Neutral Citation Number: [2022] EWHC 1682 (Comm)

Case No: CL-20201-000424 & CL-2021-000760

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2022

Before :

MR JUSTICE FOXTON

- -

Between :

NDK LIMITED	**Claimant/ (arbitration respondent)**
- and -	
(1) HUO HOLDING LIMITED **(2) KXF TRADING LTD**	**Defendants (arbitration claimants)**

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- -

Stephen Cogley QC and **Christopher Jay** (instructed by **Fieldfisher LLP**) for the **Claimant**
Aidan Casey QC (instructed by **CANDEY Limited**) and **Lionel Nichols (**of **CANDEY Limited**) for the **Respondents**

Hearing dates: 14 and 15 June 2022
Draft judgment provided to parties: 23 June 2022

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 01 July 2022 at 10:00am.

Mr Justice Foxton:

1. This is the hearing of challenges by the Claimant (**NDK**) under ss.67 and 68 of the Arbitration Act 1996 (**the 1996 Act**) to two awards made in London by London Court of International Arbitration (**LCIA**) tribunals:

    i) The Partial Final Award dated 18 May 2021 which granted final anti-suit relief restraining NDK from advancing claims against the Defendants (**HUO**, **KXF** and, together, **the LCIA Claimants**) in Cyprus (**the PFA**).

    ii) The costs award made in respect of the PFA on 5 November 2021 as part of the Final Award on Damages, Costs and Interest (**the Costs and Damages Award**).

THE FACTUAL BACKGROUND

2. This dispute arises out a joint venture for the operation of a Russian coalmine which was originally entered into in March 2012 by three groups of investors: the Lime family, Mr Indigo and Mr Brown. As is commonly the case, the joint venture was structured as follows:

    i) A Russian company, Mine LLC (**Mine Co**), acquired the licence to operate the mine.

    ii) Mine Co was owned by a Cypriot registered company called SPV Limited (**SPV**).

    iii) Corporate vehicles ultimately owned by the three sets of investors held shares in **SPV** in proportion to their interests:

        a) The Limes' vehicle, NDK, held a 75% share.

        b) Mr Brown's corporate vehicle, K Holdings Ltd (**K Co**), held a 15% share.

        c) Mr Indigo's vehicle, KXF, held a 10% interest.

3. SPV was required to have articles of association by the Cypriot Companies Law (Cap 113) (**the Articles of Association**). In Cyprus, as in England and Wales, these give rise to a statutory contract between the shareholders in their capacity as such. While they contained no express choice of law, the Articles of Association were governed by Cyprus law, as the law of the place of incorporation. They did not contain a jurisdiction clause.

4. In addition to the Articles of Association, the relationship of the three shareholders in SPV was regulated by a shareholders' agreement (**the SHA**) which was governed by English law and provided for LCIA arbitration (**the LCIA Arbitration Agreement**). The SHA contains various provisions intended to offer a degree of protection to the interests of the minority shareholders.

5. Both the Articles of Association and the SHA contained provisions regulating the rights of the shareholders in SPV to sell their shares and giving the other shareholders rights to pre-empt such a sale in certain circumstances.

6. The joint venture partners fell out, and this has given rise to a number of disputes. Disputes arising from various matters, including disputed amendments to the Articles of Association, were first referred to LCIA arbitration in 2015 (**the Original Arbitration**), in which NDK contended that the SHA had been terminated. The course of the Original Arbitration was protracted and sporadic, and in 2018 (while it was underway) the following occurred:

   i) K Co acquired HUO as a subsidiary.

   ii) K Co entered into an agreement to sell the capital of HUO to Mr Pink, it being a condition of the sale that HUO should first acquire K Co's shareholding in SPV.

   iii) K Co then purported to transfer its shareholding in SPV to HUO.

   iv) The board of SPV was asked to approve that transfer. For this purpose, SPV's corporate services provider was provided with a letter from Mr Brown's family trust (**the Orange Foundation Letter**) which stated that the beneficial owner of the shares would not change following the transfer. The Orange Foundation Letter was later found to be false and fraudulent (given the intention to sell HUO to Mr Pink).

   v) The transfer was approved by a unanimous resolution of the board of SPV on 5 February 2018 (**the 5 February Resolution**).

   vi) As part of the same transaction as the sale of HUO, Mr Indigo also transferred the beneficial ownership of KXF to Mr Pink.

   vii) HUO was then joined to the Original Arbitration.

7. While at one point NDK sought to impugn these transfers in the Original Arbitration, suggesting that they were wrongful and gave rise to a breach of the SHA, it accepted in the course of its opening submissions that the transfers were "not in themselves a breach of the SHA" (because the pre-emption rights and transfer restrictions in the SHA did not extend to the disposal of shares in a shareholder in SPV, only to the disposal of shares in SPV itself).

8. On 25 September 2019, the tribunal in the Original Arbitration handed down its award rejecting NDK's claim that the SHA had been terminated and upholding certain of HUO and KXF's complaints. Four months later, on 21 January 2020, NDK commenced proceedings in Cyprus (**the Cyprus Proceedings**) against K Co, KXF, HUO and various individuals alleged to be connected to them, alleging that:

   i) Mr Pink was acting as a nominee for a competitor of Mine Co in acquiring a beneficial interest in SPV;

   ii) the transfers of beneficial ownership to him were undertaken as part of a fraudulent conspiracy in breach of the terms of the Articles of Association; and

iii) the purpose and effect of the transfers had been dishonestly misstated in the Orange Foundation Letter which was intended to induce, and had the effect of inducing, NDK not to exercise rights of pre-emption arising under the Articles of Association.

9. The causes of action advanced were conspiracy to defraud, deceit, breach of the Articles of Association and inducing breach of the Articles of Association. The relief sought includes:

i) declarations that (i) the transfers themselves are void, alternatively voidable (because they were undertaken in breach of NDK's pre-emption rights under the Articles of Association) and (ii) the 5 February Resolution giving effect to the (ex hypothesi) void transfers was ultra vires;

ii) orders setting the transfers aside and transferring the relevant interests to NDK (and supplementary orders intended to facilitate those transfers);

iii) rectification of the register of members to show NDK and not HUO as the owner of the shares; and

iv) damages.

It is no criticism of the draftsperson of the statement of claim in the Cyprus Proceedings to observe that it studiously avoids reliance on the SHA for the purposes its claims, but relies extensively on the Articles of Association.

10. The LCIA Claimants contended that the claims made against them in the Cyprus Proceedings had been brought in breach of the LCIA Arbitration Agreement, and they commenced a fresh LCIA arbitration seeking an anti-suit injunction requiring NDK to abandon the Cyprus Proceedings so far as it concerned them on 13 March 2020 (**the Second Arbitration**). As well as challenging the substantive jurisdiction of the Second Arbitration tribunal to grant such relief on the basis that the LCIA Arbitration Agreement did not apply to the claims brought in the Cyprus Proceedings (see for example paragraphs 3 and 4 of its Response to the Request for Arbitration), one of the points NDK took in response was to say that the conduct on the part of the LCIA Claimants which had been pleaded in the Cyprus Proceedings gave rise to a repudiatory breach of the SHA, and NDK purported to accept that breach and terminate the SHA (and with it, it was contended, the LCIA Arbitration Agreement).

11. This led the LCIA Claimants to commence two more arbitrations on 16 April and 3 July 2020, which were consolidated by the LCIA (**the Consolidated Arbitration**). The relief sought by the LCIA Claimants in the Consolidated Arbitration included declarations that the SHA remained valid and binding.

12. The Consolidated Arbitration was still ongoing both when the merits hearing took place in the Second Arbitration (2 and 3 December 2020), and when the tribunal handed down the PFA on 18 May 2021 granting the LCIA Claimants final anti-suit relief.

13. The merits hearing in the Consolidated Arbitration took place between 12 and 27 May 2021. On 22 March 2022, the tribunal in the Consolidated Arbitration handed down

its award (**the Consolidated Arbitration Award**) in which it held, inter alios, that the SHA remained valid and binding. In the Consolidated Arbitration Award, the tribunal held that it was an abuse of process for NDK to raise the complaints relating to the transfer of shares from K Co to HUO having regard to the position it had taken in the Original Arbitration. It also went on to deal with NDK's complaints on the merits, and rejected them. The fact that the dispute as to whether the SHA had been terminated was still pending when the PFA was handed down gives rise to one of NDK's s.68 challenges.

