Neutral Citation Number: [2018] EWHC 2713 (Comm)

Case No: CL-2015-000613

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th October 2018

Before :

Mrs Justice Cockerill

- -

Between :

EASTERN EUROPEAN ENGINEERING LTD	**Claimant**
- and -	
VIJAY CONSTRUCTION (PROPRIETARY) LTD	**Defendant**

- -
- -

Mr Benjamin Pilling QC and Mr Daniel Khoo (instructed by **Cooke, Young, & Keidan LLP**) for the **Claimant**
Mr Sandip Patel QC and Mr Muthupandi Ganesan (of **Scarmans**) for the **Defendant**

Hearing dates: 8, 9 October 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MRS JUSTICE COCKERILL

Mrs Justice Cockerill :

The application

1. I have before me an application brought by Vijay Construction (Proprietary) Ltd ("VCL") under section 103 of the Arbitration Act 1996. That application is to set aside the order of 18 August 2015 of Cooke J by which permission was granted to the Claimant ("EEEL") to enforce an arbitration award dated 14 November 2014 in ICC Arbitration 18943 ("the Award") and to enter judgment against VCL. That order also awarded EEEL the costs of the application, including the costs of entering the judgment.

2. VCL issued the application to set aside Cooke J's order on 23 October 2015 – nearly three years ago. As will be readily apparent, since then there has been a hiatus. That has come about because VCL brought proceedings in both France and the Seychelles to set aside the Award, on grounds which are essentially similar to those raised in this challenge. While those proceedings were pending Flaux J on 14 June 2016 stayed this application until the final determination of the French proceedings.

3. These proceedings are now live once more in circumstances where:

    i) On 28 June 2016 the Cour d'Appel at Paris dismissed VCL's appeal;

    ii) A further appeal to the Court of Cassation was not pursued and was terminated on 22 August 2017;

    iii) On 18 April 2017 the Supreme Court of the Seychelles granted permission to EEEL to recognise and enforce the award in the Seychelles;

    iv) On 6 November 2017 Andrew Baker J lifted the stay in these proceedings;

    v) On 13 December 2017 the Seychelles Court of Appeal allowed VCL's appeal and refused recognition and enforcement of the Award in the Seychelles;

    vi) On 13 March 2018 there was a case management conference setting directions for this hearing.

4. I should also note that between 7 September 2018 and 18 September 2018 VCL were unrepresented, Clyde & Co (who had previously represented VCL) having come off the record and Scarmans not yet having been formally instructed.

5. VCL advanced four arguments:

    i) Ground 1: It contends that the arbitral tribunal ("the Tribunal") lacked jurisdiction because its composition was not in accordance with the parties' agreement (section 103(2)(e)). The factual basis of this argument is the contention that EEEL failed to comply with a contractual dispute resolution procedure before commencing the arbitration.

    ii) Ground 2: It contends that it was unable to present its case (section 103(2)(c)). The factual basis of this argument is that the Tribunal permitted EEEL to rely on a third report from its expert, Danny Large, but denied VCL a proper opportunity to respond to that report.

iii) Ground 3: It contends that EEEL interfered with a witness, Mr Egorov, preventing him from giving evidence in the arbitration, and that enforcement of the Award would therefore be contrary to public policy (section 103(3)). EEEL denies that there was any such interference.

iv) A fourth ground was initially advanced that because EEEL wishes to enforce the judgment entered by Cooke J in the Seychelles under a reciprocal enforcement statute, that is a means of circumventing a decision of the Seychelles Court of Appeal and therefore enforcement in this jurisdiction would be contrary to public policy (section 103(3)). That ground was sensibly not pursued before me by Mr Patel QC.

6. EEEL says that the three remaining grounds are also bad points. There is also a supplemental issue arising from the procedural history. EEEL says that VCL is issue estopped as regards the first two issues because VCL has already made an application in Paris to have the Award revoked in which proceedings VCL also relied on Grounds 1, 2 and 3. Alternatively it is said that because VCL has already pursued these grounds before the court with supervisory jurisdiction over the arbitration (i.e. the French court), and lost, and brought proceedings in the Seychelles to have the Award declared null and void on the same grounds there is a very strong policy in favour of upholding the Award in such circumstances.

7. There is a further procedural matter I should mention. On 28 September 2018 Andrew Baker J heard VCL's application for permission to cross-examine Mr Zaslonov and Mr Andriushkin (who have given statements for EEEL) in relation to Ground 3: an application opposed by EEEL. The Court adjourned the application to the present hearing, on the basis that there is a real possibility that this application can be determined without resolving the disputed facts relating to Ground 3. Mr Patel QC for VCL has argued that I should either determine the factual issues of witness interference in VCL's favour today, or should direct that the issues raise sufficient argument to make it appropriate to direct a trial of those issues.

The factual background

8. VCL and EEEL are companies incorporated in Seychelles. In 2011, EEEL hired VCL to carry out construction work for a hotel called the Savoy Resort and Spa. The works contracted were spread across 6 contracts. The terms of these contracts were materially identical. Disputes arose and EEEL terminated the contracts.

9. The arbitration clauses in the contracts were at clause 20. They provided:

> "Clause 20.1 Amicable Settlement
>
> Should any dispute arise between the Parties under or out of this Contract, or out of the execution and completion of the Works, or out of the remedying of defects and flaws, including disputes on any certificate, determination, instruction, opinion or valuation of the Employer, each Party shall notify another Party of such dispute, and both Parties shall try to settle such dispute amicably before any arbitration starts.

> However, unless otherwise agreed between the Parties, the arbitration shall not start before expiration of a 2-month period starting on the day of the notice of a dispute, even though attempts may not be made to settle the dispute amicably.
>
> Clause 20.2 Arbitration
>
> Provided that the procedure described in Sub-Clause 20.1 of the Contract has been followed, any dispute, disagreement or claim arising under or from this Contract, including disputes on breach, termination and validity of the Contract shall be finally settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce.…"

10. On 9 July 2012 VCL served two notices of dispute, one in relation to Contract 6, and the second relating to Contracts 1-5. EEEL referred the disputes to ICC arbitration on 10 September 2012; 2 months and 1 day after those notices. A sole arbitrator was appointed: a well-known solicitor-arbitrator from White & Case's Paris office, Andrew de Lotbinière McDougall. As detailed further below VCL raised a preliminary challenge to jurisdiction, claiming that these notices were not apt to trigger the arbitration provision. The Arbitrator held against VCL in a Partial Award.

11. The key issue in the arbitration was whether the termination of the contracts had been lawful; in particular whether EEEL had been entitled to terminate for cause based on defects, delay or failure to tender programmes. There was an alternative argument regarding termination for convenience. Issues arose as to the consequences if termination was lawful, including alleged outstanding payments for works performed, alleged overpaid amounts for works performed and damages said to be owed by each party to the other.

12. Procedural Order No 1, as is fairly usual in ICC proceedings, set out a detailed timetable for the proceedings. It envisaged the service of pleadings sequentially – ie. EEEL first with VCL to follow. Under that order there was a requirement to serve expert reports and witness statements with pleadings (including the reply). There was also provision for the Arbitrator to summon witnesses. There was no formal order for witness statements to stand as the evidence in chief but as regards examination in chief, the order envisages such examination being brief.

13. At the hearing it appears that the main issues related to (i) defects (all contracts) (ii) delay (all contracts) (iii) failure to submit programmes (Contracts 1-5) and bribery of Mr Egorov by VCL (all contracts).

14. The Tribunal held that the termination of all six contracts was lawful (on the basis of defects (for all contracts except Contract 3), delay (Contracts 1, 2, 5 and 6) and programmes (Contracts 1 - 5)), and that the Claimant was entitled to damages and costs. He ordered VCL to pay:

    i) €12,857,171.04 under Contract 6 for damages, overpayments to VCL and the reasonable cost of completing the Savoy, and provision of reinforcement steel;

ii) €150,000 under Contract 6 for breaching its confidentiality provisions;

iii) €600,449.32 under Contracts 1-5 for damages for delays and provision of reinforcement steel;

iv) €640,811.53 representing 80% of EEEL's costs;

v) $126,000 i.e. 80% of EEEL's costs payable to the ICC.

