Neutral Citation Number: [2019] EWCA Civ 1219

Case No: A4/2018/1462

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
THE HON MR JUSTICE ROBIN KNOWLES

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 July 2019

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HADDON-CAVE
and
SIR TIMOTHY LLOYD

- -

Between:

SANA HASSIB SABBAGH	**Respondent /Claimant**
- and -	
(1) WAEL SAID KHOURY **(2) SAID TOUFIC KHOURY (deceased)** **(3) SAMER SAID KHOURY** **(4) TOUFIC SAID KHOURY** **(5) SAMIR HASSIB SABBAGH** **(6) SUHEIL HASSIB SABBAGH** **(7) WAHBE ABDULLAH TAMARI** **(8) CONSOLIDATED CONTRACTORS GROUP SAL (HOLDING COMPANY)** **(a company incorporated in the Lebanon)** **(9) CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL (OFFSHORE)** **(a company incorporated in the Lebanon)** **(10) HASSIB HOLDING SAL** **(a company incorporated in the Lebanon)**	**Appellants/ Defendants**

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Philip Edey QC, Andrew Fulton and Andrew Feld (instructed by **DLA Piper UK LLP**) for the **eighth defendant** and **Jessica Hughes** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **fifth, sixth, eighth and tenth defendants**

John Wardell QC, Simon Colton QC and James Walmsley (instructed by **Mishcon de Reya LLP**) for the **Respondent**

The **remaining Defendants (**none of whom was an Appellant) did not appear and were not represented

Hearing dates: 20 and 21 March 2019

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Approved Judgment

Lord Justice David Richards:

Introduction

1. This is an appeal against the grant of an injunction to restrain the appellants from pursuing an arbitration in Lebanon. The judge held that the claims made in the arbitration were not within the arbitration agreement relied upon by the appellants and duplicated claims made in proceedings properly brought by the respondent in England. The injunction was granted on the basis that continuation of the arbitration would thus be vexatious and oppressive. The issues raised on the appeal include whether the court has jurisdiction on these grounds to grant an injunction to restrain an arbitration with a foreign seat and, if so, whether the jurisdiction is limited to cases where England is the natural forum for the underlying dispute.

The proceedings and the parties

2. The claimant in these proceedings, and the respondent to the appeal, Sana Hassib Sabbagh (Sana) is the sister of the fifth and sixth defendants Samir and Suheil Hassib Sabbagh (respectively Samir and Suheil). They are the daughter and two sons of the late Hassib Sabbagh (Hassib) who died on 12 January 2010. They are his heirs under Lebanese law, each entitled to one third of his estate.

3. Hassib, with the late Said Toufic Khoury, founded in 1950 what has become the Consolidated Contractors Company group (the CCC group), the largest engineering and construction business in the Middle East. The evidence is that its value is at least US$5 billion. The ultimate holding company is the eighth defendant, Consolidated Contractors Group SAL (CCG), which is owned by Hassib's family and by the Khoury family. CCG and its subsidiaries are incorporated in Lebanon.

4. Relations have broken down between Sana and her brothers over disputes concerning the management of, and dealings with, their father's assets both after he suffered a severe stroke in June 2002 and following his death in 2010.

5. The present proceedings were commenced in the Commercial Court in July 2013. The first to fourth defendants are members of the Khoury family. The late Said Khoury is named as the second defendant and his three sons, Wael, Samer and Toufic are the first, third and fourth defendants. They are all directors of CCG and Wael is the non-executive chairman. Samir, Suheil and the seventh defendant, Wahbe Abdallah Tamari (Wahbe), are also directors of CCG. The ninth defendant is a company in the CCC group. The tenth defendant, Hassib Holdings SAL (HH), is a Lebanese company, owned and controlled by Samir and Suheil. They, together with Samer and Wahbe, are the directors of HH.

6. The only connection with England is that Wael is resident here. Sana lives in New York, Wahbe lives in Switzerland and the other individual defendants are resident in Greece. CCG and CCIC accepted service of the claim form in Greece, where each has an office, and they are treated in these proceedings as domiciled in Greece for jurisdiction purposes. HH is domiciled in Lebanon.

7. Wael is the anchor defendant for the purposes of establishing jurisdiction against the other individual defendants, CCG and CCIC under art. 2(1) of Regulation 44/2001

and against Wahbe under art. 6(1) of the Lugano Convention. Leave to serve HH out of the jurisdiction as a "necessary or proper party" was given under the CPR. The defendants other than Wael challenged the jurisdiction of the court. Those challenges were upheld in part by Carr J at first instance ([2014] EWHC 3233 (Comm)) but, on appeal, rejected in whole by this court (Gloster V-P, Patten LJ and Beatson LJ) in a judgment given on 28 July 2017 ([EWCA Civ 1120]) (the 2017 judgment).

8. The claims made in these proceedings are summarised in the 2017 judgment:

> "7. On 29 June 2002 Hassib suffered a severe stroke which incapacitated him for the rest of his life and, it is alleged, rendered him unable to make any business decisions or to manage his own affairs. In proceedings issued in the High Court on 9 July 2013 Sana alleged that the principal defendants conspired from a date shortly after Hassib's stroke to misappropriate assets belonging to Hassib and that since his death in 2010 they have also conspired to deprive her of her entitlement to the shares in CCG which she claims belonged to Hassib at the date of his death. These two claims have been labelled the asset misappropriation claim and the share deprivation claim and, for convenience, we shall adopt the same terminology.
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> 8. The asset misappropriation claim relates for the most part to dividends from Hassib's shares in CCG which were used either to make investments in other companies and property or to meet expenses such as the running costs of an aircraft. It is not in dispute that before his stroke Hassib used and authorised CCIC to pay family expenses and charitable donations out of his income from dividends and other investments. But the allegation is that, following Hassib's stroke, accumulated dividends and other income were used knowingly by the defendants (other than Wahbe and HH) to make improper or unauthorised investments in their own names and that, when sold, the proceeds of sale from these investments were not accounted for or applied for the benefit of Hassib. To the extent that they would otherwise have formed part of Hassib's estate on death, Sana seeks damages for conspiracy based on the value of the misappropriated assets.
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> 9. The share deprivation claim depends upon Hassib having retained ownership of shares in CCG at the date of his death. Sana relies on a confirmation by the Commercial Registry in Beirut ("the Commercial Registry") dated 16 January 2010 that its register contained an entry which records that, as at 10 May 2009, Hassib continued to hold 399,915 shares in CCG. She alleges that following her father's death, the defendants conspired to deprive her of her entitlement under Lebanese law to a third of this shareholding by unlawfully procuring the transfer of the shares to HH.

10. The defendants accept that HH is now the registered holder of 399,915 shares in CCG following general meetings of the members of CCG held in July 2010 which confirmed HH as the holder of the shares. But their case is that there was no unlawful conspiracy and that the shares now held by HH are derived from transfers of shares in CCG which Hassib made prior to his death (and prior to his stroke) in favour of Sana, Samir and Suheil. We will come to the detail of this later in the judgment but it is now common ground that by three share transfer agreements made in 1993 ("the 1993 Agreements") Hassib agreed to transfer to his children 199,960 of his then holding of 199,970 shares in CCG subject to the retention by him of a usufruct in the shares for his life. Sana became entitled to receive 20,000 shares (for a stated consideration of US$1,333,333) and Samir and Suheil each became entitled to receive 89,980 shares at a price of US$6m. In September 1993 Hassib agreed to transfer 2 more of his remaining shares in CCG to each of his sons leaving him with only 6 shares.

11. Further agreements were entered into in 1995 between Hassib and his children and between Sana and her two brothers, the cumulative result of which (after taking into account increases in the share capital of CCG) was that Sana became entitled to 100,000 shares and Samir and Suheil to 199,960 and 199,961 shares respectively. Then in 1998 Sana transferred her entire holding of 100,000 shares back to Hassib who in turn transferred them to CCIC. His remaining 3 shares in CCG were transferred to Suheil. If this sequence of agreements was effective to pass ownership of the shares and any necessary corporate formalities were complied with, the net result of the agreements and transfers executed between 1993 and 1998 was that Hassib had ceased to own any shares in CCG but had retained his usufruct rights over 399,915 shares. By an agreement dated 16 July 2006 (but whose date is in issue) Samir and Suheil transferred 399,915 shares to HH subject to Hassib's usufruct. CCIC retained the shares it had acquired in April 1998.

