Neutral Citation Number: [2024] EWHC 231 (Comm)

Case Nos: CL-2021-000211 & CL-2023-000893

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

IN THE MATTER OF ARBITRATION CLAIM

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

Date: 07/02/2024

Before :

THE HONOURABLE MR JUSTICE FOXTON

- -

Between :

FRANEK JAN SODZAWICZNY	**Claimant/Respondent**
- and -	
GERALD MARTIN SMITH	**Defendant/Applicant**

And Between :

FRANEK JAN SODZAWICZNY	**Claimant/Applicant**
- and -	
GERALD MARTIN SMITH	
GAIL ALISON COCHRANE	**Defendant/Respondent**

- -

- -

David Caplan (instructed by **Charles Russell Speechlys LLP**) for the **Applicant**
Dr Smith in person
Dr Cochrane did not appear and was not represented

Hearing dates: 26 January 2024

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Approved Judgment

Rev 2

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 Wednesday 07 February 2024 at 10:30am.

The Honourable Mr Justice Foxton:

INTRODUCTION

1. This is an application by the Claimant (**"Mr Sodzawiczny"**) for an "anti-arbitration" injunction (**"AAI"**) to prevent Dr Smith and Dr Cochrane from pursuing an LCIA Arbitration which they purported to commence on 6 December 2023.

2. The court must also consider Dr Smith's application under s.9 of the Arbitration Act 1996 (**"the 1996 Act"**) to stay enforcement of the judgments entered in respect of certain arbitration awards under s.66 of the 1996 Act and, as the matter developed in argument, to stay the AAI application.

3. For those familiar with Dr Smith's name, it will be apparent that these applications represent the latest in a series of costly and time consuming disputes which have occupied the Commercial Court since 2012. One of the more recent summaries of their convoluted history can be found in my judgment in *SMA Investment Holdings Ltd v Harbour Fund II LLP* [2023] EWHC 428 (Comm), in which I chronicled the many findings of dishonesty against Dr Smith, Mr Ruhan, Mr Cooper and Mr Nally, and the various applications brought by those unwilling to accept the determinations made by impartial tribunals of the various claims.

4. In concluding that judgment, at [103-104], I noted:

> "As will be apparent from the foregoing, there is a real risk in this case that individuals who are bound by, but unhappy with, the outcome of the Directed Trial have been and are continuing to instigate proceedings and applications in these proceedings and elsewhere to challenge the outcome of the Directed Trial or by way of a collateral attack on its conclusions. The scale of these activities and the legal costs and court time they are consuming, mean that considerable vigilance will be required on the court's part to ensure that its judgments are respected and its processes are not abused.
>
> If activities of this kind continue, there will need to be careful consideration of a number of matters, including:
>
> i) whether there are any individuals who may have breached court orders and undertakings and, if so, whether the court's committal jurisdiction should be engaged;
>
> ii) whether officers of the court should be given control of any companies which have changed hands in questionable circumstances, and which are being used in this process;
>
> iii) whether further injunctions could or should be granted against individuals where there is a sufficiently arguable case that they are engaged in activities intended to challenge a judgment which is binding upon them;
>
> iv) the consequences of undischarged costs orders in the litigation to date; and

v) who has been funding these various applications and whether any orders against the funding parties or those controlling them would be appropriate."

5. As will be apparent from what follows, those warnings are falling on deaf ears.

THE BACKGROUND FACTS

6. In 2005, Mr Sodzawiczny claims that he was involved in the foundation of a profitable data centre business (which became known as Sentrum) with Mr Andrew Ruhan, on the basis of an oral agreement with Mr Ruhan that Mr Sodzawiczny would receive a share of the profits on terms to be agreed. The Sentrum business began with a data centre in Camberley.

7. On 24 June 2005, Mr Sodzawiczny was sent a letter before action by Manches LLP on behalf of a company called Marlboroughtech Limited (**"MTech"**), alleging that he had diverted the Camberley data centre opportunity from them in breach of fiduciary duty. That letter contained a relatively detailed statement of the matters relied upon, and intimated an intention to bring a claim for damages and for an account of profits.

8. On 12 August 2005, Manches LLP wrote to Mr Sodzawiczny again, referring to the fact that the sale of the Camberley property had now completed, and stating that MTech's loss had crystallised.

9. In 2006, the Sentrum Camberley business was sold to a Merrill Lynch subsidiary. Mr Sodzawiczny claims that following this sale, he reached an oral agreement with Mr Ruhan under which Mr Sodzawiczny agreed to assist in creating a data centre business (**"the Sentrum Group"**) in return for 15% of the future profit from any sale of the group.

10. On 6 May 2008, MTech was dissolved.

11. The bulk of the Sentrum Group was sold in 2012 to a company called Digital Reality.

12. Mr Sodzawiczny claims that he met Mr Ruhan at the Lazy Cow pub on 22 September 2012, where they orally agreed that in addition to an entitlement to 15% of the net proceeds of the sale to Digital Reality, he would receive various other rights. Mr Sodzawiczny claims that his 15% profit share was worth £21.75m, of which £20m was to be paid into an offshore trust structure administered by Mr Ruhan's personal lawyers and close advisers, Mr Simon Cooper and Mr Simon McNally.

13. In circumstances which were the subject of findings by me in a judgment known as the Directed Trial Judgment ([2021] EWHC 1272 (Comm), [73-87]), certain assets held within another offshore trust structure administered by Mr Cooper and Mr McNally were transferred into the control of Dr Smith and his sometime wife Dr Cochrane in late 2013/2014, in circumstances which I found to involve a fraudulent breach of trust of which Dr Smith was aware. That transfer took place in the context of ongoing proceedings commenced by a company and two individuals (known as **"the Orb Claimants"**) against Mr Ruhan, in which Dr Smith was very closely involved in advising the Orb Claimants.

14. On 9 April 2014, Stewarts Law LLP for the Orb Claimants wrote to Mr Sodzawiczny stating that their clients had taken control of the assets which were subject to the Isle of Man structure.

15. Mr Sodzawiczny says that in 2014, he made enquiries of Dr Smith and his close business associate Ms Dawna Stickler as to what had happened to his £20m, and this led to discussions culminating in a series of agreements with a company controlled by Dr Smith and managed by Ms Stickler on Dr Smith's behalf, called Pro Vinci Ltd (**"Pro Vinci"**). Dr Smith referred me to material showing the initial involvement of Mr Phil Barton in facilitating those discussions.

16. These agreements included a Confidential Settlement Deed (**"the Settlement Agreement"**) to which Mr Sodzawiczny, Mr Cooper, Mr McNally and Dr Cochrane (but not Dr Smith) were parties. The Settlement Agreement contained an LCIA Arbitration Agreement.

17. Given the centrality of the Settlement Agreement to the events with which these applications are concerned, the following should be noted:

    i) The recitals recorded by way of background Mr Sodzawiczny's account of his dealings with Mr Ruhan, including the alleged profit share agreement, and Mr Ruhan's subsequent denial of any such agreement.

    ii) The recitals recorded threats by Mr Sodzawiczny to bring proceedings against the other parties alleging that they held assets on trust for him (a state of affairs defined as **"the Dispute"**).

    iii) The recitals stated that the Settlement Agreement had been entered into to settle the Dispute.

    iv) It provided for Pro Vinci to pay £12m in settlement, to be paid in instalments.

    v) It otherwise contained release provisions in wide terms.

    vi) It provided that the Settlement Agreement constituted "the compromise of disputed matters" and was not an admission of liability or wrongdoing.

18. On 31 March 2015, Pro Vinci commenced an LCIA arbitration against Mr Sodzawiczny seeking a declaration that it was not liable to make further payments under the Settlement Agreement because it was no longer in a position to procure payment by others. Mr Sodzawiczny counterclaimed for the outstanding balance under the Settlement Agreement. On 5 April 2016, an award was made in Mr Sodzawiczny's favour (**"the Pro Vinci Award"**). On 15 June 2016, the Pro Vinci Award was made a judgment of the court following an application under s.66 of the 1996 Act.

19. Pro Vinci went into liquidation on 3 April 2017.

20. On 22 May 2018, Mr Sodzawiczny commenced Commercial Court proceedings against, among others, Dr Smith, Mr Cooper and Mr McNally making various claims of breach

of trust and dishonest assistance (**"the 2018 Proceedings"**). On the application of Mr Cooper and Mr McNally, Mr Justice Popplewell stayed the 2018 Proceedings against those defendants under s.9 of the 1996 Act: *Sodzawiczny v Ruhan and others* [2018] EWHC 1908 (Comm). He also found that Dr Smith and Ms Dawna Stickler were third party beneficiaries of certain settlement and release provisions in the Settlement Agreement, and were entitled to seek to enforce those provisions in arbitration under s.8(2) of the Contracts (Rights of Third Parties) Act 1999. Accordingly, the proceedings against Dr Smith and Ms Stickler were also stayed.

21. As a result, Mr Sodzawiczny commenced an LCIA Arbitration against Dr Smith, Ms Stickler and Messrs Cooper and McNally (**"the Second LCIA Arbitration"**).

22. On 25 March 2020, Dr Smith served a witness statement from Mr David Almond in the Second LCIA Arbitration (**"the Almond Statement"**). In that statement, Mr Almond alleged that Mr Sodzawiczny had diverted the Camberley opportunity to himself in breach of fiduciary duty, and had lied to Mr Almond to put him off the scent. He said that a decision had been taken in 2005 not to pursue the claims against Mr Sodzawiczny because he was wrongly believed to be a "man of straw". Dr Smith accepted that he had been closely involved in the preparation of the statement, and told me that he first met Mr Almond in 2019, "or it might be earlier".