15. After the Award was delivered VCL made a complaint to the ICC accusing it (via the arbitrator) of bias. That complaint was rejected.

16. I should also by way of background deal specifically with the factual position in relation to three features of the arbitration which correlate to Grounds 1, 2 and 3: (i) the jurisdictional challenge made by VCL; (ii) the third expert report of Mr Large and (iii) the evidence of Mr Egorov.

VCL's jurisdictional challenge in the arbitration

17. The Tribunal's terms of reference recorded at paragraph 27 that VCL raised a preliminary jurisdictional objection to the arbitration proceedings based on clauses 20.1 and 20.2 of the construction contracts. Clause 20 provided for the notification of a dispute before any arbitration was started.

18. VCL made two submissions on jurisdiction to the arbitrator. In summary, VCL's position was that, notwithstanding that VCL had itself served a notice of dispute, EEEL was also required to serve a notice of dispute, and since it had not done so the arbitrator had no jurisdiction. The arbitrator determined the point against VCL in the Partial Award dated 17 June 2013. In outline, the arbitrator held that Clause 20 did not require both parties to serve a notice and it was sufficient that one party (in this case, VCL) had served a notice.

The third expert report of Mr Large

19. During the arbitration, EEEL relied upon two expert reports of Mr Large in relation to delay and quantum. VCL did not call any independent expert evidence in relation to those issues.

20. Instead VCL applied to be allowed to have an expert, Dr du Toit Malan, assist its counsel with formulating questions for cross-examination. EEEL's evidence was that this created a difficulty, in that a case was effectively being put forward on no notice without Mr Large being able to consider or to respond to the case being made.

21. A third expert report of Mr Large ("Large 3") was served with EEEL's post-hearing submissions on 17 July 2014. Prior to the service of Large 3, EEEL's representatives in the arbitration had informed VCL's representative, Mr Georges, that EEEL would be relying on a further expert report. The reason given was that Mr Large had been given no advance notice of the points to be raised via VCL's expert in the absence of an expert report. It is common ground that in fact the only new area in the report related to the reasonableness of costs of completion of outstanding matters, which was one head of damage. Mr Large had previously opined on the costs, but had not reviewed

them for reasonableness. The report therefore produced a lower figure for this head of EEEL's claim than had previously been advanced.

22. VCL objected to the inclusion of Large 3. VCL's objections resulted in Procedural Order No. 10 dated 4 August 2014. That order permitted VCL to serve new documentary, factual witness and expert evidence in writing with a combined length no longer than EEEL's new expert report (including appendices), together with new written argument limited to 10 pages. The evidence and argument were required to be *"focussed solely on responding to new evidence"* in Large 3, and any factual witness or expert evidence was required to come from witnesses and experts who had already testified in the arbitration.

23. VCL did not serve any responsive expert evidence. Instead, on 25 August 2014 VCL asserted that it was unable to *"respond meaningfully... within the confines"* of Procedural Order No. 10 and that it sought three options, bifurcation, an independent expert or permission for a report on all issues it felt necessary to address (ie. a non-responsive report), its preference being the latter.

24. The Tribunal addressed VCL's request in Procedural Order No. 11, dated 2 September 2014. It saw no reason to change its view but it extended the time for service of any responsive expert report/submissions to 15 September 2014. VCL declined to serve any such evidence.

25. Following further objections by VCL, the Tribunal then offered VCL the opportunity to cross-examine Mr Large either in person or by telephone for up to two hours, followed by the opportunity to serve a written submission. VCL did not take up this proposal. In the Award the Tribunal endorsed the figures in Large 3 for the reasonable costs of completion.

The evidence of Mr Egorov

26. Mr Egorov is at the heart of Ground 3. It is alleged that EEEL unlawfully engaged with him with the objective of interfering with his evidence in the arbitration.

27. Mr Egorov was employed by EEEL as a project manager during the period of VCL's construction works. In the arbitration, EEEL alleged that Mr Egorov had been bribed by, and colluded with, VCL, and relied on these allegations as one of the grounds justifying termination of the contracts. That claim was not successful. As noted above, EEEL also successfully sought to justify the termination on other grounds, including defective work and delay.

28. Mr Egorov provided a short statement for VCL dated 1 March 2013. That statement did not deal with the bribery allegations but did comment in very general terms on the quality and progress of the works which he said were good. Mr Egorov subsequently – and consequent on a settlement agreement between himself and EEEL - provided an even shorter statement for EEEL, dated 11 March 2014, in which he stated that he had been unaware of alleged defects in the works and understood that one of the reasons that he had been accused of dishonesty by EEEL was his purchase of land in the Seychelles without prior notification to EEEL. VCL says that he was intimidated/bribed into giving this statement and not appearing at the evidential hearing.

29. Mr Egorov was not called by either party in the arbitration. The parties both agreed that his statements ought to remain on the record but the Tribunal should give them the weight he considered appropriate.

30. In the event, and in the light of the fact that neither party called Mr Egorov, the Tribunal concluded that EEEL had failed to prove its allegations of bribery, and that the termination of the contracts could not be justified on that basis. The Tribunal did not refer to Mr Egorov's evidence in making findings about the defects and delays to the works.

31. After the evidential hearing, but before the Award, VCL's managing director Mr Patel wrote directly to the Tribunal, alleging that EEEL had applied pressure to Mr Egorov and that this was the basis on which Mr Egorov did not attend the arbitration hearing. Mr Patel did not copy the letter to the parties and asked the Tribunal to keep it confidential and to destroy it after reading it.

32. The Tribunal sent the letter to the parties' lawyers, inviting comment. VCL (through its lawyers) offered no comment. The Tribunal expressed the view that the documents added nothing, that it did not intend to rule unless invited to do so, and invited further observations. VCL confirmed that it did not seek a formal ruling on the documents

The Challenges in France and the Seychelles

The French proceedings

33. Paris was the seat of the arbitration, and the French courts therefore had supervisory jurisdiction over the arbitration. The Award was recognised by the French Courts on EEEL's application.

34. VCL sought to have the Award set aside by the French courts. The grounds relied on are accepted to be essentially the same as Grounds 1 to 3: (i) that *"EEEL has failed to observe... clause 20"*; (ii) that as a result of Large 3, VCL was at a procedural disadvantage and (iii) that there were *"threats, blackmail, promises of payments... against [Mr Egorov]"*.

35. The Cour d'Appel dismissed VCL's challenge. It held:

    i) Clause 20 did not go to the Tribunal's jurisdiction;

    ii) VCL had exercised its rights to object to Large 3 and the argument that there was a breach of the adversarial principle/equality of parties should be rejected ;

    iii) The Tribunal's decision was not influenced adversely by Mr Egorov's evidence;

    iv) The Award did not as a matter of French Law violate 'international public order'.

36. VCL appealed against the decision of the Cour d'Appel to the Cour de Cassation, but did not pursue its appeal, which was accordingly dismissed on 11 May 2017.

The Seychellois proceedings

37. VCL initiated protective proceedings in the Seychelles to prevent enforcement on 26 January 2015 (plaint CC06/15), seeking to set aside the Award. Again, the points advanced by VCL were in essence the same as Grounds 1 to 3:

    i) Paragraph 6 alleged that the arbitrator had no jurisdiction by virtue of the fact that EEEL *"failed to give notice of a dispute to [VCL] prior to engaging the arbitral process"*;

    ii) Paragraph 7 alleged that VCL was *"not given an opportunity of presenting its case or of substantiating its claims fully, or that the rule of arbitral procedure that each party be given equal opportunities to present the case they felt needed to be presented was breached"*. The factual basis relied upon was that Large 3 had been admitted into evidence, which was alleged to be a *"procedural irregularity"* that amounted to a *"serious violation of due process"*;

    iii) Paragraph 8 alleged that *"the award is contrary to public policy"*. Amongst the grounds relied upon was the allegation the EEEL had *"exerted pressure"* on Mr Egorov so that he would not testify before the Tribunal. It described him as the most important witness. Other grounds relating to pressure allegedly put on other people were *"not pressed"*.

