Neutral Citation Number: [2022] EWHC 2580 (Comm)

Case Nos: CL-2021-000424, CL-2021-000760, CL-2022-000189, CL-2022-000250 and CL-2022-000485

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:14 October 2022

Before :

MR JUSTICE FOXTON

- -

Between :

NDK LIMITED	**Claimant (arbitration respondent)**
- and -	
HUO HOLDING LIMITED	**Second Defendant (arbitration claimant)**

(No 2)

- -
- -

Stephen Cogley KC and **Christopher Jay** (instructed by **Fieldfisher LLP**) for the **Claimant**
Aidan Casey KC and Alexander Cook (instructed by **CANDEY Limited**) for the **Second Defendant**

Hearing date: 15 September 2022
Draft sent to parties: 16 September 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 14 October 2022 at 10:00am.

Mr Justice Foxton :

Introduction

1. This judgment addresses the next stage in a series of challenges made by NDK to awards of LCIA arbitration tribunals arising from disputes with HUO and KXF. I have set out the background facts in a judgment I gave in respect of a challenge made by NDK to an earlier LCIA Award between the same parties, reported as *NDK v HUO and KXF* [2022] EWHC 1682 (**the First Judgment**). I have adopted the same defined terms in this judgment.

2. By way of a brief background to the court challenges:

    i) Following a hearing, I dismissed NDK's challenge under s.67 of the 1996 Act to the PFA for the reasons set out in the First Judgment.

    ii) NDK's challenge to the PFA under s.68 of the 1996 Act was reserved, to be dealt with at the same time as NDK's challenges under ss.67 and 68 of the 1996 Act to the Consolidated Arbitration Award.

    iii) On 11 July 2022, I struck out NDK's challenges to the Consolidated Arbitration Award under s.68 of the 1996 Act and parts of its s.67 challenge, pursuant to the jurisdiction to dismiss challenges to arbitration awards which have no realistic prospect of success on a summary basis (see O8.6 of the Commercial Court Guide, 11th edition).

    iv) That leaves outstanding one part of NDK's challenge to the Consolidated Arbitration Award under s.67 of the 1996 Act and a further s.67 challenge brought by NDK on 9 September 2022 to the Costs Award published by the Tribunal on 12 August 2022. If the challenge to the Consolidated Arbitration Award is dismissed, NDK accepts that its outstanding challenge to the PFA under s.68 of the 1996 Act will also be dismissed.

    v) This hearing was fixed to determine a threshold issue in NDK's challenge to the Consolidated Arbitration Award under s.67 of the 1996 Act – whether, on the assumption that HUO never became a shareholder in SPV, it nonetheless became a party to the LCIA Arbitration Agreement in the SHA.

    vi) If that issue is resolved in HUO's favour, that is decisive of NDK's s.67 challenge to the Consolidated Arbitration Award. If it is resolved in NDK's favour, then it will be necessary to have a further hearing (currently fixed for January 2023) to consider HUO's other responses to NDK's s.67 challenge.

The S.67 Challenge

3. NDK's s.67 challenge is advanced at paragraphs 21 and 22 of the Arbitration Claim Form as follows:

> "[NDK] contends that the Share Transfers were each void and of no effect because they were made in breach of the pre-emption provisions contained in cl. 10 of the SHA …

By reason of the fact that the [HUO] Share Transfer and/or the [HUO] Acquisition Transfer were void and of no effect:

(i) [HUO] is not a member of [SPV] and, accordingly, has not acceded to the SHA for the purposes of cl. 10.6(a) of the SHA and/or is not a Shareholder within the meaning of that term in the SHA and/or is precluded from exercising the rights of a Shareholder (including the right to arbitrate disputes in accordance with the provisions of the SHA) or from taking advantage of its own wrongful conduct.

(ii) In the circumstances, [HUO] is not a party to the arbitration agreement contained in cl. 11.7 of the SHA and/or was not entitled to invoke that agreement by commencing the Consolidated Reference, and the Tribunal has no jurisdiction to determine the disputes that it has referred to the tribunal."

