IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS CIVIL DIVISION

CICA (CIVIL) APPEAL No. 0019 of 2023
(Formerly FSD 0130 of 2023)

BETWEEN

MINSHENG VOCATIONAL EDUCATION COMPANY LIMITED

APPELLANT

AND

(1) LEED EDUCATION HOLDING LIMITED

(2) NATIONAL EDUCATION HOLDING LIMITED

(3) HYDE EDUCATION HOLDING LIMITED

RESPONDENTS

Before:

The Rt Hon Sir John Goldring, President
The Hon Sir Michael Birt, Justice of Appeal
The Hon Sir Anthony Smellie, Justice of Appeal

Appearances: **Mr. Tom Lowe KC instructed by Mr Erik Bodden and Mr Jordan McErlean of Conyers Dill & Pearman LLP appearing on behalf of the Appellant**
Mr Stephen Moverley Smith KC instructed by Mr Nicholas Dunne and Ms Rebecca Moseley of Walkers (Cayman) LLP appearing on behalf of the Respondents

Heard: **23 January 2024**

Draft circulated: **15 March 2024**

Judgment delivered: **28 March 2024**

JUDGMENT

Smellie JA:

1. The Appellant (hereinafter "**Minsheng**") appeals against an Order made by Mr Justice Segal (the "**Judge**") on 29 August 2023 in this action (the "**Orde**r"). By the Order the Judge granted the Respondents' application for an injunction pursuant to Section 54 of the Arbitration Act 2012 (the "**Act**") restraining Minsheng from taking any steps to enforce a series of share charges granted by the Respondents over 49% of the issued share capital in Leed International Education Group Inc, a Cayman Islands company (the "**Share Charges**" and "**LIEG**", respectively), pending the outcome of arbitration proceedings commenced between the parties in the People's Republic of China (the "**PRC**").The seat of the arbitration being agreed to be the PRC, the proceedings were commenced at and pursuant to the rules of the China International Economic and Trade Arbitration Commission located in Beijing (the "**CIETAC Arbitration**").

2. The Judge's reasons for the grant of the Order were set out in a detailed judgment of 3 August 2023 (the "**Judgment**").

3. The injunction was granted subject to two conditions which were set out in the Schedule to the Order. First, the Respondents were required to file an affirmation confirming, with supporting evidence, the claim made in submissions on their behalf that they were unable to apply for interim injunctive remedies in the CIETAC Arbitration despite and after the filing of their request there for arbitration (the "**Affirmation Condition**"). Secondly, the Respondents were required to apply to the CIETAC Arbitral Tribunal for permission to continue to rely on the Order within 5 business days after its constitution in accordance with the CIETAC Arbitration Rules (the "**Application Condition**").

4. Subject to those conditions, the Judge concluded essentially that the risk of grave and irreparable harm to the Respondents if Minsheng were not restrained from enforcing the Share Charges pending the outcome of the CIETAC Arbitration, outweighed any risk of prejudice to Minsheng as might arise from the grant of the injunction restraining its enforcement of the Share Charges in

the meantime. In effect, as appears from [131] to [134] of the Judgment, the application was framed and granted not as an ordinary injunction but as one needed urgently to preserve the Respondents' interests, to protect the integrity of the CIETAC Arbitration, and to assist the arbitral process to operate effectively as contemplated by Section 54 of the Act, in circumstances where the Arbitral Tribunal had not yet been properly constituted.

5. Minsheng pursues a number of grounds of appeal under four main heads as follows[1]:

(i) There was no sufficient basis for exercising the jurisdiction under Section 54 of the Act because the Respondents failed to establish that there was a need for the Order without having first sought an injunction from either the CIETAC Tribunal or the Tribunal in related proceedings also under way between the parties in the Hong Kong International Arbitration Center (the "**HKIAC Arbitration**"). Since Minsheng was a party to both those proceedings and therefore amenable to orders from the Arbitral Tribunals or the relevant supervisory courts, the Respondents ought to have first sought such orders which would have been directly enforced if made or otherwise provided evidence to show that it was impractical to make any such prior applications.