38. On 6 June 2015 EEEL commenced proceedings in the Seychelles for recognition of the Award (plaint CC33/15). VCL adopted the same position in CC33/15 as it had in CC06/15 and the proceedings in VCL's action CC06/15 were stayed whilst CC33/15 was determined.

39. The Seychellois Supreme Court (the first instance tribunal in the Seychelles) held a seven day hearing to determine CC33/15. The Court heard live evidence from (amongst others) Mr Kuhner, who represented EEEL in the arbitration; Mr Egorov; and Mr Patel (the managing director of VCL).

40. The Seychellois Supreme Court issued its decision in CC33/15 on 18 April 2017. In a lengthy and careful ruling, the court dismissed all of VCL's challenges to the Award and held that it was enforceable. It made a number of findings relevant to Grounds 1 to 3, although it is accepted that (in the light of the case's later history) these cannot be used to found a case on issue estoppel.

41. The Court endorsed the reasoning of the Tribunal in relation to jurisdiction. The Court held that Clause 20.1 enabled a party to commence arbitration once either party had served a notice and that it was not mandatory for the parties to attempt to settle any dispute arising between them. Other findings highlighted to me include the following:

    i) VCL knew of Procedural Order No. 1; VCL had time to retain and procure the attendance of an expert; VCL had the opportunity to defend itself in the arbitration; and VCL was responsible for not retaining or producing expert evidence in the arbitration.

    ii) The production of Large 3 was necessitated by VCL's unusual request for Dr du Toit Malan to assist VCL's counsel in cross-examination.

iii) *"Natural [justice] did not demand that VCL be allowed to submit a report on all issues it felt necessary to address but rather that VCL be granted the opportunity to rebut [Large 3]"*.

iv) VCL took a decision not to call Mr Egorov as a witness.

v) The court rejected as *"incredible"* the suggestion that the Defendant wanted to call Mr Egorov, but could not get in contact with him.

vi) VCL's explanation for Mr Egorov's absence (namely that EEEL had put pressure on Mr Egorov) was *"incredible, unsubstantiated and vague"*.

vii) The *"real reason"* for the decision not to call Mr Egorov was because VCL was unsure as to whether Mr Egorov's testimony would be favourable.

viii) VCL took the decision not to raise the alleged bribery of Mr Egorov by EEEL during the arbitration.

42. VCL successfully appealed against the Seychellois first instance decision in the Seychellois Court of Appeal. The basis of the decision was that, because of the repudiation of the New York Convention by the Seychelles in 1979, there was as a matter of Seychellois law no power to order enforcement of a Convention award. The substantive grounds were not considered by the Court of Appeal.

The relevant legal principles

Challenges to enforcement

43. The general principles applicable to an application to challenge enforcement of a New York Convention award under section 103 of the 1996 Act are not controversial. They are set out in *Dallah v Pakistan* [2011] 1 AC 763 at para [101], per Lord Collins:

> "the trend, both national and international, is to limit reconsideration of the findings of arbitral tribunals, both in fact and in law. It is also true that the Convention introduced a "pro-enforcement" policy for the recognition and enforcement of arbitral awards. The New York Convention took a number of significant steps to promote the enforceability of awards. The Geneva Convention placed upon the party seeking enforcement the burden of proving the conditions necessary for enforcement, one of which was that the award had to have become "final" in the country in which it was made. In practice in some countries it was thought that that could be done only by producing an order for leave to enforce (such as an exequatur) and then seeking a similar order in the country in which enforcement was sought, hence the notion of "double exequatur" (but in England it was decided, as late as 1959, that a foreign order was not required for the enforcement of a Geneva Convention award under the Arbitration Act 1950, section 37 : see Union Nationale des Co-opératives Agricoles des Céréales v Robert Catterall & Co Ltd [1959] 2 QB 44). The New York Convention does not require

> double exequatur and the burden of proving the grounds for non-enforcement is firmly on the party resisting enforcement. Those grounds are exhaustive."

44. Before moving to consider these principles as they apply to the grounds in this case I will first allude to the logically anterior issues. EEEL submitted that there are two preliminary reasons why the Court should reject Grounds 1 to 3: issue estoppel and public policy on finality

Issue estoppel and public policy on finality

45. The judgment of a foreign court on an issue will give rise to an issue estoppel between the same parties provided that the relevant conditions are made out: *The Good Challenger* [2004] 1 Lloyd's Rep. 67 at para [50] (per Clarke LJ):

> "The authorities show that in order to establish an issue estoppel four conditions must be satisfied, namely (1) that the judgment must be given by a foreign Court of competent jurisdiction; (2) that the judgment must be final and conclusive and on the merits; (3) that there must be identity of parties; and (4) that there must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the English proceedings …"

46. The principle is not in issue, but VCL reminded me of the rigour with which these questions must be approached. The following relevant principles were cited to me:

    i) *'Issue estoppel only applies to issues. There is no estoppel as to evidentiary facts found in the course of determining the affirmative or negative of an issue'*: Fullagar J's observation in *Brewer v Brewer* (1953) 88 CLR 1, 15. Estoppel arises in respect findings of 'ultimate facts' only: *Inhenagwa v Onyeneho* [2017] EWHC 1971 (Ch) para 58.

    ii) *'On the merits'* in this context means that the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction: *The Sennar (No. 2)* [1985] 1 WLR 490 at p. 495 per Lord Diplock.

    iii) There is no reason in principle that issue estoppel cannot arise from *"rulings made by a foreign court in the course of enforcement proceedings including enforcement proceedings under the New York Convention"*: *Diag Human SE v Czech Republic* [2014] 1 CLC 750 at para [59] (per Eder J).

iv) Not all determinations will qualify; only determinations which are necessary and fundamental to the issue before the court and which are not collateral will do so: *Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada* [2004] EWCA Civ 1660, [2006] 1 All ER (Comm) 675. The requirement that the prior determination should have been '*necessary'*, rather than *'merely collateral or obiter'* was emphasised in *The Good Challenger.*

v) An issue is a '*necessary ingredient'* in a cause of action when it was a necessary step to the decision in the first action or had to be decided as groundwork of the decision in that first action: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No .2)* [1967] 1 AC 853.

vi) The need for caution has also been emphasised eg. per Lords Upjohn and Wilberforce in *Carl Zeiss No 2* at pp 947, 967.

47. VCL did pray in aid a number of authorities which indicate that a foreign judgment can be impeached for fraud even though no newly discovered evidence is produced and even though the fraud might have been, and was, alleged in the foreign proceedings, and in particular *Abouloff v Oppenheimer* (1882) 10 QBD 295 and *Jet Holdings v Patel* [1990] 1 QB 335. It placed particular weight on the latter as an analogous case. However it was rightly accepted in the course of argument that only limited weight could be placed on these authorities given the existence of authorities such as *Westacre Investments Inc. v Jugoimport-SPDR Holding Co. Ltd.* [1988] QB 288 which establish that the principle is not directly applicable to arbitration awards.

48. As regards the public policy on finality EEEL prays in aid the principle that the fact that a party has been refused a remedy by the supervisory court of the arbitration in relation to an alleged defect in the award or conduct of the arbitration is usually a *"very strong policy consideration"* that the award should be enforced: *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647 at p. 661 (per Colman J):

> "In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must, in my judgment, be a cardinal policy consideration by an English court considering enforcement of a foreign award.
>
> In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards so also must great weight be attached to the policy of sustaining the finality of

the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word 'normally' because there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be re-investigated by the English courts on an enforcement application is to be most strongly deprecated."

49. I was also directed to *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740 (per Colman J), where a party was seeking to serve evidence at the enforcement stage to make good an allegation that an award had been obtained by perjured evidence. In a characteristically clear summary at 784C the learned judge stated:

> "Where the additional evidence has already been deployed before the court of supervisory jurisdiction for the purpose of an application for the setting aside or remission of the award but the application has failed, the public policy of finality would normally require that the English courts should not permit that further evidence to be adduced at the stage of enforcement."