The Procedural Background

4. The suggestion that HUO never became a party to the LCIA Arbitration Agreement is a curious one when viewed against the procedural history of the arbitrations between the parties and the subsequent court challenges to them:

i) HUO was joined as an additional party to the Original Arbitration, and NDK did not suggest that, if its case that the SHA had been terminated was rejected, HUO was not a party to the SHA or the LCIA Arbitration Agreement. NDK's termination case in the Original Arbitration failed. NDK argued in the alternative that HUO had breached the SHA (a contention which failed on the facts). The arbitral tribunal issued an award granting relief (inter alios) in HUO's favour. No challenge was brought to that award within the time period permitted by s.67 of the 1996 Act.

ii) HUO was a claimant in the reference which culminated in the PFA. In that case, NDK advanced an argument that particular claims did not fall within the LCIA Arbitration Agreement, that they were not arbitrable, and that the pre-conditions to the commencement of an arbitration had not been satisfied. It also sought to raise a jurisdictional objection that the SHA, and with it the LCIA Arbitration Agreement, had been terminated, submitting (to quote from para. 206 of the PFA) that "if it were to succeed in establishing in the Consolidated Arbitration that it had validly terminated the SHA… it would be wrong for it to continue to be restrained from pursuing the Cyprus Proceedings against the Claimants because the Arbitration Agreement could not be treated as continuing in existence beyond the termination of the SHA". However, it did not argue that HUO never became a party to the LCIA Arbitration Agreement.

iii) NDK brought a challenge to the PFA under s.67 of the 1996 Act but did not contend in that context that HUO had never been a party to the LCIA Arbitration Agreement. That was a particularly noteworthy omission, because one of the points taken by HUO and KXF was that if there was any arbitration agreement between them and NDK, the court could not review the tribunal's

decision to grant anti-suit relief in respect of a breach of that agreement under s.67. It would have been a complete answer to this point, so far as HUO is concerned, if it had never become a party to the LCIA Arbitration Agreement.

iv) In the Consolidated Arbitration, NDK notified its jurisdictional objection in its Response to the Request for Arbitration. The principal focus appeared to be the argument that the SHA had been terminated and with it, the LCIA Arbitration Agreement, albeit it is possible to find wider formulations. The Defence and Counterclaim advanced a jurisdictional challenge on the basis that the rights arising under the SHA (including the right to arbitrate disputes) could only be exercised by "quasi-partners and/or joint venturers", and that Mr Pink (the ultimate beneficial owner of HUO and KXF) was not a quasi-partner or joint venturer, and therefore not permitted to exercise rights under the SHA (including the LCIA Arbitration Agreement) "through the Claimants". It was also argued that the SHA and with it the LCIA Arbitration Agreement had been terminated.

v) The absence of any clear argument on NDK's part that HUO never became a party to the LCIA Arbitration Agreement is reflected in the terms of the Consolidated Arbitration Award, which does not identify NDK as having advanced such an argument (but does refer to and reject the suggestion that the effect of the purported termination of the SHA was to deprive the tribunal of jurisdiction).

5. Nonetheless, I have proceeded for the purposes of determining the issue before me at this hearing on the basis that it is open to NDK to raise the jurisdictional challenges in its Arbitration Claim Form, without deciding whether or not that is the case.

The Factual Position so far as HUO is Concerned

6. The following facts are not in dispute (or are not disputable):

i) On 17 November 2017, K Co entered into an Instrument of Transfer purporting to transfer 300 SPV shares to HUO.

ii) On the same date, HUO signed a Deed of Adherence agreeing to be bound by the provisions of the SHA (which included the LCIA Arbitration Agreement), and such Deed of Adherence was delivered as required.

iii) On 5 February 2018, the board of SPV resolved to register HUO as the owner of 300 shares.

7. However, it is to be assumed for present purposes that the steps in i) and iii) did not have the effect that HUO became a shareholder of SPV.