23. On 26 March 2020, Dr Smith applied to amend his Amended Defence and Counterclaim in the Second LCIA Arbitration. On 8 April 2020 (by which date, the merits hearing had been fixed for September 2020), Mr Sodzawiczny applied to exclude the Almond Statement on the basis that the allegations it contained were irrelevant and could not fairly be determined at the hearing. Mr Sodzawiczny submitted that the allegations made had not been pleaded despite many rounds of amendments and were, therefore, at best matters going to Mr Sodzawiczny's credit. Dr Smith replied submitting that the evidence was adduced "in rebuttal of a number of key assertions the Claimant has made in the course of proceedings, in particular how the Sentrum Camberley business came into being". The material was also said to be relevant to the disputed oral agreement which Mr Sodzawiczny alleged he had concluded with Mr Ruhan, although principally on the basis that the material was said to show Mr Sodzawiczny could not be believed. Messrs Cooper and McNally, through their legal team, also supported Dr Smith's attempt to adduce the Almond Statement.

24. On 19 April 2020, the arbitrator (Mr Stuart Isaacs KC) issued a ruling permitting Dr Smith and Messrs Cooper and McNally to adduce the Almond Statement. The ruling made it clear that the case would be tried on the statements of case, but that Mr Isaacs KC was not satisfied that the Almond Statement went only to the issue of Mr Sodzawiczny's credit. However, he specifically noted that:

> "The allegation made in Almond that, in pursuing the Camberley Sentrum project in 2005 with Mr Ruhan, the Claimant breached fiduciaries owed to Marlborough is not pleaded. On that basis, the Tribunal can and should make it clear that it will not engage with the allegation at the evidentiary hearing (and will also be astute to stop inappropriate cross-examination which seeks to raise that allegation)."

25. Despite that statement, no application was made to amend to plead this allegation (although Dr Smith did make various other amendments), nor any application to adjourn the merits hearing.

26. On 25 April 2020, an email in Mr Almond's name was sent to Mr Sodzawiczny repeating the allegations previously made, including that Mr Sodzawiczny had stolen the Camberley opportunity. The letter intimated that proceedings were to be commenced against Mr Sodzawiczny, the email stating:

> "Our claim, which will be distilled into a letter before action, will be served as soon as I know the outcome of the LCIA proceedings, unless you settle with me …
>
> I have been advised to wait until the outcome of the LCIA before I issue our claim to ensure that you have something left for us to claim against."

The premise of that last line was that if Mr Sodzawiczny lost the Second LCIA Arbitration, there would be no assets worth claiming against. The metadata of this letter indicated that the author was Mr McNally and Mr McNally's solicitors later confirmed that they had assisted Mr Almond in drafting the letter, and that Mr McNally was considering whether to purchase the claims referred to. The letter suggests that a deliberate decision was taken to await the outcome of the Second LCIA Arbitration, rather than (for example) seeking to amend the counterclaims in the Second LCIA Arbitration.

27. A further email in Mr Almond's name was sent to Mr Sodzawiczny on 9 May 2020, repeating the threat to commence proceedings "when the LCIA tribunal is concluded, if you have anything left."

28. On 28 May 2020, a letter in the joint names of Mr Almond and Dr Smith was sent to Mr Sodzawiczny repeating the allegations of fraud on Mr Sodzawiczny's part, and stating that Dr Smith had agreed to assist Mr Almond in his claims. The letter alleged that by entering into the profit share agreement with Mr Ruhan, Mr Sodzawiczny had "dishonestly conspired with Mr Ruhan" (thereby clearly alleging that Mr Ruhan was "in on" the alleged breach of fiduciary duty) and also specifically alleged that Mr Sodzawiczny had deceived Dr Cochrane into entering into the Settlement Agreement.

29. The three week merits hearing in the Second Arbitration took place in September 2020. On 9 December 2020, Mr Isaacs KC issued his third partial award (**"the TPA"**) in which Messrs Cooper and McNally were found to have acted in fraudulent breach of trust, and Dr Smith was found to have dishonestly assisted in those breaches. Dr Smith was ordered to pay Mr Sodzawiczny about £18.3m. Mr Almond gave evidence at the hearing, but he was not asked about the allegations of breach of fiduciary duty by Mr Sodzawiczny.

30. On 19 April 2021, Mrs Justice Cockerill made an order permitting Mr Sodzawiczny to enforce the TPA in the same manner as a judgment of the court under s.66 of the 1996 Act.

31. On 2 June 2022, MDL issued a claim form against Mr Sodzawiczny in the Chancery Division. I caused the action to be transferred to the Commercial Court.

32. On 5 October 2022, Mr Sodzawiczny received a letter sent by Mr Crossley – a solicitor who has acted for various parties at various phases of the Smith/Ruhan saga – on behalf of a company called Marlborough Developments Limited (**"MDL"**), previously a shareholder in MTech, repeating the allegations of breach of fiduciary duty in relation to Mr Sodzawiczny's 2005 involvement in Sentrum Camberley.

33. On 29 November 2022, a further claim was intimated against Mr Sodzawiczny by a company called Pro Vinci Recoveries Ltd, again sent by Mr Crossley, although to date, no such claim has been issued.

34. On 8 December 2022, letters in Mr Almond's name were sent to business associates of Mr Sodzawiczny repeating the allegations about the 2005 breach of fiduciary duty. A "press announcement" was sent to business associates of Mr Sodzawiczny on 19 June 2023 referring to MDL's intention to bring claims for breach of fiduciary duty against Mr Sodzawiczny.

35. On 14 May 2023, Mr Isaacs KC made his final award (**"the Final Award"**) and ordered Dr Smith to make further substantial payments on account of interest and costs. On 23 June 2021, I made an order under s.66 of the 1996 Act permitting Mr Sodzawiczny to enforce the Final Award in the same manner as a judgment of the court.

36. On 8 June 2023, Dr Smith wrote to Mr and Mrs Sodzawiczny stating that he was seeking to set aside the TPA and Final Award, and on 12 June 2023, Dr Smith intimated an intended application "to reverse the LCIA Award you fraudulently obtained against Cooper, McNally and I during December 2020".

37. On 8 August 2023, Dr Smith sent Mr Sodzawiczny and his wife a letter before action.

38. On 7 September 2023, Mr Sodzawiczny received a letter sent on behalf of Mr Andrew Ruhan, intimating a further claim, the letter once again coming from Mr Crossley (on this occasion, from a firm called Taylor Rose). Once again, that claim has not, to date at least, been pursued. Mr Crossley had previously been MDL's solicitor when it sued Mr Ruhan and obtained a default judgment against him in circumstances which may arise for consideration in other litigation.

39. On 9 October 2023, Dr Smith issued a claim in the Commercial Court against Mr Sodzawiczny (**"the Smith Court Claim"**) seeking to set aside the Pro Vinci Award, the TPA and the Final Award (**"the Three Awards"**). This came to my attention and I stayed the Smith Court Claim until Dr Smith had clarified why it was said he was able to challenge the arbitration awards by fresh proceedings rather than in accordance with the carefully circumscribed provisions for challenging awards seated in this jurisdiction under ss.67-70 of the 1996 Act. I gave Dr Smith time to take legal advice on that issue.

40. On 23 November 2023, Dr Smith wrote to the court stating that he had now taken legal advice, that he accepted any challenge to the Three Awards had to be brought in accordance with the 1996 Act and that he was unable to satisfy the requirements for such a challenge. He consented to the striking out of the Smith Court Claim, which I did on 24 November 2023.

41. On 6 December 2023, a Request for Arbitration was sent to the LCIA in the name of Dr Smith and Dr Cochrane seeking essentially the same relief as the Smith Court Claim (**"the Smith RFA"**).

42. On 10 December 2023, Dr Smith issued a stay application under s.9 of the 1996 Act seeking to stay enforcement of the Three Awards.

43. On 22 December 2023, Mr Sodzawiczny issued this application for an AAI.

The Smith RFA

44. The Smith RFA names Dr Smith and Dr Cochrane as the claimants, with the other parties to the Settlement Agreement and the Orb Claimants (who are not parties to the Settlement Agreement) named as the respondents. It will be recalled that Dr Smith is not a party to the Settlement Agreement. Dr Cochrane was said to be represented by Mr Crossley.

45. The Smith RFA contends that the Settlement Agreement had been induced by a fraudulent statement by Mr Sodzawiczny that he had entered into an oral profit share agreement with Mr Ruhan but that:

> "It has only very recently now fully emerged that FS's purported arrangement with Mr Ruhan arose from his theft of property from … MDL … which stolen property …. he sold to Mr Ruhan on or about 11 April 2005 …. ('the Secret Oral Agreement') … However the Secret Oral Agreement terms are unlawful and the purported oral contract unenforceable".

46. It was alleged that what was described as "the Secret Oral Agreement" had been converted into the Settlement Agreement which Mr Sodzawiczny had "subsequently ruthlessly, dishonestly and perjuriously, exploited in repetitive proceedings before the LCIA and courts in other jurisdictions." It is also alleged that Mr Sodzawiczny had breached the Settlement Agreement by bringing claims against the parties to the Settlement Agreement and their affiliates, including the Second LCIA Arbitration and associated enforcement proceedings.

