Neutral Citation Number: [2015] EWHC 3555 (Comm)

Case No: CL02014-000953

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2015

Before:

MR JUSTICE COOKE

Between :

Biotec International d.o.o. **Claimant**

- and -

(1) Siemens Healthcare Diagnostics Manufacturing Limited
(2) Siemens Medical Solutions Health Services GmbH
(3) Siemens Healthcare Diagnostics GmbH

Defendants

Mr I. Quirk (instructed by Fox Williams LLP) for the Claimant
Mr N. Kitchener QC and Mr A. Brown (instructed by Hill Hofstetter) for the Defendants

Hearing dates: 1st, 2nd and 9th December 2015

Judgment Approved by the court for handing down (subject to editorial corrections)

Mr Justice Cooke:

Introduction

1. By two arbitration claim forms the claimant (Biotec) challenges a Partial Final Award dated 22nd September 2014 and a Final Award issued on 13th February 2015 under section 68 of the Arbitration Act 1996. The Partial Final Award, to which I will refer as "the Award" determined various issues of substantive liability between the parties whilst the Final Award essentially dealt with the taking of an account as to commission owing by Siemens to Biotec and issues of costs. I shall refer to this award as "the Costs Award".

2. The challenge under section 68 to the Award as set out in the Arbitration Claim Form is based on the contention that there were serious irregularities affecting the arbitral proceedings and the Award, namely that the Tribunal failed to deal with all the issues that were put to it (section 68(2)(d) of the 1996 Act) and failed to comply with its duty under section 33 of the Act, as it failed to act fairly and impartially as between the parties and failed to adopt procedures that provided a fair means for the resolution of the matters to be determined (section 68(2)(a) of the Act). These serious irregularities are said to have led to substantial injustice within the meaning of section 68(2) of the Act.

3. Although matters were canvassed in oral submissions in a different order, the first arbitration claim form sets out four grounds of challenge to the Award as follows:

> "(1) The Tribunal did not decide some of Biotec's breach of contract claims, under section 68(2)(d). Upon being invited to decide those claims pursuant to Article 27 of the LCIA rules (which permits the Tribunal to issue an additional award in relation to claims which it did not determine), it failed again to do so.
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> (2) As regards the other breach of contract claims, the Tribunal failed to consider Biotec's submissions and evidence on crucial points which would have determined those claims in Biotec's favour. That was a failure to deal with all the issues put to it under section 68(2)(d) and/or failure to comply with its duty [under] section 68(2)(a);
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> (a) In relation to the claim for breach of contract arising out of failure to comply with the orders made in January 2007, the Tribunal said that there had been no intention to be legally bound – but it ignored the authorities Biotec relied on (and its submissions) that a contract arose even in the absence of relevant terms.
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> (b) As regards breach of the assurances given in the 6 October 2006 and 19 October 07 emails, the crucial question was whether the parties intended to be legally bound. The Tribunal ignored the authorities (and accompanying submissions) that Biotec relied on, which made it clear that

the burden was on Siemens to show it was not binding and it was a heavy burden to discharge.

(c) As regards the commission claim, the Tribunal held that (notwithstanding a well established practice, documented internally at Siemens to pay Biotec 20% commission), clause 16.4 required a variation to be in writing. The Tribunal ignored Biotec's submissions and the authorities Biotec relied on demonstrating that as a matter of law clause 16.4 did not have that effect. It also ignored Biotec's reliance on s. 6 Limitation Act 1996 on the limitation point.

(3) In relation to the Tribunal's conclusion on the implied terms case (a) it was incorrectly based on Biotec having allegedly "agreed" to a legal position, when it had not done so and its submissions made that plain (and the tribunal decided there were no terms to be implied on that very legal basis); (b) it ignored Biotec's arguments and authorities on why Clauses 16.1 and 16.4 (entire agreement clause and variation clause) did not prevent the implication of terms; and (c) it failed to rule out Biotec's claim that the terms were to [be] implied by reason of separate legal bases arising from Socimer v Standard Bank and other authorities cited by Biotec (which the Tribunal did not consider). These amounted to serious irregularities under s.68(2)(a) and/or s.68(2)(d).

(4) In relation to the conspiracy claim, the Tribunal, contrary to s.68(2)(a) and/or s.68(2)(d):

(a) Incorrectly held that Biotec had agreed that there was a "high onus of proof" in relation to the conspiracy claim and failed to put that issue to Biotec to allow it to refute it (when, had the tribunal been intending to apply a higher standard than the normal civil standard, it was bound to put this to Biotec).

(b) Failed to put to Biotec that the Tribunal considered that it had abandoned a "key part of its claim", namely that the protagonists had a motive. Had Biotec been able to respond to this it would have said (a) it had not abandoned that point, because it was implicit that they stood to gain; but (b) it was of no consequence to the claim, because there is no requirement to show dishonesty or any other particular motive for a conspiracy claim. The Tribunal wrongly assumed on the basis of this alleged "abandoning" that a fundamental pillar of the conspiracy claim had gone, when that was not the case.

(c) Ignored key evidence regarding *inter alia* the crucial meeting of 25 April 2006.

> (d) The Tribunal failed to determine a number of issues and submissions made by Biotec going to the heart of the determination of the conspiracy claim."

4. The recitation of the claim as put betrays the difficulty which faces Biotec. Whilst the allegation of a failure by the Tribunal to decide some of Biotec's breach of contract claims, if demonstrated, might well fall within section 68(2)(d), being a failure by the Tribunal to deal with issues put to it, nearly all the other allegations focus on the Tribunal's failure properly to consider Biotec's submissions, the authorities cited by it or evidence adduced. Reference to the decided authorities on the ambit of section 68 shows the difficulty involved in this submission. Whilst the allegation of misunderstanding on the part of the Tribunal as to the agreement of Biotec to a given position in relation to implied terms or the onus of proof for the conspiracy claim at first blush appears more promising, if established the points would be of no consequence unless substantial injustice resulted.

5. The second arbitration claim form proceeds on the basis that there were serious irregularities affecting the Costs Award inasmuch as the Tribunal failed to comply with its general duty under section 33 of the 1996 Act (section 68(2)(a)), exceeded its powers (section 68(2)(b)), failed to conduct the proceedings in accordance with the procedure agreed by the parties (section 68(2)(c)) and failed to deal with all the issues that were put to it (section 68(2)(d)). There were again four grounds of challenge set out in this arbitration claim form in the following manner:

> "(1) If the challenge in Claim No. 2014-1440 in relation to the Award (on liability) succeeds, then the Quantum Award necessarily falls away.
>
> (2) The Tribunal failed to deal with Biotec's claim for an account of the remaining 17% commission accrued due it, having contradicted itself by dismissing the claim as not pleaded (para. 31). This relief had been sought and an account of all sums due to Biotec had been ordered in the Award, yet the Tribunal failed to even address Mr Koutnik's admission that this sum was accrued and owing to Biotec. This was a failure to deal with all the issues put to it under section 68(2)(d) and/or a failure to comply with its duty under section 68(2)(a).
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> (3) The Tribunal made a costs award against Biotec on the CPR indemnity basis (paras. 36 and 56), holding that the costs provisions in the Act were "the same" as the CPR (para. 51). That exceeded the Tribunal's powers which were delineated by the Act and the LCIA Rules, and which plainly (and intentionally) differ from the CPR. The Tribunal's application of the rules which only apply to litigation in the English Courts, and not to arbitration, was a serious irregularity under s.68(2)(b) and (c).
>
> (4) The Tribunal's costs award against Biotec (in a total amount of £1,124,992.20 plus the costs of the arbitration of £149,924.25) was so disproportionate and draconian that it

> amounted to a failure to act fairly, or adopt procedures suitable to the circumstances of the case, avoiding unnecessary expense (contrary to s.68(2)(a)), and amounted to an excess of powers and a failure to conduct the proceedings in accordance with the procedure agreed by the parties (contrary to s.68(2)(b) and (c)) in that it was not an application of the proper costs rules set out in the LCIA rules and Act."

