Neutral Citation Number: [2019] EWHC 3740 (Ch)

Case No: CL-2017-000252

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

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: Friday, 20th December 2019

Before:

MRS. JUSTICE COCKERILL DBE

- -

Between:

PAO TATNEFT	**Claimant/Respondent**
- and -	
UKRAINE	**Defendant/Applicant**

- -
- -

MR. DAVID FOXTON QC and MS. EMILY WOOD (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Claimant/Respondent**

MR. PHILIP EDEY QC (instructed by **Winston & Strawn LLP**) for the **Defendant/Applicant**

- -

Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MRS. JUSTICE COCKERILL :

I. INTRODUCTION

1. On 9 August 2017 Teare J made an *ex parte* Order (the "*Teare* Order") which granted Tatneft permission to enforce an Award which it obtained against Ukraine in a bilateral investment treaty ("BIT") arbitration under the UNCITRAL Arbitration Rules 1976 ("the UNCITRAL Rules"), subject to any application (as is now made) to set aside that Order.

2. By this application Ukraine applies to set that Order aside, at least in part.

3. Ukraine says that recognition and enforcement of the relevant part of the Award should be refused pursuant to section 103(2)(e) of the Arbitration Act 1996 ("the 1996 Act"), on one or both of two related bases (both of which were unknown to Ukraine or its legal team until after the Award was issued).

4. First, it is said that there was a serious failure of the agreed arbitral procedure (as set out in the UNCITRAL Rules) in that the presiding arbitrator in the arbitration, the late Professor Francisco Orrego Vicuña, failed to disclose that during the arbitration he was approached by the same Cleary Gottlieb team as was representing Tatneft in the arbitration about his acting as arbitrator in a further prestigious and potentially highly lucrative investor/state arbitration for another investor; and that following whatever private discourse ensued, he was so appointed.

5. Secondly, Ukraine says that the composition of the Tribunal was not in accordance with the agreement of the parties under the UNCITRAL Rules that the Tribunal should be composed only of arbitrators free of apparent bias (to use a shorthand), in that the facts just referred to - both surrounding the appointment of Professor Vicuña in the other arbitration and the non-disclosure of those circumstances - gave rise to justifiable doubts about Professor Vicuña's impartiality and/or independence. It is made clear that there is no case of actual bias; the issue is that of justice being not simply done, but being seen to be done.

6. There was, in the original application, a suggestion that this apparent bias ground would also be argued by reference to Professor Vicuña's membership of the same set of London Chambers as one of his co-arbitrators. That ground of argument has, entirely sensibly, not been pursued before me. It could not have succeeded.

7. Ukraine reminds me that arbitrator impartiality is important in all arbitrations, but it says it is perhaps particularly so in the specific context of what are, by nature, highly sensitive (including politically) investor/state arbitrations such as this, with a consequently direct, strong public interest; and in particular in circumstances where the parties have no ability to appeal the Tribunal's Award on the merits. Without proper disclosure by arbitrators, Ukraine says, the legitimacy of the entire process is fatally undermined.

Background

8. The relevant factual and procedural background is set out in the judgment of Butcher J on Ukraine's jurisdiction challenge in these proceedings: *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), [2018] 1 WLR 5947 at [3]-[23].

9. In summary, the dispute arose out of the provisions of a bilateral investment treaty, namely the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the encouragement and mutual protection of investments dated 27 November 1998 ("the BIT"), which contained an arbitration clause.

10. In 1995 Tatneft, along with the Republic of Tatarstan (a constituent republic of the Russian Federation) and Ukraine, became the major shareholders in a new Ukrainian company, CJSC Ukrtatnafta Transnational Financial and Industrial Oil Co ("Ukrtatnafta"). That company owned and operated the Kremenchug refinery, which was the largest oil refinery in Ukraine. It later bought shares in Amruz and Seagroup, companies who held other shareholdings in Ukrtatnafta.

11. The dispute which arose concerned a seizure of the refinery and orders of the Ukrainian courts which purported to invalidate Tatneft's, as well as Amruz's and Seagroup's, purchases of shares in Ukrtatnafta and deprived them of their shares.

12. Tatneft commenced arbitration. It alleged that Ukraine had violated its obligations under the BIT: (i) to encourage and protect investments (article 2); (ii) not to expropriate investments (article 5); and (iii) to treat investors fairly and equitably.

13. In the arbitration Tatneft appointed Professor Rudolf Dolzer as arbitrator. Ukraine appointed The Hon. Marc Lalonde PC, OC, QC as arbitrator. In turn, those two co-arbitrators appointed Professor Vicuña as presiding arbitrator. Following that, Ukraine successfully challenged the appointment of Professor Dolzer pursuant to Article 11 of the UNCITRAL Rules on the grounds of apparent bias. In his place, Tatneft then appointed The Hon. Charles N. Brower as arbitrator.