12. Sana's original position was that the family agreements made between 1993 and 1998 were artificial or sham transactions with no legal effect. But she no longer disputes the existence, validity or effectiveness of the agreements as such. Her case now is that, as a matter of Lebanese law, the agreements fall to be treated as gifts rather than agreements to sell which would continue to bind Hassib (and his heirs) even after his death. As gifts they would lapse on death unless completed as transfers before then. She says that the agreements were ineffective to divest Hassib of ownership of the shares which were later transferred to HH because the formalities of board approval, registration and reissuing of the

> shares required under Lebanese law and the articles of association in relation to the earlier agreements were not complied with. It is not disputed that Sana received US$50m at the time she agreed in 1998 to give up her shareholding in CCG. But she disputes that the money (or at least all of it) was paid as consideration for her shares."

9. Like the court in the 2017 judgment, I shall refer to the claims made by Sana in these proceedings (the English proceedings) as the share deprivation claim and the asset misappropriation claim.

10. In March 2014, after the issue of the present proceedings, Samir, Suheil, CCG and HH (the appellants) initiated arbitration proceedings in Lebanon with Sana named as the respondent (the Lebanese arbitration). It will be necessary to look in more detail at the claims made in the arbitration but, in brief, the appellants seek a determination as to the entitlements of Samir, Suheil, Sana and HH to shares in CCG (the shares claim) and a determination of the balance of any monies owed by CCG on Hassib's shareholder's account (the assets claim).

11. The Lebanese arbitration was commenced pursuant to article 45 of the articles of association of CCG which makes provision for arbitration of certain claims. Sana disputes the jurisdiction of the arbitrators, on the grounds that the claims advanced in the arbitration do not fall within article 45 and that, not being a shareholder of CCG, she is not bound by the arbitration agreement constituted by article 45. She has declined to take part in the arbitration.

12. In the alternative to their challenges to the jurisdiction of the English court, the defendants applied for a stay of the English proceedings either under section 9 of the Arbitration Act 1996 or under the court's inherent jurisdiction or case management powers.

13. In the 2017 judgment, this court held that neither the asset misappropriation claim nor the share deprivation claim fell within the terms of the arbitration agreement in article 45 (or in other agreements not relevant to this appeal), and accordingly refused a stay of the proceedings.

14. Following the 2017 judgment, Sana applied to the Commercial Court for an injunction restraining the appellants from taking any steps to prosecute the Lebanese arbitration, and from seeking recognition or enforcement of any award made in it and, further, requiring them to take steps to stay the arbitration.

15. The application was heard by Robin Knowles J who granted the injunction sought by Sana.

The judgment under appeal

16. In a reserved judgment, Robin Knowles J said at [10] that he was satisfied that "the claims pursued in, or the issues truly in dispute in, the Lebanese Arbitration…are within the two claims" in the English proceedings. He relied in particular on a passage in a Memorial on Jurisdiction dated 8 October 2015 submitted by three of the

appellants to the arbitrators that the claims in the arbitration "correspond in substance" to the claims in the English proceedings.

17. The judge recorded at [17] that the appellants accepted "at the level of the Commercial Court and in my view rightly" that the court had power to grant an injunction in the terms sought by Sana. He referred to decisions in the Commercial Court which emphasised, in the case of injunctions to restrain an arbitration with a foreign seat that offered appropriate supervisory jurisdiction, "the need for exceptional circumstances for (at least where arbitration was agreed) and caution in the exercise of the power" to grant such an injunction. Specifically, the grant of an injunction may be appropriate if continued pursuit of an arbitration would be vexatious and oppressive.

18. The judge noted at [22] that while he was being asked to grant an interim injunction, with liberty to apply in the event of a change of circumstances, there might be little, if any, difference in practice between an interim and a final injunction, and he approached the application with that in mind.

19. At [23]-[29], the judge reviewed the effect of the 2017 judgment and said that it was plain that the basis of the court's refusal of a stay was that "in respect of the two claims Sana is not bound by Article 45 because the claims are not based on the Articles and she is not suing on behalf of Hassib as a shareholder". The judge continued:

> "28. Mr Edey QC argued that the injunction sought would leave unresolved "the question of who are the rightful shareholders in CCG". However that is not an issue between the Arbitration Claimants and Sana because Sana is not claiming a right to be a shareholder, and this was made clear to the Court of Appeal. The question identified by Mr Edey QC cannot therefore be a reason for the Lebanese Arbitration.
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> 29. Thus the parties did not agree to arbitration in respect of the two claims. The reasoning of the Court of Appeal shows why a conclusion of the tribunal in the Lebanese Arbitration that it has jurisdiction is wrong. The Arbitration Claimants do not accept that, but they should. They have deployed their argument about Article 45 and it has been shown to fail."

20. At [46] the judge said that he had no hesitation in concluding that it was just and convenient to grant the injunction in the terms sought. Respecting the caution required in such cases, it was "a plain and compelling case for the exercise of my discretion". There was no agreement to submit to arbitration the claims made in the Lebanese arbitration. The decision of the arbitrators to the contrary was in effect overtaken by the decision of the Court of Appeal in the stay appeal. Although that was not a decision of the supervisory court in Lebanon, it was a decision "by a court properly fulfilling its role in litigation properly before it, and in addressing a question put to it and argued before it by the parties who contended that there was an agreement to arbitrate".

The grounds of appeal

21. The appeal is brought with permission granted by Flaux LJ who, in giving his reasons, said that two grounds of appeal were fully arguable with a real prospect of success. Further, there was a compelling reason for hearing the appeal because the issues whether the English courts have jurisdiction to restrain a foreign arbitration and, if so, in what circumstances that jurisdiction should be exercised, are far from clear and there was a need for appellate guidance.

22. The two grounds of appeal for which Flaux LJ gave permission are as follows:

> "1. The Learned Judge erred in law in that the grant of an injunction restraining the Appellants' pursuit of its claims in a Lebanese-seated arbitration was not an Order which the Court had power to make, having regard to the scheme of the Arbitration Act 1996 and the UK's treaty obligations under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (a fortiori where, as here, one of those claims was a claim which indisputably fell to be arbitrated); alternatively which it could ever in principle be a proper exercise of the Court's discretion to make.
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> 2. Further, or alternatively, the learned Judge erred in law in that after (apparently) accepting (as he was right, as a matter of clear authority, to accept) that it was a precondition to the injunctive relief sought that England be the "natural forum" for the litigation, he then misinterpreted and/or misapplied the concept of natural forum, wrongly regarding it as sufficient merely that the English Court had jurisdiction over the claim and the Appellants. Had the Learned Judge correctly applied the test, he would have had to conclude that England was not the "natural forum" for the litigation and as a result the Court either could or should not grant the anti-arbitration injunction."

23. Mr Edey QC, appearing for the appellants, structured his submissions on the following basis. First, the English court has no jurisdiction to grant an injunction to restrain an arbitration with a foreign seat (a foreign arbitration), at any rate on grounds, as in the present case, that it would be vexatious and oppressive because of proceedings in this jurisdiction. That was, Mr Edey said, the wider issue arising under the first ground of appeal. Second, the narrower submission was that there is no such jurisdiction in circumstances where, if the claim in the foreign arbitration were brought in English proceedings, those proceedings would be subject to a mandatory stay under section 9 of the Arbitration Act 1996. Mr Edey submitted that this was the case as regards one of the claims made in the arbitration, the shares claim, and that the judge was wrong to decide otherwise. Third, in the further alternative, by analogy with the grant of injunctions to restrain the pursuit of foreign court proceedings, the English court will not grant an injunction to restrain a foreign arbitration on grounds that the foreign arbitration was vexatious and oppressive unless England is the natural forum for the dispute. It is said that in this case England is not the natural forum. References in Mr Edey's submissions to a lack of jurisdiction for the grant of such injunctions include bars or limitations to the exercise of the jurisdiction if in theory it exists. As Longmore LJ observed in a case to which I will later refer, *Albon v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124 at [7], this is "purely a matter of nomenclature".

The arbitration claims

24. It is convenient to start with an examination of the claims made in the Lebanese arbitration and whether they fall within the terms of the arbitration provisions, so that the points of principle raised by the appeal can be considered in the context of the actual claims.

25. The claims made in the arbitration, as set out in the request for arbitration dated 12 March 2014, are twofold. First, they seek "a determination as to ownership and entitlement to any rights in the shares" of CCG of each of Sana, Suheil, Samir and HH. Essentially, they seek a determination that Sana has no entitlement to shares of CCG, because Hassib had no interest in CCG shares that survived his death and therefore Sana did not become entitled and is not entitled, as Hassib's heir, to any shares of CCG. This is what I have called the shares claim. Second, they seek "a determination of the balance of any monies owed from Hassib Sabbagh's shareholder's account" in CCG to each of Sana, Suheil, Samir and HH. I have called this the assets claim.

