true legal name. The Federal District Court declined to nullify the contract, finding that "both parties knew the meaning of the terms that they used".

401. We accordingly resolve the Lack of Capacity Issue in favour of the Claimants.

C. The Misdescription Issue

402. We can deal with this issue shortly, not least because it was not elaborated upon in oral argument.

403. In our judgment, the relevant question is not whether the description of "the Supplier" in the POA matches exactly the name under which RDEVCO was registered in Texas; but whether, construing the POA against the background facts, RDEVCO is sufficiently identified in the POA as "the Supplier". So formulated, the question produces only one answer: As stated earlier, all concerned knew perfectly well when the POA was signed that "the Supplier" was RDEVCO. Accordingly, sections 10 and 11 of the Law of Contract Act do not come into play.

404. We accordingly resolve the Misdescription Issue in favour of the Claimants. To reach any other conclusion on this issue would, in our judgment, be to achieve a triumph of form over substance.

D. The Illegality Issue

405. Section 31(1)(b) of the PPA 2004 provides that no "public body" shall award any contract "unless the award has been approved by the appropriate tender board". Section 31(2) of the PPA 2004 provides that "no person or firm shall sign a contract with any public body unless the award has been approved by the appropriate tender board". It is common ground that both the Respondent and MEM fall within the definition of "public body" in section 3(1) of the PPA 2004, and that, in relation to the POA, the "appropriate tender board" was that of the Respondent.

406. On the facts, we have no hesitation in finding – indeed it may be common ground between the parties[55] – that the award of the POA to RDEVCO was not approved by the Respondent's Tender Board. Hence the award of the POA to RDEVCO amounted to a contravention of section 31(1)(b) by the Respondent and/or MEM (if it be the case

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[55] See, e.g., paragraph 59(d) of the Claimants' Reply and Answer to Counterclaim, where the Claimants plead that the Tanzanian Government "formed a team of experts to select the bidder, *rather than seek TANESCO Tender Board approval*" (emphasis supplied). Compare, however, Mr Cordara's oral opening, at Day 1 page 33 lines 13 to 18, where he said: "Given that TANESCO was under a Ministerial directive to make this contract it would have been inconceivable if the Tender Board did not approve of it. The Respondent no doubt will, in due course, lead evidence to suggest that there was disapproval by the Tender Board. We haven't seen any yet."

that, on a true analysis, MEM, rather than the Respondent, "awarded" the POA to RDEVCO), and also a contravention of section 31(2) by RDEVCO (acting by Mr Gire).

407. So, the first question for the Tribunal in addressing the Illegality Issue is whether those contraventions of the PPA 2004, or either of them, had the effect of rendering the POA void and of no effect.

408. It is common ground that, in all respects material to the Illegality Issue, Tanzanian law is for all practical purposes the same as English law.[56] It follows that cases decided under English law, albeit not amounting to legal precedents under the doctrine of *stare decisis*, are nonetheless of high persuasive value.

a) The English Authorities

409. We turn, then, to the English authorities on the Illegality Issue. We address them chronologically.

410. The starting-point is the decision of Parke B in *Cope v. Rowlands* (1836) 2 M & W 149, which, although not cited to us directly, is cited in a number of the later authorities. In *Cope v. Rowlands*, the relevant statutory provision prohibited any unauthorised person from "acting as a broker" within the City of London. It was held that an otherwise valid brokerage contract made by an unauthorised person was illegal and void. In the course of his judgment, Parke B said (at page 157):

> "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. .... And it may be safely laid down ... that if *the contract* be rendered illegal, it can make no difference in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute *means to prohibit the contract*." (Emphasis in original.)

411. Later in his judgment, Parke B stated[57] that the language used by Parliament:

> "... shows clearly that the Legislature had in view, as one object, the benefit and security of the public in those important transactions which are negotiated by brokers. The clause, therefore, which imposes a penalty, must be taken ... to imply a prohibition of all unadmitted persons to act as

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[56] See Transcript Day 6, page 57 line 2 to page 58 line 4.

[57] At p.159.

brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make ...".

412. In *Cornelius v. Phillips* [1918] AC 199 (a decision of the House of Lords) the appellant was asked by a friend to assist him in raising money, and was introduced to the respondent, who was a registered moneylender. The appellant signed a promissory note in favour of the respondent, in consideration of which the respondent gave him a cheque which he duly endorsed in favour of his friend. The transaction was carried out in a hotel room at some distance from the respondent's registered address.

413. The judge at first instance held that the transaction contravened section 2(1)(b) of the Moneylenders Act 1900, which required a moneylender to carry on his business "at his registered address ... and at no other address", and that the promissory note was accordingly void. The Court of Appeal agreed with the judge that the transaction contravened section 2(1)(b), but held (by a majority) that the promissory note was not thereby rendered void. The House of Lords reversed the Court of Appeal's decision and held that the promissory note was void.

414. In the course of his speech, having discussed the relevant authorities, Viscount Haldane stated this (at page 211):

> "We are therefore free on the present occasion to construe the subsection [i.e. section 2(1)(b)] according to the words which the Legislature has used. These words do not appear to be ambiguous. They enact that a moneylender shall carry on his business at his registered address and at no other address. So standing they are clear, and they prohibit, and make void, any contract which contravenes them. That there is a subsequent subsection which makes a contravention by the moneylender a criminal offence makes no difference. There might have been inserted in the statute a special context which would have modified the application of the general rule, but there is nothing in the actual context to exclude the ordinary result which follows in law when a statutory prohibition is disregarded."

415. Lord Dunedin said this, at the conclusion of his speech (at page 213):

> "My Lords, ..., the question always comes to be put, as Parke B put it in *Cope v. Rowlands* ...: Does the statute seek to prohibit the contract? Section [2(1)(b)] seems to me to prohibit the contract, though it is expressed in words which apply directly to the contractor rather than to the contract. Indeed, if one looks at the mischief sought to be remedied, the case seems to me to be a stronger one than that of *Cope v. Rowlands.*"

416. For present purposes it suffices to note that the House of Lords in *Cornelius v. Phillips* treated the issue as to whether the promissory note was void as one of construction of the relevant statute; and that in the event it held that on its true construction the statute prohibited the contract, so as to render it void *ab initio*.

417. In *Re an Arbitration between Mahmoud and Ispahani* [1921] 2 KB 716 ("*Mahmoud*") the plaintiff contracted to sell to the defendant a quantity of linseed oil, contrary to an Order made under the Defence of the Realm Regulations which required both parties to hold a licence for the purchase or sale of specified products, including linseed oil. The plaintiff held such a licence, but the defendant did not. However, the defendant misrepresented to the plaintiff that he held such a licence, and the plaintiff entered into the contract in reliance on that misrepresentation. The defendant subsequently refused to accept delivery of the linseed oil on the ground that the contract was illegal and void *ab initio* since he held no licence under the Order. The plaintiff claimed damages for breach of contract. The arbitrator stated his award in the form of a special case, the only question raised by the case being whether the defendant's contention that the contract was illegal and void *ab initio* was good in law. The judge at first instance rejected that contention and awarded damages to the claimant. The Court of Appeal reversed that decision.

418. The leading judgment was given by Bankes LJ. In the course of his judgment, Bankes LJ said this (at page 723):

> "The first question is, What is the true construction of the Order ...? Clause 1 provides: "Until further notice a person shall not either on his own behalf or on behalf of any other person buy or sell or otherwise deal in ... any of the articles specified in the schedule hereto" – which included linseed oil – "whether situated within or without the United Kingdom, except under and in accordance with the terms of a licence issued by or under the authority of the Food Controller". The language of the clause is clear. It makes it illegal, on the part both of the buyer and of the seller, to enter into a contract prohibited by the clause. [Bankes LJ went on to consider clauses 2, 3 and 4 of the Order.[58]] It is not material to consider, for the purpose of deciding this case, whether or not the respondent has been guilty of an offence under the Order. It is said, as I understand it, that, provided a person complies with the requirements of clause 3 and asks for information which would be "for the purpose of satisfying them or him that the provisions of this Order have not been contravened", all the requirements of the Order have been complied with. That is not my view of the Order. I think clause 1 makes such a contract as this illegal. Clause 3 is an additional requirement for securing that persons shall not enter into these contracts; but when one is considering what is the effect of non-compliance with clause 1, it seems to me to be immaterial whether they do or do not make the inquiries. The Order is a clear and unequivocal declaration by the Legislature in the public interest that this particular kind of contract shall not be entered into. [A]s the language of the Order clearly prohibits the making of this contract, it is open to a party, however shabby

[58] Clause 3 of the Order imposed an obligation on the parties to provide information confirming that the provisions of the Order had not been contravened. Clause 4 provided that infringements of the Order were summary offences.

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it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract."

419. Scrutton LJ agreed. In his judgment, he noted (at page 727) that the Order was made "[f]or public purposes and for public reasons". He found it to be clear, looking at the Order as a whole, that the intention of the legislature was that a contract for the sale of specified products should not be enforceable unless each of the parties to the transaction held the requisite licence to enter into such a contract.

420. Atkin LJ also agreed. He found the contract to be expressly prohibited by the terms of clause 1 of the licence. However, in the course of his judgment he referred to the distinction between cases of express prohibition and cases of implied prohibition, saying this (at page 731):

> "When the Court has to deal with the question whether a particular contract or class of contract is prohibited by statute, it may find an express prohibition in the statute, or it may have to infer the prohibition from the fact that the statute imposes a penalty upon the person entering into that class of contract. In the latter case one has to examine very carefully the precise terms of the statute imposing the penalty on the individual. One may find that the statute imposes a penalty upon an individual, and yet does not prohibit the contract if it is made with a party who is innocent of the offence which is created by the statute. .... [H]ere it appears to me to be plain that this particular contract was expressly prohibited by the terms of the Order".

421. *Mahmoud* is certainly authority for the headline proposition (espoused by Respondent's Leading Counsel in the instant case) that an express statutory prohibition on entering into a particular class of contract will render such a contract illegal and void. However, the proposition needs to be examined more closely, since to describe a contract as "prohibited" by the relevant legislation is to beg the underlying question as to whether the intention of the legislature, as gathered from a consideration of the relevant legislation as a whole and any other admissible evidence, is that, having regard to its terms, the purported contract shall not create legally enforceable rights and obligations. In *Mahmoud* itself, the Court of Appeal considered the Order in its entirety. In doing so, it found the intention of the legislature to be that a contract for the sale or purchase of specified goods should not create legally enforceable rights and obligations unless each party to the transaction held the requisite licence to enter into such a contract. It was in that sense that it found the contract to be "prohibited".

