Neutral Citation Number: [2014] EWHC 68 (Comm)

Case No: 2013 FOLIO 1156

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 27/01/2014

Before :

MR. JUSTICE TEARE

- -

Between :

Interprods Limited	**Applicant**
- and -	
De La Rue International Limited	**Respondent**

- -
- -

Zoë O'Sullivan (instructed by **Mishcon de Reya**) for the **Applicant**
Huw Davies QC and Siddharth Dhar (instructed by **Clyde & Co**) for the **Respondent**

Hearing dates: 16 January 2014

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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.

.....

THE HONOURABLE MR. JUSTICE TEARE

Mr. Justice Teare :

1. The Applicant, ("Interprods"), is a Nigerian company which, for many years, acted as an agent and distributor in Nigeria for the Respondent, ("De la Rue"), the well-known supplier of bank notes, in return for the payment of commission. They fell into dispute and on 24 March 2011 had a meeting at which, according to De La Rue, Mr. Akeju on behalf of Interprods stated that the commission paid to it would be used to bribe and corrupt Nigerian officials. De La Rue therefore terminated the agency agreements between the parties on 21 September 2011 and, on 23 November 2011, commenced an LCIA arbitration seeking a declaration that it was entitled to and had terminated the agency agreement and that it was not obliged to pay any further commission to Interprods. By an award dated 3 July 2013 the arbitrator dealt with two preliminary issues. He held that Mr. Akeju had stated that he needed the commission to pay bribes and that in consequence De La Rue had been entitled to terminate the agency agreement and was not obliged to pay any otherwise outstanding commission to Interprods.

2. Interprods has not sought to appeal this decision pursuant to section 69 of the Arbitration Act 1996 but has sought to challenge it by saying that the arbitrator lacked jurisdiction to make the award in question pursuant to section 67 of the Arbitration Act 1996 and that there were serious irregularities in the making of the award pursuant to section 68 of the Arbitration Act 1996.

<u>The challenge to the jurisdiction of the arbitrator</u>

3. Interprods' challenge to the jurisdiction of the arbitrator can be dealt with relatively shortly.

4. The agency agreements in question were known as the Currency Agency Agreement ("the CAA") and the Cash Processing Solutions Agreement ("the CPSA"). Clause 25 of the CAA and CPSA provided as follows:

> "Any dispute arising out of in connection with this contract, including any question regarding its existence, validity or termination, shall in the first instance be referred to mediation. Should mediation fail, the matter will be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause."

5. Although there was a dispute as to whether one of these agreements had ever bound De La Rue there was no dispute at the hearing of this application that the arbitrator's jurisdiction depended upon the true construction of clause 25 save to the extent that the arbitrator's jurisdiction was limited by the terms of the correspondence between the parties prior to the appointment of the arbitrator.

6. Interprods' argument, as set out in counsel's skeleton argument, is that

> "the allegation that Mr. Akeju admitted bribery (which would be a criminal offence under the law of both England and Nigeria) does not arise out of or in connection with the Agency

> Agreements. The court should not construe the clause as extending to allegations of serious criminal conduct."

