ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 561 of 2013

Date	Order with signature of Judge

For hearing of CMA 5458/2013

Date of hearing: 05.12.2013

Mr. Aga Zafar Ahmed, Advocate for the plaintiff.
Mr. Mansoor A. Shaikh,
Advocate for the defendant No. 2.

Munib Akhtar, J.: This suit, and the application that falls to be determined, raise an important question in relation to international commercial arbitration: can an award-debtor bring suit for declaratory and injunctive relief against the recognition and/or enforcement of a New York Convention award? The plaintiff seeks such relief (and by means of the present application, appropriate interim relief) in respect of an award made in London on or about 17.10.2012 ("Award") in favor of the defendant No. 1 against the plaintiff and the defendant No. 2. The award-creditor, the defendant No. 1 ("CNAN"), is a company incorporated under the laws of Algeria, where it has its offices. The defendant No. 2 ("Igen") is the proprietary concern of one Mr. Muhammad Nadeem Shahenshai, who carries on business at Karachi. The plaintiff himself also trades as a sole proprietor under the name and style of M/s Hasan Ali Rice Export Company. The arbitrators have made certain declarations adverse to the plaintiff and have awarded a total sum of USD 269,810.38 in favor of CNAN. The relief sought by the plaintiff, if obtainable, is usually referred to as a "negative declaration" or a "preventative declaratory judgment". The issue raised requires, *inter alia*, consideration of the statute that gives effect to the New York Convention in this country, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("2011 Act").

2. The litigation history of the matter is rather tangled. The present suit is in fact the third suit between the parties pending in this Court. All the suits were brought by the plaintiff, the other two being Suit 1727/2008 and Suit 1683/2009. There was also litigation in New York though that, it appears, was started by CNAN against the plaintiff. For reasons that will become clear later, it is not necessary to set out the facts in any detail. I will not therefore, without any disrespect to the detailed submissions made by learned counsel on the factual aspects, record the same here. The question posed above can be

dealt with essentially as a question of law. Two factual aspects must however be noted. Firstly, while CNAN has instructed counsel in the other two suits, it has not done so in this suit. For reasons not now material, all three suits were listed on 05.12.2013 when the present application came to be heard. Learned counsel appearing for CNAN confirmed that he only had instructions in the other two suits. (The other suits were adjourned, to await the decision in the present matter.) However, I do note from the record of this suit that CNAN has been served by DHL courier service. It would therefore appear, prima facie, that CNAN has chosen to stay away from these proceedings while having full knowledge of the same. Secondly, and more importantly, the Award has been made on an arbitration agreement contained in a charterparty dated 07.11.2005. The plaintiff has all along taken the position that it was never a party to the said charteparty and hence to the arbitration agreement. The plaintiff's case is, and has always been, that that charterparty was only between CNAN and Igen and the plaintiff had nothing to do with it. Although the arbitrators have declared that the plaintiff was the undisclosed principal of Igen for purposes of section 30 of the (UK) Arbitration Act, 1996, the plaintiff strongly denies and disputes this. The sole ground taken before me by learned counsel for the plaintiff, to advance the submission that the question posed above should be answered in the affirmative, was that since the plaintiff was never party to the arbitration agreement, the Award is not binding on it and therefore ought not to be recognized and/or enforced in Pakistan. (It is clear that the plaintiff is the primary party against whom any enforcement proceedings would be taken.) In support of his contention, learned counsel relied on certain case law, and in particular on a decision of the UK Supreme Court reported as *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] 1 All ER 485, [2010] 3 WLR 1472 ("*Dallah*"). I will consider the cited cases later herein below.

3. It will be convenient to start by setting out the relevant provisions of the 2011 Act and the New York Convention ("Convention") which is set forth in the Schedule to the said Act. The 2011 Act, *inter alia*, provides as follows:

> "**2. Definitions.**— In this Act, unless there is anything repugnant in the subject or context,- ...
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> (b) "Convention" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10th June 1958, set forth in the Schedule to this Act;
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> (c) "Court" means a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the official Gazette; ....

3. Jurisdiction of Court.— (1) Notwithstanding anything contained in any other law for the time being in force, the Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act. ....