50. Based on these authorities, EEEL submits first that the decision of the French Cour d'Appel was a final merits decision in courts of competent jurisdiction between the same parties and that the conditions for establishing an issue estoppel are met in relation to the following findings:

    i) In relation to Ground 1: Clause 20 does not go to the tribunal's jurisdiction.

    ii) In relation to Ground 2:

        a) VCL had exercised its rights to object to Large 3.

        b) There was no breach of the adversarial principle/equality of parties on the basis of the adjudicator's decision to admit Large 3.

51. EEEL says that on any fair reading of the French decision, the points raised are raised squarely, are identical and are clearly decided and that this suffices for issue estoppel.

52. VCL submits that once one puts the more detailed decision of the Seychellois court to one side, the French Cour d'Appel decision is insufficient. It submits that there is very little documentary evidence as to the appeal. The appeal was heard on 24 May 2016, during which there does not appear to have been any live evidence. It is unclear what documentary evidence was provided, what submissions were made, or even how long the hearing lasted. There is no transcript from the hearing.

53. As to Ground 1 it submits that on a close reading of the decision the reasoning indicates that the French Court's decision is not on the same point but a point relating the substantive jurisdiction.

54. As to Ground 2 it submits there is little analysis or consideration of the basis of the decision and the text is far from clear.

55. In the event EEEL placed more reliance on its second preliminary point. It submitted that although *Minmetals* was concerned with alleged procedural failings, it is clear that the policy for finality also applies in cases where the party seeking to prevent enforcement relies on allegations which go beyond the '*procedural'*. It says that this strongly resonates here, where each of the grounds could have been raised before the supervisory court. The French court had power to set aside the Award, and was the natural court to do so and thus the policy considerations apply with equal force here.

56. This argument, it contends, applies whether one is looking at s. 103(2) or 103(3). EEEL accepts that there can be competing considerations of public policy where the challenge is under s. 103(3) because there, the result is that public policy plays public policy, as was made clear in *Minmetals* at p. 661. However the essence of the point remains, and remains good: VCL could have and did raise these points with the court of supervisory jurisdiction. Grounds 1, 2 and 3 have already been raised before the French court, and rejected. For good measure they have also been raised before the Seychelles court, and rejected. Therefore absent exceptional circumstances this court should not set aside the order on basis of renewed allegations; and no exceptional circumstances have been deployed.

57. VCL submitted that if the Court were satisfied there is solid evidence that the Award was procured by fraud, then it would be pivotal; it would be a matter of public policy for an English court to consider that notwithstanding whatever findings have been made abroad, and notwithstanding that it may emanate from an international arbitration award subject to the convention. In essence it was submitted that such evidence would and does constitute exceptional circumstances so as to take the case outside the *Minmetals* ambit.

Conclusions: issue estoppel and public policy on finality

58. I am with VCL on the issue estoppel point as regards Ground 2. Bearing in mind the caution which is required in this area I cannot be satisfied that the conditions as to a ruling on the merits are met, in particular as to there being a full ruling on the merits of the issue actually in play. The procedural unfairness argument refers back to some slightly diffuse correspondence and there are different manifestations of the argument to be discerned. It actually seems to me that the iteration of the argument made before the French Court was the same as made in the Seychelles and is slightly different from the point made before me. As I note below the focus has shifted in this application to the question of limitation of the new evidence to existing witnesses. I would not therefore hold that there was an issue estoppel on Ground 2.

59. However in relation to Ground 1 the argument in play before the Cour d'Appel appears to be exactly the same and with no differences. It is a point which has no factual complications which can give rise to doubt as to whether the issue engaged was identical. Although there is also reference to jurisdictional issues, the determination is

absolutely clear. I do therefore conclude that as regards that ground VCL are issue estopped.

60. On the second (public policy) point I conclude that the *Minmetals* principle is *prima facie* engaged. However, particularly when the principle is being relied upon beyond the bounds of procedural issues, and also in the context of a s. 103(3) argument, I would consider that it is one which has to be considered in conjunction with the merits of the case. For example, if the supervisory jurisdiction had been invoked unsuccessfully the principle would be engaged, but the question would be one of discretion. So if there was a good reason why a different argument to that previously deployed was now being taken elsewhere, and that argument had good merits, the reluctance to proceed might be overcome. Similarly if the question is a s. 103(3) one, a consideration of the merits may well be relevant to the balancing exercise between two competing public interests. This appears to be what was in Colman J's mind in *Minmetals* at paragraph 29 when he said:

> "Although Adams was concerned with public policy in relation to the enforcement of foreign judgments, it illustrates the principle that in the sphere of enforcement considerations of public policy involve investigation not only of the core procedural defect relied upon by way of objection to enforcement, but of all those other surrounding circumstances which are material to the English court's decision whether, as a matter of policy, enforcement should be refused. Such circumstances may give rise to policy considerations which so strongly favour enforcement as to outweigh policy considerations to the contrary."

61. In this case I therefore conclude at this stage that the principle is engaged, and it does appear that the issues explored before the French Court and the Seychelles Court were very similar if not quite identical in some respects at least, which points towards a refusal. But given that there is not an exact identity of issue I consider that it would be wrong to short circuit the argument here, and that the better course is to consider the merits of the challenges, before reverting (as appropriate) to the discretionary issue.

Ground 1: Lack of jurisdiction

62. VCL asserts that the Tribunal lacked jurisdiction as its composition was not in accordance with the agreement of the parties and that enforcement should be refused pursuant to s. 103(2)(e) of the 1996 Act. Mr Kenton's witness statement says this is a challenge brought under the part of section 103(2)(e) of the 1996 Act which provides that enforcement may be refused if *"composition of the arbitral tribunal... was not in accordance with the agreement of the parties"*. The provision mirrors Article V(1)(d) of the New York Convention.

63. It is not in issue that in order to succeed on this ground the applicant must show a material breach of the arbitration agreement that was not an inconsequential irregularity: *Tongyuan (USA) v Uni Clan Ltd* (unreported) 19 January 2001 (Comm).

64. VCL's first ground is based on clause 20 of the Contracts. VCL asserts that EEEL did not comply with clause 20 of the Contracts as EEEL did not itself serve a notice of

dispute. It is common ground that VCL served two notices of dispute. This is said to have two consequences: (i) that there was no jurisdiction under clause 20 and (ii) that EEEL failed to crystallise its rights. VCL also says that the Seychelles Civil Code required a notice to be given.

65. A preliminary objection is made by EEEL which submits that, properly analysed, VCL's complaint is not a complaint that relates to the composition of the Tribunal at all as the part relied on within section 103(2)(e) requires. Clause 20.1 does not make any provision in relation to the composition of the Tribunal. Nor is it alleged by VCL that any notice given or not given had any bearing (contractual or otherwise) on the composition of the Tribunal. That accords with the decision in the French courts. If that is right it says that this ground of challenge fails at the first fence.

66. VCL argued only to a limited extent against this point. Indeed it seems hard to imagine what could have been realistically said against it; the issue plainly does not go to the composition of the Tribunal, but to the pre-arbitration procedure. The reference to this section appears to have been a misunderstanding as to the ambit of the section. The ground, as relied on, cannot therefore succeed.

67. I raised the possibility in oral argument that the reality of VCL's argument might have been intended to invoke the later parts of the relevant section which provide: *"that ... the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place."*

68. EEEL pointed out that this had never been argued and in reply VCL conceded that the relevant parts of the section were not applicable, as being intended to refer to the arbitration procedure itself rather than pre-arbitration matters. That concession seems to be right; the wording of the relevant part of the section seems plainly designed to invoke the actual procedure of the arbitration judged ex post facto. This is manifestly not what VCL's complaint takes aim at.

69. Accordingly I conclude that Ground 1 fails on this preliminary point. As formulated it is not apt to fall within the relevant section.