The Separability of Arbitration Agreements

8. Section 7 of the 1996 Act provides:

"Separability of arbitration agreement.

> Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

9. The statutory principle of separability is reinforced in this case by the terms of the LCIA Arbitration Agreement:

   i) The LCIA Arbitration expressly extended to "any questions regarding [the SHA's] existence, validity, breach or termination".

   ii) The LCIA Rules are expressly incorporated into the LCIA Arbitration Agreement. Article 23 of the LCIA Rules provides:

> "23.1 The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.
>
> 23.2 For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause."

By signing the Deed of Adherence, did HUO accede to the LCIA Arbitration Agreement even if it had not become a shareholder in SPV?

10. NDK points to the fact that HUO does not claim to have been an original party to the SHA, but someone who acceded to it subsequently. It suggests that the SHA is to be analysed as a standing offer, on the part of the parties from time-to-time, to contract with those entities who subsequently become shareholders on the terms of the SHA. That analysis of the SHA as containing a standing offer of this kind is, in my view, correct, although the identity of those to whom the offer is addressed or who are permitted to accept it requires further consideration. The "standing offer" analysis is well-recognised in international arbitration – for example when explaining how investors are able to take the benefit of arbitration provisions in bilateral investment treaties between states (*Redfern and Hunter, Law and Practice of International Commercial Arbitration* (6th) Section F, [1.217]).

11. The principal contention advanced by NDK in support of the argument that, if the share transfer to HUO was void, HUO never became a party to the LCIA Arbitration Agreement was that, properly construed:

   i) It was only open to "Shareholders" to accede to the SHA by signing it, a term which was only extended to those to whom a valid transfer of shares in SPV was made and who had been registered as Shareholders on SPV's register of members; and

ii) The LCIA Arbitration Agreement only extended to disputes between "Shareholders" as so defined.

12. It should immediately be acknowledged that there are a number of provisions of the SHA which provide support for that analysis:

i) The introduction to the SHA provides:

> "[NDK], [K Co], [KXF] and *any other shareholder* of the Company who subsequently through execution of the Deed of Adherence in the form attached thereto as Exhibit A becomes a party to this Agreement are hereinafter sometimes referred to collectively as the 'Shareholders' and each individually as a 'Shareholder'. The Shareholders and the Company are hereinafter sometimes referred to collectively as the 'Parties' and each individually as a 'Party'."

I shall refer to this as "the Introductory Section". The words "any other shareholder" provide support for the view that only a shareholder in the sense of someone who has been validly registered as a shareholder can be a Party to the SHA.

ii) Clause 10.6(a) provides:

> "Any Shares, whether transferred in accordance with the terms of this Clause 10 or in any other manner whatsoever, shall remain subject to the provisions of this Agreement, and no transfer of Shares shall be effective, unless and until the transferee agrees in writing to assume and be bound by the provisions of this Agreement by executing and delivering to the Company and each other Shareholder a Deed of Adherence and accedes to this Agreement as then in effect. *Following the execution and delivery of such a Deed of Adherence and the effectiveness of such Deed of Adherence, the transferee shall be a 'Shareholder' for all purposes of this Agreement and shall be entitled to all rights and subject to all obligations of Shareholders under this Agreement*".

(the italicised words appear to assume that the transferee will otherwise meet the requirements of a Shareholder for all purposes).

iii) Clause 11.7, which contains the LCIA Arbitration Agreement, refers at clause 11.7(a) to "all disputes, differences, controversies or claims between or among *the Parties"*, at clause 11.7(b) to the "disputing *Parties*" and in clause 11.7(c) to "the *Parties*", all references back to the Introductory Section.

