Case No: 2011-95

Neutral Citation Number: [2012] EWHC 130 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2012

Before :

MR JUSTICE ANDREW SMITH

- -

Between :

Nomihold Securities Inc	**Claimant**
- and -	
Mobile Telesystems Finance SA	**Defendant**

- -
- -

Adrian Beltrami QC and Alexander Polley
(instructed by **Simmons & Simmons LLP**) for the **Claimant**
Vernon Flynn QC, David Scorey and Tom Smith
(instructed by **Latham & Watkins LLP**) for the **Defendant.**

Hearing date: 19 January 2012

- -

Judgment

Mr Justice Andrew Smith :

Introduction

1. There are two applications before me. By application notice dated 2 December 2011 the claimant, to whom I refer as "Nomihold", applied for an order by way of a final injunction that the defendant, to whom I refer as "MTSF", within seven days discontinue or take all steps within its power to discontinue two arbitrations before the London Court of International Arbitration ("LCIA") to which I refer as the "SPA Arbitration" and the "Second Option Agreement Arbitration". Nomihold pursued its application before me only under section 37 of the Senior Courts Act 1981 (the "1981 Act"), although it was originally also made under section 44 of the Arbitration Act 1996 (the "1996 Act"). MTSF by application notice dated 30 December 2011 applied under section 9 of the 1996 Act for an order that Nomihold's application be stayed.

2. On 11 November 2010 in what I shall call the "First Option Agreement Arbitration" a LCIA tribunal comprising Mr. Steven Jagusch, Mr. Peter Rees QC and Mr. Peter Turner (the "Tribunal") made an award (the "Award") against MTSF in Nomihold's favour. In these proceedings, brought by an arbitration claim form on 25 January 2011, Nomihold claimed orders under section 66(1) of the 1996 Act that Nomihold should be at liberty to enforce the Award in the same manner as a judgment or order of the High Court and under section 66(2) of the 1996 Act that judgment be entered in the terms of the Award, and also sought a world-wide freezing order against MTSF in respect of the amount of the Award and disclosure orders. At an ex parte hearing on 26 January 2011 Gloster J made the orders sought in the claim form. On 1 August 2011 Burton J dismissed MTSF's application to set aside the orders of Gloster J under section 66 of the 1996 Act and affirmed her decision that the Award should be enforced as a judgment. I have been told that the Court of Appeal granted permission to appeal against Burton J's order but it was conditional upon the amount of the Award and some security for costs being paid into court by 30 January 2012, and that has not been done. It appears from what I have been told unlikely that an appeal will be pursued.

The underlying dispute.

3. MTSF is incorporated in Luxembourg and has been described as a "financing entity" for its parent company, Mobile Telesystems OJSC, a wireless communications provider in Russia and the Commonwealth of Independent States. Nomihold, incorporated in the British Virgin Islands, owned the shares in Tarino Limited ("Tarino"), which is a company incorporated in the Seychelles and was the indirect holder, through a combination of its subsidiaries, of all the issued share capital of Bitel LLC ("Bitel"), a mobile telecommunications company incorporated in the Kyrgyz Republic. Bitel holds an apparently valuable GSM 900/1800 licence for the entire territory of Kyrgyzstan.

4. On 17 November 2005 MTSF and Nomihold entered into a sale and purchase agreement (the "SPA") under which MTSF agreed to acquire a 51% holding in Tarino from Nomihold for $150 million. On 22 November 2005 MTSF and Nomihold

entered into a put and call option agreement (the "Option Agreement") in respect of the other 49% shares in Tarino and a corresponding interest in Bitel. The Option Agreement gave MTSF a call option exercisable between 22 November 2005 and 17 November 2006, and gave Nomihold a put option exercisable between 18 November 2006 and 8 December 2006. In either case the price for the 49% holding was $170 million. The SPA and the Option Agreement each includes an arbitration agreement for arbitration in London under LCIA rules of "any dispute, controversy or claim arising out of or in connection with" it.

5. A dispute arose between Nomihold and MTSF after Bitel's corporate offices were seized by a third party following a decision of the Kyrgyz Supreme Court on 15 December 2005, as a result of which, as MTSF avers, the investment in Tarino was valueless. In November 2006 Nomihold exercised the put option or purported to do so, and it contended that MTSF was obliged to pay $170 million for the shares. MTSF refused to pay.

The arbitrations

6. On 9 January 2007 Nomihold commenced before the LCIA the First Option Agreement Arbitration under the Option Agreement, and sought among other relief specific performance of the put option. By the Award the Tribunal ordered MTSF to pay US$170 million in exchange for 49% of the shares in Tarino and damages of US$5.88 million, together with interest on both sums, and denied MTSF's requests for rescission of the Option Agreement, for a declaration that "Nomihold was not in a position to satisfy the obligations under the Option agreement and therefore could not make its Put option rights" and for a declaration that Nomihold was no longer able to exercise the put option.

7. On 26 June 2008 MTSF commenced the SPA Arbitration under the SPA Arbitration Agreement, alleging that it was not bound by the SPA because of misrepresentation, mistake and Nomihold's breach of its terms and that Nomihold was obliged to return the money paid thereunder and to pay damages. More specifically it made allegations:

   i) About Tarino not being the legal owner (through the holding structure) of Bitel.

   ii) About Tarino shares not being free from encumbrances and third party rights and claims because of an agreement to sell it to purchasers referred to as the "Kazakh Group".

   iii) About Nomihold not disclosing to MTSF a decision made in the Bishkek Inter-District Court concerning the proper registration of Bitel (so that Nomihold's representation about Tarino's control of Bitel was incomplete and so misleading).

The issues raised in the SPA Arbitration had an impact upon the First Option Agreement Arbitration because MTSF maintained that the "validity of the Option Agreement is predicated upon a valid SPA and valid performance of the SPA" and MTSF was "running as a defence to liability under the Option Agreement the alleged

invalidity or non performance of the SPA" (as the Tribunal put it in a letter to the parties dated 22 August 2008).