26. The matters in dispute, as set out in the request for arbitration, were in summary as follows. First, Sana's "claim that, as one of her father's heirs, she has inherited and is entitled to 1/3 of the 40% of [CCG's] shares that she alleges were held by Hassib Sabbagh in full ownership on the date of his death". Second, Sana's "claim for the delivery up of the shares claimed by her which are currently held by [HH]". Third, Sana's "claim that she is entitled to all the rights attached to these alleged shares as a shareholder of [CCG] as per the Articles of Incorporation of [CCG], including rights to dividends attached to these shares which have been distributed prior to and after the death of her father". Fourth, Sana's "claim that she is entitled, as an heir to Hassib Sabbagh, to a one-third share of the balance of the amounts and investments held in Hassib Sabbagh's shareholder account with [CCG] upon his death, in which dividends were credited". Fifth, her claim to take an account of his shareholder's account from 2002 until his death.

27. It can readily be seen that there is, to use a neutral term, a correspondence between the shares claim (and the first and second matters in dispute) and the share deprivation claim, and between the assets claim (and the fourth and fifth matters in dispute) and the asset misappropriation claim. The third matter in dispute would appear to relate to the shares claim as regards distributions made since Hassib's death and to the assets claim as regards distributions made before his death.

28. It is not necessary to examine further the assets claim. The appellants accept that the effect of the 2017 judgment is that it is indistinguishable from the asset misappropriation claim and does not therefore fall within the arbitration provision in article 45. The appellants do not accept that this decision is correct as a matter of Lebanese law. However, they accept that the courts in England (including this court) are bound by the 2017 judgment on this point. Any consideration of this appeal must therefore proceed on the basis that the second claim is not subject to arbitration in Lebanon, while recognising that the Lebanese arbitral tribunal has taken a different view.

29. The position as regards the shares claim is different. Sana does not now, in the English proceedings, claim to be entitled to any shares in CCG nor does she now seek

any order for delivery to her of any shares in CCG. This has not always been her position either in the English proceedings or elsewhere. In September 2012, Sana advanced in correspondence a claim, based on detailed legal advice, that as one of her father's heirs she was entitled to 133,305 shares in CCG, being one-third of her father's shareholding at the date of his death, and that she was entitled "to recover all her rights in the late Hassib Sabbagh's estate, especially in CCG Holdings SAL".

30. On the basis of Wael Khoury's domicile in England, Sana commenced the English proceedings in July 2013. Particulars of claim were served on 15 January 2014. It was alleged in the particulars of claim that until his death Hassib owned 399,915 shares in CCG, that she became entitled on his death to one-third of those shares as an heir and that since then the appellants had conspired to deprive her of her entitlement to those shares, causing them to be improperly transferred to HH. She sought, first, "Delivery up of one-third of 40% of the shares in CC Holdings, or their true value, together with a like proportion of all dividends declared or distributed since Hassib's death" and, secondly, damages.

31. There can be no doubt that by these particulars of claim, Sana was asserting an entitlement, as against her brothers, HH and CCG, to one-third of the shares said to have been owned by Hassib at his death and to delivery up to her of those shares. In the course of argument, Mr Wardell QC on behalf of Sana said that this claim for delivery up was not by way of restitution of the shares claimed by Sana but only a form of compensation for loss. I am not sure that this makes any difference to the essential nature of the claim then being made by Sana to become a shareholder in CCG, but in any event I see no reason to disagree with the analysis of this claim in the 2017 judgment at [19] as being for "an order against HH for the restitution of the shares", at [28] as being for "an order for the re-transfer of the CCG shares" and at [155] as being "what would amount in English terms to a proprietary claim to the shares".

32. The particulars of claim were provided to the appellants in unsigned form on 11 December 2013 and the appellants initiated the first steps under article 45 shortly afterwards, on 7 January 2014, by requesting mediation. The particulars were served on 15 January 2014, the offer of mediation was refused and the request for arbitration was made on 12 March 2014.

33. As at the commencement of the arbitration, there can be no dispute that Sana was claiming that she was entitled to be recognised as a shareholder in CCG as one of her father's heirs and claiming relief to give effect to her claim. That remained her position in the English proceedings until her solicitor stated in a witness statement dated 25 April 2014 that she no longer claimed delivery up of the shares. It is recorded in the 2017 judgment at [155] that "she has now limited her claim…to a personal claim for damages for the loss of the property to which she would otherwise be entitled. There is now no claim against HH, for example, for the delivery up of the CCG shares". While that is now Sana's position in the English proceedings, she has not, so far as we know, renounced all possibility of advancing elsewhere a claim to the shares.

34. It was common ground on the stay application that, in principle (but subject to the precise terms of article 45, as to which see [38]ff below), Sana was obliged under article 45 and Lebanese law, the governing law of article 45, to submit to arbitration

any claim by her as her father's heir to be recognised as a shareholder of CCG: see the judgment of Carr J [2014] EWHC 3233 (Comm) at [238]. This was recognised in the 2017 judgment at [128]. It was also accepted by Mr Wardell in the course of argument before us. The absence of any such claim in the English proceedings by the time of the appeal in the stay application was central to this court's decision to refuse a stay of the share deprivation claim. Indeed, Sana's skeleton argument on the appeal stated that neither of the questions in the Lebanese arbitration, including the present ownership of shares in CCG, "are in issue in the present proceedings" and that "[t]he Lebanese Arbitration deals with entirely different issues".

35. Given that the issue raised in the Lebanese arbitration is whether Sana is entitled to shares in CCG and that it is common ground that in principle a claim to be a shareholder in CCG is subject to arbitration under article 45, it would seem to follow that this claim in the arbitration is within the arbitration agreement contained in article 45.

36. This conclusion is disputed on behalf of Sana on a number of grounds.

37. First, reliance is placed on the decision of this court that the claims made in the English proceedings are not subject to article 45. By itself, this cannot assist Sana for the reasons already given. In the English proceedings, Sana now makes no claim to be a shareholder in CCG nor does she make any claim as Hassib's heir and, accordingly, there is no basis for saying that the English claims are subject to article 45. Since article 45 could bind Sana only "if the share deprivation claim was brought as Hassib's heir or if Sana was claiming to be entitled to be recognised as a shareholder" (the 2017 judgment at [128]), it followed that Sana was not bound to arbitrate her claims in the English proceedings.

38. Second, article 45 is expressly confined to the two kinds of dispute, identified in the article as "A" and "B". They are themselves confined to disputes falling within articles 166 to 168 of the Lebanese Trade Act. In the 2017 judgment, this court expressed the view, albeit *obiter*, at [130] that "In any event we would accept that the share deprivation claim is, like the asset misappropriation claim, outside the scope of article 45 since the arbitration clause is confined to the two specified kinds of dispute".

39. It is submitted on behalf of Sana that the view expressed at [130] is correct and that it follows that the shares claim made in the Lebanese arbitration is not subject to arbitration under article 45.

40. No further explanation was given by this court of the view expressed at [130], but it is critical to note that the court was addressing the share deprivation claim made in the English proceedings. The reason underlying the conclusion expressed at [130] is apparent from the expert evidence of Lebanese law adduced by Sana, which was in this and other respects accepted by the court. The expert said at para 207 of his report that from his consideration of the particulars of claim in the English proceedings "Ms Sabbagh's claims are not based on any matters that could fall within Articles 166 to 168 CDC, but on the delictual responsibility of the Defendants. Such allegations of wrongful behaviour on the part of the Defendants are, in my view, outside the scope of the disputes covered by Article 45…". In my judgment, this court was not at [130]

saying anything about whether a claim to determine entitlements to CCG shares fell within article 45.

41. Third, it is submitted on behalf of Sana that she disavowed any claim in the English proceedings to be a shareholder a long time ago, and it is not open to the appellants to force her into an arbitration by seeking a negative declaration in respect of a claim to be a shareholder that she no longer makes. This, however, ignores the fact that at the time of the request for arbitration this was the claim that Sana was making. While she has since abandoned in the English proceedings a claim to be recognised as a shareholder of CCG, she has not unequivocally for all purposes and in all jurisdictions given up the right to make such a claim. The arbitration proceedings were commenced in relation to a live claim and the subsequent abandonment of the claim in the English proceedings is not a ground for saying that the shares claim made in the arbitration thereby ceased to be within the scope of article 45. Whether it would provide a ground on which the arbitral tribunal could or should terminate the arbitration is a matter for the tribunal. It is not a basis on which the English court could or should restrain the further prosecution of the arbitration.