6. Having heard Mr Quirk for Biotec, I did not need to hear from Mr Neil Kitchener QC on this challenge to the Costs Award, whether in relation to commission or costs. As appears later in this judgment, it did not appear to me to be arguable that the Tribunal had exceeded its powers in awarding Siemens 90% of its costs on an indemnity basis or in arriving at the figures which it did and the real complaint relating to the 17% commission sought in restitution was that the Tribunal decided that the point was not open to Biotec at the late stage of the proceedings at which it was raised.

The arbitration proceedings

7. The arbitration began when Biotec filed with the LCIA its request for arbitration against Siemens on 22nd October 2012. Biotec served a Statement of Case on 6th March 2013 running to some 33 pages with a Statement of Reply of 41 pages to Siemens' Statement of Defence of 32 pages. In due course there were to be extensive written and oral opening and closing submissions in respect of a two week hearing which took place from 23rd July to 5th August 2014. Importantly a List of Issues was agreed between the parties pursuant to paragraph 3 of the First Procedural Order made by the Arbitrator. In the heading to this list it was stated that "This List of Issues sets out the issues of fact and law which require determination by the Arbitrator". When the Tribunal which consisted of a single Arbitrator, came to make its award, he included this list of 56 issues within it in one column and in an adjoining column set out his answers to those issues. It is said by Biotec that those answers are inadequate and in some cases did not grapple with the true issues at all. Nonetheless the Arbitrator did set out all the Agreed Issues and what he considered to be a determination of them, by reference to the body of the Award.

8. At paragraphs 36 to 114 of the Award, the Arbitrator set out the factual background to the dispute, about which no complaint is made by Biotec. Although the Agreement between Siemens and Biotec was described as an "Agent Agreement" he found in paragraph 43 of the Award that it was essentially a distribution agreement. He summarised its contents by using the summary of its terms advanced by Biotec in its opening written submissions as follows:

> "i) the territory in which Biotec was to operate (Serbia and Montenegro);
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> ii) the products which Biotec was selling (laboratory testing systems ("LTS"));
>
> iii) the duties on Bayer to use reasonable endeavours to support Biotec through know-how, training and promotion (clause 4);

> iv) the duties on Biotec to purchase exclusively from Bayer and to place machines by [sic] with the use, amongst other methods of financing, of long term leases and reagent rental programmes (clause 5.1);
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> v) the duties the duties [sic] on Biotec to maintain a stock of spare parts and to provide an after-sales service for customers (clause 5.7(c));
>
> vi) the duties on Biotec to obtain and maintain licenses for the import, advertising, storage and marketing and sale of the products (clause 5.13);
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> vii) the ability of Bayer, on 14 day's notice to Biotec and with a Biotec representative, to visit Biotec's customers to check on the servicing and maintenance of the products (clause 5.16);
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> viii) that Bayer is to inform Biotec of any sale of the products into the territory that might occur through another supplier (clause 7.8);
>
> ix) that the Agreement may be terminated upon not less than 3 months' written notice of termination after the first year of the Agreement (clause 12.1);
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> x) that if the Agreement is terminated in accordance with its terms, Biotec shall have no claim for compensation for loss of distribution rights or similar loss (clause 13.3); ..."

9. He noted that the Agreement was a non-exclusive agreement and that it related only to laboratory testing systems which included clinical chemistry, bio-chemical and haematology products. Siemens had two other distributors in Serbia and Montenegro, Interlight, which was responsible for medical diagnostics equipment, including blood gas analyzers, immuno chemistry and immunology products and Medinic which was responsible for urine testing and diabetes products.

10. In section V of the Award, the Arbitrator set out the parties' arguments in outline under the headings "Unlawful Means Conspiracy, Breach of Implied Terms, Breach of the Alleged Client Relations Assurance and the Price Assurance, the Tender Assurance, the Other Breach of Contract Claims, Commission and Rolling Accounts Claims" before going on to discuss those matters and making findings.

11. Biotec submits that the Arbitrator failed to deal with its claims for breach of express terms of the contract (as opposed to implied terms) and for breach of fiduciary duty.

The law relating to the ambit of section 68

12. Mr Quirk accepted that Biotec had a high hurdle to overcome in alleging serious irregularity causing substantial injustice to it. He said that there was little dispute between Biotec and Siemens on the relevant law in this respect. Although his skeleton argument relied on a *dictum* of Toulson J (as he then was) in *Arduina*

Holdings BV v Celtic Resources Holdings Plc [2006] EWHC 3155 (Comm), in oral argument his submissions accepted the law as correctly stated by Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC).

13. Siemens relied on a sequence of authorities commencing with *Lesotho Highlands Development Authority v Impregilo S.p.A* [2006] 1 AC 221 where Lord Steyn not only held that section 68 set a high threshold but referred with approval to the DAC report which described the section as a "long stop" which was only to be available where the tribunal had gone so far wrong in its conduct of the arbitration in one of the respects listed in the section that justice called out for it be corrected. A list of other authorities to the same effect appears in a judgment of Tomlinson J (as he then was) in *ABB AG v Hochdief Airport GmbH* [2006] EWHC 388 (Comm) at paragraph 63.

14. For present purposes however, as Flaux J held in *Sonatrach v Statoil* [2014] EWHC 875 (Comm) the focus of the enquiry under section 68 is due process, not the correctness of the Tribunal's decision. It is therefore necessary in the context of any section 68 application to examine whether, on analysis, the real complaint is that the Tribunal reached the wrong result which is not a matter in relation to which an Award is susceptible to challenge under section 68 or whether there has been a fundamental procedural irregularity. It does not matter, as other authorities show, whether there had been an error made by the Arbitrator which is unfair to a party. This does not constitute a serious irregularity for the purpose of section 68(2) (whether under subsection (a) or otherwise). As I said in *New Age Alzarooni 2 Ltd v Range Energy Natural Resources Inc* [2014] EWHC 4358 (Comm):

> "None of the grounds in section 68 … allow for a challenge to an arbitration award on the basis of the Tribunal's view of the evidence, the weight it accorded to any evidence, its findings of fact or its conclusions of law. Moreover, the assertion that a decision is contrary to the weight of the evidence could not begin to meet the requirements of section 68(2)(a) since that would be no more than a challenge to the arbitrator's findings of fact. A failure to refer to any particular piece of evidence in the Award or Reasons is likewise no basis for attacking an award or contending that the evidence in question was not taken into account. Any contention that the Tribunal had overlooked or misunderstood any particular piece of evidence would necessarily involve a review and evaluation of all the evidence considered by the Tribunal which would be an unjustified and unauthorised interference with the function of the Arbitrators and the agreement of the parties to refer their dispute to them for determination."