8. The SPA Arbitration has not progressed. After it was commenced by the LCIA's receipt of the request for arbitration, Nomihold responded to it on 30 July 2008, but thereafter apparently the LCIA Court did not appoint a tribunal under rule 5.4 of the LCIA rules. (The statement in the written submission of Mr Vernon Flynn QC, who represented MTSF, that there was an "arbitral panel" was acknowledged to be a mistake.) On 30 June 2008 MTSF advised the Tribunal that it had commenced the SPA Arbitration. It asked Nomihold to agree to the two references being consolidated, but Nomihold declined. Nomihold also resisted MTSF's request that the Tribunal should stay the First Option Agreement Arbitration until an award had been made in the SPA Arbitration, and rejected the Tribunal's suggestion that it should accept appointment in the SPA Arbitration (provided the SPA Arbitration was expedited). Nomihold's reasons for rejecting these various suggestions have not been explained or explored before me.

9. In these circumstances, the Tribunal decided on 22 August 2008 that what it called the "SPA issue" should be determined in the First Option Agreement Arbitration. It defined the SPA issue in a letter dated 8 October 2008 from Mr Jagusch, as chairman of the Tribunal:

> "For the avoidance of doubt, the 'SPA issue' is whether the Option Agreement is predicated upon a valid SPA and the valid performance thereof and, if it is, whether the SPA was invalid or not performed, thus amounting to a defence to Nomihold's claims in these proceedings under the Option Agreement."

10. On 10 November 2010 MTSF served a SPA Issue Statement of Case in the First Option Agreement Arbitration, in which it requested the Tribunal to "set aside the SPA for misrepresentation or mistake or … find that Nomihold has breached the contract such that the entire purchase price of $150 million must be returned to [MTSF] on the grounds of failure of consideration, or that compensatory damages of like amount be paid to [MTSF] to vindicate Nomihold's breaches of contract".

11. In the Award the Tribunal determined:

    i) With regard to the complaint about Tarino not being the legal owner of Bitel, that it owned them (whether or not Bitel's shares were so registered).

    ii) With regard to the complaint about Tarino shares not being free from encumbrances and third party rights and claims because of an agreement to sell them to the Kazakh Group, that there was no binding agreement that could possibly have amounted to an encumbrance or right or claim.

    iii) With regard to the complaint about non-disclosure of the decision of the Bishkek Inter-District Court, that the decision was appealable and of no effect until an appeal was disposed of, and no representation by Nomihold was false on account of the decision.

Thus the Tribunal rejected the three complaints which were comprised in the SPA issue, an issue that was stated in the Award at para 19 to be "The question whether the Option Agreement is predicated upon a valid SPA, and whether the SPA is valid or not performed". It concluded at para 293 as follows: "[MTSF] has failed to establish that the SPA or the Option Agreement are void or unenforceable for misrepresentation or mistake or that there was any breach of warranty in relation to either".

12. In November 2011 MTSF took two steps which have led to the applications that are before me. On 17 November 2011 it submitted to the LCIA what it called an "amended request for arbitration" in the SPA Arbitration. The standing of this document seems to me uncertain: the LCIA rules do not provide for amendment of a request for arbitration. It might be that properly the document is to be regarded as a new request for arbitration and MTSF is to be taken to have abandoned its earlier request, but this question was not explored before me and I say no more about it. I shall refer to the document as the "Amended Request" without prejudice to any issue of this kind that might later arise between the parties.

13. The Amended Request includes, as well as to the complaints in the original request under the SPA Arbitration Agreement, a complaint (the "money laundering complaint") that "Nomihold was in the business of money laundering", that it had acquired the Tarino shares "by unlawful means and for an unlawful purpose" and that they were "criminal property". It alleges that in these circumstances Nomihold did not have capacity and power to enter into the SPA and perform obligations under it, that it made false representations about its capacity and power to do so and that it is in breach of warranties under the SPA. The amended request seeks a declaration in these terms: "That [MTSF] is not obliged to carry out LCIA arbitration award … dated 11 November 2010 …", and damages or equitable compensation because, as a result of the money laundering complaints, Nomihold has been unjustly enriched.

14. On 21 November 2011 MTSF filed with the LCIA a new request for arbitration under the Option Agreement, and commenced the Second Option Agreement Arbitration. This raised similar money laundering complaints: that Nomihold was in the business of money laundering and acquired through Tarino its interest in Bitel by criminal acts. The remedies sought in the Second Option Agreement Arbitration include, as well as rescission or termination of the Option Agreement and damages or an award on the basis of unjust enrichment, a declaration in similar terms to that sought in the Amended Request and an order in these terms: that MTSF be released from any obligation to pay the purchase price of US$170 million to be paid under the Option Agreement (a "release order").

15. When I refer to the "New Arbitrations" in this judgment, I am referring to the SPA Arbitration that MTSF seeks to bring by the Amended Request and the Second Option Agreement Arbitration.

Nomihold's argument

16. Nomihold contends that in bringing and proposing to pursue the New Arbitrations, MTSF is acting and threatening to act in breach of contract because, by entering into the agreements for LCIA arbitration governed by the LCIA rules, MTSF agreed to comply with any award that was made pursuant to the arbitration agreement and also to comply with the supervisory jurisdiction of the English court. Accordingly, it is

said both in relation to the Amended Request and the Second Option Agreement Arbitration that it is a breach of the Option Arbitration Agreement for MTSF to seek (as it is put by Nomihold's solicitor, Mr David Sandy, a partner in Simmons & Simmons) "to re-arbitrate matters that have already been determined in the [First] Option Agreement Arbitration and to usurp the jurisdiction of the English court to supervise enforcement of the Award". Nomihold submits that, because issues in the Amended Request have been determined in the Award, it is also a breach of the SPA Arbitration Agreement for MTSF to make the Amended Request to the LCIA.

17. Nomihold also submits that the New Arbitrations are, and if pursued would be, an abuse of process and so vexatious, oppressive and unconscionable. It is said that they contravene the public policy expressed in the Latin maxim "Nemo debet bis vexari pro una et eadem causa" and its manifestation in the principles of estoppel per rem judicatam and issue estoppel and the principle associated with Henderson v Henderson, (1843) 3 Hare 100, 115 per Wigram VC that it is an abuse of process to raise in subsequent litigation matters that could and should have been raised in earlier proceedings (or, as it has been said, could and therefore should have been so raised: per Lord Kilbrandon in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd, [1975] AC 581, 590.) For the sake of a convenient, if inelegant, description, I shall adopt the expression the "re-arbitration complaints" to refer to Nomihold's complaints that MTSF's conduct contravenes these three principles.

