

Case No: A3/2015/2491

Neutral Citation Number: [2016] EWCA Civ 1290
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE TEARE
[2015] EWHC 1994 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2016

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE ELIAS
and
LORD JUSTICE BEATSON

Between:

Ashot Yegiazaryan
- and -
Vitaly Ivonovich Smagin

Appellant

Respondent

Mr Joe Smouha QC & Mr Jeremy Brier (instructed by **Gibson, Dunn & Crutcher LLP**) for
the **Appellant**

Mr Alan Maclean QC & Mr Andrew Scott (instructed by **Baker & McKenzie LLP**) for the
Respondent

Hearing dates: 29 - 30 November 2016

Judgment

Lord Justice Beatson:

I. Introduction:

1. This is an appeal by Mr Ashot Yegiazaryan against the order of Teare J dated 9 July 2015 dismissing his challenge under section 67 of the Arbitration Act 1996 (“the 1996 Act”) to an award by the London Court of International Arbitration (“the LCIA”) dated 11 November 2014. The arbitration was commenced by the respondent, Mr Vitaly Smagin, on 26 October 2010. In the arbitration the second respondent was Mr Yegiazaryan and the first respondent was Kalken Holdings Ltd (“Kalken”), a company registered in Cyprus wholly controlled by him. There was a jurisdiction challenge by both respondents but only that by Mr Yegiazaryan is relevant in these proceedings. The tribunal found that it had jurisdiction over Mr Yegiazaryan and ordered him and Kalken to pay US \$ 72,243,000 to Mr Smagin.
2. The judge gave permission to Mr Yegiazaryan to appeal against his decision that an agreement between Mr Yegiazaryan and Mr Smagin, known as the 2008 Agreement, contained an arbitration agreement conferring jurisdiction over Mr Yegiazaryan. At the hearing we also considered and rejected an application by Mr Smouha QC on behalf of Mr Yegiazaryan to consider an additional and new ground of appeal, that the claims referred to arbitration by Mr Smagin were not claims under the 2008 Agreement, but claims brought under two other agreements, a Shareholders’ Agreement and an Escrow Agreement, to which Mr Yegiazaryan was not a party. In this judgment I give my reasons for rejecting Mr Smouha’s application and my conclusions on the grounds upon which the judge gave Mr Yegiazaryan permission to appeal, and my reasons for them. It is convenient to set out the factual and contractual background before giving my reasons for rejecting the application to consider the new ground of appeal.

II. The factual and contractual background:

3. The factual background is set out fully in the judgment below at [2015] EWHC 1944 (Comm) at [2] - [8] and [11]. At the request of the parties, the judgment below was anonymised but it is common ground that there is no need for further anonymity. To assist those who refer to the fuller statement of the facts in the judgment below, I have annexed a key to the anonymising references in the judgment below to this judgment.
4. The underlying dispute between Mr Smagin and Kalken and Mr Yegiazaryan concerned a real estate development project in Moscow (“Europark”) which was used as security for a loan to Mr Yegiazaryan by Deutsche Bank for the purposes of refinancing the refurbishment of a hotel in Moscow. Through a number of corporate vehicles, including Tufts Investment Trade Inc (“Tufts”), a BVI company, Mr Smagin had a 20% interest in Europark, and Mr Yegiazaryan, through Kalken, had a 73% interest in it. The dispute concerned Kalken’s breach of an obligation to put its shareholding in Tufts in escrow in order to protect Mr Smagin’s interest in Europark, a subsequent transfer by Tufts of its interest in another of the corporate vehicles, which Tufts wholly owned, to two companies, the effect of which rendered Mr Smagin’s shareholding in Tufts valueless because Tufts no longer owned Europark.

5. Europark was developed through a company called LLC Centurion Alliance (“Centurion”), the ownership of which was: Mr Yegiazaryan 73%, Mr Smagin 20%, and Mr Garkusha 7%. After Mr Smagin agreed to Mr Yegiazaryan’s request that Europark be used as security for the loan he was seeking from Deutsche Bank, the ownership of Centurion was changed. A Cypriot company, Doralin which was wholly owned by Tufts became the owner of Centurion. The ownership in Tufts was: Mr Smagin 20%, Mr Garkusha 7%, and Kalken 73%.