15. Mr Quirk's submissions in relation to the challenges he made in respect of the Award essentially centred on three or four paragraphs in two authorities.

    i) In *Sonatrach* (*ibid.*) at paragraph 18, Flaux J stated that he was not constrained to follow the *obiter dictum* of Toulson J in *Arduina* (*ibid.*), where the exceptional case which that judge had in mind was not specified. Flaux J went on to say that he could quite see that "in a case for example of an agreed or

admitted piece of evidence which was ignored or overlooked, it might be possible to say that the Tribunal was in breach of its duty under section 33, so that section 68(2)(a) was engaged". Beyond that, a contention that the Tribunal had overlooked or misunderstood particular evidence necessarily involved interference with the evaluation of the evidence by the Tribunal, which was impermissible.

ii) In *Raytheon* (*ibid.*) at paragraph 33(g) Akenhead J stated, in relation to section 68(2)(d) that there had to be a failure by the Tribunal to deal with an issue which was put to it. He said there was a distinction to be drawn between "issues" on the one hand and "arguments, points, lines of reasoning or steps in an argument" although it could be difficult to decide quite where the line demarking issues from arguments fell. At sub-paragraph (iii) he stated the following:

> "While there is no expressed statutory requirement that the Section 68(2)(d) issue must be "essential", "key" or "crucial", a matter will constitute an "issue" where the whole of the applicant's claim could have depended upon how it was resolved, such that "fairness demanded" that the question be dealt with."

16. The learned judge went on to say in later sub-paragraphs that there would be a failure to deal with an issue where the determination of the issue was essential to the decision reached in the Award but if the Tribunal had dealt with the issue in any way, section 68(2)(d) was inapplicable and that was the end of the inquiry since it did not matter whether the Tribunal had dealt with it well, badly or indifferently. It mattered not at all that the Tribunal might have done things differently or expressed its conclusions on the essential issues at greater length. Furthermore, whether there had been a failure by the Tribunal to deal with an essential issue involved a matter of fair, commercial and commonsense reading (as opposed to a hyper-critical or excessively syntactical reading) of the Award in question in the factual context of what was argued or put to the Tribunal by the parties (and where appropriate, the evidence). The court could consider the pleadings and the written and oral submissions of the parties to the Tribunal in that respect.

17. With regard to the issue of "substantial injustice" again reliance was placed on *Raytheon*. At paragraph 33(h) of the judgment Akenhead J said that it was inherently likely that substantial injustice would have occurred if the Tribunal had failed to deal with an essential issue. Furthermore, at sub-paragraph (i) he held that for the purpose of meeting the substantial injustice test, an applicant need not show that it would have succeeded on the issue with which the Tribunal failed to deal or that the Tribunal would have reached a conclusion favourable to him. It was necessary only for him to show that his position was reasonably arguable and that had the Tribunal found in his favour, it might well have reached a different conclusion in the Award. If however the court was satisfied that the result of the arbitration would have been the same, even if the applicant had succeeded on the issue in question, there could be no substantial injustice.

The serious irregularities alleged in relation to the Award

The Tribunal's alleged failure to decide some of Biotec's breach of contract claims

18. Mr Quirk submits that the Arbitrator failed to determine claims for breach of clauses 7.8 and 6.15 of the Agreement. It was submitted that these matters were plainly before the Arbitrator for his consideration. This was a surprising submission since, apart from the recitation of those two clauses in Biotec's opening written submissions which were put before the Arbitrator, no reference was made to these particular clauses at any stage before the Award was issued and a subsequent invitation made by Biotec to the Arbitrator to decide such claims pursuant to Article 27 of the LCIA Rules which permits the Tribunal to issue an additional Award in relation to claims which it has not determined. The Arbitrator rejected that invitation.

19. Biotec's Statement of Case made no mention of these clauses at all. Whilst it was suggested that at paragraph 33 of the Statement of Case, reference was made to facts which amounted to a breach of clause 7.8 or 6.15, it is the case that the sub-paragraphs there all took the following form after the initial opening paragraph which read as follows:

> "From in or around November 2006 the respondent, acting by Mr Cvetkovic and/or Mr Koutnik and/or Ms Aiger and/or EDJ; and/or EDJ began appropriating and/or converting to its own use the maturing business opportunities developed by Biotec (which had by this time acted, de facto, as the respondent's exclusive agent for more than 20 years)."

20. Each of the sub-paragraphs referred then to different occasions upon which Siemens supplied and installed a machine, without informing or consulting Biotec, whether by using EDJ or someone else, at Biotec's customers. This was done "by abusing Confidential Information obtained from Biotec on 25th April 2006 or otherwise" and "the respondent was thereby in breach of the Client Relations Assurance (and the implied terms) and thereby in breach of the Agreement."

21. It is clear in my judgment that this paragraph relates to the allegation of conspiracy and that the breaches of the Agreement referred to are breaches of the Client Relations Assurance and the implied terms of the Agreement and not to any express term of the Agreement.

22. At no point, at any stage in the later submissions made by the parties or in any of the examination of witnesses, did clause 7.8 or clause 5.16 surface. The Arbitrator did not deal with breach of these provisions because he was not asked to. At paragraph 116(ii) of the Award he set out, as part of the section dealing with the parties' arguments in outline, the acts pleaded in paragraph 33 as the alleged unlawful acts and means by which the unlawful means conspiracy was effected.

23. In the Award, the Arbitrator decided as a matter of fact that no confidential information was imparted at the meeting of 25th April 2006 (paragraph 175-179) that the supply and installation of machines pleaded by Biotec were not the result of the passing of confidential information (paragraph 221) and that there was "no evidence whatsoever" of a conspiracy on the part of Siemens against Biotec which led to the appointment of EDJ as distributor in its stead (paragraphs 215 and 223).

24. In the list of issues forming part of the Award, issue 31 read as follows:

> "Was the respondent in breach of the Agreement by supplying and/or installing machines to customers whether itself or by EDJ (as alleged in paragraph 33 of the Statement of Case and responded to in paragraph 73 of the Statement of Defence)? Who supplied/installed the machines, when and on what terms? Did any of these transactions derive from the misuse of Biotec's confidential information?"

The Arbitrator answered that issue with the single word "No", having concluded that there was no conspiracy and, as appears subsequently in this judgment, no implied term or binding obligations constituted by the Client Relations Assurance and the Price Assurance.

25. Not only were clauses 5.16 and 7.8 not addressed in any of the pleadings or submissions made to the Arbitrator, but it is hard to see how these provisions had any materiality at all to anything which the Arbitrator had to decide. The clauses read as follows:

i) Clause 5.16: "On 14 days' notice to the Agent, [Siemens] shall be entitled (at its own expense) to visit end users of the Products in the Territory together with representatives of the Agent, so as to check on the servicing and maintenance by the Agent of the Products.

ii) Clause 7.8: "[Siemens] will inform the Agent about any sale of the Products into the Territory that might occur through another supplier".

26. Clause 5.16 plainly does not, on its face, prevent Siemens from contacting customers of Biotec but entitles them to do so for the specific purpose of checking on the servicing and maintenance of the products supplied by Siemens to Biotec and Biotec to the customers. Clause 7.8 similarly does not prevent Siemens from selling products in the territory but merely requires Siemens to inform Biotec about any such sale which may occur through another supplier. Since Biotec was not the exclusive distributor of the products in the territory, Siemens was not only entitled to sell the product itself, if it could do so, but was able to sell through another supplier into the territory. Any breach of clause 7.8 would merely be a failure in the giving of notice of such a sale which would not advance Biotec's case at all since these supplies took place during the 3 month period of notice or even after its expiry. No plea of a breach of clause 5.16 or 7.8 could have advanced Biotec's position at all and it was doubtless for such reasons that no such case was made.