7. It is now well established that arbitration clauses such as clause 25 of the agency agreements in this case should be construed upon the assumption that the parties, as rational business men, were likely to have intended that any dispute arising out of the relationship into which they had entered was to be decided by the same tribunal unless the language of the clause made it clear that certain questions were intended to be excluded from the tribunal's jurisdiction; see *Fiona Trust and Holding Corporation and others v Privalov and others* [2007] 4 AER 951 at para.13 per Lord Hoffman. The declaratory relief sought by De La Rue from the arbitration tribunal was that it had lawfully terminated the agency agreements and was not obliged to pay any further commission. The claim for such relief is a dispute arising out of or in connection with the agency agreements. The fact that the reason why the agreements were terminated and the reason why De La Rue is said no longer to be obliged to pay commission under them is an alleged admission on behalf of Interprods that it intended to use the commission for a criminal purpose does not lead to any contrary conclusion. Illegality in the performance of a contractual obligation is often alleged to be a reason why a contract cannot be enforced. It would seriously restrict the ambit of arbitration clauses phrased in terms such as clause 25 of the agency agreements were the allegation of criminal conduct to be sufficient to deprive the arbitral tribunal of jurisdiction to determine the contractual rights and obligations in the light of that criminal conduct. If it were sufficient to do so the arbitral tribunal would have jurisdiction to deal with only some, but not all, contractual disputes. That is not an intention to be attributed to the parties unless there are words in clause 25 which show that contractual disputes which are dependent upon an assertion of criminal conduct are to be excluded from the jurisdiction of the arbitral tribunal. Clause 25 does not contain words which make it clear that allegations of criminal conduct which are said to be relevant to the contractual obligations of the parties to each other are to be excluded from the jurisdiction of the arbitral tribunal. Accordingly, the jurisdiction of the arbitral tribunal must apply to the present dispute.

8. Counsel for Interprods sought to resist this conclusion by emphasising that the allegation made against Interprods was one of very serious criminal conduct and that the parties cannot have intended that such allegations should be the subject of arbitration. But for the reasons I have given I must disagree. Such an approach is inconsistent with the approach of the House of Lords in *Fiona Trust.* In addition it is to be noted that clause 9.2.3 of the agency agreements expressly contemplates that De La Rue may terminate the agreement if Interprods commits "any criminal offence". This makes it even more unlikely that the parties intended that where the contract was terminated on the grounds that a criminal offence had been committed the dispute should not be referred to arbitration.

9. Counsel's further argument was that

> "the scope of Interprods' submission to arbitration is limited by the express distinction made by it in its letter of 15 November 2011 between issues arising out of non-fulfilment by De La Rue of its obligations under the Agency Agreements and the allegations of bribery."

10. This argument requires consideration of the correspondence passing between the parties between 4 and 15 November 2011, that is, after De La Rue's termination of the agency agreements and the failure of mediation in September and October 2011 and before the reference to arbitration on 23 November 2011. I shall summarise that correspondence as shortly as is possible.

11. On 4 November 2011 Interprods requested that the parties proceed to arbitration. On 14 November De La Rue agreed but suggested that the parties agree to arbitration under the LCIA rules. On 15 November Interprods agreed to commence the process immediately. Interprods then noted its "two key petitions" as follows:

> "(i) Non-fulfilment of Delarue's part of the Agency Agreement on Currency and delay in meeting due obligations on the Cash Processing Agreement. These issues are for arbitration as agreed.
>
> (ii) The attempt by Delarue to induce us into official corruption through request for payment via the company's payments agent with shady bank account operations in Jersey Island needs to be addressed conclusively. …….
>
> As these two cases, though related, are separate in nature, they would need to be treated as such. Prompt action can be taken on either of them first, to provide a resolution for the other. ……
>
> We trust that you will agree with this process and with your consent as such, we will commence appropriate action as outlined in due course."

12. In the event it was De La Rue who commenced the arbitration process, seeking a declaration that it was not obliged to pay any outstanding commission to Interprods. Submissions were exchanged on the scope of the arbitrator's jurisdiction and pleadings on the merits of the dispute were exchanged between March and August 2012. In its Defence Interprods said that the scope of the arbitration extended no further than was necessary to resolve the contractual dispute between the parties arising and that "no issues of criminal liability on the part of either party can be determined in this arbitration." Subject to that reservation the pleadings dealt in terms with the question whether Interprods had admitted that the commission was to be used to pay bribes and whether, in those circumstances, De La Rue was excused from liability to pay commission.

13. Counsel for Interprods submitted that a clear distinction was drawn by Interprods in its letter dated 15 November 2011 between contractual disputes and allegations of bribery and that only the former were to be referred to arbitration. I am unable to accept that submission. The letter from Interprods agreed to refer to arbitration Interprods' claim to commission. De La Rue had denied liability to pay commission, first, on the ground that the agency agreement relied upon was not one to which it had agreed and, second, on the ground that it had in any event terminated the agreement on the grounds of Interprods' admission of bribery. If the claim is referred to arbitration so must the defences to that claim. The natural construction of Interprods'

letter therefore is that both the claim to commission and the defences to that claim had been referred to arbitration.