(ii) Relief under Section 54 of the Act was unavailable in the circumstances of this case. This is said to be because the Share Charges, which are governed by Cayman law, are issued by LIEG, a Cayman company, and covered by a competing dispute resolution clause (Clause 18 of the respective Share Charges) to that covered by either the CIETAC or HKIAC Arbitrations and which requires the parties to the Share Charges to submit any dispute to the non-exclusive jurisdiction of the Cayman Islands Courts. The Appellant's right to enforce the Share Charges was thus a matter which was subject to the non-exclusive

[1] Following an application to the Judge for leave to appeal upon which he concluded that leave was not required because the Order, which finally disposed of the Respondents' summons was final and not interlocutory in nature (only in the sense that it was dispositive of the summons although not conclusive of any rights in dispute). The Judge stated however, that if leave had been required he would have granted it because the case raised a question of public importance which would benefit from appellate review: see Written Decision of 31 August 2023 in this Cause. No issue arises as to the right of appeal or the jurisdiction of this Court to entertain it.

jurisdiction of the Cayman Courts and outside any relief that could be given in the foreign arbitrations. Accordingly, the injunction purportedly in aid of the CIETAC Arbitration was misconceived and should not have been granted.

(iii) No injunction could properly otherwise have been made in the case because the Respondents, who have no proprietary interest in the Share Charges, were not otherwise entitled to one and so the Judge should not have invoked the Section 54 power in the circumstances of the case. This is said to be supported by the fact that the Judge had accepted that the Respondents were able to make a proprietary claim but only contingently in the future if (a) Minsheng refused or failed to comply with an order for specific performance that the HKIAC Tribunal might make in the future and (b) the Respondents then chose to treat that as a repudiation of a put option which they claim to hold (to be explained below) and thus reclaim the shares which are the subject of the Share Charges.

(iv) The Court should not, in any event, have granted an injunction restraining the enforcement of Minsheng's security interest. No injunction was properly available either under Section 54 or otherwise, to restrain the enforcement by Minsheng as a creditor of security held in respect of a debt – here said to be the interest-bearing loans provided by Minsheng (through an affiliate entity) to the Respondents, in respect of which the Share Charges were given to Minsheng by way of security. The Court had erroneously held at [125] of the Judgment, that the principle preventing a Court from enjoining enforcement of a security did not apply when the debtor argued that the secured debt had been contractually eliminated or reduced even if the secured creditor disputed that the debt had been so eliminated or reduced. But the principle preventing a Court from enjoining enforcement of a security when properly understood applied (a) so long as the secured creditor disputed the elimination or reduction of the loan as having been a sufficient payment of the loan unless or until the account given by the debtor was agreed or established by proceedings; or (b) whenever the debtor claimed by a different transaction to have repaid the loan of the secured creditor to which a

charge related, such as by the alleged put option upon which the Respondents relied (and to be further discussed below).

6. The Injunction, although interim in nature and effect, was in final form and expressed to expire on the delivery of a final award on the merits in respect of the CIETAC Arbitration (or until the CIETAC Arbitral Tribunal otherwise directed). A further complaint of Minsheng is that there was no undertaking in damages given by the Respondents, contingent upon that outcome, and the Judge refused a request to require such an undertaking when the Order was made. However, as the Respondents pointed out during the hearing, such an undertaking was indeed required and given by them, as set out at [4] to the Schedule to the Order. To the extent that an undertaking in damages could be relevant to the outcome, it appears therefore that this argument falls away.

The factual background

7. The inquiry in the action touches upon the Share Charges as well as upon three other sets of inter-related agreements – a share purchase agreement between Minsheng (as purchaser) and each of the Respondents (as sellers) to purchase shares in LIEG and two loan agreements entered into to facilitate the acquisition of the shares. The factual contexts of these Agreements, along with that of a further ancillary agreement - the Equity Entrustment Agreement - will be more fully explained below, in terms largely as taken from the Statements of Facts prepared by the parties for the appeal, as well as from the Judgment itself.

8. Some understanding of the various Agreements is needed in order to assess whether the Respondents' case met the requirements for protection by way of interim proprietary injunctive relief and so for a proper assessment of the Judge's exercise of jurisdiction and discretion in granting the Order in the circumstances of the case.

9. The Respondents are companies incorporated in the British Virgin Islands. They are each investment holding companies, with investments in education-related projects primarily in the PRC, where they operate schools and universities.

10. LIEG was incorporated in the Cayman Islands on 15 April 2008 and is the sole shareholder of Leed International Education Group (China) Limited, which in turn, is the sole shareholder of a group of entities operating in the PRC.

