Neutral Citation Number: [2019] EWHC 3347 (Comm)

Case No: CL-2019-000262

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

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

Date: **29 November 2019**

Before :

Sir Michael Burton GBE
Sitting as a High Court Judge

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Between :

BSG RESOURCES LIMITED	**Claimant**
- and -	
(1) VALE S.A.;	**Defendant**
(2) FILIP DE LY;	
(3) DAVID A.R. WILLIAMS;	
(4) MICHAEL HWANG	

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David Wolfson QC and Iain Quirk (instructed by **Mishcon de Reya LLP**) for the **Claimant**
David Foxton QC and James Willan (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **First Defendant**
William Hooker (instructed by **Boies Schiller Flexner (UK) LLP**) for the **Third and Fourth Defendant**

Hearing date: **28th November 2019**

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JUDGMENT

Sir Michael Burton GBE **Friday, 29 November 2019**

(11:01 am)

SIR MICHAEL BURTON GBE

1. This is the latest episode of a long-running saga relating to the arbitration between BSG Resources Limited, (the Claimant, Respondent in the LCIA Arbitration), and Vale SA, (the Defendant, Claimant in that Arbitration).

2. It is an application by the Claimant, represented by David Wolfson QC and Iain Quirk, under ss. 68 and/or 24 of the Arbitration Act 1996 ("the Act") on the basis of apparent bias, alternatively serious procedural irregularity by the experienced LCIA Arbitrators who delivered an Award of 1,005 paragraphs on 4 April 2019, opposed by David Foxton QC and James Willan on behalf of the Defendant.

3. The co-Arbitrators have been represented before me by Mr Hooker because of the existence of the s.24 application. I have not needed to hear from him, although he helpfully put in a written skeleton.

4. The original dispute arose out of the termination by the Government of Guinea of rights to mine iron ore which became the subject of a joint venture between the Claimant and the Defendant on grounds of alleged corruption by the Claimant, and the Defendant's claim in the arbitration was for fraudulent misrepresentation and rescission of the Framework Agreement and the Shareholders' agreement between them, and it led to an award in its favour of rescission and damages of more than $1.2 billion, plus interest and costs.

5. There was one separate argument raised by the Claimant, by reference to an alleged failure by the Arbitrators to deal with an issue raised by the Claimant as to the impact upon the finding by the Arbitrators of fraudulent misrepresentation and rescission of the Framework Agreement of a finding of frustration of that agreement. This was not pursued orally before me, but was left open by Mr Wolfson for decision. I can deal shortly with it: I am quite satisfied that the Arbitrators dealt clearly and indeed rightly with the position in paragraphs 335 and 992 of their Award.

6. I was supplied with an agreed bundle of authorities relating to the law as to ss. 68, 24 and 33 of the Act, but they are mostly well familiar, and not in issue between the parties, and I do not need to recite them. Suffice it to say that there is a heavy burden on the party challenging the conduct and decisions of an arbitrator, and, unless I am satisfied as to the existence of apparent bias, the Claimant must show that the alleged serious procedural irregularity led to substantial injustice.

7. Before I turn to the cases made, I must explain that the dispute now before me largely arises out of the fact that, in parallel with the LCIA Arbitration there was an ICSID Arbitration, started in August 2014, brought by the Claimant against the Government of Guinea, claiming in respect of the termination of the rights the subject matter of the joint venture and challenging the grounds, based upon allegations of corruption, for so terminating.

8. The Claimant made two unsuccessful applications to stay the LCIA Arbitration pending the outcome of the ICSID Arbitration, first on 16 December 2014 and then on 24 July 2015.

9. Although the Claimant's original s. 68 application was based upon four matters, as a result of an amendment, the application is now put on only one basis and the other three matters are simply said to amount to context. I deal with each:

    (i) The fixing of the date for the final hearing (after its adjournment from August 2016 due to the removal of the first Chairman) for 20-24 February and, if necessary, 3-7 April 2017, notwithstanding the opposition by the Claimant on the grounds of the unavailability on those dates of its legal counsel, Mr Wolfson, which was considered and reconsidered by the Tribunal by Procedural Order (PO)17 (17 October 2016), PO 18 (7 December 2016) and PO 19 (26 January 2017).

    (ii) The alleged failure by the Arbitrators properly or at all to reconsider the earlier decisions pursuant to s. 27(4) of the Act, after the first Chairman had been removed.

