Neutral Citation Number: 2017 EWHC 148 (Comm)

Case No: CL-2016-617

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 03/02/2017

Before:

THE HON. MR JUSTICE POPPLEWELL

- -

Between:

P — **Claimant**

- and -

(1) Q
(2) R
(3) S
(4) U — **Defendants**

- -
- -

Stephen Houseman QC (instructed by **Mishcon de Reya LLP**) for the **Claimant**
David Foxton QC & James Willan (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **First Defendant**
Edmund King (instructed by **Boies, Schiller & Flexner (UK) LLP**) for the **Second and Third Defendants**
The Fourth Defendant was not represented and did not attend

Hearing dates: 20 January 2017

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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.

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THE HON. MR JUSTICE POPPLEWELL

The Hon. Mr Justice Popplewell:

Introduction

1. On 20 January 2017 I heard an application by the Claimant for disclosure of documents in support of the Claimant's application to remove the Second and Third Defendants as arbitrators for misconduct, pursuant to section 24(1)(d)(i) of the Arbitration Act 1996 ("the Act"). At the conclusion of the hearing I announced my decision that the application would be dismissed. On 3 February 2017 I delivered my reasons. This is an anonymised version of those reasons.

The Dispute and the Arbitration

2. The Claimant and the First Defendant entered into a Joint Venture Framework Agreement and a Shareholders Agreement.

3. The First Defendant asserted claims against the Claimant for fraudulent misrepresentation and breach of warranty and alleged frustration of the contracts. Amongst other things, the First Defendant contended that the Claimant was in breach of express representations and warranties.

4. The Joint Venture Framework Agreement and the Shareholders Agreement, which were governed by English law, each contained an arbitration clause which provided for disputes to be resolved by arbitration in accordance with the rules of the London Court of International Arbitration ("the LCIA Rules") with a tribunal of three arbitrators. The First Defendant commenced an arbitration against the Claimant in respect of disputes arising out of the agreements.

5. The Second and Third Defendants ("the Co-Arbitrators") were the party appointed arbitrators in the arbitration. The tribunal was completed by the appointment of a chairman on 16 July 2014 ("the Chairman"). In or about August 2014 an individual was appointed by the Chairman as Secretary of the Tribunal ("the Secretary") with the agreement of the parties.

6. The Claimant is also engaged in other arbitration proceedings relating to the same rights as are in issue in the arbitration between the Claimant and the First Defendant.

7. The application for the removal of the Co-Arbitrators is founded on conduct in relation to three interlocutory decisions made by the Tribunal:

(1) In 2015, the Tribunal ordered the record in the LCIA arbitration between the Claimant and the First Defendant to be shared with the parties to the other arbitration proceedings ("the Record Sharing Decision").

(2) On 24 July 2015 the Tribunal issued a decision refusing the Claimant's further application for an order staying the LCIA arbitration until after the other arbitration proceedings had been heard ("the Second Stay Decision").

(3) Following an earlier decision in relation to production of documents, on 16 February 2016 the Tribunal issued a second decision in relation to production of documents ("the Second Document Production Decision"). This arose out of an application by the First Defendant in which it alleged that the Claimant had failed to fulfil its disclosure obligations under earlier orders. Written submissions were exchanged and a teleconference hearing took place before the Chairman alone on 4 February 2016. By its Second Document Production Decision the Tribunal ordered further disclosure and, amongst other things, that the Claimant's counsel complete a certification exercise explaining the efforts undertaken to obtain the documents responsive to the First Defendant's requests. As a result of the Second Document Production Decision, the Claimant disclosed an additional 10,000 or so documents to the First Defendant.

8. The following month, on 23 March 2016 the Chairman sent an email which formed the trigger for the s. 24 application. The email was intended for the Secretary, but was mistakenly sent to a paralegal at the Claimant's lawyers, who had the previous day sent by email a letter to the Tribunal addressing matters relating to its compliance with the Second Decision on Document Production and seeking an extension of time. The Chairman's misdirected email, intended for the Secretary, attached the Claimant's lawyer's covering email and asked "Your reaction to this latest from [the Claimant]?"

9. On 5 May 2016 the Claimant filed a challenge (the "LCIA Challenge") against all three members of the Tribunal seeking to have them removed on the following five grounds:

(1) Ground 1: the Tribunal improperly delegated its role to the Secretary by systematically entrusting the Secretary with a number of tasks beyond what was permissible under the LCIA Rules and the LCIA Policy on the use of arbitral secretaries;

(2) Ground 2: the Chairman breached his mandate as an arbitrator and his duty not to delegate by seeking the views of a person who was neither a party to the arbitration nor a member of the tribunal on substantial procedural issues (i.e. the Secretary);

(3) Ground 3: the other members of the Tribunal equally breached their mandate as arbitrators and their duty not to delegate by not sufficiently participating in the arbitration proceedings and the decision-making process;

(4) Ground 4: circumstances existed which gave rise to justifiable doubts as to the Chairman's independence or impartiality; these arose out of comments the Chairman had made at an international conference;

(5) Ground 5: the Chairman breached his duty to maintain the confidentiality of the arbitral proceedings.

10. The first and third grounds concerned the actions of the Co-Arbitrators; the remaining grounds concerned the Chairman only.

11. All three members of the Tribunal declined to withdraw from the arbitration and the Claimant declined to agree to the LCIA Challenge. Accordingly on 27 May 2016 the LCIA Court appointed a three person division to determine the challenge ("the LCIA Division"). Following written submissions an oral hearing took place on 19 July 2016.

12. The evidential basis for the grounds of challenge before the LCIA Division was essentially (a) the misdirected email and (b) an analysis of the time spent by the Secretary, Chairman, and the Co-Arbitrators respectively in relation to the three Decisions. In short it was said that the time spent by the Secretary was so high that it indicated that there had been an improper delegation of functions to him, and that by comparison the relatively short period of time spent by the Co-Arbitrators indicated that they had failed properly to fulfil their arbitral responsibility.

13. The position of the Co-Arbitrators was explained in two letters sent to the LCIA Division on 20 June 2016 and 11 July 2016 respectively.

14. In the letter of 20 June 2016, the Co-Arbitrators said:

(1) "….. There was no inappropriate delegation of Tribunal decision-making to the Secretary… In this case it is impossible to suggest that the Secretary actually decided anything or influenced the Tribunal improperly.

