



Neutral Citation Number: [2022] EWHC 757 (Comm)

Case No: CL-2021-000190

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
IN THE MATTER OF THE ARBITRATION ACT 1996

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

Date: 11/04/2022

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

Between:

LIVIAN GmbH
- and -
(1) ELEKTA LIMITED
(2) MEDICAL INTELLIGENCE MEDIZINTECHNIK
GmbH

Claimant

**Defendants/
Respondents**

Mr Harry Matovu QC (instructed by **Enyo Law LLP**) for the **Claimant**
Mr Michael Black QC (instructed by **Morgan Lewis Bockius LLP**) for the **Defendants/Respondents**

Hearing date: 16 February 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the hearing of a claim by the claimant for an order pursuant to s.68(2)(a) of the Arbitration Act 1996 (“AA”) for an order setting aside and/or remitting to the arbitral tribunal for reconsideration the Final Award dated 2 March 2021 (the “Award”) made in the arbitration between the Claimant and the Defendants under LCIA Reference No. 163537 on the ground of a failure by the Tribunal to comply with section 33 of the AA.

Background

2. The claimant (previously called HumediQ GmbH) is a German registered company whose business was at all material times the development and manufacture of electronic equipment for application in the healthcare sector. The first defendant is an English registered company that manufactures and sells equipment for use in the clinical management of cancer and allied diseases including in particular Linear Particle Accelerators “(LINACs)” by which radiotherapy is delivered to those suffering from such diseases. At the time material to this dispute, the defendant was one of only two suppliers of such equipment globally. The second defendant is a subsidiary of the first defendant. Nothing material turns on this fact.
3. The claimant developed an automated patient identification and accessory verification system called “*Identify*” (“Identify” or “the Product”). Identify is a computerised system that stores information about patients so as to enable accurate positioning of the patient at each treatment session on the treatment table before and during radiation treatment, and includes a safety and override system to prevent harmful radiation of the patient outside the areas of the body intended for treatment. The Product was specifically designed to be combined and used in conjunction with a LINAC machine. It is common ground that Identify is an electronic system that could be added to (or as the parties describe it “bundled with”) the defendant’s LINACs.
4. By an agreement in writing dated 20 October 2011, referred to in these proceedings and between the parties as the “*Private Labeller and Distribution Agreement*” (“PLDA”), the claimant ceded to the defendant certain rights for the development, marketing and distribution of Identify.
5. By clause 7.4 and 7.8 of the PLDA, it was agreed that:

“7.4 As of the date of this Agreement it is MI’s intention to have a phased approach to sales of the Products which would commence with sales of the Product linked to sales of new Elekta Linacs and Elekta Linac installed base and then progress to sales to the installed base of MOSAIQ and LANTIS customers. Moving to the next phase would depend on several factors including but not limited to customer demand, customer satisfaction with the Product, humediQ ability to produce the Product in the numbers and timescales required and combined Elekta and humediQ servicing and post sales capabilities

...

7.8 Subject to (i) humediQ complying in full with its obligations in this Agreement for each phase (including but not limited to meeting clauses 2. 7, 3.2, 5 of this Agreement); and (ii) MI having accepted the Product in accordance with clause 2.8(i) on or before the Final Product Notice Date for each phase MI shall commit to purchase the following minimum volumes (although any acceptance of the Products in Phase 1 shall not in any way commit MI to acceptance of the Products in Phase 2, with the latter Products requiring a separate and additional acceptance process in accordance with clause 2.8):

Phase 1

(i) By 31 December 2011 - 20 Products (ordered, for delivery before 1st May 2012) for which the CE Mark has been obtained by humediQ in accordance with this Agreement and for which humediQ shall attempt to obtain the 51 O(k) Approval before 1st May 2012);

Phase 2

(ii) By 31 December 2012 - 100 Products (purchased, delivered and invoiced), subject to humediQ obtaining 51 O(k) Approval for the Product before 1st May 2012;

(iii) By 31 December 2013 - 175 Products (purchased, delivered and invoiced), subject to humediQ obtaining 51 O(k) Approval for the Product before 1 May 2012.