422. It is also to be noted that Bankes LJ, when referring to clause 3 of the Order, did not go so far as to say that a contravention of clause 3 on its own would have produced the same result, describing the clause merely as "an additional requirement for securing that persons shall not enter into these contracts".

423. Lastly, in *Mahmoud,* it was the subject-matter of the contract itself (i.e. the sale of a specified product) which was "prohibited" by the Order unless both parties to the

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contract held the requisite licence. The requirement for a licence limited the scope of the prohibition, but the focus of the prohibition itself was the subject-matter of the contract. By contrast, in the instant case the focus of the prohibitions in section 31(1) and (2) of the PPA 2004 is the pre-contract requirement for tender board approval, rather than the subject-matter of the POA itself – which, on the evidence, was undoubtedly in the public interest. In that sense, and to that extent, the instant case differs *Mahmoud*.

424. In *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] AC 277 ("*Vita Foods*"), a decision of the Privy Council, a consignment of herrings was shipped from Newfoundland to New York. During the voyage, the ship ran aground due to the negligence of the captain. The herrings were loaded onto another ship, but arrived in New York in a damaged condition. The appellants, who were the consignees of the herrings, sued the respondent shipowner for damages. The respondent contended (among other things) that relevant bill of lading, the terms of which were governed by English law, was void since it did not comply with a Newfoundland statute. The Privy Council rejected that contention.

425. The judgment of the Privy Council was delivered by Lord Wright. In the course of his judgment, Lord Wright said this (at page 293):

> "Illegality is a concept of so many and varying and diverse applications, that in each case it is necessary to scrutinise the particular circumstances with precision in order to determine if there is illegality and if so what is its effect. As Lord Campbell said in *Liverpool Borough Bank v. Turner* ... : "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed".
>
> In that case the court, by a careful examination of the object of the Act and the public importance of compliance with it, held the transfer of a vessel to be a nullity for breach of a registration law. The same result has been reached in other cases, some of which have been cited in argument, where breaches of statutes were held to nullify the transactions in question, even without express words of nullification. .... Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

426. It is important to note that, in *Vita Foods*, the issue was whether there was an implied, as opposed to an express, prohibition in the Newfoundland statute; and Lord Wright's observations are directed to that issue (see his reference in the last sentence of the passage quoted above to "contracts not expressly forbidden by statute").

427. In *St. John Shipping Corporation v. Joseph Bank Ltd* [1957] 1 QB 267 ("*St. John Shipping*") a ship was overloaded, contrary to section 44 of the Merchant Shipping (Safety and Load Line Conventions) Act 1932. The defendant, who was liable to the plaintiff shipowner for the freight, withheld a sum equivalent to the amount of cargo which had caused the ship to be overloaded, contending that the shipowner was not entitled to that sum since it had performed the contract in an illegal manner. Devlin LJ upheld the shipowner's claim to recover the balance of the freight, primarily on the basis that the infringement of a statute in the performance of a contract which was legal when made did not render the contract illegal unless the contract, as performed, was one which the statute meant to prohibit; and that, on its true construction, the statute in question did not mean to prohibit contracts for the carriage of goods. *St. John Shipping* is accordingly distinguishable on its facts from the instant case, in that in the instant case there was nothing illegal in the manner of performance of the POA: the question in the instant case is whether the POA was legal when made. However, in addressing the issue before him Devlin LJ made a number of observations which are of assistance in the instant case.

428. Describing the defendant's contention as based on a misconception as to the application of the principle that a person who performs a contract in an illegal manner cannot sue on it, Devlin LJ continued (at page 283):

> "In order to expose that misconception I must state briefly how that principle fits in with other principles relating to illegal contracts. There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law. .... This principle is not involved here. Whether or not the overloading was deliberate when it was done, there was no proof that it was contemplated when the contract of carriage was made. The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class you have only to look and see what *acts* the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what *contracts* it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable." (Emphasis supplied.)

429. Later in his judgment (at page 285) Devlin LJ cited with approval the passages in the judgment of Parke B in Cope v. Rowlands quoted above. Devlin LJ went on:

> "Now this language ... shows that the question always is whether the statute meant to prohibit the contract which is sued upon. .... If in considering the effect of a statute the only inquiry that you have to make is

whether an act is illegal, it cannot matter for whose benefit the statute was passed; the fact that the statute makes the act illegal is of itself enough. But if you are considering whether a contract not expressly prohibited by the Act is impliedly prohibited, *such considerations are relevant in order to determine the scope of the statute."* (Emphasis supplied.)

430. In *Archbolds (Freightage) Ltd v. S. Spanglett Ltd* [1961] 1 QB 374 ("*Archbolds*"), the plaintiffs engaged the defendants to carry a consignment of whisky by road. The whisky was stolen from the defendants' van en route. The plaintiffs sued the defendants for damages, alleging that the theft occurred through the negligence of the defendants' van driver. The defendants contended that the contract of carriage was illegal since the van did not have the requisite road traffic licence. The Court of Appeal (one of whose members was Devlin LJ), distinguishing *Mahmoud*, held that the contract was not expressly or impliedly prohibited by statute.

431. The leading judgment was given by Pearce LJ. In the course of his judgment, he said this (at page 384):

> "The first question, therefore, is whether this contract of carriage was forbidden by statute. The two cases on which the defendants mainly rely are [*Mahmoud*] and *J. Dennis & Co. Ltd v. Munn*. In both those cases the plaintiffs were unable to enforce their rights under contracts forbidden by statute. .... In neither case could the plaintiff bring his case within the exception that alone would have made its subject-matter lawful, namely, by showing the existence of a licence. Therefore, the core of both contracts was the mischief expressly forbidden by the statutory order and the statutory regulation respectively.
>
> In [*Mahmoud*] the object of the order was to prevent (except under licence) a person buying and a person selling, and both parties were liable to penalties. A contract of sale between those persons was accordingly expressly forbidden. In *Dennis*'s case the object of the regulation was to prevent (except under licence) owners from performing building operations, and builders from carrying out the work for them. Both parties were liable to penalties and a contract between these persons for carrying out an unlawful operation would be forbidden by implication.
>
> The case before us is somewhat different. The carriage of the plaintiffs' whisky was not as such prohibited; the statute merely regulated the means by which carriers should carry goods. Therefore this contract was not expressly forbidden by the statute."

432. Pearce LJ went on to consider whether the contract of carriage was prohibited by implication. After referring to the observations of Devlin LJ in *St. John Shipping* quoted above, and after considering the object of the relevant statute (the Road and Rail Traffic Act 1933), Pearce LJ concluded that the contract of carriage was not impliedly prohibited by the statute.

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433. Devlin LJ began his judgment by distinguishing between three different effects of illegality on a contract, the third of which he described thus (at page 388):

> "The third effect of illegality is to avoid the contract *ab initio* and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy."

434. Later in his judgment, with reference to cases where there is no express prohibition in the legislation and the issue is whether a prohibition is to be implied, Devlin LJ said this (at page 390):

> "The general considerations which arise on this question were examined at length in [*St. John Shipping*] ... Fundamentally they are the same as those which arise on the construction of every statute; one must have regard to the language used and to the scope and purpose of the statute. I think that the purpose of the statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute. Moreover, the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might, as it would in this case, greatly outweigh the punishment that could be imposed upon him, and thus undo the penal effect of the statute."

435. *Archbolds* was a case in which it was not the contract of carriage itself which was objectionable, but the manner in which the contract was performed. Hence it is not directly in point in the instant case. Nor do the statements of principle in the judgments add significantly to the dicta in the earlier cases to which we have referred, beyond describing the wide-ranging nature of the inquiry which is required where the contract in issue is not expressly prohibited by the legislation.

436. *Chai Sau Yin v. Liew Kwee Sam* [1962] AC 304, a decision of the Privy Council, is relevant for present purposes only for the following observation by Lord Hodson (at page 311):

> "If, on the other hand, the contracts were prohibited by law and the prohibition was made in the public interest, no claim can be entertained: "The court must enforce the prohibition even though the person breaking the law relies upon his own illegality": see [*Mahmoud*]."

437. In *Shaw v. Groom* [1970] 2 WLR 299, the plaintiff let a room in her house to the defendant and issued the defendant with a rent book which did not contain all the information required by the Landlord and Tenant Act 1962. On a claim by the plaintiff for arrears of rent, the defendant contended that the contravention of the statute meant that the rent was irrecoverable. The judge at first instance upheld the defendant's contention, but the Court of Appeal rejected it, holding that the test as to the enforceability of a contract was whether, on the true construction of the relevant legislation as a whole, Parliament had intended to preclude the plaintiff from enforcing the contract of letting; and that, in

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applying that test, no such intention was to be found. In reaching its decision the Court of Appeal reviewed the relevant authorities.

438. As with *Vita Foods, Shaw v. Groom* was a case in which the issue was whether there was an implied prohibition in the statute, such as to render the contract in question void.

439. In *Bedford Insurance Co Ltd v. Instituto de Resseguros do Brasil* [1985] 1 QB 966 ("*Bedford Insurance*"), the issue was whether certain marine insurance policies were rendered void *ab initio* by reason of the fact that they were written by an unauthorised insurer, contrary to the Insurance Companies Acts. Parker J held that the policies were expressly prohibited by the legislation, and that in consequence the observations of Devlin LJ in *Archbolds* quoted above were not in point.

440. At page 981H Parker J said this:

> "The express prohibition is upon the carrying on of insurance business of a relevant class, but ... the definition in the case of each class begins: "the effecting *and carrying out* of contracts of insurance". What is therefore prohibited is the carrying on of the business of effecting *and performing* contracts of insurance of various descriptions in the absence of an authorisation. It is thus both the contracts themselves *and the performance of them* at which the statute is directed." (Emphasis supplied.)

441. Parker J went on to quote the section of the Act which created the offence of carrying on business in contravention of the Act, and continued (at page 982C):

> "There is here a clear indication that the mere paying of claims ... was intended to be prohibited whether or not the contracts of insurance under which the claims were made were themselves made in contravention of the Act."