14. Tatneft was represented throughout the arbitration proceedings by Cleary Gottlieb; Ukraine was represented by King & Spalding. Ukraine challenged the jurisdiction of the Tribunal in February 2009. On 28 September 2010, that challenge was dismissed.

15. On 15 June 2011, Tatneft submitted its first Memorial on the Merits. Ukraine filed its first Memorial on the Merits on 13 December 2011.

Professor Vicuña's appointment in the DP World Arbitration

16. In that period between Tatneft and Ukraine filing their respective Memorials on the Merits, on 22 July 2011 a port operator named DP World, represented by the same Cleary Gottlieb team as was representing Tatneft, commenced an ICSID arbitration against Peru ("the DP World Arbitration"). The allegation was that it had been prevented from tendering for the operation of the north pier in Peru's biggest port.

17. At some time in this period, Cleary Gottlieb approached Professor Vicuña about his being appointed by DP World as arbitrator in the DP World Arbitration. The exact

details of that approach and the correspondence which ensued is not before the court. It was apparently the first appointment of Professor Vicuña by Cleary Gottlieb. Professor Vicuña was appointed for an investor, not the state.

18. On 21 September 2011 Professor Vicuña was duly appointed by DP World and Professor Vicuña did not disclose the approach or the appointment to Ukraine.

19. The issue which arises therefore has some similarities to that which arose in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, [2018] 1 WLR 3361. That case was heard by the Supreme Court last month and it is understood that judgment may be imminent.

20. It was suggested that, depending on the terms and timing of the Supreme Court judgment, it might be appropriate for the court to consider further submissions from the parties on the effect of that judgment before handing down its own judgment in this case. I have, however, formed the view that it is not necessary to do so and it would be very much preferable for this application to be determined today.

Issue estoppel

21. Before dealing with the substance of the application I should consider the logically anterior question of issue estoppel, because Tatneft argues that Ukraine cannot take its points on section 103(2)(e) because that issue has effectively been decided by the French Courts. The factual background to this is as follows.

22. The court of the seat of the arbitration is France. On 27 August 2014 Ukraine invoked that court's jurisdiction, applying to the Paris Court of Appeal to annul the Award.

23. The Paris Court of Appeal rejected that challenge on 29 November 2016. In doing so it dismissed all the bases advanced by Ukraine.

24. Ukraine filed an appeal challenging the decision on 21 March 2017, but the Court of Cassation removed this appeal from the docket because Ukraine had not paid to Tatneft legal fees which were outstanding, as well as amounts owed under the Award. At the present time the position is that there is potentially the possibility of an appeal to the Court of Cassation but the appeal before the Court of Cassation is currently dismissed.

25. Tatneft therefore says that there is a decision of the Paris Court of Appeal that upholds the award and dismisses Ukraine's challenges to it. That decision is *res judicata* even if Ukraine was still to mount some further appeal from it. But in any event, at this current moment, Ukraine's appeal stands dismissed.

26. Tatneft points me to the judgment of Clarke LJ in *The Good Challenger* [2004] 1 Lloyd's Rep 67 at [50]:

> "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 on the merits; (3) that there must be identity of parties; and (4) that there must be an 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...".

27. In relation to those requirements, it is common ground that requirements (1), (2) and (3) are not in dispute.

28. As to requirement (4) Tatneft says that the grounds on which challenge was made before the French Court were essentially identical to those which are put forward before me today.

29. So far as concerns the point raised in this application of failure to follow arbitral procedure, it is submitted that that actually has no application to questions of disclosure and was, at best, a subset of the "composition of the tribunal issue", so the absence of this precise point from the French proceedings could not remove the identity of issue.

30. As regards the French law point so far as concerns the fact that the determination which was made was a determination of French law, Tatneft said that this was not an insuperable obstacle because this is not a matter akin to public policy where there would be a different approach between the two jurisdictions. In relation to the question of the composition of the tribunal, it says that this Court should not strain to find artificial distinctions between the two Courts' approaches. The Court has been applying the same language, and the issue is essentially identical and has been asked and answered in Paris.

31. Ukraine for its part says that no issue estoppel arises because the arbitral process point was not before the French Court and that therefore there is no issue estoppel. It also said that the test applied by the Paris Court in determining whether there was an appearance of bias was the test advanced by Tatneft as the relevant test under French law, and that involved a determination of whether there was a "course of dealings". However, that French "course of dealing" test is not a relevant test on this application which concerns whether, in accordance with the UNCITRAL Rules (which were not referred to in the Paris judgment), disclosure was required and whether the Tribunal was correctly composed – i.e. free of apparent bias. To those questions it is said the French law test is irrelevant. It is submitted that there was nothing about the agreement of the parties in the Paris judgment or any reference to the UNCITRAL rules, and the French law approach has nothing at all to do with the agreement of the parties.