It is normal for a Secretary to work under the direct supervision of the Chairman, who will give multiple written and oral instructions to the Secretary in relation to the work which he/she wants the Secretary to do. The Secretary's job (among other things) is to assist the Chairman to prepare the work product for the review of the co-Arbitrators. It is unnecessary and impractical for the co-Arbitrators to be apprised of all communications between the Chairman and the Secretary. We are confident that, in the present case, the Chairman and [the Secretary] have worked closely and properly together to produce the drafts of the relevant decisions for our comment. The proposed conclusions contained in those drafts for our review had been those of the Chairman. The Chairman has then taken our comments into consideration and decided upon any appropriate amendments before providing a final draft for our approval. All relevant decisions referred to by [the Claimant] in this challenge had been made unanimously.

… In any event, we have repeatedly said there has been no delegation of the decision-making process."

(2) "We have read the relevant correspondence and participated in all key decisions… It is evident from the time spent by the Chairman on this case that the way in which this Tribunal has functioned on important procedural/interlocutory matters (such as document production and applications for a stay of proceedings) has been that the Chairman, with the assistance of the Secretary, has prepared a draft decision for our review. Having studied the relevant materials beforehand, including the submissions of the parties, we would then comment on the draft and review any subsequent drafts incorporating our suggested amendments. As expected, neither co-arbitrator was involved in the substantive drafting of the final decisions. This is, in our experience, standard procedure which is both expeditious and cost efficient."

(3) In relation to the Record Sharing Decision:

(a) "[The First Defendant] requested an order from the Tribunal to share the LCIA record with the other arbitration Tribunal…. Further correspondence was received… with an email from the Tribunal… and further correspondence…. The Tribunal's decision was issued….

We can confirm that, at the time, we read the party correspondence and considered the issues which arose in that connection. A draft was provided to us by the Chairman of the proposed decision. We read and approved the draft decision before it was issued and we were both in full agreement with the contents of that decision. The decision was six pages long and did not contain issues that were controversial, as the parties had agreed on most of the issues and a decision on the issues still in dispute was deferred to a later date."

(b) The letter then went on to identify that the Second Defendant had spent a total of 3 hours in relation to the decision. The times spent by others in respect of that decision were 1½ hours by the Third Defendant, 9 hours by the Secretary, and 8½ hours by the Chairman.

(4) As to the Second Stay Decision:

(a) "We confirm that we read the parties' correspondence and submissions on this issue and reviewed the draft decision thoroughly before it was issued. This was a short decision, prepared once again by the Chairman with the assistance of the Secretary and sent to us for our approval. We were in full agreement with the reasoning and the outcome contained in this Decision."

(b) The letter identified the time spent by the Second Defendant in relation to the Decision as having been 2 hours. The time spent by others was 4¾ hours by the Third Defendant, 10 hours by the Chairman, and 14 hours by the Secretary.

(5) In relation to the Second Document Production Decision:

(a) "We confirm that we read the parties' correspondence and submissions and participated in internal tribunal discussions on relevant matters (both before and after the draft decision was produced).

Each of us were sent and reviewed three drafts of the Decision before it was issued and read the transcript of the telephone hearing conducted by the Chairman with the parties.

Although this was a 65 page decision, a large proportion of the document contained summaries of the parties' positions on the various applications. In relation to the sections which contained substantive reasoning and the Tribunal's decision on the requested documents, we note that there was much repetition – given that the same reasoning was essentially applied to several categories of similar documents. Contrary to [the Claimant's] suggestion … we consider it reasonable to have reviewed the final draft (being the third draft we had been sent) in one hour."

15. The 11 July 2016 letter included the following:

(1) "[The Claimant] repeatedly alleges that the Co-Arbitrators "rubber stamped" the proposed draft. This is a patently wrong characterisation, as has been made plain in our earlier Submissions. We confirm that we both carefully examined the draft Rulings before deciding to assent to them and did not "rubber stamp" the draft. We had read the relevant papers, and had formed a preliminary view of the merits of the applications before the Chairman sent us his draft rulings. As to the … Second Decision on Document Production,… comprised of… 68 pages, … we commented on the first draft received and subsequent drafts were exchanged and commented upon by us until we received a final draft, which we approved. Generally, and more broadly, the Chairman's drafts accorded with our views on the merits of the issues they addressed, and his skill and experience in drafting Rulings resulted in our often having little (if anything) to criticize or seek to amend significantly. In short, we emphatically affirmed his conclusions as expressed in his drafts after having considered the matters ourselves. Being of one mind with the Chairman clearly does not equate to "rubber stamping"."

(2) "[The Claimant] argues here that "The Tribunal Secretary's substantial influence is further confirmed by the little time that the co-arbitrators spent on reviewing the decision". This is plainly a *non sequitur.* If the drafts had been drafted solely by the Chairman, we would most likely have spent exactly the same amount of time on reviewing the drafts and commenting on them. Our only responsibility was to study the work product placed before us by the Chairman and to respond with our views, having studied the relevant papers, listened to the oral arguments (in the case of the First Stay Application) and read the transcripts of the oral arguments (in the case of the Second Decision on Document Production). All we were concerned with was whether the Chairman's draft expressed our own views on the outcome of the application to our satisfaction. So long as we had (in our own estimation) spent enough time on reviewing the relevant papers to form a clear view on the desired outcome, all we needed to do was to check that the Chairman was on the same

page as us, and that his drafts accorded with our views on how the application in question should be disposed of, and why."

"…We also confirm that the draft sent to us was the Chairman's draft decision, regardless of whether the Secretary assisted in drafting duties. It was then our task to independently examine the draft and decide whether to agree to it or to offer amendments (or alternative conclusions) based on our prior reading of the parties' submissions…. The precise point is whether all three members of the Tribunal had examined for themselves the draft prepared by the Chairman, with the assistance of the Secretary, and agreed with the draft. This is what happened."

(3) "[The Claimant] contends that "the time records of the wing members indicate that they cannot have formed any form of ***independent review*** (emphasis added) of the matters in issue and as such were simply "rubber stamping" the decisions of [the Secretary]". This begs the question of what is meant by an "independent review" by [the Co-Arbitrators]. [The Claimant] does not explain why the reviews [the Co-Arbitrators] conducted were not "independent". … In short the fact that we:

(a) appreciated the Chairman's wisdom and experience in articulating what to the three of us were the appropriate decisions to make in respect of the three applications placed before us; and

(b) fully agreed with his conclusions,

does not make us any the less independent"

(4) "This is the last point directed against the wing arbitrators, where [the Claimant] complains we breached our duty not to delegate by:

(a) not sufficiently participating in the decision making process; and

(b) allowing the Tribunal Secretary to exercise substantial influence over the decision

We have in our previous Submissions explained why we did not delegate our essential decision making duties to [the Secretary]… we have in those Submissions …explained why we have sufficiently participated in the decision making process.