442. Parker J accordingly held (at page 984C) that:

> "... [h]ere, as a matter of plain language, both the contract and performance are prohibited, the offence created is a continuing one, and the statute is for the protection of the public".

443. Later in his judgment (at page 984G), Parker J said this:

> "[W]here, as here, ... there is a clear express prohibition on contract and performance, they [i.e. the observations of Devlin LJ in *Archbolds* quoted above] cannot be used to escape the well settled principle that if the contract is expressly prohibited it is avoided *ab initio*."

444. Lastly, at page 985H Parker J said this:

> "[Counsel for the plaintiffs] sought to argue that what the plaintiffs were seeking to do was in effect to carry out the policy of the Act, for, by

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ratification long after action brought, they were protecting the insured; that by the reinsurance they were ensuring that the insured would be paid, and that reinsurance is expressly encouraged by the Acts. Hence, he said, public policy does not require that the plaintiffs should be prevented from recovering. I reject this argument both in principle and on the facts. I reject it in principle because, once it is concluded that on [their] true construction the Acts prohibited both contract *and performance*, that is the public policy." (Emphasis supplied.)

445. *Bedford Insurance* is thus authority for the proposition that where, on its true construction, the legislation *expressly* prohibits a particular class of contracts, contracts which fall within that class are void *ab initio* and there is no further scope for recourse to considerations of public policy since "that is the public policy". Respondent's Leading Counsel submits that the instant case is just such a case. We address that submission below.

446. In *Phoenix General Insurance Co. of Greece SA v. Halvanon Insurance Co. Ltd* [1988] 1 QB 216 ("*Phoenix Insurance*"), the plaintiffs entered into contracts of reinsurance with the defendants relating to certain aviation contingency business written by the plaintiffs. When the plaintiffs sought to be indemnified by the defendants under those contracts, the defendants alleged that the contracts were illegal and void on the ground that the plaintiffs were not authorised under the relevant regulations to write the aviation contingency business. On the trial of a preliminary issue as to the enforceability of the contracts, the judge at first instance held that the contracts were unenforceable. The Court of Appeal allowed the plaintiffs' appeal, holding that, on the true construction of the legislation, the plaintiffs possessed the necessary authorisation.

447. The only reasoned judgment was given by Kerr LJ, with whom Parker and Balcombe LJJ agreed. At page 268B Kerr LJ cited with approval the passage in the judgment of Parke B in *Cope v. Rowlands* quoted earlier. After referring to *Cornelius v. Phillips, Mahmoud, St. John Shipping*, and *Archbolds*, he continued (at page 273E):

> "If the Act of 1974 permits resort to considerations of public policy, then in my view there can only be one answer, and cases such as *Cope v. Rowlands* ... and *Cornelius v. Phillips* ... would be readily distinguishable. The problem is therefore to determine whether or not the Act of 1974 prohibits contracts of insurance by necessary implication, since it undoubtedly does not do so expressly. In that context it seems to me that the position can be summarised as follows:
>
> (i) Where a statute prohibits both parties from concluding or performing a contract when both or either of them have no authority to do so, the contract is impliedly prohibited: see [*Mahmoud*] and the analysis by Pearce LJ in [*Archbolds*], with which Devlin LJ agreed. (ii) But where a statute merely prohibits one party from entering into a contract without authority, and/or imposes a penalty upon him if he does so, ... it does not follow that the contract is impliedly prohibited so as to render it illegal and void. Whether or not the statute has this effect depends upon

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considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations. The statutes considered in *Cope v. Rowlands* ... and *Cornelius v. Phillips* ... fell on one side of the line; the Foods Act 1974 would clearly fall on the other. (iii) The Insurance Companies Act 1974 only imposes a unilateral prohibition on unauthorised insurers. If this were merely to prohibit them from carrying on "the business of effecting contracts of insurance" of a class for which they have no authority, then it would clearly be open to the court to hold that considerations of public policy preclude the implication that such contracts are prohibited and void. But unfortunately the unilateral prohibition is not limited to the business of "effecting contracts of insurance" but extends to the business of "*carrying out* contracts of insurance". This is a form of statutory prohibition, albeit only unilateral, which is not covered by any authority. However, in the same way as Parker J in [*Bedford Insurance*], I can see no convincing escape from the conclusion that this extension of the prohibition has the unfortunate effect that contracts made without authorisation are prohibited by necessary implication and are therefore void. Since the statute prohibits the insurer from carrying out the contract ... how can the insured require the insurer to do an act which is expressly forbidden by statute? And how can a court enforce a contract against an unauthorised insurer when Parliament has expressly prohibited him from carrying it out? In that situation there is simply no room for the introduction of considerations of public policy. As Parker J said in [*Bedford Insurance*], at p.986A: "once it is concluded that on its true construction the [Act] prohibited both contract *and performance*, that is the public policy". (iv) It follows that, however reluctantly, I feel bound to agree with the analysis of Parker J in [*Bedford Insurance*] and his conclusion that contracts of insurance made by unauthorised insurers are prohibited by the Act of 1974 in the sense that they are illegal and void, and therefore unenforceable." (Emphasis supplied.)

448. Kerr LJ went on to cite with approval further passages from the judgment of Parker J in *Bedford Insurance* quoted above.

449. It is apparent from Kerr LJ's reasoning that he regarded the decisive factor in that case, and the one which drove him, albeit "reluctantly", to his conclusion that the contracts were illegal and void, was the extension of the statutory prohibition to the *performance* of the contract. As noted earlier, that is not a factor which is present in the instant case.

450. Lastly, so far as the English authorities are concerned, we turn to *Hughes & Ors. v. Asset Managers plc* [1985] 3 All ER 669 ("*Hughes*"). In *Hughes*, the claimants remitted £3M to the defendants for the purchase of shares on their behalf pursuant to a number of investment management agreements between them. Shortly thereafter the defendants, at the direction of the claimants, sold the shares at a substantial loss. The claimants sued for the recovery of the loss, alleging that the investment management agreements were void on the ground that the individual who signed them on behalf of the

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defendants did not at the time hold the requisite licence under the Prevention of Fraud (Investments) Act 1958. On an application by the plaintiffs for summary judgment, the judge at first instance held that the agreements were not void as alleged. On the plaintiffs' appeal, the Court of Appeal affirmed the judge's decision.

451. The leading judgment was given by Saville LJ. In the course of his judgment, Saville LJ said this:

> "The appellants submit that the 1958 Act was passed for the protection of the investing public, by not only prohibiting unlicensed persons from engaging in the business of dealing in securities, but also by prohibiting dealings in securities by unlicensed persons acting on behalf of those engaged in that business. In the present case the individual concerned had, by making the agreements, purported to do the very thing prohibited by the 1958 Act. It must follow, submit the appellants, that what was done was a nullity, since the Act, by its prohibition, had stripped the individual of any legal power to do that thing. The fact that the respondents were licensed was an irrelevancy, since the prohibition on unlicensed agents dealing was in addition to the prohibition on unlicensed persons carrying on a dealing business. The further fact (if such it be) that the failure to hold a licence was, according to the respondents, a matter of innocent misunderstanding, was also an irrelevancy since the statute contained an absolute prohibition.
>
> To my mind this argument contains within it the assumption that by prohibiting the unlicensed representative from dealing in securities the legislature was, in effect, rendering it legally impossible for such a representative to make deals in securities: that is to say, legally binding contracts between third parties on the one hand, and his principals on the other. This is not expressly spelt out by the 1958 Act, so that the question is whether this is the true meaning and intent of the Act. As Devlin LJ put it in [*St. John Shipping*]: '... does the statute mean to prohibit contracts at all?' in the sense of rendering any purported contract void.
>
> As a matter of pure construction, the language used by Parliament does not, to put it at its lowest, clearly indicate that the statute meant to prohibit (that is to say make void) contracts made by unlicensed representatives, for the subsection prohibits such a representative both from making deals (which *ex hypothesi* he could not do) and purported deals in securities. Indeed, as a matter of language, this could be said to indicate that Parliament was not seeking to render unlicensed dealings a nullity, but instead was confining itself to imposing criminal sanctions on those who engaged in such activities. Nevertheless, if there were other indications that Parliament intended to strike down deals made by unlicensed representatives, I would not myself regard this point as conclusive, since to do so would be to prefer the form to the substance. In my judgment, however, there really is nothing to indicate that this was the intention of Parliament.
>
> In this connection, there are two matters worthy of note. The first of these is that the particular prohibition under discussion is not on its face directed

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against deals themselves, but against the servant or agent making the deals; while the second is that this prohibition is not directed against either of the contracting parties to the deal but to the agent of one of them. Thus the case is distinguishable both from those instances where specific transactions (or their performance) are prohibited and those where the prohibition is directed against one or both contracting parties to the transaction (see ... [*Cornelius v. Phillips*].)

The case therefore stands at one remove from the cases cited by the appellants. This again is not fatal to their argument, provided considerations of public policy and the mischief against which this part of the 1958 Act was directed pointed to the need to render void deals in securities by unlicensed representatives. Decisions on different statutes using different words and directed at different ends are necessarily of limited assistance in this regard. I should say at this point that I did not find helpful the old cases cited to us ..., save to note that in *Cope v. Rowlands* ... Parke B propounded the test adopted by Devlin LJ in [*St. John Shipping*].

I readily accept that the purpose of the 1958 Act was to protect the investing public by imposing criminal sanctions on those who, as principals or agents, engaged in the business of dealing in securities without being duly licensed. .... However, I can see no basis in either the words the legislature has used or the type of prohibition under discussion, or in considerations of public policy (including the mischief against which this part of the 1958 Act was directed), for the assertion that Parliament must be taken to have intended that such protection required (over and above criminal sanctions) that any deals effected through the agency of unlicensed persons should automatically be struck down and rendered ineffective. On the contrary, it seems to me that not only is there really no good reason why Parliament should have taken up this stance, but good reason why Parliament should have held the contrary view.