6. Enforcement of foreign arbitral awards.— (1) Unless the Court pursuant to section 7, refuses the application seeking recognition and enforcement of a foreign arbitral award, the Court shall recognise and enforce the award in the same manner as a judgment or order of a court in Pakistan.

(2) A foreign arbitral award which is enforceable under this Act, shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Pakistan.

7. Unenforceable foreign arbitral awards.— The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention.

8. Inconsistency.—In the event of any inconsistency between this Act and the Convention, the Convention shall prevail to the extent of the inconsistency."

Insofar as the Convention is concerned, reference need only be made to Article V thereof. This Article, as presently relevant, is as follows:

"Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

[grounds (b) – (e), which are not relevant for present purposes].

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

[grounds (a) and (b), which need not be set forth in detail]."

4. The Convention has of course been judicially considered by the courts of in many countries, and there are a number of resources where such decisions can be found. One useful Internet resource is www.newyorkconvention1958.org, a website on the Convention maintained by UNCITRAL. Another is the Yearbook of Commercial Arbitration ("YCA") which is published annually under the editorship of Professor Albert Jan Van Den Berg. The YCA series gathers together (in English

translation as appropriate) the judgments on the Convention from many jurisdictions. It is of course now well recognized that national courts should strive for uniformity in the interpretation of a treaty such as the Convention, and therefore the case law developed in other jurisdictions can and ought to be taken into consideration by the courts of the States party to such treaty: see, e.g., *Deep Vein Thrombosis and Air Travel Group Litigation (8 actions) (formerly 24 actions)* [2005] UKHL 72, [2006] 1 All ER 786 (at [55] per Lord Mance). The ready availability of material from various jurisdictions in respect of the Convention facilitates this approach, which I respectfully endorse.

5. One point that has been widely recognized in relation to the Convention is its pro-enforcement "bias". The Convention is designed to facilitate speedy enforcement of awards made in Convention countries in other States party to it. Thus, in the (English) Court of Appeal, in *Lombard-Knight & Anor v. Rainstorm Pictures Inc* [2014] EWCA Civ 356, Tomlinson, LJ observed as follows:

> "35. ... The International Council for Commercial Arbitration (ICCA) has produced a Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (May 2012 edition) ("ICCA Guide") which sets out the questions to be answered and the steps to be followed by the courts when applying the Convention. The Guide summarises the overall object and purpose of the New York Convention as follows:
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> > "The Convention is based on a pro-enforcement bias. It facilitates and safeguards the enforcement of arbitration agreements and arbitral awards and in doing so it serves international trade and commerce. It provides an additional measure of commercial security for parties entering into cross-border transactions."
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> 36. The pro-enforcement basis of the New York Convention is also supported by Van den Berg in his work to which I have already referred above, as did Mance LJ in [*Dardana Limited v Yukos Oil Company* [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep 326], at page 4:
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> > "As far as the object and purpose of the New York Convention are concerned, they are to facilitate the enforcement of arbitration agreements within its purview and of foreign arbitral awards. This object and purpose must, in the first place, be seen in the light of enhancing the effectiveness of the legal regime governing international commercial arbitration.""

(The Guide abovementioned is available on the Internet: http://www.arbitration-icca.org/publications/NYC_Guide.html.) Reference may also be made to a recent decision from Australia, that of the Supreme Court of Victoria (in its Court of Appeal division) in *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC* [2011] VSCA 248. The Court was there considering the Convention in light of a commonwealth statute, the

International Arbitration Act, 1974, which implements the Convention in Australia. In their joint judgment, Hansen JA and Kyrou AJA made a number of observations of which the following can be usefully cited (internal citations omitted):