We now respond to the charge of allowing the Tribunal Secretary to exercise substantial influence over the decision. We do not accept that [the Secretary] "exercised substantial influence over the decision". We believed that, that while [the Secretary] would have provided assistance to the Chairman in the draft rulings and orders, those drafts had been painstakingly worked out by the Chairman, who would have been ultimately responsible for every word of the drafts. In other words, we considered the drafts as the Chairman's drafts, reflecting his personal view of the substance and wording of each ruling or order, regardless of whatever assistance he may have received. Accordingly while we did ultimately exercise our own independent judgement on each draft

> ruling or order, we dealt with the various drafts on the basis that these were the Chairman's views, and not those of [the Secretary]."

16. In relation to the misdirected email, the Chairman explained the position in a letter dated 8 April 2016 sent on behalf of the Tribunal, as follows:

> "For the sake of completeness however and in order to dispel the "confusion" experienced by [the Claimant's] counsel, it is appropriate to note that the request by the Tribunal Chairman to the Tribunal Secretary encompassed in the misdirected e-mail of 23 March 2016 had been intended simply to elicit from him, on behalf of the Tribunal, a response as to the status of outstanding issues relating to the Tribunal's First, Second and Third decisions on Document Production based on the letter of [the Claimant's] counsel dated 22 March 2016."

17. On 4 August 2016 the LCIA Division issued its decision on the LCIA Challenge. The Division dismissed grounds 1 to 3 and 5 of the Challenge. It upheld ground 4, finding that circumstances existed giving rise to justifiable doubts as to the Chairman's impartiality and revoking his appointment.

18. In relation to grounds 1 and 3 its reasoning was essentially as follows. As to ground 1, it concluded that the tasks undertaken by the Tribunal Secretary were the sort of tasks which it was permissible for him to perform, and that there had been no improper delegation (paragraph 262); and that there was no basis for concluding that the Secretary had been involved in the decision making process or drafting without adequate supervision (paragraphs 263-264). As to ground 3, the Division concluded that the Co-Arbitrators had spent appropriate and proportionate time on each of the Decisions in issue (paragraph 286); that their approach of commenting on drafts prepared by the Chairman was entirely in keeping with the way that arbitral tribunals function; and that the number of hours spent corresponded with the specific nature of the decisions with no indications that they had simply rubber stamped the decisions of the Chairman (paragraph 287).

19. The Fourth Defendant, was appointed as the new Chairman by the LCIA Court on 17 August 2016.

The section 24 challenge

20. On 7 October 2016 the Claimant issued the Arbitration Claim Form seeking the removal of the Co-Arbitrators. The grounds identified are that the Co-Arbitrators have refused and/or failed properly to conduct proceedings by delegating their roles to the Secretary of the Tribunal as set out in more detail in the supporting witness statement of Mr Daele. Those grounds were essentially the same as grounds 1 and 3 which had been rejected by the LCIA Division. Mr Daele's witness statement identified the evidential basis as essentially the same, namely the misdirected email and the analysis of the time spent on the decisions by the Secretary, the Chairman and the Co-Arbitrators respectively as derived from their billings. As to the inference to be drawn from the timesheets, the essence of the

case is set out in paragraphs 25.3 and 59 of Mr Daele's witness statement in the following terms:

> "25.3 The discrepancy between the Co-Arbitrators' time and the Secretary's time is so large that it can only be explained by the members of the Tribunal having delegated their tasks to the Secretary. The three decisions dealt with evidence in this case, and had (and continue to have) a substantial impact on the parties' respective positions and thus the outcome of the dispute. They required the involvement of the Co-Arbitrators in order for a fair decision to be reached.
>
> 59. The failure of the Co-Arbitrators to render their duties personally has frustrated, rather than furthered, the very object of arbitration. In particular the Co-Arbitrators have failed to deal with the issues put to the Tribunal in relation to the three decisions under review, failed to make their own decisions, and failed properly to participate in deliberations of the Tribunal. Instead the Co-Arbitrators effectively passed their pens to the Tribunal Secretary, in breach of their general duties. This causes prejudice which cannot be un-done. The decisions that were sent to the Co-Arbitrators were fully formed before the Co-Arbitrators considered them. They adopted them: they did not make them or properly participate in the discussions which led to them."

21. The Arbitration Claim Form has recently been amended to add an additional ground of misconduct falling within s. 24(1)(d)(i) namely that the Co-Arbitrators "negligently and/or innocently misrepresented to [the Claimant] the position as to the existence and/or nature and/or extent and/or effect of such delegation [of their roles to the Secretary]". Although not set out in the grounds, the misrepresentation is said to be contained in two letters sent by the Chairman on behalf of the Tribunal in April 2016:

    (1) In the numbered paragraph 1 of the letter of 8 April 2016 sent by the Chairman on behalf of the Tribunal, he addressed a request by [the Claimant's] counsel for a detailed description of the tasks delegated by the Tribunal or the Chairman to the Secretary and for all communications which passed between the members of the Tribunal in connection with the role of and the tasks delegated to the Secretary. The letter said "first for the avoidance of any doubt, neither of the Tribunal nor any of its members has "delegated" any functions to the Tribunal Secretary." This is said to be misleading because the Co-Arbitrators' case is that there was no inappropriate delegation of functions rather than no delegation of any functions at all.

    (2) In paragraph 2 of the letter from the Chairman on behalf of the Tribunal to the Claimant of 21 April 2016 the Chairman said "…none of the powers and responsibilities of any of the Members of the Tribunal has been delegated, surrendered or assigned in any way to the Tribunal Secretary, who has functioned entirely within the bounds of the LCIA Arbitration Rules (1998) [and certain identified guidance documents]".