Discussion

32. The question is whether the same issue was referred to the Paris Court. This involves a consideration of what was said to that Court. The grounds were far more extensive than those now raised, but among them was this issue: that the Award should be annulled "*based on the irregularity of the constitution of the arbitral tribunal*".

33. The complaint raised by Ukraine was then summarised as follows:

> "UKRAINE claims that Mr. Orrego Vicuña, President of the arbitral tribunal, repeatedly failed in his duty to inform the parties by not revealing, on the one hand, that he had

> been appointed by TATNEFT's law firm in 2011 in another investment arbitration and ...".

34. Accordingly, what was before the Paris Court was an issue of the supposed failure by Professor Orrego Vicuña to make a "disclosure" and that leading to an irregularity of constitution of the Tribunal.

35. This on its face appears to be the same issue as one of those advanced before me today. However, in the first place it is plainly right that the second point raised as to failure of arbitral process was not before the French Court. Further, the surface resemblance which I have noted is somewhat undermined by the way in which this was dealt by the Paris Court. The Paris Court held that:

> "Whereas ... Mr. Orrego Vicuña was appointed, by a party represented by the law firm Cleary Gottlieb Steen, in another investment arbitration, filed on 22 July 2011 before the International Centre for Settlement of Investment Disputes, as is clear from the publication made by the Centre on its website;
>
> Whereas UKRAINE faults Mr. Orrego Vicuña for not having disclosed this appointment made by a law firm that was counsel to TATNEFT;
>
> But whereas UKRAINE fails to demonstrate how a single appointment in the course of the seven years that the arbitration lasted, which did not characterise a history of business between this arbitrator and this law firm, had the potential to raise a reasonable doubt about the independence and impartiality of Mr. Orrego Vicuña.
>
> Whereas the ground must be set aside."

36. This demonstrates that the facts upon which the conclusion is based -- the constituent parts of the relevant legal test -- are different. Here we are concerned with the question of what the UNCITRAL rules provide. As Mr. Edey QC rightly pointed out, I must be cautious not to elide concepts which may be similar but not identical.

37. Further, it may be said that issue estoppel is, in essence, based on determinations which are necessary and fundamental to the issue before the Court. Therefore, if the overall issue is based on different constituent parts, the overall determination of the issue arguably cannot be said to be one which has been previously arrived at, such that the doctrine of issue estoppel arises. As I remarked in argument, this is akin to the point made in the context of public policy in cases such as *Yukos v Rosneft.*

38. Here, although the scope of argument has not delved in full depth into all the ways the case was put before the Paris Court of Appeal, it does appear that the question of course of dealing was an essential part of the French Court's determination.

39. I then bear in mind the need for caution expressed in relation to the question of the issue estoppel arising out of foreign judgments, for example in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (No .2) [1967] 1 AC 853, 967:

> "The right to ascertain the precise issue decided, by examination of the court's judgment, of the pleadings and possibly of the evidence, may well, in the case of courts whose procedure, decision-making technique, and substantive law is not the same as our own, make it difficult or even impossible to establish the identity of the issue there decided with that attempted here to be raised, or the necessity for the foreign decision. And I think that it would be right for a court in this country, when faced with a claim of issue estoppel arising out of foreign proceedings, to receive the claim with caution in circumstances where the party against whom the estoppel is raised might not have had occasion to raise the particular issue."

40. Bearing these matters in mind, it would not, in my view, be safe to conclude that there was identity of issue, such that the issue had been determined and it is not open to Ukraine to raise it now. This seems to me to be entirely a case where the caution called for in the *Carl Zeiss* case is appropriate. Therefore, I am not satisfied that issue estoppel arises on the constitution issue and I am satisfied that, so far as that issue is relevant, there is no issue estoppel on the procedure issue.

41. A point was raised by the Respondents in relation to the authority of *Minmetals*. Ultimately Mr. Foxton QC did not press this argument hard, and rightly so. As Mr. Edey QC pointed out, that line of authority seems to be one which is developed in the context of public policy objections to enforcement, where the question of balancing a countervailing public policy makes perfect sense.

42. There is no analogous authority relied on in this context and, given the nature of the issue in play, the impartiality of arbitrators being a fundamental question, I would be slow to find that an otherwise good objection to enforcement should not prevail. There may be, as is suggested in *Dallah, s*ome principled basis on which this might be said to be appropriate, but no specific principled basis was deployed here. Accordingly, I would not be minded to deploy the *Minmetals* approach or an analogous approach.