> "128. Secondly, the Act, and the Convention, reflect what is often described as a 'proenforcement bias' or policy. What that means is this. The Act, and the Convention, recognising the role and importance of arbitration in international trade and commerce and the certainty and finality of awards, has simplified the procedure for enforcing foreign arbitral awards while also limiting the grounds upon which the enforcement of such an award may be resisted and placed the onus of establishing those grounds upon the party resisting enforcement. In *Redfern and Hunter on International Arbitration*, it is said of the expression 'a pro-enforcement bias' that it 'means that whilst it may be possible to challenge an arbitral award, the available options are likely to be limited.' Sir Anthony Mason has described the objective of the Convention as being 'to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced.'
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> 129. The Act's pro-enforcement policy is relevant to the interpretation of particular provisions of the Act. Hence, in *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (Rakta)* [508 F. 2d 969, 974 (US Court of Appeals, 2nd Cir, 1974), I YCA 205 (1976)], it was held that the public policy ground of resistance to the enforcement of an award was to be given a narrow construction as meaning contrary to the basic notions of morality and justice of the forum. That is consistent with the attainment of the objects of the Act and the Convention. It would be inappropriate, however, for this Court to give to a provision of the Act a meaning which is not supported by the words used by the Parliament, construed in accordance with conventional principles of statutory interpretation, for the purpose of giving effect to the pro-enforcement policy.
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> 130. Thirdly, as the Act gives effect to the Convention, decisions of overseas courts on the meaning of provisions of domestic legislation that adopt the wording of the Convention may be of assistance in the interpretation of the Act. Apart from promoting comity, there are obvious advantages in consistency in the interpretation of legislation that gives effect to an international convention. In that regard, however, it will be important to note any relevant differences in the legislation of another jurisdiction."

I respectfully agree. Reference may also be made to *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.* 284 F. 3d 1114 (US Court of Appeals, 9th Cir, 2002), XXVII YCA 922 (2002), where it was observed as follows:

> "The Convention and its implementing legislation have a pro-enforcement bias, a policy long-recognized by the Supreme Court:
>
> > 'The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are

enforced in the signatory countries. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15'".

6. With the foregoing principles in mind, I turn to consider the issue before me. For present purposes, section 7 of the 2011 Act is the key provision. It is clear from the section that if all a suit can be brought by an award-debtor for a preventative declaratory judgment, he must show that the ground(s) taken by him come within the scope of Article V of the Convention. The sole ground taken in the present case has already been noted (see para 2 above), and the first question therefore is whether it falls within Article V. Learned counsel for the plaintiff referred to the following passage from the judgment of Lord Collins in *Dallah* (emphasis supplied):

> "77. Although Article V(1)(a) ... deals expressly only with the case where the arbitration agreement is not valid, the consistent international practice shows that there is no doubt that *it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement.* Thus in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 it was accepted by the Court of Appeal that section 103(2)(b) applied in a case where the question was whether a Swedish award was enforceable in England against Yukos on the basis that, although it was not a signatory, it had by its conduct rendered itself an additional party to the contract containing the arbitration agreement. In *Sarhank Group v Oracle Corp*, 404 F3d 657 (2d Cir 2005) the issue, on the enforcement of an Egyptian award, was whether a non-signatory parent company was bound by an arbitration agreement on the basis that its subsidiary, which had signed the agreement, was a mere shell; and in *China Minmetals Materials Import and Export Co Ltd v Chei Mei Corpn,* 334 F3d 274 (3d Cir 2003) enforcement of a Chinese award was resisted on the ground that the agreement was a forgery. See also Born, *International Commercial Arbitration* (2009), pp 2778-2779." ([2010] 3 WLR at pp. 1502-3)

Since the ground in *Dallah* was the same as has been taken before me, the question posed in this paragraph must be answered in the affirmative and in favor of the plaintiff.

7. I turn therefore to consider section 7 in detail. Before doing so however, it would be advantageous to see how the question of whether an award-debtor can obtain a preventative declaratory judgment has been dealt with in other jurisdictions. Three decisions have come to my attention, being (in chronological order) those of the French Court of First Instance, the US Court of Appeals for the Seventh Circuit and the Supreme Court of Italy. In the first decision, reported as *Acteurs Auteurs Associés v. Hemdale Film Corporation* XVI YCA 543 (1991), the award was made in London and the award-debtor (Acteurs Auteurs Associés) initiated proceedings in the Court of First Instance seeking a declaration that the award would be invalid in France. The proceedings were, under French law, known as an *action en*

inopposabilité. The French Court, noting the award-creditor's objection to the maintainability of the action, observed as follows:

> [2] "However, [Art. V of the New York Convention] only lists the cases in which recognition and enforcement can be refused by 'the competent authority' of the State – either *ex officio* (Art. V(2)) or at the request of the party against whom the award is invoked (Art. V(1)) – without regulating the procedural forms by which recognition and enforcement may be refused. These forms are explicitly left to the discretionary power of the State where the arbitral award is relied upon (Art. III of the Convention). Hence we may not infer that a main *action en inopposabilité*, which has a preventative character, is inadmissible [under the Convention] if it is admissible in the State where the action is commenced." (pp. 543-44)