(i) The Shareholders’ Agreement and Escrow Agreement:

6. On 26 December 2006, Mr Smagin, Kalken and Mr Garkusha entered into a Shareholders’ Agreement and an Escrow Agreement. Deutsche Bank was also to be a party to the Escrow Agreement but it did not sign it until 13 November 2007. The Shareholders’ Agreement provided that, once the Escrow Agreement came into force, Kalken was to deliver its shares in Tufts to Deutsche Bank to hold in an escrow account. The parties to that agreement also undertook in clause 9.1.5 to ensure that the pledge of Europark as security for the loan for the hotel project would be terminated within one month of the expiry of the Shareholders’ Agreement, and , in certain circumstances, to transfer the shares to Mr Smagin who would then have the right to sell them).
7. The Shareholders’ Agreement included an English governing law clause (clause 12.1), and an arbitration clause (clause 12.2) providing for the resolution of disputes by way of LCIA Arbitration with a London seat. Clause 12.2.5 enabled consolidation in a single arbitration of claims arising under the Shareholders’ Agreement and the Escrow Agreement “or any instruments or documents delivered in connection therewith”. It provided that “upon the request of any party to an arbitration proceeding constituted” under any of these documents or instruments “the arbitral tribunal shall consolidate the arbitration if all parties concerned agree or the arbitral tribunal determines that there are issues of fact or law common to the proceedings so that a consolidated proceeding would be more efficient than separate proceedings and that no party would be unduly prejudiced as a result of such consolidation”. In a case in which the parties in the two proceedings are not identical, the clause provides that the ruling of the arbitral tribunal constituted first in time shall control but that a new tribunal for any consolidated arbitration shall be constituted in accordance with the provisions of clause 12.2.1. Clauses 9.1 and 9.2 of the Escrow Agreement contain governing law and arbitration clauses in identical terms to those in the Shareholders’ Agreement.
8. The Shareholders’ Agreement expired on 26 December 2007. Despite Mr Smagin’s demands to Mr Yegiazaryan, Kalken did not comply with the requirement in clause 9.1.5 and ensure that the pledge of Europark as security for the loan for the hotel project was terminated within one month. . In a letter dated 19 February 2008 to Deutsche Bank, Mr Smagin’s lawyers, Herbert Smith CIS LLP, stated that, if Kalken persisted in its failure to perform its obligation to terminate the pledge in the shares, Mr Smagin intended to enforce his rights under the Shareholders’ Agreement by seeking specific performance of clause 9.1.5 of the agreement. The letter also stated that Mr Smagin considered that any dispute between him and Kalken in relation to the assets secured under the loan agreement may trigger an event of default under that loan agreement.

(ii) *The 2008 Agreement:*

9. Messrs Yegiazaryan and Smagin later resolved the issue by entering into a further agreement, which has been referred to in these proceedings as the “2008 Agreement”. Mr Smagin was described as “Partner 1”, and Mr Yegiazaryan was described as “Partner 2” “of whom Kalken Holdings Ltd is a controlled affiliate that in its turn is a holder of 73% of shares in Tufts Invest and Trade Inc”. Mr Smagin agreed to permit Europark to remain as security for another 2-3 years, subject to the terms of the 2008 Agreement.

10. Article 2 of the 2008 Agreement provides:

“2.1 Partners (shareholders” designated by them) will enter into an amendment agreement to the TUFTS Shareholders' Agreement, no number, dated December 26, 2006, which shall govern the revenue distribution procedure of CJSC CA.

2.2 In connection with a default and termination of the Escrow Agreement, no number, dated November 13, 2007 the Partners will enter into a similar escrow agreement whereunder Deutsche Bank AG will act as an escrow agent, and will procure for its performance by all parties and when entering into such agreement they will remove all inconsistencies that existed before. Partner 2 (shareholders” designated by him) will also execute and deliver to Deutsche Bank AG instruments of transfer with respect to all TUFTS shares owned (controlled) by him.

2.3 The constituent documents of Blidensol, Doralin and TUFTS will need to be amended to provide that any document of any such companies shall be considered to be duly executed and having legal force only upon its execution by two authorized persons, namely Partner 1 and Partner 2.

2.4 Partner 2 will appoint the General Director of CJSC CA, and Partner 1 will appoint Chief Accountant and control the Financial Director (any other senior finance positions)

[handwritten comment indicates a change of the sentence “Partner 1 will appoint Chief Accountant and control the Financial Director” to “Partner 1 will appoint and control Chief Accountant and the Financial Director”. The word “control” is crossed-out in manuscript]. [Further handwritten comment: illegible]

2.5 Actions specified in clauses 2.1 – 2.4 shall be taken by the Partners on or before _____. Partner 2 agrees to instruct its legal counsel White & Case to prepare the relevant documents and take necessary actions.

2.6 Partner 1 will purchase from D.V. Garkusha 2% of TUFTS Shares at par value.

[handwritten comment: “?”] 2.7 Partner 1 will purchase 50% *[the number is handwritten]* of shares in Blidensol *[handwritten comment: “Doralin” is inserted after the word “Blidensol”]* at par value.