22. The disclosure application with which I am concerned was issued on 8 December 2016. It seeks disclosure by the Co-Arbitrators of the following documents in relation to each of the three Decisions or the drafting thereof:

> "1. Instructions, requests, queries or comments from the Co-Arbitrators (or from [the Chairman] to which the Co-Arbitrators were copied) to the Secretary ("Instruction Emails"). For the avoidance of doubt, Instruction Emails shall not include emails which were copied to the Secretary for information purposes only; and
>
> 1.1.1 (sic) all responses from the Secretary to the Instruction Emails
>
> 2. All communications sent or received by the Co-Arbitrators which relate either:
>
> 1.2.1 to the role of the Secretary; and/or
>
> 1.2.2 to the tasks delegated to the Secretary."

23. At a listing hearing on 13 December 2016, Blair J ordered that the disclosure application should be heard on 20 January 2017, with the substantive s. 24 removal application heard on 3 February 2017, subject to consideration on 20 January as to whether in the light of the outcome of the disclosure application the removal application hearing date should be adjourned. The Claimant seeks an adjournment of that hearing date on the following grounds: if disclosure is ordered, it will not be capable of being provided and digested in time for the orderly conduct of the removal application hearing two weeks later; and if disclosure is not ordered, nevertheless the removal application hearing should await the outcome of an application made in the US in which the Claimant is seeking discovery (in its American sense of production of documents and deposition taking) in aid of the s. 24 application (the "1782 Application").

24. The current state of play in the arbitration is that the substantive hearing to determine the merits of the dispute is due to commence on 20 February 2017. The Claimant unsuccessfully sought a stay from the newly constituted Tribunal pending the resolution of its s. 24 application.

Principles to be applied

25. The researches of counsel have not identified any case in which an arbitrator has been ordered to give disclosure in connection with a removal application under s. 24 of the Act or a challenge to the award under s. 68 of the Act. The parties disagreed as to the relevant principles which should be applied.

26. On behalf of the Claimant, Mr Houseman QC submitted that:

(1) the relevant principles were those governing specific disclosure pursuant to CPR 31.12, from which the Court derived its power to make the order sought in this case;

(2) the documents needed to satisfy a simple test of relevance (i.e. that contained in CPR 31.6);

(3) thereafter the Court had a discretion to order disclosure which was to be exercised in accordance with the overriding objective: 31APD paragraph 5.4;

(4) in so far as the disclosure sought might involve potential revelation of the substance of the deliberations of the Tribunal, practical arrangements could be made by way of redaction; and by resolution of any disputes as to the proper scope of redaction by a judge determining disputes in private under a procedure which could be worked out, so as to maintain confidential from the parties that which genuinely fell within that description; and

(5) the only threshold merits test to be applied was that of a real prospect of success (equivalent to serious issue to be tried); the s. 24 challenge met this test, as a claim brought in good faith and in good standing, there having been no cross-application to strike it out or have it summarily dismissed.

27. On behalf of the Co-Arbitrators, Mr King submitted as follows:

(1) The starting point was the judgment of the Court of Appeal, in its strongest possible constitution, in ***Locabail (UK) Limited v Bayfield Properties Limited*** [2000] QB 451, in which it was stated at paragraph 19 that "there can, however, be no question of cross-examining or seeking disclosure from the judge" in the context of a challenge to a judge's impartiality. In paragraph 3 of the judgment it was made clear that the expression "judge" was intended "to embrace every judicial decision-maker, whether judge, lay justice or juror".

(2) Also of central importance were the terms of Article 30.2 of the applicable LCIA Rules, namely the 1998 version, which provided:

> "The deliberations of the Arbitral Tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26."

[Article 10 provides for revocation of the arbitrator's appointment in circumstances which to a considerable extent overlap with those identified in s. 24 but are narrower. I observe, however, that Article 30.2 does not provide for an incursion into the confidentiality of the deliberations save where the grounds for the revocation are refusal to participate in the arbitration].

(3) The documents which are now being sought, in so far as relevant, fall within the definition of "deliberations" in Article 30.2. Accordingly the parties have validly contracted out of any jurisdiction of the Court to order disclosure by having promised to each other and to the Tribunal that the documents sought would remain confidential.

(4) Alternatively, if the Court has power to order disclosure, it should exercise such power in accordance with the parties' contractual bargain which was that such deliberations should remain confidential.

(5) The position would normally be the same even if an arbitration agreement contained no express provision equivalent to Article 30.2; generally any arbitration agreement would implicitly extend to protecting from disclosure confidential deliberations of the tribunal, by analogy with ***Locabail*** and as a necessary incident of the nature of the arbitral process. There might be exceptional circumstances where this did not apply; if, for example, the parties expressly contracted in the arbitration agreement and/or any contractually adopted rules that such disclosure might be granted, to which the arbitrators agreed, there would remain a jurisdiction to do so.

28. On behalf of the First Defendant, Mr Foxton QC submitted as follows:

(1) Whilst recognising that the effect of ***Locabail*** might be that arbitrators should be treated in exactly the same way as judges and immune from any order for disclosure or cross-examination, he did not invite the Court to proceed on that basis.

(2) However, as a result of the specially sensitive nature of the material sought in this case, the nature of the s. 24 proceedings, and the policy considerations reflected in sections 1, 33, and 40 of the Act, disclosure should only be granted in rare and compelling cases where:

(a) there was a strong prima facia case on the merits of the s. 24 challenge; and

(b) the disclosure was strictly necessary for the fair disposal of the s. 24 application.

29. Three questions fall to be considered:

(1) Should the Court apply a merits threshold in respect of the s. 24 removal application, and if so what should that be?

(2) Should the Court apply a heightened test of relevance, and if so what should it be?

(3) What should be the Court's approach to the exercise of discretion?

Merits threshold

30. When hearing interlocutory applications, the Court sometimes has to form a provisional view of the merits of the claim. It is necessarily provisional because it would be inimical to the overriding objective of speedy justice at proportionate cost to embark on a full investigation of the merits at that stage; and in any event in many cases such an investigation would be impossible or impractical because the process of gathering and deploying evidence in relation to the merits of the substantive dispute is at that stage incomplete. A variety of solutions has been adopted in different contexts.

31. Where a party is seeking permission to serve a claim form out of the jurisdiction, the Court applies the test of serious issue to be tried to the merits of the claim. In this context the test has been equated with the test for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: see ***AK Investment CJSC v Kyrgyz Mobil Tel Limited*** [2011] UKPC 7 at [71]. The Court applies a more stringent test to the question whether the claim falls within one or more classes of case in which permission to serve out may be given, namely that of a good arguable case. In this context "good arguable case" has been said to connote that one side has a much better argument than the other: see ***Canada Trust Co v Stolzenberg (No 2)*** [1998] 1 WLR 547 , 555–7 per Waller LJ, affd [2002] 1 AC 1; ***Bols Distilleries BV v Superior Yacht Services*** [2006] UKPC 45, [2007] 1 WLR 12, [26]-[28]; ***AK Investment*** per Lord Collins at [71].