14. On 21 November 2021, the Tribunal handed down the Costs and Damages Award.

THE APPLICATIONS

15. Against that background:

i) NDK has brought challenges under ss.67 and 68 of the 1996 Act to the PFA and the associated parts of the Costs and Damages Award, which are before me at this hearing. The first ground of the s.68 challenge is advanced in the alternative to the s.67 challenge, by way of response to the LCIA Claimants' contention that the issues which NDK seeks to raise in the s.67 challenge are not challenges to the tribunal's "substantive jurisdiction" for the purpose of ss.30 and 67 of the 1996 Act. There is a second, independent, ground of challenge advanced under s.68 (which is put forward in two ways) which arises from the feature of the relationship of the various arbitrations referred to at [13] above (**the Second S.68 Ground**).

ii) NDK has also brought a challenge under ss. 67 and 68 of the 1996 Act to the Consolidated Arbitration Award and the associated relief in the Costs and Damages Award. That challenge was issued on 17 May 2022, and the LCIA Claimants have applied to strike the challenge out on the basis that it has no real prospect of success.

iii) The basis of the Second S.68 Ground is that the relief granted in the PTA failed adequately, or sufficiently clearly, to allow for the ongoing dispute as to whether the SHA had been terminated. It is accepted that if the finding in the Consolidated Arbitration Award that the SHA remains valid and binding cannot be impugned, then even if NDK is able to establish a relevant head of serious irregularity within s.68(2) of the 1996 Act, the Second S.68 Ground would fail because it would not be possible to establish that the irregularity had caused "substantial injustice".

iv) For that reason, and also having regard to the obvious overlap between the issues raised by the Second S.68 Ground and the matters in issue in the challenges brought to the Consolidated Arbitration Award, the parties agreed to adjourn the application so far as it concerned the Second S.68 Ground so that it could be considered at the same time as the challenge to the Consolidated Arbitration Award (if that is not struck out), with NDK providing undertakings in relation to the Cyprus Proceedings in the meantime. The parties also agreed that, if possible, the LCIA Claimants' applications issued in relation to the challenges to the Consolidated Arbitration Award should be allocated to me for determination.

DO NDK'S CHALLENGES TO THE PFA CONSTITUTE CHALLENGES TO THE SUBSTANTIVE JURISDICTION OF THE TRIBUNAL FOR THE PURPOSES OF SS.30 AND 67 OF THE 1996 ACT?

16. Section 30 of the 1996 Act provides:

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to:
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> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."

17. Section 67 provides a right to challenge "any award of the arbitral tribunal as to its substantive jurisdiction" or to seek "an order declaring an award on the merits to be of no effect … because the tribunal did not have substantive jurisdiction". While s.67 does not itself define the concept of substantive jurisdiction, s.82(1) states that "'substantive jurisdiction' in relation to an arbitral tribunal refers to the matters specified in section 30(1)(a) to (c) and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly." The three elements of s.30(1) are also reproduced in s.72(1), which deals with the position of a person alleged to be a party to arbitral proceedings but who takes no part in them. The effect of these provisions is that the three sub-paragraphs of s.30(1) exhaustively identify those issues which go to the tribunal's substantive jurisdiction (*C v D1* [2015] EWHC 2126 (Comm), [130]-[135], Carr J).

18. NDK contends that the matters which form the subject of the Cyprus Proceedings do not fall within the LCIA Arbitration Agreement for two reasons:

i) First, that as a matter of construction, claims brought under or in respect of the statutory contract constituted by the Articles of Association do not fall within the LCIA Arbitration Agreement in the SHA (**the Construction Question**).

ii) Second, that the matters raised in the Cyprus Proceedings are not, as a matter of English law, arbitrable (**the Arbitrability Question**).

19. The LCIA Claimants' argument that these matters do not concern the "substantive jurisdiction" of the tribunal runs as follows:

i) In this case, there is no dispute that NDK, HUO and KXF are parties to *an* arbitration agreement (the LCIA Arbitration Agreement).

ii) The arbitration tribunal appointed under the LCIA Arbitration Agreement has jurisdiction to grant relief for breaches of the arbitration agreement, whether by way of declaration, injunction or an award of damages. In this context, Mr Casey QC referred me to the following statement by Males J in *Nori Holdings Ltd v Public Joint-Stock Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm), [38]:

> "A dispute as to whether the pursuit of foreign court proceedings is a breach of an arbitration clause is a matter which falls within the scope of a conventional arbitration clause. It is therefore 'a matter which under the agreement is to be referred to arbitration'. If that were not so, an arbitral tribunal would not have jurisdiction to order anti suit relief, as its jurisdiction is limited to determination of the matters which the parties have agreed to refer to it."

iii) If, in deciding to grant anti-suit relief, the arbitral tribunal concludes that particular claims brought (or threatened to be brought) in another forum fall within the scope of the arbitration agreement, and grants relief accordingly, that is simply the exercise of the jurisdiction it has under the undisputed arbitration agreement to determine whether there has or might be a breach of the arbitration agreement, and is not susceptible to a challenge under s.67. The position would be no different to the LCIA tribunal concluding that there had been a breach of the framework contract to which the arbitration agreement was ancillary, and granting relief in respect of such a breach, which decision would not be reviewable on the merits.

iv) When deciding whether or not to grant relief in respect of proceedings commenced in another forum on the basis that the claims fell within the arbitration agreement, the tribunal also had substantive jurisdiction to determine whether the particular claims in issue were arbitrable as a matter of public policy (because that may be a necessary aspect of determining whether there has been a breach of the arbitration agreement), and the arbitrators' decision on this issue was also incapable of being challenged under s.67.

20. There are a number of surprising features of the argument which should be noted:

i) It is accepted that a challenge to an award granting relief by way of enforcement of an arbitration agreement will be a challenge to the tribunal's "substantive jurisdiction" where no arbitration agreement at all has been entered into. It would seem to follow that, where both the existence and scope of the arbitration agreement are in issue in such a context, a court hearing a s.67 application should first determine whether the arbitrators had been appointed under an arbitration agreement of some kind between the parties. If the answer was yes, then however narrow or apparently inapplicable its terms might be, that would be the end of the jurisdiction challenge.

ii) Mr Casey accepted that when the relief granted by an arbitral tribunal concerns something other than the enforcement of the arbitration agreement itself (for example an order enforcing the framework contract of sale or awarding damages in tort), the award could be challenged under s.67 on the basis that, although there was an arbitration agreement between the parties, its scope did not extend to the dispute in question.

iii) Where a tribunal awards relief for conduct said to breach the arbitration agreement against a party who takes no part in the arbitration, the saving provided by s.72(1)(a) would not apply in any case in which there was an arbitration agreement of some kind between the parties under which the arbitration tribunal had been appointed, whatever its scope.

iv) An arbitrating party who sought and obtained a declaration or injunction by way of final award on the basis that particular disputes which the other party had brought or threatened to bring before a court fell within the arbitration agreement might subsequently bring a claim in respect of the same matters before the arbitrator. In that eventuality, the issue would arise as to whether the grant of final anti-suit relief gave rise to a binding issue estoppel so far as the arbitral tribunal's jurisdiction over the claims in the arbitration was concerned:

a) If it did, then the arbitrators would have determined their own jurisdiction as to whether those claims fell within the arbitration agreement for the purpose of pursuing those claims in arbitration, as well as for the purpose of restraining their pursuit elsewhere, notwithstanding the distinction which Mr Casey seeks to draw between these two scenarios.

b) If it did not, then the position might arise in which the arbitrators had jurisdiction to prevent the claims being brought elsewhere on the basis that they fell within the arbitration clause, but no jurisdiction to determine the claims themselves on the basis of the court's conclusion under s.67 that they did not.

v) While the issue of arbitrability will often arise because of a public policy determination that particular types of dispute are not capable of being determined by a privately appointed tribunal in a private hearing, the effect of the argument is that, in this context at least, a privately appointed tribunal sitting in private will itself finally decide the issue of arbitrability.

21. I asked Mr Casey QC what the position would be if a party commenced an arbitration asserting certain claims on the merits and at the same time asked the tribunal also to declare that those claims fell within the scope of an arbitration agreement whose existence was accepted, but whose scope was in dispute. After some consideration, he accepted that the granting of a declaration in these circumstances would not preclude the other party from bringing a s.67 challenge by reference to the disputed scope of the arbitration agreement. It seems to me that that concession was obviously correct, otherwise there would be a wholly unprincipled distinction between cases where an application for such a declaration was made and those where it was not. However, I found the distinction between this case, and Mr Casey QC's position as outlined at [19] above, elusive. Nor can I accept that the answer would be any different if a claimant had originally sought only a declaration from the arbitrators that particular claims were arbitrable, and subsequently advanced those claims on the merits in a separate reference.