[handwritten comment: “-“] 2.8 Partner 1 will purchase from Partner 2 (shareholder designated by him) 23% of TUFTS Shares at \$34.5 per share. *[the number is handwritten]*

The amount of \$5,000,000 will be deducted from the price specified in this clause which is necessary to Partner 2 to purchase from D.V. Garkusha 5% of Tufts Shares; such transaction to be initiated no later than the first quarter of 2009.

2.9 The payment procedure for TUFTS Shares by Partner 1 shall be determined by the Partners in chapter 4 hereof.

2.10 If Partner 2 fails to perform his obligations set forth in clauses 2.1.-2.4, Partner 1 will seek to enforce his rights under the Shareholders’ Agreement by filing a claim against Partner 2 with the London Court of International Arbitration and require, among other things, enforcement of Clause 9.1.5 of the Shareholders’ Agreement, limitation of restrictions on use of his property (shares in TUFTS, MTC, Europark), and indemnification for losses.”

Article 2.10 is the crucial provision in this appeal, but the other provisions provide the context for its construction.

11. In 2009, Tufts transferred its shares in Doralin to two companies that were unknown to Mr Smagin. The effect was to render his shareholding in Tufts valueless because Tufts no longer owned the Europark retail complex. Mr Smagin claims that, because the pledge of Europark was not terminated and the shares in Tufts were transferred, he had claims against Mr Yegiazaryan and Kalken under clause 9.1.5 of the Shareholders’ Agreement. As I have stated, he commenced the arbitration by a request dated 29 October 2010. The LCIA constituted the tribunal on 19 March 2011 and the tribunal found in Mr Smagin’s favour.

III. The request for arbitration and the award:

12. Paragraph 10 of the request for arbitration states that the dispute between the parties “arises out of two agreements”, and then identifies the Shareholders’ Agreement and the Escrow Agreement. The request states that the Shareholders’ Agreement includes undertakings “by Kalken (and Ashot Yegiazaryan as its principal)” (paragraph 12) and (paragraph 13), that “Kalken (acting on behalf of Yegiazaryan)” should transfer the Tufts shares into an escrow account, and that, “in breach of the Shareholders’ and Escrow Agreements” Kalken and Mr Yegiazaryan failed to place the Tufts shares into escrow, and misappropriated Mr Smagin’s interest in Europark. The request also states

(paragraphs 37-38) that the 2008 Agreement records and describes Mr Yegiazaryan's relationship with Kalken and Tufts and confirms his "personal submission to the arbitration provisions contained in the Shareholders' Agreement".

13. The section in the request about the arbitration clauses refers to clause 9.2 of the Escrow Agreement and clause 12.2 of the Shareholders' Agreement. It states (at paragraph 63) that "at all times, Kalken was acting under Mr Yegiazaryan's complete ownership and control in relation to the Escrow and Shareholders' Agreements", and that Kalken executed those agreements "in its capacity as agents for Ashot Yegiazaryan who was Kalken's disclosed principal and who personally controlled the execution, operation and ultimately breach of both agreements". It is stated (paragraph 64) that Mr Yegiazaryan "was, therefore, in effect, at all times a party to the Shareholders' and Escrow Agreements, despite not being mentioned in the agreements...." and that he expressly confirmed his submission to the arbitration agreement in the Shareholders' Agreement in the part of the 2008 Agreement that recorded and described his relationship with Kalken and Tufts.
14. Mr Yegiazaryan argued that the tribunal lacked jurisdiction because he was not a party to the Shareholders' Agreement or the Escrow Agreement and has never been a beneficial owner of shares in Kalken. He also contended that his signature on the 2008 Agreement was forged, that it was an unenforceable letter of intent, that none of the obligations in it were ever performed by either party, and that "the 2008 Agreement provides no basis for jurisdiction because the purported arbitration clause does not cover the claims raised by the claimant".
15. The tribunal held that, although (see paragraph 172) the language of Article 2.10 of the 2008 Agreement was somewhat unorthodox, its express and implied terms provided for LCIA Arbitration of the claim for relief against Mr Yegiazaryan, insofar as the claims are based on the Shareholders' Agreement, the Escrow Agreement, and the 2008 Agreement. Paragraph 174 of the award stated:

"The Tribunal finds that the language of Article 2.10 and of Articles 2.1-2.4 as well as of the Shareholders' Agreement, to which reference is made, is broad enough to give the Tribunal jurisdiction raised by Claimant, insofar as they are based on the Shareholders' Agreement, the Escrow Agreement and the 2008 Agreement."
16. Under the express and implied terms of those agreements, Mr Yegiazaryan was obliged to preserve the ownership structure of Europark and protect Mr Smagin's interest in it. The tribunal stated (at paragraph 176) that it followed that it was not necessary to deal with the Shareholders' and Escrow Agreements from a jurisdictional perspective. In the merits section of its award, under the heading "Joint and several liability" it found that Mr Yegiazaryan breached his obligations under the 2008 Agreement and Kalken breached its obligations under the Shareholders' and Escrow Agreements, that their breaches related to the same events and that they were "both responsible for any losses suffered by" Mr Smagin. It is stated that "their liability must therefore be joint and several". It was common ground that the tribunal erred in referring to "joint and several liability". Mr Smouha submitted that this went to the root of the tribunal's assumption of jurisdiction over Mr Yegiazaryan because it assumed without deciding that Mr Yegiazaryan was a party to the Shareholders' and Escrow Agreements and the judge

erred in not considering the basis on which the tribunal found it had jurisdiction over Mr Yegiazaryan. Mr Maclean argued the error had no effect on the issues before the court.

IV. The decision below:

17. Before the judge, Mr Yegiazaryan reiterated his claim that he had not signed the 2008 Agreement and his signature was a forgery. The judge rejected Mr Yegiazaryan's evidence: see [2015] EWHC 1944 (Comm) at [12] - [18]. In the light of contemporaneous documents and the handwriting evidence, he reached the firm conclusion that Mr Yegiazaryan had signed the agreement: see [23] - [24] and [30] - [35]. Permission to appeal against that finding was not sought.
18. The judge held that Article 2.10 of the 2008 Agreement contained an arbitration clause which bound Mr Yegiazaryan and conferred jurisdiction on the LCIA tribunal. He accepted (see [41] and [48]) that the meaning of Article 2.10 is unclear. He stated that "there is a problem with the words of Article 2.10 [because] the Article provides that Mr Smagin will seek to enforce his rights under the Shareholders' Agreement but then provides that he will do so by filing a claim against Mr Yegiazaryan" who "was not expressed to be a party to the Shareholders' Agreement". He described this as an apparent inconsistency in the language of the clause.
19. The judge considered (see [42] – [43]) the submission that the clause expressed Mr Smagin's intentional aspiration to enforce his rights under the Shareholders' Agreement by filing a claim against Mr Yegiazaryan because he wrongly believed he was a party to the Shareholders' Agreement to be "an unusual role for a term of a contract" because "terms usually embody agreements not statements of intent". He also considered (see [44]) that there was a difficulty with the submission on behalf of Mr Smagin that Article 2.10 refers to LCIA arbitration claims by Mr Smagin for breach of the 2008 Agreement because the only express reference in that provision is to the enforcement of rights under the Shareholders' Agreement.
20. The relevant background material included the fact that both parties had their own interests to pursue and protect. Mr Smagin's interest was to protect his interest in Europark. Mr Yegiazaryan's was to protect his interest in the hotel project. After considering this (see [43] and [49]), the judge stated that a reasonable man would understand Article 2.10 to mean that, if Mr Smagin filed a claim against Mr Yegiazaryan at the LCIA, the latter would submit to the jurisdiction of that tribunal: "[t]he reasonable man would not consider Article 2.10 was nothing more than a forlorn and mistaken aspiration by Mr [Smagin]".
21. The judge then considered the fact that Article 2.10 refers only to the enforcement of rights under the Shareholders' Agreement, and expressly refers to clause 9.1.5 of that agreement. He stated that, although that appears inconsistent with interpreting the clause to mean that any claim for breach of the express or implied terms of Articles 2.1 and 2.4 of the 2008 Agreement would be referred to arbitration at the LCIA, the answer (see [52]) "to this difficulty is that by Articles 2.1-2.2 Mr [Yegiazaryan] assumed the obligations of [Kalken] under the Shareholders' Agreement and Escrow Agreement (and undertook the related obligations under Articles 2.3-2.4 [of the 2008 Agreement])". The judge noted (at [53] – [54]) that the arbitral tribunal came to the same conclusion and stated that it was open to the court considering a challenge under section 67 of the 1996 Act carefully to examine the reasoning and the conclusion of the arbitral tribunal on the

question of jurisdiction: see *Dallah Real Estate v The Ministry of Religious Affairs* [2010] UKSC 46, reported at [2011] 1 AC 763, at [31].