70. For completeness, however, I will consider the substantive issue. Had there been some applicable basis under s. 103 it was VCL's submission that the failure to serve a notice by EEEL was a significant failure. It pointed me to *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2014] EWHC 2104 (Comm) where it was held that a requirement for friendly discussion was a valid and enforceable condition precedent. VCL quotes paragraph 27 of Teare J's judgment:

> "There is obvious commercial sense in such a dispute resolution clause. Arbitration can be expensive and time consuming. It is far better if it can be avoided by friendly discussions to resolve a claim. Thus the clause obliges the parties to seek to resolve a claim by friendly discussions before a claim can be referred to arbitration. The reference to a period of four continuous weeks ensures both that a defaulting party cannot postpone the commencement of arbitration indefinitely by continuing to discuss the claim and that a claimant who is eager to commence arbitration must have the opportunity to consider such proposals

> as might emerge from a discussion of his claim for a period of at least four continuous weeks before he may commence arbitration."

71. It also prays in aid *Wah (Aka Alan Tang) v Grant Thornton International Ltd & Ors* [2012] EWHC 3198 (Ch) [2014] 2 CLC 663, where Hildyard J held at [60]:

> "In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach."

72. VCL says EEEL failed to give notice so as to trigger the agreement to arbitrate, and in doing so did not take the necessary steps to crystallise their purported rights. Thus there could be no dispute. VCL also points to the requirements of article 1230 of the Seychelles Civil Code, which provides

> "whether the original obligation contains a time-limit within which it must be executed or not, the penalty is only incurred when the person is bound to deliver or take or to do something is under notice to perform".

73. EEEL submits that this argument is simply wrong on the merits in that, on the true interpretation of clause 20.1, EEEL was not required to serve a notice of dispute. It adopts the arbitrator's reasoning in this regard. It also submits that in any event, even if it were right on the meaning of clause 20.1, VCL cannot show anything more than the most technical of breaches.

74. As to the Seychelles law point, it says that if there was a failure to serve a notice that might have given a defence to the claim, but that has got nothing to do with the composition of the tribunal, or even with jurisdiction. It submitted that this point was really an attack on the merits because in reality it was saying that some part of the damages should not have been awarded. EEEL also noted that the point was taken in Seychelles and dealt with in the judgment. To the extent necessary to do so it submitted that the point was not open in that there was no permission for expert evidence in these proceedings.

Conclusion: Ground 1

75. I am persuaded that this point is based on a misreading of this clause and that it has no merit. I accept the submission that the words *"each Party shall notify another Party of*

such dispute" provide that either party is to notify the other of a dispute. They do not require that both parties notify each other of the same dispute.

76. I note that this interpretation was preferred by the Tribunal. The arbitrator found:

> "56…the language of the arbitration agreement in Clause 20.1 makes it sufficiently clear that no attempts to settle the dispute amicably are required prior to commencing arbitration. The second paragraph of Clause 20.1 states that "*arbitration shall not start before expiration of a 2-month period starting on the day of the notice of a dispute, even though attempts may not be made to settle the dispute amicably*." The plain meaning of this is that arbitration can only start after a waiting period of two months (otherwise known as a "cooling-off period") and that this is the case "*even though attempts may not be made to settle the dispute amicably*" (emphasis added). In other words, there is no requirement that the Parties attempt to settle any disputes amicably prior to commencing arbitration; the Parties may do so, but it is not mandatory under this arbitration agreement and is therefore not a condition precedent to arbitration. Clause 20.1 simply provides that a two month waiting period must be observed and foresees the possibility that "attempts may not be made to settle the dispute amicably", making it sufficiently clear that no attempts at settling are actually required. That is the only logical meaning of the words at the end of the second paragraph of Clause 20.1…
>
> 57…the language of … Clause 20.1 makes is sufficiently clear that the only formal requirement for the commencement of arbitration is that the two month waiting period be observed following one of the Parties sending "the" notice to the other party of "a" dispute. The plain meaning of the first paragraph of Clause 20.1 is that either Party ("*each Party*") shall not notify the other Party ("*another Party*") of a dispute "*before any arbitration starts*" (emphasis added). The plain meaning of the second paragraph of Clause 20.1 is that the two-month waiting period starts on the day of "*the notice of a dispute*" (emphasis added). In other words, Clause 20.1 does not specify that only the notifying Party may commence arbitration after its notice of a dispute has been given and the waiting period has expired. It does not restrict the right to commence arbitration to the Party that issues the notice of a dispute. Rather, Clause 20.1 leaves it open for either Party to commence "*any*" arbitration once either Party has issued "*the*" notice of "*a*" dispute and the two-month waiting period has passed. This is the more logical, common sense reading of Clause 20.1 taken as a whole based on a plain meaning of the words."

77. That passage of the arbitrator's reasoning is both exhaustive and clear. I consider that it sets out the correct analysis admirably and I note (without surprise) that the Seychellois courts expressly and carefully endorsed his reasoning.

78. I am unsurprised by the consensus between myself and the other tribunals who have considered this point, since the reading is in my view plainly right, and furthermore serves the purpose for which the clause obviously exists: namely to ensure that the parties know there is a dispute. Notification by one party serves that purpose; requiring both to serve a notice would serve no practical purpose and be a waste of time and costs. Such an intention should not, on ordinary principles of construction, be easily imputed to the parties.

79. This is also a very different case to the ones relied on by the Respondent. Here the language of the clause, as the Tribunal found, makes it absolutely clear that attempts to settle are not a condition precedent to commencing arbitration.

80. Even if there had been a breach it would seem to have been, as submitted by EEEL, entirely technical. A notice was served. VCL understood that there was a dispute between the parties (at the latest, by the time of service of the first of its own notices). The time period for engagement was observed in that EEEL waited two months and a day from the service of that notice before commencing arbitration. No submission was made that VCL was prejudiced by any failure to serve a notice.

81. So far as the Seychelles law issue is concerned I consider that it takes matters no further. It is, as EEEL submitted, addressed to a different matter – the service of a notice in relation to a penalty clause. It has no relation to jurisdiction, but would operate, if at all, as a substantive defence. Still less can it be said to have any relation to the composition of the Tribunal.

82. It follows that VCL's challenge under this ground would fail on the merits, if it did not fail *in limine*.

Ground 2: Inability to present the case/Large 3

83. VCL complains that the Sole Arbitrator admitted Large 3 into evidence but denied VCL an opportunity to properly and reasonably respond to that, so that VCL was denied an opportunity to present its case, thus amounting to procedural unfairness and triggering s. 103(2)(c) of the 1996 Act which provides that enforcement may be refused if an applicant can show that *"he ... was otherwise unable to present his case"*. The provision mirrors Article V(1)(b) of the New York Convention.

84. VCL says that this report:

    i) Contained entirely new evidence of material importance to the arbitration;

    ii) Addressed areas that were previously outside Mr Large's prior instructions and expertise;

    iii) Was produced without the Defendant being provided a copy in advance despite the request of Defendant' s counsel;

iv) Was produced after Mr Large had been cross-examined on his prior expert evidence at the main evidentiary hearing in order to redress issues and errors;

v) Was produced without the prior consent or order of the Sole Arbitrator; and

vi) Was produced against procedural rules governing the arbitration.

85. Principally however before me it complains of the direction that VCL's own evidence be from the same witnesses who had already given evidence. It says that this has denied it the right to be heard and to present the necessary evidence to respond to Large 3.

86. VCL denies EEEL's case that it chose not to adduce evidence and points me to the evidence now produced to challenge Large 3. It says that the evidence of Large 3 was material particularly as regards a key passage of the Award dealing with reasonable costs of completion under Contract 6. Though this is only one part of the Award, it submits that it is the single largest part. To the extent it is argued that the admission of Mr Large's report worked to benefit of VCL on its face, in that the reasonableness consideration led to the dropping of the headline figure claimed, it remains the fact that it is VCL's case that it is in fact too high. If not admitted VCL says EEEL's claim under this head would have failed on burden of proof; if allowed properly to deal with it VCL would at least have eroded the figure considerably further.

