in the same legal tradition. In order to express the reasons for their award they must find language with which each is comfortable. Directing myself in accordance with these principles I turn to consider ABB's challenge to this award under each head.

K Discussion

68. The Article 37.8 point.

I have already recorded that Hochtief did not in terms contend that the purported transfer of shares took place pursuant to the Three Agreements. However a point which HTA clearly did take in the arbitration was that the conclusion of the Three Agreements in 1999 was itself a breach of Article 37.8, which constituted an act of bad faith on the part of ABB upon which HTA could rely in connection with ABB's argument that HTA was acting in bad faith in refusing to accept Horizon's unilateral declaration in 2003. ABB countered this argument in at least two ways.

First, they contended that the conclusion of the Three Agreements in 1999 was not of itself a breach of Article 37.8 because it neither granted security over the shares in AIA nor amounted to an agreement in respect of the votes attached thereto. Secondly, and in the alternative, ABB contended that even if the Three Agreements amounted to a breach of Article 37.8, this had no continuing relevance because the Three Agreements were rescinded on 3 December 2003 by reason of ABB entering into a new and completely different Share Sale and Transfer Agreement with Horizon which was again confirmed on 24 May 2004. Therefore, so it was said, HTA could derive no rights from the rescinded Three Agreements when trying to justify its own refusal to accept Horizon's unilateral declaration – see ABB's Post–Hearing Written Submissions at pp.73 and 74. In its Post-Hearing Written Submissions HTA contended that although the purported transfer to Horizon was to a different Copelouzos company than the unnamed company involved in the Three Agreements, "the commercial reality was that this was a closing of the 1999 agreement, structured so as to conceal the 1999 agreement from HTA."

69. Thus although the point was not taken that the purported transfer to Horizon took place pursuant to the Three Agreements and was for that reason alone invalid, because the Three Agreements were themselves concluded in breach of Article 37.8, nonetheless there was clearly in issue before the arbitrators for the purpose of the bad faith argument (a) whether the conclusion of the Three Agreements had at the time been a breach of Article 37.8 and (b) whether the 2003/2004 agreement was in reality a fresh agreement which rescinded the earlier agreements or was rather to be regarded as the working out or closing of the earlier agreements. It was also common ground that because the ADA had been "ratified by law" a breach thereof would lead to the invalidity of the transfer purportedly effected rather than simply giving rise to an action for damages for breach of contract – see the Supplementary Expert Report of Professor Spyridakis, ABB's expert witness on Greek law. That is the basis upon which the oral evidence on Greek law on day three of the arbitration proceeded. During the cross-examination of the two expert witnesses including vigorous questioning by the tribunal there was considerable discussion of the Three Agreements and the question whether the conclusion thereof amounted to a breach of Article 37.8.

70. There was also much discussion of the true ambit of the doctrine of bad faith in Greek law upon which HTA was relying. Professor Berger evidently regarded Greek law as reflecting German law in this regard and summarised the principle in the course of argument in this way: if a party has itself behaved against good faith it is debarred from relying on bad faith conduct of another party. There needs to be a certain connection between the two conducts. See the Transcript for Day 3 at p.157. Professor Spyridakis did not accept that this principle was known to Greek law. He acknowledged a principle usually encapsulated in the phrase "nemo auditur suam turpitudinem allegans" but said that it went no further than preventing a party from deriving an advantage, right or privilege from conduct of his own which amounted to a breach of the obligation to observe good faith. It was in the context of this debate that there took place the following exchange right at the end of the cross-examination of Professor Spyridakis, and right at the end therefore of the third day of the arbitration: -

"MR STYLE: Professor Spyridakis…..is not what is happening here that this is a closing of an agreement which was reached with Copelouzos in 1999, an agreement which was concluded in breach of the ADA, an agreement which was concealed from Hochtief in breach of ABB's obligation of good faith - -

Mr WAKSMAN: I think we are getting back to have you beaten your wife again.

MR STYLE: I am simply making the point Mr Waksman that it is possible for the tribunal to arrive at a view of the facts which does involve ABB purporting to derive its rights, in other words, its ability to deal with Copelouzos from the bad actions taken in the past.
Now if the tribunal were to arrive at that view it with fit itself (sic) with even your formulation, would it not?

A: I do not see any claiming by ABB based on its bad actions, it does not derive anything.

