Neutral Citation Number: [2023] EWHC 892 (Comm)

Case No: CL-2022-000037

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 21/04/2023

Before :

Dame Clare Moulder DBE
sitting as a Judge of the High Court

- -

Between :

Radisson Hotels APS Danmark	**Claimant**
- and -	
Hayat Otel Işletmeciliği Turizm Yatırım Ve Ticaret Anonim Şirketi	**Defendant**

- -
- -

Ali Malek KC, Can Yeginsu and Calum Mulderrig (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**
Jonathan Dawid and Emilie Gonin (instructed by **Gardner Leader LLP**) for the **Defendant**

Hearing dates: 13 and 14 March 2023

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

....

This judgment was handed down in unredacted form by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be Friday 21 April 2023 at 10:00.

Dame Clare Moulder DBE :

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Introduction

1. The claim between the Claimant ("Radisson") and the Defendant ("Hayat") arises out of an ICC Arbitration (the "Arbitration"), commenced in October 2018. Radisson is the Respondent and Hayat is the Claimant in the Arbitration. The Arbitration is seated in London, England, and conducted pursuant to the 2017 ICC Rules ("ICC Rules").

2. Hayat is an indirect subsidiary of Bilgili Holding AS ("Bilgili Holding"), a Turkish holding company ultimately owned by the Bilgili family. Radisson is part of the Radisson Hotel Group, an international hotel management group.

3. The subject matter of the Arbitration concerns claims by Hayat relating to the management of a hotel in Turkey. Radisson has also brought a counterclaim for allegedly unpaid management fees.

4. The Tribunal originally constituted for the Arbitration comprised AB KC, BC KC and CD. AB KC is an Australian barrister. He was appointed by the ICC as Presiding Arbitrator. BC KC is an English barrister. She was nominated by Radisson as co-arbitrator. CD is a Turkish hospitality professional. She is not legally qualified. CD was nominated by Hayat as co-arbitrator.

The contact between CD and Mr Önkal

5. It is common ground that in the course of the Arbitration, CD had the following contact with Mehmet Önkal, a Turkish hospitality professional who, at that time, was engaged by Hayat in the Arbitration:

   a. On 20 and 21 March 2019, CD forwarded to Mr Önkal two chains of internal Tribunal emails ("March Emails"), one of which contained BC's initial impressions of the parties' cases. The other emails dealt with hearing logistics among other things.

   b. CD was copied on an email from Mr Önkal to (among others) Mr Natan, a board member of Bilgili Holding, and on Mr Natan's reply on 26 April 2019 ("April Emails"). In his email of 25 April 2019, Mr Önkal stated to Mr Natan *inter alia* that CD had returned from London "fully filled" and that "we have a lot to talk about". Mr Natan responded the next day saying "[b]rother, if it suits let's talk on the phone on Monday, then decide how to proceed." Mr Natan's evidence is that he subsequently spoke to Mr Önkal and instructed him not to have any contact with CD.

   c. On 14 May 2019, CD sent Mr Önkal an email attaching *inter partes* correspondence from Radisson to the Tribunal. Mr Önkal forwarded this email (without the attachment) to Mr Natan ("May Emails"). Mr Natan's evidence is that following receipt of this email, he again spoke to Mr Önkal and repeated his instruction not to have any contact with CD. The recipients of the April Emails (but not the March and May Emails) also included Dr Durman, Vice President of Legal at Bilgili Holding, as well as Ms Tahmaz and Mr Ercantürk (board members of Bilgili Holding).

6. Following a change to Hayat's legal representation, Hayat ceased using Mr Önkal's services in August 2019. Mr Önkal was not called to give evidence and did not submit any reports in the Arbitration.

7. The existence of the March, April and May Emails was not disclosed to Radisson by either CD or Hayat prior to the issue of these proceedings.

Chronology

8. The following summary of the facts is also common ground and is taken from the List of Common Ground and Issues.

9. The evidential hearing on liability and causation took place in October 2020.

10. On 13 and 14 December 2020, Dr Durman exchanged LinkedIn messages and emails with Ms Cambré of Radisson in which he offered his services as a lawyer "even against Bilgili".

11. On 23 March 2021, the Tribunal issued a Partial Award on liability and causation (the "Partial Award"), finding Radisson liable for breach of contract, breach of fiduciary duty, negligence, and breach of duty as bailee. The Tribunal deferred consideration of Radisson's counterclaim to the quantum phase.

12. Radisson held meetings and/or calls with Dr Durman on at least 24 September, 16 November and 25 November 2021, during which Dr Durman made and/or repeated allegations that Hayat had had *ex parte* communications with CD.

13. On 1 December 2021, Radisson engaged Dr Durman as a legal adviser for matters relating to Turkey.

14. Radisson held further meetings/calls with Dr Durman on at least 4 and 26 January 2022.

15. Dr Durman also put Radisson in contact with Mr Önkal. Radisson held meetings with Mr Önkal and Mr Önkal's assistant, Ms Gülkilik, on at least 29 September and 16 November 2021 and 4, 25 and 26 January 2022, in the course of which they had discussions related to Mr Önkal' s previous work for Hayat and whether Mr Önkal could assist Radisson in the Arbitration.

16. By no later than 4 January 2022:

    a. Radisson agreed to engage Mr Önkal to assist it with the quantum phase of the Arbitration.

    b. Mr Önkal provided Radisson with a USB drive of documents pertaining to his work for Hayat which Radisson provided to its legal counsel in the Arbitration, Quinn Emanuel.

17. By no later than 13 January 2022, Radisson and/or Quinn Emanuel identified that the USB drive also contained a Word Document apparently reproducing the text of emails between CD and the rest of the Tribunal (i.e. the March Emails).

18. Radisson subsequently obtained native copies of the March Emails from Mr Önkal and Ms Gülkilik by no later than 25 January 2022.

19. On 27 January 2022, Radisson issued the Claim Form in the present proceedings together with a Supplementary Statement of Case, applying to set aside the Award pursuant to sections 68(a), (c) and (g) of the Arbitration Act 1996 ("1996 Act"). The Claim Form was amended on 31 January 2022.

20. On 31 January 2022, Radisson applied to the ICC Court challenging CD and BC KC under Articles 14, 15(2) and 42 of the ICC Rules ("ICC Challenge"). In her response to the challenge, CD admitted to having been contacted by Mr Önkal and to having sent him the March Emails.

21. On 4 March 2022, Hayat disclosed the April Emails and May Emails, both in these proceedings and in the ICC Challenge. Before the challenge to CD was determined, on 9 March 2022, she resigned from the Tribunal. On 24 March 2022, the ICC Court ruled in favour of the challenge against BC and at the same time accepted CD's resignation.

22. Following disclosure of the April and May Emails on 4 March 2022, Hayat consented to Radisson re-amending its case to include reliance upon them subject to preserving Hayat's right to object to the amendment as being out of time. In the re-amendment, made on 28 March 2022, Radisson withdrew its Supplementary Statement of Case and its reliance on s.68(g) of the 1996 Act.

Issues

23. It is common ground that:

    (1) The statutory requirements for a challenge to the Award under s. 70(2) of the 1996 Act are satisfied.

    (2) The time limit for challenging the award under s. 70(3) of the 1996 Act has expired and Radisson needs an extension of time to bring its challenge pursuant to s. 80(5) of the 1996 Act and CPR r.62.9.

Delay/waiver-Section 73

24. Although Radisson stressed the seriousness of the substantive allegations against CD, I propose to deal first with the issue of waiver under section 73 of the 1996 Act, since section 73 can result in Radisson having lost the right to challenge the Partial Award.

25. Section 73(1) provides (to the extent relevant):

> "*If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—*

(a) […]

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

Hayat's case on waiver

26. It is Hayat's case that:

    a. Radisson was first informed that CD had had *ex parte* communications with Hayat in September 2021. This information came from a credible source: Dr Durman, Hayat's former in-house counsel (skeleton para 3).

    b. Radisson took a strategic decision to bank it for later use, while continuing to participate in the Arbitration in the hope of obtaining a favourable outcome on quantum and/or making recovery from its insurers.

    c. In consequence, Radisson failed to take any steps to investigate or act on Dr Durman's allegations of *ex parte* contact, including failing to make obvious enquiries of Mr Önkal, who Radisson knew to be connected to CD. This only changed when the Tribunal chair, AB KC, unexpectedly resigned on health grounds on 22 December 2021.

27. Hayat submitted that even though on 4 January 2022 Mr Önkal provided Radisson with a batch of documents relating to his previous engagement by Hayat including copies of the March 2019 Emails, it waited a further 23 days before issuing these proceedings, while continuing to participate fully in the Arbitration in the meantime. Hayat therefore submitted that as a result of its deliberate delay and continued participation, Radisson has lost its right to challenge the Award pursuant to section 73.

Radisson's response on waiver

28. In response Radisson raised a preliminary legal point as to whether section 73 applied in the circumstances where a "final" Award had been issued on liability and causation. It was submitted that the proceedings in the Arbitration were bifurcated, such that the Partial Award which was obtained by Hayat related to liability and causation and was final; the steps taken in the Arbitration subsequently related to a separate phase of the dispute, quantum.

29. Further it was submitted for Radisson that the purpose of s.73 is to prevent a party from "keeping up his sleeve" potential challenges that could have been deployed in the arbitration, continuing to participate in the arbitration, and then attempting to use that challenge if it receives a result it does not like and that is not this case.

30. Radisson also submitted that the April and May Emails provide a self-contained ground of challenge and it is common ground that those emails were only disclosed (by Hayat) on 4 March 2022.

Does s73 apply where a partial award has been issued?

31. In support of its submission that section 73 does not apply where a "final" Partial Award has been issued, Radisson relied on *Federal Republic of Nigeria v Process & Industrial* [2020] EWHC 2379 (Comm) at [152]:

> "*152. Section 73 of the 1996 Act governs the position before an award is published: it has no relevance to the conduct of the party from that moment onwards: Merkin and Flannery, Arbitration Act 1996 (6th Edition) at para 73.7.*
>
> *"It is important to understand that section 73(1) deals only with waiver during the conduct of the proceedings, meaning the arbitral proceedings. Accordingly, once an award is made, <u>if it is a final award, leaving nothing further to be decided by the tribunal,</u> then section 73(1) simply has no relevance to the conduct of the party from that moment onwards….*" [Emphasis added.]