47. The Smith RFA is not a particularly clear or coherent document, but it cannot escape close scrutiny on this application for that reason alone. There are two key paragraphs which it is necessary to consider in some detail.

48. First paragraph 32 which pleads various court proceedings said to have been commenced by Mr Sodzawiczny in breach of the Settlement Agreement:

    i) Various (unidentified) proceedings in "Jersey, the Isle of Man, Liechtenstein, England and Wales and Mallorca" ([32(a), (e) and (f)]). This appears to be a reference to the proceedings taken to enforce the Three Awards, or steps taken to support enforcement.

    ii) The 2018 Proceedings which, insofar as they were brought against parties to the Settlement Agreement or their Affiliates, were stayed by Mr Justice Popplewell ([32(b)]).

iii) The Second LCIA Arbitration ([32(c)]).

iv) A claim issued by Mr Sodzawiczny in the Directed Trial ([32(d)]). For present purposes, I should note that the court required all parties asserting interests in certain assets to make a claim in the Directed Trial, and that the purpose of the direction requiring claims to the property to be issued was to permit the court to determine the position as between all potential claimants.

v) It is also said that in these proceedings – i.e. in a legally privileged context – Mr Sodzawiczny made disparaging statements about Dr Smith, Dr Cochrane and the other respondents (save for Mr Cooper), although the statements are not identified.

49. Second paragraph 35 which sets out the relief sought:

i) "A Declaration that the Secret Oral Agreement is unlawful and unenforceable as a matter of law and public policy, deriving as it does from the sale of the stolen Camberley Project Property and it be set aside and declared unenforceable and void" ([35(a)]). That is, of course, an alleged agreement between Mr Sodzawiczny and Mr Ruhan, who is not party to the Settlement Agreement.

ii) "That as a consequence, the Pro Vinci LCIA 153979 award be set aside and be declared null and void as it was obtained by means of fraud" ([35(b)]).

iii) "An Order that FS account for the profits made from funds he obtained from Dr Cochrane, Pro Vinci and or the Orb Claimants and monies received from the Sentrum Group from April 2005 onwards" ([35(c)]). Nothing was payable by Dr Cochrane to Mr Sodzawiczny under the Settlement Agreement, only by Pro Vinci, with the obligation to make those payments having since merged into the Pro Vinci Award. Neither the Sentrum Group nor the Orb Claimants are parties to the Settlement Agreement.

iv) "An Order that all awards deriving from LCIA 183969 against Dr Smith and Mr McNally should be set aside as they were obtained by means of fraud" ([35(d)]).

v) "That recitals a b c and i of the Settlement Deed be set aside and declared void as they derive from fraudulent misrepresentations of FS" ([35(e)]). Those are recitals of background facts which do not give rise to any obligations, and the suggestion that they be "set aside and declared void" is legally incomprehensible.

vi) "A declaration that the Settlement Deed is otherwise valid, enforceable and cannot be set aside by FS as against the Claimants and the third to ninth respondents" ([32(f)]). I should note that there does not appear to be any live dispute as between the parties to the Smith RFA as to whether the Settlement Deed is a valid, enforceable and binding contract.

vii) "An order staying all claims or derivative claims made or being made or contemplated to be made by FS as set out in paragraph 32 above" ([35(g)]).

viii) "A declaration that the proceedings set out paragraph 32 above constitute breaches of clauses 6 (Release), 7 (Agreement not to Sue), 15.2 (Non-Disparagement) and/or 17 (Jurisdiction) of the Settlement Agreement." ([35(h)]).

ix) "An Order restraining FS from pursuing the proceedings set out in paragraph 32 above" ([35(i)]).

x) "An award in damages for any harm that has been or may be suffered by the Claimants and the fourth to ninth Respondents as a result of FS's fraudulent misrepresentations and his previous, continuing and/or future breaches of his obligations pursuant to clauses 6 (Release), 7 (Agreement not to Sue), 15.2 (Non-Disparagement) and/or 17 (Jurisdiction) of the Settlement Deed, such damages including (but not being limited to) all the costs of the proceedings listed in paragraph 32 in so far as not already recovered from the Respondent in those proceedings" ([35(j)]).

xi) "An order that FS is required pursuant to clause 11 of the Settlement Agreement to indemnify each of the Claimants and the Settlement Deeds Parties for all costs and damages incurred by them in relation to the proceedings listed in paragraphs 32, including but not limited to the Claimants' and the Parties full legal expenses (on a full indemnity basis) in relation to any of those proceedings …. " ([35(k)]).

THE STAY APPLICATION

The Stay Application in Outline

50. Dr Smith has issued an application under s.9 of the 1996 Act to stay "all enforcement proceedings instigated by the Defendant as a consequence of [the TPA and Final Award]". While the application was not on its face limited to enforcement proceedings in the courts of England and Wales, the s.9 power only extends to proceedings in the courts of England and Wales.

51. In the course of the hearing, I understood Dr Smith to argue that the s.9 stay should extend to Mr Sodzawiczny's application for AAI relief as well.

52. For a stay application to be granted, Dr Smith must establish that the enforcement proceedings and the AAI application have been brought "in respect of a matter which under the [arbitration] agreement is to be referred to arbitration" (s.9(1) of the 1996 Act). I shall refer to this as an "Arbitral Matter".

Are the enforcement proceedings and the AAI application brought in respect of an Arbitral Matter?

53. There is now definitive guidance as to how the court is to identify an Arbitral Matter in the decisions of the Privy Council in *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Co Ltd* [2023] UKPC 33 and of the Supreme Court in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32, decisions handed down on the same day, and in which Lord Hodge delivered both judgments.

i) It is necessary to focus upon "the substance of the dispute", taking into account defences which reasonably foreseeably will be raised (*FamilyMart*, [58-59]; *Mozambique*, [72-73]).

ii) An Arbitral Matter need not encompass the whole dispute raised in court proceedings (*FamilyMart*, [60]; *Mozambique*, [74]).

iii) An Arbitral Matter must be "a substantial issue" which is "legally relevant to a claim or defence, or foreseeable defence" and be susceptible to determination "as a discrete dispute". It must be an essential element of the claim or defence, and not simply a "mere issue or question" that might fall for decision (*FamilyMart*,[61]; *Mozambique*, [75])).

iv) Identification of an Arbitral Matter requires judgement and common sense, and is not a mechanistic exercise (*FamilyMart*, [65]; *Mozambique*, [77]).

v) It is necessary to have regard to "the context in which the matter arises in the legal proceedings" (*Mozambique*, [78]). That last requirement is particularly important here.

54. Applying that guidance, it is clear that the enforcement of the TPA and Final Award is not an Arbitral Matter. The enforcement of arbitral awards is not a matter for the arbitral tribunal (which becomes *functus officio* to the extent it has issued a final award) but for each court in which enforcement process is commenced: *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041, [9]; *London Steamship-Ship Owners' Mutual Insurance Association (The Prestige Nos 3 and 4)* [2021] EWCA Civ 1589. [118-119]; *Xiamen Xinjinqdi Group Co Ltd v Eton Properties* [2020] HKFCA 32, [120]. In addition, the TPA and Final Awards have been the subject of orders under s.66 of the 1996 Act, such that they are enforceable as judgments of this court. The status of these s.66 orders, and whether they should be stayed, is a matter falling within the exclusive jurisdiction of this court, not a matter which the parties to the Settlement Agreement agreed to refer to arbitration.

55. I am also clear that the application for an AAI is not an Arbitral Matter. This issue has been the subject of two judgments of this court which I gratefully follow.

56. In the first, *Sheffield United Football Club v West Ham United Football Club Plc* [2008] EWHC 2855 (Comm), the claimant sought an AAI to prevent the defendant from challenging the award in an arbitration seated in England and Wales before the International Court of Arbitration in Sport (**"ICAS"**), an arbitral panel in Geneva. Mr Justice Teare held at [40] that the parties' arbitration agreement did not extend to "a dispute as to whether the court should exercise its supervisory jurisdiction":

> "Were it otherwise that part of the court's supervisory jurisdiction referred to by Lord Hoffmann would usually be subject to a stay pursuant to section 9 of the Act. Moreover, whilst the parties have agreed that disputes between them should be referred to arbitration they have also agreed, by reason of the seat of the arbitration being England, that the English court is the forum which can exercise a supervisory jurisdiction in support of the arbitration …"

57. In the second, *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), Mr Justice Andrew Smith undertook a careful analysis of this issue. He accepted that the arbitral tribunal would have jurisdiction to hear and determine at least some of the applicant's "re-litigation" complaints ([40], [44]), but held that this was not enough "to establish that the legal proceedings brought by Nomihold are in respect of matters 'to be referred' to arbitration within the meaning of s.9 of the 1996 Act ([45-46]), noting:

> "This expression connotes that the parties agreed that the matters must be referred to arbitration. The objective of s.9 is to ensure that the parties' arbitration agreement is observed and enforced, and a party to an arbitration agreement is entitled to a stay to this end. However, by making the arbitration agreements Nomihold and MTSF also agreed to the supervisory jurisdiction of the English court. So long as its application seeks relief in accordance with that part of the agreements, Nomihold cannot be said to be acting in breach of the arbitration agreements.
>
> The point is explained precisely by Raphael in *The Anti-Suit Injunction* (2008) in paragraph 7-38, with which I agree … :'…, although claims that foreign proceedings are in breach of the obligation to arbitrate do generally fall within the scope of arbitration clauses, nevertheless, by contracting for arbitration in England under English law, the parties have impliedly agreed that the usual ancillary proceedings may be brought before the English court to assist and protect the arbitration. These include claims for an anti-suit injunction, which are therefore not a breach of even broadly worded arbitration clauses. This implied agreement operates as an exception to the general scope of the arbitration clause, and permits the court and the arbitrations to exercise a concurrent jurisdiction.'"