18. In support of the re-arbitration complaints, the main points upon which Nomihold relies are, I think, these:

    i) That the declarations and the release order would subvert the very result of the First Option Arbitration through a procedure that is not available to MTSF under the arbitration agreements (or otherwise). The matters that MTSF seeks to pursue have been determined and so any claim based on them has merged in the Award, and cause of action estoppels preclude MTSF from resurrecting them.

    ii) That in the SPA arbitration MTSF seeks to pursue relief on the basis of complaints that were made in the original SPA Arbitration and that were determined in the First Option Agreement Arbitration as the SPA Issues and were rejected. These claims too have been merged in the Award, and the principle of cause of action estoppel precludes MTSF from resurrecting them. They include the new claim in the Amended Request for "an award of damages and/or equitable compensation based upon Nomihold's unjust enrichment" in as much as this is a claim for different relief on the basis of the same facts as were alleged in the original request. (I observe in passing that here Nomihold's argument would appear to be supported by The Glasgow and South-Western Railway Co v Boyd & Forrest, [1918] SC 14 (HL).)

    iii) That, even if the claims in the New Arbitrations are not debarred by estoppel per rem judicatam, MTSF is precluded by issue estoppel from asserting the matters upon which they are based.

    iv) That the money laundering complaints could and should have been brought in the First Option Arbitration and it is vexatious and an abuse of process to bring them in the New Arbitrations.

19. I should explain further three aspects of Nomihold's argument.

20. Nomihold submits that the New Arbitrations are a device deployed by MTSF in what it calls an "enforcement war", and alleges that MTSF's purpose is to prevent enforcement of the Award in whatever way it can. Undoubtedly there have been numerous hearings before this court since the order of Gloster J on 26 January 2011. There have also been related proceedings in the Seychelles, in Luxembourg and in the Isle of Man. It is not necessary to describe them in detail. I am prepared to accept for present purposes that MTSF has used and intends to use any legal routes available to it to prevent enforcement of the Award. That in itself does not determine whether it should be restrained from pursuing the New Arbitrations.

21. Secondly, Nomihold submits that the money laundering complaint was considered and dismissed by Burton J in his judgment of 1 August 2011. At the hearing before Burton J one of the arguments advanced by MTSF that the Award should not be enforced was that this would be contrary to English public policy because of the money laundering complaint. That argument was rejected. However, as I read his judgment, Burton J did not determine that the money laundering complaint, if made out, did not infect the SPA or the Option Agreement. He was concerned only with public policy with regard to enforcing the Award.

22. Thirdly, Nomihold's case is that the money laundering complaint is based upon evidence given by a witness of Nomihold, Mr Yerimbetov, in the First Option Agreement Arbitration in December 2007. I accept that for present purposes because it has not been disputed before me by MTSF.

MTSF's undertaking

23. When opening his submissions Mr Adrian Beltrami QC, who represented Nomihold, described the claim in the Amended Request for a declaration (and, as I would understand his submission, the similar claim in the request for the Second Option Agreement Arbitration) as "the most blatantly abusive part of the process". I therefore asked Mr Flynn whether he confirmed that MTSF's position was that it could properly pursue New Arbitrations in their entirety and that it had no secondary or alternative case that it should be allowed to pursue the rest of the claims even if the Court restrains it from pursuing the claims for the declarations. Mr Flynn responded that MTSF had no secondary or alternative case. Later in the hearing, however, MTSF had a change of heart: it offered an undertaking in these terms:

> "MTSF undertakes 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 $179 million to be paid under the Option Agreement."

Therefore the "most blatantly abusive part of the process" is to be abandoned together with the claim for a release order. Although Nomihold still maintains that "the undertaking is not sufficient to justify the saving of either Request", its application for an injunction must be considered on the basis that this undertaking is offered.

The Issues

24. There was some difference between Mr Beltrami and Mr Flynn about how the issues that I have to decide should properly be formulated. It seems to be convenient to categorise the questions as follows:

i) Does the court have jurisdiction under section 37 of the 1981 Act?

ii) Is MTSF entitled to a stay under section 9 of the 1996 Act?

iii) In what circumstances will the court make an anti-arbitration injunction?

iv) Is it just and convenient to grant Nomihold's application, and ought the court exercise its discretion to do so?

Jurisdiction under section 37 of the 1981 Act

25. The jurisdiction upon which Nomihold relies is conferred on the court by section 37 of the 1981 Act in these terms:

> "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just..."

26. The parties cannot deprive the court of jurisdiction by an agreement between them (any more than they could so confer jurisdiction on the court). The only question is whether the general jurisdiction under the 1981 Act has been curtailed in some relevant way by a more specific statute. MTSF contends that, although not expressed in these terms, this is the effect of section 9 of the 1996 Act, and I shall consider that submission later. It was not suggested that the jurisdiction of the Court is curtailed by section 1 of the 1996 Act: "The provisions of this Part [Part 1 of the 1996 Act] are founded on the following principles, and shall be construed accordingly - … (c) in matters governed by this Part the court should not intervene except as provided by this Part". This section does not limit the court's jurisdiction, but provides statutory guidance about when it should be exercised in relation to arbitrations to which Part 1 of the 1996 Act applies: see Vale do Rio Doce Navegacao SA v Shanghai Bao Stell Ocean Shipping Co Ltd, [2000] AER (Com) 70 at para 48.

27. It is not disputed that the court has jurisdiction under section 37 to grant what have been called "anti-arbitration injunctions", that is to say to make an order that a person do not commence or do not pursue an arbitral reference. If authority still be needed for that, I refer to Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT, [2011] EWHC 34 (Comm) at para 28. It is equally well established that, if it is just and convenient to do so, the court may exercise its jurisdiction under section 37 to make an anti-arbitration injunction on either or both of two bases:

i) That the arbitral proceedings are an infringement of a legal or equitable right of a party, or threaten breach of such a right.

ii) If the proceedings are or threaten to be vexatious, oppressive or unconscionable.