32. Hayat relied on the wording of section 73 and dicta in *Thyssen Canada Ltd v Mariana Maritime S. A & Another* [2005] EWHC 219 (Comm) at [18] referring to the arbitration "*proceedings*":

> "*<u>…the expression "continues to take part in the proceedings" in section 73 is broadly worded</u> and is designed to ensure that a party who believes he has grounds for objecting on the basis of serious irregularity should raise that objection as soon as he is, or reasonably ought to be, aware of it. He is not permitted <u>to allow the proceedings to continue</u> without alerting the Tribunal and the other party to a serious irregularity, which, in his view, renders the whole arbitral process invalid. As Moore-Bick J points out, <u>this is not only to avoid a waste of time and expense but is based upon a more fundamental point of fairness and justice</u>. It cannot be right for a party <u>to participate in proceedings</u>, which he believes to be fundamentally irregular, with the intention of taking advantage of any decision in his favour, whilst keeping up his sleeve an objection to an irregularity, which he will only produce in the event of an unfavourable decision.*"
> [emphasis added]

33. I accept the submission for Hayat that what was being challenged in the *Nigeria* case was a final award and the point in issue here was not argued before the judge.

34. In my view the language of the statute referring to "*the proceedings*" and not to the issue of an award supports Hayat's contention. Section 73 refers to taking part in the proceedings and in my view the proceedings continue until all aspects of the arbitration have been resolved and not merely part of the proceedings, even where there have been

determinations of some or part of the issues. In my view this interpretation is supported by the underlying purpose of the provision, as referred to by Cooke J above, which otherwise would allow the party to carry on with the next phase of the proceedings, the quantum determination, and still raise an objection to derail the proceedings if and when he chose to deploy the objection.

35. It was submitted for Radisson [Day 2 p52] that there was no step that Radisson could take in the quantum stage of the proceedings which would improve its position on liability and causation because the award was final and there was no card that Radisson could keep up its sleeve to deploy later. However (as discussed below) the evidence in this case shows that Radisson and its lawyers continued throughout the course of the Arbitration to look for grounds to challenge the impartiality of the arbitrators and to have the Partial Award set aside.

36. The conclusion that section 73 does apply notwithstanding the "final" Partial Award is consistent with the facts of *Thyssen* where there were two awards and Cooke J referred to the continued participation in the arbitral proceedings. Cooke J said

> "*21. In my judgment, there is no doubt that the Claimants continued to take part in the arbitration proceedings in the period between the hearing and the publication of the Award and further took part in those proceedings by taking up the Award on 26th March 2004. Furthermore, <u>they continued to take part in the Arbitral proceedings up until the second Award, albeit making their objection known on 24th May 2004</u>. In order therefore to sustain any challenge under section 68 , it is necessary for the Claimants to show, under section 73 , that <u>throughout that time</u> they did not know and could not with reasonable diligence have discovered the grounds for the objection, which they now make…*" [emphasis added]

37. I therefore find that section 73 can apply notwithstanding the issue of the Partial Award on liability and causation.

Application of section 73

38. Turning then to the application of section 73, in *Rustal Trading Ltd v Gill & Duffus SA*, [2000] C.L.C. 231 Moore-Bick J stated:

> "*The effect of this section is that a party to an arbitration must act promptly if he considers that there are grounds on which he could challenge the effectiveness of the proceedings. If he fails to do so and continues to take part in the proceedings, he will be precluded from making a challenge at a later date. Moreover, it is clear from the language of subs. (1) itself that it is unnecessary for an applicant to have had actual knowledge of the grounds of objection in order for him to lose his right to challenge the award. <u>If the respondent can show that the applicant took part or continued to take part in the proceedings without objection after the grounds of objection had arisen, the burden passes to the applicant to show that he did not know, and could not with reasonable diligence have discovered, those grounds at the time</u>. It may often be necessary, therefore, to consider the applicant's conduct of the proceedings against the background of his developing state of knowledge.*" [emphasis added]

The grounds of objection in this case

39. The first issue to determine is what were the grounds of objection in this case. The authorities on how to identify the grounds of objection were reviewed and summarised in *Province of Balochistan v Tethyan Copper Company Pty Ltd* [2021] EWHC 1884 (Comm) at [110] where Robin Knowles J said:

> "…
>
> *(4) In addition, each ground of challenge to jurisdiction or of objection to jurisdiction must have been raised if it is to be raised; by this is meant the irregularity that the party considers renders the whole arbitral process invalid: see Colman J in Zestafoni at [64], Cooke J in Thyssen at [18] and Aikens J in Primetrade at [59]-[61].*
>
> *(5) It is wrong to be prescriptive or try to lay down precise limits in the abstract for the meaning of the phrase "ground of objection", but it is usually easy to recognise (or obvious) in particular cases whether a party is attempting to raise a new ground of objection to jurisdiction on an appeal: see Aikens J in Primetrade at [59]-[61].*
>
> *(6) The "grounds of objection" should not be examined closely as if a pleading, but broadly, or adopting a broad approach. The fact that different and broader arguments are raised or new evidence is put forward does not mean that there is a new ground: see Aikens J in Primetrade at [59]–[61] and [112] and Hamblen J in Ases at [36]–[37] and Habas Sinai at [86]–[87].*" [emphasis added]

40. It was submitted for Hayat (skeleton para 100) that Radisson's grounds of objection to the award is bias on the part of CD. That follows both from (a) Radisson's original formulation of its case, at paras [14.1]-[14.2], which asserted that *"[t]he fact of secret communications passing between a party and the arbitrator appointed by that party is sufficient to establish actual and/or apparent bias*" as the basis for its challenge under s.68(2)(a) and 68(2)(c), and (b) its skeleton argument, which asserted at [163] that *"[t]he fact and nature of CD's ex parte contact with M Önkal (and members of the Bilgili board) establishes both actual and apparent bias…*".

41. Radisson submitted that the April and May Emails amount to different grounds which were only disclosed by Hayat on 4 March 2022. In oral closing submissions it was submitted that the 3 sets of emails were of different character and that Hayat was not involved directly in the March Emails. It was submitted that while the allegations underlying the March, April and May Emails relate to CD's lack of impartiality, there were "crucial differences" between the character and nature of the impartiality alleged in each case, and that meant that they are distinct grounds of challenge. The March Emails showed that CD thought that Mr Önkal could use the content of the March Emails to Hayat's benefit. That case of bias does not involve Hayat directly and, Hayat denies having received the March Emails or known of them, but Hayat also denies that CD was aware of Mr Önkal's affiliation at this stage and puts this misconduct down to an inadvertent lapse of judgment. By contrast, the April Emails were of a different character. They show that CD spoke with Mr Önkal about tribunal deliberations. They also involve

Hayat representatives who do not raise any concerns. By contrast the March Emails on Hayat's case were never sent by Mr Önkal to them. (Day 2 p57:24-58:18)

42. In my view, applying the authorities that the grounds should be broadly construed and that the Court is concerned with "*the irregularity that the party considers renders the whole arbitral process invalid"*, the entire foundation of Radisson's case is that unbeknown to Radisson, CD communicated with Mr Önkal and representatives of Hayat and it is to be inferred from the circumstances was guilty of actual bias (failing which Radisson allege apparent bias).

43. This is evident from the written and oral submissions of Radisson:

> "*The requirement of impartiality on behalf of those who adjudicate is a fundamental tenet of our legal system and is necessary to upholding public confidence in the administration of justice. In that respect, this case raises issues of considerable importance not only to Radisson, but to those who choose London as a seat of arbitration. It concerns the proper approach to be taken by the English Court under s.68 of the 1996 Act when faced with evidence of clandestine communications between an arbitrator and another party, where there is a failure to disclose the fact of those communications, and where there is no application under s.24 of the 1996 Act before the Court for removal because members of the Tribunal have either resigned or been removed by the arbitral institution.*" (Skeleton paragraph 6). [emphasis added]
>
> "*The s.68 Challenge: CD's ex parte communications with Mr Önkal and other representatives of Hayat, and her decision to share confidential Tribunal deliberations with other parties, constitutes the most egregious form of arbitrator misconduct…"* (skeleton para 10).

44. The Court was referred to the correspondence in which Hayat had asserted that the April and May Emails were new grounds of challenge and not existing and Radisson asserted that they were not new grounds. The parties are not precluded by the correspondence from asserting a contrary view to the Court and in my view the correspondence does not assist the analysis nor is it determinative.

45. In my view the grounds advanced are of bias and lack of disclosure arising out of communications between a tribunal member and Hayat or its representatives. The March, April and May Emails are evidence of the grounds; the communications all involve Mr Önkal and attempts to distinguish the emails as separate grounds based on the imputed motive of CD and whether the contact with Hayat was direct or with a representative of Hayat are in my view not sufficient to establish these as separate grounds. As described in Radisson's skeleton (paragraph 12), "*The later emails [evidenced] further ex parte contact between CD and representatives of Hayat.*" [emphasis added]

46. It was submitted for Radisson that the Court should take into account the fact that Hayat deliberately withheld disclosure of the April and May Emails. It was submitted that it would allow Hayat to benefit from its own iniquity in withholding the April and May Emails and that Radisson could never have made an application in relation to the April and May Emails until they were disclosed. [Day 2 p60]

47. In my view this latter submission cannot affect the analysis of what constitutes the grounds. To the extent it is submitted that Radisson could not make an application until the April and May Emails were disclosed that goes to the issue of whether Radisson has shown that it could not with reasonable diligence have discovered the grounds and is discussed below.

48. For the reasons set out above, I find that the March April and May Emails do not amount to separate grounds for the purposes of section 73.

49. There is no issue about when the grounds of objection arose: they arose in March 2019 at the time the March Emails were sent and it is not disputed that Radisson participated in the Arbitration after that date.

When did Radisson have knowledge of the grounds for objection?