11. The Respondents were the initial shareholders of LIEG.

12. Minsheng is a Cayman Islands company and is part of a group of companies (the "**Minsheng Group**") ultimately held by Minsheng Education Group Company Limited ("**Minsheng Parent**"), a company listed on the Hong Kong Stock Exchange ("**HKSE**").

13. By a Share Purchase Agreement dated 20 August 2018 (the "**SPA**"), the Respondents agreed to sell and Minsheng agreed to purchase the Respondents' interest in LIEG, amounting to 51% (the "**Sale Shares**" or "**First Tranche**") of the total issued share capital of LIEG.

14. Upon the sale and purchase of the First Tranche, Minsheng acquired 51% of LIEG and the Respondents together retained the remaining 49% (the "**Remaining Shares**" or "**Second Tranche**").

15. The SPA is governed by the law of Hong Kong and contains an HKIAC arbitration clause. In its original form the SPA is written in Chinese and the meaning of its terms in the Chinese language prevails.

16. In accordance with Clause 13.4 of the SPA, on 24 December 2018, the Respondents, Minsheng and certain of their affiliates entered into a loan agreement (the "**2018 Loan Agreement**") pursuant to which an affiliate of the Appellant (the "**Minsheng Lender**") extended a loan of RMB200 million to a borrower (the "**Leed Borrower**") designated by the Respondents.

17. On 27 June 2019, the same parties to the 2018 Loan Agreement entered into another loan agreement (the "**2019 Loan Agreement**", together with the 2018 Loan Agreement, the "**Loan**

Agreements") pursuant to which the Minsheng Lender extended a further loan of RMB200 million to the Leed Borrower.

18. The 2018 Loan Agreement called for the execution of the Share Charges and on 24 December 2018, each of the Respondents as Chargor and Minsheng as Chargee, executed a share charge pursuant to which the Respondents charged the Remaining Shares to Minsheng (the three resulting charges are what are referred to above and hereinafter as the Share Charges). No equivalent share charge was executed in relation to the 2019 Loan Agreement.

19. Much of the dispute between the parties turns on the arrangements relating to the Remaining Shares (or Second Tranche) held by the Respondents. The arrangements which deal with these shares are contained in the following:

a. Clause 8 of the SPA which provides a mechanism, whereby the Respondents may exercise an option granted by Minsheng compelling the purchase of the Remaining Shares by Minsheng. That put option mechanism is that which has been mentioned above and is one of the subject matters of the HKIAC Arbitration (the "**Put Option**");

b. An Equity Entrustment Agreement (also mentioned above, the "**EEA**") (at Appendix 37 of the SPA) dated 20 August 2018, whereby Minsheng was entrusted to control and receive all the benefits from the Remaining Shares during the entrustment period[2]. Under Clause 5 of the EEA, the entrustment period runs from the date of the completion of the SPA, until the earlier of five years from the completion date (instead of the signing date) of the SPA or the date of sale of the Remaining Shares to Minsheng.

The EEA together with the Loan Agreements and the Share Charges are therefore ancillary agreements to the SPA. These ancillary agreements provide a

[2] As agreed at [13 (b)] of the Appellant's Statement of Facts but in contrast with [24] of the same where it is asserted (presumably in error) that it was the Respondent who was so entitled.

framework for the Remaining Shares pending any potential exercise of the Put Option mechanism under Clause 8.1 of the SPA. Thus, the entrustment period for the EEA correlates with the put option period under Clause 8.1 of the SPA.

c. Deduction arrangements under the Loan Agreements whereby outstanding balances of the loans advanced pursuant to the Loan Agreements may be deducted against the price payable by Minsheng to the Respondents in the event the Respondents choose to sell the Remaining Shares to Minsheng pursuant to the Put Option.

d. The Share Charges which secured the indebtedness of the Respondents under the 2018 Loan Agreement. As already also mentioned, there is a non-exclusive Cayman jurisdiction clause in each of the Share Charges.

20. The Loan Agreements, which are each in Chinese and governed by PRC law, are the subject of the CIETAC Arbitration, even while the SPA is the subject of the HKIAC Arbitration.