(This formulation reflects the judgment of Aikens J in Elektrim SA v Vivendi Universal SA, [2007] EWHC 571 (Comm) at para 56. It is possible to regard the right not to be subjected to vexatious, oppressive or unconscionable litigation or arbitral proceedings itself as an equitable right, as Hobhouse J did in Cie Europeene de Cereals SA v Tradax Export SA, [1986] 2 Ll L R 301 at p.304, but that debate is not useful for present purposes.)

28. Whatever the basis upon which Nomihold's complaints are put, in essence they are that the New Arbitrations amount to a collateral attack upon the Award, which is an award that is binding between the parties and was made by a properly constituted tribunal. Mr Beltrami cited the judgment of Toulson LJ (sitting at first instance in this court) in Noble Assurance v Gerling-Konzern, [2007] EWHC 253 (Comm), in which Noble Assurance sought to restrain proceedings in the United States District Court for the District of Vermont brought to vacate an arbitration award in its favour: having observed that the "whole object of the Vermont proceedings is to undo the findings of the arbitrators as to Gerling's obligation to indemnify Noble", Toulson LJ continued (at para 87):

> "I do not think that the fact that the award has been delivered, rather than is pending, weakens the position either on authority or in principle. As to authority, in the *Glencore* case [sc Glencore International AG v Exter Shipping Ltd, [2002] EWCA Civ 528] the court observed, at para 68, that the issues sought to be raised by the respondents in another jurisdiction had to a large extent already been decided by the English court (and that, to the extent that the issues had not already been determined, they had been deliberately ducked in England when they ought properly to have been raised if the respondents wished to raise them). As to the principle, a collateral attack on a binding judgment or award of a properly constituted tribunal is capable of being oppressive conduct at least as much as if the same proceedings had been commenced before the judgment or award had been given."

(In fact Toulson LJ did not make an injunction against Gerling-Konzern because, in the exercise of his discretion, he considered that it would suffice to meet the ends of justice to make a declaration, but that is irrelevant for present purposes.)

29. In support of its submission that a challenge to an award made by a properly constituted arbitral tribunal constitutes both a breach of contract and a procedural abuse, Nomihold also cited the judgment of Cooke J in C v D, [2007] EWHC 1541 (Comm), which was upheld by the Court of Appeal, [2007] EWCA Civ 1282. In that case the claimant sought an anti-suit injunction restraining the defendant, who proposed to challenge a London arbitration award in the courts of the United States, from bringing proceedings to challenge, vacate or review the award. Cooke J said (at para 29) that:

> "The significance of the 'seat of arbitration' has been considered in a number of recent authorities. The effect of them is that the agreement as to the seat of an arbitration is akin to agreement to an exclusive jurisdiction clause. Not only is there agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over that arbitration. By agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration."

He referred to A v B, [2006] EWHC 2006 (Comm) in which Colman J said (at para 111), "Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration", and continued as follows (at paras 51 to 54):

> "51. If, as I have found, the governing law of the agreement to arbitrate and the agreement to refer is English law then it is common ground that, as stated by Lord Hobhouse in *AEGIS Ltd v European Re-insurance Co of Zurich* [2003] 2 CLC 340; [2003] 1 WLR 1041 (PC) at paragraph 9, 'it is an implied term of an arbitration agreement that the parties agree to perform the award'.
>
> 52. The earlier authority upon which he relied, *Bremer Oeltransport v Drewry* [1933] 1 KB 753 at 760 and 764, also places the implied term to perform the award in the agreement to arbitrate or the agreement to refer. The effect of Colman J's decisions in *A v B* is that there is a contractual promise made by each of the parties, in the agreement to the curial law, to treat the courts of the seat of the arbitration as having exclusive supervisory jurisdiction.
>
> 53. Whilst a challenge to the award in accordance with the terms of the arbitration agreement (here the *Arbitration Act* 1976) or in accordance with the law of the agreed supervisory jurisdiction (here English law) does not constitute a breach of contract, the attempt to invoke the jurisdiction of another court is such a breach, of the contract to arbitrate, the agreement to refer and the agreement to the curial law. Such a challenge usurps the function of the English court which has a power to grant injunctions to protect its own jurisdiction and the integrity of the arbitration process. In such a case there is an infringement of the legal rights of C (both contractual and statutory rights) under English law and an abuse of the process of this court in the usurpation of its exclusive jurisdiction to supervise arbitrations with their seat in this country.
>
> 54. When Colman J in *A v B (No 2)* at page 363 stated that 'the whole structure of the supervisory jurisdiction of the seat of an international arbitration would be completely undermined',

> unless there was exclusive jurisdiction in the court of the seat of an international arbitration, it was suggested that he was overstating the case. The difficulties which would arise, however, if there was not such exclusive jurisdiction or if the exclusive jurisdiction agreement was ignored, are manifest. No challenge has been made to the Partial Award in this country and it is to be regarded as binding therefore in this jurisdiction. If proceedings were brought in New York and the challenge was successful there, what would a third party country's courts do when faced with an application to enforce the award? Moreover, although D's counsel would not accept the point, it appears to me that the logic of D's argument is that D could take proceedings anywhere in the world to challenge the award on the basis that the substantive law of New York governed the contract and had the effect for which it contended, namely that a 'manifest disregard of the principles of New York law' vitiated the award (unless there is a narrow jurisdictional argument under the FAA)."

30. By the arbitration agreements in the SPA and the Option Agreement, Nomihold and MTSF agreed that arbitration proceedings should be governed by the LCIA rules, which include these provisions:

> i) "By agreeing to arbitration under these Rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except with the agreement in writing of all parties to the arbitration or the prior authorisation of the Arbitral Tribunal or following the latter's award ruling on the objection to its jurisdiction or authority." (rule 23.4).
>
> ii) "All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made." (rule 26.9).