22. I am unable to accept Mr Casey's argument. In my view, a decision as to the scope of the arbitration agreement, and whether it extends to a particular dispute, falls within s.30(1)(a) of the 1996 Act, the issue being whether there is a valid arbitration agreement extending to those claims. That avoids the unsatisfactory distinctions and consequences outlined at [20] to [21] above. Nor do I accept that the quotation from *Nori Holdings* at [19(ii)] assists the LCIA Claimants:

i) If proceedings were commenced in court for relief (whether by way of a final injunction or damages) in relation to an alleged breach of an arbitration

agreement, Males J was noting the theoretical possibility of an application to stay the court proceedings under s.9 of the 1996 Act.

ii) However, before granting a s.9 stay, the court will have to be satisfied that the application has been brought by "a party to an arbitration agreement … in respect of a matter which under the agreement is to be referred to arbitration". Males J was clearly not contemplating that it was for the arbitrators to make a final decision on the issue of whether the claim for an anti-suit was a "matter which under the agreement is to be referred to arbitration".

23. It follows that it is only necessary to consider NDK's challenge under s.67 of the 1996 Act, and not that part of its s.68 challenge which was premised on the court having concluded that the issues raised were not jurisdictional for s.67 purposes. It is common ground that in determining the s.67 challenge, the court is engaged in a re-hearing, not a review of the arbitrator's decision (*Dallah Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [30]).

THE CONSTRUCTION QUESTION

The Cyprus Proceedings

24. I am happy to adopt the description of the Cyprus Proceedings given by the Tribunal at paragraphs 50 and 51 of the PFA, which I am satisfied is a fair and accurate summary (with appropriate amendments for the purposes of anonymisation):

> "The Cyprus Proceedings were commenced by NDK on 21 January 2020 in the District Court of Nicosia, Cyprus, bearing action number 137/2020. As originally commenced, the Cyprus Proceedings were against eleven defendants, including SPV, K Co, KXF, HUO and various individuals or entities related (or formerly related) to K Co, HUO or KXF (whether as ultimate beneficial owner, director or officer of those companies). These individuals include Mr Brown and Mr Indigo, as well as Mr Pink whose role is considered below. Subsequently, NDK applied to join a twelfth defendant to the proceedings, Mrs Red, a director of HUO.
>
> … [T]he following appears from the Statement of Claim in the Cyprus Proceedings.
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> 1. The background to the claims is the execution and completion of two share purchase agreements dated 21 December 2017 pursuant to which Mr Pink acquired 100% of the share capital of KXF and HUO (the "KXF SPA" and "Huo SPA" respectively). By these SPAs, Mr Pink effectively became the indirect holder of 25% of the share capital of SPV (10% through KXF and 15% through HUO).
>
> 2. Prior to the conclusion of the KXF SPA and HUO SPA, K Co owned 100% of the share of capital of KXF, which in turn owned 10% of the share capital of SPV. K Co also owned 15% of the share capital of SPV and 100% of the share capital of HUO. The completion of the HUO SPA was conditional upon K Co transferring its 15% shareholding in SPV to HUO prior to Mr Pink acquiring 100% of the share capital of HUO from

K Co. The fulfilment of this condition and completion of the HUO SPA thus enabled Mr Pink to acquire K Co's original 15% stake in SPV through his acquisition of HUO. When added to the 10% stake he acquired through the acquisition of KXF, his total indirect stake in SPV, following completion of the KXF and HUO SPAs, amounted to 25% of the share capital of SPV.

3. The gist of NDK's case is that:

3.1 Mr Pink is a front or nominee for (or otherwise associated with) Mine Co's biggest competitor, a Russian company known as Ultra Violet LLC, which is owned by another Russian company, Cyan LLC ('Cyan'), and owns and/or operates mines which are adjacent to the Mine Co mine; and

3.2 Mr Pink's acquisition of the share capital of KXF and HUO (and hence control of 25% of share capital of SPV) is part of a fraudulent conspiracy between Mr Pink, Mr Indigo (the former UBO of KXF before its sale to K Co and thereafter by K Co to Mr Pink) and Mr Brown (the majority UBO of K Co, who is said to be deceased and whose estate NDK intends in due course to join to the Cyprus Proceedings) and others (including KXF and HUO), designed to enable Ultra Violent LLC to take control of the Mine Co mine and associated coal-field rights and licences at SPV's expense.

4 NDK alleges that pursuant to this fraudulent conspiracy (which is alleged to have taken the form of an unlawful means or lawful means conspiracy):

4.1 KCo had without the knowledge and consent of the Limes consolidated ownership of 25% of the share capital of SPV;

4.2 Mr Indigo had sold 100% of the share capital of KXF to K Co (including the 50% allegedly held by him on trust for the Limes) and K Co had then sold the share capital of KXF to Mr Pink pursuant to the KXF SPA, thereby indirectly transferring ownership of 10% of SPV (as held by KXF) to Mr Pink, all such transactions being entered into without the knowledge and consent of the Limes;

4.3 K Co's 15% shareholding in SPV was transferred to HUO on the basis of representations that HUO was a fully-owned subsidiary of K Co so that the transfer of the shareholding to HUO was permitted under Article 28 of the New Articles without engaging the other Shareholders' (in particular, NDK's) rights of pre-emption under Article 28A – in fact, those representations were false and known by the defendants (or at least some of them) to be false because, by virtue of the sale of HUO to Mr Pink pursuant to the HUO SPA (which was concealed from the Limes), HUO was no longer a fully-owned subsidiary of K Co when the SPV Board (including the Director nominated by NDK on the Board) unanimously approved the transfer of the 15% shareholding to HUO at a Board meeting on 5 February 2018; and

4.4 KXF, K Co, HUO, Mr Brown, Mr Indigo, Mr Pink and their associates thereby (i) misappropriated 50% of the beneficial interest of the Limes in KXF, (ii) defrauded NDK out of the exercise of its pre-emption rights under Articles 28 and 28A of the New Articles in relation to the intended sale of K Co's 15% shareholding in SPV to HUO, and (iii) breached the 'joint venture quasi-partnership' between Mr Indigo, Mr Brown and the Limes, pursuant to which NDK alleges that SPV was established, by introducing Mr Pink (a stranger to the Limes) into the said quasi-partnership.

5 The specific causes of action relied upon by NDK are 'conspiracy to defraud, … deceit …[,] … breach of the statutory contract contained in the [New Articles] and/or for inducement to breach the statutory contract contained in the [New Articles]' (paragraph 88 of the Statement of Claim).

6 Central to all of these causes of action is NDK's complaint that it was deceived into not exercising its rights of pre-emption under Articles 28-28A of the New Articles in connection with the direct transfer of K Co's 15% shareholding in SPV to HUO as well as the indirect transfers of HUO's 15% shareholding (as acquired from K Co) and KXF's 10% shareholding in SPV to Mr Pink pursuant to the KXF and HUO SPAs, and that those transactions were completed in breach of the statutory contract contained in Articles 28 and 28A of the New Articles (paragraphs 89-99 of the Statement of Claim).

7 The relief claimed by NDK comprises the following:

7.1 declarations (i) that the transfer of the 15% shareholding in SPV from K Co to HUA is void or voidable, and (ii) that NDK is entitled under Articles 28 and 28A to acquire the 15% shareholding originally held by K Co and subsequently transferred to HUO;

7.2 orders (i) setting aside or cancelling the transfer and/or registration of the said 15% shareholding in HUO's name, (ii) transferring and registering title to the 15% shareholding in favour of NDK in exchange for payment by NDK of the purchase price stipulated in the relevant share purchase agreement between K Co and HUO or payment of the value of such shareholding to be assessed by SPV's auditors under Articles 28 and 28A, (iii) requiring HUO and its directors to take all steps and/or sign all necessary documents for the transfer of title to the 15% shareholding held or registered in HUO's name to NDK, and (iv) requiring the rectification of the register of members of SPV and of the records kept by the Registrar of Companies in order to reflect and/or record NDK as the owner of the said 15% shareholding instead of HUO;

7.3 declarations (i) that the transfer of 100% of the shares of KXF by K Co to Mr Pink was part of a fraudulent scheme to prevent NDK from exercising its pre-emption rights under Articles 28 and 28A over the shares held by KXF in SPV, and (ii) that the said transfer amounted to a breach of Articles 28 and 28A; orders (i) transferring

title to the 10% shareholding held by KXF in SPV to NDK for a price to be determined by SPV's auditors under Articles 28 and 28A, and (ii) requiring the rectification of the register of members of SPV and of the records kept by the Registrar of Companies in order to reflect and/or record NDK as the owner of the said 10% shareholding instead of KXF;

7.4 damages for any losses caused to NDK; and

7.5 orders compelling such of the defendants as are necessary to take every necessary step to cause or arrange for the transfer of the 25% shareholding in SPV held by KXF and HUO to NDK."