Q: It is seeking to close the deal - -

A: We signed the contract and you have a declaration by Mr Copelouzos. It is up to the tribunal to decide if the acceptance of the declaration is in violation.

THE CHAIRMAN: I think what Mr Style is putting to you, Professor Spyridakis, is if we come to the conclusion that in 1999 ABB was in breach of its obligation of good faith, cooperation, in entering into an agreement with the Copelouzos Group and in 2003 that agreement became the sale of the shares to Horizon, would that not fall within your definition of them taking advantage of their previous bad actions?

That is what he is putting to you I think. Mr Style will tell me if I am wrong.

A: I do not see any point in that.

THE CHAIRMAN: You do not?

A: No. They are bad actions, they do not derive any privilege from those bad actions. They just sign a contract.

THE CHAIRMAN: I see. Thank you.

MR STYLE: No further questions Chairman.

A: That is nemo auditur suam turpitudinem allegans. If we apply that in this case, you will - - even according to the

German law, you will not accept that, the application of that principle.

The other principle which I do not know and which does not exist under Greek law, I cannot…..do not bother."

See Transcript, Day 3, pp.273 – 4.

71. It is interesting to compare this passage with the passage to be found very early in the transcript for Day 3 at page 33. Dr Schneider, a director of ABB, was recalled to give further evidence. He was evidently not fully familiar with all of the relevant contractual background, but he was obviously surprised at the suggestion put to him by Mr Style for HTA that the completion of the deal did not take place pursuant to the Three Agreements.

"MR STYLE: Now in the event, the Copelouzos Group did not complete their purchase in the manner provided for in the Vorverträge, did it? It did not complete the purchase in the manner provided for in the Vorverträge, did it?

A: You mean the fact that Copelouzos has not paid the second instalment?

Q: No, I mean the two Vorverträge gave the Copelouzos Group the right to close their purchase of the shares, the right to exercise their option to acquire the ABB Robotersysteme after that company had acquired the AIA shares and the completion of the deal did not take place pursuant to the Vorverträge, did it?

A: It did not. Why it was not according to the Vorverträge?

Q: Because in the event the Vorverträge were cancelled and there was a direct sale to Horizon, was there not?

A: I cannot recall. I am not aware of that.

Q: Is not the reason it was structured in that way because ABB wished Hochtief to remain ignorant of the contracts concluded in 1999?

A: I cannot - - no, this contractual issue, I was not that much involved and - -"

72. It is of course correct to observe by way of reiteration that all of this discussion took place in the context of the bad faith argument rather than in the context of an argument directed simply to establishing that the purported transfer to Horizon was a nullity because effected pursuant to an agreement or collection of agreements that was itself a breach of Article 37.8 which acquired the force of Greek law. However in my judgment all of the essential elements that might lead

to that conclusion were fairly in play or, to use a different expression, in the arena. The arbitrators concluded that the Share Sale and Transfer Agreement of May 2004 was not in reality a new agreement at all but rather was all part and parcel of the same transaction as had been provided for in the Three Agreements. The price was the same as provided for in the Three Agreements and the parties were broadly the same with ABB refusing to divulge the identity of the Copelouzos Group company involved in the Three Agreements. As late as 1 December 2003 Mr Copelouzos evidently regarded himself as having the option to utilise the unilateral transfer provision or "self-agreement" in the Three Agreements. On 3 December 2003 HTA obtained an injunction from a German court prohibiting ABB from transferring its shares in AIA to a third party without the prior consent of HTA and on the very same day Horizon filed with the Athens Tax Office a declaration recording the transfer of the shares from ABB. All of this material was in play in the context of the bad faith argument and the parties had a full opportunity to address the tribunal on the implications thereof. In my judgment the tribunal has extracted an alternative case from the parties' submissions in a manner foreshadowed by the Chairman's question to Professor Spyridakis which I have set out in paragraph 70. I do not consider that the duty to act fairly required the tribunal to refer back to the parties its analysis of the material and the additional conclusion which it derived from the resolution of arguments as to the essential issues which were already squarely before it. In my judgment ABB had had a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion. That is of course strictly determinative also of the question whether substantial injustice has been caused to ABB. In that regard I can see no further argument which ABB could have deployed which would have been in substance different from the arguments already deployed. ABB made the point that the transfer restrictions contained in Article 37.8 were limited in time so that by the end of 2003 it was only the restrictions imposed by Article 37.10 which remained. That point is in its Post-Hearing Submissions at p.20 albeit of course in a different context – and in any event the fact that the Article 37.8 restrictions were limited in time was fundamental to the entire discussion of the significance of the Three Agreements – see paragraph 148 of the award. It is irrelevant on this application to consider whether the arbitrators should have concluded that the time-limited nature of the restriction on alienation meant that the May 2004 Share Sale and Transfer Agreement could not be invalidated thereby. The only question is whether ABB has been unfairly deprived of the opportunity to advance argument to that effect. In my judgment it has not. ABB has effectively advanced that very argument. It has argued, unsuccessfully, that the shares were not transferred pursuant to the Three Agreements but pursuant to a completely new agreement which had the effect of rescinding the earlier collection of agreements. The arbitrators have concluded that the transfer took place pursuant to the Three Agreements, which were prohibited by law when made. Although irrelevant to my conclusion it is not immediately obvious to me why the fact that the alienation provisions were by late 2003/2004 of no further effect is an answer to the arbitrators' conclusion that the transfer took place pursuant to an agreement which had been invalid when made.