    (iii) The alleged failure by the Tribunal to reproduce the original appointment procedure in relation to the appointment of the new Chairman.

10. None of those matters would, together or separately, begin to amount to any ground for challenge under s.68, nor be in any way indicative of apparent bias. All were well within the discretion of the Arbitrators.

11. In particular, in relation to the first complaint, for my part I find it very difficult to understand why the Claimant did not find a replacement leading counsel, which there was sufficient time for them to do (several names of eminent leading counsel are suggested of whom the Claimant had had previous experience). In any event, I note that at the ICSID hearing itself, when Mr Wolfson appeared, the solicitor advocates from those instructing him actually carried out the cross-examination of the three Government of Guinea witnesses to whom particular reference is made, and there is no explanation as to why they could not have attended at the hearing of the Arbitration to cross-examine the same witnesses. I am left not beginning to understand why the course was taken, as it was, of writing to the Arbitrators on 31 January 2017 to say that the Claimant would not attend. If there was material evidence from the three Government of Guinea witnesses which could have been adduced to assist the Claimant (as is said to have occurred at the ICSID arbitration), then it could have been so elicited before the Arbitrators and tested in re-examination by the Defendant. In any event, I consider it was entirely open to, and within the discretion of the Arbitrators, to fix the date, notwithstanding the asserted unavailability of Mr Wolfson.

12. There is nothing in the three matters, in my judgment, which gives any "context" to the Claimant's only surviving complaint, which relates to the fact that the Arbitrators did not admit into the Arbitration, three months after the hearing had closed, 2,000 pages of the transcript of the ICSID hearing.

13. I shall set out a potted history of the Arbitration relevant to that issue:

    (1) The Arbitration was commenced on 28 April 2014 by the Defendant. The ICSID Arbitration was commenced in August 2014. The first unsuccessful stay application was

made by the Claimant on 16 December 2014. In rejecting that application, the Arbitrators stated, at paragraph 49:

"*The Tribunal urges the parties to seek to come to an agreement for the mutual exchange of evidence and submissions between the two arbitrations. The aim of such an understanding, of course, would be to minimise the possibility of inconsistent decisions by them. The Tribunal notes that the parties appeared open to this idea when it was recommended by the Chairman of this Tribunal during the stay application hearing.*

The Tribunal now proposes formally that the parties confer and attempt to arrive at an agreement among themselves and also to seek the consent of Guinea as necessary."

(2) By a Decision dated 28 June 2015, made at the request of the Defendant, the Arbitrators made the order foreshadowed by what they had stated in response to the first stay application, namely what has been called the "Record Sharing Decision", dealing with the disclosure, not the admissibility or weight, of the record. By paragraph 10 of the Record Sharing Decision the Tribunal said this:

"The Tribunal decides unanimously as follows:

(a) [the Claimant] *shall disclose on an ongoing basis all documents from the ICSID proceedings to [*the Defendant*] and to this Tribunal within seven days of the documents being filed or the record becoming available in the ICSID case.*

(b) the parties are authorised to provide to the Republic of Guinea and the ICSID Tribunal all pleadings, documents, evidence, transcripts, orders and awards ... produced or rendered in the LCIA Arbitration [with certain exceptions]."

(3) The second unsuccessful stay application by the Claimant was dismissed on 24 July 2015. At paragraph 32 the Arbitrators stated:

"*The parties have agreed that the entire ICSID record will be available to this Tribunal.*"

(4) By a Decision on Document Production dated 18 March 2016, at paragraph 25, the Tribunal stated this:

"*The Tribunal points out that all of its document production rulings have taken into account the 'Bribery Issue' lying at the centre of this dispute. It is within that context that the Tribunal has set the relevant parameters for what it deems relevant and material."*

(5) the centrality of the "Bribery Issue" was somewhat diminished by virtue of the terms of the Claimant's Reply on 24 March 2016, and subsequently. In their Award the Arbitrators said this, at paragraph 1002:

"As regards substance [the Defendant] *presented its case as one of bribery and corruption initially, but gradually qualified its narrative to emphasise that its claim was not dependent on proving bribery and could succeed by proving fraudulent misrepresentation and breach of warranties on matters which would have raised 'red flags' if disclosed.* [The Defendant's] *narrative of an innocent party being induced by its partner* [the Claimant] *to invest large amounts of money when its partner had bribed local officials in Guinea and hidden these corrupt practices through obscure intermediaries and opaque BSG Group business structures could have been avoided by the Tribunal without making enquiries and findings on bribery*."