50. The burden is then on Radisson to show that it did not know and could not with reasonable diligence have discovered the grounds. As stated in *Thyssen* at [18]

> "*…The approach to this section appears from the decision of Moore-Bick J in Rustal v Gill & Duffus [2000] 1LLR 14 page 20–21. If the respondent can show that the applicant took part in or continued to take part in the arbitration proceedings without objection, after the grounds of objection arose, the burden passes to the applicant to show that he did not know and could not with reasonable diligence have discovered those grounds at the time. Moreover, the expression "continues to take part in the proceedings" in section 73 is broadly worded and is designed to ensure that a party who believes he has grounds for objecting on the basis of serious irregularity should raise that objection as soon as he is, or reasonably ought to be, aware of it. He is not permitted to allow the proceedings to continue without alerting the Tribunal and the other party to a serious irregularity, which, in his view, renders the whole arbitral process invalid….*" [emphasis added]

Submissions on knowledge

51. Radisson submitted that it has not waived its right to challenge the Partial Award under s.68 because it did not know the grounds on which the s.68 Challenge was based until 25 January 2022. This was when native copies of the emails showing the *ex parte* contact between CD and Mr Önkal were first provided to Radisson. It was submitted (skeleton para 205.1) that the last step taken by Radisson in the Arbitration was the filing of a rejoinder on quantum on 14 January 2022. While the Word Document containing the text of the March Emails was discovered on 13 January 2022, the native versions of those emails, which confirmed their veracity and included the attachment of the list of issues prepared by BC KC, were only provided to Radisson on 25 January 2022. It was submitted that it was only once the verified March Emails were obtained from Mr Önkal that Radisson had the cogent evidence necessary to bring its s.68 Challenge. It could not bring the application until it had taken steps to establish their authenticity. The March Emails were obtained after the quantum rejoinder was filed. Accordingly, there was no waiver.

52. For Hayat it was submitted (skeleton para 105) that Radisson had the necessary belief in its grounds of challenge from 24 September 2021, alternatively 1 December 2021 when Dr Durman was engaged by Radisson (on the basis that his knowledge is to be imputed to Radisson) or by 13 January 2022. It was submitted for Hayat that the starting point is when a party first forms the belief that it has grounds for objection not when it first obtains admissible evidence to support that belief. Hayat relied on *Thyssen* at [41]:

> "*41... Mr. Hamblen Q.C. maintained that, in order to satisfy section 68(2)(g) of the Act, he had only to show that there had been perjury and conspiracy to fabricate evidence on the part of the Officers and crew of the vessel as opposed to the management of the Defendants themselves. If this is so, it cannot be said that the Claimants did not know everything they needed to know for the purpose of section 73 on 12th November. At that stage they knew that Mr. Katsarakis was saying that hot work had been done and that the evidence given by the Officers and crew was a pack of lies. If the Claimants did not believe this, then it could be argued that they had no knowledge for the purpose of section 73 , but no representative of the Claimants has said that Mr Katsarakis she was not believed and the comments of leading Counsel in the e-mail, show that, to the contrary, this information confirmed the suspicions that she had always held. Moreover, nothing therefore occurred after 12th November to change the Claimants' state of knowledge prior to the issuing of their application, save the obtaining of written material from Mr. Katsarakis and hearsay evidence from Mr. Daskalakis, whilst the statements from the two Romanian able seamen were obtained subsequently and merely confirmed what they had already heard. Mr. Hamblen Q.C. sought to say that it was the emerging body of evidence which made all the difference but in circumstances where the Claimants say that Mr. Katsarakis is to be believed and never suggest that they did not believe him, it appears to me that the Claimants, on their own case, knew the grounds for their objection on November 12th 2003, since the objection is that the Award was obtained by fabricated and perjured evidence.*" [emphasis added]

53. It was submitted for Hayat that as in *Thyssen*, the allegations made by Dr Durman in September 2021 were willingly received by Radisson, who regarded them as confirming its long-held suspicions regarding CD. That Radisson took Dr Durman's allegations seriously is shown by the fact that, within a week, it had contacted Black Cube, a firm of investigators for a proposal to conduct a wide-ranging investigation into CD and Hayat, with two further firms contacted on 26 October 2021. While Radisson decided not to pursue an investigation at this point, it was submitted that this was on the basis of a cost-benefit analysis as to the merits of pursuing a challenge compared with proceeding with the Arbitration, and did not reflect any lack of belief in the truth of what Dr Durman had told it.

Evidence

Meeting on 24 September with Dr Durman

54. Ms Cambré met Dr Durman on 24 September 2021. Her evidence in her witness statement was as follows:

"*On 24 September 2021, I met Dr Durman in person for the first time at the Radisson Blu Bosphorus Hotel in Istanbul. I was accompanied by my colleague, Erdal Yiicel. At that meeting, I was told by Dr Durman that CD was in fact a friend and former schoolmate of Mr Bilgili's sister, Sevil Bilgili Temo. He also suggested that there had been direct contact and discussions between CD, members of the Bilgili family, and Hayat's representatives during the course of the ICC Arbitration…*" [emphasis added]

55. In an email on 26 September 2021 following the meeting on 24 September 2021 Ms Cambré wrote to Isabelle Michou and Alexander Leventhal:

"*Following up on the meeting Erdal and I had last Friday with Okay Durman who was Hayat's former corporate lawyer for five years he told us the following.*

…

3. CD is a close friend of Serdar's sister and they were class mates either in school or in university. There has been contact between Bilgili family, lsin Karakas and CD during the arbitration proceedings.

We need to evaluate the option lsabelle suggested to do a formal investigation into the arbitrator and the links with the Bilgili family…" {B/61/1} [emphasis added]

56. In cross examination Ms Cambré said that she did not trust Dr Durman and did not regard him as a credible source:

"*Q. And you believed what Dr Durman told you, didn't you?*

A. It's not -- he told me this. I didn't ask about this one. I was very surprised about that one, and whether I believed it, I wanted to investigate it. If it was true, it was a serious --

Q. But my question is you believed it. Did you believe what he told you?

A. I don't know Dr Durman, I just wanted to be careful, if I believed him if it was true then it was correct, but I had no reason to believe him or not to believe him. I didn't entirely trust him.

Q. All right, but he was -- I mean, he was Bilgili's former in-house lawyer, so you must have thought this man knows what he's talking about?

A. But I didn't know what his reasons were." [emphasis added] [Day 1 p85]

57. Ms Cambré's evidence that she did not know whether to trust Dr Durman has to be tested against the contemporaneous documents. In its proposal to Vantage for an investigation dated 1 November 2021, Quinn Emanuel on behalf of Radisson set out its belief that CD had been in contact with Bilgili and referred to a "*credible source*" which I infer was a reference to Dr Durman:

"*…The Client has reasons to suspect that the parties in question may be partial to Bilgili Holding and, specifically, has received information from a credible*

source that CD went to high school with the sister of Serdar Bilgili and has recently been in contact with Bilgili Holding, possibly with regard to the arbitration..." [emphasis added] {B/81/2}

Meeting with Mr Önkal on 29 September 2021

58. On 29 September 2021 Mr Yücel of Radisson met Mr Önkal. There is no evidence from Mr Yücel as to what was discussed. The evidence of Ms Cambré is that:

> "*at no point did Mr Önkal mention that he or Hayat had engaged in any ex parte communication with CD.*" (Second Witness Statement of Ms Cambré)

59. A contemporaneous email in advance of that meeting from Ms Cambré indicates that Radisson was looking to get information from Mr Önkal but it appears to focus on the suggestion that he was to be paid a percentage of the arbitration award to inflate his quantum report. An exchange between Ms Cambré and Mr Moubarak on 27 September 2021 however does refer both to the fee and the contact with Bilgili:

> "*agree, and probably Isabelle's team need to find a proper way to clarify bilgili's meeting with Turkish arbitrator during arbitration process, and we try to demonstrate that Bilgili's witness get paid to be witness an inflated amount is now besides (no facts) is more to earn more money than re damages*" [emphasis added] {B/62/1}

Instructions to investigators and decision not to proceed with investigation

60. On 1 October 2021 Quinn Emanuel approached an investigation firm, Black Cube. The email from Quinn Emanuel said (so far as material):

> "*We were wondering if you could provide a quotation to help us on a new matter, in which we are looking to establish the opposing party's contacts with an arbitrator during the arbitral proceedings, and possible success fees for fact witnesses and experts.*" [emphasis added] {B/66/13}

61. Black Cube responded with its fee proposal and scope of work on 8 October 2021. Quinn Emanuel approached Vantage, another investigator, with a similar request on 26 October 2021. Vantage submitted a proposal on 1 November 2021. A third firm, Raedas was also approached on 26 October 2021 but also not instructed.

62. On 5 November 2021 Ms Cambré sent an email to Isabelle Michou and Alexander Leventhal of Quinn Emanuel {B/87/1} which read (so far as material):

> "*After the calls with all three firms I do not see how we can generate a return on investment which would justify the costs of any of the three investigation firms that submitted a proposal...*
>
> *Even assuming the best case scenario of annulment of the partial award and for that we would need to find tangible and legally correctly obtained evidence that we can use in an arbitration case we have the risk that (i) a replacement*

arbitration tribunal were to come to the same conclusion and issue a negative award on liability and (ii) the legal fees of cost of a full retrial for Radisson would be significant and probably in excess of 1M EUR and (iii) such a new trial would take probably another two years so we would run up additional interest liability.

In addition, even if the evidence is against Bilgili's appointed arbitrator of a conflict of interest and she is replaced, Bilgili can appoint a new arbitrator which will not bring any solution so unless we find evidence against the biased chairman it will lead us nowhere in my opinion.

Unless Bilgili's former lawyer I will be meeting now with Antoine and Erdal on the 16th of November would provide us with any tangible information that we can use in an arbitration and if so it will probably be better to sign a consultancy agreement with that lawyer which may be more added value rather than using one of the investigation firms, my recommendation is that we focus our efforts on the claim against the insurer to seek coverage of whatever award we will get as that will more likely generate a better return on investment." [emphasis added]

63. I note that the explanation in this contemporaneous email for not pursuing the investigations is at odds with the explanation provided in Ms Cambré's second witness statement in which she said that:

"*13. Strictly without waiving privilege, following my initial meeting with Dr Durman, I made some preliminary enquiries with third party investigations firms for the purposes of considering whether it might be worthwhile to instruct a firm to investigate Dr Durman's allegations of contact between CD and Hayat/Bilgili. To that end, (and again without waiving privilege), I scheduled introductory calls with three investigations firms in early November 2021. Based on those calls (without waiving privilege), I was unconvinced that the instruction of an investigation firm would be likely to yield any meaningful evidence, and I decided not to take this matter further…*" [emphasis added]

64. In her oral evidence to the Court Ms Cambré said that she changed her mind after the meeting on 16 November 2021:

"*…I was going to have another meeting with Mr Önkal on 16 November, so my idea was to wait until I had a second meeting with Dr Durman and Mr Önkal, and after that meeting I revised my opinion and asked for —— I instructed Quinn Emanuel to proceed with Vantage…*". [Day 1 p111]

65. However it would appear from the contemporaneous documents that in early December the instructions to Vantage were to focus on AB and it was only in early January after he had resigned that the instructions were given to focus on CD. I note that the proposed investigation into AB was wide ranging seeking a preliminary investigation to "*research his current and past activities to identify any instances, or leads to, of illegal or inappropriate behaviour"* and a timeframe of 10-15 working days. Depending on the outcome it was said that this might lead to physical surveillance to determine his state of health.