31. Thus, by the SPA and Option Arbitration Agreements Nomihold and MTSF agreed both to LCIA arbitration and to the supervisory jurisdiction of the English court subject to their agreement through the rules restricting the circumstances in which they might invoke the supervisory jurisdiction. That "supervisory" jurisdiction is not only supervisory in a narrow sense of a court overseeing arbitrations in order to correct error. It includes the jurisdiction to make orders to support the arbitration under section 44 of the 1996 Act (see Sheffield United FC v West Ham United FC, [2008] EWHC 2855 (Comm) at para 40) and orders to enforce an award and to make effective the agreement to refer disputes to arbitration. Thus it is a breach of an arbitration agreement to bring proceedings to make "an unlawful attempt to invalidate the award" (C v D, loc cit at para 55) or to make a "collateral attack on a binding

judgment or award of a properly constituted tribunal" (Noble Assurance v Gerling-Konzern, loc cit at para 87).

32. Unless the court's jurisdiction under section 37 of the 1981 Act is curtailed by some other statutory provision, I see no basis for concluding that the court has no jurisdiction to make an anti-arbitration injunction or for concluding that it has no jurisdiction for making an order preventing the arbitration of matters already determined between the parties: see The Glasgow and South-Western Railway Co v Boyd & Forrest (cit sup). Unless it is prevented by section 9 of the 1996 Act, therefore, the Court does have jurisdiction to determine whether the New Arbitrations involve an unlawful attempt to invalidate the Award or an impermissible collateral attack upon it, and if it concluded that they do, it has jurisdiction to grant relief to restrain MTSF from pursuing them if it is just and convenient to do so.

Section 9 of the 1996 Act

33. MTSF submits that it is entitled to a stay of Nomihold's application under section 9 of the 1996 Act. That section provides:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter... .
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed…".

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".

35. At the start of the hearing of these applications, there were two points in dispute about whether MTSF's application is one to which the section applies:

    i) Whether Nomihold's application notice was covered by the expression "legal proceedings ([brought] whether by way of claim or counterclaim)"?

    ii) Whether the application was "in respect of a matter which under the [arbitration] agreement is to be referred"?

36. The first question no longer arises. After meeting criticism because its claim for a final injunction was made by application notice and not included in its arbitration claim form, Nomihold applied to amend the form to include such a claim, MTSF does not oppose the amendment and I permit it (although I am persuaded by Mr Beltrami, who cited Masri v Consolidated Contractors International SA (No 3), [2008] EWCA

Civ 625, that the procedure originally adopted by Nomihold was not in fact impermissible or defective).

37. I add that in my judgment Nomihold's original application brought by application notice was by way of legal proceedings within the meaning of section 9. I acknowledge that not all forms of legal process are legal proceedings in that sense: see Best Beat Limited v Rossall, [2006] EWHC 1494 (Ch), in which Park J considered that a winding up petition was not covered by the section although it was "a species of legal proceedings". Although the expression "legal proceedings" is qualified in section 9 by the parenthesis "(whether by claim or counterclaim)", that qualification, I think, is intended only to make clear that a party to an arbitration agreement who has himself brought court proceedings is not thereby precluded from invoking the section. However that may be, I cannot accept that section 9 can be circumvented by a party who has agreed to arbitration seeking a court injunction by an application notice rather than by a claim form. That interpretation of the section would unnecessarily create an anomalous loophole in the legislation.

38. MTSF's application therefore turns upon whether the application was "in respect of a matter which … is to be referred" under the arbitration agreements (or one of them). Mr Beltrami submitted that the "matter" in respect of which there are legal proceedings is Nomihold's application for an injunction, arguing that "what is important is the remedy". He also said that the application invokes the court's supervisory jurisdiction and therefore is not a "matter" that could be subject to a reference. Mr Flynn criticised Mr Beltrami's characterisation of the "matter" by reference to the nature of the relief sought in the legal proceedings, and I accept that part of Mr Flynn's argument. I consider that the language of section 9(1) makes it clear that it is directed to the subject of the legal proceedings and not the nature of the legal proceedings themselves or the relief claimed in them or the jurisdiction invoked. I shall, however, revert to Mr Beltrami's submission that what matters is that the application invokes the supervisory jurisdiction.

39. Mr Flynn contended that in this case the "matter" is to be characterised by the fact that Nomihold's essential complaints in its application are the re- arbitration complaints, and submitted that the parties agreed in the arbitration agreements that disputes and controversies about complaints of this kind should be arbitrated.

40. I accept that, if the New Arbitrations proceed, the tribunals would have power to reject MTSF's claims on the basis that they had merged in the Award because of res judicata or on the basis that MTSF has been precluded by issue estoppel from arguing disputed questions upon which its claims relied. (In H E Daniels Ltd v Carmel Exporters and Importers Limited, [1953] 2 QB 242 Pilcher J recognised that a tribunal might reject a claim that is debarred by the rule in Conquer v Boot.) The application of the principle in Henderson v Henderson to the circumstances of this case needs more consideration, although it was not disputed before me that, in proper cases, an arbitral tribunal could apply the principle or an analogous one to dispose of a case before it.

41. The principle of Henderson v Henderson applies typically when a litigant in court proceedings complains about matters that could and should have been raised in earlier litigation. During and after the hearing before me there emerged an issue between the parties about whether MTSF's money laundering complaint could have been

determined in the First Option Agreement Arbitration. Mr Flynn submitted that it was only by agreement between the parties that the Tribunal took it upon itself to determine the SPA issue and it did not encompass the money laundering complaint: that complaint could not have been determined in the First Option Agreement Arbitration unless both parties and the Tribunal had so agreed. Nomihold argued that MTSF knew before the SPA Arbitration was brought the evidential basis for its money laundering complaint and could have raised it, had it wished to do so, in the SPA Arbitration from the start; that the First Option Arbitration included all disputes between the parties about whether the SPA was invalid and not performed; and that, had MTSF raised the money laundering complaint, the Tribunal would certainly have decided it. I do not need to decide this difference, I do not have all relevant material about any agreement between the parties that led to the Tribunal assuming the burden of deciding the SPA Issue, and in view of my decisions on the applications, I do not comment upon the merits of it: it might fall to be determined in the New Arbitrations and I should not trample upon such questions. However, in these circumstances I shall say something about the principle of Henderson v Henderson in the context of arbitral proceedings.