32. The test of a good arguable case has also been adopted in other contexts, for example where the claimant applies for a freezing order. Although originally adopted as the same test as for service out of the jurisdiction, the jurisprudence has diverged on what is meant by a good arguable case in the two different contexts. For freezing orders a good arguable case is one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50% chance of success: see Mustill J in ***Ninemia Maritime Corp v Trave Schiffartsgesellschaft GmbH (The Niedersachsen)*** [1983] 2 Lloyd's Rep. 600 at 605. This is a lower threshold than for the service out gateways, where a good arguable case with the ***Canada Trust*** gloss requires much the better of the argument.

33. In exercising the *Norwich Pharmacal* jurisdiction for disclosure from non-parties, the Court requires a threshold of an arguable case of wrongdoing, with the strength of the claim above that threshold being a matter which can be taken into account in the exercise of the discretion: ***Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd)*** (in liquidation) [2012] UKSC 55, [2012] 1 W.L.R. 3333.

34. Mr Foxton sought to draw an analogy with cases in which the Court had to consider whether the iniquity exception applied to prevent a party relying on legal professional privilege. In such cases the Court must be satisfied that there is at least a strong prima facie case of iniquity: see ***Kuwait Airways Corpn v Iraqi Airways Co (No 6)*** [2005] 1 WLR 2734 at paragraphs [36] to [38]. The analogy is not one which can be applied to all s. 24 removal applications; such applications need not involve any incursion into the private deliberations of the arbitrators, for example where an application for removal for apparent bias is based on the conduct of the tribunal towards a party at a hearing. But in any event the analogy is not an exact one. Legal professional privilege is absolute, subject to the iniquity exception or waiver. It does not fall to be protected or overridden by the exercise of any discretion in the Court. The existence or absence of iniquity is therefore all that requires to be examined, and if it exists it provides a sufficient key to the door unlocking the privilege. It is therefore appropriate in those circumstances that there should be a substantially enhanced merits threshold in relation to establishing iniquity before the door is unlocked. By contrast, in the context of an application for specific disclosure under CPR Rule 31.12, the Court has a discretion to exercise, in which all the circumstances of the case can be taken into

account, including the nature of the material which is being sought in the exercise of the discretion. For these reasons the nature of the material being sought, even if it includes material relating to the internal deliberations of the tribunal, does not dictate an enhanced merits threshold.

35. The default position in interlocutory applications generally is that the Court does not address the merits of the substantive dispute. They are assumed to meet the minimum threshold which would survive an application for summary judgment or strike out, namely that the claim has a real prospect of success. This is because the party has an opportunity to bring proceedings to a swift conclusion in the case of spurious claims or defences through the process of summary judgment or strike out applications. If he has not done so, the claim or defence is assumed to meet this threshold. The summary judgment procedure is available in arbitration claims, which are brought under Part 8 and Part 62. In the case of applications under s. 68 of the Act to set aside awards for serious irregularity, the grounds of which may sometimes be identical to those which would have supported an application to remove an arbitrator under s. 24, there is a summary procedure for dealing with the matter on paper in accordance with the Commercial Court Guide paragraph O8.8. I see no reason why a similar procedure should not be invoked in appropriate cases for a s. 24 removal application.

36. This default position is that which is normally applied in an application for specific disclosure under CPR Rule 31.12. The proceedings will be on foot without any (successful) summary dismissal application. The Court addresses the relevance of the specific disclosure sought by reference to the issues identified in the statements of case on the hypothesis that the merits on each side of that which is alleged in those statements of case are sufficient to give rise to a real issue to be tried. The disclosure question is addressed to the fair resolution of the issues so identified on the hypothesis that they are sufficiently arguable on both sides.

37. I do not regard it as appropriate to impose some merits threshold imposing a higher standard on an application such as the present. The relevance and nature of the material sought can be taken into account in the exercise of the discretion. So too can the merits of the removal application: a consideration of all the circumstances of the case might lead to the conclusion that whilst disclosure might be justified in support of a very strong case, it would not be justified in support of a very weak one. If the merits of the s. 24 application are something which fall for consideration in the exercise of discretion, they need not provide a threshold for the grant of relief, to be met as a condition, subject to one important caveat.

38. The arbitral context of applications under s. 24 of the Act means that it may not be realistic to expect the respondent to engage the summary procedure for strike out or dismissal. A party faced with an unmeritorious s. 24 application will often not be able to obtain a listing for an application to strike it out or have it summarily dismissed earlier, or significantly earlier, than the listing of the application itself. It is unattractive to such a respondent, and productive of the risk of wasted costs and expense, to make an application for summary dismissal. It will often be more sensible to use the hearing of the s. 24 application itself to seek its dismissal. The default position which applies in court proceedings, which assumes a previous opportunity to make a summary dismissal application, is not entirely analogous. For these reasons there should be imposed on an applicant for interlocutory relief

within a s. 24 application the equivalent merits threshold which would have to be established if facing a summary dismissal application, namely that his s. 24 application has a real prospect of success.

39. In saying that the merits can be taken into account in the exercise of discretion, I do not of course mean to encourage the filing of substantial evidence on the question, or any prolonged investigation of it in evidence or argument. The Court will only go into the merits for these purposes if on a brief examination of the material it can be clearly demonstrated one way or the other that there is a high degree of probability of success or failure; cf ***Porzelack KG v Prorzelack (UK) Ltd*** [1987] 1 WLR 420 per Sir Nicolas Browne-Wilkinson V-C at 423D-F.

Relevance

40. There are a number of reasons why the test should be that proposed by Mr Foxton, namely that the documents sought should be strictly necessary for the fair resolution of the removal application.

41. First, that is the test generally applicable in interlocutory proceedings in court. In ***Fiona Trust Holdings Corporation & others v Uri Privalov & others*** [2007] EWHC 39 (Comm), David Steel J said:

> "25. It is of course open to the court to order disclosure at any stage of the proceedings, including for the purpose of interlocutory proceedings. But it is well established under the previous procedural rules that such a power should be exercised sparingly and only for such documents as can be shown to be necessary for the fair disposal of the application see *Rome v Punjab National Bank* [1989] 2 All England Reports 136. There are no reasons for concluding that any different approach is appropriate under the provisions of CPR: see *Disclosure, Matthews and Malek* 2nd Edition Para 2.68."