(6) On 4 August 2016 the first Chairman was removed by the LCIA Court. By PO15 on 24 August 2016, the hearing fixed for 29 August to 16 September 2016 was cancelled.

(7) The substantive hearing was then fixed, after PO17 (17 October 2016) when the Arbitrators stated that Mr Wolfson should indicate dates between 1 January and 30 April 2017 when he was available, by PO18 (7 December 2016) and PO19 (26 January 2017) for the dates that I have given above, namely to start on 20 February 2017.

(8) The Claimant's solicitors said, by letter dated 31 January 2017, that:

"*Our client has concluded that, regrettably, its right to set out its case and be treated fairly in accordance with the LCIA rules and the 1996 Arbitration Act at an oral hearing scheduled for 20-24 February and 3-7 April 2017 will not be respected for the reasons set out in previous correspondence. Therefore our client will not be participating in the forthcoming hearing.*"

The only substantive reasons indicated by Mr Daele of the Claimant's solicitors in paragraphs 96 and 97 of his witness statement are the unavailability of Mr Wolfson, the fact that an application (subsequently very unsuccessful) to remove the co-Arbitrators was still pending in the High Court (with a hearing date fixed for 3 February 2017) and that "certain" of the witnesses were not available, of which particulars were not then given. This decision seems to me to have been very unwise.

(9) The hearing followed. The three Guinean witnesses particularly referred to in this application, Messrs Souaré, Nabé and Kanté, who had given witness statements in this Arbitration for the Defendant, attended and gave evidence.

(10) The Arbitration was then closed and PO23 (3 March 2017) provided, by paragraph 13:

"*No further procedural issues to be discussed except for the hearing transcript and costs submissions as per below and,* [the Defendant] *not requesting the submission of post-hearing briefs, the Arbitral Tribunal closes the proceedings implying that the parties ... cannot file further submissions, correspondence, or evidence without the prior consent of the other side, or the prior authorisation of the Arbitral Tribunal upon a reasoned application of any party.*"

(11) The hearing of the ICSID Arbitration took place between 22 May and 1 June 2017. On 9 June 2017 the Claimant's solicitors wrote to apply for the entire transcript (2,000 pages) to be added to the record in this Arbitration. They said that, with regard to the three Guinean witnesses who had been heard by the Arbitrators, "*their evidence at times departed from the*

evidence they gave to the LCIA Tribunal". In a letter of 30 June, in response to the Defendant's solicitors, they concluded as follows:

"*Vale concentrates on the addition of the transcripts of the cross-examination of BSGR witnesses, but this is not the only new material to be added. The new ICSID material includes:*

1. the testimony of Guinean witnesses who were not called to the LCIA tribunal;

2. the testimony of Guinean witnesses who were called (and whose consistency must be considered);

3. submission on key matters including the provenance with the contract with Mamadie Touré said to evidence corruption;

4. submission on payments to Mamadie Touré;

5. submission on the status of international criminal investigations;

6. documents from the FBI in relation to Mamadie Touré and the status of international investigations, and;

7. a number of new factual exhibits provided by both parties.

As BSGR has set out in detail in its letters of 9 and 23 June 2017 these matters are of relevance to the LCIA proceedings, and full and frank disclosure must be made of the new information."

The effect would obviously have been to have reopened the arbitration.

By PO24 (6 September 2017) apart from admitting by consent of the parties (pursuant to PO23) three documents relating to a Mr Thiam (not in the event of any materiality to the Award), the Arbitrators did not agree to the admission of the transcripts of the ICSID hearing. They said this:

"*9.3. By virtue of paragraph 13 of PO23, and absent agreement between the Parties, [the Claimant's] request to add the transcripts of the ICSID hearing to the record and to file*

further submissions on them is stayed pending the Arbitral Tribunal's deliberations and preparation of the award. If and to the extent necessary and proper, the Arbitral Tribunal will re-open the proceedings or alternatively will deal with the issue of the ICSID hearing transcript in any other appropriate way, or in the award ...

10. The Arbitral Tribunal also notes and clarifies that it considers that any evidence or other documents related to the ICSID proceedings at this stage of the present proceedings which have been closed, is no longer governed by the Record Sharing Decision, the first or the second stay decisions, but by paragraph 13 of PO23."