42. Fourth, Sana submits that it is implicit in the 2017 judgment, albeit not expressly decided, that this court held that the Lebanese arbitral tribunal lacks jurisdiction and that Sana is not bound to arbitrate any dispute. It is submitted that the court's decision to refuse a stay of the share deprivation claim implicitly involves a decision that none of the issues arising in that claim were subject to arbitration. As Sana's case that Hassib was the absolute owner of shares at his death is the basis of her share deprivation claim and one of the principal issues in that claim, it follows that this court decided that this issue was not subject to arbitration under article 45.

43. Mr Wardell referred us to a decision of Popplewell J in *Sodzawiczny v Ruhan* [2018] EWHC 1908 (Comm), [2018] Bus LR 2419, decided after the 2017 judgment. Popplewell J there considered the meaning of "a matter" in section 9 of the 1996 Act, specifically whether it was limited to claims or causes of action or extended to issues arising in the proceedings. There was a division of views in earlier High Court decisions and Popplewell J held that "matter" meant any issue arising in the proceedings which falls within the scope of the arbitration agreement. To that extent, he held, the court is obliged by section 9 to stay the proceedings and then decide, as a matter of case management, whether, as regards the other issues, the proceedings should continue or be stayed pending a determination in the arbitration. Applying this approach, Mr Wardell submitted that it followed that the Court of Appeal must have concluded that the issue of Hassib's ownership of shares at the time of his death did not come within article 45.

44. While Popplewell J's judgment was not given until after the 2017 judgment, it appears from the 2017 judgment at [117]-[119] that a submission was advanced to this court that the share deprivation claim must, at least in large part, be stayed.

45. It is, however, important to refer again to the way in which the court dealt with the application for a stay. At [129] the court said:

> "Similarly, we are inclined to accept that Sana is not claiming an entitlement to be recognised as a shareholder, but rather is claiming that the defendants have deprived her of this

> entitlement. The relationship is tripartite: whilst Hassib would have been bound to arbitrate an assertion that he was entitled to be recognised as shareholder, as against the defendants, this cannot bind Sana to arbitrate her claim even if her claim depends in part on the question of Hassib's ownership, since she does not claim on Hassib's behalf."

46. As Sana was not claiming on Hassib's behalf nor was she claiming to be a shareholder, none of the issues in the claim for damages for conspiracy comprising the share deprivation claim in the English proceedings could be the subject of arbitration under article 45. That is the very point being made by the court in the first sentence of [129], distinguishing between a claim to be recognised as a shareholder, which Sana is not making in the English proceedings, and a claim that she had been deprived of that entitlement, which she is making. I therefore reject the submission that this court in the 2017 judgment implicitly held that a claim by Sana that she is entitled to shares in CCG, or the converse claim by the appellants that she is not entitled to such shares, is not an issue that falls within article 45.

47. For these reasons, I conclude that the shares claim made in the Lebanese arbitration is subject to the arbitration provisions of article 45 and that this court did not expressly or implicitly decide otherwise in the 2017 judgment.

48. It follows that I disagree with Robin Knowles J when he said at [10] that "the claims pursued in, or the issues truly in dispute in, the Lebanese Arbitration…are within the two claims" brought in the English proceedings, at least as a basis for saying that the claim as regards entitlements to shares made in the Lebanese arbitration does not fall within article 45. As regards the judge's analysis at [23]-[29] of the effect of the 2017 judgment, the "two claims" to which he there refers are the two claims brought in the English proceedings. While therefore the judge was right to say at [29] that the parties did not agree to arbitration in respect of the two claims, it does not assist in deciding whether the shares claim brought in the Lebanese arbitration is subject to arbitration under article 45.

49. It follows that, in approaching the issues of principle argued on this appeal, I proceed on the basis that the shares claim is subject to article 45 but that the assets claim is not subject to it.

Jurisdiction to grant an injunction restraining a foreign arbitration

50. Mr Edey made clear that he was confining his submission that the court has no jurisdiction to grant an injunction to restrain the pursuit of a foreign arbitration (an anti-arbitration injunction) to cases where it is said that it would be oppressive and vexatious to pursue the foreign arbitration. He accepted that claims for an injunction based on a breach of a contractual or other obligation, such as a choice of jurisdiction clause or a different arbitration agreement, raised different issues which did not arise in this case.

51. Mr Edey submitted that the grant of an injunction to restrain a foreign arbitration that is said to be oppressive and vexatious is fundamentally inconsistent with the scheme of the Arbitration Act 1996 (the 1996 Act) and The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). He relied

also on a number of other points: the absence of the grant of any anti-arbitration injunctions before the enactment of the 1996 Act and the limited circumstances in which injunctions to restrain domestic arbitrations may be granted, the principles of comity and the absence of any binding decision since the enactment of the 1996 Act that the court does have jurisdiction to grant an anti-arbitration injunction.

52. The New York Convention was made in 1958 and the United Kingdom acceded to it in 1975, giving effect to it in domestic law by the Arbitration Act 1975. The relevant provisions are now contained in the 1996 Act. Article II of the Convention requires contracting states to recognise arbitration agreements and Article II.3 requires the court of a contracting state, at the request of a party, to refer the parties to arbitration "when seized of an action in a matter in respect of which the parties have made" an arbitration agreement, unless it finds the agreement to be null and void, inoperative or incapable of being performed. Effect is given to this provision by section 9 of the 1996 Act, providing for a mandatory stay of proceedings "in respect of a matter which under the [arbitration] agreement is to be referred to arbitration", subject to the same exceptions as provided in article II.3.

53. The rest of the Convention is concerned with the recognition and enforcement of foreign arbitration awards, to which effect is also given by the 1996 Act. Limited grounds for refusing to recognise or enforce an award are contained in article V, including the invalidity of the arbitration agreement or that the dispute did not fall within the scope of the arbitration agreement. Although not the subject of express provision in the Convention, it follows from the fact of an arbitral seat that supervision of an arbitration is reserved to the courts of the seat.

54. While the existence, validity and scope of an arbitration agreement will generally be matters for the arbitral tribunal, under the general principle of international arbitration law often called kompetenz-kompetenz (or jurisdiction-competence, as Lord Sumption has called it), or for the courts of the arbitral seat, there are circumstances in which a foreign court will or may examine these issues for itself. In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 783, Lord Collins said:

> "97. Where there is an application to stay proceedings under section 9 of the 1996 Act, both in international and domestic cases, the court will determine the issue of whether there ever was an agreement to arbitrate: see…*Albon (trading as NA Carriage Co) v Naza Motor trading Sdn Bhd (No 4)* [2008] 1 Lloyd's Rep 1 (Malaysian arbitration). So also where an injunction was refused restraining an arbitrator from ruling on his own jurisdiction in a Geneva arbitration, the Court of Appeal recognised that the arbitrator could consider the question of his own jurisdiction, but that would only be a first step in determining that question, whether the subsequent steps took place in Switzerland or in England: see *Weissfisch v Julius* [2006] 1 Lloyd's Rep 716, para 32.
>
> 98. Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts

> of the arbitral seat: and it can resist enforcement in the court before which the award is brought for recognition and enforcement."

55. Mr Edey accepted that the New York Convention did not explicitly prohibit the grant of an anti-arbitration injunction, but he submitted that it limited the powers of the courts to three responses in the event of a finding that the tribunal did not have jurisdiction over the relevant claims, and thereby implicitly prohibited the grant of an anti-arbitration injunction. The three permissible responses are (i) to refuse a stay of court proceedings relating to the subject matter of the dispute (article II), (ii) if but only if it was the supervisory court, to suspend, set aside or annul any award (articles V.1(e) and VI), and (iii) if but only if it is the court before which recognition or enforcement of an award was sought, to refuse the application.

56. He submitted that other provisions of the 1996 Act emphasised the limited role of the English court as regards foreign arbitrations.

57. Section 1 provides:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly –
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

58. Section 1 sets out principles to be applied in the construction of the provisions of Part 1 of the Act. Section 1(c) derives from article 5 of the UNCITRAL Model Law on International Commercial Arbitration (1985) but with the deliberate substitution of the less emphatic "should" for "shall": see *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889 (*AES*) per Lord Mance at [33] who said that "Even in matters which might be regarded as falling within Part 1, it is clear that section 1(c) implies a need for caution, rather than an absolute prohibition, before any court intervention".