In the event that humediQ is unable to obtain 51 O(k) Approval as required above following acceptance by MI of the Products in Phase 1 and/or Phase 2, the parties shall discuss in good faith how to proceed further, although such discussions may include an extension of the applicable date for obtaining the 51 O(k) Approval. Following such discussions, and solely at MI's option, MI may notify humediQ in writing in accordance with this Agreement of any such extension that may be granted. However, for the avoidance of doubt, MI shall not be bound by the minimum volumes in Phase 2 unless humediQ obtains the 51 O(k) Approval in accordance with this clause (including any extension that MI may serve notice of).”

The PLDA was expressly made subject to German law and by clause 22.1:

“This Agreement shall be governed by and construed in accordance with the laws of Germany and any dispute arising out of or in connection with this Agreement shall be referred to and finally resolved by arbitration under the rules of the London Court of International Arbitration which rules are deemed to be

incorporated by reference into this section and the decision of such arbitrator shall be final and binding on the parties. The place of arbitration shall be London. The arbitration proceedings shall be conducted in the English language.”

6. Disputes arose between the parties. The dispute was referred to arbitration pursuant to an arbitration agreement contained in the PLDA. The dispute that is material for present purposes concerned an allegation that the defendants failed to promote, market and sell Identify in accordance with their contractual obligations under the PLDA. Broadly, the claimant maintained that the defendants were obliged to incorporate Identify with all new LINACs sold by it and was not permitted to sell its LINACs otherwise than bundled with Identify – see its closing submissions to the tribunal, where it submitted that:

“2.2.16 It was and is Claimant's case that pursuant to Sec. 7.4 PLDA, Elekta was obliged to bundle the sale of Identify to the sale of a new LINAC, particularly in deals comprising more complex systems like Versa HD and Synergy. Here, according to Experts heard and Elekta's own conviction, Identify could have served as a "key differentiator" and a "lock-out specification". This is confirmed by extensive testimony of Tim Prosser, who emphasises that bundling is useful, necessary and typically envisaged for Western markets, but less so for emerging markets to which cheaper, more basic LINAC solutions may be sold as a consequence of tighter customer budgets.

The scheme also constitutes a breach of Section 7.8. PLDA. Elekta's conduct with regard to humediQ and its product Identify is irreconcilable with the marketing and promotion obligation contained therein.”

This part of the claimant’s submissions culminated in the submission at paragraph 8.3.1 and 8.3.2 in these terms:

“Elekta downgraded and excluded Identify even from the base package of their core systems. It was therefore henceforth only optional, if available at all. This shows that they were separating and disintegrating Identify. It is a paradigm shift, in contrast to bundling. This is a clear change in sales strategy and a strident disregard of what the Parties could expect from their relationship.

8.3.2. Therefore, at least since September 2013, Respondents did not link sales of its LINACs and Identify, although it is stipulated in the PLDA”

The claimant sought damages that it quantified in the sum of €575m by reference to these assertions. The claimant alleged that the obligation on which it relied is contained in clause 7.4 above.

7. The final hearing of the reference was completed on 17 October 2019. Final written submissions were filed on 13 December 2019. The tribunal published its Final Award about 1¼ years later on 2 March 2021. By its Final Award (“Award”), the Tribunal dismissed the claimant’s claim.

The Issue

8. The dispute between the parties turned upon the true meaning and effect of the PLDA. Under German law it is necessary, when construing a contract, to have regard to the content of the negotiations leading to that contract and the subjective intentions of the parties in the period leading up to the agreement.
9. One of the defendant’s employees concerned with the negotiation of the PLDA was Mr Tim Prosser. The defendants had decided not to adduce any evidence from him, the tribunal learned that this was so and by its procedural order No.8, the Tribunal directed “... *the Parties to coordinate the means and manner of approaching Mr. Tim Prosser to determine his willingness to offer witness testimony in the present arbitration ...*” Mr Prosser expressed himself willing to attend to give evidence. Prior to the hearing the Tribunal prepared a list of questions that it intended should be put to Mr Prosser. Mr Prosser attended on Day 4 of the evidential hearing of the reference leading to the Award as a witness of the Tribunal. The method by which his evidence was adduced was that the President and the other members of the Tribunal asked Mr Prosser a series of questions from a list that had been supplied to the parties and to Mr Prosser prior to the hearing.
10. Mr Prosser’s evidence extends over a number of pages of transcript and much of it is not centrally relevant to the issue that arises. However the critical issues that need to be noted are that first Mr Prosser was entirely clear that he was not authorised to enter into a contract with the claimant on behalf of the defendant and that he was assisting those charged with negotiating the contract on behalf of the defendant as a consultant. In relation to the bundling issue the following exchange took place between the President of the Tribunal and Mr Prosser:

“THE PRESIDENT: A question with regard to bundling and I will take you again to this exchange of emails we looked at earlier, and the question is whether it had been envisaged or planned to bundle Identify with the sale of every new LINAC by Elekta, but if I look at this exchange of emails, you wrote in your email of 9 June under paragraph 1:

"We expect Identify when released to be configured with >50% of the LINAC production in Identify's first year.

"(a) in bundled deals with average discounts it should deliver an additional €50K-75K to each LINAC room configured in material margin."

So the idea was not to bundle Identify with every LINAC of Elekta?

A. It wasn't -- the assumptions I made in the forecast were based on approximately 50%. I assume that 50% of the Elekta LINACs sold would go with an Identify, of one device or another. ... ?”

The President returned to the bundling issue a little later in his questioning of Mr Prosser, when the following exchange took place:

“THE PRESIDENT: Yes. And you told us earlier that one of your assumptions as regards the issue of bundling was that not all of the LINACs would be bundled with the new Identify model or programme, but only up to 50%, you said; did I understand this correctly?

A. What I would say, to clarify that, is my assumption is that slightly more than 50% of new sales --

PROF DR SACHS: Of new sales, right.

A. -- would be bundled with Identify.

PROF DR SACHS: And when you make these assumptions and in preparing this business plan, did you discuss those assumptions with Mr Hieronimi?

A. Yes.

PROF DR SACHS: Including the issue of bundling, your assumptions that around 50% for the new LINACs would be bundled?

A. Yes.”

11. Mr Hieronimi was the individual who controlled the claimant. Professor Dr Sachs was one of the members of the tribunal. The claimant did not ask any questions of Mr Prosser. Mr Black QC asked Mr Prosser a number of questions but none of them impacted on the issue that is material for present purposes.
12. Mr Prosser’s evidence is inconsistent with the notion that the mutual understanding of the parties had been that under clause 7.8 PLDA, the defendant was obliged to bundle the sale of Identify to the sale of a new LINAC. It is consistent only with offering Identify as an option and an assumption that such an offer would be taken up in around 50% of the sales of new LINACs.
13. Mr Black submits that this was really the end of the issue so far as Mr Prosser was concerned because the claimant’s case was that the subjective contractual intention of the parties in entering into the PLDA was that “... *Elekta was obliged to bundle the sale of Identify to the sale of a new LINAC ...*”, as is apparent from the closing written submissions lodged on behalf of the claimant with the Tribunal and Mr Prosser’s evidence was unambiguously to contrary effect. Indeed, Mr Prosser explains that in relation to LINAC sales, the market was a global but not a single one and whilst the add on extra of Identify might have been attractive in some markets it would be

significantly less so in others. Plainly if this was accurate, then if the contractual intention had been that all LINACs manufactured by the defendant was required to be offered only with Identify added then that could have significant and obvious adverse effects on the defendant's business. As he put it a little later in his evidence "... *in a global estimation of all the Elekta LINACs that would be sold, it wasn't reasonable in my mind to think that they would be on 100% of the devices*".