(12) The Claimant made a further application which was denied by PO25 on 26 November 2017 in the following terms:

"*On 18 October 2017* [the Claimant] *wrote to the Arbitral Tribunal to the effect that it considered PO24 to be unfair as precluding it to submit new documents*. [The Defendant] *replied thereto ... and* [the Claimant] *... expressed its hope that the Arbitral Tribunal would have substance prevail over form and respect the Record Sharing Decision of 28 June 2015 regarding the relationship between the current LCIA Arbitration and the ICSID Arbitration.*

4. On the basis of the above and after deliberation, the Arbitral Tribunal considers that this is not the appropriate time for a final decision on the [Claimant's] *request. Accordingly, the Tribunal has decided as follows:*

4.1 By virtue of paragraph 13 of PO23, as confirmed in PO24 and absent agreement between the Parties, [the Claimant's] *request in its letter dated 18 October 2017, if and to the extent to be interpreted as reiterating its request to add the transcripts of the ICSID hearing to the record and to file further submissions on them, is dismissed and the Arbitral Tribunal confirms its decision in PO24 to stay the request pending the Arbitral Tribunal's deliberations and preparation of the award. If and to the extent necessary or proper the*

Arbitral Tribunal may re-open the proceedings, or alternatively may deal with the issue of the ICSID hearing transcript in any other appropriate way, or in the award."

(13) There was then a final application on 25 October 2018 by the Claimant for the admission of their post-hearing briefs for the ICSID Arbitration, which was rejected in similar terms, namely that such application was stayed pending their deliberation and preparation of the award. They said this at paragraph 9:

"*At this stage of the proceedings the arbitral tribunal does not see a reason to deviate from PO24 in relation to the ... [briefs], all the more as the transcripts of the ICSID hearing are not on record. Thus, also the request to seek leave to produce the ... [briefs] - which the Arbitral Tribunal has not read - is stayed pending the arbitral tribunal's deliberations and preparation of the award.*"

And they concluded in the same terms as their previous decisions.

14. As to the three Guinean witnesses, because of the refusal by the Claimant to take part in the hearing of this Arbitration when they could have cross-examined them, the result was that the Arbitrators would either have had to admit what they had said in the ICSID arbitration unseen by them and unchallenged by the Defendant, or would have had to re-open the arbitration to a further hearing. This would apply a fortiori to the rest of the matters set out in the Claimant's solicitors' letter dated 30 June.

15. The Award was delivered by the Arbitrators on 4 April 2019. At paragraph 676, they set out a summary of whether fraudulent statements were made by the Claimant during the due diligence process:

"676. In summary, and based on the analysis above, the tribunal finds that BSGR made false or misleading statements in its responses to a number of questions asked by Vale during the due diligence process. These false or misleading statements arise out of the following ten circumstances.

676.1. BSGR's failure to disclose all consultants and agents - including Pentler, Cilins, Boutros and Fofana.

676.2. BSGR's failure to disclose agreements with consultants and agents.

676.3. BSGR's failure to disclose all relevant documents and information relating to the shareholder structure of BSGR Guernsey and its subsidiaries in relation to the share purchase agreement between BSGR Guinea BVI and BSGR Guernsey regarding the shares in BSGR Guinea.

676.4. BSGR's failure to disclose all agreements between the shareholders of BSGR Guernsey and any of its subsidiaries, as well as all agreements relating to the share capital or ownership, control, management or operation of a group company in relation to the share purchase agreement between BSGR Guinea BVI and BSGR Guernsey regarding the shares in BSGR Guinea.

676.5. BSGR's failure to disclose the pending disputes with Bah and Camara.

676.6. BSGR's representation that no personnel or shareholders of BSGR or their immediate family were government officials with regard to the relationship between IS Touré, an employee of BSGR Guinea and Madam Touré.

676.7. Avidan's representation that IS Touré and Madam Touré were not related.

676.8. BSGR's misleading description of its role in the GoG's decision to withdraw Rio Tinto's mining rights.

676.9. BSGR's failure to disclose financial and business connections to Madam Touré/Matinda.

676.10. BSGR's representation that it had not engaged in bribery or corruption in relation to benefits granted to Madam Touré."