However, the Court concluded that French law (referred to as "CCP") did not, in fact, allow for the action that had been commenced. It was stated as follows:

> [5] "Further, by the amendment to the law on arbitration of 21 May 1981, the law-makers clearly wanted to reduce the number of possible means of recourse. They also aimed at simplifying and unifying them under the five grounds for attacking the award or exequatur (Art. 1502 New CCP).
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> [6] "In view of this *lex specialis*, admitting the present petition would mean granting the party against which enforcement is sought the option of a main action which is not provided by Art. 1498 New CCP and which could paralyze the *res judicata* effect of the arbitral decision...." (pp. 544-5)
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> The action was accordingly dismissed.

8. In *Mary D. Slaney v. International Amateur Athletic Federation* 244 F.3d 580 (2001), XXVI YCA 1091 (2001), the matter was decided by the US Court of Appeals for the Seventh Circuit. The award-debtor (the appellant, Mary Slaney) filed suit in the relevant US District Court seeking declaratory and other relief against a decision made by the respondent federation, which was treated as an award. The District Court dismissed the action *inter alia* on the ground that the Convention barred such an action. The appeal against the decision also failed.

9. The third decision, of the Italian Supreme Court, is reported as *Lanificio Mario Zegna SpA v. Ermenegildo Zegna Corporation and another* XXXI YCA 798 (2006). An award was made at Paris in favor of the first respondent. Enforcement of this award was sought in Italy. The appellant did not file an opposition to the award as permitted under Italian law, but instead started its own actions seeking, *inter alia*, a declaration that the award was

not enforceable in Italy. The actions were dismissed and on appeal the decision affirmed by the Supreme Court. It was held as follows:

> [2] "The court notes that … the lower court followed the jurisprudence of the Supreme Court that an action seeking a negative declaration is an atypical instrument that [is inadmissible] where a typical instrument [is available] and where such [atypical action] if granted would lead to circumventing the specific criteria for a judgment imposed by law.
>
> [3] "In the case at issue the court of appeal – which was the court having jurisdiction on the issue whether the conditions for recognizing the foreign award in Italy were met, in the context of typical enforcement proceedings – correctly held that [Mario Zegna's] action was inadmissible as it would have prevented [Ermenegildo Zegna] from using the instruments made available in Arts. 839 and 840 CCP. The court of appeal thus prevented frustration of a typical instrument, which guarantees [the possibility] to attack [an award] on limited grounds…." (pp. 800-01).

10. In *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* by Herbert Kronke, et. al. (2010) ("*Kronke*"), the learned authors, after considering the US and the Italian decisions, have opined as follows:

> "As a general rule, courts should be cautious in allowing an application by the respondent to an arbitration either for a declaratory judgment that recognition should be denied or for challenging the award in general; courts should permit it only when such party shows a legitimate interest or need. To find a "legitimate interest", courts should require the party to show an existing adverse impact of the arbitration award, such as a denial of rights or other use of the award by the award-holder." (pg. 134)

In a subsequently published treatise on the Convention, *New York Convention: Commentary* by Dr. Reinmar Wolff (ed.), 2012 ("*Wolff*"), the learned authors, after *inter alia* considering the French and the Italian decisions as well as the foregoing passage from *Kronke*, have opined as follows:

> "The *lex fori* also determines the question of whether the award debtor against whom an arbitration award may be enforced, may file for a preventative declaratory judgment (rather than wait until the award creditor applies for recognition and enforcement)." (pg. 198)

11. Taking all of the foregoing material into consideration, I am of the view that, as a general principle, a suit such as the present, whereby the plaintiff as award-debtor seeks declaratory and injunctive relief against a Convention Award, ought to be regarded as maintainable, but whether it can, in law, actually be instituted depends on exact terms of the law in force for the time being in the *lex fori*, here Pakistan. This therefore brings me to the

nub of the matter: the correct interpretation and application of section 7 of the 2011 Act.