43. I therefore consider the position in relation to the challenge on its merits.

The Challenge to Enforcement

44. The relevant legislative provision is section 103(2)(e) of the 1996 Act. This provides:

> "Recognition or enforcement of the award may be refused if the person against whom it is invoked proves… that the composition of the arbitral tribunal or 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."

45. The argument arises out of the concept of the "agreement of the parties" as regards the composition of the Tribunal as prescribed by the relevant arbitral procedure. That is to be found in the combination of the BIT between Russia and Ukraine and the UNCITRAL Rules, pursuant to which the arbitration took place.

46. Article 9(2) of the BIT provides:

> "In the event the dispute cannot be resolved through negotiations within six months as of the date of the written notification as mentioned in Item 1 hereof above, then the dispute shall be passed over for consideration to:
>
> …
>
> c) an 'ad hoc' arbitration tribunal, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL)."

47. Article 9 of the UNCITRAL Rules provides:

> "A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances."

48. Ukraine says that these provisions are part of the hallmark of the pro-disclosure consensus which is key in international arbitration which it is said is a badge of impartiality and independence.

49. Ukraine also points me to Article 10 of the UNCITRAL Rules, which provides:

> "1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence …".

50. While there is no challenge under Article 10, Ukraine says that this gives the context of the parties' expectations as to the impartiality and independence of the tribunal.

51. It was not controversial that the effect of these provisions was that the parties had agreed that the tribunal would be composed only of arbitrators free from justifiable doubts as to their impartiality and independence. Further as part of the arbitral procedure:

    a) the arbitrators were required to disclose circumstances that were likely to give rise to justifiable doubts as to their impartiality or independence; also

    b) the duty of disclosure would continue to apply after appointment, as it did before appointment. This was a point which is made in the AWG award to which I was referred.

52. Although Mr. Edey placed great stress on the fact that the issue before me is of the correct construction of the UNCITRAL Rules, rather than an English common law issue, it was common ground and positively averred in the skeleton for Ukraine that the parties' agreement is similar to the position which would exist under English law.

53. Under English law, the duty of an arbitrator is to disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality: *Halliburton* at [56] and [66]. Under the UNCITRAL Rules, there is very little basis to see a material difference between that test of "*justifiable doubts as to impartiality*" and the common law's "*a reasonable apprehension of lack of impartiality*". It is common ground that the test in each case is an objective test, viewed from the position of a fair-minded and informed observer who had considered the facts and circumstances known to the arbitrator. The only gloss which Ukraine puts on this is that that has to be read in the context of this particular form of arbitration, an issue to which I will return.

54. The point at which a difference of approach could be discerned was as to the question and meaning of "likely" in this context. Ukraine says Article 9 refers to circumstances "likely" to give rise to justifiable doubts, whereas the English law test refers to circumstances which "would or might" provide the basis for a reasonable apprehension. It submits that to the extent that there is a difference it is immaterial.

55. Tatneft says that that is wrong and "likely" imposes a higher test of "*more likely than not would support a challenge*" -- and they have referred me to a footnote in the *AWG* award, which, by reference to some of the commentary, seems to suggest that. But the submission was that it matters not on the facts.

56. I shall proceed on the basis that the correct approach is to say that the difference is not material -- although there is a difference in words, it seems unlikely that any significant difference of effect was intended. The overlap between the Arbitration Act approach, which echoes the common law, and that in the UNCITRAL Rules can be seen to be extensive, for example in the DAC report.

57. I am also reminded that the standards for disclosure on the one hand and actually establishing (apparent) bias on the other, whether under the UNCITRAL Rules or English law, are not identical and that the obligation of disclosure extends in both cases to matters which may not ultimately prove to be sufficient to establish justifiable doubts as to the arbitrator's impartiality. However, a failure of disclosure may then be a factor in the latter exercise.

58. Ukraine did emphasise one further difference between Articles 9 and 10 on the one hand and English law on the other. They noted that the former includes the requirement of "independence" as distinct from and in addition to "impartiality", whereas "independence" was deliberately omitted from section 24 of the 1996 Act.

59. I was referred to the reasoning of the DAC report on the Arbitration Bill, which discloses that the drafters of the Act did not want to permit removal grounded in questions as to independence unless there were also doubts about impartiality. Doubts about independence could, it was felt, be triggered by such issues as membership of the same chambers or expertise in a particular field, and that was a kind of challenge which the drafters did not wish to see made. It is said for Ukraine that those reasons effectively recognise that where (as here) the word "independent" is included as a requirement, it is a requirement over and above "impartiality" and therefore must add something substantive.