27. There is therefore in this respect no serious irregularity, let alone substantial injustice.

The alleged failure to deal with the issue of fiduciary duty

28. Biotec submitted that the Arbitrator had conflated the implied terms issue raised by it with the fiduciary duty issue. He considered that he had answered issue 17 of the List of Issues, when he had not done so. Issue 17 read:

> "Was the relationship between the parties that of fiduciaries; did the respondents owe Biotec any duty of good faith? If so did the respondent breach any such duty?"

In the column in which he gave his answer to these issues, the Arbitrator stated "No duty of good faith is to be implied into the Agreement".

29. In the Statement of Case, Biotec pleaded that there were implied terms of the agreement that it would be performed honestly, in a proper fashion, in a commercially acceptable manner, in a manner consistent with the fidelity of the parties' bargain and not unconscionably; that it would be performed with mutual trust and confidence, in good faith and with loyalty and that in exercising any power to make decisions or act in any manner under the Agreement, the respondent would exercise such power or act honestly and in good faith and not exercise a power or act arbitrarily, capriciously or unreasonably/irrationally.

30. Further implied terms were pleaded in paragraphs 17(d) and (e) of a more detailed nature and in a footnote to this paragraph, Biotec stated its reliance upon the decision in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB). The further implied terms were as follows:

> "d. Insofar as the Respondent instructed or encouraged Biotec to incur marketing expenses it would do so only for products that it knew or reasonably believed it could supply nor would the Respondent offer knowingly false information on which Biotec was likely to rely to its detriment; and
>
> e. That the Respondent would not prejudice Biotec's sales to its Customers or potential Customers by:
>
> 1. breaking the duty of confidence attaching to the Confidential Information or otherwise appropriating and converting the Confidential Information imparted to it, to its own use and specifically so as to damage Biotec to the benefit of another;
>
> 2. permitting, authorising or facilitating the sale of machines, reagents or other products in Serbia and Montenegro at a lower price than that offered to Biotec; and
>
> 3. permitting, authorising or facilitating the gift of machines, reagents or other products in Serbia and Montenegro on terms more favourable than that offered to Biotec."

31. At paragraph 52 of the Statement of Case, Biotec pleaded that by nature of the relationship between the parties and the length of time for which Biotec had been acting for Siemens and developing Siemens' market share in the former Yugoslavia, the parties were in a position of fiduciaries such that the respondent owed to Biotec a duty to act in good faith and in all other ways consistent with a fiduciary relationship.

Such duties were said to be in addition to the express and implied terms of the Agreement to which reference had earlier been made in the pleading.

32. The overlap between the implied terms and this general plea of a fiduciary relationship is plain since the notion of a fiduciary relationship involves good faith, mutual trust and confidence and the implied terms went further than any simple plea of fiduciary duty, in imposing obligations on Siemens.

33. The Statement of Case went on to plead unlawful means conspiracy and unlawful acts by which Biotec was injured. In the section headed "Causation and Loss – Introduction", Biotec pleaded that as a consequence of the termination of the Agreement and the appointment of EDJ in circumstances involving breaches of contract and conspiracy, Biotec suffered a loss of business and profit in respect of its customers. At no point however was there any plea of loss following from a breach of fiduciary duty which did not amount to a breach of contract.

34. In its written opening submissions, Biotec cited the classic definition of a fiduciary relationship as set out by Millett LJ (as he then was) in *Bristol & West Building Society v Mothew* [1998] Ch 1 at page 18:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."

The exact consequences of a fiduciary relationship can be debated but may include a duty of loyalty and a duty to put the interests of another before one's own. "A fiduciary must act in good faith, must not make a profit out of his trust, may not act for his own benefit or for the benefit of a third person without the informed consent of his principal." This can give rise to a duty to account.

35. Under the heading of "Fiduciary Relationship and Issue 17", Biotec, in its opening written submissions, recognised that fiduciary duties, if they were to exist, had to be moulded to fit the contractual framework and that the contractual foundation was all important because it regulated the basic rights and liabilities of the parties. Any fiduciary relationship had to accommodate itself to the terms of the contract in order to be consistent with and conform to them. It was accepted that the fiduciary duties should complement and not distort the deal set out in the contract.

36. In its 96 page closing submissions in writing Biotec:

i) Referred to Siemens' supply of machines to Biotec's customers during the currency of the Agreement as being contrary to the implied terms and fiduciary duties owed by it, without which the Agreement could not operate (paragraph 3(2)(c));

ii) Referred to its opening written submissions on the implied duty of honesty and good faith and relied on the *Yam Seng* decision (paragraphs 28-31);

iii) At paragraph 39, referred to its opening written submissions on fiduciary duty (at paragraphs 178-181) and stated that a fiduciary is someone who has undertaken to act for or on behalf of another in a particular manner in

circumstances which give rise to a relationship of trust and confidence. It was submitted that the existence of a commercial contract was no bar to the co-existence of fiduciary duties.

iv) At paragraphs 48 and 50, in making submissions on the List of Issues and the evidence, by reference to Issues 10-14 and the Agreement, said that the question was whether fiduciary duties arose from the relationship of trust and confidence between the parties and that terms were to be implied into the Agreement of "honesty, fidelity of the parties' bargain, mutual trust and confidence and not prejudicing sales or potential sales";

v) Relied upon the evidence of Mr Gruber that Siemens and Biotec were in a relationship of trust and confidence which depended on each being able to rely on the other's honesty and loyalty in their dealings, which was said to be crucial in relation to the supply of re-agents at an agreed price, on which Biotec relied for its remuneration and the recovery of the Cost of machines it had donated to its customers (paragraphs 74-76);

vi) At paragraph 160, submitted that the supply and installation of machines at Biotec's customers by Siemens/EDJ was in direct breach of the implied terms to act honestly, fairly and with loyalty "and in breach of the similar obligations as a fiduciary" as well as the Client Assurance given on 6th October 2006.

37. Whilst Biotec's closing submissions made reference to fiduciary duties therefore in the context of the supply of machines by Siemens to Biotec's customers, this was aligned with allegations of breach of the agreement, implied terms and the Client Assurance given on 6th October. In the conclusion to its closing written submissions, Biotec sought no relief in relation to any breach of fiduciary duty.

38. In its written closing submissions of 105 pages, Siemens, at paragraph 448-451 submitted that Biotec's claim that the parties were in a fiduciary relationship and owed a duty of good faith to Biotec added nothing to Biotec's case on implied terms. Siemens submitted that there was no obligation of good faith on it, that any fiduciary duties had to fit the contractual framework and that there was no scope for the implication of the additional obligations for which Biotec contended (and which Siemens had earlier addressed in its submissions).

39. In the closing oral submissions, Biotec's counsel argued that the fiduciary duties alleged did not alter the operation of the contractual relationship.