14. Further, the second "key petition" in the letter made no reference to the alleged admission by Interprods that the commission it received from De La Rue was to be used to bribe Nigerian officials. The allegations of corruption to which it referred expressly were against De La Rue in connection with bank accounts in Jersey. It may be (though this is not entirely clear) that the true construction of the letter is that those allegations were not to be referred to arbitration. But if this is right it does not assist Interprods' argument because the second "key petition" makes no reference to Interprods' admission that it intended to use the commission to bribe Nigerian officials.

15. I must therefore reject Interprods' submission that its letter dated 15 November 2011 excluded from the scope of the arbitrator's jurisdiction the question whether any obligation of De La Rue to pay commission had been lawfully terminated by De La Rue on account of an alleged admission by Interprods that it intended to use the commission to bribe Nigerian officials.

16. De La Rue's argument that Interprods had waived any jurisdictional objection does not therefore arise. But if it were necessary to consider it I would not have held that Interprods had, independently of clause 25 and the correspondence of November 2011, submitted to the jurisdiction of the arbitrator in respect of De La Rue's claim that it had lawfully terminated the agency agreements on the grounds of Interprods' admission concerning bribery of Nigerian officials. The suggestion was that such a submission necessarily arises from the exchange of pleadings in 2012 in the course of which both parties locked horns on the issue in question. But Interprods' Defence stated expressly that "no issues of criminal liability on the part of either party can be determined in this arbitration." It was said that this merely stated that the arbitrator could not determine issues of criminal liability as opposed to determining the contractual rights and obligations of the parties on the basis of such facts and matters as the parties proved on the balance of probabilities. If that were the true construction of the disclaimer it would add nothing to what would ordinarily be the case. I therefore consider that the disclaimer was intended to preserve, and is reasonably to be understood as preserving, Interprods' argument on jurisdiction which it has advanced on this application.

<u>The section 68 challenge</u>

17. Counsel for Interprods submitted that the arbitrator had committed three serious irregularities in the conduct of the reference such that his award should be set aside pursuant to section 68 of the Arbitration Act 1996.

18. It was common ground that the case law as to the type of irregularity covered by section 68 was fairly summarised by Popplewell J. in *Terna Bahrain Holding Company v Ali Marzook Al Bin Kamil Al Shamsi and others* [2012] EWHC 3283 at paragraph 85 where he said:

> "(1) In order to make out a case for the Court's intervention under s. 68(2)(a), the applicant must show:

(a) a breach of s. 33 of the Act; i.e. that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;

(b) amounting to a serious irregularity;

(c) giving rise to substantial injustice.

(2) The test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.

(3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court's intervention. Relief under s. 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably be expected from the arbitral process, that justice calls out for it to be corrected.

(4) There will generally be a breach of s.33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.

(5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of s. 33 or a serious irregularity.

(6) The requirement of substantial injustice is additional to that of a serious irregularity, and the applicant must establish both.

(7) In determining whether there has been substantial injustice, the Court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the claimant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

19. The first suggested irregularity arises out of the circumstances in which the arbitrator decided to conduct a telephone hearing on 25 February 2013 (to fix a date for the hearing of the two preliminary issues) and made an order resulting from it that the two preliminary issues be heard in May 2013. It is said that such conduct was a breach of the arbitrator's duty to act fairly and impartially between the parties and as a result Interprods suffered substantial injustice in that it was deprived of an oral hearing at which it could test the evidence of De La Rue's witnesses.