60. Although this was said to be potentially material, it was rightly accepted in argument that in the present case, and on the basis of the challenge which is brought before me today, this distinction was not one which had any impact. I can therefore deal with this issue essentially on the basis of the question of impartiality, although I have also considered the question of independence separately at the end and it makes no difference to the conclusion which I reach.

61. Ukraine also reminded me of Article 15(3) which flags the importance of there not being private communications. Mr. Edey says that this goes beyond the question of submissions and the problem which is flagged by Article 15.3 is the appearance of private communications. This is said to inform the approach to the disclosure issue.

Failure as regards arbitral procedure: non-disclosure

62. In relation to the issue as to the failure as regards arbitral procedure arising out of what is said to be a material non-disclosure, the essence of Ukraine's case is that, just as was concluded in the case of *Halliburton,* Professor Vicuña ought to have disclosed the fact of Cleary Gottlieb privately approaching him about the DP World Arbitration and his eventual appointment as arbitrator.

63. It was said that these were matters which prospectively were likely to give rise to justifiable doubts about his impartiality and/or independence.

64. I was taken to some of the materials in the international arbitration world such as the IBA Guidelines on Conflicts of Interest in International Arbitration. This question was not on the Orange List, but I was referred to the rubric above the current Orange List in the 2014 guidelines which indicates that depending on the circumstances an arbitrator may need to disclose "*an appointment made ... by the same counsel appearing before the arbitrator while the case is ongoing*". It was said that that shows that this kind of situation could be a situation where there may need to be disclosure.

65. I was also referred to the ICC guidance. In relation to past appointments that indicated that other appointments is a matter to which attention should be paid when making an assessment, albeit in the context of a subjective disclosure test.

66. Reference was also made to the judgment of Fraser J in *Beumer Group v Vinci Construction* [2017] Bus LR 449, in which he observed at paragraph 31 that, *"unilateral telephone calls are strongly discouraged (if not verging on prohibited) due to the appearance of potential unfairness ... ".* However, it was accepted that the circumstances in that case, which was a case of contemporaneous adjudications with some particular features, was very different.

67. Ukraine suggested, however, that this is a case which is *a fortiori* compared to the *Halliburton* case. The reasons for that were as follows:

68. The first is the state/investor nature of the arbitration, which Ukraine says has a number of features which make it a very different beast and raise particular sensitivities which effectively harmonise with the gloss it puts on the question of concerns on the part of a fair-minded and informed observer. It says that the particular features are the fact that states are, absent a valid arbitration agreement, (broadly) immune from claims by

investors. There is generally (as was here the case) a very heavy political angle to such disputes and that it will often be said that the dispute was governed by political motives, giving a particularly high need for transparency. The third point was that the relevant state is, or represents, its people whose taxes fund its costs of the arbitration. That, it is said, gives it a unique public interest -- a direct financial interest, which takes the position well beyond the usual public interest in justice being seen to be done.

69. Ukraine also points to the timing of the appointment, coming as it did after Tatneft had successfully resisted Ukraine's jurisdiction challenge. Its submission is that a fair-minded and informed observer would be legitimately concerned that the appointment could have the appearance of a show of appreciation for Professor Vicuña's "good" work so far, with the implication of the possibility of further appointments if "good" work was kept up.

70. Ukraine refers to the prestigious nature of the appointment and what were said to be the particularly large sums that Professor Vicuña could reasonably expect to receive from his appointment in the DP World Arbitration. In that regard it was said that in *Halliburton* there was nothing particularly prestigious about the appointments in question. I had my attention drawn to the fact that the average fees earned by an arbitrator in an ICSID arbitration are around £300,000 and Professor Vicuña himself had earned hundreds of thousands of dollars in similar arbitrations.

71. On this basis Ukraine submitted that the vice was not simply in the potential payment under the new arbitration. It was in a concatenation of all the circumstances: the same team, the possibility of future appointments, coming at this particular point in time and also the fact that Professor Vicuña was appointed by two arbitrators, one of whom later stood down for apparent bias.

72. A marker was also put down as to the point which was raised by Popplewell J in the Court of Appeal in the *Halliburton* case, where they indicated that one appointment could not lead to apparent bias. The point is made by Ukraine that it does not accept that that is necessarily correct and it reserves the right to argue otherwise in another court.

73. Ukraine points to the fact that the appointments which King & Spalding made of Professor Vicuña were not on all fours with the appointment which they themselves criticise where King & Spalding appointed Professor Vicuña. That appointment was done by different teams where there was nothing to suggest that the different team knew anything about the other arbitration.