40. It is plain from this recitation that not only were the arguments as to the existence of fiduciary duties and the existence of implied terms closely linked and overlapping, but that, in reality, it was accepted that characterisation of obligations as fiduciary duties added nothing at all to the argument on implied terms of good faith, loyalty and trust and confidence and the more detailed obligations which were said to exist (whether consequently or otherwise). Siemens' oral closing did not seek to deal with fiduciary duties as a separate point at all, which was in these circumstances unsurprising.

41. In the Award, the Arbitrator set out the implied terms alleged by Biotec (Award paragraph 120) and considered the submissions which had been put forward in rejecting their implication at paragraphs 224-241. At paragraphs 227 and 231 he

referred to Biotec's reliance on *Yam Seng* (*ibid.*) in support of its arguments that terms should be implied that decisions should be made honestly, in good faith and not arbitrarily, capriciously or unreasonably/irrationally, that knowingly false information should not be offered and that Biotec's sales should not be prejudiced. This was a fair summary of the pleaded case. At paragraph 234 he referred to the nature of the Agreement as a non-exclusive distribution Agreement which provided for a commercial relationship between the parties who were entitled to pursue and act in their own interests. He found that this Agreement was a comprehensive Agreement spelling out the duties and obligations of the parties to each other in clear terms and that there was no basis for concluding that the implied terms sought by Biotec were part of the contract (paragraph 235). He went further in saying that the implication of such duties would contradict the express terms of the Agreement. The duty of good faith was thus excluded, together with all the other implied terms of fidelity, mutual trust and confidence and loyalty in performance.

42. In these circumstances particularly given the agreed List of Issues and the terms of Issue 17, which effectively equated the duty of good faith with a fiduciary relationship, it is unsurprising that the Arbitrator, in determining the issue of implied terms (Issue 12) at paragraphs 224-240 of the Award, considered that he had determined the issue of fiduciary relationship in Issue 17. Issue 12 read:

> "Were any of the implied terms (including those of honesty, fidelity of the parties' bargain, mutual trust and confidence and not prejudicing sellers or potential sellers) that Biotec contended for, incorporated into the Agreement?"

The Arbitrator answered "No (see paragraphs 224-240)".

43. The Arbitrator had found as a fact that no confidential information was passed to Siemens on 25th April 2006 (paragraphs 175-178 of the Award) and that the supply and installation of machines at Biotec's customers was not the result of the giving of confidential information (paragraph 221), in circumstances where EDJ had existing relationships with all those customers in any event. At paragraphs 234-238, he found that the nature of the Agreement provided for a commercial relationship which entitled the parties to pursue and act in their own commercial interests and that any implication of the terms of good faith, loyalty or trust and confidence would contradict the express terms of the Agreement and could therefore not be incorporated. He referred to the evidence of Mr Koutnik and Mr Gruber on the relationship and stated that this was not a basis upon which to imply the obligations for which Biotec contended.

44. There was nothing beyond the Agreement and the relationship of the parties as set out which could give rise to a fiduciary duty and, in concluding there were no implied terms of the kind alleged, because they would be inconsistent with the contract, he thus found there was no fiduciary duty. The Arbitrator therefore did determine the issue of fiduciary duty at the same time as determining the issue of implied terms on any fair commercial and common sense reasoning of the Award.

45. In consequence it cannot be said that the Arbitrator failed to deal with the issue of fiduciary duties as raised. To the contrary, he determined the issue as part and parcel

of the implied terms argument which the parties accepted as subsuming the question of fiduciary duty.

46. Moreover, as the existence or absence of any fiduciary duty added nothing to the pleas of implied terms, any failure to grapple with the issue would have been of no consequence because there were only, in reality, two areas of contention which gave rise to damages claimed, namely the conspiracy claim and the claim based upon the Client Assurance and the Price Assurance. If these points were not made good, there was no basis upon which a breach of fiduciary duty could be said to have caused any loss, given the terms of the contract which allowed for termination on 3 months notice without giving any reason whatsoever and without any entitlement to consequential compensation.

47. Once again, not only was there no serious irregularity within the meaning of section 68 but there could be no substantial injustice. At no point did Biotec spell out any consequences of a breach of fiduciary duty independently of any breach of implied terms or the Client or Price Assurance. Whilst in the original Statement of Case a declaration was sought that Siemens had acted in breach of fiduciary duty, that was placed alongside unlawful conspiracy as leading to an account of profits and of commission due. No loss was alleged to have been caused independently of any breach of contract or conspiracy.

Ignoring Biotec's case

48. Biotec eschewed any allegation of bias on the part of the Arbitrator but contended that the Arbitrator had ignored its submissions in relation to three alleged breaches of contract. These breaches related to the Client and Price Assurances in an email of 6th October 2006, the Tender Assurance in an email of 19th October 2007 and the Instrument Order in an email of 15th January 2007.

49. These points are not realistically arguable and could be seen as demurrable, on the basis of the line of authorities to which I have already referred.

50. In his Award at paragraphs 248-249, the Arbitrator found that the 6th October email which was said to contain the Client Assurance and Price Assurance did not create any legally binding obligations and was merely a goodwill gesture by Siemens designed to give some comfort to Biotec as to continued supply of re-agents to it after the termination of the distributorship of which it was giving forewarning. The Arbitrator found that the email was not a legal offer capable of acceptance by Biotec, that there was no consideration to support any agreement based upon it and that there was a basic contradiction in Biotec's case, inasmuch as it rejected the 17th November termination of the Agreement as unlawful on the basis that it was part of a corrupt conspiracy against it whilst relying upon the earlier email as creating a different binding obligation in lieu.

51. At paragraphs 251-263 of the Award, the Arbitrator considered the 19th October 2007 email (The Tender Assurance) against the background of other correspondence between Biotec and the Serbian Ministry of Health and the termination of the distributorship agreement on 17th February 2007, some 10 months earlier. He concluded that the email was written solely in relation to a tender submitted by Biotec to the Ministry of Health on 18th October 2006 (at a time prior to the termination but

when Biotec knew that such notice of termination was shortly to be forthcoming) which had been accepted by the Ministry on 22nd March 2007. He held that the 19th October 2007 email did not constitute a variation of the Agreement which had already been terminated nor did it amount to a legal obligation to supply any products directly or through EDJ to Biotec. The email was a goodwill gesture which, as later correspondence demonstrated, was not taken up because Biotec refused to accept Siemens' price of $6,000 per instrument or to complete a purchase order, even though the price indicated was lower than the price previously put forward as far back as 20th October 2005.

52. The complaint advanced here is that the Arbitrator failed to cite the case law advanced by Biotec in support of its submissions or to refer to the submissions themselves on the central issue of whether there was an intention to be legally bound. It was submitted by Mr Quirk that the Arbitrator thus failed to determine an issue or to act fairly and impartially between the parties within the meaning of section 68(2)(a) and section 62(d). It was not suggested that he did not give each party a reasonable opportunity to put its case or deal with that of its opponent, a matter of fairness to which section 33 and section 68(2)(a) of the 1996 Act specifically refers. What is said is that the Arbitrator did not refer to the line of authority from *Edwards v Skyways* [1964] 1 WLR 340 ff and the "heavy onus" on a party to show, in a long term contractual relationship, that offers were not intended to have legal effect. As there is no suggestion of bias on the part of the Arbitrator, the question arises as to what is meant by saying that the Arbitrator ignored Biotec's case. The complaint is that he made no express reference in the Award to the particular submissions of law upon which it relied, but it does not follow that he did not consider the arguments presented.