14. The Tribunal decided the relevant issue of construction against the claimant. In arriving at that conclusion the Tribunal did not refer to any of Mr Prosser's evidence. It is necessary that I refer to some parts of the Final Award before turning to the parties' respective cases. At Paragraph 120, the Tribunal said that in arriving at its conclusions as set out in the Award, it had "... *reviewed all the Parties' submissions, both in writing and orally at the Hearing...*". This is significant because as far as I can see the claimant did not at any stage submit that Mr Prosser's evidence was relevant to the issue that is material. At paragraph 124, the Tribunal refers to a sales forecast created by Mr Hieronomi and Mr Prosser, which became the business plan that Mr Prosser was asked about when he gave evidence to the Tribunal. Given the express mention of Mr Prosser in paragraph 124 specifically in connection with the business plan that Mr Prosser had been asked about, it is unlikely that the Tribunal simply overlooked or forgot about his evidence. Mr Prosser is mentioned again in paragraph 156 in the context of some correspondence concerning the inclusion within the PLDA of a provision making German law the governing law of that agreement.
15. At paragraph 162 of the Award, the Tribunal identifies the issues that remained in issue by the end of the close of submissions between the parties. At paragraph 171 it summarised the issue with which this claim is concerned as being:

"Relying on Clause 7.8 of the PLDA, the Claimant argues that the Respondents were solely responsible for the promotion of the Product within the Elekta Field of Use.¹²⁷ The Claimant contends that in view of Clause 7.4 of the PLDA, this meant that promotion and sale of Identify products were to be bundled to the sales of all new Elekta LINACs.¹²⁸ Claimant's claim that "during the first month after the entry of Identify in the price book and alleged beginning of sales, Elekta struck it from its basic standard configuration"."

The Tribunal then embarked on its resolution of the issues between the parties that remained live. These included "... *whether there was an obligation of the Respondents to bundle Identify with all of its LINAC sales ...*" during the "exclusivity period" between 16 April 2012 and its end on 31 December 2014 – see paragraph 178 of the Award. It turned to consider this issue at paragraph 189 of the Award, where the Tribunal summarised the issue between the parties as being:

"According to the Claimant, to meet its marketing, promotion and sales obligations under the PLDA, the Respondents were required to bundle the Product with all new Elekta LINAC sales. For the Claimant, Identify should have been integrated in all VersaHD and Synergy LINAC systems (types of LINACs sold

by Elekta) without the option to opt out of the additional safety feature.”

At paragraph 190, the Tribunal set out a series of question put to Mr Hieronimi by Mr Black relevant to this issue including the following exchange:

“[Mr. Black:] So there were other things you say they should have been doing at the time?

[Mr. Hieronimi:] Mm-hm.

[Mr. Black:] And did you bring those to their attention?

[Mr. Hieronimi:] Yes.

[Mr. Black:] Where is the evidence of that?

[Mr. Hieronimi:] You have given me one just a few ago where I was asking Tim Prosser as head of product management, business line management, to fully bundle it into the overall --

[Mr. Black:] You asked whether it was possible.

[Mr. Hieronimi:] Yes, I asked him if it was possible. I mean I’m a friendly person, so I didn’t dictate. How am I to dictate it?”

It is noteworthy that Mr Prosser is referred to expressly in this part of the evidence recorded in the Award as relevant to the bundling issue.

16. The Tribunal resolved this issue at paragraph 191 to 194 of the Award in these terms:

“191 The Arbitral Tribunal does not accept the Claimant’s argument that to meet their marketing, promotion, and sales obligations under the PLDA and DA, the Respondents were obliged to bundle the Product with all of their new LINAC sales. The so-called “bundling requirement” is not reflected in the language of the PLDA or DA. Clause 7.4 of the PLDA does not express an obligation to bundle the sales of the Product with the sales of all new Elekta LINACs. Said provision describes a phased approach to sales of the Products “which would commence with sales of the Product linked to sales of new Elekta Linacs and Elekta Linac installed base”. Thus, while Elekta agreed to link or bundle its sales of the Product with its LINAC sales, it did not commit to bundle the Product with all of its LINAC sales.