13. However, on closer inspection, it is apparent that the position is more complicated:

i) The SHA contains various warranties as to the legal ability of a "shareholder" to enter into the SHA: clause 2.2(b)(i) (representing and warranting authority to enter into the SHA and to perform the obligations it imposes); clause 2.2(b)(ii) (representing and warranting that the terms of the SHA constitute binding and

enforceable legal obligations); and clause 2(4)(d) (representing and warranting that all governmental consents necessary for a Shareholder to enter into the SHA have been obtained).

ii) These provisions, which are frequently found in commercial agreements, are intended to address the position in which an apparent party to an agreement later claims that it did not have the capacity, or the signatory signing in its name did not have authority, to enter into it, or that the agreement is not for some other reason binding on it, or that a necessary consent to assuming the relevant obligations had not been obtained. Provisions are clearly intended to create enforceable obligations (although I accept that warranties as to capacity will frequently not do so).

iii) Clause 2.4 of the SHA then provides that:

> "Each Person … who subsequently becomes a party hereto after the date hereof shall upon execution of the deed of adherence in form and substance as set out in Exhibit A hereto by such Person, make the warranties of a Shareholder set forth in Clauses 2.2(a)-2.2(e) (inclusive) hereof and on Exhibit A, which warranties shall be incorporated by reference herein, as though made in this Agreement".

iv) Clause 2.4 of the SHA clearly envisages that signatories to the Deed of Adherence will immediately provide representations and warranties in these terms, enforceable by the parties to the SHA, to address the possibility that (the Deed of Adherence notwithstanding) the SHA is not binding in all respects on the signatory to the Deed. However, in such a scenario, the signatory would not be a Shareholder in the sense which Mr Cogley KC contends is required, and therefore (on his argument) not in a contractual relationship with the intended beneficiaries of those warranties. As noted above, by clause 10.6 of the SHA, no transfer of shares is effective unless and until the transferee agrees to assume and be bound by the SHA by executing and delivering the Deed of Adherence to the existing Shareholders and the Company. It is only "following the execution and delivery of such Deed of Adherence and the effectiveness of such Deed of Adherence" that "the transferee shall be a 'Shareholder' for all purposes of this Agreement …".

v) It is clear from these provisions that the word "Shareholder" has been used in the SHA with some degree of latitude, and that, on occasions at least, it extends to those who have not been entered (and are not entitled to be entered) on the register of shareholders.

14. The terms of the Deed of Adherence, also make it clear that the Deed is executed *in anticipation* of the executing party becoming a shareholder rather than only after it has done so:

i) The Recitals state that the transferee (defined as "the New Shareholder") "*proposes to take* a transfer" of shares "and has agreed to be bound by the terms of the Shareholders Agreement and the Articles" and that "the New Shareholder

proposes to acquire the Shares … and has agreed to be bound by the terms of the Shareholders Agreement and the Articles".

ii) By clause 3, the "New Shareholder" gives a warranty as to its entitlement to be entered on the register of members upon the Deed of Adherence being executed and delivered. That pre-supposes that the Deed of Adherence creates obligations between the New Shareholder and the existing shareholder, whether or not the transfer of shares is valid and before any such registration takes place which can be enforced against the "New Shareholder" if, contrary to its promise, it is not entitled to be registered as a member of the Company.

iii) That is also true of the warranties as to capacity, authority, that the SHA is binding and that requisite consents have been obtained given in clauses 4(a) to (e) of the Deed of Adherence.

iv) Clause 5 provides that the effect of the Deed is that "the New Shareholder hereby agreed with effect from the execution and delivery of this Deed of Adherence *to become* a Shareholder as defined in the Shareholders' Agreement and *to become* bound …" (i.e., forward-looking promises which take effect prior to the "New Shareholder" becoming a Shareholder).