74. I was also asked to step back and consider the position of a judge of a Commercial Court who was approached during his or her final case by a party for a future arbitral appointment. It was suggested that it would naturally occur to me that this would be something that the judge would feel had to be disclosed and, if it was suggested to me that disclosure should be made, it must follow that disclosure should have been made in this case by Professor Vicuña because the position was effectively analogous.

75. There was also of course a specific comparison with *Halliburton* itself, and it was said that the need to disclose here was even stronger than in *Halliburton* given that there is nothing in the judgments in *Halliburton* to suggest that the arbitrator in that case could have expected to receive the similar sorts of sums that Professor Vicuña was going to

receive. Also, the scale (as opposed to mere fact) of remuneration has been established as a relevant factor in the case of *Cofely Ltd v Anthony Bingham and Knowles Ltd* [2016] EWHC 240 (Comm), [2016] 2 All ER 129. That was a case where Hamblen J took into account a high proportion of fees coming from one source.

76. Ukraine also prayed in aid the fact that prior to the arbitrator's appointment in the *Halliburton* case, Halliburton had been made aware of and had not objected to the arbitrator being appointed in the arbitrations, and that was not the case here. On the contrary, there was a prior challenge to Mr. Dolzer's appointment by Tatneft on the grounds of lack of impartiality and independence. It was submitted that against that background, a fair-minded and informed observer would be likely to be justifiably particularly sensitive as regards any matters that could (unconsciously) affect the impartiality or independence of any of the other arbitrators.

77. Ukraine also submits that Professor Vicuña's appointment in the DP World Arbitration was something which under the IBA guidelines would have fallen to be disclosed. It draws attention, as I have said, to the recent 2014 Guidelines and says that this is analogous to the current case.

78. Effectively, that covers the first ground of challenge, but then, as in the *Halliburton* case, Ukraine goes on to submit that in addition (or alternatively) the facts which should have be disclosed, coupled with the fact of their non-disclosure in the circumstances which have been set out, mean that this is a case where there are justifiable doubts about the impartiality or independence of Professor Vicuña.

79. It is said that, unlike the duty of disclosure, this is an issue to be assessed by reference to all the facts as they are now known to be, including the fact of the non-disclosure.

80. The factors which are relied upon to give the something extra noted to be necessary in *Halliburton* are, first, that, unlike in *Halliburton*, this is not a case where the court has the benefit of the arbitrator's explanation, or indeed the party appointing's explanation. There was no contemporaneous challenge by Ukraine and there was no response to a challenge by Professor Vicuña while he was still alive. There was therefore no opportunity for those concerns to be explained and discussed with Professor Vicuña and Cleary Gottlieb have not given any explanation of the discussions between it and Professor Vicuña.

81. Tatneft's response to these submissions are in summary as follows:

    (1) Tatneft says that the disclosure issue is neither one as to the composition of the tribunal nor as to procedure. It is not alleged to be a failure of composition, because that arises out of the next step -- apparent bias. At the same time what is contemplated by section 103(2)(e) is a failure in the actual arbitration procedure -- that is the procedure applying to the substantive arbitration.

    (2) Tatneft submits that the language of justifiable doubts, which is key to this consideration, mirrors the Arbitration Act section 24 and that shows a need for objective assessment, something which gives a real question mark as to bias and means that the two tests overlap with each other and with the common law test.

(3) Tatneft submits that the requirement is, effectively, that the fair-minded and informed observer be made to think of the possibility of actual bias and that this was a very different case to the *Halliburton* case on which so much emphasis has been placed by Ukraine.

(4) Tatneft prays in aid that finding in *Halliburton* both by the Court of Appeal and by Popplewell J that one reference via a common party is not enough and notes that in that case there was the additional factor that the arbitrations in question were very closely related, both arising out of the Deepwater Horizon incident, and still even so that was not enough. Here Tatneft says this is a single appointment case which one can cross-check against what the IBA has to say, which is that three appointments within three years from the same counsel may be something which ought to be disclosed, and this obviously falls far short of that. Also, Tatneft reminds me that this is a form of arbitration where there is effectively no secrecy and the parties who are involved and the arbitrators who are involved were always going to be a matter of public record, and that of course is relevant to, they say, to the question of what the fair-minded and informed observer would have to say.

Discussion

82. I proceed on the basis that the question of disclosure can come within the heading of section 103(2)(e) (procedure). It may be the case that there is an *in limine* argument on this, but I certainly would not be minded to decide this case based on this argument which first emerged in oral submissions and which might well be informed by further research and consideration.

83. Accordingly, I address the points as they were put for Ukraine. In the end, despite the considerable skill and clarity with which these arguments were deployed by Mr. Edey QC, I find myself completely unpersuaded by them.