Clause 8.1 of the SPA

21. The proper interpretation of Clause 8.1 of the SPA, including the manner in which the Put Option was granted, the validity of the Put Option Notice, and the calculation of the exit (or purchase) price for the Remaining Shares, is a central matter of dispute between the parties:

a. On Minsheng's case, Clause 8.1 of the SPA provides a mechanism for operation of the Put Option, pursuant to which it, Minsheng, is required to grant an option to the Respondents at a time of its choice within the put option period provided under Clause 8.1 (the "**Exercise Period**"), and the Respondents may choose to exercise the option granted by it and sell the Remaining Shares at an exit price to be calculated pursuant to the formula provided under Clause 8.1 of the SPA.

b. On the Respondents' case, the Put Option was exercisable at any time during the Exercise Period at the Respondents' sole discretion. Upon the Respondents'

election to exercise the Put Option under Clause 8.1 of the SPA, Minsheng is obliged to purchase the Remaining Shares. It is the Respondents' case that, on 15 October 2021, they exercised the Put Option under Clause 8.1 of the SPA by issuance of a notice to Minsheng at a price of RMB 2,180,735,567.50, that being the purchase price for the Remaining Shares resulting from the application of the formula under Clause 8.1 of the SPA (the "**Put Option Notice**" and the "**Purchase Price**", respectively).

c. Minsheng denied that the Respondents were entitled to exercise the Put Option without Minsheng's prior grant of option or that if they were so entitled, the amount payable was the Purchase Price. Minsheng further contends that the Respondents' interpretation of the put option period under Clause 8.1 is wrong, and as such the Put Option Notice was invalid.

d. Minsheng also raised various counterclaims in the HKIAC Arbitration concerning the Respondents' alleged breaches of the SPA and seeks a full set-off of the damages for its counterclaims against any exit price payable by it under Clause 8.1.

22. These disputes arising out of the SPA are subject to the ongoing HKIAC arbitration, commenced by the Respondents on 26 October 2021.

The Loan Agreements and Deduction Arrangement

23. The Loan Agreements contained an arrangement whereby loans advanced pursuant to the Loan Agreements may be deducted in part payment of the price payable by Minsheng to the Respondents upon the exercise of the Put Option pursuant to Clause 8 of the SPA.

24. Clause 14(4) of the 2018 Loan Agreement (governed by PRC Law) provides that in the event that the Respondents exercised the Put Option in Clause 8.1 of the SPA, and the Leed Borrower or the Respondents issued a written confirmation to the Minsheng Lender or Minsheng that they would

not continue repaying the Loans, the amounts owed by the Leed Borrower or the Respondents to the Minsheng Lender or to Minsheng under the Loan Agreements and/or the Share Charges, are then to be deducted against the exit price payable by Minsheng to the Respondents.

25. Clause 13(4) of the 2019 Loan Agreement (also governed by PRC Law) contained an identical provision for the amount to be repaid under it to be potentially deducted from the price payable for the Remaining Shares.

26. On Minsheng's case, both the 2018 and 2019 Loans were deemed to fall due for payment on 27 July 2023. As at that date the debts under the Loan Agreements will have amounted to a total of approximately RMB 411,824,246.58, consisting of (i) RMB 205,811,917.81 under the 2018 Loan Agreement and (ii) RMB 206,012,328.77 under the 2019 Loan Agreement.

27. On 27 April 2023, the Respondents notified Minsheng that upon their exercise of the Put Option, no amounts remained outstanding under each of the Loan Agreements as these amounts have been deducted against (or set off against) the purchase price which the Respondents claim Minsheng is liable to pay for the Remaining Shares (or Second Tranche) pursuant to Clause 8.1 of the SPA. This is denied by Minsheng and is one of the subject matters of the CIETAC Arbitration.

28. The 2018 Loan Agreement and 2019 Loan Agreement each contain a Beijing CIETAC arbitration clause. The CIETAC Arbitration has thus been commenced by the Respondents in relation to, *inter alia*, the deduction arrangements in the Loan Agreements against the Purchase Price due under Clause 8.1 of the SPA. The existence of the Loans themselves is not in dispute. According to Minsheng[3], the dispute is about the ability of the Respondents to use the set-off arrangements in the Loan Agreements against the sum alleged to be due under Clause 8.1 of the SPA for the Remaining Shares as well as the CIETAC Tribunal's decision related to jurisdiction.