59. Section 2(1) provides that Part 1 applies where the seat of the arbitration is in the United Kingdom. Part 1 does, however, have a limited application to foreign-seated arbitrations. Sections 9 to 11 (stay of legal proceedings), section 66 (enforcement of awards), sections 43 (securing the attendance of witnesses) and section 44 (court powers exercisable in support of arbitral proceedings) apply to foreign-seated arbitrations, as well as to those with a UK seat: see section 2(2) and (3).

60. Mr Edey drew attention to section 72 which confers on the court an express power to grant relief, including by way of injunction, where a person who is alleged to be a

party to arbitral proceedings but who takes no part in the proceedings questions (a) whether there is a valid arbitration agreement, or (b) whether the tribunal is properly constituted, or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. This power applies only to UK-seated arbitrations and, Mr Edey submitted, it was significant that it was not among the sections applied to foreign arbitrations. Combined with the principles in section 1, especially section 1(c), and the express powers of the court to rule on such issues but only in the context of an application to recognise and enforce a foreign arbitration award, the absence of any power in the Act for the court to injunct a foreign arbitration demonstrated, or at least suggested, that the court had no such power.

61. The absence of such power was, in Mr Edey's submission, consistent not only with the overall approach to non-interference in foreign arbitrations but also to principles of comity. While not directly interfering with proceedings in a foreign court, an anti-arbitration injunction does interfere with the supervisory role of the courts of the arbitral seat.

62. As regards cases, Mr Edey pointed to the lack of any case of an injunction against a foreign arbitration before the 1996 Act. The issue has arisen in a number of cases since the 1996 Act, but all have been at first instance except for two in the Court of Appeal. In one of those, the court upheld an injunction but jurisdiction to grant it was conceded. In the other case in this court, no injunction was granted and observations on the point were *obiter* and, in any event, the case was distinguishable. Anti-arbitration injunctions were granted in some first instance cases but always on the basis that the jurisdiction to do so had been established by the two decisions of this court, a basis that Mr Edey submitted was erroneous.

63. Mr Edey developed his submissions with great skill but I am unable to accept them, principally because I do not accept that a prohibition on the power of the court to grant an anti-arbitration injunction which otherwise exists under section 37 of the Senior Courts Act 1981 can be spelt out of the 1996 Act, read with the New York Convention.

64. No-one doubts that the general approach adopted in the New York Convention and in the 1996 Act is to give effect to arbitration agreements and to minimise the involvement of courts. As Mr Edey himself pointed out, the Convention does not itself prohibit anti-arbitration injunctions. We were not referred to any of the *travaux préparatoires* (and I make no complaint about that) and we do not know whether the possibility of including a prohibition was considered. I do not think that there can be drawn from the express provisions to which Mr Edey referred an implied prohibition on anti-arbitration injunctions.

65. The power of the court to grant an injunction is conferred by section 37 of the Senior Courts Act 1981. Since the decision of the House of Lords in *South Carolina Insurance Co v Assurantie Maatschappji "De Zeven Provincien" NV* [1987] AC 24, it has been recognised that, while the power is not unlimited, it can be exercised not only in protection of a legal or equitable right but also to prohibit conduct that would be vexatious and oppressive, including in appropriate cases to restrain the pursuit of foreign court proceedings. In *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC), it was established that an injunction may be granted to restrain proceedings in a foreign court in circumstances where, by reason of parallel

proceedings in the English courts, the pursuit of the foreign proceedings would be oppressive and vexatious. A similar power as regards foreign arbitrations must exist, unless by statute (and the 1996 Act is the only candidate) section 37 has been implicitly modified to exclude an anti-arbitration injunction.

66. In my judgment, it is not possible to extract such a modification from the 1996 Act. Reliance on the general principle in section 1(c) that "in matters governed by this Part [Part 1] the court should not intervene except as provided by this Part" suffers from two problems. First, the matters governed by Part 1 are arbitrations with a seat in the UK (except Scotland): section 2(1). Section 2(2) and (3) extend the application of a small number of specific provisions to foreign arbitrations but, save in those respects, foreign arbitrations are not matters governed by Part 1. Second, and in any event, the word "should", not "shall", was deliberately chosen for section 1(c) for the purpose and effect stated by Lord Mance in *AES* at [33] which I have earlier quoted.

67. Section 72 of the 1996 Act does not, in my judgment, assist. It is the counterpoint to sections 30 to 32. Under those sections, a tribunal may rule on questions relating to its jurisdiction and a party dissatisfied with the ruling may, subject to the conditions set out in section 32(2), have the matter determined by the court. A party which is not participating in the arbitration may instead take the issue directly to the court under section 72. This is part of the overall scheme for arbitrations with a UK seat but it does not, in my judgment, shed any light on or affect the power of the court to grant an injunction restraining a party from pursuing a foreign arbitration.

68. Mr Wardell QC for Sana relied on four cases, two in the House of Lords or Supreme Court and two in this court, which he submitted provided authority binding on us that the court had jurisdiction to grant anti-arbitration injunctions.

69. I agree with Mr Edey that neither the decision of the House of Lords in *Bremer Vulkan v South India Shipping Corp Ltd* [1981] AC 909 nor the decision of the Supreme Court in *AES* provides any such authority. Both cases concerned arbitrations with their seats in England and neither addresses, directly or indirectly, the jurisdiction to grant injunctions to restrain a foreign arbitration. Moreover, *Bremer Vulkan* restated "the well-established law that the jurisdiction of the High Court to grant injunctions, whether interlocutory or final, was confined to injunctions granted for the enforcement or protection of some legal or equitable right": see p.979 per Lord Diplock. The jurisdiction to grant an injunction to restrain vexatious and oppressive conduct, on which Mr Wardell relies, was not recognised until the *South Carolina* case. *AES* did not concern an injunction to restrain any arbitration, whether with a seat in the UK or elsewhere, but concerned an injunction to restrain foreign court proceedings by way of enforcement of an agreement to submit to arbitration in England. There are observations in Lord Mance's judgment which are germane to issues in the present case, one of which I have already quoted, but it has nothing to say about the court's jurisdiction to restrain foreign arbitrations and is certainly not a binding authority that the court possesses such jurisdiction.

70. The two decisions of the Court of Appeal are concerned with injunctions to restrain foreign arbitrations. *Weissfisch v Julius* [2006] EWCA Civ 218, [2006] 1 Lloyd's Rep 716 has frequently been cited at first instance as authority for the power of the court to grant anti-arbitration injunctions, but it was a case with highly unusual facts and it is important to identify the issue that arose in it.

71. The case arose out of disputes between two brothers, Amir and Rami Weissfisch, who carried on a successful metal trading business. The immediate dispute related to a Bahamian discretionary trust. An English solicitor, Mr Anthony Julius, was appointed as sole arbitrator "with the broadest possible powers to make final and binding determinations or awards on all issues and disputes between the parties in full and final settlement." The agreement was expressed to be governed by Swiss law and the seat of the arbitration was agreed to be Geneva. Mr Julius had previously acted for the companies through which the brothers' business was conducted and also for each brother personally. He had also over several months sought to assist the brothers to reach an amicable settlement of their disputes.

72. Amir issued proceedings in England, alleging, first, that the arbitration agreement had been procured by misrepresentations by Rami and Mr Julius and that the agreement was accordingly void or had been avoided by Rami, and, second, that in promoting and accepting appointment as arbitrator in a dispute between two existing clients Mr Julius was acting in breach of his fiduciary duties as a solicitor. The court noted at [13] that this latter conduct "is alleged to entitle Amir to an injunction restraining Mr Julius from continuing to act as arbitrator".

73. The defendants, who apart from Mr Julius were out of the jurisdiction, applied for declarations that the English court had no jurisdiction to try the claims made in the action or should not exercise any jurisdiction it might have and for a stay under section 9 of the 1996 Act. Essentially, the grounds were that the claims should be pursued in Switzerland as they concerned the validity of an agreement for arbitration, the putative law and seat of which were Swiss.

74. Before these applications were heard in England, Mr Julius notified the parties that he intended to hold a hearing in Geneva to determine his jurisdiction and invited submissions. Amir applied in England for an injunction to restrain Mr Julius from taking any further steps in the arbitration until determination of the stay application. This was therefore a very unusual application. Anti-arbitration injunctions are almost invariably sought against the other parties, not the arbitrator. The application was made against Mr Julius personally because of the particular ground for the application.