73. For all these reasons in my judgment the challenge to the award on the Article 37.8 ground fails. That is sufficient to dispose of this application but I will out of

deference to the argument addressed to me state my conclusions on the other two grounds of challenge.

The Greek Law point

74. The key paragraph in the award here is paragraph 174 which for ease of reference at this point I will set out again: -

> "174. For its part, ABB submits that Hochtief was in breach of its duty of good faith in refusing to accept Horizon's unilateral notarial declaration. The Tribunal rejects that submission. The Tribunal has found that it was ABB that was in breach of the duty of good faith. In the light of that finding, the Tribunal concluded that it was not unreasonable for Hochtief to refuse to accept the proffered declaration, which did not comply with the requirements of Article 37.10.1 of the ADA."

In relation to this issue Mr Waksman's submissions in his skeleton argument were in part as follows: -

> "29. In order to make sense of that paragraph it must be read to mean only one or other of two things:
>
> (1) ABB was in breach of its duty of good faith towards HTA (i.e. principally the events of 1999) and accordingly (i.e. "in the light of that finding") HTA was acting in good faith in refusing Horizon in 2003;
>
> or
>
> (2) ABB was in breach of its duty of good faith towards HTA (i.e. principally the events of 1999) and accordingly (i.e. "in the light of that finding") it could not be heard to complain of HTA's bad faith in 2003.
>
> 30. These are two different arguments. The first says that HTA was actually acting in good faith in 2003. The second says that it was not, but ABB is prevented from complaining about it. HTA never made argument (1). It made argument (2) but on its own case and that of ABB, that argument depended on key expert evidence as to the existence or otherwise of a wide "clean hands" principle under Greek Law.
>
> 31. On argument (1), it is clear from HTA's submissions that it accepted that it would have been acting in bad faith in 2003 unless there was indeed the alleged oral agreement, partnership or community of interests, one or more of which HTA claimed it was seeking to protect by refusing Horizon unless Horizon signed a new agreement with HTA. But the tribunal rejected the existence of all three things. It rejected the oral agreement and

> the partnership expressly and although it did not say so, it must have rejected the community of interests argument as well. If it upheld it, it would undoubtedly have referred to it as a support for HTA's actions in 2003 as HTA had invited it to do and there was extensive expert evidence on the issue of community of interests."

75. There is no doubt that paragraph 174 of the award contains some very compressed reasoning. I am inclined to think that what has happened here is that the tribunal has to some extent elided two arguments. The seeds of that elision can be seen in paragraph 107 which reads: -

> "107. In answer to ABB's case, Hochtief contends that it was entitled to decline to accept Horizon's unilateral declaration, or to enter into an agreement with Horizon, because of the conduct of ABB during the period between 1999 and 2003, which, Hochtief contends, demonstrates a breach by ABB of its duty to deal with Hochtief in good faith. So, Hochtief contends, it was entitled to require Horizon to agree specifically the terms upon which it would join the Consortium, and was not obliged to accept Horizon's unilateral declaration."