In this connection it must be remembered, as Kerr LJ pointed out in [*Phoenix Insurance*], that rendering transactions void affects both the guilty and the innocent parties. The latter, just as much as the former, cannot enforce a bargain or obtain damages for its breach. In the context of the section under discussion this could very well produce very great hardship and injustice on wholly innocent parties .... In other words, the argument put forward by the appellants necessarily involves the proposition that Parliament has chosen to provide a defence against claims for breach of contract in favour of the very people who have ignored its licensing requirements. I repeat that I can find nothing to indicate that this is what Parliament did, or intended to do, when enacting this statute, nor anything to indicate any good reason or public need for such a result.

As I have said, in the case of other statutes, of course, other considerations might well apply – as, for example, in *Cornelius v. Phillips*. In the context of the Moneylenders Acts, a transaction of lending ... would hardly give rise to obligations which the borrower would wish to enforce; so that (as

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> Kerr LJ pointed out in [*Phoenix Insurance*]) rendering the loan void would be unlikely to carry with it any injustice to the borrower. Thus the factor which to my mind militates against the effect contended for by the appellants was not present in that case. As I have said, it is distinctions such as these that make unhelpful the citation of other cases on other statutes where other considerations apply, except of course for the purpose of finding expressions of the general principles applicable. In the end, the question in each case is the one to which I have referred, namely whether the Act in question has prohibited the contract in the sense of rendering any purported contract void."

452. Hirst LJ agreed with Saville LJ that the Act did not expressly prohibit the contracts in question, and that the question was whether there was an implied prohibition. In the course of his judgment, Hirst LJ said this (at page 675c-d):

> "Looking at [Kerr LJ's judgment in *Phoenix Insurance*] as a whole, it is quite clear that, but for the embargo against carrying out contracts of insurance, the decision would have gone the other way. Although this part of that judgment is strictly *obiter*, it is of the greatest persuasive force .... If [counsel for the appellants] were right and these contracts were void, the innocent client might well suffer loss which he could not recover in the circumstances already described by Saville LJ, which (as Pearce LJ stated in [*Archbolds*]) would be a most unsatisfactory result, and one which, in my judgment, would be inimical to public policy, which is the ultimate test to be applied."

453. Nourse LJ agreed with both judgments.

454. *Hughes* is a further illustration of the wide-ranging approach to construction of the relevant legislation which the court adopts where the issue is whether there is an implied, as opposed to an express, prohibition in respect of the contract in *question*. Moreover, it is important to note that (as we observed earlier, and as Kerr LJ stressed in *Phoenix Insurance*) when referring to a contract being "prohibited" by the legislation, the relevant "prohibition" must be one which, on the true construction of the legislation, renders the purported contract void.

455. The issue in the instant case, therefore, is whether section 31 of the PPA 2004 expressly or impliedly prohibits, in the sense of rendering void, contracts awarded in contravention of its provisions or -- to put it another way -- whether the PPA 2004 "means to prohibit" such contracts by rendering them automatically void *ab initio*. As the authorities to which we have referred demonstrate, the resolution of this issue raises a pure question of construction as to the true meaning and effect of the PPA 2004. As Saville LJ put it in *Hughes*: "In the end, the question in each case is ... whether the Act in question has prohibited the contract *in the sense of rendering any purported contract void*" (Emphasis supplied.)

b) The PPA 2004

456. We accordingly turn to the PPA 2004.

457. It is common ground between the parties that, in construing a particular provision of a statute, the correct approach is to read that provision in the context of the statute as a whole and against the background of such other evidence as may be admissible as an aid to its construction.

458. The decision of the Court of Appeal of Tanzania in *Warioba v. Wassira & Anor.* [1997] TLR 272 establishes that, in construing a Tanzanian statute, it is permissible to hold regard to the statement of Objects and Reasons relating to the Bill which was the precursor of the statute. At page 276H of the report, Kissanga JA, giving the judgment of the Court, said this:

> "[Counsel for the first respondent] objected to any reference to the Objects and Reasons of the Bill for the purposes of discovering the intention of Parliament when enacting the 1995 legislation to reintroduce corrupt practices into the Elections Act. He contended that for the purposes of discovering that intention, the objects and reasons were irrelevant and should not be looked at at all. However, learned counsel did not cite any authority in support of this view. *For our part, we think that the objects and reasons for the Bill are relevant and that we are entitled to look at them in trying to discover the intention of Parliament when enacting the law in question."* (Emphasis supplied.)

459. Accordingly, before turning to the PPA 2004 itself, we refer to the statement of Objects and Reasons relating to the Public Procurement Bill (the precursor to the PPA 2004).

460. The statement of Objects and Reasons relating to the Public Procurement Bill included the following:

> "... the Government has in mind that efficiency and tight control on procurement processes will ultimately lead to delivery of quality social services and tangible improvement of infrastructure facilities. The other objective is to convince our partners in development on Government commitment in ensuring sound management of public funds with a view to attract[ing] more donor-support that is essential for offsetting the budget deficit.
>
> ....
>
> This Bill is intended to provide for an Act that will cater for best practices in public procurement both at local and international levels. The Bill is further designed to establish a regulatory body for the Act as well as to provide for tender decentralization in Ministries, Ministry departments and parastatal organizations.
>
> The grounds for the enactment of the new Act are essentially as follows:
>
> (a) The Central Tender Board had in the former Act [i.e. the Public Procurement Act 2001] been overwhelmed with a great range of power

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which consequently had made it susceptible to contravention of the principles of accountability and good governance.

(b) A need to have a single regulatory body for the overall management of procurement in the public sector.

(c) A need to establish a mechanism that will oversee public procurement processes and also provide for procurement audit.

(d) There is a need for the establishment of [a] Public Procurement Appeals Authority to cater for settlement of tender disputes. The authority will also address tender issues in the private sector to ensure equity and justice for all parties."

461. We turn next to the PPA 2004 itself. Its formal title reads as follows:

"An Act to repeal the Public Procurement Act, 2001 with a view to make better provisions for the regulation of Public Procurement in the Government of the United Republic and to provide for other related matters."

462. The PPA 2004 itself is divided into eight Parts. Part I (sections 1 to 4) contains preliminary provisions. Part II (sections 5 to 27) establishes the PPRA. Part III (sections 28 to 43) deals with Tender Boards. Part IV (sections 44 to 57) sets out a number of principles applicable to public procurement. Part V (sections 58 to 71) deals with methods of procurement. Part VI (sections 72 to 76) contains a number of prohibitions. Part VII (sections 77 to 85) establishes the Public Procurement Appeals Authority ("the PPAA"). Part VIII (sections 86 to 91) contains a number of miscellaneous provisions. There are three schedules to the PPA 2004. The First Schedule deals with the composition, appointment and procedures of the Board of Directors of the PPRA. The Second Schedule deals with the composition, appointment and procedures of tender boards. The Third Schedule deals with the composition and procedures of the PPAA.

463. Section 2 of the PPA 2004 provides as follows (so far as material):

"2(1) This Act shall apply:

(a) to all procurement by tender undertaken by a procuring entity except where it is provided otherwise in this Act ..."

464. Section 3(1) contains a large number of definitions, including the following:

""Accounting Officer" means a Government officer appointed in accordance with the provisions of Public Finance Act, 2004 to hold a vote and account for all monies expended from that vote;

"Approving Authority" means an Accounting Officer or Chief Executive, a Ministry tender board, ..., or a parastatal tender board;

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"competitive tendering" or "tendering" means the method of procurement whereby suppliers, contractors or consultants are invited by the procuring entity to compete with each other in submitting priced tenders for goods, works or services;

"contractor" means a firm, company, corporation, organisation, partnership or individual person engaged in civil, electrical or mechanical engineering or in construction or building work of any kind including repairs and renovation, and who is, according to the context, a potential party or the [party] to a procurement contract with the procuring entity;

"lowest evaluated cost" means the price offered by a supplier, contractor, or consultant that is found to be the lowest after consideration of all relevant factors and the calculation of any weighing [of] those factors, provided that such factors have been specified in the tender documents;

"Minister" means the Minister for the time being responsible for matters relating to finance;

"parastatal organisation" means:

(i) a body corporate established by or under any Act or Ordinance other than the Companies Ordinance; or

(ii) any corporation registered under the Companies Ordinance, in which not less than fifty per cent of the share capital is owned by the Government or by another parastatal organisation ...;

"procuring entity" means a public body and any other body, or unit established and mandated by government to carry out public functions;

"procurement" means buying, purchasing, renting, leasing or otherwise acquiring any goods, works or services by a procuring entity spending public funds on behalf of a ministry, department or regional administration of the Government or public body and includes all functions that pertain to the obtaining of any goods, works or services, including description of requirements, selection and invitation of tenderers, preparation and award of contracts;

"public body or public authority" means:

(i) any ministry, department or agency of government;

(v) any parastatal organization.

....

"successful tender" means the tender selected by the procuring entity as:

(i) offering the [lowest] evaluated cost, in case the method of procurement used was competitive tendering; or

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(ii) being the most responsive to the needs of the procuring entity if [the method of] procurement used was competitive quotations, single source procurement, competitive selection or where goods or services of minor value were procured;

....

"tender" means an offer, proposal or quotation made by a supplier, contractor or consultant in response to a request by a procuring entity;

...."

465. Section 4(1) provides as follows:

"4(1) To the extent that this Act conflicts with an obligation of the United Republic under or arising out of:

(a) any treaty or other form of agreement to which the United Republic is a party with one or more other states ...; or

(b) any grant agreement entered into by the United Republic with an inter-governmental or international financing institution in which the United Republic is the beneficiary,

the requirement of such treaty or agreement shall prevail, but in all other respects, the procurement shall be governed by this Act."

466. Section 5 establishes the PPRA. The objectives of the PPRA are set out in section 6 (wrongly numbered 6(1)), which provides as follows (so far as material):

"6. The objectives of the [PPRA] shall be to:

(a) ensure the application of fair, competitive, transparent, non-discriminatory and value for money procurement standards and practices;

(b) harmonize the procurement policies, systems and practices of the Central Government, local governments and statutory bodies;

(c) set standards for the public procurement systems in the United Republic of Tanzania;

(d) monitor compliance of procuring entities; ...

(e) ...."

467. The functions of the PPRA are set out in section 7(1), which provides as follows (so far as material):

"7(1) The functions of the [PPRA] shall be to:

(a) advise Central Government, local governments and statutory bodies on all procurement policies, principles and practices;

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(b) monitor and report on the performance of the public procurement systems in the United Republic of Tanzania and advise on desirable changes;

(c) set training standards ...