87. EEEL commences by directing me to the relevant law, which was again not in issue. The principles applicable to a challenge under s. 103(2)(c) were set out in *Cukurova Holding v Sonera Holding* [2014] UKPC 15; [2014] 1 CLC 643 at paras [32] – [34] (per Lord Clarke):

> "32. It is not in dispute that in applying these principles the enforcing court must apply its own concept of natural justice. …. It is contrary to public policy in England to enforce a foreign arbitral award where the foreign proceedings violated English principles of natural justice: see e.g. Adams v Cape Industries [1990] Ch 433. ...
>
> 33. … if a particular breach of natural justice does not fall within section [103] because it was not one which meant that the party could not present its case, it is in principle open to the court to refuse to enforce the award on the ground of public policy. However, it follows from the above that the question … is whether [the applicant] was unable to present its case for reasons which were beyond its control. …. As Sir John Donaldson MR observed in Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ra's al-Khaimah National Oil Co [1990] 1 AC 295, 316 considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution.
>
> 34. The general approach to enforcement of an award should be pro-enforcement …"

88. It points me also back to the case of *Minmetals*. This was a case where a case was remitted to the tribunal. The challenging party therefore had the opportunity to make

further submissions in relation to the evidence but failed to take up that opportunity and the tribunal subsequently issued a second award which upheld the first award. The second award was challenged under ss. 103(2)(c) and 103(3). Colman J dismissed the challenge to enforcement, holding that the basis of the challenge was the result of the challenging party's own failure. He said at p. 658:

> "In my judgment, the inability to present a case to arbitrators within s. 103(2)(c) contemplates at least that the enforce has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforce has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment, bring himself within that exception to enforcement under the convention. In the present case that is what has happened."

89. It was also common ground that, as indicated as a "given" by Lord Clarke in *Cukorova* at [53], the party challenging the award must also demonstrate that the outcome of the arbitration would have been different had there been no breach of natural justice.

90. EEEL notes that this is not a case where it is said that this ground shades into arguments of public policy; it is a simple procedural fairness challenge. There is no reference here to public policy as an alternative argument under this head.

91. It says these principles are fatal on the facts. It says the difficulty was originally created by VCL who made a decision not to serve expert evidence, and did so in the knowledge that Mr Large had provided evidence. They then caused the procedural issue which necessitated Large 3 by cross-examining by reference to input from an expert without any notice of the points to be taken. Large 3 contained only one new point – reasonableness of the completion costs. There was no request for a new witness at the time; the issue was as to timing, and the ambit of the report (wishing it to go further). Indeed at the time VCL positively accepted the usefulness of Large 3, which reduced its exposure. Its actual proposals were really geared to ambit of the report, and a renewal of an earlier bifurcation proposal. In that context Procedural Order 10 gave all that was needed and was appropriate. The arbitrator's ruling in Procedural Order 11 is also unobjectionable – nothing new had arisen and there was no need for more. Any residual issue could be dealt with and was dealt with by a provision for cross examination with submissions to follow.

Conclusions: Ground 2

92. I accept EEEL's submissions.

93. The law does not appear to me to be in issue. In order for the relevant subsection to be engaged I need to be shown (the burden being on VCL) that it was prevented from being heard by matters beyond its control - or perhaps that it is a case where, though not so prevented, the principle should exceptionally operate (ie. exceptional circumstances). Neither is made out here.

94. The bottom line is this. Both parties were given permission to rely on expert evidence in good time. This is clear on the documents and was found by the Seychellois court and not appealed. It is not clear why VCL chose not to call expert evidence, but it did make that choice.

95. Having done that, it was enabled by the arbitrator to adopt an unusual course of cross-examining EEEL's expert with the assistance of an expert, rather than putting in expert evidence in an orthodox fashion and tendering its own expert for his evidence to be tested.

96. It seems clear that by so doing it created an imbalance which the Tribunal was absolutely right to redress by allowing Large 3 into evidence - subject to allowing VCL a reasonable opportunity to address it. As to this, VCL was given ample opportunity to address Large 3 and there was no procedural unfairness. It was given permission to serve responsive submissions and evidence to Large 3 specifically. Again the reason for failure to do so is not properly explained, particularly given that Dr du Toit Malan is one of the witnesses on whom VCL now seeks to rely. If he could give a statement now, it is completely unclear why he could not at the very least give VCL the information which it would need to put in responsive submissions at the time. Similarly there seems no reason why he could not (again) have assisted VCL in cross-examining Mr Large on his new report, as he had done on the others. In essence the issue is one which was within VCL's control.

97. It is notable that the precise iteration of the argument made before me and in particular the focus on the limitation in the order to witnesses called is slightly new. It was not suggested at the time that this was the unfairness objected to; it is quite clear from the documents that VCL wanted to put in evidence which was not purely responsive; that was the focus of its objections and the basis of its claim that it was being denied the right to be heard. That also appears to have been the focus of its challenges elsewhere.

98. In this specific context what VCL did not do (and perfectly well could have done) was to raise with the arbitrator the question of whether the form of his order in fact shut them out from putting in a statement from Dr du Toit Malan, or to make submissions as to why they needed to get evidence from some other identified person in order to respond to the submissions made. Instead they chose to seek to challenge the decision on the basis that they should be allowed to put in new evidence which covered all issues, not simply in response to Large 3. This decision to challenge on one basis and not the other is a matter which was entirely within VCL's control.

99. In those circumstances too I accept the submission that the admission of Large 3 (or failure to allow responsive evidence) would not have had an impact on the result of the arbitration. The liability decision was based on the earlier reports of Mr Large and other witnesses. That is common ground. In relation to quantum, the arbitrator's reliance upon Large 3 had the effect of reducing the quantum awarded to EEEL (by some €9 million). It therefore cannot be said that VCL was prejudiced by Large 3. If it was prejudiced it was by its failure to avail itself of the opportunity given it to respond.

100. It follows that VCL's challenge under this ground must fail.

Ground 3: Mr Egorov and public policy

101. VCL's challenge under this ground is that EEEL *"wrongfully prevented, or sought to prevent, [VCL] from relying on evidence of a material factual witness [i.e. Mr Egorov] and interfered with the witness attending to be tendered and examined in the Arbitration"*. It is alleged that enforcement would be contrary to public policy, thus engaging s. 103(3) of the 1996 Act which says: *"Recognition or enforcement of the award may also be refused ... if it would be contrary to public policy to recognise or enforce the award."*

102. The point taken by VCL is that EEEL prevented it from calling Mr Egorov at the arbitration. In this context VCL asserts that Mr Egorov was a pivotal witness and his absence from the hearing put it at a considerable disadvantage. In this regard VCL point to the facts that, since the Final Award, Mr Egorov has given sworn testimony in the witness statement dated 27 January 2015 and the affidavit dated 24 August 2015; and in open court in the Seychelles.

103. They note that in all of these Mr Egorov testified that EEEL and its Russian holding company, the GUTA Group, both intimidated and offered payment to Mr Egorov so as to procure false evidence from Mr Egorov, contradicting his initial witness statement in the Arbitration, and so that he would not attend the evidentiary hearing in the Arbitration so that his evidence could not be tested.

104. I was taken very carefully through the history of the alleged pressure and intimidation said to have been put on Mr Egorov, including the correspondence which Mr Egorov had at the time with Mr Georges, the lawyer for VCL, in which he detailed the accusations against EEEL as well as Mr Egorov's testimony in the Seychelles proceedings.