84. Whether or not the Paris Court applies a slightly different test in substance to the one which is operative here, like the Paris Court I do not consider that it can at all be said that a single appointment in the course of the seven years the arbitration lasted would or might provide the basis for a reasonable apprehension about the independence or impartiality of Professor Vicuña; and still less that they were likely to give rise to justifiable doubts so as to trigger the duty of disclosure. The argument that this appointment does so is in reality premised on the supposed fair-minded and informed observer being either not entirely fair minded or not entirely informed, or both.

85. The test which one applies is an objective one, as the parties agree. It imports a degree of distance and a measured approach to the question. The requirement of a degree of distance, implicit in the words “fair minded and informed”, is echoed by the words of the UNCITRAL Rules which are key here and which also appear in section 24 of the Arbitration Act. The UNCITRAL Rules speak of justifiable doubts. What is looked for is not understandable subjective doubts by a party, but justifiable doubts in the mind of a third party. It is of course possible to prescribe a subjective approach, as the ICC rules and some other rules do, but the common law and UNCITRAL do not take that view. That is a distinction which is significant and which must be respected.

86. This links in, as Tatneft submits, to such contextual points relevant to the well-informed nature of the observer, as the fact that that person is taken to understand the nature of international commercial arbitration, including party-appointed arbitrators. That is the point which was raised in the *Cofely* case. There is also the fact that arbitrators will be active in more than one reference at a time and will require to be paid for their services. So too is there a relevant background point in the finding in *Halliburton* that arbitrators are assumed to be trustworthy.

87. Naturally, Ukraine looks to compare this case to that in *Halliburton*. In my judgment that is a false comparison. The issue which *Halliburton* raises is, as a full reading of the judgments makes clear, one which is rendered acute by the combination of the factor of concurrent appointments and the fact of those appointments being in related arbitrations arising out of essentially the same factual situation. There is thus, as extensive portions of the judgments make clear, the key issue of the potential leaking of knowledge acquired by an arbitrator in one case into another. This case lacks that very important feature and it has never been suggested that the two arbitrations are in any sense related.

88. While Ukraine may be right that the fair-minded and informed observer may apply a slightly more rigorous standard when looking at arbitrations of this nature, both because of the quasi-political aspect and because of the size of the arbitration, and the amounts of money involved, both for the parties and hence for the arbitrators, there are also significant countervailing factors such as the absence of secrecy. Overall, there is no justification for applying an entirely or even significantly different standard to that which applies generally in international commercial arbitration. It must be recalled that many international commercial arbitrations will themselves be highly significant commercially and may involve many millions if not billions of money. Further, as a matter of principle, there seems to be nothing in the fact of the bill landing at the taxpayers' door to make a difference. In all arbitrations ultimately, bills will feed back via one mode or another to individuals.

89. I am also not persuaded that the timing in this case is a factor which has any real weight. This is a good example of the test being sought to be applied by the Ukraine being one which is essentially subjective rather than, as the authorities require, objective. There was a ten-month gap after a unanimous award. That is a background feature which hardly gives rise to a suggestion of suspicious timing. The fact of appointing Professor Vicuña himself cannot be said to require any explanation or raise any question. Professor Vicuña was a well-known arbitrator who had, for example, been a vice president of LCIA and the President of the World Bank Administrative Tribunal. The idea that the appointment becomes questionable because it was the first appointment by the same team is an apprehension which smacks of the subjective, as does the timing question.

90. This conclusion is the more so when one bears in mind what *Halliburton* has to say about the question of pecuniary advantage, which of course underpinned what Ukraine submitted in relation to the timing issue. It was said to be likely to be perceived as a reward for good work to date, and that question of reward posits something financially advantageous. *Halliburton* was a case where the question of financial reward was looked at closely. It says that the fair-minded and informed observer would not understand the fact that an arbitrator appointed in arbitration A is, during the course of that arbitration, appointed by one of the parties in arbitration B as being a factor which

gives rise to any improper pecuniary advantage. So, at paragraph 82 per Hamblen LJ;

> "We do not consider this to be a matter of significance, essentially for the reasons given by the judge at [20]-[21] of his judgment. In essence, the argument goes too far and would mean that a remuneration benefit which an arbitrator receives from his appointing party (even indirectly) is a disqualifying benefit. If that were so it would equally apply to party-appointed arbitrators in a single arbitration and would be wholly inconsistent with the manner in which commercial arbitration is routinely conducted. The alleged 'secrecy' of the benefit adds nothing. Either the benefit is disqualifying or it is not. If it is, then objection could be made to every party-appointed arbitrator, which would be absurd."