....

(i) monitor the award and implementation of public contracts with a view to ensuring that:

(i) such contracts are awarded impartially and on merit;

(ii) the circumstances in which each contract is awarded or as the case may be terminated, do not involve impropriety or irregularity;

(iii) ... the implementation of each such contract conforms to the terms thereof;

....

(q) administer and enforce compliance with all the provisions of this Act;

...."

468. Section 7(2) gives the PPRA the legal rights necessary for the discharge of its functions. It provides as follows (so far as material):

"[7](2) For the purposes of the discharge of its functions under this Act, the [PPRA] shall be entitled:

(a) to be advised of the award and, where applicable, the variation of any public contract by the procuring entity responsible for such contract;

....

(c) to have access to any premises or location where work on a public contract has been or is being or is to be carried out;

(d) in relation to any matter which is the subject of investigation by the [PPRA], to have access to all books, records, documents or other property used in connection with the grant, issue, suspension or revocation of any prescribed licence whether in the possession of any public officer or any other person;

....

(f) within reasonable hours to enter any premises occupied by any person in order to make such inquiries or to inspect such document, record or property as it considers necessary to any matter being investigated by it; ...

...."

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469. Section 7(3)(b) provides that, where a member of the PPRA's staff who has been authorised by the PPRA to enter any premises for the purposes of making a search is refused access or is otherwise prevented from entering the premises, the PPRA may apply to a magistrate for an entry warrant authorising the member of staff concerned, or any police officer, "to forcibly enter the premises to conduct the search and make copies or take extracts of documents therein".

470. Section 8 confers wide investigatory powers on the PPRA, including power to conduct an investigation into "tender procedures relating to contracts awarded by public bodies", "the award of any public contract", and "the implementation of the terms of any public contract".

471. Section 13 deals with procedure following an investigation. It provides as follows (so far as material):

> "13(1) After conducting [an] investigation under this Act the [PPRA] shall, in writing inform the accounting officer of chief executive officer of the public body concerned of the result of that investigation and make such recommendations as it considers necessary in respect of the matter on which investigation was conducted.
>
> (2) ...."

472. Section 14 deals with disciplinary action to be taken against public officers. It provides as follows (so far as material):

> "14(1) If the [PPRA] finds, during the course of its investigation or on the conclusion thereof that there is evidence of a breach of duty or misconduct or criminal offence on the part of an officer, or member of a public body, it shall refer the matter to the competent authority.
>
> (2) The [PPRA] shall refer the matter to the person or persons competent to take such disciplinary or other proceedings as may be appropriate against that officer or member and in all such cases shall submit a special report to the Minister."

473. Section 16 confers wide powers on the PPRA in relation to the carrying out of its regulatory functions, including (in paragraph (e)) power "to act upon complaints by procuring entities, suppliers, contractors, consultants or any other entity or person in respect of any party to a procurement ...".

474. Section 18 establishes the Board of Directors of the PPRA. Section 19 empowers the Board of Directors to establish, among other things, a Complaints Review Committee "which shall handle complaints from bidders and any other interested parties arising out of the execution of the procurement function by the procuring entities.

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475. Section 28(1) provides that in each Ministry and parastatal organisation there shall be "a tender board for procurement of goods, services and works". Section 30 sets out the responsibilities of tender boards, as follows:

> "30. A tender board shall be responsible for:
>
> (a) .... award of contracts;
>
> (b) review all applications for variations, addenda or amendments to ongoing contracts;
>
> (c) approving tendering and contract documents;
>
> (d) approving procurement and disposal by tender procedures;
>
> (e) ensuring that best practices in relation to procurement and disposal by tender are strictly adhered to by Procuring Entities;
>
> (f) ensure compliance with this Act; and
>
> (g) [liaising] directly with the [PPRA] on matters within its jurisdiction."

476. Section 31 deals with the award of contracts, and is central to the issue before the Tribunal. We have already referred to particular provisions in section 31, but we now set out the relevant subsections in full, as follows:

> "31(1) Notwithstanding any other enactment, no public body shall:
>
> (a) advertise, invite, solicit or call for tenders or proposals in respect of a contract unless authorised by the appropriate tender board; and
>
> (b) award any contract unless the award has been approved by the appropriate tender board.
>
> (2) No person or firm shall sign a contract with any public body unless the award has been approved by the appropriate tender board.
>
> (3) ....
>
> (4) Where it comes to the knowledge of a tender board that a contract has been awarded or is about to be awarded in breach of this Act or Regulations made under the Act, [the] appropriate tender board shall forthwith report the matter to the [PPRA] ... and to the Permanent Secretary to the Treasury, recommending such actions as it may deem appropriate.
>
> (5) ...."

477. Section 32 confers a number of powers on tender boards, including power (in subsection (2)) to require the chairman, accounting officer or chief executive of a public body to provide information, and to examine the records of a public body.

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478. Section 33 provides that the accounting officer or chief executive of a procuring entity shall have overall responsibility for "the execution of the procurement process in the procuring entity", and shall be responsible in particular for (among other things) "signing contracts for the procurement activities on behalf of the procuring entity".[59]

479. Section 39 provides that an accounting officer or chief executive of a procuring entity may delegate the procurement functions of the procuring entity to another procuring entity, "in accordance with the terms and conditions specified in Regulations made under this Act".

480. Section 45 provides that a procuring entity "shall plan its procurement in a rational manner and in particular shall ... avoid emergency procurement wherever possible".

481. Section 59 deals with the selection of methods of procurement. It provides as follows (so far as material):

> "59(1) Except as provided for in [subsection (2) hereof],[60] a procuring entity engaging in the procurement of goods, works and services or disposal by tender shall apply competitive tendering, using the methods prescribed in the Regulations depending on the type and value of the procurement and, in any case, the successful tender shall be the tender offering the lowest evaluated cost.
>
> (2) In circumstances where:
>
> ....
>
> (b) there is an urgent need for the goods, works, or services such that it would be impractical to engage in open national or international tendering [or] competitive selection;
>
> ....
>
> the procuring entity may either restrict the issue of tenders in accordance with the procedures set out in the Regulations provided that:
>
> (i) the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor caused by dilatory conduct on its part;
>
> ...."

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[59] Section 33 paragraph (h).

[60] The printed copy wrongly refers to section 60.

482. Sections 60 to 67 are concerned with the process of competitive tendering, including the publication of a tender notice/advertisement, the issue of tender documents, the receipt of tenders and the evaluation and comparison of tenders. Section 68 is in the following terms:

> "68. The tender board shall review the evaluation and recommendation made by the procuring entity and may either:
>
> (a) approve the recommendation and authorize the procuring entity to accept the tender and award a contract in the form specified in the tender documents; or
>
> (b) refuse to authorize acceptance of any of the tenders and refer the evaluation back to the procuring entity with an instruction to re-evaluate the tenders or a recommendation for re-tendering or other action."

483. Section 72 contains provisions directed at the elimination of fraud and corruption in the award and performance of publicly financed contracts. Subsection (3) provides (among other things) that, where a court has found any person or firm to have been engaged in corrupt or fraudulent practices in the course of the award of a contract for goods, works or services, the procuring entity may "cancel the portion of the funds allocated to [the] contract". To similar effect, section 73(6) provides that any tender proved to have been awarded on the basis of inducement "shall be revoked forthwith".

484. It is to be noted that neither in section 72 nor in section 73 is there any express provision to the effect that a contract awarded in such extreme circumstances is automatically void *ab initio*, notwithstanding that it would have been an easy enough task for Parliament to have included such a provision.

485. Section 77 establishes the PPAA, the functions of which are to "entertain appeals against tender boards, clarify the issues in dispute between the parties and ... endeavour to bring about agreement between the parties on mutually acceptable terms". Sections 79 and 80 provide (among other things) that any supplier or contractor who claims that he has suffered, or that he is about to suffer, loss as a result of certain specified breaches of duty by a procuring entity may seek a review by the accounting officer or chief executive of the procuring entity, provided that the contract in respect of which the claim of breach of duty is made has not yet "entered into force". Section 81 provides (among other things) that where the contract in respect of which a claim of breach of duty is made has "entered into force", a claimant supplier or contractor may submit a complaint to the PPAA. The powers of the PPAA in relation to such a complaint are set out in section 81(4). They include (in paragraphs (d) and (e)) powers to "annul in whole or in part an unlawful act or decision of the procuring entity ... *other than any act or decision bringing the procurement* contract *into force*", and to "revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, *other than any decision bringing the procurement contract into force*" (Emphasis supplied.)

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486. The excepting of "any decision bringing the procurement contract into force" from the scope of each of these powers demonstrates that, at least in relation to a breach of duty by a procuring entity which gives rise to a right of review under section 79, the procurement contract itself is not thereby rendered automatically void *ab initio*. A similar point can be made, albeit with perhaps less force, in relation to the power in paragraph (f) of section 82(4) for the PPAA to:

> "... require the payment of compensation for any reasonable costs incurred by the supplier [or] contractor ... submitting the complaint ... as a result of an unlawful act, decision or procedure followed by the procuring entity ...".

487. At the very least, it can be said that there is nothing in the provisions of the PPA 2004 relating to the functions and powers of the PPAA to suggest that a contravention of section 31 in relation to a procurement contract renders that contract automatically void *ab initio*.

488. Section 87(1)(f) makes it a criminal offence to contravene or fail to comply with any provision of the Act or of regulations made under it.

489. Section 88(1) confers on the "Minister" (i.e. the Minister of Finance), the power to make regulations "for the better carrying out of the provisions of this Act". In the event, the relevant regulations are the 2005 Regulations.

*c) **The 2005 Regulations***

490. In our judgment, no material assistance is to be gained as to the true meaning and effect of the PPA 2004 from an examination of regulations made under it. At best, such regulations indicate what the Minister of Finance, or those advising him, believed to be its true meaning and effect at the time when the regulations were promulgated. However, certain of the regulations were referred to in the course of argument, and it is convenient to note them at this point.

491. Regulation 32(1) enables an accounting officer or chief executive officer to delegate "certain procurement and disposal by tender functions of the tender board". Regulation 32(2) provides that "for the avoidance of doubt, delegation of functions shall be within the procuring entity and contracting out of functions shall be outside the procuring entity".