The purpose of Dr Smith's stay application

58. In these circumstances, it is not necessary to address Mr Caplan's alternative argument – that if the enforcement proceedings in this court and the AAI application constituted proceedings brought in respect of an Arbitral Matter, the court should nonetheless refuse the stay application because Dr Smith is not seeking to stay the proceedings for a "real or proper purpose."

59. This limitation on the right to apply for a stay is not to be found in s.9 itself, nor in Article II of the New York Convention (although Article II does not address procedural limitations on when a stay might be sought – for example the time limit in s.9(3)). So far as s.9 is concerned, I believe the conventional understanding until recently was as set out by Mr Justice Andrew Smith in *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [34]:

> "If MTSF's application is one to which the section applies, the court has no residual discretion to refuse a stay under section 9(4). The only basis upon which a stay can be refused is under the statutory exception because 'the arbitration agreement is null and void, inoperative, or incapable of being performed'."

60. However, there were occasional references to the possibility of some form of discretion to refuse a s.9 stay. In *Sheffield United Football Club v West Ham United Football Club Plc* [2008] EWHC 2855 (Comm), [41], Mr Justice Teare had referred to the possibility that a stay application based on an arbitration agreement with a seat in this jurisdiction but brought for the purpose of bringing proceedings in another forum altogether "might well be regarded as frivolous or vexatious", but he noted that "that possibility was not debated before me in terms." In *Lombard North Central plc v GATX Corporation* [2012] EWHC 1067 (Comm); [2012] 2 All E.R. (Comm) 1119, [15], Mr Justice Andrew Smith floated the requirement of a "real and proper purpose" as "a possible qualification" to the right to a s.9 stay.

61. The existence of that qualification has now received support at the highest level of judicial authority, from both the Privy Council in *FamilyMart*, [64] and the Supreme Court in *Mozambique*, [52]. The examples given in those cases of the circumstances in which a stay application might lack a "real or proper purpose" include (i) where the application related to "issues that were peripheral to the legal proceedings" (*FamilyMart*, [64]); and (ii) where the stay applicant would face the same issues in the court proceedings in claims brought by another party even if the claims by one particular claimant were stayed (*Mozambique*, [110]). This represents a significant and, it is respectfully suggested, controversial development in English arbitration law. The courts have yet to have the opportunity to explore its full ramifications, including the legal basis for such a principle (whether a rule of court process, an implied term of the arbitration agreement or some other basis) and the precise circumstances in which it can avail a court claimant.

Should I certify the stay application "totally without merit"?

62. Given the technical legal nature of this point, and the fact that Dr Smith is acting as a litigant in person, I have concluded that it would not be appropriate to certify the stay application as totally without merit.

AAIs: THE LEGAL PRINCIPLES

63. It is well-established that, like anti-suit injunctions (**"ASIs"**) restraining the pursuit of foreign court proceedings, AAIs can be granted on two grounds:

    i) where the pursuit of the arbitration infringes the applicant's legal or equitable rights; and

    ii) where the pursuit of the arbitration is "vexatious and oppressive", and thereby engages the jurisdiction of the English court to prevent the wrong of vexatious, oppressive and unconscionable conduct;

    (Elektrim SA v Vivendi Universal SA [2007] EWHC 571 (Comm); [2007] 1 CLC 227, [56]; *Claxton Engineering Services Ltd v TXM Olaj Es Gazukato Kft* [2011] 345 (Comm), [34]; *Sabbagh v Khoury* [2019] EW CA Civ 1219, [50]).

64. There are three fact patterns in which AAI applications are usually encountered, each raising different issues.

Category 1

65. The first category is essentially the equivalent of the contractual ASI, and the strong presumption in favour of holding parties to their promises is equally applicable. Indeed, there are authorities which suggest that, once the legal right not to be the subject of the arbitration is established to the requisite standard, an AAI may more readily be granted than an ASI:

    i) An AAI does not involve even indirect interference with a foreign court, with the result that considerations of comity bear less heavily: *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24, [47] ("anti-arbitration injunctions will be granted somewhat more readily, as no question of interference with a foreign court is involved").

    ii) It has been suggested that delay in seeking relief may have less impact than when the effect of the delay has involved the unnecessary use of foreign court resources: *Tyson International Company Limited v Partner Reinsurance Europe Se* [2023] EWHC 3243 (Comm), [66-67]).

66. The most obvious type of case which falls within Category 1 is where the parties have agreed to bring the claim in some other forum (e.g. in court or arbitration under a different set of arbitral rules or with a different seat) or not to arbitrate a particular dispute at all. Thus:

    i) In *Claxton Engineering Services Ltd v TXM Olaj Es Gazukato Lft* [2011] EWHC 345 (Comm), [35], an AAI was granted to restrain the pursuit of an arbitration which had been commenced after it had been determined by the English court in a prior application that the claims in question were subject to an exclusive English jurisdiction clause.

    ii) In *Huyton SA v Peter Cremer GmbH & Co* [1999] CLC 230, an AAI was granted to prevent the defendant from pursuing a GAFTA arbitration in breach of a settlement agreement. There had been no final determination of the existence of the obligation not to arbitrate in advance of the AAI application. Mr Justice Mance determined the respondent's defences of duress and undue influence as part of the AAI application, and no one appears to have suggested that they be left to the determination of the arbitral tribunal.

    iii) In *Whitworths Limited v Synergy Food Ingredients and Processing BV* [2014] EWHC 4239 QB (Comm), Mr Justice Cooke granted a final AAI at the trial to restrain arbitration proceedings in the Netherlands under the NZV rules of arbitration, in circumstances in which he found that the parties had agreed to arbitration in England under the CENTA Rules.

67. However, there is a further category of AAIs which have been rationalised on the basis that the applicant is protecting a contractual right arising from the agreement to arbitrate, namely where the parties have agreed that an arbitration will have its legal seat in England and Wales, and a losing party then seeks to challenge the award otherwise than in accordance with ss.67 to 70 of the 1996 Act (**"a Non-Compliant Challenge"**):

i) It is well -established that parties who agree to arbitrate with a seat in England and Wales agree to the supervisory jurisdiction of the English courts and, as a result, agree that any challenge to an award can only be made in the courts of England and Wales in accordance with the provisions of the 1996 Act: *A v B* [2007] 1 Lloyd's Rep 237, [111]; *C v D* [2007] EWHC 1541 (Comm), [27], [29]; [2007] EWCA Civ 1282, [17]; *Minister of Finance (Incorporated) 1Malaysia Development Berhad v International Petroleum Investment Company Aabar Investments PJS* [2019] EWCA Civ 2080, [57].

ii) In *Noble Assurance v Gerling-Konzern* [2007] EWHC 253 (Comm); [2007] 1 CLC 85, Mr Justice Toulson held that this obligation was breached when the respondent commenced proceedings before a Vermont court to vacate an award made by an arbitral tribunal with a London seat (although no ASI was granted on the facts of that case). In *C v D, supra*, an ASI was granted to restrain the breach of an arbitration agreement in similar circumstances.

iii) In *Sheffield United Football Club v West Ham United Football Club Plc* [2008] EWHC 2855 (Comm), an injunction was granted to prevent a party to an arbitration seated in England and Wales from seeking to challenge the award before the ICAS, in effect an arbitral body.

iv) In *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [31], Mr Justice Andrew Smith observed that "it is a breach of an arbitration agreement to bring proceedings to make 'an unlawful attempt to invalidate the award' … or to make a 'collateral attack on a binding judgment or award of a properly constituted tribunal'" and, but for certain undertakings, would have granted an AAI to restrain an attempt to challenge a decision reached by an arbitral tribunal appointed on the basis of one of a suite of agreements between the parties by way of a fresh arbitration under another of those agreements.

68. It is possible to envisage variations of this approach where the legal right relied upon is not (or not necessarily) contractual:

i) While the cases in the preceding paragraph address the contractual right of a party who has agreed to arbitrate with a seat in England and Wales that Non-Compliant Challenges will not be brought, it has been held that the 1996 Act also confers a legal right to be able to pursue the challenges the 1996 Act confers, and that the court can grant an AAI to restrain the pursuit of an arbitration which would infringe that right.

ii) This follows from the Court of Appeal decision in *Minister of Finance (Incorporated) 1Malaysia Development Berhad v International Petroleum Investment Company Aabar Investments PJS* [2019] EWCA Civ 2080, in which the AAI applicant had brought challenges under both ss.67 and 68 of the 1996 Act to an LCIA consent award entered pursuant to a settlement agreement (and was, therefore, necessarily challenging the jurisdiction of the arbitral tribunal), and had sought to restrain the pursuit of an arbitration commenced by the respondent

pursuant to a separate provision for LCIA arbitration in the settlement agreement. The Court of Appeal noted at [38] that:

> "The jurisdiction of the court under sections 67 and 68 is therefore founded on the agreement of the parties to an arbitration with a London seat. It is, however, also founded on wider considerations of the public interest".

iii) The court referred to the claimant's "undoubted legal right to pursue the court applications under sections 67 and 68" and stated that the second arbitration was part of:

> "a clear attempt to fetter the claimants' exercise of their statutory right to challenge the consent award in the first arbitration under sections 67 and 68."

iv) No doubt such relief could, in principle, be available against a party who had participated in the arbitration under a jurisdictional objection, who then sought to challenge any *kompetenz-kompetenz* decision by the tribunal before some other arbitration tribunal rather than in accordance with s.67 of the 1996 Act.

v) These can all be seen as instances in which a statutory right provides the basis for an anti-suit relief (cf. *Petter v EMC Europe Ltd* [2015] EWCA Civ 828).