The parties' arguments on the Construction Question

25. The parties' arguments ran on relatively familiar lines.

26. NDK acknowledged that, ordinarily, an arbitration agreement governed by English law will be interpreted on the basis of a presumption that the parties intend it to apply to all disputes arising from the relationship between the parties represented by the contract containing the arbitration clause (*Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [13]). However, it emphasised the additional complexities which arise when seeking to apply the *Fiona Trust* interpretative approach in a context in which it is alleged that an arbitration or jurisdiction clause in one agreement applies to claims arising under another contract with no (or a different) jurisdiction clause. NDK referred to the summary of the principles applicable in this context (which has been described as involving "the Extended *Fiona Trust* principle") given by Bryan J in *Terre Neuve Sarl v Yewdale Ltd* [2020] EWHC 772 (Comm), [26]-[28] and [30]. NDK submitted that its claims in the Cyprus Proceedings advanced by reference to the Articles of Association and the status and effect of the 5 February Resolution did not relate to or were not connected with the relationship represented by the SHA. Instead, they arose from the statutory contract and relationship between members of a company arising under Cypriot company law (relying in this connection on the absence of any claim advanced by reference to the SHA in the statement of claim in the Cyprus Proceedings). NDK also argued that, on a proper analysis of the issues in the Cyprus Proceedings, they did not concern the same matter as the SHA (relying in this context on the decision of Blair J in *Autoridad del Canal de Panama v Sacyr SA and others* [2017] EWHC 2228 (Comm), [137]).

27. The LCIA Claimants stressed the width of the LCIA Arbitration Agreement, which provided for "disputes, differences, controversies or claims between or among the Parties arising out of, relating to or in connection with this Agreement" to be referred to LCIA Arbitration. In giving effect to that clause, they ask the court to apply the well-known passage from Lord Hoffmann's judgment in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [13]. They also submit that in determining whether the claims brought in the Cyprus Proceedings arise out of the same relationship as that represented by, the SHA, it is necessary to have regard to the substance of the dispute, not the particular formulation of the claims in the Cyprus Proceedings (relying on *Lombard North Central Plc v GATX Corporation* [2012] EWHC 1067, [14] and *Microsoft Mobile (OY) v Sony Europe Ltd and others* [2017] EWHC 374 (Ch), [72]).

The principles to be applied in answering the Construction Question

28. With one exception (which I address in the following section), the principles applicable to resolving the Construction Question were not in dispute.

29. First, "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal" (*Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [13]).

30. Second, when the issue arises of whether an arbitration agreement in one contract extends to disputes arising under another contract between the same parties (the so-called Extended *Fiona Trust* issue) the approach to be adopted is that summarised by Bryan J in *Terre Neuve*, [31] (internal citations largely omitted):

> "The following six points can be made about the Extended Fiona Trust Principle:-
>
> (1) The principle is based on the construction of the relevant jurisdiction clause (which I will refer to as being contained in 'Contract A'): it is not based on an implication or implied incorporation of the jurisdiction clause from Contract A into a related contract (henceforth known as 'Contract B').
>
> (2) As a matter of contractual construction, the wording of the clause in Contract A must be fairly capable of applying to disputes in Contract B. For example, a clause which stated that 'any dispute under this contract shall be referred to arbitration' may not apply to disputes arising out of a (related) Contract B.
>
> (3) It is not legally or commercially odd or improbable that an agreement should have no jurisdiction clause. Equally an agreement may have no jurisdiction clause and not be covered by a jurisdiction clause in a different agreement … However, the absence of any *competing* jurisdiction clauses in any agreements within a particular set of agreements concluded by the parties for the same purpose, at the same time, and with the same subject matter, can be a relevant consideration.
>
> (5) The Extended Fiona Trust Principle normally applies where Contract A and Contract B are interdependent (Point (5a)), or have been concluded at the same time as part of a single package or transaction (Point (5b)), or (if concluded at different times) dealt with the same subject-matter (Point (5c)).
>
> (6) A jurisdiction agreement in Contract A will generally apply to Contract B where that contract was entered into at the same or a similar time as Contract A. In this regard:
>
> (a) In *Etihad* at [104], the judge noted that jurisdiction agreements in Contract A generally did not apply to a different agreement

(Contract B) which had been concluded *prior to* the jurisdiction agreement coming into existence:

> 'Whilst it is not impossible for a jurisdiction agreement to have, on its true construction, such retrospective effect, a party seeking to rely upon a subsequently agreed jurisdiction agreement, in a separate contract, is likely to face an uphill struggle: see e.g. *Satyam*. One reason is that the earlier contract had an existence of its own, and hence an applicable law, prior to the conclusion of the subsequent agreements. If there was no jurisdiction agreement at the time it was concluded, then it may be difficult to conclude that it is to be found in a subsequent agreement, particularly if (as in *Choil*) the disputes arising under the later agreement are likely to have a very different character to disputes arising under the earlier agreement.'

(b) Further, if Contract B was concluded prior to Contract A and the Contract A parties intended for the jurisdiction clause to deal with disputes under Contract B, one would normally expect Contract A to deal expressly with jurisdiction under Contract B. Quite apart from anything else the parties already know about Contract B's existence.

(c) If Contract A was concluded prior to Contract B, and a jurisdiction clause in Contract A was intended to cover Contract B, one might expect Contract B to cross-refer back to Contract A (albeit that ultimately what one is construing for present purposes is Contract A and on normal principles of contractual construction it stands to be construed at the date on which it was entered into). It is also to be borne in mind that it may be more difficult to conclude that parties to a particular jurisdiction agreement intended for that agreement to apply to disputes arising out of contracts that have not been concluded yet, particularly if such future contracts are not being discussed as part of the same package of agreements, or if the future contracts are in fact separated by a significant period of time from the conclusion of the jurisdiction agreement."

31. Third, in considering whether the subject-matter of litigation falls within the scope of an arbitration agreement, the approach to be adopted is that set out by Andrew Smith J in *Lombard North Central plc v GATX Corp* [2012] EWHC 1067 (Comm), [14]:

> "The question of course depends upon the nature of the claim (or claims) made in the legal proceedings, but not, I think, only on the formulation of it (or them) in the claim form and any pleadings. That would allow a claimant to circumvent an arbitration agreement by formulating proceedings in terms that, perhaps artificially, avoid reference to a referred matter."

32. That observation was made in the context of an application for a s.9 stay, but the same approach is to be adopted when considering whether or not court proceedings have been brought in breach of an arbitration agreement: *Nori Holdings Ltd v Public Joint-*

Stock Company Bank Otkritie Financial Corporation [2018] EWHC 1343 (Comm), [63] and *Riverrock Securities Ltd v International Bank of St Petersburg* [2020] EWHC 2483 (Comm), [64] (where I described Males J in *Nori Holdings* as having determined that the issue of whether the dispute fell within the arbitration agreement involved "looking at the substance of the dispute, rather than the particular legal vehicle through which it was being advanced before the foreign court").

33. Finally on this last topic, Mr Cogley QC relied on the judgment of Blair J in *Autoridad del Canal de Panama v Sacyr SA* [2017] EWHC 2228 (Comm), [137] when considering whether court proceedings raised a matter which the parties had agreed to refer to arbitration:

> "(2) [A]s was said in *Tanning* at p. 193, 'in any context, "matter" is a word of wide import', and the context in which it is being considered is important. The essential nature of the claim here is that it is brought under guarantees (the APGs), which are subject to English law and jurisdiction. The substance of the controversy between the parties is the claim under the APGs, and that is the 'matter' for the purposes of s.9(1). The issue of the liability of the principal debtor to repay the advance payments (i.e. the GUPC Repayment Issue) is necessarily bound up with the nature of the instrument as a guarantee, but it is not the, or a, 'matter' for these purposes in itself.
>
> (3) On that basis, the proceedings are not 'brought in respect of a matter which under the agreement is to be referred to arbitration'. The proceedings are brought in respect of a matter (the claim under the APGs) which is referred to the exclusive jurisdiction of the English court.
>
> (4) Although s.9 cannot be circumvented by the way the proceedings are framed, that does not apply here. The claim is brought under the APGs because that is the security that ACP chooses to enforce. As the court said in *Tomolugen* at [113], in most cases, the 'matter' will encompass the claims made in the proceedings. There is no reason to take a different approach here. To hold otherwise and impose a mandatory stay would run contrary to the substantive provisions of the contract, by which ACP is entitled to enforce the security without enforcing any other security or the principal indebtedness itself.
>
> (6) Accordingly, ACP is correct that the 'matter' in respect of which these proceedings have been brought is whether the defendants are liable to ACP under the English law APGs. This is within the exclusive jurisdiction clause and is not a matter which the parties have agreed to refer to arbitration, nor in the context of the APGs is the GUPC Repayment Issue a matter which the parties have agreed to refer to arbitration. Section 9(1) does not apply."