20. I shall recount the material events, albeit in summary form:

i) On 11 July 2012 De La Rue suggested that two preliminary issues be determined; (i) whether Interprods had admitted bribery, or an intention to commit bribery and (ii) what the consequence of such admissions was on De La Rue's liability to pay commission.

ii) On 23 July and 17 August 2012 Interprods opposed the determination of the two preliminary issues (and, it may be noted, did not suggest that the arbitrator had no jurisdiction to determine them).

iii) On 17 August 2012 the arbitrator agreed to hear the preliminary issues. He noted that the "matter has dragged far too long" and suggested a hearing on 29 and 30 October 2012. In the event a hearing on 5 and 6 November 2012 was fixed.

iv) Interprods changed its legal representation and sought an adjournment of the hearing. On 2 November 2012 the arbitrator adjourned the hearing until February 2013 on terms that Interprods transferred £60,000 to the LCIA to be applied against De La Rue's costs resulting from the adjournment. In the event the adjourned hearing was fixed for 12 and 13 March 2013.

v) On 14 January 2013 Interprods' legal representative informed the arbitrator that he had not been put in funds by Interprods and so was unable to prepare evidence and submissions. A further adjournment was sought by Interprods and on 5 February 2013 De La Rue agreed to an adjournment because "it was of the utmost importance that the [Applicant] is properly legally represented." It was suggested that a new hearing date be fixed as soon as possible. The arbitrator agreed to adjourn the hearing.

vi) On 14 February 2013 De La Rue suggested a revised hearing date of May, June or September 2013 and that a telephone conference should take place in the following week to fix the date. The arbitrator suggested 25 or 26 February and, on 18 February, asked Interprods' legal representative to confirm his availability.

vii) On 21 February 2013 Interprods itself (not its legal representative) informed the arbitrator that "the management" of Interprods was "currently out of Nigeria", that "the management" would be back in Nigeria in the first week in March and "will respond properly to issues in view promptly in the week beginning Monday 11 March 2013." It was said the only realistic date for a hearing was June 2013.

viii) On Friday 22 February the arbitrator replied as follows:

> "This matter has been too long delayed, in large part by Interprods' serial change of lawyers. It is time to set (re-set) hearing dates. Interprods has a lawyer of record, Professor Oditah. It can either instruct him to represent it on Monday's conference call [25 February], choose a new lawyer to do so, or represent itself with a person it authorises to do so. Wherever Interprods' responsible executives may be in the world, modern communications permit them to participate in the conference call. I look forward to Interprods' participation."

ix) On Saturday 23 February 2013 Interprods replied to the arbitrator in a long email. It said that with management overseas it was "not possible for Interprods' management, now abroad, to participate or issue instructions without adequate notice and consultation for a teleconferencing programme. It would obviously be disadvantageous." Interprods said that it could participate "with due legal representation" at a teleconference in two weeks' time which would be "at least three months to the new dates of hearing proposed by Delarue and agreed to by Interprods and the Tribunal for June or September 2003." The email then said:

> "Suggestions repeatedly made to choose counsel for Interprods or ask Interprods to continue with the matter without a counsel are beyond the duty and fair neutrality expected in this matter….Any date fixed without an agreement by Interprods in good and reasonable time in view of the agreed adjournment dates in June and September will amount to an unjust coalition of [De La Rue] and the tribunal against [Interprods]……..We strongly submit that the 25 February is not okay for Interprods as a company based overseas and currently out of base to participate in any short notice telephone conference on this matter, until we have taken due legal advise. We seriously urge the tribunal to dispassionately consider a new and fair date to both parties from 11 March 2013……."

x) The arbitrator replied later that day as follows:

> "The point of the telephone call on 25 February is to set the dates for the hearing - a hearing which has been far too long delayed. It is not too much to ask both parties now for simple submissions on the dates they favour, to attempt to find mutually agreed-upon dates, and failing that, to set dates that are, in the opinion of the Tribunal, fair and adequate. In these days of instant telephone and email communications, it is not too much to ask the parties to instruct someone to participate in a conference to address this simple question. I look forward to having Interprods' participation in the conference call to assist me in making this decision. Failing

that participation, I will have to make my decision on the basis of the information I have then available."