V. The grounds of appeal:

(i) The grounds upon which permission was granted:

22. The judge gave Mr Yegiazaryan permission to appeal on the question of whether the 2008 Agreement contains an arbitration agreement; i.e. whether Article 2.10 is an arbitration agreement. It was submitted by Mr Smouha that the appeal should be allowed on three grounds. The first is that Article 2.10 of the 2008 Agreement was not an arbitration agreement and could not be construed as one because it only articulated the substantive effect of a failure to comply with the 2008 Agreement, namely to put in place a new contractual regime and to ensure that rights under the Shareholders' Agreement, which had by then terminated, were not waived by it, and that those which had expired were reinstated. The second and third are (see [30] and [35] below) that the language of Article 2.10 is clear and effect should have been given to its natural meaning, and that the judge erred in finding that its language was unclear and adopted a construction that was linguistically impossible.

(ii) The additional ground of appeal:

23. This was raised shortly before the hearing as a result of the reconsideration of the case by Mr Smouha who did not appear below. This ground is that the arbitral tribunal and the judge erred in finding that there was jurisdiction because the request for arbitration was only brought pursuant to the Shareholders' and the Escrow Agreements, and pursuant to the detailed and materially identical arbitration clauses in those agreements. Accordingly, the tribunal was appointed by the LCIA pursuant to, and only to, those agreements. The tribunal never decided the question of whether Mr Yegiazaryan was party to the Shareholders' and Escrow Agreements, and it was not open to it to find that it had jurisdiction over Mr Yegiazaryan on the basis that it did; i.e. that the arbitration was one under the 2008 Agreement.
24. Mr Smouha argued that the judge had fallen into error because he should have asked himself whether any claims brought before the tribunal were ones in relation to which the tribunal has jurisdiction. He should not only have dealt with jurisdiction by asking if the 2008 Agreement contained an arbitration agreement. There was, he stated, no prejudice to Mr Smagin in the court dealing with this ground because it concerned the provisions of the award for which permission to appeal had been granted and because it was a pure question of construction overlapping with that for which permission had been granted and not a factual question.

VI. Discussion:

(i) The additional ground of appeal:

25. My principal reason for rejecting Mr Smouha's submission that this court considers the additional ground of appeal is that it was not part of the section 67 challenge to the arbitrators' jurisdiction. The points before the judge were those identified by him at [1] and dealt by him in his judgment: see the summary at [18] – [19] above. Moreover, there was no application to the judge for permission to appeal on this ground. It is clear from

the transcript of the hearing when the judge considered the application for permission to appeal that the application was for permission to appeal on the question of the construction of Article 2.10. The new point is not a question of the construction of Article 2.10 but involves the submission that, even if Article 2.10 is an arbitration agreement and the dispute is within its scope, there was no jurisdiction because no separate arbitration under the 2008 Agreement has been commenced.

26. In *Republic of Kazakhstan v Istil Group Ltd. (No.2)* [2007] EWCA Civ. 471, reported at [2007] 2 Lloyd's Rep 548 and [2008] Bus LR 878 ("the *Istil* case") it was held that where the judge who heard the section 67 application refused an application for leave to appeal there is only a very limited "residual discretion" in this court to accept an appeal. Longmore LJ (at [11]) regarded this as "a very limited inroad on the finality of the judge's decision" in order to maintain the compatibility of these provisions with the requirement of a fair hearing in article 6 of the European Convention for the Protection of Human Rights in cases where there was procedural unfairness in the judge's decision or a failure to engage with the arguments. Longmore LJ referred to the decision of this court in *CGU International Insurance PLC v Astra Zeneca Insurance Co Ltd.* [2006] EWCA Civ. 1340 reported at [2007] 1 Lloyd's Rep 142 and [2007] Bus LR 162 [100] which was concerned with the section 69(8) of the 1979 Act, which, like section 67(4), limits the right of appeal to cases where the first instance judge himself gives leave to appeal. Rix LJ, with whom the Master of the Rolls and Longmore LJ agreed, stated that "the courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration". In the *Istil* case, Longmore LJ stated (at [32]) that the residual discretion is to be exercised only in exceptionally rare cases. Where the party seeking leave has neither raised the ground in the arbitration claim nor even applied to the judge below, the position is *a fortiori*, and it was not suggested that in this case there was any procedural unfairness or that the judge failed to engage with the arguments that were put to him.
27. It is also of significance that section 70(3) of the 1996 Act requires any application or appeal to be brought within 28 days of the date of the award by way of an arbitration claim which, see CPR Part 62.4(1)(a)(ii), must identify the question upon which a decision of the court is sought. Mr Smouha submitted that the decision of Colman J in *Westland Helicopters v Sheikh Salah Al-Hejailan* (1) [2004] EWHC 1625 (Comm) reported at [2004] 2 Lloyd's Rep 523 refusing to allow a challenge outside the 28 day period is distinguishable because in that case the new ground related to paragraphs of the award that had not been challenged in the arbitration claim. Although, in this case, the new ground does relate to the same paragraphs of the award, its nature is fundamentally different to the grounds that were the subject of the challenge to the award in the arbitration claim. Moreover, it is not correct to describe it as a challenge on a pure point of law. It is more accurately described as one on a point of mixed law and fact. Determining the issue would require consideration of evidence about the basis on which the arbitration was brought.
28. I also reject the submission that this court should allow this application because it is the court of the seat of the arbitration and the courts at the seat should deal with all questions going to issues of jurisdiction. Mr Smouha submitted that this was so because courts in other jurisdictions considering enforcement would want to know the conclusion of the court of the seat on questions going to the jurisdiction of the arbitral tribunal. I do not