16. The Arbitrators gave their reasons for not admitting the transcripts from the ICSID proceedings at paragraphs 164 to 169 of their Award:

"*164. The Tribunal considers that specific mention should be made of the parallel ICSID arbitration ... that is ongoing between BSGR, BSGR Guinea and the Republic of Guinea. In particular, the tribunal wishes to record (in addition to what is said at paragraph 1001 of this Award) the reasons that it has decided not to admit as evidence in this arbitration the transcripts from the ICSID proceedings, as well as the Post-Hearing Briefs from those proceedings. It has also declined to receive further submissions regarding the suggested impact of the ICSID proceedings on the current arbitration.*

165. At the outset, the Tribunal refers to Procedural Orders Nos. 24, 25 and 27 which are summarised at paragraphs 152, 153 and 160 above. In these Procedural Orders, the Tribunal made it clear that, although its proceedings were closed in accordance with Procedural Order No. 23, additional evidence could still be admitted with agreement of the parties or permission from the tribunal. Hence, new evidence could be accepted up until the rendering of this award. However, the Tribunal has also sought to manage the proceedings efficiently so that its deliberations on and preparation of an award were not disturbed whenever new evidence arose in the ICSID proceedings. A case in point is the forensic report prepared in the ICSID proceedings as to BSGR's allegations that some contracts were forgeries. In Procedural Order No. 24, the Tribunal dismissed the request for submission of this report into these proceedings as being premature as no forensic report was yet available. However, the Tribunal authorised BSGR to seek leave to submit that report when it became available. In the event, BSGR never sought such permission.

166. As noted above, these proceedings were closed by Procedural Order No. 23, which stated at paragraph 13 that no further submissions, correspondence or evidence were to be filed without the consent of the other side or the prior authorisation of the tribunal upon a reasoned application of any party. Paragraph 10 of Procedural Order No. 24 then clarified that any evidence or other documents related to the ICSID proceedings were no longer governed by the

Record Sharing Decision or the First or Second Stay Decisions but by paragraph 13 of Procedural Order No. 23. Paragraph 9.3 of Procedural Order No.24 then indicated that, if and to the extent necessary or proper, the Tribunal would open the proceedings, or alternatively deal with the issue of the ICSID hearing transcript in any other appropriate way in its award. Such language was repeated at paragraph 4.1 of Procedural Order No. 25 and at paragraph 8 of Procedural Order No. 27.

167. This Award now records that the Tribunal did not consider it necessary or proper to re-open the proceedings in relation to the ICSID transcripts or other documents or to deal with this issue in any other way other than in this award. The reasons for this decision are as follows.

167.1. First, the ICSID proceedings are separate proceedings with different substantive principles and procedural rules as compared to this arbitration. Whether a particular conduct involves breach of a treaty (as alleged in the ICSID proceedings) is not determined by asking whether there has been a breach of contract or the commission of a tort, which are the key issues in this arbitration. As a result, it is difficult to know what, if any, weight could be given in this arbitration to evidence received from that proceeding. This is particularly so in relation to the transcripts of witness evidence where neither the Tribunal nor the claimant in this arbitration had any opportunity to observe and evaluate the relevance of such evidence or assess the credibility of the witnesses or ask questions of them.

167.2. Secondly, BSGR - in the Tribunal's opinion - failed, save for the forensic report, to specifically indicate what precise evidence from the ICSID proceedings it sought to submit. Instead, BSGR sought to submit the full ICSID hearing transcript without any sufficient precision as to what material was relevant and why. To have accepted this evidence would have risked reopening the full LCIA Arbitration or major parts of it. The same holds true for BSGR's request to submit the ICSID hearing transcripts in relation to six Guinean fact witnesses, three of whom were heard by this Tribunal. Although the latter three are easily identifiable by the

Tribunal, the identity of the other three Guinean fact witnesses heard by the ICSID Tribunal but not by this Tribunal, was not disclosed, nor was the precise scope of their witness evidence in the ICSID proceedings explained to this Tribunal. Indeed, as a matter of principle, the Tribunal would, absent exceptional circumstances, take the view that the findings of another tribunal between different parties on different issues would not be binding on this Tribunal or even relevant to its inquiry. And if the findings of such other tribunal are not relevant, it follows that, again subject to exceptional circumstances, the evidence in support of such findings would be equally irrelevant.