29. Further, according to Minsheng, subject to PRC law, the Respondents' purported set-off could not arise unless and until the Respondents establish at least their case in the HKIAC Arbitration and then only if the loans were not already in default. Hence, says Minsheng, the Respondents'

[3] See [30] of its Statement of Facts

claim for a proprietary right (said to be an equity of redemption) in relation to the Share Charges, can only be a future contingent claim which is as yet not to be regarded as a proprietary interest upon which a claim for an injunction can properly be based.

30. This is also an important reason, as Mr Lowe came to argue on appeal, why the Respondents were obliged to seek any interim injunctive relief they regarded as necessary in aid of the CIETAC Arbitration, not from the Cayman Courts but from either the CIETAC or the HKIAC Tribunal or the Hong Kong Courts.

The Share Charges

31. Under the terms of each of the Share Charges, where the secured obligations have been unconditionally and irrevocably discharged in full, and following a written request from the Respondents, Minsheng is obliged to *"... release the security constituted*" by each of the Share Charges (see Clause 15.1 of each of the Share Charges) ("**Request for Release**").

32. Pursuant to Clause 1.1 of each of the Share Charges, the definition of "*Event of Default*" only referred to the 2018 Loan Agreement but not to the 2019 Loan Agreement. The Respondents' case is therefore that the enforcement of the Share Charges would only be triggered by a failure of the Respondents to repay amounts owed under the 2018 Loan Agreement and/or any breach or event of default under the Share Charges. Thus, that they have an equity of redemption of the Remaining Shares and a right to release of those shares, once the Loan is discharged.

33. Also on 27 April 2023, each of the Respondents sent a Request for Release to Minsheng purportedly in accordance with Clause 15.1 of each of the Share Charges. They also asked Minsheng to confirm whether it challenged not only the exercise of the Put Option but also the Respondents' application (and set-off) of the Loans against the Purchase Price. The Respondents said that if this was not the case, then in order to preserve the position pending the conclusion of the HKIAC Arbitration and to avoid irreparable harm to the Respondents, they requested that Minsheng and the Minsheng Lender provide within fourteen days, an undertaking that they would not seek to enforce any term of the Loan Agreement or the Share Charges pending the final

resolution of the HKIAC Arbitration. The Respondents said that they would take legal action if they did not receive the requested undertaking.

34. On 11 May 2023, Minsheng's lawyers replied that they were taking instructions but noted that the Loan Agreements required any disputes to be referred to the CIETAC Arbitration and that disputes arising from the Share Charges were to be submitted to the non-exclusive jurisdiction of the Cayman Islands Court, and that matters regarding the Loan Agreements and Share Charges should be dealt with in the designated jurisdiction rather than the HKIAC Arbitration. They stated further that they did not see how the matters raised by the Respondents' lawyers' letter of 27 April 2023 were closely related to the HKIAC Arbitration, as the Respondents claimed.

35. On 12 May 2023, the Respondents further sought an undertaking from Minsheng that it would not take steps to enforce any term of the Share Charges pending the outcome of their disputes referred to arbitration. As no undertaking was forthcoming, the Respondents commenced this action on 19 May 2023[4] seeking the Order which was eventually granted by the Judge.

36. Whether or not the Respondents' right of set-off is ultimately established, Minsheng asserts that the Share Charges can be enforced by it to the extent of the amount of the Loans outstanding against the current market value of the Remaining Shares, without reference to the amount claimed by the Respondents by way of set-off or counterclaim.

37. But all that said, it is important to emphasise that the dispute about <u>the scope</u> of the Share Charges is not itself the subject of arbitration. The Share Charges are expressed in near identical terms in English and are governed by Cayman Islands law. They each provide for the non-exclusive jurisdiction of the Courts of the Cayman Islands in the following terms:

---

[4] Their Originating Summons prayed as follows: *"Until the delivery of a final award on the merits in respect of the following proceedings outside the Cayman Islands [the HKIAC Arbitration and the CIETAC Arbitration] the Defendant, whether by itself or by its servants, agents or otherwise, be restrained from taking any steps to enforce [the Share Charges] against 49% of the issued share capital of [LIEG], the charged property pursuant to the Share Charges (the "Charged Property"), whether pursuant to the Share Charges or otherwise, including without limitation, taking any steps to exercise voting rights and/or consensual powers pertaining to the Charged Property or any part thereof, to sell, transfer, grant options over or otherwise dispose of the Charged Property or any part thereof, or to receive and retain any dividends, interest or other moneys or assets accruing on or in respect of the Charged Property or any part thereof."*