105. Focussing on the allegations which predate the Award, VCL say that:

    i) On 8 February 2013 Mr Egorov was requested to meet members of the GUTA Group's security department. Mr Egorov was offered a financial inducement to provide a statement that VCL offered him money for the acquisition of a batching plant that belonged to EEEL and that VCL cheated the Savoy, which Mr Egorov refused to do.

    ii) Shortly after providing his first witness statement for VCL in March 2013, Mr Egorov was told that the GUTA Group *" will place a sanction or try to revoke my property in the Seychelles"* by commencing private prosecutions. On 11 March 2015 and 24 June 2015, EEEL initiated two private prosecutions against Mr Egorov, alleging theft and forgery.

    iii) In October 2013 two civil claims were also filed against Mr Egorov in Russia on similar facts to the cases in Seychelles, claiming a total sum in excess of Euro 500,000.

    iv) In January 2014, Mr Egorov was contacted by a lawyer from the GUTA Group offering to withdraw all cases in Russia and Seychelles if he made a statement condemning the work of VCL at the Savoy. He was informed that if he refused he would face, among other things, prison and the seizure of all his family's properties.

v) In February 2014, Mr Egorov was informed that his properties in Russia had been provisionally seized, together with the properties of his family. There was also a restriction registered against a plot of land he owned in the Seychelles.

vi) On 11 March 2014, during a hearing for the cases in Russia, Mr Egorov was again approached by a lawyer of the GUTA Group. Mr Egorov was told that if he agreed to sign a statement to the effect that VCL had been in violation of construction technology at the Savoy, and if he did not come to the arbitral hearing as a witness for VCL, then the cases against him in Russia and Seychelles would be withdrawn.

106. VCL submits that the evidence of intimidation is compelling, and that he was induced to sign the second statement and to agree not to give evidence as a result of it and to ensure proceedings against him were dropped. VCL says that there is at least a sufficient case made out that this court should want to get to the bottom of it. It says that it is clear that Mr Egorov did not attend because of intimidation and not because of want of trying on the part of VCL to obtain his evidence.

107. VCL also submits that the requisite causative link is made out. It says that if one looks at the first witness statement of Mr Egorov it shows that he disagreed with the decision to terminate the contracts and considered that the termination was without material grounds. It argues that his second statement and his subsequent non-appearance to give evidence lie at EEEL's door and that this unfairly prejudiced VCL.

108. Had Mr Egorov appeared, it contends, the issues of quality of works would have had different results, though it was conceded that as to delay and programmes he could not have had much if any impact.

109. EEEL commences by reminding me that the language of the statutory test makes it clear that bad behaviour is not enough; what has to be established is that there are circumstances which render it contrary to public policy to enforce an award.

110. EEEL then took me to the law and said that the threshold for refusing enforcement on public policy grounds is high. In *Deutsche Schachtbau v Shell* [1990] 1 AC 295, Sir John Donaldson MR stated (at p. 316):

> "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J. remarked in Richardson v. Mellish (1824) 2 Bing. 229, 252, "It is never argued at all, but when other points fail." It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."

111. EEL submits that this case is akin to an allegation that a party suppressed relevant evidence and thus it is necessary to show that the award creditor dishonestly intended to deceive in a manner that has contributed in a substantial way to obtaining an award

in his favour: *Gater Assets v Nak Naftogaz Ukrainiy* [2008] 1 Lloyd's Rep. 479 at para [40] (per Tomlinson J).

112. In this context EEEL also referred me to *Elektrim SA v Vivendi Universal SA* [2007] 1 CLC 16, a section 68 case involving concealment of a vital memorandum which at [82] makes it clear that the causative link is required. This case concerned section 68, but EEEL submits, and VCL has accepted, that in the light of the close relationship between the relevant provisions it is applicable, not the less because of its consistency with *Gater*.

113. EEEL submits that VCL's objection under this ground does not meet the high threshold required for an objection on public policy grounds. It submitted that while the allegations are robustly denied:

i) The parties agreed not to call Mr Egorov – and this agreement was actually put before the Tribunal by VCLs own counsel. It was clear from the transcript of proceedings before the arbitrator that there was no hint that VCL's agreement was under protest;

ii) See also Mr Georges statement which says: *"in the light of conflicting statements I decided not to call him"*;

iii) There was at the time no mention of difficulty with wanting to call Mr Egorov but being unable to contact him, no concern that anything untoward might have taken place and no invitation to the Tribunal to summon him;

iv) This is what Mr Patel told the Seychellois courts and is reflected in their findings. Before the Court of Appeal of Seychelles VCL accepted that the Supreme Court had been "*correct*" find that Mr Egorov was not called because VCL was unsure what evidence he would give;

v) Again Mr Egorov's absence is the result of a decision by VCL.

114. Further EEEL submits, even if Mr Egorov had attended the arbitration hearing, it is unrealistic to suggest that his evidence would have made any difference to the outcome of the arbitration, let alone any "*substantial*" difference in circumstances where:

i) Mr Egorov's first witness statement was very short and dealt only in very general terms with the quality and progress of the works. It did not deal specifically with defects but its broad affirmation of adequacy was undercut in any event by the concession by VCL that there were some defects.

ii) The Tribunal's determinations in relation to defects were based on the evidence of Mr Morel, an independent consultant who had worked for both parties.

iii) The Tribunal's determinations in relation to delay were based on the independent expert evidence of Mr Large.

iv) Mr Egorov's live testimony would not have altered (still less "*substantially*" altered) any decision in relation to either defects or delay. By his own admission, Mr Egorov is not a civil engineer; nor is he an expert qualified to give an opinion

on those matters. He accepted this in evidence in the Seychelles, as well as the fact that an expert was needed to opine on defects.

v) Further Mr Patel in his recent statement says VCL relied in the arbitration on the expert evidence of Joe Pool, a consultant engineer who is identified in the award as being of a third party consultant engineers.

vi) EEEL also cast doubt over Mr Egorov's value given what they submitted were serious credibility issues. They pointed to his no comment replies when challenged and the Seychellois court's assessment of him as a witness, namely that *"Mr Egorov was not a credible witness… The court found Mr Egorov to be a biased untrue and unreliable witness who was not able to deal firmly and fairly with the questions of detail put to him in this case."*

115. So far as the merits are actually concerned EEEL submits that I could and should if necessary conclude that there is nothing in them. Mr Egorov's evidence does not suggest that he was physically prevented from attending the arbitration. Mr Egorov's evidence is that he agreed with EEEL not to attend, in return (amongst other things) for the discontinuance of the proceedings in the Seychelles; although this account sits uneasily with the fact that the executed document made no reference to the agreement now asserted by Mr Egorov in relation to the Seychellois proceedings and EEEL did not discontinue in the Seychelles. In essence it says that the proceedings against Mr Egorov were *bona fide* claims conducted entirely lawfully and that suspicions of bribery were hardly overwrought given the conclusions which the arbitrator reached on the merits in connection with a project which Mr Egorov's job was to project manage. The settlement which was reached was one in which Mr Egorov was legally represented. Thus there could be nothing in these allegations which are reprehensible to the level needed to found this claim.

116. It contends that the picture that emerges of Mr Egorov is of a witness who was happy to speak to both sides in the dispute and take substantial assistance (in the form of legal representation, bail surety and accommodation) from VCL.

117. It also flags a number of peculiarities about VCL's case on this aspect:

i) The failure to contact Mr Egorov is odd if he was a key witness;

ii) Mr Patel very belatedly said Kaushal Patel did contact Mr Egorov, but that is not consistent with Mr Georges' statement which says Mr Patel said he tried to make contact;

iii) There is still no statement from Kaushal Patel, or disclosure of the communications and Mr Egorov does not himself say that there were attempts to contact him;

iv) Mr Patel's evidence in Seychelles that he tried to contact Mr Egorov is not borne out by documents disclosed which show no emails. It is also flagged that in evidence he denied that the parties agreement not to call Mr Egorov was by consent, which is seen on the face of the transcript, but then said that VCL decided not to call Mr Egorov *"because we cannot make out the state of mind of Mr Egorov";*

v) The letter sent by Mr Patel to the Tribunal was one which raised intimidation well before the Award, and subsequently the Tribunal invited the parties to comment, which VCL did not and they subsequently confirmed they did not seek a formal ruling. No explanation for this conduct has been offered.

118. EEEL also says that the other allegations of improper conduct against EEEL in relation to events that occurred after the Award cannot constitute grounds for refusing enforcement of the Award in themselves, and have no probative value in relation to the allegation of interference with Mr Egorov.