34. At [138] he continued:

> "This is consonant with the commercial sense of the transaction. On the defendants' case, ACP must submit the claim under the APGs to arbitration under different guarantees, in respect of which ACP has made no demand, and has no claim. There is nothing unusual in a party holding more than one security for the same obligation. It is up to that party which security it chooses to enforce. Though there is now an arbitration commenced by the defendants in

> which they seek a negative declaration, it is common ground that it does not extend to the APGs and could not result in an award in ACP's favour under the APGs."

35. The decision in *ACP* is helpful in demonstrating that, when the parties have entered into more than one agreement, the process of identifying whether legal proceedings involve a "matter" which the parties have agreed to refer to arbitration under one of those contracts will often depend on the commercial context, and in particular on the role and commercial purpose of the various agreements under consideration. *ACP* was a case in which the defendants had provided various guarantees in respect of the same underlying obligations, some of those guarantees being subject to Panamanian law and ICC arbitration ("the Panamanian Guarantees"), others (those sued upon) being subject to English law and exclusive jurisdiction ("the English Guarantees"). It was necessary, for the purposes of establishing liability under both sets of guarantees, to establish that the performance of the guaranteed obligations had fallen due. That overlap in subject-matter, however, was not sufficient to render the enquiry into that issue in the context of claims to enforce the English Guarantees a matter which the parties had agreed to refer to arbitration in accordance with the terms of the Panamanian Guarantees. The alternative approach would have deprived the claimants of the choice and benefits which the different types of overlapping guarantees were intended to offer.

36. The decision in *ACP* does not, however, mean that the pursuit of a cause of action under a different contract to that containing an arbitration agreement is always itself sufficient to establish that the claim does not involve a matter which the parties have agreed to refer to arbitration, particularly when (as in this case, and in contrast to *ACP*), the agreement sued upon does not contain any alternative choice of jurisdiction. In all cases, it will be necessary to have regard to the commercial purpose and relationship of the agreements in question.

What approach should be adopted to the issue of whether claims framed by reference to a company's articles of association fall within an arbitration clause in a shareholders' agreement?

37. NDK submitted that a dispute framed by reference to a company's articles of association does not fall within an arbitration agreement in a shareholders' agreement, having regard to the fundamentally different legal character of these two sets of obligations, and the legally subordinate nature of the rights and obligations arising under the private contract as against those which arise under company law. In this regard Mr Cogley QC understandably placed considerable reliance on the decision of Vinodh Coomaraswamy J in the Singapore High Court in *BTY v BUA* [2018] SGHC 2013.

BTY v BUA

38. The *BTY* case, like this one, concerned a joint venture company whose shareholders had entered into a shareholders' agreement (referred to in that case as the investment agreement), to which the company was also a party, and which contained an arbitration agreement. One shareholder brought court proceedings against the company alleging that it had breached the articles of association in relation to the preparation and approval of annual accounts, by adopting the accounts without

obtaining the approval of the shareholders as required by Article 61 of the articles. The company applied for a mandatory stay of the proceedings under s.6 of the (Singapore) International Arbitration Act (Cap 143A, 2002 Rev Ed). It was common ground that the alleged breaches of the articles would also constitute breaches of the shareholders' agreement. Even though in Singapore, in contrast to England and Wales, it is only necessary to show a prima facie case as to the existence and application of an arbitration agreement in order to obtain a stay of court proceedings (*Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373, [63]), the application for a stay failed.

39. At the risk of failing to do justice to the clear, careful and conscientious consideration of the issue in *BTY*, the reasons given by Vinodh Coomaraswamy J for reaching that conclusion were in broad terms as follows:

i) A "sine qua non" of the claimant's claim was the allegation that there had been a breach of the articles of association, which was the "matter" in the court proceedings ([64]).

ii) That "matter" was not the subject of the arbitration agreement because it arose out of or in connection with the articles of association, not out of or in connection with the shareholders' agreement ([75]). That was because the legal relationships created by these contracts were separate and different: the shareholders' agreement created a "private contractual relationship" between the parties, whereas disputes under the articles were "governed by recourse to the courts in accordance with the ordinary principles of company law" ([79]).

iii) Expanding on that conclusion, the Judge states that while the shareholders' agreement and the articles both had contractual force, they operated on "separate planes", the former being a "private contract" deriving "its contractual force purely from the private law of obligations", whereas the articles derived their contractual force from company law (s.39(1) of the (Singapore) Companies Act) and were a "public contract" ([82]-[84]).

iv) The Judge held that the private law plane was "subordinate to company law … on the company law plane" (heading to [91]), a conclusion which in part reflected the importance of the interests of third parties who might extend credit to the company in reliance on its public filings ([96]). The Judge said that the terms of the shareholders' agreement reflected those two different planes ([100]).

v) He held that his conclusion was not undermined by the "supremacy clause" in the shareholders' agreement (stating that in the event of any conflict or inconsistency between the provisions of that agreement and the articles, the shareholders' agreement would prevail and the articles would be amended to give effect to them), because that clause only operated on the private law plane, and it recognised that it was necessary to amend the articles for the provisions of the shareholders' agreement to prevail where inconsistent with the articles ([125]).

40. In reaching that decision, the Judge endorsed the decision to similar effect of Austin J in *ACD Tridon v Tridon Australia* [2002] NSWSC 896. In that case the issue for the

court was whether various claims for relief under company law statutory provisions fell within an arbitration agreement to which both shareholders, but not the company itself, were parties. The Judge held that they did not, stating (at [170]) that "these claims do not touch and concern the construction of that agreement or the rights and liabilities of the parties *under the agreement*. They touch and concern the rights and liabilities of Mr Lennox and Tridon as shareholders in TAPL, but the rights in question are statutory rights arising out of their status as shareholders rather than under the Agreement." At [165], he stated that "of its nature, a shareholders' agreement is supplementary to the rights and liabilities of the shareholders conferred by company law. It does not purport to exclude or replace the shareholders' company law rights."

41. The decision in *BTY* has been followed in Hong Kong in *Dickson Holding Enterprise Company Limited v Moravia CV* [2019] HKCFI 1424. Dismissing an application to stay an unfair prejudice petition seeking relief arising from the alleged cancellation and forfeiture of the claimant's shares, Lam J held that:

    i) the presumption of one-stop adjudication had to be applied having regard to the special features of company law, and the relationship between shareholders arising under company law and the articles of association ([40]); and

    ii) even general words in an arbitration clause in a shareholders' agreement may not be apt to encompass all disputes concerning shareholders' rights ([41]).

The commercial context

42. The structure of the transaction considered in this case, and in both *BTY* and *Dickson Holding*, is a common one, in which:

    i) A number of parties making an investment together do so through a joint venture company, often incorporated in what the parties perceive to be a fiscally or regulatorily advantageous jurisdiction.

    ii) That company may be incorporated by one or more of the participants, or it may be acquired "off the shelf", complete with "mem and arts", from a corporate services provider. The terms of the original articles of association will not always have been negotiated between the shareholding groups who come to own the company but may reflect the choice of the incorporating agency or its client at the point of incorporation.

    iii) The joint venture company, either directly or through intermediate entities, holds the ultimately economically significant entity, which is usually located in another jurisdiction.

    iv) The terms of the parties' joint investment are then set out in a shareholders' agreement, which sets out in detail how the joint venture company is to be managed and operated. The shareholders' agreement will provide various safeguards so far as the minority shareholders are concerned (their precise content being a matter for negotiation), and also address what is to happen in the event that the requisite majority for a particular decision cannot be reached (a so-called "deadlock" scenario).

v) Finally, and significantly in the present context, the shareholders' agreement:

a) will frequently place limits on each party's right to dispose of its shares, and require any new shareholder to sign up to the shareholders' agreement through a document such as a deed of adherence (with the result that any shareholder must also be a party to the shareholders' agreement);

b) will contain a "supremacy" clause, saying that in the event of a conflict between the terms of the shareholders' agreement and the provisions of the articles, the former have priority, with the parties promising to amend the articles to bring them into line with the terms of the shareholders' agreement in the event of inconsistency; and

c) will frequently contain an arbitration agreement expressed in wide language, often providing for arbitration under one of the well-known sets of institutional rules.

The precedent shareholders' agreement in chapter 5 of the 8th edition of Sean Fitzgerald and Geraldine Caulfield, *Shareholders' Agreements* (2020) provides for all of these terms. Many of the topics addressed in a shareholders' agreement of this type – in particular those addressing the required quora or majorities for particular types of meetings or resolutions, or addressing transfers of shares and rights of pre-emption – deal with subjects which are frequently addressed in a company's articles of association.

43. In this case, SPV was incorporated in November 2011, and its registered shareholders at the point of incorporation were two Cypriot corporate service providers, Green Nominees and Green Secretarial. It is not possible on the evidence to determine whether they were acting as nominees for those interested in NDK at the time of the incorporation of SPV, but there is nothing to suggest that SPV was engaged in any significant activity at that point, or that it had more than one set of shareholders when the Articles were drawn up.