"*This Charge shall be governed by and construed in accordance with the laws of the Cayman Islands and the Parties irrevocably submit to the non-exclusive jurisdiction of the courts of the Cayman Islands provided that nothing in this Clause shall affect the right of the Chargee to serve process in any manner permitted by law or limit the right of the Chargee to take proceedings with respect to this Charge against the Chargor in any jurisdiction, nor shall the taking of proceedings with respect to this Charge in any jurisdiction preclude the Chargee from taking proceedings with respect to this Charge in any other jurisdiction whether concurrently or not*."

38. The Share Charges also include identical indemnity clauses at Clause 10.1 of the respective Share Charges which provides that:

"10. *INDEMNITIES*

10.1 The Chargor will indemnify and save harmless the Chargee, the Receiver and each agent or attorney appointed under or pursuant to this Charge (each an "Indemnitee") from and against any and all expenses, claims, liabilities, losses, taxes, costs, duties, fees and charges properly and reasonable (sic) suffered, incurred or made by the Chargee, the Receiver or such agent or attorney:

(a) in the exercise or purported exercise of any rights, powers or discretions vested in them pursuant to this Charge or by law:

(b) in the preservation or enforcement of the Chargee's rights under this Charge or the priority thereof; or

(c) on the release of any part of the Charges (sic) Property from the security created by this Charge,

And the Chargee, the Receiver or such agent or attorney may retain and pay all sums in respect of the same out of the money received under the powers conferred by this Charge.

All amounts recoverable by the Chargee, the Receiver or such agent or attorney or any of them shall be recoverable on a full indemnity basis".

39. Ultimately, whatever the outcome in either of the arbitral proceedings, Minsheng's case is that it will be able to rely upon that indemnity, enforceable under Cayman law.

Summary of the Arbitral Proceedings

The HKIAC Arbitration

40. As already noted, on 26 October 2021, the Respondents commenced the HKIAC Arbitration. Under the HKIAC Arbitration, the Respondents seek relief, *inter alia,* for (i) an order for specific performance of Clause 8.1 of the SPA that Minsheng purchases the Remaining Shares on such terms as specified in the Put Option Notice and (ii) an order for damages for breach of the SPA in lieu of or in addition to the relief of specific performance.

The CIETAC Arbitration

41. Also as already noted, on 11 May 2023, the Respondents initiated the CIETAC Arbitration purportedly in accordance with the dispute resolution clause under the Loan Agreements. The main claim in the CIETAC Arbitration is that Minsheng, in breach of the Loan Agreements, denied the Respondents the right to exercise the Put Option under the SPA (and hence the right to deduct any outstanding sums under the Loan Agreements from the exit or Purchase Price payable by Minsheng), and they seek an order that all outstanding debts and obligations of the Leed Borrower and/or the Respondents under the Loan Agreements have been discharged as a result of the written confirmations and request for release provided by the Respondents to Minsheng on 27 April 2023.

42. On 27 June 2023, the Minsheng Lender filed an application in Beijing No. 4 Intermediate People's Court challenging the validity of the arbitration agreement in the Loan Agreements ("**Application to Challenge the CIETAC Arbitration**"). As a result, on 4 July 2023, CIETAC

issued a letter informing the parties that the CIETAC Arbitration was suspended as of the date of the letter. On 11 July 2023, the Minsheng Lender unilaterally withdrew the Application to Challenge the CIETAC arbitration, without, according to the Respondents, providing any explanation or justification. On 3 August 2023, CIETAC issued a notice to reinstate the process of the CIETAC Arbitration.

43. On 15 September 2023, the Respondents, in keeping with the Application Condition imposed by the Order, applied to the CIETAC Arbitral Tribunal for permission to continue to rely on the Injunction granted in the Order ("**Injunction Reliance Application**"). Minsheng and the Minsheng Lender opposed the Injunction Reliance Application and filed submissions arguing, *inter alia,* that the Tribunal in the CIETAC Arbitration has no jurisdiction to make any orders with respect to the Share Charges. As at the date of the hearing of this appeal, the decision of the CIETAC Arbitration was still awaited.