192 Contemporaneous correspondence reflects this understanding. On 22 May 2013, Mr. Hieronimi wrote to Mr. Prosser “could you potentially bundle Identify with VersaHD?” adding that “[i]t would make sense from a safety point of view and would make the market introduction a lot easier. What do

you think?”. Although said correspondence is relied upon by the Claimant as evidence of a so-called bundling requirement under the PLDA, the correspondence demonstrates that this was no more than a request made by him at the time and shows that he understood there was no obligation as per the PLDA to bundle. Mr. Hieronimi’s explanation at the evidentiary hearing as to why he phrased bundling as a “friendly” request is irreconcilable with his allegation in these proceedings that bundling was a requirement. The Claimant has also referred the Arbitral Tribunal to the email exchange in Exhibit CF-73 as proof for a common understanding of the Parties that Identify should be linked to new Elekta LINAC sales. However, a careful reading of this email chain does not convince the Arbitral Tribunal that the Parties understood the bundling as an obligation on the part of the Respondents. All it shows is that the Respondents hoped to “lock out” its competitor Varian and that Tim Prosser “expect[ed] Identify when released to be configured with > 50% of the LINAC production in Identify’s first year”. It is true that Respondents’ Jay Hoey responded to this: “I agree we’ll sell one with every machine.” But this is again not enough to reflect an agreed contractual obligation of bundling. Even Claimant’s counsel spoke of a “common expectation of the parties of a bundling” rather than a common understanding of a corresponding obligation.

193 Furthermore, the business plan relied upon by the Claimant also does not support its argument that bundling of the Product was needed with all new Elekta LINAC sales. In the business plan forecasted sales of Identify, even at their highest projection, were at a rate of 50% to the number of LINACs to be sold by the Respondents. Had there been an obligation to sell the Product with each and every Elekta LINAC, as the Claimant alleges was necessary for the Respondents to meet their marketing, promotion and sales obligations under the PLDA, then the projected sales of the Product should have been equivalent to the number of projected Elekta LINACs to be sold, and not at a 50% ratio in the best-case scenario. In addition, a so-called bundling requirement also runs counter to the substantially smaller figures accepted by the Respondents for their MVC.

194 In view of the forgoing, there was no contractual obligation under the PLDA to include the Identify as a mandatory element of Elekta’s LINAC base package.”

It is noteworthy that in resolving this issue the Tribunal referred expressly to correspondence between Mr. Hieronimi and Mr. Prosser. Given this reference in this context it is at least unlikely that the Tribunal would have forgotten about Mr Prosser’s evidence. This is all the more so because of the copious references throughout the Award to the oral evidence the Tribunal had received (which was set out in transcripts

to which the Tribunal referred as necessary in the Award) and the obvious care that has been taken in the resolution of the issues and the preparation of the Award.

The Parties' Respective Cases in Summary

17. The claimant alleges that by "... *ignoring and/or overlooking the undisputed evidence of its own witness, the Tribunal committed a serious irregularity which affected the Final Award and caused substantial injustice to the Claimant*". On this basis that the claimant applies for an order setting aside the Award or alternatively remitting the Award to the Tribunal to determine the issue afresh. This is the sole basis on which the Award is challenged. It is not alleged that the Tribunal failed to ask itself the correct question or proceeded on a basis that the parties did not have an opportunity to address or even that the Award was unreasonably delayed because it was published approximately 15 months after the end of the evidential hearing
18. The defendant denies that on proper analysis any irregularity whether serious or otherwise has occurred and in any event no substantial injustice has been caused.

Applicable Principles

19. By AA s.33:

"(1) The tribunal shall—

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

- By AA S.68:

"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failure to comply with the requirements as to the form of the award; or
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

- (a) remit the award to the tribunal, in whole or in part, for reconsideration,
- (b) set the award aside in whole or in part, or
- (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.”

20. The principles applicable to challenges under AA s.68 were summarised by Popplewell J as he then was in Terna Bahrain Holding Company WLL v Al Shamsi [2012] EWHC 3283 (Comm); [2013] 1 Lloyd’s Rep 86 at paragraph 85 in these terms:

“(1) In order to make out a case for the court’s intervention under section 68(2)(a), the applicant must show:

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

(b) amounting to a serious irregularity;

(c) giving rise to substantial injustice.

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

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

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

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

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

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

As Carr J, as she then was, emphasised in Obrascon Huarte Lain SA (t/a OHL International) v Qatar Foundation for Education, Science and Community Development [2019] EWHC 2539; [2019] 2 Lloyd's Rep. 559 at paragraph 44

“S. 68 imposes a high threshold for a successful challenge... It is not to be used simply because one of the parties is dissatisfied with the result, but rather as a longstop in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice "calls out for it to be corrected".”