42. The issue between the parties is whether MTSF can raise in the New Arbitrations matters that, as Nomihold asserts, it could and should have raised in the First Option Agreement Arbitration if it wished to raise them at all. The rule that a party will not be permitted to raise an issue that he could and should have raised in an earlier reference is well established and indeed ante-dates Henderson v Henderson: see Smith v Johnson, (1812) 15 East 213. However, where the previous dispute was determined in arbitration, the principle of Henderson v Henderson has a narrower application than where it was determined in court proceedings: Mustill & Boyd, Commercial Arbitration (1989) 2nd Ed. p.412. The consensual nature of arbitration means that a tribunal determines disputes referred to it by the parties. It is because of this, as Mance LJ explained in Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co, [2004] EWCA Civ 1660, that the principle of Henderson v Henderson applies in relation to previous arbitrations only if all parties to subsequent litigation (or their privies) have also been parties to the earlier reference (whereas the principle of Henderson v Henderson can apply where the parties to the earlier and subsequent litigation are different: see Dexter v Vieland-Boddy, [2003] EWCA Civ 14 at para 49).

43. Similarly, as it seems to me, in so far as the principle of Henderson v Henderson is to be regarded as an aspect of the courts' power to control abuse of process (see Glencore International AG v Exter Shipping Ltd, [2002] CLC 1090 at para 35), there is room for debate whether the consensual nature of arbitration gives scope for a tribunal to decide that the reference agreement to which it is itself a party (together with proper consequences of the reference) is an abuse of its own process. For present purposes it suffices to say that, at least where the question is whether a complaint could and should have been raised in an earlier reference, the principle recognised in Smith v Johnson is available to a subsequent tribunal as a basis for rejecting the complaint, because it would be entitled to reject a complaint on the basis that it had been abandoned and the Smith v Johnson principle is an aspect of the principle of abandonment: Excomm Limited v Guan Guan Shipping (Pte) Limited (The "Golden Bear"), [1987] 1 Ll. L R 330, 343.

44. I agree with Mr Flynn's submission, therefore, that, if the New Arbitrations proceed, the arbitrators in them would be entitled to determine Nomihold's contention based upon estoppel per rem judicatam, issue estoppel and what it calls the principle of Henderson v Henderson (and might more exactly be called the doctrine of Smith v Johnson). I cannot see, and it was not suggested, that there is any relevant difference between the ambit of the powers available to tribunals in the New Arbitrations to dispose of claims and the power that a court would have to dispose of complaints on the basis of argument such as Nomihold's re-arbitration complaints including the principle in Henderson v Henderson.

45. However, in my judgment that is 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 section 9 of the 1996 Act. This expression connotes that the parties agreed that the matters must be referred to arbitration. The objective of section 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.

46. The point is explained precisely by Raphael in The Anti-Suit Injunction (2008) in paragraph 7-38, with which I agree. Having considered the decision of the Court of Appeal in Toepfer International GmbH v Société Cargill France, [1997] 2 Ll L R 98, in which it was said that claims for an anti-suit injunction do not fall within the scope even of a broadly worded arbitration clause, the paragraph continues:

> "… it is suggested that the result achieved by the Court of Appeal in *Toepfer v Cargill* is more aptly to be explained on the different basis that, 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."

47. This analysis was endorsed by Teare J in Sheffield United FC v West Ham United FC, [2008] EWHC 2855 (Comm) at para 40), a judgment that, to my mind, is inconsistent with Mr Flynn's submission that MTSF is entitled to a stay under section 9 and with his submission (to which I refer further below) that the court has never granted an anti-arbitration injunction in the absence of a dispute about whether there was an applicable arbitration agreement between the parties. In the Sheffield United case a tribunal established under the Football Association rules had held that Sheffield United FC was entitled to recover damages (to be assessed at a later hearing) from West Ham FC, and West Ham FC had filed an appeal against the interim award to the

Court of Arbitration for Sport ("CAS"). Sheffield United FC sought an injunction to restrain West Ham FC from pursuing the appeal or challenging the interim award otherwise than under the 1996 Act, and West Ham FC applied under section 9 of the 1996 Act to stay Sheffield United's application. West Ham FC contended that, by agreeing to arbitration by the Football Association, the parties had agreed to an appeal from the decision in the arbitration to the CAS. Teare J was unimpressed with that contention ("In my judgment Sheffield United has, to put it at its lowest, a very strong case that West Ham's recourse to CAS is a breach of the arbitration agreement. So strong is it that I cannot discern an answer to it": see para 18 of his judgment), but there was a dispute between the parties about this. Teare J refused the application for a stay and granted Sheffield United's application for interim relief. (I assume, although it is not reported, that the relief was in the form of an injunction.) With regard to the application for a stay he said this:

> "39. This application for a stay raises the question whether an application for an anti-suit injunction based upon a breach of an arbitration clause is a dispute referred to arbitration by terms such as those in Rule K of the FA Rules. This question was the subject of short written submissions in counsel's skeleton arguments which were not developed orally. I was not referred to any decision on the question after the coming into force of the *Arbitration Act 1996*. The question is however discussed in *The Anti-suit Injunction* at paragraphs 7.36-7.38 where two cases decided under the law prior to the 1996 Act are mentioned; *Compagnie Europeene de Cereals SA v Tradax Export SA* [1986] 2 LI. Rep 301 and *Toepfer International v Cargill* [1998] CLC 198.
>
> 40. My approach to this question is as follows. As was stated by Lord Hoffmann in *The Front Comor* [2007] UKHL 4 at paragraph 19 the English courts have for many years exercised a jurisdiction to restrain parties from pursuing foreign proceedings in breach of an arbitration clause. He described such jurisdiction as part of the court's supervisory jurisdiction over the arbitration. Whilst an arbitral tribunal can determine issues of breach between the parties and whilst the remedies available to the tribunal include making orders restraining a party from acting in breach (see section 48(5)(a) of the A*rbitration Act* 1996) the court nevertheless has its supervisory jurisdiction which includes its powers under section 44 of the *Arbitration Act* 1996. There might in some cases, such as the present, be an overlap between the powers of the arbitral tribunal to determine issues of breach between the parties concerning their contractual relationship and the court's supervisory jurisdiction when it is invoked in support of an arbitration agreement. But I do not consider that the class of disputes referred to arbitration by Rule K of the FA Rules encompasses 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; cf C v D [2007] 2 CLC 930 at paragraph 17 per Longmore LJ. My approach to the question therefore appears to be the same as or similar to that suggested in *The Anti-Suit Injunction* at the end of paragraph 7.38. For this reason I must dismiss West Ham's application for a stay."