Summary of the arguments before the Judge

44. These, with the foregoing factual background in mind, appear helpfully in the Judgment respectively at [33] to [35] for the Respondents (then the Applicants), and at [66], for Minsheng. By way of further context for the Judge's decision as explained at [1] to [4] above, the following are excerpts from those passages of the arguments before the Judge:

"[33] The (Applicants) seek to restrain the exercise by Minsheng of its enforcement rights under the (Share) Charges pending the outcome of the Arbitrations. The (Applicants) say that if they are successful in the Arbitrations it will be established that the liabilities secured by the (Share) Charges have been discharged so that Minsheng no longer had the right under the (Share) Charges (or in equity) to enforce the (Share) Charges. They say that if Minsheng is permitted to exercise their enforcement rights under the (Share) Charges before the (Applicants) have been able to obtain an award in the Arbitrations, they will suffer irreparable loss (for which damages will not be an adequate remedy) because such enforcement (particularly a sale of their shares in (LIEG) to a third-party) would at least be difficult and probably impossible to unwind and the effect of such enforcement would or could be to prejudice their claim to specific performance of

the Put Option in the (HKIAC) Arbitration or to deprive the (Applicants) of their proprietary rights in these shares which may subsist and be of material value in the event that if they succeed in the Arbitrations, the Loans are confirmed as having been paid and the (Share) Charges released. The (Applicants) also argue that they have established that Minsheng itself [(as distinct from Minsheng Group as a whole)] is unlikely to have sufficient assets to meet its liabilities to the (Applicants) and to compensate (them) for the loss as a result of a wrongful enforcement of the (Share) Charges.

[34] The (Applicants) argued that in order to establish before the (HKIAC) arbitral tribunal a right to an award of specific performance they must show that they are ready, willing and able to complete the sale pursuant to the Put Option by transferring the Second Tranche to Minsheng. They argue that they will not be in a position to do so if the Second Tranche has already been sold or appropriated by Minsheng, purportedly in the exercise of its enforcement rights under the Charges. Such a wrongful enforcement would entirely frustrate the (HKIAC) Arbitration"

And as to Minsheng's arguments:

"[66] (a) Minsheng agreed that Section 54 was modelled on Article 17J of the Model Law and that the Explanatory Note to that Article was a relevant guide to its purpose.

(b) the (Applicants) had failed to show that Minsheng's right to enforce the (Share) Charges was the subject of any disputed issues in either of the Arbitrations. Indeed, the (Applicants) had not clearly explained their case as to how the (Share) Charges related to the Arbitrations. The relief now sought by the (Applicants) in respect of the (Share) Charges was outside the legitimate scope of the (CIETEC) Arbitration (since the (Share) Charges contain non-exclusive Cayman jurisdiction clauses) and therefore outside Section 54. The Court had no jurisdiction to grant that relief based on Section 54.

(c) even if enforcement was a matter falling within the scope of the Arbitrations, the (Applicants) had failed to explain why they had not first applied to the arbitral tribunals to seek the relief they now seek from this court. In fact, there was no proper justification for the failure to do so and for that reason the Court should not grant the relief sought. Nor was an injunction necessary to protect the Arbitrations.

(d) Minsheng has not threatened to sell or dispose of the secured shares. The (Applicants) had failed to establish that there was a risk of an actionable wrong. The (Applicants) were not entitled, as a matter of Cayman Islands law, to an interlocutory injunction to prevent enforcement of the (Share) Charges. No injunction could be given without the (Applicants) paying the full amount of the secured liabilities into Court.

(e) in this case damages would be an adequate remedy. The (Applicants) maintained a claim for the Purchasers' Purchase Price and if correct would have a claim for the balance of that sum after a deduction of the Loans. Even if Minsheng went ahead and enforced the (Share) Charges, any loss suffered by the (Applicants) could be compensated in damages and the (Applicants) had failed to show that Minsheng would not be good for such damages.

(f) Minsheng already had control of the Second Tranche pursuant to the (EEA) and so there was little concern over disrupting the status quo if Minsheng was allowed to enforce the (Share) Charges.