75. David Steel J refused Amir's application for an injunction. He said that "on the face of it, the obvious forum for any challenge to the contract and to the appointment or performance of the arbitrator at this stage is Switzerland". It was a well-established principle of English law that the courts of the seat should have supervisory jurisdiction and, as Lord Phillips LCJ giving the judgment of the court (Lord Phillips, Sir Anthony Clarke MR and Moses LJ) said, paraphrasing the judge, "if, despite the limitations of the 1996 Act, section 37 of the Supreme Court Act gave him jurisdiction to grant the injunction sought, it was a jurisdiction that should be exercised with great caution". Even taking account of the nature of the case that Mr Julius should not be acting as arbitrator, the structure of the 1996 Act and the spirit of the New York Convention militated against the grant of the injunction sought by Amir.

76. It appears from Lord Phillips' judgment at [28] and [29] that on the appeal the case for an injunction was presented by reference to the position of Mr Julius. By the time of the hearing of the appeal, the stay application had been fixed for hearing by

Colman J two months later. The court declined to grant the injunction on the grounds, as stated at [33(vi)], that no special circumstances had been shown which would justify an interim injunction pending that hearing. It would be for Colman J to decide whether the issues raised by Amir's action should be determined in England or Switzerland.

77. It is important to note that the basis of the application was an allegation that, in acting as arbitrator, Mr Julius would be in breach of existing fiduciary duties that were not governed by the arbitration agreement. In that sense, it was analogous to an injunction to restrain a party from pursuing a foreign arbitration in breach of a contractual obligation that was not subject to the arbitration agreement.

78. Lord Phillips said at [33]:

> "We have formed the view that there are cogent reasons why we should not at this stage restrain Mr Julius by injunction from holding a hearing to consider his own jurisdiction. These essentially mirror the conclusions of Steel J. They are:
>
> > (i) Amir and Rami, each of whom was receiving independent legal advice, expressly agreed that their disputes should be resolved by Mr Julius under arbitration which would be governed by Swiss law and have its seat in Switzerland.
> >
> > (ii) The natural consequence of this agreement was that any issues as to the validity of the unusual provisions of the arbitration clauses would fall to be resolved in Switzerland according to Swiss law.
> >
> > (iii) This consequence accords with principles of the law of international arbitration agreed under the New York Convention recognised by this country by the 1966 Act.
> >
> > (iv) For the English court to restrain *an arbitrator* under an agreement providing for arbitration with its seat in a foreign jurisdiction to which the parties unquestionably agreed would infringe those principles.
> >
> > (v) Exceptional circumstances may, nonetheless, justify the English court in taking such action. Whether such circumstances exist will be a matter to be resolved by Colman J and nothing in those reasons is intended to influence his decision in that regard.
> >
> > (vi) No special circumstances have been shown which justify taking such action on an interim basis, pending the hearing before Colman J." (emphasis added)

79. This represents a statement of principle by a court with great experience in the law and practice of arbitration. It states the principles of the law on international arbitration, agreed under the New York Convention, that where the parties have agreed to a foreign arbitration (in that case, with its seat in Switzerland and governed by Swiss law), "any issues as to the validity of the unusual provisions of the arbitration clauses would fall to be resolved in Switzerland according to Swiss law".

An injunction to restrain *an arbitrator* would infringe those principles, but "exceptional circumstances" may nevertheless justify the English court in granting such an injunction.

80. Mr Wardell submitted that, as the English court will in exceptional circumstances grant an injunction against the arbitrator, there can be no objection in principle to the grant, in suitably constrained circumstances, of an injunction against the parties to a foreign arbitration. In my judgment, *Weissfisch v Julius* does not provide authority for this proposition. The court was careful to confine its reasoning to the peculiar circumstances which concerned the personal position of the arbitrator and the duties under English law that he owed as a solicitor to present or former clients.

81. The other decision of the Court of Appeal on which Mr Wardell relied is *Albon v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124, [2008] 1 Lloyd's Rep 1. The parties had entered into a motor vehicle distribution agreement governed by English law. Mr Albon commenced proceedings in England for the recovery of sums overpaid by him under the agreement. Naza Motors applied for a stay on the grounds that the parties had entered into a joint venture agreement governed by Malaysian law and providing for arbitration in Malaysia. Mr Albon alleged that his signature on the latter agreement was a forgery.

82. Lightman J held that, as Naza had applied for a stay, it was for the English court to decide the issue of forgery. Naza agreed that it would not invite the arbitral tribunal in Malaysia to decide that issue, so the position was that the issue of forgery would be determined finally in England. Naza nevertheless wished the arbitration to proceed in Malaysia, in effect without prejudice to the forgery issue. On Mr Albon's application, Lightman J granted an injunction restraining Naza from pursuing the arbitration pending resolution of the forgery issue, against which Naza appealed.

83. Although considerations of the autonomy of arbitrators and non-interference in foreign arbitrations were to the fore of Naza's arguments in the appeal, it was accepted on behalf of Naza that the court had *jurisdiction* to grant the injunction. Longmore LJ, with whom Waller LJ and Sir Peter Gibson agreed, closely examined the arguments against the grant of the injunction, accepting that the court should be highly cautious in deciding whether to grant such an injunction, but did not question the jurisdiction of the court to restrain a foreign arbitration. Mr Edey is thus correct to say that *Albon* is not authority that such jurisdiction exists, but it is notable that a court with significant experience in arbitration should have accepted it without demur.

84. As previously mentioned, anti-arbitration injunctions have been granted by Commercial Court judges at first instance in a number of cases over the last few years. Although the possibility of an anti-arbitration injunction was recognised by Mustill J in *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at 458, none appears to have been granted until 2008, except in the cases mentioned above.

85. The first case in which an anti-arbitration injunction was granted on, at least partly, grounds of vexatious and oppressive conduct, was *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT* [2011] EWHC 345 (Comm), [2011] 1 Lloyd's Rep 510. Hamblen J granted an injunction to restrain the defendant from proceeding with an arbitration in Hungary where the English court had earlier held that the dispute was

governed by an exclusive English jurisdiction clause and was not governed by an arbitration agreement. At [28] the judge held that, despite the debate and controversy in the international arbitration community as to the grant of anti-arbitration injunctions, it was clear that the English court had jurisdiction (under section 37 of the Senior Courts Act 1981: see [26]) to grant such injunctions. He cited a number of cases, of which three related to foreign arbitrations: *Weissfisch v Julius, Albon v Naza Motor Trading* and *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep 494 at [74]. It is these authorities that have also been relied on in subsequent Commercial Court decisions for the existence of the power to grant anti-arbitration injunctions. It is common ground between the parties in the present case, and I agree, that the *Cetelem* case does not provide support for the existence of this jurisdiction and is not relevant to it.

86. Hamblen J went on to emphasise that nonetheless an anti-arbitration injunction will be granted only in exceptional circumstances and at [32] that "The need for caution in the grant of such injunctions is all the greater in relation to arbitrations outside the jurisdiction because such matters are generally best left to the relevant supervisory courts of the country of the seat of the arbitration". It was of central importance to the exercise of the discretion to grant an anti-arbitration injunction that the English court had already held that there was no arbitration agreement. Hamblen J said at [41]:

> "In many of the cases which concern whether an anti-arbitration injunction should be granted there is an issue as to whether there is any or any valid arbitration agreement. One can well understand why it would generally be appropriate for that issue to be left in the first instance to be determined by the arbitration tribunal. Here, however, not only has it already been decided by this court that there is no such agreement, but this court has also held there is a governing English exclusive jurisdiction clause."

87. The judge was satisfied that these were "sufficiently exceptional circumstances" to justify the grant of an anti-arbitration injunction. The basis of doing so was both that the foreign arbitration would infringe the claimant's contractual right for determination by the English court in accordance with the exclusive jurisdiction clause and also that continuation of the arbitration would be vexatious and oppressive.

88. Of the other first instance decisions in the Commercial Court, three have been cases where the anti-arbitration injunction was sought in aid of the claimant's contractual right under an exclusive English jurisdiction clause or an agreement providing for arbitration in England: *Sheffield United Football Club Ltd v West Ham United Football Club PLC* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep 167, *Injazat Technology Capital Ltd v Najafi* [2012] EWHC 4171 (Comm), and *Whitworths Ltd v Synergy Food Ingredients and Processing BV* [2014] EWHC 4239 (Comm). The unusual facts in *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep 289 were that the same claimant commenced court proceedings in England and arbitration proceedings in New York in relation to the same dispute. The court refused the claimant's application for a stay of its own proceedings in England and, on the defendant's application, granted an injunction against the continuation of the arbitration in New York. I will refer later to two other

Commercial Court decisions, where again the power to grant an anti-arbitration injunction was accepted.