Conclusions: Ground 3

119. I will deal first with the allegations of later conduct. I do not believe that these assist. It has not been explained to me how they have, as alleged, significant probative value in relation to the issue which I have to determine. I have tried to discern any such probative value (which must be in relation to the questions before me) and I cannot see how such value exists.

120. Having discussed the question in oral argument with Mr Patel QC, in the context of a still further statement which was sought to be admitted at the hearing, it appears to be common ground that they would only assist were I minded to determine the question of public policy finally in VCL's favour. This I am not minded to do. The question is rather whether VCL have raised sufficient grounds falling within the section and the relevant legal principles for me to direct that the issue should be tried with witness evidence to determine the disputed questions as to witness interference.

121. The key point here is the question of causation. If, on any analysis, the causation case could not be made out, it must follow that a trial of the factual disputes would be a waste of time. I therefore focus first on the case made as regards the arbitration itself and Mr Egorov's non-appearance. I note that the allegations are denied, but for present purposes I will proceed on the basis that the factual basis for them could be made out in order to test whether in that eventuality the causation test would or might be met.

122. I conclude without hesitation that causation cannot be made out. There are two aspects to this. The first is that there is no evidence that it was the hypothetical bribery which led to Mr Egorov not appearing. Mr Egorov did not say that he was prevented from appearing. What appears to have happened is that in the light of the contradictory (and unsatisfactory) statements VCL took the decision that he was too great a risk to call. That was a decision by them. There is no evidence that they tried to call him and he refused. Further, it appears from the correspondence with Mr Georges, as well as Mr Patel's own evidence and Mr Georges statement, that VCL was aware that pressure had been put on him, so it is not the case that they had no idea of what was going on and made that decision "blind".

123. That conclusion is reflected in the unappealed finding of the Seychellois court that VCL took the decision not to call Mr Egorov as a witness because VCL was unsure as to whether Mr Egorov's testimony would be favourable. Indeed it would have been hard for VCL to appeal this finding, as it entirely reflected Mr Patel's own evidence to the Seychellois court.

124. I would add that having read Mr Egorov's statements, which are contradictory, skeletal and of little substantive value, giving little guide to the advocate as to what his detailed evidence might be, having grasped the outlines of the allegations regarding Mr Egorov's probity and read the ruling of Robinson J, who had the benefit of hearing his evidence, I can only say that such a decision by VCL is entirely unsurprising.

125. Secondly I consider that VCL has manifestly failed to discharge the burden on them to show that the evidence would (or even might) have contributed substantially to a different outcome. Their case in their skeleton was pure assertion of the broadest sort. That advanced in the oral argument, despite Mr Patel QC's best efforts, is scarcely better. The argument would need to bridge the gap between Mr Egorov's skeletal (and inaccurate as to absence of defects) statement and the kind of detailed determinations which the arbitrator came to.

126. The evidence served for VCL, which concentrates solely on the allegations of intimidation, does not even begin to do this. Trying to reconstruct the position without such help and starting at the beginning, Mr Egorov's statement itself plainly would not have made a difference. If called by VCL the arbitral process allowed only for brief examination in chief; the gap could not have been bridged by VCL that way. They would therefore have been reliant on the helpful evidence being elicited in cross-examination by EEEL. But there is no guarantee that would have succeeded – or that EEEL's lawyers would even have elected to cross-examine Mr Egorov. A canny litigator might well have taken the decision not to allow VCL the opportunity to improve an inadequate statement in cross-examination.

127. Even if EEEL had cross-examined Mr Egorov, VCL's evidence does not explain why Mr Egorov would (if given suitable opportunities) have had key evidence on the key issues and why his evidence might have been preferred to that of two witnesses who had a measure of independence – and at least one of whose statements manifestly condescended to exactly the sort of line by line particulars which were necessary to deal with the individual defects.

128. When one went through the basis of the Award (as Mr Pilling QC did in the course of his submissions) it was possible to see that:

i) Contrary to what Mr Egorov had said, VCL had accepted that there were some defects. The evidence on the record also demonstrated that the defects surpassed what is normal and easily remediable. That would have left Mr Egorov exposed as a witness;

ii) The question of what defects there were, and their extent and questions of remedy were not ones which Mr Egorov could properly deal with (as he accepted in the Seychelles), and VCL had tacitly acknowledged that and relied on another witness who could;

iii) The fact that Mr Egorov was "*the person on the ground*" and could read what the civil engineers reported (as VCL submitted was enough) was of no value when the engineers themselves could be examined or have their reports examined by other engineers;

iv) The question of delay was subsidiary to that of defects (as Mr Patel QC conceded in reply); as long as EEEL was entitled to terminate on one ground it would still win.

v) Mr Egorov had nothing to offer on the third ground for termination: programmes.

vi) Nor would Mr Egorov's evidence have made any difference in VCL's favour to the arbitrator's conclusion on EEEL's bribery allegations, which the arbitrator dismissed.

129. It follows that the substantial difference test cannot come close to being met. Indeed in the light of the evidence Mr Patel QC was struggling to put his case higher than a non-acceptance that Mr Egorov's evidence would have been *"totally without value"*. This of course is not enough to meet the test.

130. I would add by way of parenthesis that in the light of this evidence, VCL's decision and apparent lack of attempts to call Mr Egorov becomes all the more explicable. It would be surprising, if Mr Egorov really were a key witness, if greater efforts were not apparent to (i) produce a better witness statement from him in the first place and (ii) ensure he was available for the hearing. What actually happened is however entirely consistent with Mr Egorov being a minor (and in the light of the bribery allegations made against him) a somewhat high risk witness. The two separate grounds on which VCL's case on this ground fails therefore harmonise.

131. I add this further point. Although it was raised essentially as part of the public policy on finality argument on my reading of the cases there is a hurdle for those wishing to raise a public policy argument of this sort, in that for the English Court to permit a party to pursue to a trial of the issues an allegation that a New York Convention award was obtained by fraud, normally two conditions will require to be fulfilled: *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] QB 288 (CA) at 309F per Waller LJ:

> "…normally the conditions to be fulfilled will be (a) that the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators; and (b) where perjury is the fraud alleged, i.e., where the very issue before the arbitrators was whether the witness or witnesses were lying, the evidence must be so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result."

132. Here VCL would (if their argument were otherwise good) face what seems to be an insuperable difficulty in that the evidence demonstrates clearly that it knew of the alleged intimidation before the Award was written. Indeed it raised the question. But then, despite specific invitation, it did not ask for a ruling. Whether one looks at it as a pre-condition to raising the argument (the *Westacre* approach), as an estoppel (as the Seychellois court does) or as a strong point in a public policy in favour of a finality

argument, the circumstances would seem inapt to permit such an argument now to be raised.

133. I should note that VCL did also argue that the allegations of bribery of individuals other than Mr Egorov should go to a separate challenge on the grounds of public policy. However the legal basis for this was not explained and does not, in my judgment, sit with the law to which I have referred earlier.

134. I therefore conclude that Ground 3 also fails, and on a basis which means that it would not be appropriate to examine further the merits of the allegations as to witness interference, as they could make no difference to the outcome of the analysis.

135. So far as those substantive allegations are concerned, I therefore do not need to deal with them, and I do not reach any final conclusions on them. However I note the points made as to the difficulties in Mr Egorov's current version of events and the points of tension between this and the actual documents which survive, in particular the settlement agreement. It also does seem to me that if VCL had any faith in these allegations it is surprising that they expressly sought no ruling on them from the Tribunal, when expressly invited to do so.

Public Policy on finality: resumed

136. As each Ground has been determined to fail on the merits, the question of the public policy on finality does not arise. I would however, if there had been some apparent merits in the arguments, but those merits had been less than compelling, have concluded that the balance came down in favour of upholding the public policy on finality. This is a case where VCL has now twice sought to raise substantially the same challenges to this Award in other courts. In the Seychelles those arguments were ventilated at a full evidential hearing and determined in a long and detailed judgment. In the supervisory Court the same arguments had been ventilated and roundly rejected. Those are circumstances which would weigh very heavily against allowing VCL a third challenge.