48. Mr Flynn distinguished the present case from the Sheffield United case because there was a dispute between West Ham FC and Sheffield United FC about whether there was agreement for CAS arbitration whereas here there is no dispute that the parties have agreed to LCIA arbitration in relation to disputes arising out of or in connection with the SPA and the Option Agreement. I accept this submission as far as it goes, but it does not recognise Teare J's reasoning and in particular his reference to "overlap" in para 40 of the judgment.

49. As I see it, the crucial question in determining whether section 9 applies to Nomihold's "legal proceedings" by way of its application is not whether it is in respect of matters covered by the arbitration agreements but whether it is about matters that can also fall to be decided when the court is exercising its supervisory jurisdiction. For this reason I reject Mr Flynn's argument that there would be an inconsistency between the court refusing MTSF's application for a stay and (as is certainly the case) that, unless the arbitration agreement otherwise provides, the court has no jurisdiction under the 1996 Act to dismiss summarily an unarguable claim covered by an arbitration agreement. There is no supervisory jurisdiction (using the expression in its wide sense) for the court to dismiss unarguable claims and so no question of an "overlapping" or concurrent jurisdiction.

50. As I have said, it is Nomihold's case that the New Arbitrations are part of what it calls MTSF's "enforcement war" to avoid the enforcement of the Award, and to challenge it in ways not contemplated by either the arbitration agreements or the 1996 Act; and that they are collateral attacks on the Award (such as described by Toulson LJ). It submits that, if this is so, the challenge to the New Arbitrations falls within the purview of the court's supervisory jurisdiction to protect the Award and to support its enforcement. I agree with that submission, and so, in my judgment, to the extent that the adjudication of Nomihold's application involves determining the re-arbitration complaints, the court is not precluded by the arbitration agreements from determining them for that purpose. They are not matters "to be referred to arbitration", notwithstanding they in themselves are matters properly to be determined in a reference when raised in another context.

51. If I am wrong to recognise an area of overlapping or concurrent jurisdiction so that matters can fall within the compass both of an arbitration agreement and of a (typically implicit) agreement to supervisory jurisdiction, then there is, I think, a different route to the same conclusion which some might prefer. If there is no area of overlap, I would consider it necessary in order to give a proper and workable effect to section 9 to define more specifically the "matter" to which it refers. Thus, in this

case the "matter" that MTSF contends is to be referred to the arbitrators in the New Arbitrations is whether in view of the First Option Agreement Arbitration and the Award they should reject the claims on the grounds of the re-arbitration complaints. Correspondingly the "matter" that is the subject of the legal proceedings, Nomihold's application, is whether in view of the re-arbitration complaints the court should exercise its supervisory jurisdiction in view of the First Option Agreement Arbitration and the Award. The distinction between this approach and that of recognising an area of concurrent jurisdiction, which I have preferred to adopt, appears to me one of arid semantics.

52. For this reason I reject MTSF's contention that Nomihold's application is in respect of a matter which is to be referred to arbitration, and therefore reject its application under section 9. I add that in reaching this conclusion I take no account of the claims that MTSF included in the New Arbitrations but is willing to undertake to the court not to pursue. I also add that it seems to me that, but for the undertakings, it would have been appropriate to restrain those claims not only by way of exercising supervisory jurisdiction in respect of the Award but also to protect the integrity of the orders of Gloster J and Burton J.

53. In view of this conclusion, the question whether this case is covered by the exception in section 9(4) does not arise. I therefore refer to it only briefly. It appeared at the start of the hearing before me that Nomihold did not contend that either the Option Arbitration Agreement or the SPA Arbitration Agreement was null and void, inoperative or incapable of being performed, and it was not said that the exception in section 9(4) applies. Nomihold's solicitors, Simmons & Simmons, had written on 22 December 2011 that:

> "Nomihold does not contend that the arbitration clauses in the SPA and the Option Agreement are null and void, inoperative or otherwise incapable of being performed generally. Nomihold contends that those clauses are inapplicable in respect of disputes which are res judicata, and/or have been determined by, and merged in, the Award and subsequent High Court judgment, or alternatively that your client may not invoke these clauses in those circumstances."

54. However, in his oral submissions Mr Beltrami said that the arbitration agreements were inoperative. (He referred to "the arbitration clause" being inoperative, but I understood him to be making the same submission about them both.) The burden is upon Nomihold to demonstrate this (Downing v Al Tameer Establishment, [2002] EWCA Civ 121 at para 20), and Mr Beltrami did not develop any argument about this. I would suppose that he meant no more than that the arbitration agreements were not applicable to Nomihold's application, but that does not engage the exception to section 9(4). The exception refers to circumstances where the agreement is generally incapable of being put into effect, not to its application to a particular dispute. In any case I cannot see how either of the arbitration agreements can be described as inoperable or how the exception might apply to the facts of this case.

In what circumstances will the court make an anti-arbitration injunction?

55. Mr Flynn acknowledged that there are circumstances in which the court will make an anti-arbitration injunction, but he submitted that the court will not restrain a party from having a matter arbitrated before a tribunal if there is no dispute that the parties are subject to a valid and binding arbitration agreement that a tribunal should determine a matter of that kind. He analysed the authorities relied upon by Mr Beltrami with a view to demonstrating that since the 1996 Act the court has never made an anti-arbitration injunction in these circumstances, and I accept his analysis of them. I have referred to the Sheffield United case upon which Mr Beltrami particularly relied and I accept that in that case there was a dispute about whether the parties had agreed to arbitration before the CAS.