492. Regulation 35(1) enables an accounting officer or chief executive officer to contract out the "entire procurement and disposal by tender function" to another procuring entity where (among other things) the accounting officer or chief executive officer decides that it would be more economical or efficient to do so, or (by paragraph (c)) "in any other reasonable circumstance".

493. Regulation 42 lays down a procedure for emergency procurement. This procedure was not invoked in the instant case. However, for completeness, we note the material parts of Regulation 42, which provide as follows:

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"42(1) If an accounting officer finds that it is in the public interest that goods or works, the value of which exceeds his or her authority, ought to be procured as a matter of urgency, the Accounting Officer shall:

(a) evaluate the need for such urgent procurement and decide which procurement method shall be followed in order to guarantee economy and efficiency, with due regard to circumstances of urgency and without regard to his limit of authority;

(b) procure the goods or works in accordance with the method of procurement selected; and

(c) immediately thereafter, present the unauthorised procurement to the Paymaster General, Treasury for retrospective approval.

....

(5) An award of a contract made by an Accounting Officer beyond its [sic] authority and not approved in retrospect shall nevertheless be valid and the Accounting Officer who approved it will be responsible for the payment of the price(s) involved."

494. Regulation 69(1)(b) provides that, subject to approval by the tender board (which was not obtained in the instant case), a procuring entity may engage in a single-source procurement of goods or services (i.e. procurement by "soliciting proposal or price quotation from a single supplier": see subregulation (3)) where:

"... there is an urgent need for the goods or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part".

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495. Regulation 70(1) contains a similar provision in relation to contracts for works. It provides as follows (so far as material):

"70(1) A procuring entity may obtain a priced quotation from a single contractor and negotiate and enter into a direct contract when:

(a) there is an urgent need for the works, such that there would be insufficient time for a procuring entity to engage in tendering or any other method of procurement, provided that the circumstances giving rise to the urgency could not have been foreseen by the procuring entity and have not been caused by dilatory conduct on its part; or

(b) there is only one particular contractor which a procuring entity can reasonably expect to undertake the required works; or

(c) there are advantages to a procuring entity in using a particular contractor who has undertaken or is undertaking similar works or who may

have already been mobilised with plant, equipment and staff in the vicinity or any other resources as may be appropriate; ....

(2) ....

(3) A procuring entity shall examine carefully any quotation received and, if necessary, negotiate subsequently with the contractor so as to ensure that the requirement for the works is properly addressed and met so far as is practicable and that the price quoted is not excessive and is in line with reasonable expectations.

...."

d) Discussion and Analysis

496. We turn first to Mr White's submission that subsections (1) and (2) of section 31 of the PPA 2004 expressly prohibit contracts awarded in contravention of its provisions, in the sense that they render such contracts automatically void *ab initio*.[61]

497. In addressing that submission, it is important at the outset to be clear as to what will be regarded by the courts as amounting to an express prohibition, in the context of the issues addressed in the authorities to which we have referred. As is clear from those authorities, a provision in the relevant legislation which, whilst not expressly providing that a particular contract or class of contracts shall be void *ab initio*, is framed in terms which nevertheless have that effect in law, will be regarded by the courts as falling within "the well settled principle that if a contract is expressly prohibited it will be void in law".[62] Paradigm examples of such a provision were those which were before the court in *Bedford Insurance* and *Phoenix Insurance*, i.e. provisions prohibiting the carrying on of an unauthorised business. As Kerr LJ explained in *Phoenix Insurance*, such a provision has the inevitable consequence that a contract, the performance of which would involve the carrying on of an unauthorised business is a contract to perform an illegal act, and hence is unenforceable at common law.

498. Faced with an express prohibition of that nature on the face of the legislation, the courts are constrained to apply it, however unjust or distasteful the consequences of doing so may be. As Parker J succinctly put it in *Bedford Insurance* (at page 986A): "Once it is concluded that on [their] true construction the Acts prohibited both contract and performance, that is the public policy". We draw particular attention, for present purposes, to Parker J's reference to contract and performance. In both *Bedford Insurance* and *Phoenix Insurance*, it was the illegality of the performance of the contract which brought the contract within "the well settled principle" referred to in the previous

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[61] See the Respondent's written Opening Submissions at paragraph 76 and its written Closing Submissions at paragraph 51.

[62] See per Parker J in *Bedford Insurance* at p.984G.

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paragraph. As Hirst LJ commented in *Hughes*, in the passage from his judgment quoted earlier, but for that provision Kerr LJ in *Phoenix Insurance* would have reached the opposite conclusion. In *Hughes,* there was no prohibition relating to the performance of the contract, and the Court of Appeal concluded that the "well settled principle" did not apply.

499. By contrast, where the court finds no express prohibition in the relevant legislation, so that the issue is whether a prohibition is necessarily to be implied, the court will undertake a wide-ranging inquiry of the kind described by Kerr LJ in the passage from his judgment in *Phoenix Insurance* quoted earlier, involving "considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant circumstances".[63] The Court of Appeal in *Hughes* undertook just such an inquiry.

500. We turn, then, to section 31 of the PPA 2004. In our judgment, it is impossible to spell out of the wording of subsections (1) or (2) of that section an express prohibition on contracts awarded or signed in contravention of those subsections such as will render such contracts automatically void *ab initio*, even in the wider sense in which the expression "express prohibition" is used in the authorities (as to which, see above). The prohibitions in section 31 are directed in terms against a public body which awards a contract which has not been approved by the appropriate tender board (subsection (1)), and against a person or firm which signs such a contract (subsection (2)). The mischief against which the subsections are directed has nothing to do with the terms of the contract itself, still less with the performance of the contract. In our judgment, section 31 leaves open the question as to whether the contract itself is rendered automatically void *ab initio*. It follows that the issue in the instant case is whether a provision to that effect is necessarily to be implied into the PPA 2004.

501. It is accordingly appropriate for us to undertake the type of wide-ranging inquiry which Kerr LJ described in *Phoenix Insurance* and which the Court of Appeal undertook in *Hughes*.

502. We turn first to considerations of public policy.

503. The statement of Objects and Reasons relating to the Bill which was the precursor of the PPA 2004 confirms that the public policy objectives of the PPA 2004 are to benefit the public in Tanzania by introducing a scheme for the sound management of public funds with a view to ensuring, so far as practicable, that public funds are spent wisely and efficiently, thereby encouraging "more donor-support that is essential for offsetting the budget deficit". To that end, a central feature of the PPA 2004 is the establishment of the PPRA, the primary objective of which is to "ensure the application of

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[63] See *Phoenix Insurance* at p.273H.

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fair, competitive, transparent, non-discriminatory and value for money procurement standards and practices".[64]

504. We can find nothing in the public policy objectives of the PPA 2004 to support the implication of a provision having the effect that a contract entered into in contravention of section 31 – that is to say, every such contract – is automatically void *ab initio*, regardless of its terms and regardless of whether the continued performance of the contract might be to the public benefit. The implication of such a draconian, disproportionate and one-size-fits-all consequence of a contravention of section 31 would, in our judgment, require a very strong statutory context, and the public policy objectives of the PPA 2004 do not begin to provide such a context.

505. As for the terms of the PPA 2004 itself, section 31(4) is, in our judgment, positively inconsistent with a contract awarded in contravention of section 31(1) being automatically void *ab initio*. Subsection (4) expressly covers a situation where a contract "has been awarded" in contravention of the Act. In such a situation, it is the duty of the tender board to report the matter to (among others) the PPRA,[65] and to recommend "such actions as it may deem appropriate". Subsection (4) accordingly recognises and contemplates that action may be taken by the PPRA (and others) in relation to an existing contract which has been awarded in contravention of subsection (1).

506. Nor can we find anything elsewhere in the PPA 2004 to support the assertion that a contract awarded in contravention of section 31 is automatically void *ab initio*. In particular, the fact that section 87 makes it an offence for a public body to award, or for the supplier to sign, a contract which has not been approved by the appropriate tender board, seems to us to suggest that Parliament considered that that was a sufficient sanction for a contravention of section 31(1) or (2). At the very least, it is in our judgment neutral on that question.

507. In *Phoenix Insurance*, Kerr LJ regarded it as significant that the statute imposed criminal sanctions on only one party to the contract (i.e. unlicensed dealers or their representatives) whereas in the instant case criminal sanctions are imposed on both parties to a contract which is awarded in contravention of section 31. However, the criminal liability of the supplier under such a contract is in a sense a vicarious liability since it is the want of tender board approval, a matter which is not within the control of the supplier, which triggers the criminal sanction against him.

508. A further factor militating against the implication of a provision rendering contracts awarded in contravention of section from being automatically void *ab initio* are the wide investigatory powers of the PPA: powers which are exercisable after, as well as before, the award of a contract to which section 31 applies.

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[64] PPA 2004 section 6(a) (wrongly numbered 6(1)(a)).

[65] See section 5(1) of the PPA 2004, where the PPRA is defined as the "Authority".

509. Lastly, and crucially, subsections (1) and (2) of section 31 say nothing whatever about the performance of the contract. On the contrary, they are focused exclusively on the awarding or the signing of the contract. Indeed, the fact that it is accepted by the Respondent that the performance of the POA by DHSA/DTL was entirely satisfactory is one of a number of extraordinary features of this case. Moreover, it is undeniable that it was in the public interest for the POA to continue in force, thereby providing much-needed power to the national grid. The Tribunal finds it ironic in the extreme that, notwithstanding that, on the evidence, the plant could be reactivated within a very short time, it remains idle in the face of a continuing need for power.

e) Conclusion on the Illegality Issue

510. In our judgment, therefore, there is no sufficient context for the implication into the PPA 2004 of a prohibition against contracts entered into in contravention of section 31, such as to render such contracts automatically void *ab initio*. In the words of Devlin LJ in *Archbolds*: "the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public, without furthering the object of the statute".

E. Conclusion on the POA Issue

511. We find that the POA, when signed, was a valid and enforceable contract. We accordingly resolve this issue in favour of the Claimants.