consider that this is a factor which justifies circumventing what Popplewell J in *Terna Bahrain Holding Co WWL v Al Shamsi* [2012] EWHC 3283 (Comm) reported at [2013] 1 Lloyd's Rep 86 described as "the principal of speedy finality which underpins the [1996] Act". A party which has not included all aspects of its challenge to the jurisdiction of the tribunal is, moreover, not left without protection. The New York Convention enables an enforcing court to refuse to recognise or enforce an award where the award deals with a difference not contemplated by or not falling within the terms of submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration: see Article V(1)(c) of the New York Convention and section 103(2(d)) of the 1996 Act.

(ii) The grounds upon which permission was granted:

29. The fundamental ground upon which Mr Smouha submitted the appeal should be allowed is that the judge erred in finding that Article 2.10 of the 2008 Agreement was an arbitration agreement. It is, however, convenient first to deal with whether its meaning is clear, and what that meaning is.
30. ***(a) Is the meaning of Article 2.10 clear?*** It was submitted that the natural meaning of Article 2.10 is that, if Mr Yegiazaryan failed to perform his obligations under Articles 2.1 - 2.4 of the 2008 Agreement, Mr Smagin would enforce his rights under the Shareholders' Agreement pursuant to the LCIA arbitration clause in that agreement including clause 9.1.5. That, Mr Smouha stated, is what Mr Smagin in fact did. He commenced arbitration under the Shareholders' Agreement. The true construction of "filing a claim against Partner two" was a reference to filing a claim on Mr Smagin's mistaken view that Mr Yegiazaryan was a party to the Shareholders' and Escrow Agreements. Alternatively, if there was to be a departure from the language of Article 2.10, the judge should have found that "Partner 2" was intended to be a reference to Kalken.
31. In my judgment, it is impossible to regard the meaning of Article 2.10 as clear. There are two difficulties with reading it literally. The first is that it refers to Mr Smagin enforcing his rights "under" the Shareholders' Agreement, but Mr Yegiazaryan is not a party to that agreement. The second is that it refers to filing a claim "against" Partner 2, who is defined as Mr Yegiazaryan.
32. The construction advanced by Mr Smouha involves an artificial reading of the clause in order to address the fact that Mr Yegiazaryan is not a party to the Shareholders' Agreement. For that construction to be correct, either: (1) Mr Smagin mistakenly believed that Mr Yegiazaryan was a party to the Shareholders' Agreement; or (2) (Mr Yegiazaryan's subsidiary submission) "Partner 2" is an interchangeable reference to Mr Yegiazaryan and Kalken. I do not consider either of these interpretations to be obvious from a natural reading of the contract.
33. The construction advanced on behalf of Mr Smagin also gives rise to difficulty. This is because Article 2.10 only refers expressly to the enforcement of rights under the Shareholders' Agreement (see judge below at [44] and [51]), and in particular clause 9.1.5. Mr Smagin's case requires the enforcement of rights under the 2008 Agreement to be read into Article 2.10.