66. On 3 January 2022 Mr Leventhal told Vantage:

> "*We would like to focus on our Turkish arbitrator as our Presiding Arbitrator has resigned and thus [t]he background check of him is no longer a priority*." {B/77/3}

67. However no action appears to have resulted from this email and the instructions to Vantage to investigate CD to proceed were only revived on 13 January 2022 after the Word Document had been discovered. A letter of engagement was issued by Vantage on 14 January 2022. It was submitted for Radisson that this was a coincidence but the evidence supports an inference that it was the result of the Word Document being discovered: in the course of the internal email exchange on 13 January 2022, Ms Michou wrote:

> "*We need to take it forward. I will chase Vantage*." {B/128/3}

Meeting on 16 November with Dr Durman

68. Radisson had further meetings/calls with Dr Durman on 16 November and 25 November 2021, during which Dr Durman made and/or repeated allegations that Hayat had had *ex parte* communications with CD.

69. Ms Cambré's evidence in her second witness statement (para 15) as to the meeting on 16 November 2021 was (so far as material):

> "*During this brief meeting (which lasted approximately 30 to 45 minutes) we discussed (strictly without waiving privilege) what kind of legal assistance Dr Durman could provide in relation to the aforementioned insurance matter were he to be instructed. <u>Dr Durman also repeated his allegation that there had been contact between CD, members of the Bilgili family and Hayat's representatives during the ICC arbitration between Hayat and Radisson.</u> During the meeting, Dr Durman also made a new allegation that a friend of his had told him that CD had attempted to convince the other members of the Tribunal to issue an award for several million euros against Radisson. Dr Durman did not disclose the identity of this friend. Again, Dr Durman said that he had no evidence to substantiate these allegations and it did not seem to me that there was any obvious means of verifying them*." [emphasis added]

70. Ms Cambré's evidence in her witness statement was that Dr Durman did not reveal the identities of the contact:

> "*I do not know whether the particular instances of contact between CD and Hayat which Dr Durman was referring to during our meetings were the same ones which were later discovered by Radisson (dating from March 2019 (the "March 2019 Emails")) or disclosed by Hayat on 4 March 2022 to the ICC Court and in these proceedings (dating from April and May 2019 (the "Further Emails")). This is because <u>Dr Durman never provided (in this or any other discussion I had with him) any specific details of the contacts he was alleging had occurred, or the identities of the people who had been involved</u>. My overall impression of Dr Durman's claims was therefore largely unchanged from when he had first raised them during our meeting on 24 September 2021<u>: they were vague and there was</u>*

no evidence to support them, and Radisson had no basis itself to make those allegations against Hayat simply based on Dr Durman' s account."

Meeting with Mr Önkal on 16 November 2021

71. On 16 November 2021 Ms Cambré also met Mr Önkal and Ms Gülkilik for the first time. The meeting took place during a coffee break at an industry business development event organised by Radisson and lasted for approximately 10 to 15 minutes. Ms Cambré's evidence was that:

> "*At no point during this meeting did Mr Önkal or Ms Gülkilik mention anything about any Hayat representative (including Mr Önkal himself) having had any ex parte contact with CD during the ICC arbitration.*" (Second Witness Statement of Nicole Cambré) {B/6/9}

72. However I note that in her first witness statement Ms Cambré said that during this meeting Mr Önkal "*explained that CD had been a former student of his (although he did not know her personally at the time) and that he had put CD forward to Hayat as a possible arbitrator*."

Call on 25 November with Dr Durman

73. There was then a call with Dr Durman on 25 November 2022. Ms Cambré's evidence in her second witness statement was as follows:

> "*After the 16 November 2021 meeting, I arranged a further call with Dr Durman on 25 November 2021. On this occasion, I asked Ms Michou of Quinn Emanuel to join so that I could ask for her views on instructing Dr Durman in the insurance matter. At the end of that call, I also asked Dr Durman to repeat (for Ms Michou's benefit) his allegation that CD had attempted to influence the other members of the Tribunal in relation to quantum in the ICC arbitration. I also asked (again) if Dr Durman had any evidence to support this allegation, but he said no…*".

Meeting with Mr Önkal on 4 January 2022

74. On 4 January 2022 Ms Cambré met with Mr Önkal. Also present were Mr Yücel, Ms Gülkilik, Ms Michou, Dr Durman and Ms Yurttutan (Radisson's Turkish external counsel). Ms Cambré's evidence is that Mr Yücel and she had a separate conversation with Mr Önkal, during the course of which Mr Önkal invited Mr Yücel and her (unsolicited) to copy the contents of his USB drive to their respective laptops (which she was told by Mr Önkal contained some draft reports he had prepared). Her evidence was that at no point did Mr Önkal mention that the USB drive also contained the Word Document which was later discovered by Quinn Emanuel on 13 January 2022. Nor did Mr Önkal ever mention that there had been *ex parte* contact between CD and Hayat, or that he himself had participated in such contact. (Second Witness Statement of Ms Cambré)

13 January 2022 emails and WhatsApp messages

75. On 13 January 2022 there was an exchange of emails between lawyers at Quinn Emanuel. Mr Leventhal identified the existence of the March emails in the Word Document:

> "*...Also, in the batch of documents given to us by Mr Önkal, there is a chain of inter Tribunal emails copied into a word document. lt is very bizarre that Mehmet Önkal would have this. Not something for our Rejoinder, but perhaps something to reflect on for future use*" {B/121/3}

76. Mr Watson responded on 13 January 2022:

> "*We clearly need to know more about how it came about that the expert had these emails. The obvious inference is that CD was feeding Tribunal correspondence to the Claimant. If that's right, then surely we must apply to set the award aside- and I would think there's an argument that time would start running on such an application from today (or whenever the client got these emails). If we can get Önkal to give a witness statement saying the Claimant gave him those emails- then I would think we have a very strong case...*" [emphasis added] {B/121/3}

77. Later in the same exchange that day Mr Watson wrote:

> "*Did it come to us in the pack of material that he relied on for his first report (referred to by Nicole in the attached email -I don't think I saw the follow up)? If so that alone might be enough to start raising it in correspondence. Of course doing so would reveal that Önkal has been cooperating with us, which we may not want to do just yet. My main concern is the timing around any set aside application springing from this.*" {B/121/1}[emphasis added]

78. In WhatsApp messages between Ms Michou and Ms Cambré on 13 January 2022 Ms Michou told Ms Cambré about the Word Document telling her:

> "*He's got internal emails from the tribunal!!! We need to be strategic*." [B/123]

79. Ms Michou also wrote:

> "*We need to explore this. lt may be our shot at CD. We need to be strategic*." {B/124/1}

Meetings on 25 and 26 January 2022 with Mr Önkal and Ms Gülkilik

80. Ms Cambré met Mr Önkal again on 25 January 2022 with Ms Gülkilik attending remotely. Ms Cambré's evidence was that the meeting was to clarify how and for what purpose the Word Document had been created. During the meeting Ms Gülkilik forwarded to Ms Cambré the originals of the March Emails. Ms Cambré's evidence was as follows in relation to Mr Önkal:

> "*30.1 As I have explained above, Mr Önkal never mentioned to me in any of my discussions with him prior to 25 January 2022 that he was aware of any ex parte communications between CD and Hayat.*
> *30.2 Mr Önkal never mentioned to me in any of my discussions with him prior to 25 January 2022 that he had participated in any ex parte communication with CD.*
> *30.3 Indeed, it is not entirely clear to me whether Mr Önkal was aware of the Word Document on the USB drive or that he had even intended to provide the Word Document to me and Mr Yücel when he asked that we copy its contents at our meeting on 4 January 2022.*
> *30.4 Although he was asked during our meeting on 25 January 2022 to elaborate on the extent of Hayat's ex parte communications with CD, Mr Önkal never mentioned the Further Emails to which I refer below…*" (Second Witness Statement of Ms Cambré).

81. There was then a further meeting with Mr Önkal and Ms Gülkilik on 26 January 2022. In an internal email that day Ms Cambré wrote:

> "*I had another meeting with Mehmet Önkal and Esin Kulkilik today and we spoke with Okay Durman, the former Bilgili lawyer They all agreed to be named in my witness statement so we will change them from Individual 1-2 and 3 and name them…*" {B/154/1}

Credibility of Ms Cambré and absence of other witnesses

82. It was submitted for Hayat that in places Ms Cambré's oral evidence was untrue. Amongst other things Hayat referred to the following evidence [Day 2 p90]:

    a. the reason she did not instruct an investigation in November;

    b. that the decision to meet and engage Dr Durman was in relation to insurance;

    c. the deletion of parts of her WhatsApp messages;

    d. what Mr Önkal told her about CD on 16 November.

83. Hayat submitted that Radisson had put forward one witness whose evidence had been exposed as lacking credibility whilst at the same time withholding other witnesses.

84. It was submitted for Radisson that Ms Cambré was a trustworthy witness and her oral evidence was consistent with the documents and her written statement and in particular on the considered and diligent approach that she took to Dr Durman's allegation and Radisson's investigation of them. It was submitted that her evidence was truthful and credible.

85. In relation to the absence of Mr Önkal and Dr Durman as witnesses it was submitted for Radisson that the evidence of Ms Cambré was that it was decided that she would give evidence when the application was issued and there was a rush to put in the evidence quickly. Following the application to the ICC, Hayat initiated a criminal complaint against Mr Önkal and Mr Gülkilik and it was submitted that as a result by the time

responsive evidence would have been obtained they were under a criminal investigation in Turkey. [Day 2 p7]

86. In relation to Ms Cambré's evidence in cross examination, one of the more surprising parts of her oral evidence was in relation to her own email of 5 November and the reasons for not instructing an investigation firm at that time. In the course of her cross examination passages from that email were read out including the passage that said:

> "*…even if …she is replaced, Bilgili can appoint a new arbitrator which will not bring any solution so unless we find evidence against the biased chairman it will lead us nowhere in my opinion*."