This is not a correct characterisation of Hochtief's arguments. On the assumption that it failed on the oral Consortium Agreement and civil law partnership arguments, HTA still had two strings to its bow on the question whether it had been acting in abuse of rights – in bad faith – in refusing to consent to Horizon's unilateral notarial declaration. The first point was that even if HTA was not entitled to invoke any legal right arising out of the Consortium Agreement and/or civil law partnership, it was in all the circumstances reasonable for HTA not to enter into the agreement offered by Horizon. The background to the Athens airport project and the contractual terms agreed between the private shareholders and the Greek State all reflected the existence of a community of interest between the private shareholders in relation to the project. Given the well-known relationship between the Copelouzos Group and the Greek State, it was reasonable for HTA to insist on concluding a consortium agreement with Horizon which obliged Horizon to respect that community of interest. See HTA's Supplemental Statement of Case paragraph 13.3. The second and quite distinct point was that, because of the wide ambit of the nemo auditur principle in Greek law, even if HTA was in bad faith in declining to accept Horizon's unilateral notarial declaration, still ABB could not be heard to complain of it on account of its own prior bad faith. Unfortunately in paragraph 32 of its Supplemental Statement of Case HTA itself confused these arguments by placing them in an illogical order. That paragraph, under the itself confusing rubric "the effect of ABB's breach" reads as follows: -

> "32. It follows that ABB's case under Article 37.10 fails on a number of grounds;
>
> 32.1 its purported operation of Article 37.10 is invalidated by its own bad faith;

> 32.2 in any event, being in breach of its obligation of good faith, ABB would not be allowed in Greek law to complain of a breach of good faith on the part of HTA; and
>
> 32.3 for the reasons given above, HTA's refusal of its consent to the sale to Horizon was not abusive. HTA acted in good faith throughout."

HTA was not in my view intending by that paragraph to put forward the proposition that bad faith by ABB converted what would otherwise be bad faith by HTA into good faith. The "reasons given above" were those to which I have already referred, viz, oral Consortium Agreement, civil partnership and community of interest, which HTA put forward as three distinct reasons why HTA's refusal to accept the declaration could not be said "obviously to exceed the limits imposed by morality." This lack of clarity led ABB to allege in its sequential Supplemental Statement of Defence that HTA was seeking to plead a new case. ABB asserted: -

> "In the Supplemental Statement of Case HTA seeks to plead a new case. It now maintains that ABB acted in breach of obligations of good faith under Article 3.1.6 of the ADA in several aspects. HTA goes on to conclude that because ABB allegedly broke these obligations, it was entitled to refuse to agree with Horizon on the terms set out in Article 37.10.1 of the ADA."

I do not believe that that was what HTA was in fact asserting but it is understandable that its own paragraph 32 may have been read in that way. The points are put rather more clearly in HTA's Post-Hearing Written Submissions. Paragraph 107 of the award I suspect reflects this confusion and paragraph 174 may well do so too.

76. However one must stand back from these compressed, possibly confused and certainly confusing paragraphs of the award to see how the land in fact lay in relation to the matters debated. It is plain both from their award and such parts of the transcript of proceedings as I have studied that the tribunal formed an extremely adverse view of ABB's conduct. They considered that ABB had acted in bad faith towards its contractual partner HTA and had attempted to conceal from HTA what it was doing. It is also plain from the transcript of his cross-examination that each member of the tribunal formed an adverse view of the evidence as to Greek law given on behalf of ABB by Professor Spyridakis. His evidence on the restricted ambit of what for shorthand was described as the nemo auditur principle was treated by Professor Berger with open incredulity. Professor Berger evidently considered that in this respect Greek law and German law coincided, both being derived from the same Roman source. The evidence of Professor Spyridakis on community of interest seems also to have been received with considerable scepticism. For present purposes what is important is that all these issues were fully ventilated in the arbitration.

77. By the time the arbitrators reached paragraph 174 of their award the dispute was already resolved in favour of HTA. The arbitrators had no formal need to set out