91. This ties in, as was said by Hamblen LJ, to the judgment of Popplewell J at first instance in *Halliburton*. He there emphasised the fact that the party appointing does not undertake to bear the arbitrator's fees; who bears them is a matter for the tribunal at the end of the day. Overall, therefore, it cannot be said that there is anything which arises out of the question of pecuniary advantage which gives assistance to the case raised by Ukraine.

92. This factor also deals with the question of the sums to be earned (which are not, in my judgment, themselves particularly out of the way in the context of international arbitrations), and there is nothing in the prestige of the appointment which, judging by what I have seen of that arbitration, would create an issue. What appears in relation to the second arbitration is that it was likely to be an interesting case but hardly notably prestigious or exceptional.

93. I do of course bear in mind, as Mr. Edey urged me to do, that there is one case where appointments in other arbitrations were genuinely seen as problematic, but that was a question of scale completely at odds with the current case. In *Cofely*, the facts were that an arbitrator was accepting repeated instructions from a particular party such that a significant proportion of the volume of business which he was doing -- 25% of his income and something in the region of 20% of his instructions --were coming from the one party. That led to a situation where the significant impact of the number of appointments led to a situation where a reasonable and informed observer might well start to wonder about the question of financial dependency and, because of financial dependence, independence.

94. This case, however, is simply a case of a well-remunerated appointment in a form of arbitration which is itself naturally well remunerated.

95. Also, it should be noted that *Cofely* was a very particular case. There were other problems in that case, including the fact that the arbitrator's response to attempts to establish the facts as to his relationship gave the impression that he was trying to pressurise Cofely into acknowledging that there was no issue and there was also the fact that he behaved in an aggressive and hostile manner.

96. There was also in that case the further fact that the party from whom the large proportion of business was obtained maintained a black list; which meant that the arbitrator's conduct of the reference could lead to him falling out of favour and being excluded from numerous further appointments. *Cofely* is therefore no safe guide in the present case.

97. So far as previous objections are concerned -- the point that there was an objection in relation to Tatneft's first arbitrator -- neither can that give any assistance to Ukraine. The test must remain the same in each case. A party cannot engineer a higher standard or particular sensitivity simply by demonstrating subjective sensitivity themselves. That approach would enable a subjective test to be applied by the back door where it is clear the test is an objective one.

98. There is also, as Ukraine tacitly concedes, nothing in the IBA Guidelines in force at the time of these matters which assists. Absence from Orange List suggests that disclosure will not currently be required. It will do so in some circumstances, but probably quite unusual ones. There is nothing of that nature here in my judgment. Given that the IBA Guidelines do not replicate the test applied in this court, and are perhaps to be regarded as guides to good practice rather than delineating where apparent bias will be discerned, this offers a useful cross check to the conclusion which I have indicated I am coming.

99. Therefore, taking all these matters together, I ask myself were these matters which viewed prospectively were likely to (in the sense of "would" or "might") give rise to justifiable doubts about Professor Vicuna's impartiality or independence. I conclude with very little hesitation that they would not.

100. That is a conclusion which is consistent with the approach indicated by Popplewell J and the Court of Appeal in the *Halliburton* case when they were considering the question of a single appointment.

101. I would add that, while I would not regard these points as being of any real weight, it does seem that the failures to disclose appointments by King & Spalding in relation to appointments of Professor Vicuña or Mr. Brower themselves also provide an interesting cross check, albeit that the situation was not quite on all fours. What one sees is that this appears not to have been the case of an experienced arbitrator "dropping the ball" in the matter of disclosure. It is thus an approach which is consistent not just with what the authorities say, but with what is being done repeatedly in other cases. While, as I have noted, in special cases there may be a need to disclose, as there was in *Halliburton* with the factors there, including the significant overlap; in most cases and in this case, for a single appointment, there will not be.

102. I would add that the Commercial Court judge analogy which Mr. Edey posited did not, as he suggested, strike me as an indicative question which forced the conclusion in his favour, but rather as an "apples and oranges" comparison. A judge who is precluded from accepting arbitral appointments during the currency of his or her office-holding (absent special appointment as a judge arbitrator), and who is remunerated by the state for his or her work as a judge, is in an entirely different position to an arbitrator whose very business depends upon accepting a throughput of instructions.

103. In any event, as I have indicated, for the reasons which I have already outlined, my conclusion is that there was no failure to disclose and, therefore, no failure of arbitral

procedure. It follows, it seems to me, since this is an essential constituent of the apparent bias limb, that the apparent bias argument also fails.

104. To the extent that disclosure is not an essential constituent of an apparent bias limb, I would unhesitatingly conclude that the matters relied on are not sufficient to amount to the requisite test for apparent bias.

105. It follows that Ukraine's application is dismissed.

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