It was put to her in cross examination that this was the reason why Radisson decided not to instruct an investigator, Ms Cambré's response was as follows:

> "*It's not correct. Based upon the information I had at that point I did not know —— I mean, whether a new tribunal would issue a different award or something, there was a risk. At that time, I did not have any insurance coverage, we were stuck with the 30 million claim which after that email on 27 November got inflated by your client to 42.5 or 42.4 million , so the situation changed between that email and my engagement of Vantage in the beginning of December when I instructed Mr Leventhal to engage Vantage, and I also instructed Mr Leventhal at that moment to also look at AB in addition to CD*."

87. It was also put to her in cross examination that her decision at that point was to close off the idea of an investigation because she did not see any point in challenging the award and because she had a claim against the insurer. Her evidence was:

> "*A. That was my initial reaction at that point. After discussion with counsel, I changed my opinion, and so it turned out that my assessment is incorrect because I decided in the beginning of December that we would continue investigating and using Vantage, so we engaged Vantage*" [Day 1 p113-114]

88. In my view Ms Cambré's oral evidence in relation to the 5 November email was not consistent with the documents and I infer was an attempt by her to put a favourable slant on her evidence to accord with the case now advanced by Radisson.

89. In relation to why she decided to instruct Dr Durman following the September meeting her evidence in her second witness statement was that it related only to advice on insurance:

> "*Following my initial meeting with Dr Durman on 24 September 2021, <u>I was still unsure whether to instruct Dr Durman on the aforementioned Turkish insurance matter</u> (as referred to at paragraph 8 above, and which was unrelated to this s.68 Challenge), and did not want to take the decision by myself. I therefore emailed Dr Durman on 7 October 2021 to arrange a further meeting, in which I would be accompanied by Radisson's Senior Area Vice President, Mr Yilmaz Yildirimlar*". [emphasis added]

90. However this evidence has to be tested in light of the contemporaneous documents: in an email on 26 September 2021 to Quinn Emanuel, Ms Cambré set out what Dr Durman had told her but there is no reference to instructing him in relation to insurance and merely a general statement that:

    "*Okay Durman has indicated that he is willing to be representing Radisson on a retainer basis of 10.000 TRY (1000 EUR) per month.*" {B/61/1}

91. Further and more significantly there is no reference in the exchange between Ms Cambré and Antoine Moubarak on 27 September 2021 to retaining Dr Durman for insurance matters, rather the exchange suggests that the proposal to engage him related to his information on knowledge of CD and meeting with Bilgili:

    "*AM: Hi Nicole <u>interesting feedback from bilgili ex lawyer .... hope we can do something out of it especially "arbitrator CD" knowledge and meeting with Bilgili</u> ...*
    NC: I don't want to take the decision on my own to engage him. Isabelle suggest to appoint an Israeli security company specialized in investigations. I need Yilmaz to meet with the lawyer and expert to get a second opinion before we take a decision…" [emphasis added]

    This is a further example of where her written evidence was not in my view consistent with the contemporaneous documents.

92. I also found Ms Cambré's evidence in relation to the meeting on 25 January 2022 inherently not credible in the circumstances. At a time when Radisson had seen the March Emails and wanted to verify their authenticity, according to Ms Cambré's evidence the obvious questions about the March Emails were not put to Mr Önkal:

    "*Did you ask Mr Önkal why he had contacted CD, yes or no?*
    A. No.
    Q. Did you ask him whether he had told CD that he was engaged by Hayat, yes or no?
    A. No.
    Q. Did you ask him whether he had passed any information from CD on to Hayat?
    A. No.
    Q. Right. Well, I think you must have —— I suggest you must have asked him those questions.
    A. I did not." [Day 1 p198]

93. In relation to the meeting with Mr Önkal on 16 November 2021, Ms Cambré was asked about her witness statement in which she said that during this meeting Mr Önkal "*explained that CD had been a former student of his (although he did not know her personally at the time) and that he had put CD forward to Hayat as a possible arbitrator.*"

    The exchange was as follows:

    "*Q. …why did you say "at the time"? Why didn't you say he did not know her personally?*

> *A. I cannot remember, but my recollection of this meeting is that Dr Önkal told me that he did not know CD personally.*" [day 2 p134]

94. That oral evidence does not seem to be credible when viewed with the evidence that Mr Önkal put CD forward as an arbitrator and appears to be an attempt to change her written evidence to help Radisson's case.

Conclusion on credibility of Ms Cambré

95. In assessing the credibility of Ms Cambré I bear in mind that she is a (Belgian) lawyer and I accept that she is not an expert in arbitration (she had one other ongoing arbitration at the time) and she relied on Quinn Emanuel for the day to day management of the arbitration proceedings and for advice.

96. The evidence suggests that one of her principal concerns in the relevant period (September 2021 - January 2022) as the person responsible at Radisson for managing the arbitration was the escalating amount of the claim by Hayat and the fact that the insurers indicated around August 2021 that they would no longer cover the costs.

97. There were occasions in her evidence where perhaps hindsight or memory failure (she apparently made no notes of any calls or meetings) may have influenced her evidence: for example, her insistence that after the 5 November email she had changed her mind and instructed Vantage to proceed with the investigation into CD. The documentary record shows that she did instruct Quinn Emanuel to proceed but she did so only once AB had resigned; a similar explanation may lie behind her evidence that the instruction to Vantage to proceed on 14 January was not connected to the discovery of the Word Document on 13 January which was also shown to be wrong by the contemporaneous record.

98. However there were clearly occasions where in my view she sought to present her evidence in a way which was favourable to Radisson even when presented with contemporaneous documents to the contrary, the most notable example being her evidence in cross examination as to her reasons for not instructing an investigation firm in October/November 2021 as contrasted with the reasons set out in the email of 5 November.

99. There were other examples which raised concerns about her credibility such as her evidence concerning her first meeting with Dr Durman in September 2021 where she implied that he had instigated the meeting. Whilst it is true that he had initiated the contact he had done so many months before and the documentary evidence is that Ms Cambré then took the initiative to arrange the meeting in September 2021, I infer at a time when the Arbitration was becoming of greater concern to her given the recent change of position by the insurers.

100. Although I accept that she left day to day management of the proceedings to Quinn Emanuel I find her evidence that she did not know the extent of the investigation proposed by Black Cube lacked credibility. Her evidence has to be tested in light of the documentary evidence that she had a call with Quinn Emanuel to discuss the appointment of an investigator. It seems to me that Ms Cambré wanted to downplay in her oral evidence to the Court the scope of the proposed investigation and the inference that

Radisson clearly was wanting to obtain any information of any kind which could be used to discredit the arbitrators.

101. These examples showed in my view a lack of candour on the part of Ms Cambré in her evidence which leads me reluctantly to conclude that even though she is a lawyer, her evidence to the Court was partial and cannot be regarded as reliable. I therefore approach her evidence with considerable caution and place little weight on her evidence except where it is supported by the contemporaneous documents.

Documents and deletion of messages

102. It was accepted for Radisson that there had been some deletion of WhatsApp messages by both Ms Cambré and Ms Michou. The reason given was that it was to free up storage and/or delete irrelevant messages. It was submitted for Radisson that the correspondence is entirely consistent with its case and the deletions do not suggest that something improper or dishonest has taken place. [Day 2 p17]

103. In my view there was no satisfactory explanation for the deletion of the WhatsApp messages. Ms Cambré's evidence was that it was to save memory and because some messages were pointless. However given that the bulk of the messages appear to be preserved it is difficult to understand why a few have been deleted if it was to save memory.

104. On one version of the messages between Ms Michou and Ms Cambré the exchange read:

> "*IM: He's got internal emails from the tribunal!!. ! We need to be strategic.. Please call me when you can. 12:43*
> *NC: I am in the plane 12: 44 ..// How can he have internal mails? 12:44 ..// I cannot call 12: 45 ..//*
> *IM: Exactly the question. Let's speak later today…"* {B/120/1}

105. When the same messages are looked at by reference to a screenshot of the messages sent by Ms Cambré to Mr Yücel they are different:

> "*NC: How did you get them? ..// I cannot call*
> *IM: Exactly the question. Let's speak later today. We need to explore this. lt may be our shot at CD. We need to be strategic."*
> {B/125/1}

106. In relation to the absence of meeting notes it was submitted for Radisson that the evidence of Ms Cambré was that there were no notes of meetings and no inference can be drawn in the face of the evidence of Ms Cambré that no notes existed. [Day 2 p8]

107. For Hayat it was submitted that Ms Cambré in her statement referred to ten separate meetings or calls with Mr Önkal and Dr Durman between September 2021 and January 2022, yet Radisson has not produced a single contemporary note, or even an agenda for any of those. Hayat submitted that it did not accept that this reflects normal practice at Radisson, still less at Quinn Emanuel, in respect of meetings they attended. Hayat submitted that the lack of any notes suggests either a conscious decision not to note the meeting, or a subsequent decision to suppress that note. [Day 1 p41-42]

108. Whilst I am prepared to accept that Ms Cambré may not have taken notes of informal meetings, it is in my view surprising that there were no notes of meetings taken of key meetings or calls (even if the setting was informal) particularly where those were attended by the external lawyers: for example the meeting on 4 January 2022 at which Ms Michou was said to be present in order to form an opinion on Dr Durman and Mr Önkal prior to them being engaged by Radisson.

109. Ms Cambré's evidence in cross examination was as follows:

> "*A. There were no notes taken because it took place in the bar of the Radisson Blu hotel.*
>
> *Q. This was a very important meeting, wasn't it?*
>
> *A. It was an introduction meeting. It was also -- I wanted to get Ms Michou's opinion on both Dr Durman and Mr Önkal and also on Ms Yurttutan because Ms Michou never knew any of them, so I wanted to get her opinion before I made any decision on any engagement.*"
> [Day 1 p146-147]

110. It was submitted for Radisson that it is not unusual for solicitors not to make notes of meetings if there is going to be another record and that a lot of discussions took place in the context of informal meetings. [Day 2 p9]

111. I do not accept that experienced litigators do not take notes of meetings which they attend, regardless of the setting for the meeting, particularly in the context of an investigation into possible bias on the part of the arbitrator and I have received no satisfactory explanation for the absence of any notes by Quinn Emanuel of any of these meetings and calls which it attended. Further I find it remarkable that at the meeting on 25 January 2022 by which time Radisson had seen the emails from CD and wanted to establish their authenticity still no notes were taken by Ms Cambré.

Discussion on knowledge

112. In *Thyssen* at [18] Cooke J cited Moore-Bick J in *Rustal*:

> "*a party who believes he has grounds for objecting on the basis of serious irregularity should raise that objection as soon as he is, or reasonably ought to be, aware of it*."