89. These first instance authorities do not of course bind this court, but I regard it as significant that in those cases seven Commercial Court judges, with great experience in international arbitrations, have found nothing surprising or questionable about the existence of this power, while acknowledging that it was to be exercised sparingly.

90. For the reasons given earlier, I do not consider that the Arbitration Act 1996 has deprived the court of its jurisdiction under section 37 of the Senior Courts Act to grant an injunction to restrain a foreign arbitration, or, which comes to the same thing in practice, has constrained that jurisdiction in such a way that it can never be proper to exercise it. None of the English appellate authorities supports Mr Edey's submission on this issue, although I accept that Mr Wardell can derive only limited support from them (and, I should add, can derive little or no support from those cases where the court has restrained an English-seated arbitration, because in such cases the English court is the supervisory court). I find it difficult to accept that the English court may restrain a foreign arbitration in aid of the claimant's legal rights, such as those arising under an exclusive jurisdiction clause, but in no circumstances may it grant an anti-arbitration injunction to prevent vexatious or oppressive conduct. At the same time, it is clear from the principles of international arbitration embodied in the New York Convention and from the English authorities that the court must show great caution and restraint before granting such an injunction.

91. I reject therefore the wide submission made by Mr Edey under the first ground of appeal.

Will the court grant an anti-arbitration injunction where the dispute falls within the arbitration agreement?

92. The narrower submission of Mr Edey under the first ground of appeal is that, even if the court has power to grant an anti-arbitration injunction, it will not do so in respect of a claim which, if brought in English proceedings, would require the court to grant a stay under section 9 of the Arbitration Act 1996. I have earlier accepted that the shares claim in the Lebanese arbitration was not held by this court in the 2017 judgment to be outside the arbitration agreement in article 45 and, moreover, that it does fall within that agreement. Mr Edey submits that in these circumstances the court would be bound under section 9 to stay English proceedings in which the same claim was made and therefore the court either has no power, or should not exercise it, to grant an anti-arbitration injunction in respect of the shares claim.

93. The logic of this submission is, in my judgment, irresistible. An anti-arbitration injunction would be wholly contrary to the fundamental principle underpinning the New York Convention and the 1996 Act of respecting and giving effect to arbitration agreements.

94. The situation here is not unlike that in *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWHC 1927 (Comm). There were two agreements between the parties, one governed by English law and providing for arbitration in England and the other governed by Italian law and providing for arbitration in Italy. The claimant commenced an arbitration in England and the English court had earlier held that the

claimant had shown a good arguable case that its claim was covered by the English arbitration clause and was not covered by the Italian arbitration clause. However, Andrew Smith J refused to grant an injunction to restrain the arbitration in Italy. The court had not earlier examined whether the Italian arbitration clause covered the claims purportedly made under the Italian agreement to the arbitral tribunal in Italy. The fact that the Italian tribunal might in due course decide that the claims did not fall within the Italian agreement was not a ground for the grant of the injunction.

95. Reliance was placed before Andrew Smith J on the speech of Lord Bingham in *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 Lloyd's Rep 425, at [24] where he stated that if contracting parties agree to give a particular court exclusive jurisdiction as regards disputes, the English court will generally enforce such agreement, whether by a stay of English proceedings or an injunction to restrain foreign proceedings. Andrew Smith J held that Lord Bingham's observation applied "when an anti-arbitration order is sought and there is no room for argument that a jurisdiction clause covers the relevant claims…either because it is common ground between the parties or because of a previous determination".

96. The logical connection between a stay and an anti-arbitration injunction lay at the heart of the reasoning of Popplewell J in *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd (The Barito)* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep 242. A dispute arose as to whether the charterer of a vessel was A or its wholly-owned subsidiary B, both A and B contending that the charterer was B. The charterparty was governed by English law and contained an English arbitration clause. An addendum to the charterparty was signed, by the owners and B, reciting that B was and had always been the charterer and substituting a Singapore arbitration clause for the English arbitration clause. The owners contended that the addendum was void for mistake and, pursuant to a settlement agreement with A, commenced an arbitration in England, without prejudice to A's right to contest the jurisdiction of the tribunal. The arbitrator published an award holding that A was the charterer. B was not a party to the arbitration and it initiated an arbitration in Singapore. The owners commenced proceedings in the Commercial Court, seeking enforcement of the award, declarations that B was not the charterer and that there was no arbitration agreement between the owners and B and an injunction under section 37 to restrain B from pursuing the Singapore arbitration.

97. In determining whether the owners had shown a serious issue to be tried that the owners were entitled to the declarations sought by them, Popplewell J addressed the threshold issue as to whether these were matters to be decided in the English proceedings or the Singapore arbitration. He answered that question by examining the course that would be followed if B sought a stay of the proceedings under section 9. He determined that, in the circumstances of the case, the English court would decide the issue of the addendum's validity and, that if it were held to be invalid, there would be a real prospect of a final anti-arbitration injunction. In the circumstances, the judge granted an interim injunction restraining the Singapore arbitration.

98. That is the converse of the present case but if, in the hypothetical stay application, the English proceedings had been stayed under section 9, the consequence would be that no anti-arbitration injunction would be granted.

99. I would hold that the narrow submission of Mr Edey under the first ground of appeal is well-founded and that an injunction should not have been granted to restrain pursuit of the shares claim in the Lebanese arbitration. The judge in the present case proceeded on the erroneous basis that this court had decided, or that it was in any event the case, that the shares claim was not within article 45 and that Sana was not bound by article 45 as regards such claim.

100. The narrow submission cannot assist the appellants as regards the assets claim in the Lebanese arbitration. As earlier recorded, they accept that the effect of the 2017 judgment is that, in the English courts, this claim must be regarded as outside article 45.

Is it a pre-condition for the grant of an anti-arbitration injunction that England is the natural forum?

101. It is on the second ground of appeal that Mr Edey relies to submit that the judge was wrong to grant the anti-arbitration injunction as regards the assets claim as well as the shares claim. If accepted, it would follow that an injunction should not be granted even if the English court has held, for example (as in this case) on a stay application, that the claim advanced in the foreign arbitration falls outside the arbitration agreement and that the continuation of the arbitration was properly held to be oppressive and vexatious.

102. Mr Edey submits that, just as with injunctions to restrain foreign court proceedings, the English court will not restrain a foreign arbitration, in cases not involving exclusive jurisdiction agreements, unless England is the "natural forum" for the underlying dispute, i.e. that as between England and the place of the arbitration, England is the more appropriate forum.

103. Although Mr Wardell sought to argue the contrary, there is no room for doubt that this is the general rule applicable to injunctions to restrain a party from commencing or continuing foreign court proceedings (anti-suit injunctions) and that it is a general rule with few, if any exceptions: see the leading authority, *Airbus Industrie GIE v Patel* [1999] 1 AC 119, and subsequent re-statements of the principle by this court in *Glencore International AG v Exter Shipping Ltd* [2002] EWCA Civ 528, [2002] 2 All ER (Comm) 1 and *Star Reefers Pool Inc v JFC Group Ltd* [2012] EWCA Civ 14, [2012] 1 Lloyd's Rep 376.

104. Mr Edey submitted that, as this principle is applicable to anti-suit injunctions, it follows that it is or should be equally applicable to anti-arbitration injunctions. It was significant, he submitted, that in *Albon v Naza Motor Trading* Longmore LJ cited at [7] the relevant passage from the judgment of Rix LJ in *Glencore* and noted at [8] that the judge at first instance had held that England was the most appropriate forum for the dispute. He referred also to the observation of Gloster J in *Excalibur Ventures v Texas Keystone* at [69] that England was the natural forum for the litigation in that case, followed by references to *Glencore* and *Albon*, although Mr Edey did not seek to place great weight on this observation.

105. The treatment of this point in *Albon v Naza Motor Trading* does not, in my view, provide a solid basis for Mr Edey's submission. The quotation from the judgment of Rix LJ in *Glencore* is included as a "recent enunciation" of the principle from which

the submissions of counsel in that case were derived, that "a party will not be restrained from instituting or continuing foreign proceedings [i.e. court proceedings] unless the applicant can show that to do so would be oppressive and vexatious or (as it is sometimes said) unconscionable". The applicability of that part of Rix LJ's statement relating to natural forum to anti-arbitration injunctions was not the subject of submissions to the court or discussion by the court.