their conclusions on the remaining matters argued. Having decided the issue of the proper construction of Article 37.10.1 as they did in paragraph 173, there was only one further question relevant to the main dispute, viz, had ABB established that HTA acted in bad faith in refusing to accept Horizon's unilateral declaration? That question could be said to embrace two separate questions. First, had HTA acted in good faith in refusing to accept the unilateral declaration. Second, even if HTA had not acted in good faith, could ABB, having been found itself to have been in bad faith in the respects summarised in paragraphs 156 and 175 of the award, complain of bad faith on the part of HTA? If the first and second sentence of paragraph 174 stood alone, without the rest of the paragraph, it would be a fair inference that the conclusion there expressed must rest upon an acceptance of HTA's case as to community of interest. If the tribunal concluded that issue in HTA's favour, the debate about the ambit of the nemo auditur principle was doubly irrelevant. Having regard to the tenor of their interventions during the cross-examination of Professor Spyridakis on this point it would be surprising if the tribunal did not accept HTA's case on community of interest, although the arbitrators do not expressly advert to having done so. The third and fourth sentences of paragraph 174 are plainly informed by the tribunal's conclusion that ABB was in bad faith. Again, having studied the transcript of the cross-examination of Professor Spyridakis I would be very surprised if the tribunal did not accept HTA's case on this point also. Furthermore, notwithstanding the manner in which paragraphs 107 and 174 are expressed, there is no suggestion in those parts of the transcript to which I have been directed that during the hearing the arbitrators considered that the proposition for which HTA was contending was, broadly, that bad faith by ABB justified HTA in refusing to accept the declaration or, to put it another way, rendered done in good faith that which otherwise would amount to bad faith.

78. Seen in that context I consider it most unlikely that paragraph 174 in fact reflects a conclusion by the arbitrators that because ABB was in breach of its duty of good faith towards HTA so without more it can be concluded that HTA was acting in good faith in refusing to accept Horizon's unilateral declaration. That was not HTA's case. ABB had asserted that it was, and there had indeed been a confusing paragraph which might be so read in HTA's Supplemental Statement of Case. There was no such confusion in HTA's Post-Hearing Written Submissions. ABB's Post-Hearing Written Submissions correctly identified HTA's argument.

79. The first sentence of paragraph 174 records a submission by ABB that HTA was in breach of its duty of good faith in refusing to accept Horizon's unilateral notarial declaration. In reliance on the arguments presented to it the arbitrators could have rejected that submission on two bases, bearing in mind how it had already disposed of other issues. It could have said that HTA was simply not in bad faith because of the community of interest point or it could have said that even if HTA was in bad faith ABB could not complain about it because of the Greek nemo auditur doctrine. In the second sentence of the paragraph the arbitrators have clearly and unequivocally rejected the submission made to them. If the paragraph had stopped there ABB's only complaint could be that the arbitrators had failed to set out their reasons for their conclusion, which might be a ground for seeking a direction under s.70(4) for further reasons but would not of itself be a ground on which the award could be challenged under s.68. The

reasoning in the third and fourth sentences of paragraph 174 seems to be informed by ABB's bad faith rather than by anything else. The third and fourth sentences are only explicable on the footing that the arbitrators have in fact accepted HTA's rather than ABB's evidence and argument on the Greek nemo auditur doctrine, since acceptance of ABB's case on this issue would have rendered its own bad faith wholly irrelevant. It is confusing that the arbitrators express their conclusion as they do. But if the arbitrators regarded the bad faith of ABB as relevant in this context, as plainly they did, that can only be because they had accepted HTA's rather than ABB's case as to the effect thereof.

80. Accordingly the attack on paragraph 174 of the award is in my judgment in substance a criticism of the adequacy of the reasons rather than an assertion of an irregularity such as is contemplated by s.68. The points which each side were taking were fully canvassed in evidence and argument. Even if there was lingering uncertainty as to the extent of HTA's case on Greek law, which I do not think there was, still acceptance by the tribunal of ABB's case as to the restricted ambit of the nemo auditur doctrine would be sufficient to render its own bad faith completely irrelevant, whether as conduct debarring it from complaining of another's bad faith or as conduct rendering that which would otherwise be bad faith good faith. In presenting its argument ABB sought to establish that the foundation upon which either way of putting the point depended simply did not exist. ABB was not deprived of the opportunity fairly to deal with the point. The tribunal did not fail to deal with an issue that was put to it. The issue here was whether HTA was in breach of its duty of good faith in refusing to accept Horizon's unilateral declaration. The tribunal dealt with that submission by rejecting it. The reasoning set out in support thereof may be unsatisfactory but that is not of itself a serious irregularity such as is mentioned in s.68. It is suggested that if the arbitrators did not apply Greek law in coming to their conclusion then they exceeded their powers, an irregularity under s.68(2)(b). It is however in my judgment inconceivable that the arbitrators did not apply Greek law in coming to their conclusion. There are references to Greek law at paragraphs 154, 173 and 175 of the award and it is plain to me that the arbitrators fully understood that they were applying the provisions of Greek law to the relevant parts of the dispute. The bulk of the third day of the arbitration hearing was taken up with cross-examination of expert witnesses, including vigorous questioning by the tribunal, as to the law of Greece relevant to these issues. It would of course have been happier had the arbitrators made some overt reference, in however summary form, to the issue of Greek law upon which they had heard such extensive argument. But it is not for this court to tell an international commercial tribunal how to set out its award or the reasons therefor. Furthermore, strictly speaking the arbitrators did not need to address this issue at all as they had already conclusively decided the dispute in HTA's favour on the Article 37.8 point. In reality, looked at in the light of all the material now before the court, ABB's complaint is that the tribunal reached an erroneous conclusion as to the content of Greek law. That is not a serious irregularity even if it were made out.