69. Allied to these cases are those where the issues raised in the arbitration which is the object of the AAI amount to a collateral attack on the decision of the supervisory court of lack of jurisdiction rather than on a prior arbitral award. This was the position in *Republic of Kazakhstan v Istil Group Inc* [2007] 2 CLC 870, [46-47], Mr Justice Aikens identifying a strong practical reason for AAI relief in this context:

> "I am fortified in that view by my conclusion that, were the arbitrators now to proceed to an award on the merits in favour of Istil, the court would be bound to accede to an application to set aside any such award. Furthermore it is the more reasonable for the court to enjoin further pursuit of the arbitration in circumstances where Istil decline to comply with costs orders made in these proceedings both by this court and by the Court of Appeal. If the court were to decline now to intervene it would simply condemn ROK to the expenditure of yet further costs which they may have grave difficulty in recovering having regard to the corporate location of Istil and Metalsukraine and the various corporate reorganisations which have evidently taken place."

Category 2

70. A second category of case is where the AAI applicant contends that the arbitral tribunal would have no jurisdiction to decide the dispute, but without contending that this is because there is a contractual right to have the dispute determined in some other forum:

i) Applications of this kind have a long history. In *Kitts v Moore* [1895] 1 QB 253, the court granted an AAI where the applicant denied that there was a binding arbitration agreement. By contrast, the courts did not grant injunctive relief to applicants who brought a different kind of jurisdictional challenge – where the

existence of the arbitration agreement was not disputed, but it was denied that there was an arbitral dispute (*North London Railway Co v Great Northern Railway Co* 11 QBD 30). Injunctions were also used as a means of addressing challenges to the conduct of the arbitration – for example to restrain arbitration before a biased arbitrator (*Malmesbury Railway Co v Budd* 2 Ch D 113).

ii) The 1996 Act has brought court orders of the latter kind to an end, but it has also had significant implications for the former kind of order as well.

iii) First, s.30 of the 1996 Act enshrined the competence of an arbitral tribunal to rule on its own jurisdiction, albeit not on a basis which would necessarily be determinative, raising the issue of when it would be right for the court to defer the initial decision on jurisdiction to the tribunal. In *Fiona Trust and Holding Corp v Privalov* [2007] EWCA Civ 20, [34], Longmore LJ referred to the relevant provisions of the 1996 Act and noted:

> "This combination of sections shows, together with the prescriptive section 9(4), that it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute. In these circumstances, although it is contemplated also by section 72 that a party who takes no part in arbitration proceedings should be entitled in court to 'question whether there is a valid arbitration agreement', the court should, in the light of section 1(c) of the 1996 Act, be very cautious about agreeing that its process should be so utilised. If there is a valid arbitration agreement, proceedings cannot be launched under section 72(1)(a) at all."

iv) Second, the 1996 Act carefully delineated the means by which issues of jurisdiction would be determined by the court: under s.32 (during the arbitral proceedings with the agreement of the parties or with the permission of the tribunal); under s.67 (by way of a challenge to the award, to be brought within a strict time limit) or under s.72, which was only available to a party "who takes no part in proceedings." In addition, it is implicit in s.9 of the 1996 Act as it has been construed that the court will determine whether the arbitral tribunal would have jurisdiction when determining whether to grant a s.9 stay (as opposed to a stay under its inherent jurisdiction).

v) The court is generally hostile to attempts to obtain a decision from the court on jurisdiction by other means. Thus in *ABB Lummus Global Ltd v Keppel Fells Ltd* [1999] 2 Lloyd's Rep 24, 30, Mr Justice Clarke referred to these provisions, and said:

> "As can be seen, the Court's power to determine any question as to the substantive jurisdiction of the tribunal is restricted in a number of ways. Mr White submits that it is not necessary for a person who wishes to have any question of the jurisdiction of the arbitrators decided to make an application under s.32. He submits that such a person claims a declaration in the ordinary way at common law.

> I am unable to accept that submission, at least where the seat of the arbitration is in England. The purpose of the Act was to restrict the role of the Court at an early stage of the arbitration. By s.2(1), the key provisions of part 1 of the Act only apply where the seat of the arbitration is in England. Section 32 is in part 1. It follows that the Court's power to determine any question as to the substantive jurisdiction of the tribunal, which is conferred by s.32(1), is subject to s.32(2), so that the Court cannot consider the question unless the requirements of s.32(2)(a) or (b) are satisfied."

In *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] EWHC 1279 (Comm), the then HHJ Waksman QC set aside an order for service of proceedings out of the jurisdiction which sought to confirm by declaratory relief the existence of an English arbitration agreement.

vi) Finally, s.72(1) (which only applies to arbitrations seated in England and Wales or Northern Ireland) provides that a person "alleged to be a party to arbitral proceedings but who takes no part in the proceedings" may seek a determination as to the jurisdiction of the arbitral tribunal "by proceedings in the court for a declaration or injunction or other appropriate relief". The express reference to injunctive relief in that provision raises the issue of whether such relief would be available to a party who disputes the tribunal's jurisdiction, but who wishes to reserve the right to take part in the arbitration.

71. These developments have led a number of statements by judges suggesting that caution is required before an AAI is granted which would preclude the exercise of the *kompetenz-kompetenz* jurisdiction of the arbitral tribunal in circumstances in which the court has not already determined that issue (e.g. by finding that the parties had in fact agreed to resolve their disputes in some other forum), and that some additional factor is required to justify AAI relief in these circumstances:

i) In *Claxton Engineering Services Ltd v TXM Olaj-Es Gazukato Kft* [2011] EWHC 345 (Comm), [41], Mr Justice Hamblen stated:

> "In many of the cases which concern whether an anti-arbitration injunction should be granted there is an issue as to whether there is any or any valid arbitration agreement. One can well understand why it would generally be appropriate for that issue to be left in the first instance to be determined by the arbitration tribunal."

In that case, the court had already determined prior to the commencement of the arbitration that the parties had agreed to the exclusive jurisdiction of the English courts.

ii) In *Weissfisch v Julius* [2006] EWCA Civ 218, one party to an agreement providing for arbitration by a named arbitrator with a Swiss seat sought an AAI against *the arbitrator* rather than the arbitrating party. The Court of Appeal referred to the principles under-pinning the 1996 Act, before noting at [33(iv)-(v)] that "for the English court to restrain an arbitrator under an agreement providing for arbitration

with its seat in a foreign jurisdiction to which the parties unquestionably agreed would infringe those principles", albeit "exceptional circumstances may, nonetheless, justify the English court in taking such action." In *Sabbagh v Khoury* [2019] EWCA Civ 1219, [74], it was noted this was a "very unusual application" because the AAI was sought against the arbitrator personally.

iii) In *Albon Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124, the claimant commenced court proceedings seeking substantive relief, and the defendant subsequently commenced arbitration in Malaysia, relying on an alleged arbitration agreement which the claimant alleged had been forged in response to the English proceedings. The Court of Appeal observed that "in the ordinary case, there would be much to be said" for the view that "it should be for the arbitrators, not the English court, to decide whether the arbitration should proceed pending the resolution of the genuineness" of the arbitration agreement" ([16-17]), but that an AAI was appropriate as the parties had agreed that the English court should first determine the issue, and it was arguable that the agreement to arbitrate had been forged to defeat the English proceedings.

iv) In *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWHC 1927 (Comm), where the English court had determined that there was a good arguable case that the parties had agreed to the exclusive jurisdiction of the English courts in respect of a particular dispute, but had yet to reach a final ruling, the Court refused an application for an AAI to prevent the pursuit of an arbitral reference in respect of the same dispute in Italy. In that case, the existence of both the jurisdiction and arbitration agreements was not in dispute, but the issue was whether a particular dispute fell within one of those agreements, or the other. At [26], Mr Justice Andrew Smith stated of applications for an AAI in respect of a foreign-seated arbitration:

> "The courts have recognised that in circumstances such as these it is not usually just and convenient to restrain a person from bringing or pursuing arbitral proceedings … This reasoning applies with particular force where, as here, there is no dispute, or cannot properly be any dispute, that the parties made an agreement for arbitration with the foreign seat, and so accepted that (i) in accordance with the principle of Kompetenz-Kompetenz a tribunal appointed under the agreement should determine whether the agreement covered disputes before it, and (ii) that the supervisory jurisdiction over such decisions of a tribunal should be that of the courts of the seat of the arbitration."

v) In *Sabbagh v Khoury* [2019] EWCA Civ 1219, the Court of Appeal noted at [111-112]:

> "Where the validity or scope of an arbitration agreement is in issue, it may be a difficult question whether the English court should seek to determine the issue. As earlier mentioned, komptenz-kompetenz is an important principle of international arbitration law. It is implicit in an arbitration agreement that the parties agree that the tribunal may rule on its own substantive jurisdiction, including issues as to the validity of the arbitration agreement and the matters

within the scope of the agreement (see section 30 of the 1996 Act as regards arbitrations with their seat in England."