12. Section 7 provides emphatically that recognition and enforcement of a Convention award "shall not" be refused "except in accordance with Article V of the Convention". The crucial question in my view is the meaning to be ascribed to the words "in accordance with". The reason why this is so becomes clear when Article V is examined. It comprises of two paragraphs. The first contains five grounds on which recognition and enforcement may be refused, and the second an additional two. The plaintiff's averred case of course comes within ground (a) of paragraph 1. Now, there is an important difference between the two paragraphs. Paragraph 1 provides that recognition and enforcement of the "award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that ...." These words are not used in paragraph 2. It would therefore seem that for paragraph 1 to apply, two antecedent conditions must be met: (a) the award must have been "invoked" against the award-debtor, and (b) the relevant ground must be shown to exist to the "competent authority" (in this country, the High Court) where the recognition and enforcement is "sought". In my view, these conditions clearly contemplate the objection(s) being taken in an action brought by the award-creditor for the recognition and enforcement of the award, and not otherwise. Since section 7 expressly provides that the refusal (if such is to be the case) must be "in accordance with" Article V, in my view this indicates that any action in which the question of a refusal to recognize or enforce a Convention award is raised must conform both substantively and procedurally with the requirements of Article V. This means that a ground in paragraph 1 of Article V can only be taken in enforcement proceedings brought by the award-creditor and not otherwise. Action to be initiated by the award-debtor is precluded in such a situation, on account of the language used in section 7 read with Article V. Put differently, at least insofar as paragraph 1 of Article V is concerned, section 7 only operates as a shield and cannot be used as a sword.

13. The foregoing conclusion as regards the interpretation of section 7 is also borne out by the pro-enforcement bias of the Convention, as noted above. It is quite clear that, wherever possible, the Convention seeks to reduce the manner and stage of challenging an award. Of course, this does not mean that such a challenge is eliminated altogether. What it does mean, in my view, is that if the relevant statute in the *lex fori* does not so provide either expressly or by necessary implication, then a challenge or objection to an award must be regarded as being limited to proceedings brought by the

award-creditor. I cannot, with respect, agree with what appears to be the rather more expansive approach suggested in *Kronke* (*op. cit.*). Certainly, in my view, the case law cited above does not support such a conclusion. Secondly, section 8 of the 2011 Act must also be kept in mind. It is a highly unusual provision. The normal rule of interpretation is of course that if there is any inconsistency between the main provisions of a statute and any schedule thereto, the former are to prevail (see, e.g., the well known observations of the Supreme Court in *Excise and Taxation Officer, Karachi and another v. Burmah Shell Storage and Distribution Company of Pakistan and others* 1993 SCMR 338). Section 8 expressly reverses the normal rule: in case of any inconsistency, the Convention is to prevail and the provisions of the 2011 Act must yield. The inclusion of such a section in the 2011 Act also points, in my view, towards the conclusion that I have arrived at in relation to section 7.

14. The case law relied upon by learned counsel for the plaintiff may now be considered. Before doing so, I must record my appreciation of the efforts made by learned counsel to gather decisions from a number of jurisdictions. The primary decision cited was, as noted, *Dallah*. In that case, a Convention award was made in Paris and sought to be enforced in England. As is at once obvious, the basic factual position of the cited decision was entirely different from that at hand. The award-debtor (interestingly, the Government of Pakistan) sought to avoid enforcement on the ground that it had never been party to the arbitration agreement on which the award was made, its case being that the relevant contracting party was a trust that was distinct and separate from the Government. This plea succeeded and enforcement of the award was refused. Ultimately the award-creditor's appeal before the UK Supreme Court also failed. *Dallah* is of course an important judgment that touches upon many aspects of international arbitration. To the extent that it is material for present purposes, I have already cited the relevant passage from Lord Collin's judgment. However, with respect, that, in my view, is the extent of the decision's relevance for present purposes. I may also note (somewhat as an aside, which however is not without interest) that the UK Supreme Court proceeded on the basis that the law governing the arbitration was French law, and Lord Collins observed that the "essential question is whether the Government has proved that there was no common intention (applying the French law principles) that it should be bound by the arbitration agreement" (see at [132], pg. 1519). It was held that there was no such intention. *Wolff* notes (see pg. 171, fn. 506) that "the Paris Court of Appeal subsequently came to an opposite conclusion than the UK Supreme Court ... finding that Pakistan, by its behavior during the negotiation and termination of the contract, considered itself to be the true party to the contract despite the

formalism of the trust which was the signatory to the contract containing the arbitration obligation". The decision of the French Court is reported at XXXVI YCA 590 (2011).