44. SPV's Articles of Association addressed a number of familiar topics in relatively brief terms:

i) Regulation 23 provided that the directors could decline to register a transfer of shares.

ii) Regulation 28 set out rights of pre-emption in the event of a transfer of shares in brief terms.

iii) Regulation 50 addressed proceedings at general meetings, providing for a quorum of two members.

iv) Regulations 90 and 91 addressed directors' proceedings, providing for a quorum of one director.

There was no agreed forum for the resolution of disputes.

45. On 19 March 2012, the two Green companies ceased to be recorded as shareholders on SPV's register of members, and NDK, K Co and KXF were listed as shareholders in the proportions identified at [2] above. That was the same date as the SHA was entered into, with the result that K Co, KXF and NDK subscribed to the Articles of Association on the same date that they signed up to the SHA.

46. The SHA contained a number of provisions dealing with the topics usually found in shareholders' agreements for a joint venture company. They included the following:

    i) The third recital stated that the SHA recorded "the terms and conditions of the management, operation, governance and functioning of the company and the group".

    ii) Clause 3.2 provided that the board would consist of five members, with NDK being entitled to appoint three directors, and K Co and KXF one director each.

    iii) Clause 3.5 provided for a quorum of four directors (with the result that NDK's directors would not be quorate on their own).

    iv) Clause 3.6 provided for voting majorities for general board resolutions of four directors, with a requirement of unanimity for "reserved policy matters".

    v) Clause 4 created similar quorum and majority requirements for shareholders' resolutions. The attendance of shareholders representing 75% of the shareholders plus 1 share was required to transact business at a general meeting, and a similar majority was required to pass resolutions at such a meeting, with "reserved matters" requiring unanimity (with the result that NDK could not conduct a meeting or pass resolutions on its own).

    vi) By clause 4.2(a), each party was obliged to exercise its voting rights as a shareholder so as to procure that the provisions of the SHA were duly and promptly observed and given full effect.

    vii) Clause 5 identified the reserved policy matters for the purposes of both board and shareholder resolutions.

    viii) Clause 7 addressed what was to happen in the event of a deadlock.

    ix) Clause 8 provided the shareholders with certain information rights.

    x) Clause 10 dealt with share transfers (and did so in considerably more detail than the Articles of Association), identifying permitted classes of transferees, and setting out drag along and tag along rights and rights of pre-emption in certain eventualities. Clause 10.6 provided that no transfer of shares would be effective unless and until the transferee had agreed in writing to be bound by the terms of the SHA by a deed of adherence.

    xi) Clause 11.3 provided that the SHA constituted the parties' entire agreement "with respect to the subject matter hereof" and superseded all previous negotiations, agreements or understandings.

xii) Clause 11.6 provided for the choice of English law, and clause 11.7 contained the LCIA Arbitration Agreement.

xiii) Clause 11.9, the supremacy clause, provided that the terms of the SHA would prevail over those of the "Organisational Documents" (defined so as to include the Articles) in the event of a discrepancy, and the parties agreed to amend the Organisational Documents to the extent necessary fully to implement the terms of the SHA.

47. Approaching the issue from a commercial perspective, it is incontrovertible that the key document governing the relationship of the shareholders in SPV was the SHA and not the Articles of Association which had been put in place when SPV was incorporated by a corporate services provider some months before. That conclusion drawn from the commercial context is supported by the much greater detail in which the SHA addressed issues such as the quorum for board and shareholders' meetings and the transfer of shares, and by the terms of the supremacy clause. While it can be said that the parties, when acceding to the existing Articles of Association, had not at that stage set about amending them, the terms of the supremacy clause limit the significance of that omission when considering the commercial hierarchy of the two regimes.

The legal character of the Articles of Association and the SHA

48. The reference in *BTY* to obligations under the shareholders' agreement and the articles of association existing on two different "legal planes" is redolent of the language used by Lord Oliver when distinguishing between the status of the International Tin Council under public international law, and the issue of who was liable for its debts under municipal (or domestic) law (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499-500). There are undoubtedly important differences between the statutory contract constituted by a company's articles of association, and a contract between shareholders (and frequently the company) in the form of a shareholders' agreement. Without attempting to state these exhaustively:

i) The contractual status of the articles has a statutory source, and only binds members in their capacity as shareholders (*Hickman v Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881, 900) whereas the existence and scope of a shareholders' agreement will depend on ordinary contractual principles.

ii) Whereas unanimity of the parties is required to amend a shareholders' agreement, the terms of the articles can be amended by a special resolution which achieves the support of the required majority of shareholders.

iii) Whereas a shareholders' agreement can be rectified, the articles of association cannot (*Scott v Frank F Scott (London) Limited* [1940] Ch 794).

iv) A company cannot be prevented from altering its articles of association even if this constitutes a breach of contract (*Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701).

49. Without seeking to understate the significance of those (and other) differences between the two, the respective rights cannot be said to arise under two different legal orders in anything like the same way as the issues under consideration in the *ITC* litigation. Indeed, when considering private companies, English authorities and commentaries have tended to treat the provisions of the articles of association and a shareholders' agreement to which all shareholders must adhere as complementary, operating together rather than on different legal planes. Thus Principle 5(1) set out at [4-02] of *Hollington on Shareholder's Rights* (9th edn) provides:

> "The relationship between shareholders is an essentially contractual one, contained in the company's articles of association and any other shareholders' agreement, as it may in appropriate circumstances be constrained in equity, which together constitute the 'bargain' between shareholders amongst themselves and the company."

50. For that reason, when construing the articles, the court will generally be willing to have regard to the terms of a shareholders' agreement to which all present and future shareholders are required to be parties. In *McKillen v Misland (Cyprus) Investments Ltd* [2011] EWHC 3466, [69], David Richards J commented that in such circumstances "it is somewhat artificial to construe the articles in isolation from the shareholders' agreement and from the background admissible to the construction of that agreement. Nor would it conflict with the reasons for the usual exclusionary rule to take account of the shareholders' agreement and its background". Phillips J observed in *United Company Rusal plc v Crispian Investments Ltd* [2018] EWHC 2415, [50] of the position considered in *McKillen* that "the shareholders' agreement was effectively synonymous with the articles and performed the same or a similar function".

51. Finally in the present context, it is helpful to consider the judgment of the Court of Appeal in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855. In that case, the articles of association of the FA Premier League Ltd required the members to comply with the rules of the Football Association. In deciding that claims brought in relation to the conduct of the chairman of FA Premier League Ltd in alleged breach of those rules were arbitrable, Patten LJ characterised the claim for relief for an alleged breach of the articles of association in a way which is wholly inconsistent from the suggestion that the obligations in issue stand on a different, and higher, legal plane from obligations under a shareholders' agreement. At [77], he observed that:

> "A dispute between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholders' agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties."

52. I do not accept that the position is any different simply because (as is frequently the case) the applicable law of the shareholders' agreement differs from the law of the place of incorporation of the company (and hence that governing the company's articles of association).

Conclusion

53. For the reasons I have set out, I am not persuaded that the rights of shareholders *inter se* which arise under the articles of association of a private company stand on a different or higher legal plane to those which arise under a shareholders' agreement to which all shareholders are required to be parties. Both are essentially contractual in nature (albeit those contracts arise through different legal mechanisms), and, in the ordinary course, they are intended to be complementary rather than exist in a relationship of legal subordination.

54. Further, in the context of a private company which is functioning as the vehicle for a joint venture, it will generally be the shareholders' agreement which is the commercially more important document, a hierarchy reflected (as it is in this case) by the supremacy clause which such shareholders' agreements generally include. The case for characterising the obligations owed under the articles of association as arising on a different and superior legal plane becomes all the more unpersuasive when the terms of the shareholders' agreement in issue concern matters – such the entitlement to transfer shares and rights of pre-emption – which are frequently addressed in articles of association. It follows, therefore, that the question of whether the claims in the Cyprus Proceedings fall within the LCIA Arbitration Agreement in the SHA is, in my determination, to be resolved through the application of *Fiona Trust* and Extended *Fiona Trust* principles, and not by reference to any special or different status of obligations arising under articles of association as compared with those arising under a shareholders' agreement. For these reasons, I have respectfully concluded that I should not follow *BTY*.

55. Mr Cogley QC submitted that if I took this course, it should not be enough to say:

> "'Oh well, but that is a matter of Singapore law'. There would need to be some rational basis upon which it is suggested that Singapore law, as enunciated in *BTY*, is actually different from English law or why it should be so regarded in relation to this area".

I agree that it would be surprising if the law of England and Singapore differed on an issue such as this, and in particular on the question of whether claims asserted under the articles of association in respect of matters which would also give rise to claims under a shareholders' agreement fall within the scope of an arbitration agreement in the shareholders' agreement.