The rationale for the approach identified in points (2), (3) and (5) of Popplewell J's summary is that identified by Carr J further on in paragraph 44 of her judgment in that case:

“As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults. The approach is to read an award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault”

It is for that reason that:

" Ultimately the question which arises under s. 33(a), is ... one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case."

- See Reliance Industries Ltd & Anor v The Union of India [2018] EWHC 822; [2018] 1 Lloyd's Rep. 562 at paragraph 32.

Discussion and Determination

21. The first question that arises is whether the claimant has shown that the Tribunal has failed to act fairly and impartially between the parties by ignoring and/or overlooking the undisputed evidence of Mr Prosser. Mr Black submitted that an allegation that a tribunal had overlooked evidence did not constitute a breach of duty under s.33. In my judgment the law is correctly stated by Teare J in UMS Holding Limited and others v. Great Station Properties SA [2017] EWHC 2398 (Comm), where at paragraph 28 he held that:

“Having considered these authorities my understanding of the law regarding allegations that an arbitral tribunal has overlooked evidence is as follows. A contention that the tribunal has ignored or failed to have regard to evidence relied upon by one of the parties cannot be the subject matter of an allegation of a serious irregularity within section 68(2)(a) or (d), for several reasons. First, the tribunal's duty is to decide the essential issues put to it for decision and to give its reasons for doing so. It does not have to deal in its reasons with each point made by a party in relation to those essential issues or refer to all the relevant evidence. Second, the assessment and evaluation of such evidence is a

matter exclusively for the tribunal. The court has no role in that regard. Third, where a tribunal in its reasons has not referred to a piece of evidence which one party says is crucial the tribunal may have (i) considered it, but regarded it as not determinative, (ii) considered it, but assessed it as coming from an unreliable source, (iii) considered it, but misunderstood it or (iv) overlooked it. There may be other possibilities. Were the court to seek to determine why the tribunal had not referred to certain evidence it would have to consider the entirety of the evidence which was before the tribunal and which was relevant to the decision under challenge. Such evidence would include not only documentary evidence but also the transcripts of factual and expert evidence. Such an enquiry (in addition to being lengthy, as it certainly would be in the present case) would be an impermissible exercise for the court to undertake because it is the tribunal, not the court, that assesses the evidence adduced by the parties. Further, for the court to decide that the tribunal had overlooked certain evidence the court would have to conclude that the only inference to be drawn from the tribunal's failure to mention such evidence was that the tribunal had overlooked it. But the tribunal may have had a different view of the importance, relevance or reliability of the evidence from that of the court and so the required inference cannot be drawn. Fourth, section 68 is concerned with due process. Section 68 is not concerned with whether the tribunal has made the "right" finding of fact, any more than it is concerned with whether the tribunal has made the "right" decision in law. The suggestion that it is a serious irregularity to fail to deal with certain evidence ignores that principle. By choosing to resolve disputes by arbitration the parties clothe the tribunal with jurisdiction to make a "wrong" finding of fact."

22. This claim fails at that point if this analysis is correct. That said, I accept there are other first instance decisions (being those referred to by Teare J) that suggest a contrary conclusion— see Arduina Holdings BV v Celtic Resources Holdings PLC [2006] EWHC 3155 (Comm), per Toulson J at [46] and Sonatrach v Statoil [2014] EWHC 875 (Comm), [2014] 2 All E.R. (Comm) 857, at [18]. Even if those cases are to be preferred over the conclusions of Teare J the general principles identified by Popplewell and Carr JJ in the authorities referred to earlier apply. In any event, a party relying on such an allegation would have to show that had the irregularity not occurred "... *the tribunal might well have reached a different view and produced a significantly different outcome ...*"
23. Given the current state of the authorities the remainder of this judgment proceeds on the basis that my conclusion that the judgment of Teare J should be followed is wrong and that in principle where a claimant in a s.68 challenge shows that arbitrator has genuinely overlooked evidence, that may support a s.68 challenge based on a breach of the s.33 duty. However, I am not satisfied that this has been demonstrated to be the case by the claimant in this case. I say that for the following reasons.