113. Cooke J continued to quote from that judgment:

> "*[19] Moore-Bick J went on to say that there might well be periods in arbitration proceedings during which no formal step is required of one or other party but, during those periods, the parties will still be taking part in the proceedings. That proposition held good for the period between the conclusion of the hearing and*

the publication of the award when nothing further might be required of either party in the interim. He continued as follows:-

"In my judgment, unless a party makes it clear that he is withdrawing from the proceedings, he continues to take part in them until they reach their conclusion, normally in the publication of a final Award. I can see no reason why a party who discovers grounds of objection after the conclusion of the hearing and before the publication of the Award should not be required to voice it promptly, even at that stage, if he wishes to pursue it later on by challenge to the Award. To require him to do so is consistent both with the wording of section 73(1) and the principles which underlie it."

[20]. I respectfully agree..." [Emphasis added]

114. The evidence of Ms Cambré is that Dr Durman never provided any specific details of the contacts he was alleging had occurred, or the identities of the people who had been involved. The reliability of this evidence has to be tested in light of the other evidence and the Court's assessment of her credibility.

115. In my view the information supplied by Dr Durman on 24 September 2021 was enough to raise a concern of contacts between Hayat and the arbitrators sufficient to warrant further investigation but not specific enough to amount to grounds for objecting. I note in this regard the email from Quinn Emanuel on 1 October 2021 seeking a quotation from Black Cube read (so far as material):

> *We were wondering if you could provide a quotation to help us on a new matter, in which we are looking to establish the opposing party's contacts with an arbitrator during the arbitration proceedings and possible success fees for fact witnesses and expenses.* {B/67/14}

116. I also note the broad description of the investigation as reflected in the proposal from Vantage on 1 November 2021:

> "*The Client asked Vantage to provide a proposal for investigative assistance in support of the arbitration. Specifically, the Client would like to determine if one of the arbitrators appointed to the arbitral panel, as well as two witnesses proposed by the opposing side, may be colluding with the opposing side, or are otherwise conflicted with regard to the arbitration.*" [emphasis added]

117. The objectives specified in the Vantage proposal did not identify *ex parte* communication but more generally whether CD had a professional or personal relationship with the Bilgili Holding group of companies or the Bilgili family generally, and whether there were historical or current ties between CD and Baskan or Karakas.

118. This suggests that although a lack of impartiality was to be investigated there was insufficient information to identify the *ex parte* contact now relied on.

119. After this however there were the meetings on 16 November and the call on 25 November for which there are no notes and only the evidence of Ms Cambré.

120. Dr Durman was engaged by Radisson on 1 December; on its face the terms of his engagement were not tied to advice on insurance and as referred to above the contemporaneous documents do not suggest that this was the purpose of his engagement.

121. On 4 January 2022 Radisson engaged Mr Önkal.

122. The contemporaneous internal emails between lawyers at Quinn Emanuel on 13 January would suggest that they were not aware of the specific *ex parte* communications between CD and Önkal prior to seeing the Word Document although this does not preclude knowledge of communications having been alleged to take place between Hayat or its representatives and CD. A contemporaneous email from Ms Cambré and Mr Yildirimlar also on 13 January 2022 read:

> "*…We do not know how Mehmet got this internal correspondence between the tribunal members most likely CD shared it either with Mehmet/Esin directly or he received it from Bilgili. This correspondence should not have been shared outside the tribunal…*" {B/130/1}

123. At the latest therefore from 13 January 2022 Radisson had knowledge of the grounds and should have raised the issue: as Mr Watson wrote in the internal email on 13 January 2022:

> "*..The obvious inference is that CD was feeding Tribunal correspondence to the Claimant. If that's right, then surely we must apply to set the award aside…*" {B/128/3}

124. However rather than raise the matter immediately, on 14 January 2022 Radisson submitted its Rejoinder on Quantum to the Tribunal. Further on 21 January 2022 Radisson wrote to the ICC Secretariat objecting to Hayat's proposals for the selection of a Presiding Arbitrator and the length and format of the hearing for the quantum phase:

> "*We comment briefly on the two points addressed in the Claimant's email below. First, the Respondent sees no reason to depart from the rule that the Presiding Arbitrator may not have the same nationality as the co-Arbitrators or the Parties. That rule has guided the ICC Court's selection of the Presiding Arbitrator from the start of this arbitration.*
> *Second. the Respondent still believes it is premature to discuss or decide on the Claimant's application to expand the hearing from a two-day hearing to a seven-day hearing, much less the specific dates of that hearing. The Respondent reserves its right to comment on those issues once a Presiding Arbitrator has been selected and is currently caucusing internally as to the availability of team members, witnesses, and experts during that time period.*" {B/135/1}

125. On 25 January 2022 the ICC Secretariat wrote to Radisson and Hayat informing them that the decision on AB KC's resignation and the appointment of a replacement was imminent {B/136-1}. On 26 January 2022 Quinn Emanuel wrote *ex parte* to the ICC Secretariat, attaching the native emails provided by Ms Gülkilik and requesting that the ICC Court refrain from appointing a new Presiding Arbitrator pending Radisson's forthcoming application for the replacement of the Tribunal in the following terms:

> "*We refer to the Secretariat's 25 January 2022 correspondence, in which the Secretariat informed the Parties that "the Court will be invited to decide on AB' resignation and on the appointment of AB' replacement imminently."*
> *The Respondent urgently requests that the ICC Court refrain from doing so for the time being as it has come recently to the Respondent's attention that the co-Arbitrator appointed by the Claimant- CD- has engaged in serious misconduct.*
> *This will lead to a request by the Respondent for the replacement of the entire Tribunal and the appointment by the ICC Court of all three members of a new tribunal.*
> *Amongst other improper behaviour, CD has shared internal Tribunal correspondence - including the Tribunal's preliminary assessment of the Parties' positions on the merits- with Mehmet Önkal, an industry expert, who at the time was a member of the Claimant's team in this arbitration. We attach examples to this letter. (Attachments 1 to 3- in PDF and original email format)*
> *This is obviously extremely serious and affects the integrity of this arbitration as a whole…*
> *In the unique and urgent circumstances, we have written to the ICC ex parte. As noted above, however, we will shortly put the Claimant and the Tribunal on notice of this issue and will provide them with a copy of this letter at that time.*" [emphasis added] [B/156]

126. On 28 January 2022 Radisson gave notice to the Tribunal that on 27 January 2022 it had filed an application with the Court to set aside the Partial Award and inviting the arbitrators to resign:

> "*In recent days, it has come to the Respondent's attention that CD has engaged in ex parte communications with a member of the Claimant's team and provided him with internal Tribunal deliberations*". [C49]

Conclusion on knowledge

127. A party to an arbitration must act "promptly" if he considers that there are grounds on which he could challenge the effectiveness of the proceedings (*Rustal Trading* above). Section 73 is designed to ensure that a party who believes he has grounds for objecting on the basis of serious irregularity should raise that objection as soon as he is aware of it. He is not permitted to allow the proceedings to continue without alerting the Tribunal and the other party to a serious irregularity, which, in his view, renders the whole arbitral process invalid (*Thyssen* above).

128. The question is not when Radisson had the "cogent evidence" necessary to bring its s.68 Challenge by that date but when it believed it had grounds for objecting whereupon it was obliged to raise the objection promptly. Radisson knew the grounds on which the s.68 Challenge was brought at the latest when the emails showing the *ex parte* contact between CD and Mr Önkal were first provided to Radisson (no later than 13 January 2022). The Word Document containing the text of the March Emails came from Mr Önkal, a credible source who had at that point been retained by Radisson. On the evidence Radisson believed it had grounds for objecting by 13 January 2022; it did not need the native versions of those emails to have a belief that it had grounds for objecting.

129. It would appear that Radisson chose not to raise the issue immediately because it wanted to keep confidential the involvement of Mr Önkal: in the internal email exchange on 13 January 2022 Mr Watson wrote:

> "*Did it come to us in the pack of material that he relied on for his first report (referred to by Nicole in the attached email -I don't think I saw the follow up)? If so that alone might be enough to start raising it in correspondence.*
> *Of course doing so would reveal that Önkal has been cooperating with us, which we may not want to do just yet*." [emphasis added]{B/121/1}

130. The March Emails were obtained before the Quantum Rejoinder was filed and thereafter Radisson continued to participate in the proceedings through the correspondence. On 21 January 2022, over a week after it had received the Word Document Quinn Emanuel wrote to the ICC Secretariat about the appointment of a new President and the timing of the next hearing.

131. The attitude of Quinn Emanuel and thus Radisson is clear from the contemporaneous documents on 13 January 2022: it did not seek to raise an immediate objection to CD but rather the evidence of her *ex parte* communications was "*something to reflect on for future use*" (Mr Leventhal). Moreover even though the information in the Word Document was acknowledged to be enough to start raising it in correspondence, Quinn Emanuel did not want to do that because that "*would reveal that Önkal has been cooperating with us which we may not want to do just yet*" (Mr Watson). Ms Michou regarded it as potentially "*our shot at CD"* but was of the view that they needed to be *"strategic"*.

132. I accept as likely the submission for Hayat that Radisson only raised its objection to CD when it was told on 25 January 2022 that a new President was about to be appointed "*imminently"* prompting an immediate and urgent response on 26 January 2022 from Quinn Emanuel:

> "*We refer to the Secretariat's 25 January 2022 correspondence, in which the Secretariat informed the Parties that "the Court will be invited to decide on AB' resignation and on the appointment of AB' replacement imminently."*
> *The Respondent urgently requests that the ICC Court refrain from doing so for the time being as it has come recently to the Respondent's attention that the co-Arbitrator appointed by the Claimant- CD- has engaged in serious misconduct...*"
> [emphasis added] {B/156/1}

133. Thus the evidence shows that Radisson (and its lawyers) had seen the Word Document by 13 January 2022 but took no action to raise this with the Tribunal (or Hayat) for nearly 2 weeks preferring to keep it in reserve and consider their strategy. When matters became urgent however they responded to the ICC Secretariat within a day, attaching the evidence of the emails:

> "*Amongst other improper behaviour, CD has shared internal Tribunal correspondence - including the Tribunal's preliminary assessment of the Parties' positions on the merits- with Mehmet Önkal, an industry expert, who at the time*

was a member of the Claimant's team in this arbitration. We attach examples to this letter…"

134. It was submitted for Radisson that when it got the evidence it needed time to consider it before making serious allegations [day 2 p70]. It was submitted that until Radisson got the native emails it could not be expected to bring the application, that it acted reasonably to establish the authenticity of the Word Document. Radisson relied on dicta in *Cofely v Bingham* [2016] EWHC 240 (Comm), Hamblen J (as he then was) at [117] that allegations of bias should be investigated properly before an application under s.68 is made:

"*On my findings the issue of apparent bias does not arise out of the earlier conduct of the arbitration reference but only out of events from March 2015 onwards. From March until July 2015 Cofely was involved in an information gathering exercise which continued until the important information provided by Knowles in its 3 July letter. It was not in a position to decide whether there were grounds for objection until that information gathering was as complete as it was likely to be. Bias is not an issue to be raised lightly. Moreover, the only part it was playing in the proceedings during this period was in pursuing its information requests. In all the circumstances I am satisfied that section 73 has no application in this case*".