167.3. Thirdly, leaving aside the issue of specificity just discussed, the Tribunal considers that BSGR did not make a sufficiently compelling case that the evidence from the ICSID proceedings it intended to submit in these proceedings were sufficiently relevant to this case or material to its outcome. For example, with regard to the six Guinean fact witnesses, BSGR failed to indicate to what extent the witness evidence of three Guinean witnesses heard in these proceedings, Ahmed Kanté, Dr Louncény Nabé and Dr Ahmed Tidiane (all former Minister of Mines), was identical, similar, or contrary to their evidence in the ICSID proceedings and whether that was relevant or material in this case. Similarly, the Tribunal is not convinced that the evidence of the three other Guinean fact witnesses before the ICSID Tribunal would be relevant or material to the issues to be decided by this Tribunal, which differ considerably from those at issue in the ICSID proceedings. Moreover, it was never suggested by BSGR that these witnesses were to be called before this Tribunal for examination and without hearing these witnesses it would of course be difficult, if not impossible, to assess their veracity. This is particularly so in light of the fact that the corruption issues addressed by this Tribunal as part of the misrepresentation and warranty allegations primarily concern the interaction between Madam Touré (fourth wife of President Conté) and Pentler Holdings Limited, as to which other members of the GoG did not have first-hand knowledge.

167.4. Fourthly, in relation to Kanté, Nabé and Souaré, BSGR chose not to appear at the merits hearing and thus not to cross-examine these witnesses produced by [the Defendant].

167.5. Fifthly, regarding the forensic expert report, BSGR did not apply for leave to submit the actual forensic report, if any, produced in the ICSID proceedings. The Tribunal would have considered this request on its merits, had BSGR decided to make such a request when the report became available.

167.6. Finally, regarding the post-hearing briefs, the Tribunal considers that a request for submission of evidence from other proceedings does not extend to pleadings and submissions in these other proceedings. The post-hearing briefs merely contain the submissions of BSGR, which would presumably make reference to the evidence of certain witnesses but would not contain the actual testimony of such witnesses (except possibly on a selective basis) nor the context in which selected extracts of such testimony was given. There can be no evidential value in submissions, as opposed to testimonial evidence, which has already been discussed in paragraphs 167.2 and 167.3 above. Consequently, there is no sound basis upon which the briefs should have been admitted in these proceedings.

168. Apart from the reasons set out above, the Tribunal has been, and remains, reluctant to accept new evidence on the record after the closure of proceedings, given that the parties in this case have already had the benefit of a full opportunity to be heard. This opportunity has included written submissions, document production and an evidentiary hearing. There is certainly no obligation or compulsion on a tribunal to receive new evidence from a parallel arbitration after the proceedings have closed, especially where the evidence is not material to the outcome of the case. Indeed, to do so would run the risk of creating unfairness to Vale that was not a party to the parallel arbitration.

169. Furthermore, the Tribunal notes that, in its deliberations and preparation of the award, the tribunal has meticulously reviewed the record and had has come to the conclusion that the

evidence sought to be admitted from the ICSID proceedings, regarding forged documents, the cooperation of Madam Touré with the FBI investigations regarding bribery in relation to the procurement of the mine rights, or the examination of six Guinean fact witnesses in the ICSID arbitration regarding the alleged fraudulent procurement of the mining rights, is highly unlikely to change the conclusions of the Tribunal set out in this award. In addition, the Tribunal is convinced that the overall outcome of the arbitration as expressed in the dispositif would not be altered by the ICSID evidence, given that the Tribunal has found multiple misrepresentations by BSGR during the pre-contractual due diligence process, other than the misrepresentation as to the absence of corruption (to which BSGR suggests the ICSID transcripts relate). Consequently, even absent a finding of corruption, the multiple remaining misrepresentations would warrant the Tribunal's conclusions and its decisions as to Vale's primary prayer for relief regarding fraudulent misrepresentation. Therefore, the evidence BSGR seeks to admit would have ultimately no bearing on the relief to be awarded in this arbitration. This is yet another reason why the Tribunal has decided not to accept the ICSID transcripts and post-hearing briefs into the record. Finally, the settlement and any withdrawal of the ICSID proceedings - in the opinion of the Tribunal - does not have a material bearing on the issues discussed above."

17. Mr Wolfson describes those reasons as bizarre or unsupportable, and indicative of apparent bias. He submits that:

    (i) it was wholly unjust not even to look at the transcripts.

    (ii) it ignores the centrality of the bribery issue acknowledged throughout the Arbitration.