24. I have identified the relevant argument being advanced by the claimant before the Tribunal earlier in this judgment. It was that the defendants were obliged to bundle Identify with all of their new LINAC sales. There were attempts to re-formulate the issue in various ways at various stages throughout the life of these proceedings. Two points arise from that: First, given the way in which the Tribunal identified the issue that had to be decided, it would be necessary for the claimant to challenge the Award on the basis that the Tribunal misunderstood the claimant's case. However that challenge has not been made and moreover is not one that could be made given the terms of the submissions made on behalf of the claimant to the Tribunal, summarised earlier. Secondly, it is an implicit recognition by the claimant of the difficulty it faces in making good the challenge that it has chosen to advance.
25. The Tribunal plainly and comprehensively rejected the argument that was advanced for reasons that were entirely appropriate applying German law. In summary it rejected the claimant's case on the bundling issue first because the bundling requirement was not reflected in the language of the PLDA. This is an entirely legitimate approach to contractual construction applying German law and the contrary was not or could not be argued. Nothing that Mr Prosser might have said much less what he said was material to that assessment. Secondly, it relied on contemporaneous correspondence as being consistent with the language used in the PLDA. Again that is an entirely legitimate approach to construction of a contractual obligation applying German law. Finally it relied on the contents of what became the Business Plan prepared by Mr. Hieronimi and Mr. Prosser. It will be recalled that Mr Prosser was asked about this document by the Tribunal. As Mr Black submits this approach to interpretation was classically what was required by German law – see the summary at paragraph 44 of his skeleton submissions.
26. The Tribunal concluded that it did not support the argument that bundling of the Product was needed with all new Elekta LINAC sales. It was fully entitled to reach that conclusion for the reasons the Tribunal identified set out above. The tribunal was fully entitled not to refer to the evidence of Mr Prosser because nothing Mr Prosser said contradicted the conclusion reached by the Tribunal or its reasons for reaching that conclusion. It is not even the case that Mr Prosser was cross examined by counsel instructed in the arbitration on behalf of the claimant at all much less in a way that suggested his evidence on the bundling issue as given in answers to questions asked by the Tribunal was partly or wholly wrong. The oral evidence he did give was consistent with the conclusions reached by the Tribunal as a matter of textual analysis as to the effect of the business plan and part of the contemporaneous correspondence. In those circumstances, I do not accept that the claimant has shown that I should infer that the Tribunal overlooked the evidence of Mr Prosser. His evidence did not assist the claimant and the conclusions the Tribunal reached by reference to the express wording of the agreement, correspondence and business plan were together a sounder basis for reaching conclusions that simply adopting Mr Prosser's evidence but in any event Mr Prosser's evidence supported the conclusions that the Tribunal has in any event reached. In addition, the fact that the Tribunal referred on a number of occasions to correspondence from or to Mr Prosser including references to such evidence in cross examination reproduced in the Award, makes it inherently improbable that Mr Prosser's oral evidence had been overlooked.

27. Even if this is wrong and I should have concluded that the failure to mention Mr Prosser's oral evidence should be regarded as a breach of the s.33 duty, that would not assist the claimant unless it could show that the failure gave rise to a serious irregularity. The test is designed to limit the circumstances in which a court can intervene to extreme cases where the tribunal has gone so wrong in its conduct that justice calls out for it to be corrected – see the principles referred to earlier. There is no basis for concluding that this requirement is satisfied in the circumstances of this case for the reasons already identified.
28. Finally, even if all this is wrong, the claimant has to establish that the irregularity relied on is one that gives rise to serious injustice. This requires that the claimant show that the Tribunal might well have reached a different view and produced a significantly different outcome. In my judgment this requirement is not and cannot be satisfied in the circumstances of this case. The claimant's case before the Tribunal was that the Respondents were required to bundle the Product with all new Elekta LINAC sales. There is nothing in the evidence that Mr Prosser gave orally that supports this case or contradicts the conclusions that the Tribunal reached on the issue – see the parts of his evidence set out above. In those circumstances the claimant cannot demonstrate that the Tribunal might well have reached a different view that matters and produced a significantly different outcome in relation to it by reference to Mr Prosser's oral evidence.

Conclusion

29. For the reasons set out above this challenge fails and is dismissed.