15. The next case is *First Options of Chicago Inc. v. Kaplan* (1985) 514 US 938. This case relates to an issue arising in relation to a well known rule of international arbitration, referred to as "competence-competence", i.e., the jurisdiction of the arbitrators to decide disputes regarding their own "competence" (i.e., jurisdiction). Although the cited decision is the leading US authority in this regard, this issue does not, as such, arise here. Furthermore, the decision of the US Supreme Court was in relation to domestic arbitration and not a Convention award. With respect, it has no relevance for the issue at hand. The third case relied upon was *Indowind Energy Ltd. v. Wescase (I) Ltd. and another* AIR 2010 SC 1793. This case, decided by the Supreme Court of India, was also in relation to a domestic arbitration and related to a stage prior to the making of any award, i.e., at the very inception of the arbitral process. It was thus in relation to issues that are quite different from the one at hand and, with respect, is not relevant as such. The fourth case relied upon was *International Research Corp. PLC v. Lufthansa Systems Asia Pacific Pte Ltd.* [2013] SGCA 55, a decision of the Court of Appeal of Singapore. The respondent, as claimant, initiated arbitration proceedings with the Singapore International Arbitration Center, and joined the appellant as one of the parties. The appellant took the plea that it was not party to the arbitration agreement and hence the arbitral tribunal had no jurisdiction in the matter. The objection was taken before the tribunal, which ruled against the appellant. This ruling was challenged before the Singapore High Court, where the decision of the tribunal was upheld. The appellant preferred an appeal to the Court of Appeal, which was allowed. While this decision may have some bearing on the ground itself, as taken by the plaintiff, it does not touch upon the issue that is before me, which is of course whether proceedings for a preventative declaratory judgment are maintainable under the 2011 Act. Furthermore, the cited decision was not on a Convention award. It too therefore, with respect, is not relevant as such for present purposes.

16. Learned counsel also relied on *Sarhank Group v. Oracle Corporation Ltd.* 404 F.3d 657 (US Court of Appeals, 2nd Cir, 2005). Although the case is cited as noted, it is pertinent to note that in fact Oracle Corporation Ltd. was the appellant and Sarhank Group was the respondent (or "appellee", as the US legal lexicon has it). This was a case of a Convention award, the award having been made in Cairo. Sarhank Group was the award-claimant and brought proceedings in the relevant US District Court to enforce the award

against Oracle Corporation. The latter resisted enforcement on the ground that it was not a party to the arbitration agreement, which is of course the ground urged by the plaintiff. Certain other objections were also taken, but all were rejected by the District Court, which enforced the award. On appeal, the Second Circuit reversed and remanded the case. Again, while this decision may have relevance for the ground taken by the plaintiff, it was not a situation where a preventative declaratory judgment or negative declaration was sought, which is the issue here. It also does not therefore, as such, have any relevance. Finally, learned counsel relied on *Dardana Limited v Yukos Oil Company* [2002] 2 Lloyd's Rep 326. The judgment was that of Mance, LJ (as he then was), with whom the other members of the Court of Appeal agreed. The cited decision was considered in *Dallah*, both by Lord Mance himself and Lord Collins in the contexts as there relevant (see at [12], [67], [77] (the passage cited herein above) and [127]). The decision does not therefore, with respect, require any separate consideration.

17. In view of the foregoing discussion, I would answer the question of law posed at the beginning of this decision in the negative, insofar as the ground taken falls in paragraph 1 of Article V of the Convention. It necessarily follows that as regards the present application for interim relief, it must be held that the plaintiff has failed to make out a prima facie case. Before concluding I may however, note one point. Nothing in this decision can or will preclude the plaintiff from taking up the aforementioned ground (and, of course, any other ground available to him) by way of any defense or objection to any proceedings that may be taken by CNAN for recognition or enforcement of the Award under the 2011 Act. Should such proceedings be initiated by CNAN, any such ground or objection taken by the plaintiff (as respondent therein) will be decided on its own merits.

18. Accordingly, this application fails and is hereby dismissed.

JUDGE

2014