106. It is necessary, in my judgment, to approach this submission as a matter of principle. First, there must be identified the rationale of the rule that England must be the natural forum before an anti-suit injunction will be granted on grounds of oppressive and vexatious conduct. Second, it must be determined whether that rationale has any application in the context of an anti-arbitration injunction.

107. The rationale as regards anti-suit injunctions appears clearly from the authorities. An anti-suit injunction involves an indirect interference with the sovereign jurisdiction of the courts of foreign states. It is indirect, because the injunction is made against a defendant amenable to the jurisdiction of the English court, not against the foreign court itself, but its effect is recognised as nonetheless interfering with the foreign court's jurisdiction. Since this is *prima facie* contrary to principles of comity, it must be kept within strict bounds that can properly be said to justify such interference, and the test of natural forum is one of the key means whereby this is achieved (although it is not by itself sufficient: see *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* at 895). In *Airbus Industrie v Patel*, Lord Goff said at p.134: "In alternative forum cases, in which the choice is between the English forum and some other forum overseas, an anti-suit injunction will normally only be applied for in an English court where England is the natural forum for the resolution of the dispute; and, if so, there will be no infringement of comity". At p. 138, Lord Goff said under the heading *Comity*:

> "I approach the matter as follows. As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails.
>
> In an alternative forum case, this will involve consideration of the question whether the English court is the natural forum for the resolution of the dispute."

108. I should mention that Mr Wardell relied on the first paragraph in this passage from Lord Goff's speech for the submission that the true requirement was not that England should be the natural forum but only that the English court should have a sufficient interest in or connection with the dispute. That this involves a misreading of the authorities is clear from the second paragraph and the subsequent decisions of this court to which I have referred.

109. This rationale does not apply to a foreign arbitration. An anti-arbitration injunction does not involve an interference with the jurisdiction of a foreign court, except in the

very indirect way of relieving it of its role as the supervisory court for the arbitration – but that is a role that is entirely dependent on the continuation of the arbitration. There can be no question, in the case of an anti-suit injunction, of the court saying that the foreign court lacks jurisdiction (save in the case of exclusive jurisdiction agreements), whereas the lack of the arbitral tribunal's jurisdiction, because there is no arbitration agreement or because the agreement does not cover the matter in issue, is the basis of an anti-arbitration injunction.

110. An anti-arbitration injunction involves an interference with a different principle, namely the fundamental principle of international arbitration that courts should uphold, and therefore not interfere with, arbitration agreements. Where it is clear that the dispute is within the terms of a valid arbitration agreement, then the courts should not interfere. When the converse is true, "either because it is common ground between the parties or because of a previous determination" (per Andrew Smith J in *Amtrust Europe v Trust risk Group* at [25]), the court may grant an anti-arbitration injunction but only if the circumstances of the case require it. Save perhaps in the case of exclusive jurisdiction agreements, the grant of an anti-arbitration remains an exceptional step.

111. Where the validity or scope of an arbitration agreement is in issue, it may be a difficult question whether the English court should seek to determine the issue. As earlier mentioned, komptenz-kompetenz is an important principle of international arbitration law. It is implicit in an arbitration agreement that the parties agree that the tribunal may rule on its own substantive jurisdiction, including issues as to the validity of the arbitration agreement and the matters within the scope of the agreement (see section 30 of the Arbitration Act 1996 as regards arbitrations with their seat in England). In *Weissfisch v Julius*, this court said that it was "the natural consequence" of an agreement for arbitration governed by Swiss law with its seat in Switzerland that "any issues as to the validity of the unusual provisions of the arbitration clauses would fall to be resolved in Switzerland according to Swiss law".

112. It is therefore an exceptional course for the English court to decide these issues in relation to an agreement for a foreign-seated arbitration. Nonetheless, there are cases where the English court may be required to do so. An application for a stay of English proceedings under section 9 is an obvious example, although even then these issues may best be left to the arbitral tribunal. In *Golden Ocean v Humpuss Intermoda*, Popplewell J explored the circumstances in which, on a stay application, the court should decide the issue for itself or leave it to the tribunal.

113. What the English court will normally have to decide is whether the issues *in the English proceedings* fall within the scope of the arbitration agreement. The court did so in the present case, and the authoritative answer given in the 2017 judgment is that neither of the claims in the present proceedings falls within article 45. That did not decide whether the claims advanced by the appellants in the Lebanese arbitration fell within article 45, but they accept that by reason of the 2017 judgment the asset claim in the arbitration does not fall within article 45, so far as the English courts are concerned. This therefore comes within Andrew Smith J's category of a "previous determination" that a claim is outside the scope of an arbitration agreement. In those circumstances, there is no objection *in principle* to the grant of an injunction to restrain the appellants from pursuing that claim in the Lebanese arbitration, and for the reasons already given there is no requirement to show that England is the natural

forum for the dispute. The appellants do not challenge the judge's decision that the discretionary factors support the grant of the injunction as regards that claim.

114. It follows that I would dismiss the appeal as it relates to the injunction restraining the appellants from pursuing the assets claim in the Lebanese arbitration.

Conclusion

115. For the reasons given above, I reject the submissions, first, that the English court has no jurisdiction to grant an anti-arbitration injunction on grounds that the arbitration is or would be vexatious and oppressive and, second, that any such jurisdiction is exercisable only if England is the natural forum for the dispute. However, I conclude that the shares claim in the Lebanese arbitration is within the arbitration agreement in article 45 of CCG's articles of association and that the judge was therefore wrong to grant an injunction restraining the pursuit of that claim in the arbitration. I would therefore allow the appeal and discharge the injunction as regards the shares claim in the arbitration, but I would dismiss the appeal and uphold the injunction as regards the assets claim in the arbitration.

Lord Justice Haddon-Cave:

116. I agree.

Sir Timothy Lloyd:

117. I also agree.

IN THE HIGH COURT OF JUSTICE **CO REF NO:443/2019**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Before MRS JUSTICE YIP DBE

BETWEEN

R (On the application of

AS (Somalia))

Claimant

V

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

ORDER

Upon hearing Counsel for the Claimant (Mr R. Khubber) instructed by Turpin & Miller LLP and Counsel for the Defendant (Ms J. Gray) instructed by the Government Legal Department

It is ordered that

1. This claim for judicial review is allowed to the extent that the Claimant is entitled to a declaration that his detention was unlawful from 12 September 2018 to 25 April 2019 on public law grounds (and for the same reasons in breach of Article 5 ECHR) for the reasons set out in paragraphs 78 to 88 of the judgment.

2. The Claimant's claim that his detention was unlawful under *Hardial Singh* principles (and for the same reasons in breach of Article 5 ECHR) is dismissed for the reasons given at paragraphs 46 to 76 of the judgment.

3. The Claimant's application for permission to appeal is refused.

4. Time for the Appellant to file his Appellant's Notice with the Court of Appeal (if so advised) be extended to 35 days after the date of the decision of this Court pursuant to CPR para 52.12(2)(a).

5. The Court's consideration of damages for unlawful detention is subject to the following case management directions:

   i). Consideration by the Court of damages arising from its judgment is adjourned pending the outcome of any application for permission to appeal made directly to the Court of Appeal.

   ii). The Claimant is to inform the Court if permission to appeal is granted or refused within 48 hours of receipt of any Order from the Court of Appeal.

6. If permission to appeal is refused by the Court of Appeal:

   i). The parties are to liaise with each other in order to see if agreement can be reached on issue of damages.

   ii). If agreement can or cannot be reached the parties are to inform the Court within 28 days of the notification of the refusal of permission to appeal.

   iii). If agreement cannot be reached the following further directions are made for the Court to resolve outstanding matters:

      a). The Court's assessment of damages in the light of its judgment on the lawfulness of detention is to be listed for an oral hearing with a time estimate of 1 day (excluding judgment).

      b). The Claimant is to file and serve an agreed bundle 21 days before the hearing date.

      c). The Claimant is file and serve his skeleton argument on damages 21 days before the hearing date.

      d). The Defendant is to file and serve his skeleton argument on damages 14 days before the hearing date.

      e). The Claimant is to file and serve an agreed authorities bundle 7 days before the hearing date.

7. The costs of this claim are adjourned to be considered after resolution of damages arising from illegality of detention by the Court, with further direction as necessary.