53. This complaint cannot justify a section 68 application for all the reasons set out in the authorities on that section to which I have already referred. The Arbitrator dealt with the agreed issues before him for determination including:

i) Issue 15

What is the true meaning and effect in law of the 6 October 2006 email? Specifically, did the email of 6 October 2006: (a) create new binding obligations on the Respondent (as contended by Biotec), and if so, on what terms? Specifically, is the true meaning and effect of the words "the only difference would be that Biotec does not have to import" and "we are chartering to Biotec client and price protection" that Biotec would continue to serve its clients as before other than not having to import?, or (b) amount to no more than a goodwill gesture (as contended by the Respondents)?	See 14 above and paragraphs 242 to 250 of the Award

ii) Issue 16

What is the true meaning and effect in law, if any, of the 19 October 2007 email?	See 14 above and paragraphs 251 to 263 of the Award.

54. Issue 14, to which cross-reference was made and its answer were as follows:

What is the true meaning and effect in law of the entire agreement provision at clause 16 of the Agreement? Specifically did clause 16 of the Agreement: (a) operate so as to prevent any variation of the amount of any commission payable to Biotec in accordance with clause 8.3 of the Agreement, and the emails dated 6 October 2006 and/or 19 October 2007 (or any other written variation or amendment/ variation or amendment evidenced in writing) from amending, varying or supplementing the Agreement and/or from having legal effect whether during the currency of the Agreement or thereafter (as contended by the Respondent); or (b) was its purpose to protect the parties from casual and unfounded allegations of variations (as contended by Biotec?)	Clause 16 of the Agreement operated to exclude any variations of the Agreement, including the commission provisions, unless made in writing signed by both parties. The emails of 6 October 2007 do not create legally binding obligations, nor did they supplement or vary the Agreement.

55. The fact that the Arbitrator did not recite all of the parties' arguments nor all of the authorities cited, nor all the evidence relied on cannot amount to a failure to determine an issue within the meaning of section 68. The Arbitrator accepted Siemens' submissions which were sufficient to determine the issue before him. It cannot be said, without more, that he ignored Biotec's arguments because he did not set them out in the Award. The reasoning at paragraph 53(g)(ii)-(vii) in the decision of Akenhead J in *Raytheon* can be applied here. The agreed issue was determined by the Arbitrator and that is an end of the enquiry. The arguments which were put forward were no more than arguments, points, lines of reasoning or steps in an argument and were certainly not essential, key or crucial issues which the Arbitrator was bound to determine as a matter of fairness to the parties. It matters not that the Arbitrator might have expressed his conclusions differently or descended into greater detail in relation to the arguments put to him. His reasoning was clear and there was no unfairness within the meaning of sub-paragraph (g)(iii) of Akenhead J's decision.

56. The Arbitrator found that Biotec's request for an offer from Siemens in the email of 15th January 2007 (the terms of which were set out at paragraph 277 of the Award), was an invitation to treat and not an offer capable of acceptance, for all the reasons he set out at paragraphs 282-287. The parties had not agreed on the essential terms of

the Instrument Order and the fact that Biotec was asking for terms demonstrated that. The Arbitrator cited authority for the need for essential terms to be agreed.

57. There was here a clear finding of fact giving rise to a conclusion of law, based upon the authority cited. The complaints raised are as follows:

i) The Arbitrator did not cite authorities relied on by Biotec to the effect that there can be a binding agreement, even if terms of significance remain to be finalised.

ii) The Arbitrator failed to decide whether customer orders made to Biotec, upon which it was said that Biotec's orders to Siemens were based, were or were not fake in circumstances where Siemens had not accepted that they were genuine and had cross-examined on that footing.

iii) The Arbitrator found that Centaur instruments were not "Products" within the meaning of the Agreement.

58. As to these complaints:

i) The failure to refer to authorities cited by Biotec cannot amount to a serious irregularity for the reasons given above. The Arbitrator did determine the issue and explained his reasons for doing so. The conclusion is unsurprising.

ii) The Arbitrator said in the Award that he had no need to determine this issue because of his finding that no order had been made by Biotec. That reasoning cannot be faulted. It cannot be said that the Arbitrator failed to take account of Biotec's submissions on this point merely because he accepted Siemens' arguments.

iii) Whatever some of the witnesses may have said, this was not an agreed or admitted piece of evidence which was ignored or overlooked. Biotec wish to rely upon evidence not referred to by the Arbitrator in seeking to persuade the court that there has been a failure to address the issue or unfairness on his part but that would necessarily involve the court in evaluation of the evidence and impinge on the function of the Arbitration.

59. In relation to all three complaints relating to the Price Assurance/Client Assurance, the Tender Assurance and the Instrument Order, it is obvious that what Biotec is really saying is that the Arbitrator was wrong in not accepting its arguments and in reaching the conclusions that he did. The points raised now would require the court to re-evaluate the evidence and/or submissions made to the Arbitrator and to determine the issues referred to him, which is not permissible under section 68. The Arbitrator's conclusions on fact are unassailable and his conclusion of law can be challenged under section 69 only in prescribed circumstances, if the right to appeal is not proscribed, as it is here under article 26.9 of the LCIA Rules. Section 68 cannot be used to mount a challenge to the Arbitrator's findings of fact or conclusions of law.

The non-existent Common Positions

60. Biotec complains that the Arbitrator relied on apparently "common positions" between the parties when this was not the case and in consequence reached conclusions based on concessions that had not been made by it.

    i) In relation to the implied terms issue, it was said that the Arbitrator based his conclusion on Biotec's alleged agreement to a legal position when it had not so agreed and its submissions made that plain.

    ii) In relation to the conspiracy claim, the Arbitrator incorrectly held that Biotec had agreed that there was a "high onus of proof" in relation to its establishment and he failed to put that issue to Biotec to allow it to refute it.

    iii) The Arbitrator failed to put to Biotec that he considered that it had abandoned a key part of its conspiracy claim, namely the motive of the protagonists.

61. The complaint in relation to the implied terms argument was not pursued in Biotec's skeleton argument for the hearing. In oral argument there was merely a brief mention of the point as raised in Mr Ashford's first witness statement where it was said that the Arbitrator wrongly held that it was agreed that terms would only be implied if they were necessary to make the contract work whereas at no stage had Biotec agreed that to be the position. Mr Ashford said that Biotec had submitted that was a broad test as set out in *AG of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988.

62. There is nothing in this point at all. The Arbitrator set out the implied terms for which Biotec contended at paragraph 120 of the Award and then at paragraph 225 referred specifically to Biotec's argument that the traditional tests used to identify implied terms were broadened by the decision of the Privy Council in *AG of Belize* (*ibid.*). The Arbitrator then went on at paragraph 226 to state that there was no dispute between the parties on the applicable legal principle in three sub-paragraphs, the third of which stated that, for a term to be implied, it must be "necessary to make the contract work", by reference to the decision in *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc* [2009] EWCA Civ 531, a decision of the Court of Appeal following the Privy Council decision. At paragraph 15 of that decision, the Master of the Rolls said that, although Lord Hoffmann in the Privy Council had emphasised that the process of implication was part of the process of construction of the contract, he was not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term and cited with approval Lord Wilberforce in *LCC v Irwin* [1977] AC 239 where the test of necessity was stressed – is it necessary to make the contract work?