xi) In the event the conference call took place on 25 February 2013 without any participation by or on behalf of Interprods. The arbitrator gave two options for a hearing date, either 6-7 May 2013 or 13-14 May 2013, with Interprods free to choose one of them. If Interprods made no choice then the date would be 6-7 May.

xii) On 8 March 2013 Interprods protested at the arbitrator's behaviour and said that it had no longer had confidence in the tribunal. The LCIA appointed Dr. Sekolec, a vice-president of the LCIA, to consider Interprods' protest. By a decision dated 22 April 2013 he rejected the challenge.

xiii) The hearing before the arbitrator went ahead on 7 May 2013 in the absence of Interprods. There is no evidence explaining why Interprods did not appear at the hearing. Mr. Daele, a solicitor acting on behalf of Interprods, has merely said that no representatives of Interprods were able to attend the hearing on 7 May. Whilst I do not doubt that these were Mr. Daele's instructions, the absence of any particular explanation for Interprods' failure to attend the hearing strongly suggests that Interprods chose not to attend. Interprods was able to forward a witness statement from its CEO to the arbitrator on the eve of the hearing. It did not suggest any reason why Interprods was unable to be represented at the hearing.

21. The decision of the arbitrator to proceed with the conference call on 25 February 2013 to fix a date for the hearing of the two preliminary issues in the absence of Interprods is said to be a serious irregularity in that it was a failure to act fairly and impartially as between the parties in breach of the arbitrator's duty pursuant to section 33 of the Arbitration Act 1996.

22. The arbitrator's decision to proceed with the conference call in the absence of Interprods was, in my judgment, a robust but fair decision. The subject of the conference call was to fix a date for the adjourned hearing of the preliminary issues. The arbitrator had already determined to hear the preliminary issues, after considering submissions by both sides. He had twice before fixed dates for a 2 day hearing, the first in November 2012 and the second in March 2013. One side had suggested a new date for May, June or September 2013 and the other had suggested a date no earlier than June 2013. The matter to be discussed was therefore rightly described by the arbitrator as "simple". The arbitrator was of the view that it ought to have been possible for Interprods' existing legal representative or another legal representative to attend the conference call, or indeed for Interprods to represent itself by someone authorised to do so. In Interprods' response of 23 February 2013 no clear reason was given as to why that was not possible. Indeed, it seems to me that the author of that response, described as a corporate affairs executive, could have participated in the conference call, given that the only matter to be discussed was the date of the preliminary issue hearing, a matter which (it would appear from his email of 21 February) he had already discussed with "the management."

23. I am therefore unable to accept the submission that by holding the 25 February 2013 conference call in the absence of Interprods the arbitrator had committed any

irregularity. The ruling he made as to the date of the hearing was equally not an irregularity, albeit that it was made without Interprods' participation in the conference call.

24. In any event the arbitrator's conduct can hardly be described as so far removed from what could reasonably be expected from the arbitral process that justice calls out for it to be corrected.

25. The second suggested irregularity arises from the circumstance that the arbitrator, subsequent to his appointment as arbitrator in this case by the LCIA, had been appointed arbitrator in two other cases where one of the parties was represented by Clyde and Co., as was De La Rue. The arbitrator disclosed this on 11 April 2013 to Dr. Sekolec. He had not disclosed it before. It was submitted on behalf of Interprods that these matters gave rise to apparent bias such that the arbitrator was unable to act impartially between the parties in breach of section 33 of the Arbitration Act 1996.

26. The test for apparent bias is whether "the fair-minded and informed observer, having considered the relevant facts, would conclude that there is a real possibility that the tribunal was biased" (see *Porter v Magill* [2001] UKHL 67). It was stressed that no actual bias was alleged.