34. The judge was therefore correct to find (at [41] and [48]) that “the meaning which [Article 2.10] was intended to bear may ... be said to be unclear” and that “there is an apparent inconsistency in [its] language”. In my view, the judge’s approach to ascertaining the meaning of the Article by considering what meaning it would have conveyed to a reasonable reader possessed of all the relevant background knowledge reasonably available to the parties was correct (see [40]) and he was entitled to reach the conclusion he did. I consider each of the submissions and criticisms of the judge’s analysis.
35. **(b) What is the meaning of Article 2.10?** I start with Mr Smouha’s submissions about the purpose and effect of Article 2.10. He argued that the 2008 Agreement simply contemplated a replacement set of agreements following the expiry of the Shareholders’ Agreement. If what was contemplated in Articles 2.1 – 2.4 of the 2008 Agreement had happened, the Shareholders’ Agreement would have been replaced and there would be no need to return to its provisions. If, however, what was contemplated did not happen, the rights and obligations in the Shareholders’ Agreement, including the right under clause 9.1.5 to have Kalken’s Tufts shares transferred, could and would be enforced.
36. I reject this submission. The 2008 Agreement was designed to resolve the difficulties between Mr Yegiazaryan and Mr Smagin that had arisen out of the Shareholders’ and Escrow Agreements, the failure to place Kalken’s Tufts shares in escrow or to transfer them to Mr Smagin, and the fact that Mr Yegiazaryan was not a party to those agreements. I agree with the judge that, in the light of the background and purpose of the 2008 Agreement, Article 2.10 is a guarantee by Mr Yegiazaryan to Mr Smagin if he did not perform his obligations under the new agreement. Making a claim under the Shareholders’ Agreement was something that Mr Smagin was entitled to do from 2007 onwards, and (although Mr Yegiazaryan disputes this) the assurances given by Mr Yegiazaryan were the principal reason he did not do so.
37. I also reject the submission that the judge erred in concluding that, by Articles 2.1 and 2.2 of the 2008 Agreement, Mr Yegiazaryan assumed Kalken’s obligations under the Shareholders’ and Escrow Agreements and that Article 2.10 refers to that (see [52]). It was argued that the language of Articles 2.1 and 2.2 cannot be given that meaning and the reference in Article 2.10 cannot be to the assumption by Mr Yegiazaryan of obligations under the Shareholders’ and Escrow Agreements because Article 2.10 does not refer to Articles 2.1 and 2.2, but only to the Shareholders’ Agreement. Against the commercial background I have described and the lack of clarity in the 2008 Agreement, the judge was entitled to conclude that, in entering into the 2008 Agreement, Mr Yegiazaryan effectively undertook to procure Kalken to perform its obligations. In light of this commercial context, the judge was right to conclude that Mr Yegiazaryan’s assumption of Kalken’s obligations is implicit in Articles 2.1 – 2.4.
38. In my opinion, on a proper construction, a reasonable person would not interpret Article 2.10 as meaning that Mr Smagin wrongly believed that Mr Yegiazaryan was a party to the Shareholders’ Agreement and therefore could file a claim against him. Mr Smouha’s submissions involve the construction of Article 2.10 as a mistaken aspiration by Mr Smagin that he could file such a claim. I agree with the Judge who was right to emphasise (at [43]) that terms usually embody agreements, not statements of intent. This submission also involves treating the two parties to the Agreement as intending something different. That is antithetical to the idea of a contractual obligation. In my judgment, where one party agrees that another may file an

arbitration claim against him, it is implied that the other party will submit to the jurisdiction of the agreed tribunal.

39. I do not consider that Mr Smouha's point on the erroneous reference by the tribunal to "joint and several liability" is relevant to the issues before this court. It concerns the award and not the judgment and order on the section 67 challenge, and it does not affect the judge's conclusion as to the construction of Article 2.10 because he does not rely on this point in any way.
40. **(c) Is Article 2.10 an arbitration agreement?** I return to the fundamental question before the judge and Mr Smouha's submissions on the contrast between the 2008 Agreement and Article 2.10 in particular, and the arbitration clauses in the Shareholders' and Escrow Agreements. He argued that, if Article 2.10 is treated as an arbitration agreement it would *prima facie* be treated as a reference to arbitration by a sole arbitrator and, in marked contrast to the arbitration provisions in the Shareholders' and Escrow Agreements, it contains no power to consolidate with any arbitration under those agreements. I do not consider that it assists Mr Yegiazaryan's case to argue that Article 2.10 would *prima facie* be treated as a reference to arbitration by a sole arbitrator. That would be the default position under section 15(3) of the 1996 Act and article 5.4 of the LCIA Arbitration Rules (1998), but arbitration is a consensual process and it is open to the parties to agree to appoint more arbitrators: see section 15(1) of the 1996 Act and article 5.8 of the LCIA rules. This is reinforced by the explicit reference in Article 2.10 to LCIA arbitration (which includes article 5.8 of the LCIA Rules) under the Shareholders' Agreement.
41. As to consolidation, Mr Smouha submitted that the provision for consolidation in clause 12.2.5 of the Shareholders' Agreement is limited to disputes arising out of the "Transaction Documents", which are defined only to include the Shareholders' and Escrow Agreements. He argued that it was not possible to consolidate arbitrations under these agreements and arbitrations under the 2008 Agreement, and that makes it less likely that the parties intended Article 2.10 to be an arbitration agreement. I reject the premise upon which this submission is based. It involves giving clause 12.2.5 a narrow meaning. But clause 12.2.5 expressly provides for consolidation of claims arising under the Shareholders' Agreement and the Escrow Agreement "or any instruments or documents delivered in connection therewith". I consider that the 2008 Agreement falls within the scope of these broad words. A narrow interpretation such as that advanced by Mr Smouha would preclude consolidating arbitrations in closely related disputes and would be inconsistent with the objective of consolidating where possible. In any event, in the present case no consolidation issues arise as there is only one arbitration.
42. Mr Smouha also relied on the contrast between the 2008 Agreement and the detailed and careful provisions in the Shareholders' and Escrow Agreements to argue that the parties did not intend Article 2.10 to be an arbitration agreement. He highlighted the fact that the 2008 Agreement is undated, contains manuscript annotations including queries and there is a gap left to fill in an important date and other gaps. There is also no governing law clause and the parties did not use the arbitration clauses in the Shareholders' and Escrow Agreements, which were available and would have been a ready template.
43. I do not consider that these differences support the proposition that Article 2.10 is not an arbitration agreement. As I stated in *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ. 437, reported at [2015] 2 Lloyd's Rep. 154 at [62], in a poorly