72. These cases which emphasise that granting an AAI where it is contended that the arbitral tribunal would lack jurisdiction is an exceptional course, all concern foreign-seated references (and indeed in *Sabbagh*, [112], it was noted that it was "an exceptional course for the English court to decide these issues in relation to an agreement for a foreign-seated arbitration"). The fact that, in such cases, the supervisory court of the arbitral process is a foreign court may raise considerations of comity. However, the suggestion that this provides a basis for adopting a less cautious approach when an AAI is sought in respect of an arbitration seated in England and Wales on the basis that the arbitrators would not have jurisdiction does not sit particularly easily with the following observations of the Court of Appeal in *Sabbagh* (the first of which now has the support of the Privy Council in *Broad Idea*, [47] quoted at [65(i)] above):

> "109 An anti-arbitration injunction does not involve an interference with the jurisdiction of a foreign court, except in the very indirect way of relieving it of its role as the supervisory court for the arbitration—but that is a role that is entirely dependent on the continuation of the arbitration. There can be no question, in the case of an anti-suit injunction, of the court saying that the foreign court lacks jurisdiction (save in the case of exclusive jurisdiction agreements), whereas the lack of the arbitral tribunal's jurisdiction, because there is no arbitration agreement or because the agreement does not cover the matter in issue, is the basis of an anti-arbitration injunction.
>
> 110 An anti-arbitration injunction involves an interference with a different principle, namely the fundamental principle of international arbitration that courts should uphold, and therefore not interfere with, arbitration agreements. Where it is clear that the dispute is within the terms of a valid arbitration agreement, then the courts should not interfere. When the converse is true, 'either because it is common ground between the parties or because of a previous determination' (per Andrew Smith J in *AmTrust Ltd v Trust Risk Group SpA (No 2)* [2015] 2 Lloyd's Rep 231, para 25), the court may grant an anti-suit injunction but only if the circumstances of the case require it. Save perhaps in the case of exclusive jurisdiction agreements, the grant of an anti-arbitration [injunction] remains an exceptional step."

73. That second principle appears to apply as much to arbitrations seated in England and Wales as those seated elsewhere, and in the former case, there is the additional factor of the 1996 Act carefully delineating the gateways for the curial determination of arbitral jurisdiction (see [70(iii)-(vi)] above).

74. Where there has been no prior determination that the dispute does not fall within the jurisdiction of the proposed or ongoing arbitration, then I am satisfied that the considerations set out above require particular caution before granting an AAI, even in respect of an arbitration seated in England and Wales.

Category 3

75. Third, there are cases in which the complaint relates to matters which the arbitral jurisdiction would have jurisdiction to determine, but which it is said involve an attempt to re-litigate matters already determined either by a prior arbitration award or a court judgment:

    i) Once again, injunctions of this kind have a long history: for example in *Glasgow and South Western Railway Co v Boyd & Forrest* 1918 SC (HL) 14, the House of Lords on a Scottish appeal granted an interdict against proceeding with an arbitration on matters which were held to be *res judicata*.

    ii) However, this category of AAI applications raise particular difficulties, because it is now established that arguments of *res judicata* or other doctrines of preclusion do not raise issues going to the jurisdiction of an arbitral tribunal, but a defence which can be pleaded in the arbitration, albeit one of a kind which is sometimes said to raise an issue of "admissibility": see *BTN v BTP* [2020] SGCA 105, [68-72].

    iii) Where the prior determination is that of an arbitral tribunal, it is possible to characterise the attempt to re-litigate the issue as a breach of the implied promise to honour the earlier award (cf. Lord Hobhouse in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041, [9]), and Mr Caplan invited me to adopt that characterisation here. However, there are real difficulties in treating the preclusive effect of an arbitral determination as a contractual obligation which can be enforced before the court through conventional contractual remedies (see *PJSC National Bank Trust v Mints* [2022] EWHC 871 (Comm), [23-25] and [2022] JBL 459, 468-470). A contractual analysis would also suggest that this species of AAI should benefit from the strong presumption of contract-enforcement AAIs (see [65] above), but this is not how cases of this kind have been treated, nor does it seem intuitively correct.

76. Where an arbitral tribunal would have jurisdiction to decide whether and to what extent the prior determination precluded the subsequent claim, the granting of an AAI by the court encounters a further obstacle:

    i) In *Sabbagh v Khoury* [2019] EWCA Civ 1219, the Court of Appeal accepted the argument that the court should not grant an AAI "in respect of a claim which, if brought in English proceedings, would require the court to grant a stay under s.9 of the 1996 Act", describing the "logic of this submission" as "irresistible", and stating that such an injunction would be "wholly contrary to the fundamental principle underpinning the New York Convention and the 1996 Act of respecting and giving effect to arbitration agreements" ([92-93]).The court approved a statement said to represent the converse of the proposition by Mr Justice Popplewell in *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm), [47] that the court would not grant permission to serve out if satisfied that it would stay the proceedings on a s.9 application.

    ii) That principle is not, on its face, one which is limited to arbitrations with a foreign seat.

iii) That raises the issue of whether the court has power under s.9 to refuse a stay other than because there is no "matter which under the [arbitration] agreement is to be referred to arbitration" or the court is satisfied that "the arbitration agreement is null, void, inoperative or incapable of being performed". As outlined at [59-61] above, that might once have been thought to be a challenging proposition, but it has recently received support at the highest level.

77. It might be possible to confine AAIs in category 3 to cases in which, if a claim had been brought in England and Wales, the court would have refused a stay even though the requirements of s.9 were satisfied because the application was made for an improper purpose. That, however, would tie the exercise of this important jurisdiction to a controversial and embryonic legal principle (see [61]).

78. An alternative approach, which I find strongly persuasive and which suffices for present purposes, arises from the fact that there will be cases which fall both within category 1 and category 3, because the attempt to re-litigate the contents of the earlier award is sufficiently fundamental and substantial as to be fairly characterised as an attempt to challenge the earlier award by a Non-Compliant Challenge, bringing the principle discussed at [67] above into play.

79. In these circumstances, and where the English court is the supervisory court for the first arbitral determination, I respectfully agree with Mr Justice Andrew Smith's insightful decision in *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [50-51] that this is a case in which the jurisdiction of the supervisory court overlaps with that of the second tribunal in which a plea of legal preclusion might be advanced. This is not the only example of overlapping jurisdiction which arises as between the courts and an arbitral tribunal. This can arise when an arbitral tribunal had granted relief by way of a partial award, the precise effect of which depends on the happening of certain events, and the court has to determine in the context of a s.66 enforcement application whether those events have occurred (*A v B* [2020] EWHC 2790 (Comm), [27-33]). Some limited form of overlapping jurisdiction may also explain the fact that a defendant to court proceedings who admits the claim will not obtain a stay under s.9, even though an arbitral tribunal would have jurisdiction to issue an award for that claim in the face of a similar admission (*Halki Shipping Corporation v Sopex Oil Limited* [1998] 1 WLR 726 and in Singapore *Tjong Very Sumitomo v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732).

80. The more clearly the claims in the second arbitration can be said to amount, in substance, to a Non-Complaint Challenge to the first award, the stronger the case for AAI relief will be. It is this factor which led Mr Justice Andrew Smith to distinguish in *Nomihold* between the "most blatantly abusive" parts of the relief sought in the second arbitration and the other matters raised. He would have granted an AAI in respect of the former, but for undertakings:

> "not to advance in [the new arbitrations] (a) any claim for a declaration (i) that MTSF is not obliged to carry out [the award] and (ii) that so far as the award is concerned MTSF is not bound by LCIA rule 26.9 or (b) a claim for an order that

MTSF be released from any obligation to pay the purchase price of US$179m to be paid under the option agreement."

81. Whether the arbitration which is to be the subject of the AAI amounts in substance to a Non-Compliant Challenge to an award seated England and Wales will not turn solely on the manner in which it is formulated (which would enable a party to improve its position by framing its challenge in a misleading or obscure way) but on the substance of the position, to be determined in the light of all relevant circumstances. In *Injazat Technology Capital Limited v Najafi* [2012] EWHC 4171 (Comm), Mr Justice Flaux was persuaded to grant an AAI inter alia because it was clear that the proceedings were "a transparent attempt to frustrate enforcement proceedings" in relation to the first award ([9], [13] and [22]), even though the injuncted arbitral claim was not expressly framed as a request to set aside the prior award or nullify its effects.

THE APPLICATION OF THESE PRINCIPLES TO THE FACTS OF THIS CASE

82. With the benefit of that lengthy legal background, I turn to the position here. I shall first consider the position of Dr Smith, and then that of Dr Cochrane.

Dr Smith

83. I am satisfied that in bringing the Smith RFA, Dr Smith is in substance seeking to bring a Non-Compliant Challenge to the outcome of the Three Awards, and in doing so is infringing Mr Sodzawiczny's legal right under the 1996 Act that any challenges to the Three Award be brought only by the means, and within the time, permitted by the 1996 Act.