56. The resolution of these issues as a matter of Singapore law is, of course, exclusively a matter for the Singapore courts. However, I have derived some comfort in the conclusions I have reached from the fact that the considerations which have led me not to follow *BTY* have themselves been voiced by a number of Singaporean jurists:

    i) In *The Wellness Group Ltd v Paris Investments Pte Ltd and others* [2018] SGCA 47, a decision of the Singapore Court of Appeal handed down six weeks before *BTY* but which does not appear to have been cited to the Judge, the Court considered how a provision in a shareholders' agreement entitling a shareholder to nominate a director to the board interacted with the company's constitution which vested the power of nomination with the board. Stephen Chong JA noted at [39] that "a shareholders' agreement to which all the shareholders are parties can be 'fully effective as a constitutional document'". He also referred to the supremacy clause in the shareholders' agreement in that

case, stating that it "shows irrefutably that the shareholders intended the Shareholders Agreement to take precedence even over the Constitution".

ii) Commenting on the decision in (2021) 33 SAcLJ 1224, Suet Lin Joyce Lee noted at [28] that "the Court of Appeal's construction of cl. 12 and its conclusion of the primacy of the Shareholders' Agreement over TWG's constitution is in stark contrast to recent dicta which suggests otherwise" (a reference to *BTY*). At [39], Ms Lin suggested that "the general tenor of the Court of Appeal's ruling …. helps to promote a paradigm of a 'company' in largely private hands in largely contractual terms. The decision is significant because it displays judicial willingness to facilitate and enforce agreements that the parties have entered into and bargained for around established company law principles".

iii) The decision in *BTY* was also the subject of commentary by Professors Lawrence Boo and Christine Artero in the Singapore Academy of Law's Annual Review of Arbitration Cases ((2018) 19 SAL Ann Rev 42). They noted at [4.19] that "parties forming joint ventures usually also enter into shareholders' agreement[s] setting out the way they wish the joint venture entity to be managed. Invariably, with respect to the parties' respective rights qua shareholder as set out in the shareholders agreement, the parties' agreement is intended to override the provisions of the joint venture entity's memorandum and articles". That commentary questions aspects of the decision in *BTY*, as does an article by Shaun Perriera published on the *Singapore Law Blog* of 23 November 2018.

Conclusions on the Construction Question

57. I am satisfied that the Articles of Association and the SHA both concern the same relationship (the parties' relationship as shareholders in the joint venture company) and, in the relevant respects (a shareholder's entitlement to transfer shares and the rights of pre-emption which arise in relation thereto) they concern the same subject-matter. The Articles of Association and the SHA are interdependent and intended to operate together (as the supremacy clause makes clear). So far as the shareholders in SPV are concerned, they were also entered into contemporaneously (NDK, K Co and KXF becoming shareholders on the same date the SHA was entered into, with subsequent shareholders being required to adhere to the SHA as a condition of any transfer of shares to them which would cause them to become parties to the statutory contract).

58. In these circumstances, and in circumstances in which:

i) for the reasons set out at [42]-[47] above, I am satisfied that the SHA was commercially the most significant document (the terms of the Articles of Association having been fixed at a point in time when there was only a single shareholding interest and without regard to the terms of the subsequent shareholders' joint venture, and the supremacy clause providing that, in the event of a conflict between the two, the terms of the SHA were to prevail); and

ii) the Articles of Association did not themselves contain a jurisdiction clause;

I am satisfied that any rational businessperson could only have intended that the LCIA Arbitration Agreement would apply to any disputes between the parties to the SHA which were related to or arose in connection with the subject-matter of the SHA, even if formulated solely by reference to the provisions of the Articles. The arguments that it would have been possible to include an arbitration agreement in the Articles, or expressly to refer to the Articles in the LCIA Arbitration Agreement, are only of limited weight in this context. That could no doubt be said in any case in which the Extended *Fiona Trust* principle is applied, and it is a particularly weak argument here given the circumstances in which the Articles of Association came into existence (see [43] above).

59. The alternative approach would allow one party to render what was clearly intended to be a mandatory dispute resolution clause in the SHA optional, to the extent that it was able to formulate its claims solely by reference to the Articles, and would run the risk of claims relating to the same subject-matter (e.g. the efficacy and consequences of a particular transfer of shares) being litigated between the same parties in two different fora. This is not a case, like *ACP*, in which (for obvious commercial reasons) one party was intentionally accorded the right to raise the same substantive issue in two different jurisdictions, and given a choice as to which jurisdiction to invoke.

60. I am also satisfied that the matters raised in the Cyprus Proceedings as between the parties to the SHA constitute claims which "relate to" or arise "in connection with" the SHA, so as to fall within the terms of the LCIA Arbitration Agreement. As a matter of substance, the claims in the Cyprus Proceedings concern the efficacy and consequences of the transfer of K Co's shares to HUO, whether SPV and/or NDK are obliged to give effect to that transfer, whether the LCIA Claimants took steps unlawfully to deprive NDK of a right of pre-emption arising from the transfer and, if so, what relief follows from that. Given the extensive and detailed provisions in the SHA relating to the right to transfer shares, the obligation of the shareholder parties to use their voting rights to give effect to permitted transfers and the circumstances in which rights of pre-emption arise, those claims clearly relate to or arise in connection with the SHA. The underlying complaints could all have been pursued between the parties to the SHA by way of alleged breaches or wrongful interference with rights arising under the SHA (and, as noted above, for a time NDK did so: see [7]). The precise legal vehicle through which those substantive claims are pursued does not affect the answer to the question of whether they fall within the arbitration agreement (see [32]).

61. The fact that NDK has claimed relief in court of a kind which could not be obtained from the arbitrators (in particular rectification of the register of members) does not have the result that the matters raised in the Cyprus Proceedings fall outside the LCIA Arbitration Agreement. In some cases, the inability to obtain relief of a particular kind from the parties' chosen tribunal is simply a "practical consequence" of their choice: *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, [40], [84] (Patten LJ), [103] (Longmore LJ); *Riverrock Securities Ltd v International Bank of St Petersburg* [2020] EWHC 2483 (Comm), [59]-[62]. Where the availability of a particular form of statutory relief from the court cannot be (or has not been) precluded by an agreement to arbitrate the underlying dispute, then it is possible to adopt a bifurcated approach, in which the relevant facts are determined by the parties' chosen

tribunal, and relief then sought from the court on the basis of the arbitrators' determination: *Fulham*, [76], [83] and the authorities collected in *Riverrock*, [68].

62. Finally, I accept that there will be parties (in particular, in this case, SPV's directors) who will be subject to the terms of the Articles but not bound by the terms of the SHA. However, the fact that the LCIA Arbitration Agreement cannot bind non-parties is no reason not to give it effect as between its signatories.

THE ARBITRABILITY QUESTION

63. It was common ground before me that, for the purposes of NDK's s.67 challenge, the issue of whether or not the matters raised in the Cyprus Proceedings were arbitrable was to be determined as matter of English law, as the applicable law of the LCIA Arbitration Agreement and the law of the seat of the arbitration.

The applicable principles

64. It has been noted that English arbitration law has not developed a general theory for the purposes of distinguishing between those matters which may be settled by arbitration, and those which may not, and it is questionable whether any useful general theory could be formulated, given the wide variety of contexts in which issues of arbitrability might arise, and the very different kinds of policy considerations which might be in play. Both parties were content to adopt the summary of the relevant authorities in *Riverrock Securities Ltd v International Bank of St Petersburg* [2020] EWHC 2483 (Comm), [67]-[69]:

> "67 There are certain classes of claim which, even if they fall within the scope of an arbitration agreement, are treated under the relevant law as being incapable of being submitted to arbitration. … A claim may be non-arbitrable *per se* (such that the entire claim is non-arbitrable even though its determination involves elements which, considered in isolation or in other contexts, would be arbitrable) or it may be that it is only some part of the dispute – for example the decision to grant a particular form of relief – which is non-arbitrable (e.g. where that relief requires what Males LJ termed 'an order which only a court can make': *Bridgehouse*, [79]), at least where those questions are capable of independent consideration.
>
> 68. The issue of arbitrability has received its most extended consideration in cases in which a shareholders' agreement contains an arbitration agreement, and one of the shareholders seeks relief from the court by way of an unfair prejudice petition. It has never been disputed that an order winding-up a company on just and equitable grounds is one for the court alone, nor that relief which impacts on shareholders who are not parties to the arbitration agreement is non-arbitrable. However, in *Fulham*, none of the relief sought pursuant to the unfair prejudice petition required an order that 'only a court could make' or impacted on third parties, for which reasons the Court of Appeal held that that dispute was arbitrable (Patten LJ, [40]). Patten LJ went further, expressing the view that even where such relief was sought, it might be possible to resolve the dispute in two stages, with the arbitrators resolving the factual disputes to the extent that they fell within the arbitration clause, leaving the petitioner on the basis of