27. In applying that test I have noted the observations of Flaux J. in *A v B* [2011] 2 Lloyd's Reports 591 at paragraphs 21-29. Flaux J. said (i) that the test was objective and was not dependent upon the characteristics or nationalities of the parties, (ii) that the fair-minded observer is assumed to be in possession of all the facts which bear on the question whether there was a real possibility of bias and (iii) that although the fair minded observer is not to be regarded as a lawyer he is expected to be aware of the way in which the legal profession in this country operates in practice. It is also to be noted from Lord Hope's judgment in *Helow v Sec.of State for the Home Department* [2008] 1 WLR 2416 that the fair minded and informed observer is not unduly sensitive or suspicious and takes a balanced approach putting matters in their context.

28. It is common ground that the arbitrator was appointed in the instant case and in the two later cases by the LCIA. He was not appointed by Clyde and Co. The question is whether, by reason of the circumstance that the arbitrator was also an arbitrator in two further cases where a party was represented by the same solicitors who act for De La Rue, a fair minded and informed observer would conclude that there was a real possibility of bias in that the "arbitrator thus acquired familiarity with Clyde and Co. and may have been unconsciously influenced by a hope of being appointed by them in other arbitrations in such a way as to lead him to regard their client's case with greater favour than he might otherwise have done."

29. In my judgment only the most suspicious of observers might conclude that there was a possibility of such bias. The fair minded and informed observer is not unduly suspicious. Mr. Paul Hannon, the arbitrator in this case, is a London-based international commercial arbitrator. He is an Irish national with American and French legal qualifications and extensive experience in business both as a practising lawyer and as a business executive. He is a member of the Board of Directors and a former Vice-President of the LCIA. He has acted as chairman, sole arbitrator, party appointed arbitrator and advocate in more than 60 arbitrations conducted under the rules of the ICC, the ICDR, the LCIA and other rules. Since Clyde and Co. is a well known

solicitor which acts in many arbitrations in London the arbitrator would, I accept, be alive to the possibility that Clyde and Co. might, if they were satisfied with his work as an arbitrator, seek to procure his appointment in further arbitrations. But the same can be said of any arbitrator who is appointed in an arbitration where one or both of the parties has instructed a solicitor with a well-known presence in London arbitration. It is, in my judgment, an unjustifiable submission that that fact would cause the fair-minded and informed observer to conclude that there was a real possibility of bias.

30. I was referred by counsel for Interprods to an LCIA decision on a challenge to an arbitrator on the grounds of apparent bias reported in Arbitration International 2011 at p.442. But the approach of the LCIA in that case supports, rather than opposes, the conclusion which I have reached. The LCIA considered that the fact that an arbitrator was regularly nominated (by different arbitral parties) on the recommendation of the same counsel or the same firm of solicitors ought not of itself to give rise to justifiable doubts as to his independence and impartiality; see para.4.6. Other factors might give rise to such doubts (as was the case in the reported LCIA case where the arbitrator had a barrister/client relationship with one of the parties) but there were no such other factors in the present case.

31. I am therefore unable to accept the submission that the arbitrator gave the appearance of bias and had thereby committed a serious irregularity.

32. The third suggested serious irregularity concerned the manner in which the arbitrator conducted the hearing on 7 May 2013. I shall first summarise what took place at the hearing and how the arbitrator reached his conclusions.

i) At the hearing De La Rue was represented by leading counsel. Interprods was not represented but had sent an email, containing a statement, to the arbitrator.

ii) The arbitrator was informed that counsel intended to call oral evidence and commented as follows:

> "I would appreciate it, seeing as there will not be the cut and thrust of cross-examination, if you, sir, will lead him through some of his testimony so that the record is quite clear."

iii) The witnesses were sworn.

iv) Mr. Denham, who took notes at the meeting on 24 March 2011, gave evidence. He confirmed that the contents of his statement were true and then was examined in chief as to the meeting on 24 March 2011 and the notes he took. At the end of his examination in chief the arbitrator asked one question because he did not understand part of the witness' statement.