2. The First Preclusion Issue

512. Given the Tribunal's ruling on the POA Issue, this issue falls away.

3. The Novation Issue

513. Given the Tribunal's ruling on the POA Issue, this issue falls away.

4. The Misrepresentation Issue

A. The Claim as Pleaded

514. The allegation of misrepresentation by Respondent is another pillar of its case. The relevant part of the Respondent's Answer and Counterclaim addressing this issue begins in paragraphs 17.2 to 17.12, and states as follows:

> "17.2 By letter dated 9 November 2006 RDEVCO, LLC requested TANESCO's consent to assign the POA to the First Claimant. The letter concluded: "Dowans Holdings SA will present its credentials directly to TANESCO".
>
> 17.3 By letter dated 14 November 2006, the First Claimant requested TANESCO's consent to the assignment to it by RDEVCO, LLC of the POA.

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17.4 In order to enable it to consider the request for consent to the assignment, TANESCO requested information about the standing and financial position of the First Claimant at meetings with the representatives of the First Claimant in early December 2006.

17.5 In response to this request the First Claimant sent to TANESCO two letters dated 8 December 2006 and 18 December 2006 together with enclosures.

17.6 The letter from the First Claimant dated 8 December 2006 represented to TANESCO that Dowans Holdings SA was an established business in good standing in Costa Rica with bank accounts with Royal Bank of Canada and CRDB Bank, Tanzania.

17.7 The letter from the First Claimant dated 18 December 2006 represented to TANESCO that the First Claimant was an established business well known to at least two world-renowned international banking groups.

17.8 The First Claimant intended TANESCO to rely upon these representations when deciding whether to consent to the assignment of the POA from RDEVCO, LLC to the First Claimant.

17.9 As it was intended to do, TANESCO relied upon the representations when deciding to consent to the assignment of the POA from RDEVCO, LLC to the First Claimant. In reliance on and induced by those representations, TANESCO consented to the assignment by letter dated 21 December 2006.

17.10 The representations made by the First Claimant were false. Far from being an established business in Costa Rica the First Claimant appears to have no business in Costa Rica at all. As noted in paragraph 1 above, although the First Claimant asserts that it is incorporated in Costa Rica, in some documents, including in the Change of Parties Agreement attached to the Request for Arbitration..., it is said to be a company incorporated under the laws of the United Arab Emirates. TANESCO will seek disclosure in this arbitration of documents and information showing the true place of incorporation, location, business and standing of the First Claimant.

17.11 . Prior to such disclosure, TANESCO believes that the First Claimant has no business other than its involvement in the electricity generation project which is the subject of this arbitration. It notes that the Second Claimant is described as its "principal asset".... TANESCO believes that, far from being an established business in Costa Rica, the First Claimant is a corporate vehicle of, or controlled by or connected with, Rostam Aziz, a Tanzanian politician. TANESCO will rely in this regard upon a Power of Attorney dated 28 November 2005 granted by the First Claimant in favour of Rostam Aziz which the First Claimant caused to be delivered to CRDB Bank (Tanzania) Limited in connection with payments to be made to the First Claimant under the letter of credit....

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17.12 In the circumstances, TANESCO's consent to the assignment of the POA from RDVECO, LLC to the First Claimant was induced by misrepresentation and was voidable and was avoided by TANESCO's letter to the Second Claimant dated 30 June 2008... alternatively by TANESCO's Answer to Request for Arbitration and Counterclaim dated 30 January 2009".

515. In its Reply and Answer to Counterclaim the Claimants responded as follows:

"48. As to the allegation...that the [POA] was procured by misrepresentation, the allegation is denied...as set out below.

49 First, there was no misrepresentation contained in the letters of 8th and 18th December 2006 applying Tanzanian law (section 18 of the Law of Contract, Chapter 345 of the laws of Tanzania).

50 The letter dated 8th December 2006 indicated that:

(a) DHSA had bank accounts with the Royal Bank of Canada and CRDB Bank as was the case.

(b) DHSA had a certificate of existence and good standing, as was the case. The relevant certificate was attached to the letter and [was] appended [to the pleadings]. [66]

51 The letter of 18 December 2006 attached two references from Royal Bank of Canada (Suisse) and Barclays Bank (Suisse) SA. The references indicated that the beneficial owners of DHSA were well regarded as was the case; and/or

52 Second, and in any event no actionable misrepresentation arises applying Tanzanian law because if, which is denied, there was any misrepresentation, then TANESCO could have discovered the same in the exercise of ordinary due diligence and prior to entering into the [POA]. TANESCO is put to strict proof of the due diligence (Section 19 of the Law of Contract Act, Chapter 345 of the laws of Tanzania) that it undertook prior to providing its consent; and/or

53. Third, TANESCO is precluded from relying upon any allegations of misrepresentation on the grounds of the application of Tanzanian law principles and/or international principles of and relating to:

(a) Waiver; and/or

(b) Affirmation; and/or

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[66] It should be noted that the mentioned certificate of existence and good standing was attached at the appendix to the Claimants Reply and Answer to Counterclaim dated 25 September 2009.

(c) Acquiescence and laches; and/or

(d) Ratification; and/or

(f) A party not being permitted to benefit from its own wrong; and/or

(g) Legitimate expectations; and/or

(h) The exercise of prerogative and/or constitutional powers by the Government of Tanzania; and/or

(i) Not permitting and/or not giving effect to a breach of international law by the Government of Tanzania.

...The Claimants will rely upon the fact that prior to TANESCO's First Answer to the Request for Arbitration, TANESCO took no steps to avoid the [POA]. For the avoidance of doubt, TANESCO's letter of 30th June 2008 did not purport to avoid the [POA].

54 Fourth, TANESCO has suffered no loss and damage. On the contrary, it has purchased electricity in significant quantities as required at a fair price....

55. Reservation: For the avoidance of doubt, the above facts and matters are without prejudice to the burden of proof that rests on TANESCO to establish its case of actionable misrepresentation under Tanzanian law."[67]

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B. Tanzanian Law on Misrepresentation

516. Sections 18 and 19 of the Tanzanian Law of Contracts 2002 (Ch 345) provide as follows (as far as material):

"18. "Misrepresentation" means –

(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believed it to be true;

(b) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him;

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of agreement.

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[67] Claimants' Reply and Answer to Counterclaim dated 25 September 2009.

19. --(1) When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused: Provided that if such consent was caused by misrepresentation or by silence or fraud within the meaning of section 17, the contract nevertheless is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

(2) A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable."

...

C. Letter of 8 December 2006

517. As previously discussed in paragraphs 203 and 204 above, the letter of 8 December 2006 basically provides the following information:

(i) Requests from both DHSA and RDEVCO for TANESCO'S consent to assign the RDEVCO agreement to DHSA;

(ii) Information relating to equipment specifications, as well as details of equipment that has already been installed at Ubungo, and units awaiting shipment at the ports of Cape Town and Durban;

(iii) Portek's Press Release basically providing details of First Claimant's and Portek's global partnership in power generation in emerging markets;

(iv) Details of the establishment of the Second Claimant, as a joint venture partner to the First Claimant, and providing details of their share ownership in the project;

(v) DHSA's legal documents, including a certificate of incorporation, deed of incorporation (in English and Spanish), and bank account details;

(vi) Further details of the Portek Group;

(vii) Further details of Pro-Energy Services.

518. Based on the evidence presented before the Tribunal, all these representations were proved to be factual – what the letter of 8 December purported to present was actually in the dossier accompanying the letter. This is substantiated by the fact that the Tribunal was presented with evidence that DHSA and RDEVCO requested the consent of TANESCO to the assignment (Section 1); the equipment specifications, shipping information and details of DHSA's procurement of equipment (including from GE) were well documented during the proceedings (Section 2); the Press Release documents the partnership between DHSA and Portek, and states that DHSA was a key

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player in the power generation business, and was partnering with Portek, a seemingly experienced Singaporean energy firm. [68] This is essentially a promotional document commonly used by firms to make an impression on the evaluation team when competitively bidding for tenders (Section 3); the details of the establishment of DTL (by way of a copy of a certificate of incorporation from the Registrar of Companies) as a joint venture partner to DHSA are well documented before the Tribunal (Section 4); DHSA's legal documents comprise a Certificate of Existence and Good Standing confirming DHSA's good standing (English translation certified by a Notary Public in Costa Rica), Costa Rican Incorporation Documents, a certified true copy of the original, as well as bank details of DHSA's bankers (Royal Bank of Canada, and CRDB Bank [69]), which was supported by correspondence from both banks (discussed below) confirming that they were bankers for DHSA (Section 5); details of the Portek Group which was the joint venture partner with DHSA (Section 6); and details of a proposal from Pro-Energy Services to provide operations and maintenance services to DHSA (Section 7).

519. TANESCO alleges that these representations were false. However based on the evidence adduced before the Tribunal these representations presented in the dossier of 8 December 2006 were statements of fact, and were true. There was a degree of embellishment, especially in relation to the partnership with Portek and GE, but in our judgment, this embellishment did not amount to misrepresentation. After all, it is well known that, in the process of competitive bidding, firms will to some extent embellish their qualifications by association with stronger groups with a view to winning contracts. Under the relevant parts of Section 18(i) a case of misrepresentation would be established if there is a "*...positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believed it to be true* [70]. ...."

520. The Tribunal therefore concludes that the statements in the letter of 8 December 2006 were true, and therefore the Claimants cannot be held to have misrepresented any information in that communication. Rather the submission was consistent with the normal bidding practices in the procurement process. [71]

D. Letter of 18 December 2006

521. The relevant provisions of the letter of 18 December 2006 made representations to the effect that DHSA conducted business with two international banking groups.[72] The evidence before the Tribunal shows that these statements enclosing

[68] [5/1157-1163].

[69] [5/1157-1172].

[70] See also Claimants' Opening Submission on Day 1, page 64, lines 11-18.

[71] Claimants' Cross Examination of Mrs Wandiba, Transcript Day 3, page 90, lines 13-20.

[72] Ibid note 35.