42. What Hirst J had said in ***Rome v Punjab National Bank*** was referred to with apparent approval by Millett LJ in ***Canada Trust v Stolzenberg (No 1)*** [1977] 1 WLR 1582 at 1587 D-F.

43. The rationale is that interlocutory proceedings must be conducted in accordance with the overriding objective and that to allow disclosure in support of them carries the risk of disproportionate delay and expense and satellite litigation. Accordingly, it would be a rare case in which disclosure falls within the overriding objective.

44. An application to remove an arbitrator is in substance an interlocutory application. It is procedural, being concerned with the process of how the substantive dispute between the parties is to be resolved, rather than the resolution of the dispute itself. The fact that it falls to be made by originating process in the High Court does not alter its essential character. The Court is exercising its supervisory jurisdiction as the Court of the seat of the arbitration. It does so in order to support the arbitral process. In other words it is assisting the parties by assisting in the determination of the constitution of the tribunal which is to decide their

substantive dispute. The position would be the same if an application were being made for a judge to recuse himself or herself in High Court proceedings.

45. Where the arbitration is institutional, the arbitral process may itself provide a mechanism for removing an arbitrator, as the LCIA Rules do. In this case, the challenge to the tribunal in the LCIA Division was a procedural application in just the same way as is the essentially identical s. 24 application to the Court. The analogy with interlocutory proceedings in the High Court is therefore a sound one.

46. Secondly, the arbitral context requires the disputes be resolved without unnecessary delay or expense and with a minimum of intervention by the Court. The former principle is expressed in s. 1(a), s. 33(1)(b) and s. 40(1) of the Act. The latter is expressed in s. 1(c) of the Act.

47. These twin principles of efficient and speedy finality, and minimum court intervention, dictate that a test of necessity should be applied to disclosure applications in support of arbitration claims. The ordering of disclosure is likely to delay the substantive resolution of the arbitral dispute, or the enforcement of any award, and to increase costs. The whole s. 24 removal process is an intrusion by the courts into the arbitral process, especially in cases such as the present where the arbitral institution, in the form of the LCIA Division, has already considered and ruled on the question. Such a process must be conducted and concluded with the minimum of delay and expense.

48. Thirdly, where disclosure is sought in litigation from non-parties, the test is one of necessity. In *Norwich Pharmacal* proceedings, one of the threshold requirements which needs to be established, as a condition, not as a matter of discretion, is that the disclosure required is necessary: see ***Ashworth Hospital Authority v MGN Limited*** [2002] 1 WLR 2033 per Lord Woolf CJ at [57]; ***R (Omar) v Secretary of State for Foreign and Commonwealth Affairs*** [2014] QB 112 per Maurice Kay LJ at [30]. Disclosure can only be ordered if it is a necessary and proportionate response in all the circumstances, although the necessity test does not require the remedy to be one of last resort (see ***Ashworth*** at [36], [57]; ***R (Mohammed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)*** [2009] 1WLR 2579 at [94]; ***RFU v Consolidated Information*** at paragraph [16]).

49. Similarly CPR Rule 31.17, which provides for applications for disclosure against persons who are not parties to the proceedings, has a test of relevance which imports a test of necessity. Rule 31.17(3) provides:

> "The court may make an order under this rule only where-
>
> (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
>
> (b) disclosure is necessary in order to dispose fairly of the claim or save costs."

50. Both the *Norwich Pharmacal* and CPR Rule 31.17 jurisdictions are concerned with disclosure by non-parties. Arbitrators are not in exactly the same position

because they are parties to any application for their removal under s. 24, pursuant to the requirement in s. 24(5) which entitles an arbitrator to appear and be heard by the court before making an order. Nevertheless, they are very far from being in the normal position of parties to litigation in which an interlocutory application is made. They are not free to respond to the application in the same way as other parties to the application. They remain, pending determination of the removal application, the members of the tribunal who must in the meantime make decisions and continue the arbitral process; and if the application is dismissed, they will remain the tribunal which has to determine the substantive dispute between the parties. They must participate in the removal application, and any disclosure applications, if at all, in a way which maintains fairness and the appearance of impartiality between the parties. It is a familiar, and perhaps increasing, phenomenon for one party to challenge an arbitrator it does not wish to have as part of the tribunal, and to use the challenge, and in particular the arbitrator's response to the challenge, as a ground to support an argument that the relationship between the party and the arbitrator has become adversarial and that removal is justified on that separate ground for apparent bias. Arbitrators are alive to this possibility, and their continuing duty of impartiality and equal treatment enshrined in s. 33 of the Act means that in applications under s. 24, together with any ancillary interlocutory applications, the tribunal has to act to a large extent as if it were not a party. For example, it is difficult to imagine in most cases that the Co-arbitrators could seek to have the s. 24 application summarily dismissed or struck out.

51. Moreover, the grounds of challenge in this case might as easily arise in the course of a s. 68 challenge following the award, or in the context of enforcement. In neither of those circumstances would the arbitrators be parties to the proceedings.

52. For all these reasons arbitrators are sufficiently analogous to non-parties to warrant the imposition of a similar test.

Discretion

53. In any specific disclosure application, the Court will apply the considerations set out in the overriding objective and take into account all the circumstances of the case. There are a number of further important considerations which arise in the present context.

54. First, this is an arbitration claim brought in accordance with the Part 8 procedure as required by Part 62. The Part 8 procedure does not normally contemplate the provision of disclosure. That does not remove the jurisdiction of the Court to grant disclosure in support of arbitration claims. But it is an indication that such disclosure will not normally be appropriate, a conclusion which is reinforced by the principles of efficient and speedy finality and minimum intervention. Accordingly, in the context of arbitration applications, it will only be in exceptional cases that disclosure might be appropriate.

55. Secondly, where there exists an arbitral institution vested by the parties with power to grant the disclosure, and it has declined to do so, the Court should be reluctant itself to order disclosure. This follows from the principle of minimum

intervention; and from the principle of party autonomy enshrined in s. 1(b) of the Act. It mirrors s. 24(2) of the Act, which provides:

> "If there is an arbitral or other institutional person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person."