v) Mr. Goodwin, who attended the meeting on 24 March 2011, also gave evidence. He too was sworn and confirmed the truth of his witness statement. He was then examined in chief as to the meeting. In addition, he was taken to Interprods' statement which had been sent on the eve of the hearing and asked to comment upon the denial that any admission of bribery had been made at

the meeting. At the end of his examination in chief the arbitrator asked no further questions. Counsel then proceeded to make his submissions.

vi) The hearing had commenced at 1000 and was completed by 1220.

vii) The arbitrator published his award on 3 July 2013. Section 1, pp. 2-21, dealt with procedural matters. Section 2, pp.22-24, dealt with jurisdiction. Section 3, pp.25-28, dealt with the facts. In this section he summarised the evidence that he had heard. Section 4, pp. 29-35 dealt with the legal analysis. In this section the arbitrator expressly considered whether the testimony of Mr. Denham and Mr. Goodwin was credible. He concluded that it was and held that Mr. Akeju had made the admissions attributed to him. He gave his reasons for so concluding between paragraphs 4.3 and 4.5. He then considered the legal consequences of such finding, holding that any payments of commission would contravene the Bribery Act and would also be prohibited under English law having regard to the illegality in the performance of the contract. Section 5 dealt with costs and section 6 dealt with interests. Section 7 was the award in which the arbitrator held that De La Rue was entitled to end the agency relationship and to refuse to pay commission and that Interprods' counterclaim was dismissed.

33. It was said, correctly, that the arbitrator, pursuant to section 33 of the Arbitration Act 1996 had a duty to "adopt procedures suitable to the circumstances of the case…so as to provide a fair means for the resolution of the matters falling to be determined." Reliance was also placed on the following guidance to arbitrators issued by the Chartered Institute of Arbitrators:

> "If a defending party fails to participate in the proceedings, the tribunal must satisfy itself that the claimant has a case by testing the evidence presented to it. …….
>
> When giving reasons for its award, the tribunal should attempt so far as possible to mention the main contentions that have been raised by the defaulting party in correspondence or otherwise. If the burden of proving any of these contentions rests on the defaulting party it will usually be sufficient to say that the point could not succeed in the absence of evidence from the defaulting party. If however the contention goes to some feature of the case being advanced by the participating party, it may be appropriate to go further and to consider the point to some extent eg by putting the point to the participating party, ascertaining its answer and referring to that answer (if it appears well-founded) in the tribunal's reasons."

34. In the light of the arbitrator's duty and this guidance three criticisms were advanced against the arbitrator's conduct of the hearing.

35. First, it was said that the arbitrator failed to put any significant questions to De La Rue's witnesses or to test their evidence by reference to Mr. Akeju's statement. In particular it was said that the arbitrator failed to question them on a "critical" discrepancy between their written and oral evidence of what took place at the meeting

and the note of the meeting which both witnesses said was 100% accurate, relating to whether they had asked Mr. Akeju to repeat his allegations a third time after a break in the meeting on 24 March 2011.

36. It cannot be said that an arbitrator must always put points to a party's witnesses in the absence of the other party. Whether fairness requires him to do so depends upon all the circumstances of the case, including the nature of the point, its importance and whether the witness has sufficiently dealt with the point. Thus Interprods' criticism must be viewed in context.

37. In the absence of an Interprods' representative at the hearing it was plain that there would be no cross-examination of De La Rue's witnesses. The arbitrator appreciated that and accordingly asked counsel to lead the witnesses through their testimony. Counsel did so. Thus the arbitrator had the benefit of hearing the witnesses not merely state that their witness statement was true and accurate but also answer questions about the meeting. The witnesses were also asked about the meeting on 20 April upon which Interprods relied in its pleading and in the letter and statement sent on the eve of the hearing. In addition Mr. Goodwin was asked about Mr. Akeju's statement (notwithstanding that it was unsigned and undated) and, in particular, his denial that he had made any admission of bribery.