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references from two international banks,[73] and which TANESCO alleges as untrue, are in fact true. The material provisions of the letter are as follows:

> "…. Dear Sirs,
>
> AGREEMENT FOR EMERGENCY POWER SUPPLY dated 23rd June 2006 between Tanzania Electric Supply Company Limited ("TANESCO") and Richmond Development Company LLC…
>
> DOWANS HOLDINGS SA, its partners and contractors for the Power Agreement.
>
> Further to your request for additional information, we are pleased to enclose:
>
> - BANK REFERENCES FOR DOWANS HOLDINGS SA
>
> We enclose bank references from two world-renowned international banking groups. We trust that this will assist you in your due diligence exercise.
>
> - DOWANS' PRINCIPALS
>
> We include a brief statement of business activities and financial resources of the main principals behind Dowans Holdings SA.
>
> - PORTEK PROJECT MANAGERS
>
> We enclose a brochure from Portek Energy, the project managers for this project, as well as 40% equity partners in the project.
>
> - PRO ENERGY OPERATION AND MAINTAINANCE SERVICES
>
> We enclose a copy of Pro Energy Services LLC's Proposal for Operation and Maintenance at the Ubungo Power Station. Pro Energy has over 2500 MW contracted O&M
>
> - DOWANS TANZANIA LIMITED
>
> Certificate of Incorporation and Memorandum & Articles of the intended operating entity, Dowans Tanzania Limited…. "

522. The dossier accompanying the 18 December 2006 letter comprises a letter from Royal Bank of Canada (dated December 18 2006) which confirms a significant relationship between DHSA and that bank. The second letter from Barclays Wealth (also dated 18 December 2006) confirms a satisfactory banking relationship with DHSA. The third letter describes the profile of the Al Adawi Group of Companies, which presents a picture of substantial business interests in the Middle East, Africa and the Indian sub-

[73] Ibid note 42.

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continent. Next is a description of Portek Project Managers, profiling an impressive capacity as "...a turnkey provider of equipment, services and solutions for the Global port industry..." and mentioning that "...Portek is a listed company in the Stock Exchange of Singapore...." The section on ProEnergy details the companies' proposal to RDEVCO to offer Operations and Maintenance services "....for four (4) – FT4 and one (1) TM2500 gas turbine units located in Tanzania for a period of two years. ...." Finally, an authenticated certificate of incorporation for DTL is presented, as well as Memorandum and Articles of Association indicating that the main business will be as "...producers, suppliers and distributors of electric power. ...." The Memorandum of Association lists Portek as one of the shareholders for DTL. The letter of 18 December 2006, stated that it was attaching documentation relating to each of these areas, and this is indeed what was attached. Therefore, these were not false statements, as is alleged by TANESCO. The Tribunal also reviewed these documents and confirmed that they were indeed true and were what they purported to be. It is therefore a little puzzling that this could be the basis of a misrepresentation claim under Section 18 of Tanzanian contract law, and the view of the Tribunal is that such a claim cannot be sustained.

523. TANESCO alleges that, in both letters, DHSA was asserting that it was an established business. This is not true as can be seen from the aforementioned discussion of the contents of both letters.

E. Conclusion on the Misrepresentation Issue

524. The Tribunal accordingly finds that the letters dated 8 December 2006 and 18 December 2006 and the accompanying documentation did not misrepresent the true position as alleged by TANESCO. It follows that the Misrepresentation Issue is resolved in favour of the Claimants.

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5. The Voidability Issue

525. Given our ruling on the Misrepresentation Issue, the Voidability Issue does not arise. However, for the sake of completeness we make two points in relation to it. We do so on the assumption (contrary to our ruling) that the letters dated 8 and 18 December 2006 and the accompanying documentation did misrepresent the true position as alleged by the Respondent.

526. Firstly, we have no hesitation in finding that, to the extent that there was a misrepresentation, the Respondent would have had no difficulty in discovering the true position through the exercise of "ordinary diligence"; and that accordingly the existence of such misrepresentation did not render the consent voidable under Tanzanian law (see the proviso to section 19(1) of the Law of Contract Act, quoted above).

527. It will be recalled that the Respondent instructed Citibank to carry out a due diligence exercise, but that in the event Citibank found itself unable or unwilling to do so. Thereafter the Respondent appears to have taken no steps to check the information contained in the two letters and the accompanying documentation. Had it done so, it

would inevitably have discovered the existence of any misrepresentation contained in them.

528. We accordingly find that the Respondent had "the means of discovering the truth with ordinary diligence", within the meaning of the proviso to section 19(1); and that in consequence had the information contained in the two letters and the accompanying documentation contained any misrepresentation such misrepresentation would not have rendered the Respondent's consent voidable.

529. Secondly, even if the Respondent were able to surmount the hurdle created by the proviso to section 19(1), with the consequence that its consent was voidable at the time it was given; by June 2008 it was far too late to seek to avoid it, given that in the meantime DTL had fully performed its obligations under the POA in a manner which was (as the Respondent accepts) above criticism. Thus, even if it were the case that at the time when the Respondent gave its consent such consent was voidable for misrepresentation as to the "standing and substance" of DHSA/DTL (see paragraph 58 of Mrs Wandiba's witness statement), by June 2008 any doubts in that respect had been shown to be unfounded. As subsequent events had demonstrated, DHSA/DTL was an organisation of standing and substance in that it had taken on a high-profile and large-scale project and progressed that project entirely satisfactorily, employing its own resources in terms of finance, equipment and manpower, until the Respondent, for its own reasons (which had nothing to do with DHSA/DTL's performance), sought to bring the project to an end. Only in that context, and at that stage (June 2008), did it occur to the Respondent that there might have been a misrepresentation in the information which DHSA had provided at the inception of its involvement in the project, being a misrepresentation on which the Respondent might rely as a ground for bringing the project to a premature end.

530. Accordingly, had the Voidability Issue arisen for decision, the Tribunal would have resolved it in favour of the Claimants.

6. The Change of Parties Issue

531. Respondent claims, in its Opening Submission on p. 33, that the Change of Parties Agreement dated 16 March 2007 is void and of no legal effect for the following reasons:

> "(i) the POA itself was void and of no legal effect; and/or
>
> (ii) TANESCO's consent to the assignment of the POA from RDEVCO and DHSA was procured by misrepresentation; and/or
>
> (iii) RDEVCO was not a party to the Change of Parties Agreement".

532. The Tribunal has determined that the POA itself is a valid and binding Agreement and that there was there was no misrepresentation by Claimants in obtaining the consent of TANESCO to the assignment. Therefore, subparagraphs "(i)" and "(ii)" above fall away. Regarding subparagraph "(iii)", TANESCO did not request or require that RDEVCO be a party to the 16 March 2007 Change of Parties Agreement.

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533. The transfer of rights from RDEVCO to DHSA is memorialized in a Change of Parties Agreement, which in relevant part provides as follows:

> "...The TANESCO has, pursuant to relevant provisions of the Agreement between itself and the **[RDEVCO]**, consented to the Assignment of the Agreement to **[Dowans Holdings]** on 'as is basis' which was initially vested upon **[RDEVCO]; AND WHERAS** the **[Dowans Holdings]** accepted in writing to take full responsibilities, rights, and liabilities and obligation vide the letter Ref. DOW/4000/1016/TANESCO dated 21st December 2006.
>
> NOW IT IS HEREBY AGREED as follows:
>
> 1. With effect from 16th day of March 2007, parties to the Agreement for the Emergency Power Supply for Rental Based Generation in **Dar es Salaam** shall be **Tanzania Electric Supply Company Ltd and Dowans Holdings SA.**
>
> 2. That all rights, obligations and liabilities formally vested upon the "Contractor" and assumed by the ASSIGNEE as contained in the Agreement shall remain unchanged.
>
> SIGNED AND DELIVERED by TANZANIA ELECTRIC SUPPLY COMPANY LIMITED AND DELIVERED at DAR ES SALAAM this 16th day of March 2007."

534. Subsequently, and for over a year, DTL provided steady and uninterrupted power consistent with the POA to the Tanzanian grid. During this time, DTL as the legitimate supplier to the POA invoiced the Respondent and was paid for some of its services in providing power to Tanzania.

535. Additionally, following the signing of the Agreement, the Respondent in a letter dated 29 March 2007, wrote to DHSA consenting to the assignment of its rights to DTL and stating as follows:

> "Pursuant to section 15:12 of the Agreement dated 23 June 2006 as amended by Amendment No. 1 dated 16 March, 2007, TANESCO has no objection to the requested consent for assignment of the Agreement provided that TANESCO and Dowans Holdings SA enter into a Deed of Undertaking in which Dowans Holdings SA will remain fully responsible for all activities during the tenure of the Contract".

536. The basis of this communication permitting DHSA to assign its rights to DTL signifies full understanding by the Respondent that DHSA had appropriately replaced RDEVCO as a party to the POA, and did have a right to assign its obligations under the Agreement.

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537. The Tribunal therefore easily concludes that the Change of Parties Agreement formally amended the Emergency Supply Agreement to replace RDEVCO with DHSA.[74]

7. The Second Preclusion Issue

538. The Tribunal has found the Change of Parties Agreement is valid and of full legal effect. Accordingly, the second preclusion issue as to whether TANESCO is precluded from denying the validity of said Agreement falls away.

8. The Assignment Issue

539. In paragraph 22.4 of its Answer and Counterclaim the Respondent pleads as follows:

> "22.4 Alternatively, if, which is denied, the POA was valid and effective, the Assignment from the First Claimant to the Second Claimant was based upon the earlier assignment from RDEVCO, LLC to the First Claimant for which TANESCO's consent was obtained by misrepresentation .... That consent was voidable and has been avoided. In the circumstances, the assignment from the First Claimant to the Second Claimant was likewise voidable and has been avoided."

540. It follows from our rulings on the POA Issue, the Misrepresentation Issue and the Voidability Issue that this issue is resolved in favour of the Claimants. We have found that the Assignment from RDEVCO to DHSA was neither voidable nor (if voidable) was it avoided. Accordingly there is no basis for the allegation that the Assignment from DHSA to DTL was "likewise" voidable and has been avoided.

9. The Third Preclusion Issue

541. The Tribunal has found that the assignment of the POA from DHSA to DTL is valid and of full legal effect. Accordingly, the issue as to whether TANESCO is precluded from denying the validity of the assignment falls away.

10. The Termination Issue

542. The Termination Issue raises the issue whether, given that (as we have found) the POA was a valid contract, it was terminated by the Respondent's letter dated 30 June 2008 (in which the Respondent purported to avoid it on grounds of misrepresentation), or by DTL's letter dated 11 August 2008 (in which DTL purported to terminate it on account of TANESCO's repudiatory breaches).

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[74] Claimants Request for Arbitration dated 14 November 2008, at paragraph 3;*see also*, Deed of Undertaking by Dowans SA.

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