63. In its closing speech, Biotec's counsel did not take issue with Siemens' written closing submissions which recorded that the parties were in agreement on the applicable legal principles for implied terms which formed the basis of what appeared in the Award. It is clear that no issues were raised regarding essential principles of law and statements were made to this effect.

64. The Arbitrator was entitled to treat the principles as agreed in such circumstances and, in any event, they could not seriously have been controverted in the light of the authorities. There is here no irregularity, let alone any serious injustice.

65. The Arbitrator did not, in his Award, suggest that it was agreed that a high onus of proof rested upon Biotec in establishing its conspiracy claim when stating that this was the position in a conspiracy claim. Since the Statement of Case alleged conspiracy on the basis that employees of Siemens had a personal interest in establishing Biotec's replacement by EDJ and thus had a corrupt motivation for termination of the Agreement, the allegations were serious and required cogent evidence commensurate with their gravity. Biotec contended that EDJ was incorporated by or at the instigation of three employees of Siemens and alleged that the corporate veil of EDJ should be pierced so as to recognise the receipts of benefits by those employees since EDJ was used as a vehicle for the unlawful interference and/or as a device or façade to conceal the true facts. In its reply, Biotec had contended that the ultimate control or interest in EDJ rested with the three employees and that the named legal owner was a bare trustee for them. The Arbitrator's conclusion in relation to the onus of proof was not a misstatement of an agreed common position, nor mistaken at all on the facts of the case and would not have been open to a section 69 challenge as an alleged mistake in law. Since the Arbitrator found that there was no evidence whatsoever of the conspiracy in question, any conclusion as to the onus of proof, whether or not there was anything which Biotec might have wished to say about it, could not amount to a serious irregularity nor give rise to a substantial injustice.

66. As to the failure to put to Biotec that it had abandoned a key part of its claim, when it resiled from the suggestion that the employees were owners of EDJ, it is self-evident that Biotec knew that it had done so and that the motivation it had put forward for the conspiracy had thus disappeared. It matters not that the tort of unlawful conspiracy does not require motivation of this kind, since Biotec had chosen to assert such motivation as underlying the conspiracy and then effectively abandoned the point and cross-examined none of the witnesses on it. The Arbitrator was entitled and right to record that Biotec abandoned a key allegation made in its Statement of Claim when making its closing submissions about conspiracy and had no need to put that to Biotec for comments. There can be no serious irregularity in that and no possibility of any serious injustice caused thereby.

Paragraph 3(4)(c) and (d) of the First Claim Form

67. No points were made by Biotec in support of the grounds of challenge set out at paragraph 3(4)(c) and (d) of the Claim Form in respect of the Award and it is self-evident that any such points would have been impermissible in a section 68 application, for the reasons set out in the authorities referred to earlier.

Commission

68. The complaint here, as recorded in the arbitration Claim Form is that the Arbitrator held, that clause 16.4 of the Agreement required any contract amendment to be in writing so that any alleged variation from the 3% contained in it to the unbarred 20% figure claimed by Biotec could not be effective. In so doing, it is said that the Arbitrator ignored Biotec's submissions and the authorities it relied on which demonstrated that as a matter of law, clause 16.4 did not have that effect.

69. This point is not susceptible to a section 68 challenge for reasons previously given, since it amounts to a challenge to the Arbitrator's conclusion of law on the facts as he

found them to be. The Arbitrator set out the parties' respective contentions at paragraphs 138-141 of the Award in which he recorded that Biotec's case was that the 3% commission set out in the Agreement was revised upwards to 20% and that a credit balance was built up with Siemens which, in February 2012, stood at €81,577.87. Siemens also said that the claim was time barred in part and no challenge is made to the Arbitrator's conclusion that any claim which accrued before 29th March 2006 was time-barred. Ultimately he held that the claim for commission which was not time barred succeeded, in the 3% figure, in the sum of €2,586. The differential between that and the 20% figure claimed is therefore some €14,654, if my mathematics is correct.

70. I have set out earlier in this judgment the terms of Issue 14 which relate to the entire agreement provision in clause 16.1, as opposed to the requirement for amendments to be made in writing duly signed by each of the parties which appears in clause 16.4. Nonetheless, the issue at 14(b) relates to clause 16.4, rather than 16.1.

71. Issues 50-52 in the list of issues referred specifically to commission and the question as to whether there was a variation. At paragraphs 295-305 the Arbitrator set out his conclusions on commission and the "rolling account" claims and the key paragraph is paragraph 300 which reads as follows:

> "As to the rate of interest Biotec claims that the rate of interest was increased by agreement between the parties to 20%. The Respondents contend that the rate provided for in the Agreement (3%) was not contractually varied and that is the rate which should be applied. It is true that in evidence Mr Koutnik said that he thought the commission payable to Biotec was 20% (before he saw the Agreement) and that his internal accounting included that figure. However there is no evidence before me of a written variation of the Agreement as required by Clause 16.4 of the Agreement and I find that the contractual rate of 3% applies."

72. The Arbitrator thus held that clause 16.4 of the Agreement was determinative of the issue of variation raised in Issue 50. The absence of any variation which was in writing and signed by each of the parties concluded the issue against Biotec.

73. It is to this that Biotec takes objection, relying upon evidence of practice during the life of the Agreement and particular emails passing between the parties and internally to Siemens. It is said that the Arbitrator failed to consider Biotec's legal submissions as to why Clause 16.4 did not prevent an oral variation being made and failed to consider the authorities cited to him including *I-Way Ltd v World Online UK Ltd* [2002] EWCA Civ 413 and to a later case which recognised that an oral variation was possible, notwithstanding a clause similar to clause 16.4.

74. The problem about this complaint is that what is being said is that the Arbitrator made a mistake of law which is not susceptible to challenge under section 68. It is not permissible for this Court to examine the Arbitrator's reasoning on a section 68 application to ascertain how he arrived at the conclusion of law that he did, which is plain from the face of the Award itself. Whether or not he was right in relation to the possibility of oral variation, waiver of compliance or estoppel is neither here nor

there. He determined the issue and the Court cannot go behind this to ascertain his evaluation of the evidence nor the interim steps taken by him in arriving at the conclusion which he clearly expressed. It is unsurprising that he did so briefly in the context of what was always a small claim and very much a "tail end Charlie" to the other matters raised in the arbitration.

The application relating to the Costs Award

75. It is submitted by Mr Quirk that the Arbitrator failed to comply with his general duty of fairness or to adopt procedures which provided a fair means of resolution of matters which fell to be determined. It is said that the Arbitrator exceeded his powers, failed to conduct the proceedings in accordance with the agreed procedure and failed to deal with all the issues put to him. I unhesitatingly reject all these submissions.

76. The Arbitrator determined what was referred to as "the rolling accounts claim". It was first made, according to the Costs Award, in Biotec's written outline submissions for the evidentiary hearing. This was a claim for payment of sums standing to the credit of Biotec with Siemens in the sum of €127,990.31. This represented, as the Arbitrator found commission which had built up but not been paid. It was not one of the issues set out in the Agreed List of Issues because the claim was not made until the beginning of the hearing. In the Award, the Arbitrator found that, although it was unpleaded, it fell within the relief sought by Biotec in its request for arbitration and that he had jurisdiction to deal with it. He therefore directed the taking of an account so that Siemens could have a reasonable opportunity to deal with the claim (Award paragraph 298). It thus fell for determination in the Costs Award hearing. Following submissions of the parties at that hearing, in the Costs Award the Arbitrator concluded that Siemens' documents showed a balance of €127,990.31 owed to Biotec and awarded that sum, together with interest upon it.