38. In those circumstances the arbitrator did not, in my judgment, act unfairly by not asking further questions of the witnesses. It is difficult to identify what further questions could have been put. The example given in argument of the sort of question which could and should have been asked was that Mr. Akeju had promptly protested that he had been misunderstood. But questions concerning this possibility had been asked by counsel; see the transcript at p.21 lines 8-19, p.23 line 3 - p.27 line 25 and p.28 line 23 - p.29 line 10 (Mr. Denham) and p.42 line 17 – p.43 line 23 (Mr. Goodwin).

39. The evidence of the witnesses was that at the meeting Mr. Akeju had volunteered that the commission was to be used to pay bribes to Nigerian officials and was then asked to confirm that admission, once before a break in the meeting and a second time after the break. Thus their evidence was that Mr. Akeju had admitted bribery three times. The contemporaneous note was consistent with that. It referred to the volunteered admission and then said that Mr. Akeju was asked "twice to confirm what he was saying which he did." However, the note went on to refer to the break in the meeting and so suggested that both confirmations were given before the break. This is different from the account given in evidence. However, the suggestion that the arbitrator failed to act fairly by not questioning the witnesses on this discrepancy is, in my submission, unrealistic. To spot the discrepancy would require a very diligent comparison of the oral evidence and the contemporaneous note. I do not consider that it is a justifiable criticism of the arbitrator that he failed to spot this discrepancy. If there is a justifiable criticism the arbitrator's conduct cannot be said to be so far removed from what could reasonably be expected from the arbitral process that justice calls out for it to be corrected.

40. In any event, if the arbitrator had spotted the discrepancy, it is most unlikely that it would have caused him to doubt that Mr. Akeju had made the admission of bribery attributed to him. The contemporaneous note of the meeting recorded that he had made that admission and that he had been asked to repeat it twice. The

contemporaneous note was the best evidence of what had been said at the meeting. Interprods cannot show that if the arbitrator had spotted the discrepancy he might well have reached a different view and reached a significantly different outcome.

41. Second, it was said that the arbitrator uncritically accepted the evidence of De La Rue's witnesses. Reference to the award does not support this suggestion. In the section entitled Legal Analysis the arbitrator gave his reasons for regarding the witnesses' evidence as credible. Those reasons demonstrate that the arbitrator did not accept the witnesses' evidence "uncritically".

42. Third, it was said that the arbitrator made no mention of Mr. Akeju's witness statement and gave no reason for rejecting it. He failed to "weigh up" that evidence against that of De La Rue's witnesses. It is true that, although the arbitrator was aware of the statement (he referred to it in paragraph 1.79 of the section entitled Procedural Matters), he made no reference to it in the section entitled Legal Analysis. However, in the section entitled The Facts, he noted what Mr. Akeju had said at the meeting on 20 April, namely, that he had borrowed money from individuals to fund his business, that his position was so desperate that it may have caused him to say anything to get De La Rue's sympathy and that he denied saying he had given bribes, adding that such conduct was unacceptable and that he would not do anything involving such conduct. Thus he was aware of Interprods' case and what Mr. Akeju's evidence would have been had he given evidence. But he did not give evidence and the statement forwarded to the arbitrator had neither been signed nor dated. In those circumstances the arbitrator was not obliged to refer to or consider Mr. Akeju's unsigned statement. I accept that the arbitrator could have done so but I am not persuaded that, in circumstances where Interprods had failed to appear at the hearing and had done no more than tender an unsigned and undated statement, the arbitrator was obliged, pursuant to his duty of fairness, to consider that statement.

43. In any event if he had had done so it is most unlikely that it would have persuaded him to reject the evidence of De La Rue's witnesses who had given oral evidence on oath and which, save for the discrepancy as to whether the third admission of bribery was made before or after the break in the meeting, was confirmed by a contemporaneous note. Interprods cannot show that if the arbitrator had expressly considered the statement he might well have reached a different view and reached a significantly different outcome.

44. For these reasons I must reject the three allegations of serious irregularity arising out of the arbitrator's conduct of the hearing.

45. It follows that I must dismiss both the section 67 and section 68 challenge to the award.