81. Because there is no serious irregularity in the relevant sense arising out of the manner in which the tribunal dealt with this issue the question of substantial injustice does not itself arise. However there was no substantial injustice. ABB had an opportunity fairly to address the issue whether HTA either was or could be

said by ABB to have acted contrary to good faith in refusing Horizon's unilateral declaration. The tribunal decided that issue against it, and it is obvious that the tribunal comprehensively rejected ABB's case as to the limited ambit of the nemo auditur doctrine in Greek law. A remission to the arbitrators would result simply in their clarifying their reasons for rejecting the submission of ABB that HTA was in breach of its duty in good faith in refusing Horizon's unilateral declaration. In any event, this was a point with which strictly the arbitrators had no need to deal.

The Bad Faith Point

82. In relation to the negotiations with HTA in 1999 and 2003 the tribunal concluded that ABB had acted in bad faith. ABB contends that in relation to this aspect of the case there was a breach by the tribunal of its duty to act impartially and fairly as summarised in paragraph 60(iii) above. In short, ABB contends that the tribunal deprived ABB of the opportunity to obtain highly relevant documents from HTA which it was not prepared to disclose voluntarily and which would or might have had a bearing as to the mindset in or with which HTA approached negotiations in 1999 and 2003 concerning a possible sale by ABB to HTA of its shares in AIA. It was ABB's position that these were genuine negotiations and that they would have sold to HTA had the price been right. They said that the negotiations foundered because HTA made a below market price offer for the shares and made it clear that they were not prepared to increase it.

83. Mr Style for HTA submitted that it was clear from the manner in which matters developed on the second day of the arbitration hearing that the tribunal was not interested in the question of HTA's negotiating position in 1999. What the tribunal was really interested in was the failure of ABB in 1999 to disclose its parallel negotiations with Copelouzos and its failure in 2003 to disclose the existence of the agreements made in December 1999. In that latter regard Mr Style pointed to a letter written by Mr Werner Schmelcher, a Director of ABB, to Dr Kalenda, Managing Director of HTA on 19 September 2003. In that letter Mr Schmelcher wrote: -

> "We refer to the discussions held with you on the takeover of our AIA shares. Your offer of January 2003 was far below our expectations, which we made clear at the time. As you did not see any room for manoeuvre for significant improvements, we have successfully looked for alternatives with ABB Zurich and the Greek ABB company organisations. We will be selling the shares to a Greek Group of companies."

What was said there was, submitted Mr Style, simply untrue. ABB had not looked for alternatives as a result of a disappointing offer in January 2003. It had already successfully looked for alternatives before and during the negotiations in 1999. Accordingly, submitted Mr Style, the tribunal focused on ABB's treatment of its "partner" Hochtief. ABB did not in 1999 disclose the state of its negotiations with Copelouzos and it did not in 2003 disclose the existence of the Three Agreements made in 1999. It did not tell HTA the number it had to beat. The tribunal was, submitted Mr Style, fully entitled to take this approach in the exercise of its case management powers under section 34(2)(d) of the 1996 Arbitration Act, Article

14 of the LCIA Rules and Article 9 of the IBA Rules on the Taking of Evidence in International Commercial Arbitrations.