15. The Deed of Adherence is in a form prescribed by and annexed to the SHA, and I am satisfied that the two fall to be read together. Doing so, I am satisfied that the clear effect of the SHA is as follows:

i) The SHA provides for those who propose to take a transfer of Shares to accede to the SHA through the Deed of Adherence, and thereby to enter into contractual relations with the other Shareholders and SPV, even before the transferee is validly registered as a shareholder.

ii) Persons proposing to take such a transfer are within the class of those to whom the standing offer in the SHA extends, and they are able to accept that offer by signing and delivering the Deed of Adherence.

iii) It is clear that to fall within the class of those to whom the "standing offer" is made (and who are therefore capable of accepting it), it is not enough (to take an example posited by Mr Cogley KC in argument) for someone simply to find the Deed of Adherence in a hotel conference room and fill it in. The Deed of Adherence clearly contemplates that there will have been an agreement between the transferor and transferee (or, in the case of a fresh share issue, the company and the transferee) as to the fact of the transfer and the number of shares to be transferred. The Deed of Adherence requires the identity of the transferring shareholder and the number of shares to be specified.

iv) It is not necessary for the purposes of this application to determine whether or not anything short of a conditional agreement between the putative parties to the transfer would suffice for this purpose (cf. the similar issue considered in *United Company Rusal plc v Crispian Investments Ltd* [2018] EWHC 2415 (Comm), [68]). There was clearly a sufficient agreement in this case.

v) By entering into the Deed of Adherence, the person proposing to become a Shareholder makes certain promises to the other parties to the SHA and assumes certain contractual obligations which are intended to apply even in circumstances in which the terms of the SHA were not in all respects binding upon it (and therefore in circumstances in which it had not and could not become a registered shareholder).

vi) I am unable to accept Mr Cogley KC's submission that the contractual promises of this kind which are apparently given, e.g. as to the New Shareholder's entitlement to be registered as a shareholder, have no effect and are writ in water unless and until the New Shareholder has in fact been validly registered (i.e. in the very circumstances in which they would not be needed). Nor can I accept the suggestion that, so far as any representation claim is concerned, the agreement as to the application of English law in the Deed of Adherence would not be binding in such a scenario.

vii) While there are infelicities of language, these arise on both constructions. Having regard to the terms of the contract as a whole (*Wood v Capita Insurance Services Ltd* [2017] AC 1173, [10]), I am satisfied that HOU became a party to the SHA on the execution of the Deed of Adherence whether or not it became a validly registered shareholder, although the rights and obligations applicable to it will differ depending on whether or not it was a validly registered shareholder. To the extent that it is necessary to interpret the term "Shareholder" as extending, for certain purposes, to a "proposed Shareholder", I am satisfied that this is appropriate as a matter of construction of a commercial document.

16. There is nothing unusual in this analysis. It is frequently the case that a deed of adherence will have the effect of making a signatory a party to an SHA before the formal transfer of shares is completed. As the editors of *Tolley's Company Law Service* note at [S4-023]:

> "The shareholders' agreement will generally contain a provision requiring prospective shareholders to enter into a so-called 'deed of adherence', making them party to the shareholders' agreement before formal transfer of the shares is completed; thus ensuring continuity".

17. Does a party who proposes to take a transfer of shares and who executes and delivers a Deed of Adherence also become party to the LCIA Arbitration Agreement? I am satisfied that the answer is yes:

i) The LCIA Arbitration Agreement is expressed in very wide terms ("all disputes, differences, controversies of claims between or among the Parties arising out of or relating to or in connection with this Agreement").

ii) The terms of the LCIA Arbitration Agreement are sufficiently wide to extend to a dispute as to whether or not there has been a valid transfer of shares to a "New Shareholder" (expressly extending to disputes as to the "existence" and "validity" of the SHA), and as to whether the "New Shareholder" has breached the various representations and warranties it has given.

iii) It would, in those circumstances, be very surprising if the SHA and the required form of Deed of Adherence created contractual obligations between the New Shareholder and the existing shareholders, which applied whether or not the share transfer had been completed or was valid, and yet the LCIA Arbitration Agreement did not apply to disputes relating to those obligations (such that there was no agreed forum for the resolution of those disputes).