56. The Report on the Arbitration Bill by the Departmental Advisory Committee of February 1996 ("the DAC Report") said at paragraph 107:

> "We have also made the exhaustion of any arbitral process for challenging an arbitrator a pre-condition of the right to apply to the Court. Again it would be a very rare case indeed where the Court will remove an arbitrator notwithstanding that that process has reached a different conclusion."

57. The same principle should apply where there is an arbitral process for disclosure in support of the challenge and the arbitral institution has reached a conclusion on that issue.

58. Thirdly, for the reasons discussed earlier in this judgment, the merits of the s. 24 application may have a bearing on whether disclosure should be ordered. Disclosure in favour of a very strong claim may potentially justify disclosure with attendant additional costs and expense where it would not be justified in support of a weak claim.

59. Fourthly, it can only be in the very rarest of cases, if ever, that arbitrators should be required to give disclosure. ***Locabail*** establishes that a judge is immune from such disclosure. The immunity extends to any documents, not merely those which might properly be categorised as "deliberations" in the sense that expression is used in the LCIA Article 30.2, although the latter expression is to be widely construed. The immunity extends to all professional and lay adjudicators.

60. The policy reasons are obvious. All adjudicating functions need to be conducted in confidentiality from the sight of the parties if they are to be carried out with the freedom which is necessary for what is typically an iterative process. Adjudicatory conclusions rarely emerge fully formed, as Athena from the head of Zeus. They often involve a process of consideration and deliberation in which reasoning, and sometimes conclusions, will shift. Moreover, where the tribunal consists of more than one person, the process requires discussion and openness to the views of others. If a judge or member of a tribunal creates a document in the course of the process of adjudication and for that purpose, the fact and content of the document are part of the adjudicatory process and the judge should not feel constrained in performing that function by fear that the document might be disclosed to the parties. Such a fear would inhibit proper deliberation and strike at the heart of the adjudicatory process. The judge must be free to explore lines of thought which may ultimately prove fruitless if he is to have the opportunity for mature reflection which is most calculated to produce the just result. It is the outcome of the process to which the parties are entitled to be given access. The

process itself has to be a private and confidential function in the interests of doing justice.

61. This applies as much to documents which come into existence to record or reflect what is not confidential between the parties as it does to other documents. If a judge makes a note of evidence, or of argument, or marks or writes on, or summarises, a document, or arranges documents or files in a particular way whether on paper or electronically, these are all materials brought into existence for the purposes of the adjudicatory function. Again it would inhibit the proper performance of the function if such documents were potentially open to inspection by the parties.

62. Arbitrators are in no different a position in this respect from judges. In ***K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd*** [1992] 1 QB 863, Sir Nicholas Browne-Wilkinson V-C said at p885 A-C:

> "The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract: see *Compagnie Europeene de Cereals S. A. v. Tradax Export S.A.* [1986] 2 Lloyd's Rep. 301. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status."

63. These objections to disclosure of documents created by any adjudicator, including an arbitrator, are reinforced by the fact that such documents will often not give the complete picture. Context is important. There may often be oral communications or other circumstances which it is necessary to understand in order for the documents themselves properly to be understood. This would require oral evidence to be given by those exercising an adjudicative function about that very exercise. The many objections to such a course were articulated by Mr Eadie as amicus curiae in ***Facey v Midas Retail Ltd*** [2001] ICR 287 at 300 D-E. If judges were required to give evidence there would be a new form of satellite litigation; it would be difficult to control cross-examination; judges would be taken away from their other tasks; proceedings would be delayed or disrupted and finality would be harder to achieve; it would be a disincentive to membership of the Bench or tribunals; the dignity of the judge or tribunal would be harmed. Moreover it would be very difficult for an arbitrator to maintain an appearance of impartiality in the context of hostile cross-examination, thus allowing any unmeritorious challenge to pull itself up by its bootstraps.

64. The potential damage which ordering disclosure might do more widely to international arbitration as a whole must also be taken into account. If arbitrators felt that their internal documents and communications were likely to be disclosed by court order to one of the parties, it would have an inhibiting effect both on their willingness to serve on tribunals, and on their ability properly to conduct their adjudicative functions. The chilling effect of the risk of having those documents

subsequently revealed to the parties is a real one. It would likely cause an increased tendency towards oral communication and incentivise arbitrators not to record anything in documents. Such an approach would itself tend to undermine the efficacy of the process.

65. These policy considerations are reinforced by the consensual nature of arbitration and the tripartite agreement between the parties and the tribunal governing confidentiality which is contained in arbitral rules. Article 30.2 of the LCIA Rules has been quoted above. Similar provisions are to be found in other arbitral rules. Among them are the following:

    (1) LCIA Rules, Art. 30.2 (Current Edition): *"The deliberations of the Arbitral Tribunal shall remain confidential to its in members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26 and 27."*

    (2) ICDR Rules, Art. 37: "*[U]nless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award."*

    (3) ICSID Arbitration Rules, Art. 15:"*(1) The deliberations of the Tribunal shall take place in private and remain secret. (2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise."*

    (4) 2012 Swiss Arbitration Rules, Art. 44(2):"*The deliberations of the arbitral tribunal are confidential."*

    (5) 2013 HKIAC Arbitration Rules, Art. 42(4): "*The deliberations of the arbitral tribunal are confidential."*

    (6) 2016 SIAC Arbitration Rules, Art 39:"*The discussions and deliberations of the Tribunal shall be confidential."*

    (7) New French Civil Code, Art 1469: *"Les délibérations des arbitres sont secretes."*

66. I am unable to accept Mr King's submission that the effect of Article 30.2 of the 1998 edition of the Rules, being those applicable to this dispute, is to deprive the Court of jurisdiction to order disclosure. In my judgement the article is to be interpreted as being subject to the applicable law of the courts of the seat of the arbitration. In other words that which is made express in the added words "save as required by any applicable law" in the more recent edition of the Rules is implicit in Article 30.2 of the 1998 edition and would be implicit in any general agreement that the deliberations of the arbitrators are to be confidential. By agreeing to arbitration the parties implicitly agree to the supervisory jurisdiction of the courts of the seat of the arbitration and to the applicable provisions of the law of such courts. If that law provides a power to order disclosure, the parties' agreement to arbitrate within the jurisdictional scope of those courts includes an agreement that the courts may exercise such powers as they possesses in appropriate cases.