77. A new claim however, referred to as "the restitutionary claim", was also advanced in respect of the difference between the 3% commission to which the Arbitrator had found Biotec was entitled in the Award, and the 20% rate which Mr Koutnik accepted in his evidence had been used to fix the price at which Biotec was to purchase from Siemens. The claim was formulated as one of an unjust enrichment or money had and received.

78. The Costs Award records that Siemens argued that this was a new and unpleaded cause of action whilst Biotec relied upon Mr Koutnik's evidence of his practice to factor in the 20% which he thought was the contractual rate of commission and to make an internal accrual so it would be paid in due course. €80,198.21 represented the difference between the contractual rate which the Arbitrator had previously awarded and the 20% which Mr Koutnik said he added to the Siemens invoices to Biotec.

79. Biotec contended that the claim had been pleaded in its Statement of Case at paragraph 90(b) inasmuch as Biotec had sought an account of profits and commissions due to it. Moreover in the Award it was recorded that Biotec had requested that any necessary accounts and enquiries be taken for the payment of all amounts found due to Biotec. The Arbitrator held that, whilst it was arguable that the unjust enrichment claim fell within the relief sought by Biotec, no plea had been made of the cause of action. It was not referred to in Biotec's pleadings or in the List of

Issues or in Biotec's opening submissions. In consequence, Siemens were unable to deal with the matter in their witness statements or in the oral evidence at the hearing. Mr Koutnik had not been re-examined on the point and none of the Biotec witnesses had been cross-examined on it. The direction in the Award relating to the taking of the account would not encompass an independent cause of action for restitution.

80. It is impossible to see how it can be said that the Arbitrator failed to deal with Biotec's restitutionary claim since he dismissed it on the basis that it had not been pleaded and Siemens had not been given the opportunity to deal with it. Such a conclusion was within the powers of the Arbitrator and it has not been contended otherwise.

81. So far as the 3% commission was concerned, the Arbitrator found that the claim succeeded in the sum of €2,586, representing that element which was not time barred. On this he awarded interest.

Costs

82. Article 28 of the LCIA Rules gives the Arbitral Tribunal the power of determining the proportions in which the parties shall bear all or part of the arbitration costs and the power to order that all or part of the legal or other costs incurred by a party be paid by another party. Article 28.3 provides that "The Arbitral Tribunal shall determine and fix the amount of each item comprising such costs on such reasonable basis as it thinks fit".

83. Article 28.4 provides: "Unless the parties otherwise agree in writing, the arbitral tribunal shall make orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the arbitral tribunal that in the particular circumstances this general approach is inappropriate."

84. The Arbitrator referred to Article 28 of the LCIA Rules and to section 61(2) and section 63(5) of the Arbitration Act 1996.

i) Section 61(2) of the Act provides that, unless the parties otherwise agree, the Tribunal shall award costs on the general principle that costs should follow the event except where it appears to the Tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

ii) Section 63(5) states that unless the Tribunal or court determines otherwise, the recoverable costs of the arbitration shall be determined on the basis that there shall be a reasonable amount in respect of all costs reasonably incurred and that any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

85. The Arbitrator then set out his view that section 63(5) set out principles of assessment which were the same as those set out in CPR 44 and that he was entitled to be guided by those set out in decided authority on the imposition of costs on an indemnity basis. He thus took into account the principles set out by Tomlinson J (as he then was) in *Three Rivers District Council v Bank of England* [2006] 5 Costs RR 714.

86. The Arbitrator went on to apply those principles and looked at the respective success of the parties. He concluded that the principal claim in the case which took up most of the time was the unlawful means conspiracy case upon which Biotec failed. He regarded this as "a wide ranging and speculative claim and one which changed during the course of the proceedings. Very serious allegations were made against the respondent's principal witnesses …".

87. He went on to find that a number of allegations were made without any evidential basis:

i) The allegation that Mr Cvetkovic, Mrs Aiger and Mr Koutnik had a personal financial interest in EDJ (Award paragraph 150);

ii) That Mr Cvetkovic and Mr Koutnik travelled to Novi Sad and had a meeting with representatives of Euromedicina, at which Biotec's confidential information was passed to Euromedicina (paragraph 181 of the Award);

iii) That Mrs Aiger and/or Mr Cvetkovic were the "directing mind and will" of EDJ (paragraph 191 of the Award);

iv) That the VMA complaint was the result of an alleged corrupt relationship between senior members of VMA and Mr Zivkovic's father (paragraph 207 of the Award);

v) That the VMA complaint was contrived by Mr Cvetkovic and/or Euromedicina in order to bring about the termination of the Biotec Agreement and Biotec's replacement by Euromedicina (paragraph 208 of the Award).

88. He went on to say at paragraph 54:

> "Biotec says that its claim was not pleaded as one of dishonesty. However there were many instances where the words "fraud" or "dishonesty" were used by Biotec during the course of these proceedings, and in cross-examination – some of these are set out in the schedule which Respondents' counsel handed to me at the end of the hearing. Biotec says that the unlawful means which it was arguing in support of its conspiracy case were no more than civil wrongs. However, whether the words "fraud" or "dishonesty" were used or not, it is clear to me that the conduct being alleged against the Respondents and their employees was conduct which, if proved, would have been corrupt and/or dishonest."

89. The Arbitrator took the view that he should award costs on the indemnity basis in respect of the conspiracy claim but that standard costs would be appropriate on the other claims. Because of the difficulty in differentiation, he took the broad brush approach of allowing costs on an indemnity basis with a reduction of 10% to allow for the fact that only standard costs would have been awarded if the conspiracy claim had not been included.

90. It cannot be said that the Arbitrator exceeded his powers, failed to conduct the proceedings in accordance with the agreed procedure or acted unfairly in coming to the conclusion that he did. As he himself said, once costs were to be assessed on the indemnity basis, proportionality to the claim ceased to be relevant but he took the view that the costs were both reasonable and proportionate and he took into account the criticisms made by Biotec in coming to the figure that he did for Siemens' costs of £1,096,747.70.

91. No criticism is made of the LCIA or Arbitrator's costs of £149,924.25, which the Arbitrator ordered Biotec to pay.

Conclusion

92. For the reasons set out above, Biotec's section 68 challenges must fail. Costs must follow the event.

93. I anticipate an application on the part of Siemens for costs to be assessed on the indemnity basis because the conduct of Biotec has taken the situation away from the norm and represents unreasonable conduct to a high degree. When I first read the section 68 challenges in the Arbitration Claim Forms relating to the Award and the Costs Award, it immediately appeared to me that the contentions in paragraph 3(2) and 3(4) in the challenge to the Award and those in paragraph 3(3) and 3(4) of the challenge to the Costs Award did not fall within the ambit of section 68. On examination, that has proved to be the case as have also the rest of the challenges. In short, the section 68 application has been brought in order to challenge findings of fact and conclusions of law reached by the Arbitrator where the LCIA Rules provide at Article 26.9 that all Awards are to be final and binding, that the parties undertake to carry out any Award immediately and without delay, and irrevocably waive their 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.

94. In these circumstances it seems to me that I should award Siemens its costs on the indemnity basis but I will listen to any submissions as to why I should not do so, should Biotec wish to address me on the point.