> those findings to go back to court to obtain the relief the arbitrators cannot give, e.g. winding up a company [83]. That approach has also been adopted in other jurisdictions: e.g., *Quicksilver Greater China Ltd v Quicksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759 (Hong Kong); *WDR Delaware Corp v Hydrox Holdings Pty* [2016] FCA 1164 (Australia); and *Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57* (Singapore). Where, however, a necessary precursor to any form of relief is a decision by the court that it would be just and equitable to wind up the company, then bifurcation will not be possible.
>
> 69 However, it is clear that the issue of arbitrability can involve more than simply ascertaining whether the relief sought engages third party interests in a relevant sense, or seeks an order that 'only a court can make'. In *Fulham*, Patten LJ recognised that a claim might be non-arbitrable for a third reason, namely that it 'represent[s] an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process' ([40]). He referred elsewhere in his judgment to relief which seeks a 'state intervention in the affairs of a company which only a court can sanction' ([77]). Examples of such intervention were matters which 'engaged the rights of creditors' or impinged on a 'statutory safeguard imposed for the benefit of third parties'."

65. In *Bridgehouse (Bradford No 2) Ltd v BAE Systems Plc* [2020] EWCA Civ 759, [58], Newey LJ stated:

> "It remains the case, as Patten LJ noted in Fulham , that 'many aspects' of the statutory regime governing companies 'are immune from interference by the members of the company whether by contract or otherwise'. Patten LJ observed that a winding-up order 'lies within the exclusive jurisdiction of the court. There can be no question, either, of an application for restoration to the register under section 1029 of the 2006 Act being susceptible to arbitration. *Such matters do not merely involve private disputes but [also] status and potentially have implications far beyond the company and any particular counterparty*."

(emphasis added).

66. Finally, it is clear that English courts will not lightly conclude that a dispute between commercial parties is incapable as a matter of public policy of being submitted to arbitration: *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, [98]-[99] (Longmore LJ) and *Bridgehouse* [73] (Males LJ referring to the need for "compelling reasons" not to respect the choice of commercial parties to refer a dispute to arbitration).

The arbitrability argument in this case

67. NDK does not argue that a dispute between participants in a joint venture company as to whether rights of pre-emption arising on a transfer of shares had come into existence or been unlawfully interfered with is *per se* incapable of being arbitrated and for good reason. That is a characteristically private, commercial dispute of a kind which is routinely arbitrated. Rather it argues that the issues raised in the Cyprus

Proceedings present three features which have the effect that the claims asserted in Cyprus are not arbitrable:

i) The question of who the shareholders of the company are involves a matter of status and not contract, and issues of status are not arbitrable (a submission which picked up on Newey LJ's statement at [65] above).

ii) The claims in the Cyprus Proceedings that the register of members should be rectified to reflect what is said to be NDK's entitlement to the shares currently registered to HUO engages the interests of third parties who deal with the company in reliance on its public register.

iii) Part of the relief sought – rectification of the register of members – involves an order which "only a court can make".

68. In this context, NDK also relies on the discussion on the issue of arbitrability in *BTY*. In that case, the company accounts which were the subject of the dispute had to be lodged with the Accounting and Corporate Regulatory Authority (**ACRA**), where they were available for public inspection. At [144], Vinodh Coomaraswamy J suggested that "an application to challenge the filing of documents on ACRA's register is not arbitrable because the outcome could affect a public interest and thereby could affect third parties who may have acted in reliance on the accuracy of that register" (and also at [158]). In an obiter passage at [160] he stated:

> "I am conscious that the 'matter' in this litigation, as I have found, is whether the defendant has adopted or approved the 2015 Accounts in breach of the Articles. Whether the 2015 Accounts reflect a true and fair view of the defendant's financial position and performance for the 2015 financial year is no part of the dispute in this litigation. But if the plaintiff is correct: (a) the public face of the defendant has disclosed inaccurate information – to put it neutrally – to its creditors and potential creditors since August 2017; and (b) that information will have to be expunged from the register. To my mind, that engages the public interest in the 'matter' which is at the heart of this litigation".

Conclusion on the Arbitrability Question

69. There are many types of disputes which are referred to and determined in arbitration in which the relief sought will have implications for entries on registers to which there is public access. A dispute between two parties, for example, under a contract for the sale of shares in which one party asserts a right of specific performance has implications for the identity of the beneficial owner of the shares, and if the purchaser succeeds in the arbitration, it will ultimately want that success to be reflected in the company's register of members. This is also the case when the facts underlying an unfair prejudice complaint are determined in arbitration, which findings are then relied upon by the petitioner to seek a "buy out" order from the court (see [61] above and *Joffe on Minority Shareholders* (6th), [6.293]).

70. Adopting the approach approved in the authorities at [61] above, the fact that the arbitration tribunal does not itself have power to grant part of the relief sought, by altering the terms of the register of members of a company so as to give effect to its determination, does not render the underlying dispute non-arbitrable, albeit it may

require the successful party to bring court proceedings for the purpose of giving effect to the arbitral determination in that context. I am not persuaded that characterising the issue of who should appear on the register of members as one of "status" requires a different analysis. The issues of whether shares were sold by A to B, or whether C had a legal right to acquire the shares from A which took priority over any such sale, are essentially private and commercial disputes, with registration being a means of giving effect to valid transfers once the relevant entitlement has been established (and therefore essentially "consequential" in nature: *Nilon Ltd v Royal Westminster Investments SA* [2015] UKPC 2, [51]-[53]), [64]). This is very different from the question of whether a company (which may have enjoyed rights against and incurred liabilities to a wide variety of parties before its "demise") should be restored to existence with which Newey LJ was dealing when referring to "status" in *Bridgehouse*, [58].

71. Nor am I persuaded that the fact that the public have access to the register of members is sufficient to render a dispute as to who of NDK and HUO is entitled to the shares in issue non-arbitrable. That would suggest that the arbitrability of a dispute of a particular type in relation to a company might depend on the extent to which there was a right of public access to any record which would have to be amended to give effect to the arbitral determination. Further, arbitrators are often called upon to rectify cancel or set aside deeds or other documents (s.48(5) of the Arbitration Act 1996), even though many commercial documents are publicly available on registers or otherwise. Arbitrators are also called on to set aside (literally, or in financial terms) transactions whose economic consequences are reflected in publicly available documents such as accounts on which third parties may have relied. The relief sought in *Fulham* included an order that Sir David Richards be removed from his position as chairman of FA Premier League Ltd, which would have required a change to its corporate filings, and yet the Court of Appeal accepted that this relief could be obtained from the arbitrators (*Fulham*, [77]-[78]).

72. Further, where steps are taken to enforce or give effect to the arbitration award by way of a court order (in this jurisdiction either under s.66 of the 1996 Act or by way of an action on the award), it will be open to the court to refuse to do so if relevant third-party interests would be adversely affected. For example, where a third-party claims to be a bona fide purchaser for value from the vendor of shares which have been the subject of an order for specific performance by an arbitral tribunal in favour of another purchaser, the court could refuse to enter judgment in terms of that part of the relief sought (*Sodzawicny v McNally* [2021] EWHC 3384 (Comm), [13]-[15]). It will be open to a court which is asked to make a buy-out order on the basis of an arbitration tribunal's decision in an unfair prejudice dispute to refuse relief of a particular kind for similar reasons.

73. However, the public interest prayed-in-aid in this case (and in play in *BTY*) is far removed from a conflicting claim by a third party to the same asset, or that which would arise when enforcing a claim between the arbitrating parties would directly interfere with a third party's legal rights (for example an order to hand over a possession of a building in which third parties were living). Any public interest arising from third party access to and reliance on public records relating to an arbitrating party's affairs, the contents or accuracy of which would be impacted by an arbitral determination, is relatively weak by comparison. In my determination, it is in

no way sufficient to outweigh the strong public interest in allowing commercial parties to refer their disputes to arbitration and holding them to their agreement to do so (*Nori Holdings*, [66], *Bridgehouse*, [73] and *Riverrock*, [87(iii)]).

74. For these reasons, I am satisfied that the Arbitrability Question is to be answered in the LCIA Claimants' favour, and that this aspect of NDK's s.67 challenge also fails.

CONCLUSION

75. For these reasons, both of NDK's challenges to the PFA under s.67 of the Arbitration Act 1996 fail. The parties are asked to agree a process for resolving any consequential issues which arise, which can be submitted to the court for its approval.

76. In conclusion, I would like to thank both legal teams for their clear and efficient presentation of their respective cases.