drawn contract such as the 2008 Agreement, there may be more scope for resort to the apparent commercial purpose than in a well-drawn contract. I also stated that “it is less likely that a reliable answer will be yielded by detailed linguistic analysis, as opposed to reading the words fairly in the context of the document as a whole in the light of the commercial background”. The judge properly interpreted the 2008 Agreement in the context of the relevant background and commercial reality of the situation, focussing on what the parties intended rather than relying on formalistic, technical differences. I agree with him that Article 2.10 is a mechanism by which Mr Yegiazaryan could be compelled through arbitration to ensure that Kalken complies with its obligations. I do so because, if it were not, the clause would be devoid of meaning and any protection afforded by the 2008 Agreement would be illusory.

44. Finally, but importantly, there is a strong presumption that businesspeople who are parties to a contract containing a dispute resolution clause intend all disputes arising out of their legal relationship to be resolved in the forum designated by that clause: see *Fiona Trust & Holding Corporation v Primalov* [2007] UKHL 40 reported at [2008] 1 Lloyd's Rep 254 at [13]. The presumption is particularly strong where, as in this case, the dispute-resolution clause is in a contract entered into to resolve disputes under an earlier contract: see *Monde Petroleum SA v Westernzagros Ltd.* [2015] EWHC 67 (Comm), reported at [2015] 1 Lloyd's Rep. 330 at [38] *per* Popplewell J.
45. Mr Smouha argued that the *Fiona Trust* presumption does not apply in the present case because Kalken is party to the Shareholders' and Escrow Agreements but not the 2008 Agreement and Mr Yegiazaryan is party to the 2008 Agreement but not the Shareholders' and Escrow Agreements. He maintained that the presumption only applies to the position where two parties have made more than one contract with each other. I consider that it would be artificial to draw a distinction between Kalken and Mr Yegiazaryan in light of the close interrelationship between the agreements and the parties to them. Even if the presumption only applies by analogy, the commercial context supports the proposition that, as rational businessmen, the parties would have intended all disputes arising out of their legal relationship to be resolved in the same forum. Since the 2008 Agreement was designed to address a dispute arising out of the Shareholders' Agreement, and the 2008 Agreement explicitly refers to arbitration under that agreement, it makes logical and commercial sense that a dispute relating to the same facts would be decided in the same forum; i.e. an LCIA arbitration.

VII. Conclusion:

46. For the reasons I have given, I would dismiss the appeal on all grounds. The meaning of Article 2.10 is unclear and the judge was entitled to reach the conclusion he did as to its proper construction.

APPENDIX:

THE ABBREVIATIONS USED IN TEARE J's JUDGMENT

"The Retail Complex" is Europark

Mr A = Mr Ashot Yegiazaryan

Mr B = Mr Smagin

Mr C = Mr Garkusha

D = Artem Yegiazaryan, Ashot Yegiazaryan's brother

Mr E = Mr Timchenko

Ms F = Ms Arapova

BT = Blidensol Trading

CA = LLC Centurion Alliance ("Centurion")

DT = Doralin Trading

TI = Tufts Investment Trade Inc ("Tufts")

KH = Kalken Holdings Ltd

ML = Maestro

FL = Famulatus

Elias LJ:

47. I agree.

The Master of the Rolls:

48. I also agree.