67. Nevertheless Mr King's alternative submission is sound. Where the parties have agreed that documents should remain confidential to the arbitrators, the Court should normally give effect to that agreement. This accords with the principle of party autonomy and minimum court intervention enshrined in the Act. The position is in some respects analogous to that where parties have reached an agreement as to how costs are to be allocated: the Court has jurisdiction to make a different order, but ordinarily the discretion should be exercised to give effect to the parties' agreement: see ***Gomba Holdings (UK) Ltd v Minories Finance Limited*** [1993] Ch. 171 at 193 to 194.

Conclusion on the applicable principles

68. Drawing the threads together, the following principles apply to disclosure applications in support of relief sought in an Arbitration Claim to the Court:

(1) The applicant must establish that the Arbitration Claim has a real prospect of success. Provided such threshold is met, the merits of the Arbitration Claim, insofar as they are capable of assessment on an interlocutory basis, are a matter to be taken into account in the exercise of discretion; however the Court will only go into the merits for these purposes if on a brief examination of the material it can be clearly demonstrated one way or the other that there is a high degree of probability of success or failure.

(2) The documents sought must be shown to be strictly necessary for the fair disposal of the Arbitration Claim.

(3) In exercising its discretion the Court will have regard to the overriding objective and all the circumstances of the case, but will have particular regard to the following considerations in the arbitral context:

(a) the Court will not normally order disclosure in support of Arbitration Claims because it will usually be inimical to the principles of efficient and speedy finality and minimum court intervention which underpin the Act;

(b) where there exists an arbitral institution vested by the parties with power to grant disclosure, and it has declined to do so, the Court will not normally order disclosure;

(c) the Court will not normally order disclosure of documents which the parties have expressly or implicitly agreed with each other and/or the tribunal should remain confidential;

(d) it will only be in the very rarest of cases, if ever, that arbitrators will be required to give disclosure of documents; it would require the most compelling reasons and exceptional circumstances for such an order to be made, if ever.

Applications of the principles

69. Leaving aside any consideration of the merits of the s. 24 application, on which I express no view, it is apparent that the Claimant does not fulfil the criteria necessary for disclosure in this case.

70. The documents sought are not strictly necessary for a fair determination of the application. The Court can and will decide the application on the basis of the available material in the same way as any other interlocutory application. Section 24 claims are regularly concluded without such disclosure, as are equivalent claims under s. 68 of the Act. Recusal applications to judges are determined without material from the judge.

71. This is not a wholly exceptional and very rare case in which there are compelling reasons to grant disclosure of material by arbitrators. What is sought would amount to disclosure of the confidential deliberations of the tribunal which is impermissible both under the *Locabail* principle and under the parties' agreement contained within Article 30.2 of the LCIA Rules.

72. Mr Houseman argued that there was a distinction to be drawn between documents which revealed the process of the decision-making, and those which went to the substance of the decision-making; and that "deliberations" in Article 30, and the scope of the *Locabail* principle, applied only to the latter and not to the former. I do not consider that there is any such distinction which can properly be drawn. All communications for the purposes of the process of deliberation, or documents which are brought into existence for such purpose, form part of the deliberations. All require protection from sight by the parties. The way in which the adjudicating body goes about making its decisions is as much part of the decision-making function as the substance of the decision and the discussion of the outcome of any application concerned. If the tribunal communicate to agree a date on which they will meet, or when they will address submissions, or who will play what part in the process, those all form part and parcel of the deliberations.

73. Mr Houseman submitted that the material of which disclosure was being sought was relevant and necessary to the s. 24 application because it would cast light on how the three Decisions were made. If that is so, it emphasises the impermissible nature of what is being sought. In paragraph 26 of Mr Daele's third witness statement, he gave an example of material which he submitted ought to be disclosed and which would not amount to deliberations:

> "For example, who produced the first draft of the Decision and how long was it? Was it that the Secretary prepared the first draft of a Decision and it was 90% [of] the length of the final Decision indicating that it was the Secretary, rather than the Tribunal members who considered the parties' submissions and drafted the Decision? By way of further example who responded and how quickly thereafter? Upon receipt of the draft Decision, did the Co-Arbitrators respond within a very short time frame indicating that they could not properly have considered the draft Decision?"

74. The answers to these questions are all part of the deliberation process of the arbitrators and are protected by the *Locabail* principle and by Article 30.2 of the LCIA Rules.

75. Mr Houseman submitted that there must be at least some communications which are being sought which do not come within the scope of the *Locabail* principle or Article 30.2, because the explanation for the misdirected email was that it was merely a request for a status update. The fallacy in this submission is to treat such a request, if that is what it was, as not being part of the Tribunal's deliberations. It is part of the process of those deliberations, all of which should be immune from disclosure.

76. It is of course possible that there were communications between the arbitrators which did not form any part of their adjudicatory function. Mr Foxton gave as a hypothetical example an email in which they agreed to meet for a dinner following publication of the award. However no such documents could have any relevance to the issues which arise on the s. 24 application. There are no documents which are (a) potentially relevant but (b) outside the scope of what is immune from production under the *Locabail* principle and Article 30.2. I pressed Mr Houseman in argument to identify any such type or class of document, and he was unable to do so without drawing what I have explained to be an illegitimate distinction between process and content.

77. Accordingly the disclosure application will be dismissed.

Adjournment

78. I can deal briefly with the Claimant's request that the hearing of the removal application be adjourned from its current listing on 3 February 2017 because of the existence of the 1782 Application.

79. It would not be appropriate to delay the resolution of the removal application before this Court to await the outcome of the 1782 Application, or the disclosure of any documents or deposition process pursuant thereto if ordered. The substantive hearing in the arbitration is listed for 20 February 2017. It is important that the removal application be determined before then. This court has decided, for the reasons given, that the documents which are being sought are neither necessary nor appropriate for the resolution of the removal application.

80. It would therefore be illogical, and contrary to the principle of efficient and speedy finality, for there to be any delay in the resolution of the removal application by virtue of the 1782 Application. The documents which are being sought are not necessarily identical to those which were being sought from this Court, because of the difference in the custodians, but what I have said about the documents sought from this Court applies with equal force to this Court's view of the documents sought in the 1782 Application. Of course it is a matter for the US District Court to consider the merits of that application; but insofar as it is exercising a jurisdiction to assist and support the English Court in determining the s. 24 application, it will not be providing any relevant assistance or support by ordering disclosure of the documents. Accordingly an adjournment is inappropriate.