    (iii) the Arbitrators do in fact go ahead and make a finding, in paragraph 1002 to 1003 of the Award in respect of bribery, and so cannot be heard to say that they could have just as well based the findings on the other fraudulent misrepresentations, and in any event they are inseparable.

(iv) because of the existence of the Record Sharing Decision, even though it had come to an end at the closing of the hearing, and because of the very refusal of the stay, which was in part on the basis that the record would be shared, it was inevitable that further information had come out in the ICSID Arbitration and the information given in the Claimant's application ought to have sufficed to cause the Arbitrators to look at the transcript, which might have caused them to change their mind. In any event, the further explanation and exposition set out in the "Wolfson schedule" prepared for this hearing from the ICSID transcripts makes the position now quite clear, and it does not matter that the Claimant took no part in the hearing of the Arbitration at the time, if this information had now become available.

(v) substantial injustice was done because there was a finding of bribery, even if there might have been, and were findings of deceit, bribery being a significant factor both as to reputation and as to costs.

18. Mr Foxton submitted that:

(i) this is a further attempt to delay or waylay the Arbitration, and the Claimant should not be entitled to take advantage of the fact that it did not attend the hearing and cross-examine the Guinean witnesses to put in before the Arbitrators cross-examination of those witnesses which took place at a later hearing when the Defendant was not present. Justice was required for both parties, as the Arbitrators recognised in paragraph 168 of the Award.

(ii) it is an inevitable result of the refusal of the stay application, which the Claimant did not, and cannot challenge, that the transcripts of the ICSID hearing would not be available via the Record Sharing mechanism.

(iii) the Arbitrators were entitled to take account of their conclusions that there was fraudulent misrepresentation by the Claimant which did not depend upon the finding of actual bribery, even though they went on to find that, in a particular respect, referred to by the Arbitrators in

paragraph 167.3 as unaffected by the alleged new matters, in relation to the financial arrangements with Madam Touré, there was actual bribery. Insofar as relevant to the question of substantial injustice, there was no likelihood of a different "*outcome*" (see **Terna Bahrain Holding Company Wll v Al Shamsi** [2013] 1 Lloyds Rep 86), namely the liability of the Claimant for damages and other relief for fraudulent misrepresentation.

(iv) there was, as the Arbitrators said at paragraphs 167.2 and 167.3 of their Award, no specificity in the application for the admission of the 2,000 pages of transcript. Now that some specificity has belatedly been provided in the form of the Wolfson Schedule, it can be seen to add nothing of value.

19. I find the reasons given by the Arbitrators persuasive, and certainly a sufficient and reasonable explanation of why they took the decision they did. I agree with Mr Foxton and would add the following:

(i) It was plainly within the discretion of the Tribunal to decide whether to admit additional evidence and re-open the hearing, even in relation to matters which post-dated the hearing, and certainly to delay that decision, as they said they would, until they allowed their own determinations to become clear, which would clarify whether they would be assisted by that evidence.

(ii) They were particularly so entitled in the light of PO23 and PO24. Mr Wolfson accepts that the record sharing regime no longer applied, so there was nothing automatic about admission of the entire record of the ICSID hearing.

(iii) Standing back and looking at the position, given that the Record Sharing Decision had come to an end, new and dramatic evidence was needed to be put before the Arbitrators in order for them to be persuaded to take the exceptional step of admitting further evidence and opening up the arbitration as would I am quite satisfied inevitably have had to occur if they had permitted its admission. I see a clear analogy with **Ladd v Marshall** [1954] 1 WLR

1489. Of course the suggested evidence was new in the sense that it consisted of the transcript of a hearing which had occurred since their own hearing. However:

(a) The evidence given by the three Guinean witnesses, which was said to have "*departed at times from the evidence they provided to the LCIA tribunal*", was only needed because they had not given that evidence in cross-examination before the Arbitrators, since the Claimant had not attended at the hearing and cross-examined them. That was, as the Arbitrators said in paragraph 167.4 of the Award, the Claimant's choice.

(b) In any event, whether in the application to the Arbitrators or even now, as presented before me in the Wolfson Schedule, nowhere is there any indication of anything dramatic or significantly likely, as the Arbitrators again said in paragraph 169, to cause them to change their minds, or even consider doing so.

20. I am satisfied that there was no apparent bias, no procedural irregularity under s. 68 and, in any event, no substantial injustice has been done.