84. Whether the arbitrators were wise to reject ABB's request for disclosure is not a matter I have to decide. If what is in part in issue is the good faith of one party in a negotiating process, it may be calculated to give rise to an appearance or impression of unfairness if only one party to the negotiations is required to disclose documents which bear on the good or bad faith with which each approached those negotiations. A party is entitled to say that he would have been prepared to act differently had not his counterparty made it clear that there was no purpose in so doing. However the tribunal's second rejection of the request made does I think, with the benefit of hindsight, make it clear that the tribunal was already approaching the question of bad faith on the basis that what really mattered was ABB's attempt to circumvent the alienation provisions in the ADA. That is no doubt why the Chairman of the tribunal in his letter of 28 February 2005 remarked: -

> "In the Tribunal's view the "good faith claim" is not a free-standing claim, but is linked to the alleged breach of Article 37. The Second Request does not request documents that are relevant to ABB's alleged breach of Article 37."

It was of course quite correct that the documents requested were not relevant to that question. It is also clear from paragraphs 156 and 175 of the award that the arbitrators regarded the entire process of negotiating and entering into the Three Agreements as amounting to a breach by ABB both of Article 3.1.6 and of the duty implied as a matter of Greek law to deal in good faith. The manner in which ABB purported to negotiate with HTA without revealing its parallel negotiations with Copelouzos was simply a further manifestation of its bad faith. Against that background one can see that it would not avail ABB to demonstrate, if it be the case, that HTA went into the 1999 and/or 2003 negotiations determined not to improve upon a low offer. As far as the tribunal was concerned ABB's bad faith in that regard was made out alone by its failure to reveal the existence of the parallel negotiations which, incidentally, were negotiations aimed at securing a circumvention of the alienation provisions. That bad faith did not stand alone – the whole process of negotiation and agreement with Copelouzos was conducted by ABB in breach of the obligation of good faith. It may well be of course that by the time it had to rule on ABB's Second Request to Produce Documents in February 2005 the tribunal's thinking on these matters was relatively advanced in the light of developments during the first two days of the hearing.

85. The arbitrators had express power under the IBA Rules to exclude from production any document on the ground of lack of sufficient relevance or materiality. In my judgment they cannot be said to have acted unfairly in dealing with ABB's request as they did. Yet again there is also simply no scope for an allegation of substantial injustice. The arbitrators have plainly concluded on the basis of overwhelming evidence that ABB conducted itself towards HTA in a number of respects which amounted to bad faith. The foundation for that finding is ABB's negotiation and conclusion of the Three Agreements as a device to circumvent the alienation provisions in the ADA. Had ABB proved that in the

negotiations in December 1999 and/or January 2003 HTA were unwilling to pay a fair market price for ABB's shares this would have had no effect whatsoever upon either the arbitrators' conclusion as to ABB's bad faith or as to the outcome of the dispute as a whole.

L Conclusion

86. For all these reasons ABB's challenge to the award under section 68 of the Arbitration Act fails.

87. Challenges to awards under ss.67 and 68 of the Act now appear to exceed in number applications for leave to appeal under s.69. A challenge under s.67 or s.68 can be mounted as of right without leave. Those who resort to and practise in international commercial arbitration are rightly jealous of the autonomy of the process, and the case law which has developed in this field demonstrates that the court will respect that autonomy. Challenges such as this are immensely time-consuming and therefore costly. For the purposes of this hearing I was supplied with thirteen lever arch files of documents plus two elaborate (and very helpful) skeleton arguments and a further bundle of authorities. I spent one whole day reading in advance of the hearing, which was inadequate, and the hearing itself occupied one and half days although the estimate had been for simply one day. Had it not been for the excellence of the oral argument and the opportunity to pre-read, inadequate though that was, the hearing would have taken very much longer. Preparation of the judgment has taken some time. Whilst the court will never dictate to arbitrators how their conclusions should be expressed, it must be obvious that the giving of clearly expressed reasons responsive to the issues as they were debated before the arbitrators will reduce the scope for the making of unmeritorious challenges as this ultimately has proved to be. It will be of little comfort to ABB but it may be instructive to know that at the end of my pre-reading in this case I was fairly certain that I would have no alternative but to remit or to set aside the award, notwithstanding the court's general approach to strive to uphold arbitration awards. I have had to strive a little harder than I might reasonably have expected. Reasons which were a little less compressed at the essential points might have been more transparent as to their meaning and might even have dissuaded the unsuccessful party from challenging the award or, at any rate, from mounting so wide-ranging a challenge.