84. Although Dr Smith was not a party to the Settlement Agreement, he sought and obtained a s.9 stay in respect of Mr Sodzawiczny's claims against him in court, with the benefit of the rights accorded to him by a combination of the Settlement Agreement and the Contracts (Rights of Third Parties) Act 1999. By invoking the right to have any claim brought in an arbitration seated in England and Wales, enforcing it through a s.9 application and then participating as a party in the resultant arbitration, Dr Smith has acceded to the obligation arising from the arbitration agreement not to bring a Non-Compliant Challenge to any the award in the arbitration (i.e. the TPA and the Final Award).

85. In any event, I am satisfied that Mr Sodzawiczny has a legal right under the 1996 Act that the Three Awards are only challenged under and in accordance with the 1996 Act, and that Dr Smith is seeking to infringe that right by issuing and seeking to pursue the Smith RFA.

86. I have reached this conclusion for the following reasons:

i) The core relief sought in the Smith RFA is the setting aside of the Pro Vinci Award (at [35(b)]; and the TPA and the Final Award (at [35(d)]).

ii) The Smith RFA also seeks orders the substantive effect of which would be (and is clearly intended to be) that Mr Sodzawiczny would be prevented from enforcing

the rights arising under the Three Awards (at [35(g)-(i)]). For example, it is alleged that proceedings brought by Mr Sodzawiczny by way of enforcement of the Three Awards are a breach of the settlement and release provisions in the Settlement Agreement (at [32(a)]) and there is an attempt to recover the costs of those arbitrations ([35(j)-(k)]).

iii) The circumstances in which the Smith RFA was issued also confirm that this is, in substance, a Non-Compliant Challenge to the Three Awards. As I have stated, Dr Smith initially brought the Smith Court Claim which is in very similar terms to the Smith RFA, but ultimately accepted after taking legal advice that this amounted to a Non-Compliant Challenge to the TPA and the Final Awards, and that he could not satisfy the time limits for a compliant challenge. The Smith RFA was issued very shortly after the Smith Court Claim was struck out, in what was clearly an attempt to avoid the application of those time limits.

iv) Not only does this relief infringe Mr Sodzawiczny's rights under the 1996 Act, but any tribunal appointed in the Smith RFA would not have jurisdiction to set aside or restrain enforcement of the Three Awards, which is not an Arbitral Matter (see [54] above) and Dr Smith was not even a party to the Pro Vinci arbitration.

87. I am satisfied that these aspects of the Smith RFA amount to a case falling within Category 1 as outlined at [67] above, such that I should grant an AAI in respect of them unless Dr Smith can show strong reasons why I should not do so. I am satisfied that there are no such strong reasons in this case. Indeed in this type of case, it will be even more difficult than in a conventional ASI case to establish reasons why, notwithstanding the clear infringement of the applicant's legal rights, the court should nonetheless refrain from issuing injunctive relief to protect that right (given the matters in [65] above).

88. I accept that relief is also sought by Dr Smith in the Smith RFA which does not so directly seek to impugn the Three Awards, and for that purpose, it is necessary to consider a further issue relating to the Smith RFA. Dr Smith is not a party to the Settlement Agreement and the arbitration agreement it contains. He obtained a s.9 stay in respect of the claims brought in the 2018 Proceedings because he was a third party beneficiary of certain promises as an affiliate of some of the signatories, and was able to enforce those provisions and to do so in arbitration, given the width of the arbitration agreement (see [20] above). However, Dr Smith is in significant respects seeking to bring positive claims against Mr Sodzawiczny, not to defend Mr Sodzawiczny's claims, but to advance a claim in deceit against Mr Sodzawiczny. Subject to the particular claims discussed at [92] below, he has no right to bring such a claim under the arbitration agreement in the Settlement Agreement, and any LCIA tribunal appointed over such claim would have no jurisdiction.

89. For that reason, and subject to [92] below, all of the claims in the Smith RFA fall into Category 2 as outlined at [70] above – an attempt to assert claims in arbitration over which the arbitral tribunal would have no jurisdiction. It might be said that, in these circumstances, I should leave the issue of jurisdiction to the determination of the arbitral tribunal in the exercise of its *kompetenz-kompetenz* jurisdiction to the extent that they do not clearly fall within Category 1. However:

i) Mr Sodzawiczny has not taken part in the arbitration commenced by the Smith RFA, with the result that injunctive relief of the type recognised by s.72(1) of the 1996 Act is, in principle, available to him.

ii) I have already decided to grant an AAI in relation to the Smith RFA, to the extent that it amounts to a Non-Compliant Challenge to the Three Awards.

iii) To the extent this is a relevant consideration, the Smith RFA concerns an arbitration seated in England and Wales.

iv) The Smith RFA was clearly a response to the striking-out of the Smith Court Claim, something identified as a factor justifying AAI relief by the Court of Appeal in *Albon*: see [71(iii)] above.

v) It is clear that the overall intent and effect of the Smith RFA is to attempt to bring a Non-Compliant Challenge, and thereby infringe Mr Sodzawiczny's rights under the 1996 Act. In these circumstances, and having concluded that the core claims are being pursued in breach of Mr Sodzawiczny's rights under the 1996 Act, I do not consider it would be appropriate to leave this overlapping but fundamental objection to Dr Smith's claims under the Smith RFA to the *kompetenz-kompetenz* jurisdiction of the arbitral tribunal.

90. There is further relief sought in the Smith RFA which any LCIA tribunal appointed in that reference would clearly have no jurisdiction to grant:

i) The request to set aside the alleged agreement between Mr Sodzawiczny and Mr Ruhan, Mr Ruhan not being party to the Settlement Agreement and, absent some link to the Settlement Agreement, the claim for a declaration as to the status of that agreement.

ii) The order requiring Mr Sodzawiczny to account for profits allegedly received from the Orb Claimants or the Sentrum Group.

91. In the particular circumstances of this case, I am also satisfied that it is appropriate to grant an AAI in respect of these claims rather than leave the matter to the *kompetenz-kompetenz* jurisdiction of any LCIA arbitral tribunal, essentially for the reasons given in [89] above.

92. That leaves the claims for breach of the agreement not to sue and/or the arbitration agreement, which is said to have been breached by the 2018 Proceedings, and the claim for breach of the non-disparagement obligation said to have arisen from statements made in those proceedings:

i) As to the former, Mr Justice Popplewell expressly reserved all questions of costs in the stay application to the Second LCIA Arbitration. In the Final Award, Dr Smith was ordered to pay Mr Sodzawiczny's costs. As a result, the claim for costs arising from the 2018 Proceedings has already been dealt with, and the claim appears to be a Non-Compliant Challenge to that determination.

ii) I would, in any event, note that Dr Smith does not appear to have incurred any legal costs – he did not participate in the stay hearing or instruct lawyers, but filed a letter as a litigant in person, and he did not submit any costs schedules.

iii) Nor does he identify any disparaging statements made in the 2018 Proceedings, but in any event these would be privileged statements and not actionable.

iv) Finally the reality is that these assertions are inconsequential fringe claims included within the Smith RFA whose overall purpose is to bring a Non-Compliant Challenge to the Three Awards. If the court were to permit these claims to proceed, it would bring no legitimate benefit to Dr Smith, but simply provide a vehicle through which he would seek to pursue his idée fixe of challenging the TPA and Final Awards by any means possible.

93. That is sufficient to persuade me that I should grant the AAI sought against Dr Smith in respect of the entirety of the Smith RFA. It is not necessary in those circumstances to explore, in the context of this application, whether there might be yet further reasons why AAI relief might, or might not, be appropriate in relation to particular relief in the Smith RFA: for example the consequence of the fact that the claims in the Smith LCIA appear on their face to embrace the counterclaims brought by Dr Smith and Mr McNally in the Second LCIA Arbitration, which were dismissed, and the fact that issues were raised about what is now being described as the alleged Secret Oral Agreement in the course of the Second LCIA Arbitration.

Dr Cochrane

94. Dr Cochrane is a party to the arbitration agreement in the Settlement Agreement, rather than simply an affiliate with rights under the Contracts (Rights of Third Parties) Act 1999, and she was not a party to the arbitrations resulting in any of the Three Awards. How does this affect the analysis?

95. In so far as the Smith RFA seeks to challenge the Three Awards, Mr Sodzawiczny has a legal right that those challenges only be brought pursuant to and in accordance with the provisions of the 1996 Act, and Dr Cochrane as a non-party to the arbitrations which culminated in the Three Awards can be in no better position than Dr Smith (indeed, in relation to the Pro Vinci Award, she is in exactly the same position). Further, Dr Cochrane is herself party to an agreement providing for the arbitration of disputes under the Settlement Agreement in LCIA Arbitration with a seat in England and Wales, and I am satisfied this carries with it an implied promise not to bring Non-Compliant Challenges to awards made under that agreement, whether Dr Cochrane was a party to the particular arbitral reference or not.

96. The clear jurisdictional objection arising in relation to Dr Smith by reason of him not being a party to the Settlement Agreement (see [88] above) does not arise in relation to Dr Cochrane. However a different jurisdictional objection has been raised, namely that Dr Cochrane is *en désastre*, and has been since 24 November 2016, and on the basis of the unchallenged Jersey law evidence before the court - from Guillaume Staal, a partner

in the firm of Dickinson Gleeson and an Advocate of the Royal Court of Jersey – that has the following effect:

i) Pursuant to Article 8 of the Bankruptcy (Désastre) (Jersey) Law 1990 ("**the Law"**), save for property held by a debtor on trust, all property of a debtor and the capacity to take proceedings in relation to such property vest in the Viscount of Jersey immediately upon the declaration of *désastre*.

ii) Pursuant to Article 24 of the Law, a debtor during the period of *désastre* is not permitted to act as a trustee, and if they are a trustee when declared *en désastre* they must resign forthwith. Contravention of these rules is an imprisonable offence.

iii) Article 9 of the Law provides a mechanism for the Viscount to gather in "after-acquired property" (i.e. property acquired by the debtor after the date of the *désastre*) by serving a written notice within a specified period; and Article 18 of the Law requires a debtor to disclose such after-acquired property and assign it to the Viscount. Failure to do so is an imprisonable offence.

iv) A debtor lacks capacity to bring claims that are vested in the Viscount, and any such claims purportedly brought by the debtor would be void.