iv) The use of the word "Parties" in the LCIA Arbitration Agreement, with its reference back to the Introductory Section, is manifestly insufficient to compel a contrary conclusion. The Introductory Section treats the execution of the Deed of Adherence as the key event which makes "the New Shareholder" party to the SHA ("subsequently through execution of the Deed of Adherence … becomes a party to the SHA") and the Deed of Adherence is entered into, and becomes binding, in anticipation of (rather than conditional on) the New Shareholder becoming a shareholder. Further, the Deed of Adherence defines the signatory as the "New Shareholder", even though such a signatory is not at the point of signature (and in some circumstances might not become) a Shareholder.

v) In these circumstances, I am satisfied that the reference to "the Parties" in the LCIA Arbitration Agreement extends to someone who proposes to take a transfer of shares held by an existing Shareholder, and then executes and delivers a Deed of Adherence.

18. To the extent that any separate issue arises as to whether the LCIA Arbitration Agreement, to which I have concluded HUO became a party, applies to a dispute as to whether or not there has been a valid transfer to HUO, I am once again satisfied that the answer is clearly "yes". A dispute of that kind falls within the wide language of the LCIA Arbitration Agreement, turning on the question of the meaning, effect and alleged non-compliance with various terms of the SHA. Mr Cogley KC accepted that the question of whether or not there has been a valid transfer, as between the transferor and another existing shareholder, fell within the LCIA Arbitration Agreement. Once it has been determined that the New Shareholder is a party to the LCIA Arbitration Agreement, the same conclusion follows as between the New Shareholder and an existing shareholder objecting to the transfer.

19. Indeed, standing back, it would be commercially absurd if a dispute between (in this case) NDK and K Co as to whether K Co had validly transferred its shareholding to HUO or whether the transfer to HUO was in breach of the SHA was a matter which fell within the LCIA Arbitration Agreement, but the same dispute as between NDK and HUO did not. That is an outcome which rational businesspeople are very unlikely to have intended (applying *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [13]).

20. Finally, I should pick up certain further points made by NDK:

i) NDK argues that, on transfer of its shares, an existing Shareholder ceases to be a party to the SHA and the LCIA Arbitration Agreement, with the new Shareholder being bound "in substitution for and to the exclusion of" the original shareholder (clause 5 of the Deed of Adherence). It suggests that "the

SHA (including the LCIA Arbitration Agreement) does not permit for a situation in which both the original shareholder and the intended substitute shareholder are parties to the SHA and the LCIA Arbitration clause" (at least where there was a transfer of the entirety of the shareholding).

ii) However, clause 5 of the Deed of Adherence only has a prospective effect (the New Shareholder agreeing to become a Shareholder "in substitution for and to the exclusion of [the transferring Shareholder] *except in respect of any antecedent breach"* (emphasis added). It follows that a transferring Shareholder does *not* cease to be party to the LCIA Agreement, which will continue to be the contractually agreed forum for the determination of antecedent breaches, giving the transferring shareholder the contractual right to prevent such claims being pursued elsewhere. That of itself is sufficient to rebut NDK's argument that only one of the putative transferor or transferee could at any point in time be a party to the LCIA Arbitration Agreement. It also answers its contention that only someone who is a validly registered shareholder at the relevant time can invoke or be impleaded pursuant to the LCIA Arbitration Agreement, making it clear that the reference to "the Parties" in the LCIA Arbitration Agreement must be given a more flexible construction.

iii) NDK also points to the requirement in clause 10.6 of the SHA that the "effectiveness" of the Deed of Adherence is a condition of any transferee becoming "a 'Shareholder' for all purposes of this Agreement, and … entitled to all rights and subject to all obligations of Shareholders". However, that provides no answer to the fact that there are clearly provisions of the SHA and the Deed of Adherence which are intended to create some contractual rights and obligations even before a transferee has become a validly registered shareholder, and even if it is not in fact able to do so.

Conclusion

21. For these reasons, NDK's challenge to the Consolidated Award under s.67 of the 1996 Act fails, as does its outstanding s.68 challenge to the PFA and its s.67 challenge to the Costs Award of 12 August 2022.

22. The parties are asked to agree the terms of an order giving effect to my determination, and to vacate the January 2023 hearing date.