135. It was submitted for Radisson that it was consistent with the scheme of the 1996 Act, which requires that challenges under s.68 are brought only where there are serious grounds for doing so, that a party is entitled to investigate an allegation in order to build a proper basis for bringing a challenge. In *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm); [2007] 1 Lloyd's Rep 693 at [72], Aikens J noted in the context of an application for an extension of time that:

"*…it is still necessary to set out the grounds of the application. In order to do that properly, the matter had to be investigated by Elektrim's English lawyers, BLG, who were new to the case. <u>It was reasonable to wait until the matter had been investigated, then to make the application to extend time on the same arbitration claim form as that for relief under section 68(2)(g), as provided for by CPR Pt 62.9(3)</u>.*" [emphasis added]

136. However, as noted *Elektrim* was in the context of an application for an extension of time and under section 73 Radisson was obliged to act promptly as Quinn Emanuel itself recognised at the time. Further the contemporaneous documents show that Quinn Emanuel recognised the value and significance of the Word Document immediately:

"*the obvious inference is that CD was feeding Tribunal correspondence to the Claimant. If that's right then surely we must apply to set the award aside -and I would think there's an argument that time would start running on such an application from today (or whenever the client got these emails)*".

137. As the contemporaneous evidence shows, Radisson and Quinn Emanuel did not want to raise the issue immediately as that would involve revealing their hand and they were of the view that they needed to deploy it strategically :

> "*that alone might be enough to start raising it in correspondence. Of course doing so would reveal that Önkal has been cooperating with us which we may not want to do just yet.*"

138. By 13 January 2022 Radisson knew there were grounds for objection. The fact that Quinn Emanuel was able to respond to the ICC Secretariat raising the objection within a day and attaching the evidence dispels any notion that Radisson needed time before it could raise the objection. It could have sent a letter raising the objection immediately following its discovery of the Word Document but for strategic reasons it chose not to do so.

139. I find that Radisson has not shown that it did not have knowledge for the purposes of section 73 of the grounds for objection at the time it continued to take part in the proceedings. Accordingly I find that it is precluded by section 73 from raising its objection to the Award.

Knowledge prior to 13 January 2022

140. My finding above on knowledge is sufficient to dispose of the case. Hayat advanced a case that Radisson had knowledge from 24 September 2021, alternatively from the date Dr Durman/Mr Önkal was engaged by Radisson. It seems to me evident from the tenor of the emails on 13 January 2022 between members of Quinn Emanuel that they did not have the evidence of the *ex parte* communications between CD and Mr Önkal prior to receiving the Word Document. However had it been necessary to decide the point, in my view it is likely that Radisson had knowledge of the *ex parte* contact between CD and Mr Önkal by 4 January 2022 for the following reasons:

    a. The evidence that Mr Önkal had been "*cooperating*" with Radisson (Mr Watson on 13 January 2022) - that reference could relate solely to the quantum issue but in light of the other evidence is likely to have extended beyond just quantum;

    b. The evidence that Mr Önkal had said at his meeting on 16 November that he knew CD and had put her forward as an arbitrator. (In light of the fact he put CD forward to Hayat as a possible arbitrator, I do not accept the evidence of Ms Cambré that he said he did not know her personally.)

    c. The call with Dr Durman on 25 November and the meeting with Mr Önkal on 4 January 2022 which was attended by Quinn Emanuel and yet there are no meeting notes.

    d. Ms Cambré denied that Mr Önkal mentioned to her prior to 25 January 2022 that he was aware of any *ex parte* communications between Hayat and CD or that he had participated in any *ex parte* communication with CD. For the reasons set out above I do not accept that Ms Cambré's evidence is reliable. Further I have regard to the deletions of WhatsApp messages by both Ms Cambré and her lawyer, Ms Michou. I regard the explanation of Ms Cambré as unsatisfactory. The deletion of messages by Ms Michou, one of the lawyers handling the Arbitration is even more surprising and unsatisfactory. Whilst it was submitted for Radisson that there is no suggestion that something has gone missing as a result of the deletions, it suggests that the full exchange between Ms Cambré and Ms Michou and their reaction to

the discovery of the Word Document has not been put before the Court and this does go to the key issue of knowledge.

e. There is evidence throughout the period from September 2021 to January 2022 (and earlier) of Radisson's strategy of seeking to challenge the impartiality of the arbitrators: this is evident from the wide-ranging instructions to the investigators proposed in relation to CD and even more so in relation to AB, where no apparent wrongdoing was identified but the strategy was to seek any possible evidence with which to undermine his appointment. The response from Radisson on 22 December 2021 to what most people might regard as the unfortunate news of AB' resignation for ill health is particularly striking: Mr Yildirimlar messaged Ms Cambré: "*Great news Nicole*". {B/109/1}

f. The evidence shows that Radisson took the view in relation to CD that there was no point pursuing the information it had from Dr Durman and seeking to force her resignation/dismissal until after AB resigned.

Attribution

141. There was an additional argument put forward by Hayat on knowledge based on Radisson being deemed to have knowledge based on the knowledge of Dr Durman from 1 December 2021 and Mr Önkal from 4 January 2022 through "attribution". However in the light of my finding above it is not necessary in my view for the Court to address this alternative basis.

Have Radisson shown that they "could not with reasonable diligence have discovered the grounds for the objection."

142. If I am wrong that Radisson waived its right to object because it continued to participate in the arbitration proceedings after it had knowledge of the grounds, then I will consider in the alternative whether Radisson has shown that it could not with reasonable diligence have discovered the grounds for the objection.

143. It was submitted for Radisson [Day 2 p65] that:

a. The evidence of Dr Durman was unreliable - he was not a credible source.

b. Had Radisson made an application it would have been opposed by Hayat and there was no evidence to support an application.

c. The allegations that Dr Durman made were different and related to allegations of an undisclosed relationship with members of the Bilgili family and an allegation that there was pressure to increase the quantum of the Award.

d. Radisson did investigate with reasonable diligence – Radisson took steps immediately in October to consult and obtain quotes from investigation firms; Ms Cambré's evidence was that she diligently took steps to investigate Dr Durman's allegations, including meeting Dr Durman and Mr Önkal separately on 16 November; Ms Cambré's evidence is that she sought proof of the allegations made

by them, and then on the call with Dr Durman on 25 November, Ms Michou asked for evidence of the allegations.

e. The matter had to be handled sensitively since Radisson did not know whether Mr Önkal intended to hand over the emails.

f. Radisson made the right decision to pursue the line of enquiry directly with Mr Önkal and Dr Durman.

144. In my view Dr Durman was viewed as a credible source - the information he provided was sufficient for Radisson to consider instructing investigators and lack of belief in the information he provided was not the reason why the investigators were not instructed to proceed.

145. I do not accept the submission that in this case Hayat's later assertion that Dr Durman's allegations are untrue are relevant to Radisson's belief and actions at the time. Various allegations were made and refuted of which only the March April and May Emails are now pursued. In any event, as referred to above the contemporaneous evidence is that in October 2021 when the investigators were approached, Dr Durman was regarded by Radisson and its lawyers as a credible source.

146. Radisson relies on Ms Cambré's evidence that she did not know what to make of his allegations and did not fully trust him. I accept Ms Cambré's evidence that she did not fully trust Dr Durman at least initially. This is supported by the contemporaneous documentary evidence. However there was sufficient belief in his information to warrant taking steps to verify what he had said and this appears to be the view of Ms Cambré and Mr Moubarak. The exchange between Ms Cambré and Antoine Moubarak and Nicole Cambré on 27 September 2021 is relevant evidence in this regard:

> "*AM: Hi Nicole <u>interesting feedback from bilgili ex lawyer .... hope we can do something out of it especially "arbitrator CD" knowledge and meeting with Bilgili</u> ...*
> *NC: I don't want to take the decision on my own to engage him. lsabelle suggest to appoint an Israeli security company specialized in investigations. I need Yilmaz to meet with the lawyer and expert to get a second opinion before we take a decision. I have asked Erdel to meet with this Mehmed Önkal expert beforehand. He knows him and is of the opinion that the guy cannot be trusted so before arranging a meeting with Yilmaz I want Erdal to get more details.*
> *The lawyer indicated that he is friends with Mehmed Önkal and that they will take Bilgili to court to get the commission once the arbitration is over*
> *<u>I am very cautious with this. I think they hate Bilgili but have their own interests</u>*
> *<u>AM: agree, and probably lsabelle's team need to find a proper way to clarify bilgili's meeting with Turkish arbitrator during arbitration process</u>, and we try to demonstrate that Bilgili's witness get paid to be witness an inflated amount is now besides (no facts) is more to earn more money than rei !damages*". {B/62/1} [emphasis added]

147. Further the contemporaneous documents show that Radisson acted on other information given to it by Dr Durman at that meeting on 24 September 2021 in terms of framing its disclosure requests.

148. It was put to Ms Cambré in cross examination that she believed Dr Durman. Her evidence was that she did not have any documentary evidence to support his claims:

> "*Q. So if you knew, if you believed what Dr Durman had told you about CD allegedly pushing the rest of the tribunal to give a 20 million award, it stands to reason you also believed what he told you about contacts between CD and Hayat, it doesn't make sense if you just believe half of what he's told you.*
> *A. But I didn't have anything on paper that would justify it . That's why I was trying to engage the investigating firm, sir*".

149. Her evidence in this regard is notable in that she did not say that she did not believe Dr Durman but only that she lacked evidence.