97. On that basis, any right which Dr Cochrane had to bring claims concerning the Settlement Agreement which arose before 24 November 2016 has been transferred to the Viscount, unless she held the right to claim as a trustee (although in that eventuality, Dr Cochrane would be committing a criminal offence under Jersey law by acting as a trustee). This would certainly include the claim for alleged deceit inducing the Settlement Agreement or damages said to flow from misrepresentations said to have been made in the run-up to the Settlement Agreement.

98. There has been a suggestion made on Dr Cochrane's behalf by Mr Crossley that Dr Cochrane is advancing claims in the Smith RFA as a trustee. Reliance was placed in this regard on my Directed Trial judgment finding that Dr Cochrane received certain funds under the Isle of Man settlement as trustee for the Orb Claimants, albeit subject at that stage to the beneficial interest of Mr Ruhan which had priority (see *Re Smith* [2021] EWHC 1272 (Comm), [79], [191]). As to this:

i) I found that the relevant corporations were held by SMA as trustee for the Orb Claimants, and I have since ordered SMA to transfer its legal title in the transferred assets to new trustees (*SMA Investment Holdings v Harbour Fund II LP and ors* [2023] EWHC 428 (Comm), [100]).

ii) The only asset which I found Dr Cochrane had received as trustee by way of transfer from Messrs Cooper and McNally was some £13m which had then been applied to acquire a number of assets (see Directed Trial Judgment, [422(iv)], [647] and [649]-[651])). However, I held that these amounts were held subject to the Harbour Trust, over which I have appointed new trustees (*Serious Fraud Office v Litigation Capital and ors* [2022] EWGC 3053 (Comm), [96]). Further, I have already held that payments wrongfully made from the various corporations held in the Isle of Man

structure are assets of the companies, with the claims vested in the Joint Liquidators appointed over those companies (Directed Trial Judgment, [652-654]).

iii) On this basis, it is wholly unclear to me how Dr Cochrane is said to retain a position as trustee in some way relevant to the rights to be asserted in the Smith RFA.

99. In addition, as I have stated, any LCIA tribunal appointed in that reference would clearly lack jurisdiction to deal with:

i) The request to set aside the alleged agreement between Mr Sodzawiczny and Mr Ruhan, Mr Ruhan not being party to the Settlement Agreement and, absent some link to the Settlement Agreement, the claim for a declaration as to the status of that agreement.

ii) The order requiring Mr Sodzawiczny to account for profits allegedly received from the Orb Claimants or the Sentrum Group.

100. It would, once again, be open to me to leave the issue of whether Dr Cochrane retained rights under the Settlement Agreement – including rights to arbitrate any dispute – or whether they were now vested in the Viscount, and the position of the two claims identified in the preceding paragraph, for determination by an LCIA arbitration tribunal appointed pursuant to the Smith RFA as part of its *kompetenz-kompetenz* jurisdiction. However, in circumstances in which I am satisfied:

i) that the core and essential relief sought in the Smith RFA infringes Mr Sodzawiczny's legal right under the 1996 Act that the Three Awards should not be subject to any Non-Compliant Challenge;

ii) the overall intent and effect of the Smith RFA is to attempt to bring a Non-Compliant Challenge, and an infringement of Mr Sodzawiczny's rights under the 1996 Act ([89(iv)-(v)] above; and

iii) for reasons I explain at [103] below, I am satisfied that it is Dr Smith who is the moving spirit behind the Smith RFA, using Dr Cochrane's name to assist his cause;

I am satisfied that I should grant AAI relief in relation to claims transferred to the Viscount on the basis that the arbitral tribunal would have no jurisdiction to determine them.

101. What does that leave?

i) The claim for an order that Mr Sodzawiczny account for funds he obtained from Dr Cochrane. However, nothing was payable by Dr Cochrane to Mr Sodzawiczny under the Settlement Agreement, only by Pro Vinci.

ii) The legally incoherent claim to "set aside" and "declare void" the recitals to the Settlement Agreement but not the Settlement Agreement itself.

iii) The claim for the declaration that the Settlement Agreement is final and binding in circumstances in which there is no dispute as to this state of affairs.

iv) A claim that the 2018 Proceedings were a breach of contract, and for costs resulting from them. However, Dr Cochrane has no such claim because she was not party to those proceedings.

v) A claim that Mr Sodzawiczny has made disparaging statements about Dr Cochrane in unidentified legal proceedings, which would be legally privileged in any event (and in circumstances in which Dr Cochrane was not party to the 2018 Proceedings).

102. Once again, I am satisfied that the reality is that these assertions are inconsequential fringe claims included within the Smith RFA whose overall purpose is to bring a Non-Compliant Challenge to the Three Awards. If the court were to permit these claims to proceed, it would bring no legitimate benefit to Dr Cochrane but simply provide a vehicle through which Dr Smith (acting in Dr Cochrane's name) would seek to pursue his idée fixe of challenging the TPA and Final Awards by any means possible.

103. In this regard, I am satisfied that Dr Cochrane is acting wholly at Dr Smith's direction and for his purposes in lending her name to the Smith RFA. In the Directed Trial Judgment, [606], I found that:

> "Dr Smith has a track record of seeking to disguise his interest in assets behind Dr Cochrane. The investigations brought by the SFO in connection with the Izodia Theft identified a ski chalet held through a corporate vehicle of which Dr Cochrane was a director and the transfer of his luxury car collection into Dr Cochrane's name shortly after the Izodia Theft came to light.
>
> Although notionally assetless, Dr Smith has been able to live 'high on the hog' (in his own phrase) off assets notionally owned by Dr Cochrane, spending those assets in accordance with Dr Smith's idiosyncratic tastes (including a commissioned water clock and artwork chosen by Dr Smith) or for his personal benefit (for example on private jet travel, much of which involved Dr Smith travelling alone). While I accept that much of the money spent by Dr Smith belonged to others, the freedom with which he dissipated assets notionally in Dr Cochrane's ownership is relevant when considering whether such interest as Dr Cochrane had in those assets was held in her own right, or as Dr Smith's nominee.
>
> Dr Cochrane has on a number of occasions proclaimed that she is a 'busy GP with two young daughters and no real business experience', with minimal knowledge of Dr Smith's business activities. Dr Smith has himself accepted that Dr Cochrane lacked 'any independent experience of the world of business, the world of property deals'. The vast network of companies which she apparently owns, and the complex web of dealings in which those companies have engaged, strongly support the suggestion that her involvement is nothing more than as a cipher, and that Dr Smith – with his extensive track-record of complex, contrived and dishonest business dealings – is 'calling the shots'.

> Dr Cochrane has no obvious sources of independent wealth from which she might have acquired these assets independently of Dr Smith. In 2005 , according to her own evidence, she was close to destitution, and in 2014 and 2016, she gave accounts of her assets and wealth which identified no substantial assets beyond those transferred under the IOM Settlement.
>
> The confiscation order made against Dr Smith gave him every incentive to hide his ownership of assets behind a nominee owner who he could trust to follow his directions. It is clear that Dr Smith has acted at all times since the Confiscation Order was made with a view to making it appear as if he has no assets – for example his Deed of Separation with Dr Cochrane of 11 March 2014 sought to give Dr Smith all the benefits of certain properties, while transferring no property for the SFO to attach."

104. I am satisfied that that is also the position here, and there was no real attempt to argue otherwise.

105. In these circumstances, I will grant the AAI sought against Dr Cochrane as well.

THE MERITS OF DR SMITH'S COMPLAINT

106. Much of Dr Smith's evidence and submissions concentrated on his case that Mr Sodzawiczny had provided a false account of his involvement in the Sentrum project before the Settlement Agreement was entered into, and that Mr Sodzawiczny had acted in breach of fiduciary duty to MTech in relation to that project.

107. I have not found it necessary to enter into the merits of that dispute, and would be reluctant to do so in circumstances in which there are pending proceedings by MDL against Mr Sodzawiczny in which the court may be required to hear an application.

108. To the extent, however, that parties to any of the Three Awards wished to contend that those awards were affected by serious irregularity in the form of the award being obtained by fraud or that the way in which the award was procured was contrary to public policy, the means of doing so was a challenge under s.68(2)(g) of the 1996 Act, within the time limit provided for by the 1996 Act or as extended by the court. Dr Smith took advice on whether such an application could now be brought, and was apparently advised it could not. It was Dr Smith who insisted on invoking arbitration in respect of the claims made against him in the 2018 Proceedings when Mr Sodzawiczny had commenced those claims in court. That decision was no doubt seen as bringing certain tactical benefits, but it had legal consequences as well. One of those consequences is that Dr Smith cannot do what he is now seeking to do, namely to challenge the resultant awards by Non-Compliant Challenges.