56. However, although the court apparently has not proceeded to make an order in the circumstances to which Mr Flynn refers, there is authority that the court may do so. In Elektrim v Vivendi Universal SA, [2007] EWHC 571 (Comm) it was conceded that in these circumstances section 37 of the 1981 Act "constitutes a very residual power to intervene in an arbitration": see para 48(1). In his judgment Aikens J said this (at para 51):

> "I do not intend to explore generally the question of whether the court has any jurisdiction at all under section 37 of the SCA to grant either interim or final injunctions to restrain arbitrations that are subject to the 1996 Act. I must assume that there is such a jurisdiction, given the comments of the Court of Appeal in the cases of *Cetelem SA v Roust Holdings Ltd* [2005] 1 CLC 821 at para. 74 per Clarke LJ; and *Weissfisch v Julius* [2006] CLS 424 at para. 33(v) per Lord Phillips CJ. Nonetheless, I must consider whether the jurisdiction is wide enough to provide a base on which an injunction might be granted on the facts of this case."

57. On the basis of Aikens J's judgment and Intermet FCZO v Ansol Limited, [2007] EWHC 226 in which Gloster J assumed that the court has power to grant an order to restrain the continuance of an arbitration, Jackson J said this in J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd, [2007] EWHC 1262 (TCC) at para 39: "It is clear from two decisions of the Commercial Court (with which I respectfully agree) that the jurisdiction does survive [the enactment of the 1996 Act], but its exercise will be even more sparing than before".

58. I do not, I think, need to set out the observations of Clarke LJ and Lord Phillips CJ to which Aikens J referred. Aikens J recognised that in view of them he should assume that the court may in proper circumstances restrain a party from having a matter arbitrated before a tribunal despite there being no dispute that the parties are subject to a valid and binding arbitration agreement that the tribunal should determine such matters. In view of the decisions of Aikens J, Gloster J and Jackson J, a fortiori I should so assume. However, the authorities emphasise the caution with which the court should intervene to restrain arbitral proceedings, and this is also emphasised by section 1 of the 1996 Act: see above.

59. Reference was made before me to the doctrine of Kompetenz-Kompetenz, the general principle that every court is entitled to examine its own jurisdiction (West Tankers Inc v Allianz Spa (Case C-185/07) [2009], ECR 1-663, [2009] AC 1138 at para 57), and

the similar principle recognised with regard to the powers of arbitral tribunals (Dallah Co v Ministry of Religious Affairs of Pakistan, [2010] UKSC 46 at paras 84-85). It does not necessarily mean that tribunals have exclusive power or jurisdiction to do so, but, given the consensual nature of arbitration, its application is necessarily subject to the parties' agreement. Under the 1996 Act, the tribunal's jurisdiction to rule upon its own substantive jurisdiction is enshrined in section 30 and the court's power to determine it circumscribed by section 32, but these sections are not directly relevant for present purposes. Here the parties agreed to references under the rules of the LCIA, including rule 23.4 to which I have referred. It suffices to say that Mr Flynn did not argue that it would be a breach of rule 23.4 or contravene that doctrine of Kompetenz-Kompetenz to grant Nomihold's application.

Is an anti-arbitration order just and convenient, and should the court exercise its discretion?

60. This leads to the question whether it is just and convenient to grant the order sought by Nomihold and whether I should exercise my discretion to grant it.

61. Nomihold argues that its application should be granted because it achieved the Award after a thorough and extensive arbitral process; because it is clear that MTSF has acted in breach of contract and threatens to do so, and it is starkly obvious that the New Arbitrations are an abuse; because damages are an inadequate remedy given that MTSF is not, as it accepts, in a position to satisfy the Award; and because the New Arbitrations are merely a device deployed by MTSF in the so-called enforcement war.

62. I accept that the conduct of the First Option Agreement Arbitration appears to have been thorough and careful, and the Award to which it led was detailed and closely reasoned. I also accept that damages would be an inadequate and unsuitable remedy for breach of the arbitration agreements. I am prepared to assume for present purposes that Nomihold has a strong case that the New Arbitrations are in breach of both the Option Arbitration Agreement and, in the case of the Amended Request, the SPA Arbitration Agreement, and, as I have said, I am prepared to assume that MTSF has used and intends to use the legal routes available to it to prevent enforcement of the Award.

63. I must ask myself whether in these circumstances it would be right to restrain MTSF from pursuing the New Arbitrations. They raise the money laundering complaint that was not considered in the Award because it was not an issue presented to the Tribunal. On its face it is a complaint of the kind that the parties agreed should be determined by LCIA arbitration. If the New Arbitrations proceed, the tribunals appointed to them will have adequate powers to determine the re-arbitration complaints. I say no more about the complaints themselves other than that they do not seem to me as straightforward as Mr Beltrami submitted, but the tribunals could adopt procedures to deal with the re-arbitration complaint as a preliminary issue. It is for them to decide whether to do so.

64. I consider that the undertaking offered by MTSF will go a long way to answer Nomihold's submission that MTSF will be able effectively to deploy the New Arbitrations to prevent enforcement of the Award. As Mr Flynn submitted, Nomihold will still have available to it all the usual means of enforcement.

65. I do not overlook the costs that will be incurred in the New Arbitrations, even if Nomihold seeks and obtains a preliminary determination of its re-arbitration complaints, but this concern is to be assessed in the context of the sums involved in this dispute and its history.

66. I have said enough to make it clear that the court would make an order of the kind sought by Nomihold only in unusual circumstances. I am not persuaded that the facts of this case justify the exceptional order sought. I do not consider that it would be just or convenient to make it, and I would decline to exercise my discretion to do so.

Conclusion

67. I therefore dismiss both applications. I shall accept the undertaking that MTSF has offered, subject to any observations that Nomihold makes about its exact terms.

68. I am grateful to counsel for their considerable help on these applications.

Copyright. Source: BAILII. This information is licensed under the terms of the Open Government Licence: http://www.nationalarchives.gov.uk/doc/open-government-licence.
(http://www.bailii.org/ew/cases/EWHC/Comm/2010/2567.html, accessed 25 July 2014)