150. In her witness statement Ms Cambré's evidence was that Dr Durman's claims were "*vague and there was no evidence to support them*" (para 16 Second Witness Statement). Her evidence was that on the call on 25 November she:

> "*…asked Dr Durman to repeat (for Ms Michou's benefit) his allegation that CD had attempted to influence the other members of the Tribunal in relation to quantum in the ICC arbitration. I also asked (again) if Dr Durman had any evidence to support this allegation, but he said no.*" (Second Witness Statement of Nicole Cambré)

151. For the reasons set out above I treat her evidence with caution. Even if the claims were vague, Radisson could have sought more detail from Dr Durman and Mr Önkal and by way of evidence could have obtained statements from Dr Durman and Mr Önkal. In her email of 5 November Ms Cambré expressly contemplated obtaining a statement from Dr Durman and signing a consultancy agreement with him. An agreement was signed at the beginning of December but no statement was apparently obtained.

152. Obtaining a statement from Mr Önkal was contemplated as an obvious step by Quinn Emanuel on 13 January 2022: in his email of 13 January 2022 Mr Watson identified the possibility of obtaining a statement from Mr Önkal:

> "*If we can get Önkal to give a witness statement saying the Claimant gave him those emails- then I would think we have a very strong case*."

153. Further the evidence shows that in January 2022 (prior to any criminal proceedings being brought) both individuals were willing to give evidence. Those statements could have been sought earlier.

154. It was submitted for Radisson that it had to act with sensitivity because it did not know if Mr Önkal intended to hand over the emails. However according to Ms Cambre's evidence, Mr Önkal indicated at the meeting on 4 January 2022 that he was willing to assist Radisson on the quantum report and that she agreed orally to pay him for his work going forward (an oral retainer). Further the evidence of Quinn Emanuel is that Mr Onkal had been cooperating with Radisson. There is therefore no reliable evidence that Radisson could not have obtained a statement from Mr Önkal in November 2021 or shortly thereafter (well before there was any suggestion of criminal proceedings).

155. It was submitted for Radisson that it did investigate with reasonable diligence as it contacted investigators and at the meeting on 25 November asked for proof of the allegations. However as is clear, the investigators were not instructed in November, steps were taken in relation to AB in December but the investigation into CD was not revived until mid-January.

156. It was submitted for Radisson that it made the right decision to pursue the line of enquiry directly with Mr Önkal and Dr Durman. Radisson rely on the meetings on 16 November and the call on 25 November as evidence that the matter was diligently pursued. It was submitted that Ms Cambré "sought proof of the allegations" made by them, and then in the call with Dr Durman on 25 November 2021 at which Ms Michou again asked for "evidence of the allegations".

157. At paragraph 15 of her witness statement Ms Cambré's evidence in relation to the meeting on 16 November was as follows:

> "*During this brief meeting (which lasted approximately 30 to 45 minutes) we discussed (strictly without waiving privilege) what kind of legal assistance Dr Durman could provide in relation to the aforementioned insurance matter were he to be instructed. Dr Durman also repeated his allegation that there had been contact between CD, members of the Bilgili family and Hayat's representatives during the ICC arbitration between Hayat and Radisson. During the meeting, Dr Durman also made a new allegation that a friend of his had told him that CD had attempted to convince the other members of the Tribunal to issue an award for several million euros against Radisson. Dr Durman did not disclose the identity of this friend. Again, Dr Durman said that he had no evidence to substantiate these allegations and it did not seem to me that there was any obvious means of verifying them.*"

158. There is no reliable evidence as to what was discussed at the meetings on 16 November or on the call on 25 November, despite the presence of Ms Michou for the call, and even though according to Ms Cambré Dr Durman was specifically asked "*for Ms Michou's benefit*" to repeat his allegation concerning CD and the quantum. It is also notable that at the meeting on 16 November 2021 Mr Önkal disclosed that he had put CD forward to Hayat as a possible arbitrator and yet no questions were said to have been asked about any ongoing communications with CD. In light of these matters I do not accept that Radisson have shown that at these meetings it raised the issue of contact between CD and Hayat representatives including Mr Önkal and was told there was no evidence.

159. Hayat in its submissions sought to draw parallels with the reasoning in *Thyssen* at [40]-[43] where a case was advanced that the claimants did not "know" of the grounds for objection nor could they be expected to do anything. That submission was rejected for the following reasons:

> *40…*
> *i) The exchanges with Counsel in November 2003 show* <u>*that a decision was made not to pursue this line of evidence at all because it was not considered to be advantageous to the Claimants…*</u>

ii) There is no satisfactory evidence that Mr. Katsarakis would not have produced his statement and notes if he had been asked - no doubt upon payment of a negotiated sum of money. The speed with which the notes and statement were produced when the matter was raised with him again on 26th April 2004, following publication of the Award, belies any suggestion that the material would not have been obtainable in November/December 2003.
iii) The Claimants made no effort to contact Mr. Daskalakis or the Romanians or indeed anyone else, in order to check the version of events put forward by Mr. Katsarakis at any time until after the publication of the Award and, moreover, they failed to do so with any speed thereafter.
iv) There is no evidence that the Claimants did not believe what Mr Katsarakis had told them or that they needed confirmation in the shape of evidence of others, or a statement from him or his notes." [emphasis added]

160. In this case the information which came from Dr Durman prompted Radisson to approach firms of investigators. In this regard the email of 5 November 2021 is particularly revealing contemporaneous evidence of what happened in this case. At that time Radisson took the decision not to instruct an investigation firm to investigate the reports of contact between Mr Önkal and CD because, as Ms Cambré said in that email, it would not lead anywhere unless AB was also replaced and she was of the view that it would be better to try and recover from the insurer.

161. It was submitted that Ms Cambré did pursue the matter, that she changed her mind after the email of 5 November and instructed Quinn Emanuel to instruct Vantage at the beginning of December. However the contemporaneous evidence shows that at that point the focus shifted to AB and the investigation into CD was not pursued until after he resigned. The evidence shows that Radisson was keen for Vantage to look for any material which Vantage could find to challenge AB and that it was only once he dropped out of the picture that it became worth concentrating again on the information about CD.

162. It was submitted for Radisson that the investigation by Vantage was ultimately not fruitful; however whether or not information would have been discovered, the failure to progress the investigation was not because Radisson decided it would not produce results but because it was felt to be better strategically to go after AB and/or pursue the insurance cover.

163. It was submitted for Radisson that Hayat would not have disclosed the emails. It was submitted for Radisson that the Court must be mindful of a party's limited ability to uncover circumstances which could provide a basis for challenge which are within the knowledge of the other party and are not disclosed. In the *Federal Republic of Nigeria* case, Sir Ross Cranston found at [233]:

"*As Mr Howard submitted, it could not reasonably be expected that those now alleged as the key fraudsters - Messrs Quinn (until his death) and Cahill, the principals of P&ID - would have revealed their own fraud*."

However in the circumstances of this case, Radisson did not need to have the cooperation of Hayat: Radisson had the cooperation of both Dr Durman and Mr Önkal to an extent that Radisson was prepared to enter into retainers with them. In those

circumstances it is irrelevant whether Hayat would have disclosed the *ex parte* communications if the issue had been raised with Hayat.

Conclusion on exercise of reasonable diligence

164. The burden of proof is on Radisson to show that it could not with reasonable diligence have discovered the grounds.

165. Radisson submitted that:

> "*whilst it was told by Dr Durman that there were things that had gone wrong in this arbitration, that there had been contacts, relationships , and steps were taken to appoint investigators ,three firms were looked at, but it never got to the threshold of the tangible evidence that was necessary or required in order to bring an application until it got that USB stick; prior to the USB stick on 4 January, all that happened were allegations which were not backed up by any material that were being made by people who, the evidence shows, had grudges against Hayat, they were unspecific, they weren't supported by anything, they certainly didn't support an application.*" [Day 1 p29-30]

166. It was submitted for Radisson that s.73 does not impose an impossibly high standard. As Waller LJ stated in *Sumukan Ltd v Commonwealth Secretariat* [2008] 1 Lloyd's Rep 40 at [36]:

> "*it would be wrong to construe section 73 so as to hold that [the appellant] could with reasonable diligence have discovered facts which it neither knew nor believed nor had grounds to suspect*."

167. However this is not a case where Radisson did not have grounds to suspect. It had been told in September 2021 by Dr Durman that there had been contact between CD and Hayat's representatives. Radisson regarded Dr Durman as a credible source albeit one that needed to be viewed with caution hence it contemplated instructing investigators. Radisson first approached the investigators on 1 October shortly after the meetings on 24 and 29 September with Dr Durman and Mr Önkal respectively. However on 5 November the decision was not to proceed:

> "*Bilgili can appoint a new arbitrator which will not bring any solution so unless we find evidence against the biased chairman it will lead us nowhere in my opinion.*"

168. Thereafter Radisson focussed on AB and not on CD until he had resigned.

169. Radisson submitted that pursuing investigations would not have rendered results; that it would not have discovered the grounds. This however does not provide an answer: Radisson had the alternative of getting more information and/or evidence from Dr Durman and Mr Önkal. Both of them were content to be retained by Radisson and were so engaged.

170. Radisson held meetings and calls with Dr Durman and Mr Önkal in November 2021. The burden is on Radisson to show that it could not with diligence have discovered the

grounds. The only evidence it has produced in relation to those meetings and the call is the evidence of Ms Cambré whose evidence I do not regard as reliable. There is no evidence from Dr Durman or Mr Önkal or any other attendee of the meetings and call and no satisfactory explanation has been provided for the lack of evidence from any other witness.

171. On the evidence both Dr Durman and Mr Önkal were content to be witnesses in January 2022; there is nothing to suggest they would not have been willing to provide statements if they had been asked earlier to provide statements, certainly once they had been retained by Radisson. Further according to Ms Cambré she did not ask the obvious questions of Mr Önkal which if true does not suggest Radisson exercised reasonable diligence.

172. For all these reasons I conclude that Radisson has not shown that it used reasonable diligence such that at the time it continued to take part in the proceedings in January 2022, it could not with reasonable diligence have discovered the grounds for the objection. Accordingly I find that it is precluded by section 73 from raising its objection to the Award.

Other issues

173. In light of my conclusions on section 73 on the basis of knowledge and, in the alternative, the exercise of reasonable diligence, it is not necessary for me to consider the issue of whether to grant an extension of time or the substantive allegations of bias and I do not propose to do so.

Addendum

174. Following a comment from Radisson when the judgment was sent in draft to the parties in advance of handdown, paragraphs 154 and 163 have been amended to reflect the evidence and in particular that the retainer with Mr Önkal agreed on 4 January 2022 by Ms Cambré was oral and not written. That change does not affect the substance of the reasoning or the conclusions to be drawn.