(g) Minsheng disputed the (Applicants') characterization of the agreement set out in the SPA and the other related documents. It did not accept that the SPA should be seen as involving a two-stage sale of all the shares in the Company. It did not accept that the (Applicants) had exercised the Put Option (an issue for the (HKIAC) arbitrators). It did not accept that the Loans were to be treated as a downpayment on the price payable upon a valid exercise of the Put Option. Furthermore, Minsheng disputed the (Applicants') claim that the liabilities owed by the (Leed) Borrower to the (Minsheng) Lender could be applied in discharge (of) the liabilities of Minsheng to the (Applicants) (sic). There was also a dispute as to whether the (Share) Charges secured the liabilities owed under the 2019 Loan Agreement, which Minsheng considered they did. Minsheng's position had been set out in its statement of defence and counterclaim, and its reply to the (Applicants') defence to the counterclaim in the (HKIAC) Arbitration"

Proceedings on the Appeal

45. In keeping with the Affirmation Condition, the Respondents filed the Third Affirmation of Li Dong Xia ("**Li 3**") on 7 September 2023. By Li 3 they seek to explain why it was not feasible for them to have applied for interim remedies (or measures) in the CIETAC Arbitration; namely that the CIETAC Tribunal does not have the power of enforcement and if an application had been

made to the CIETAC itself, it would have been required to forward it to the PRC Court, which itself would not have had jurisdiction to order the relief requested. This, as Li 3 explains at [12], is because the PRC Courts do not impose preservation measures (the equivalent of injunctions) over a foreign subject matter such as the charged shares of a Cayman company.

46. Li 3 having been filed on 7 September 2023, Minsheng could have sought to challenge the assertions made in it by way of the liberty to apply given by [3] of the Order but did not do so. Instead, on 21 December 2023, more than four months after the Judgment, three months after the filing of its Notice of Appeal and two and a half months after the filing of the Grounds of Appeal, it served the Respondents with a summons (the "**New Evidence Summons**") by which it seeks to rely, invoking *Ladd v Marshall* [1954] 1 WLR 1489, on new, expert evidence contained in a Memorandum of Opinion from Dr Wang Wen Ying (exhibited to the Fourth Affirmation of Lam Ngai Lung). In sum, it is Dr Wang's opinion that the CIETAC Rules provide for the appointment of an emergency arbitrator in circumstances where an arbitral tribunal is yet to be fully established and that the emergency arbitrator could have provided the parties with urgent interim relief such that there was no need for the Respondents to have applied to the Cayman Court.

47. Without embarking upon the debate over the merits of the New Evidence Summons, we decided to consider both the evidence presented in Li 3 and Dr Wang's opinion *de bene esse*, on the basis that whatever would have been the position had the Respondents first applied to the CIETAC Tribunal or the PRC Courts, the Judge's decision in granting the interim injunction, if correct in the circumstances presented to him, would render that debate moot.

The discussion and analysis of Minsheng's arguments on the appeal

48. **[Ground 1: That the Respondents were obliged first to seek relief in either of the foreign arbitrations or from the supervisory courts at the seats of the arbitrations].** Certain provisions of the Act are directly relevant to the issues raised by this Ground. Given that the Court is here concerned with foreign arbitrations (primarily the CIETAC Arbitration), the relevant provisions are distinct from powers given under the Act to the Courts in relation to local arbitrations, such that while the Act seeks primarily to set the framework for arbitral proceedings

within the Islands, section 54 expressly also allows the Courts to act in aid of foreign proceedings.

49. Thus, to begin the examination for present purposes, section 3 of the Act states**:**

> *"(1) The provisions of this Act apply where the seat of the arbitration is in the Islands.*
>
> *(2) ….*
>
> *(3) The provisions of this Act are founded on the following principles, and shall be construed accordingly –*
>
> *(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial arbitral tribunal without undue delay or undue expense;*
>
> *(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and*
>
> *(c) in matters governed by this Act the court should not intervene except as provided in this Act.*"

50. Under the heading "***Court's powers exercisable in support of arbitration proceedings***", Section 43 provides as follows**:**

> "(*1) In relation to an arbitration a court –*
>
> ***(a)*** *may make such orders in respect of any of the matters set out in sections 38 and 40*[5] *as it would in relation to an action or matter in the court:*
>
> ***(b)*** *may secure the amount in dispute;*
>
> ***(c)*** *shall ensure that any award that may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and*
>
> ***(d)*** *may grant an interim injunction or any other interim measure.*

[5] Viz: procedural orders for the conduct of the arbitration, including for discovery and preservation of evidence and for the attendance and compulsion of witnesses by way of summonses or subpoena.

(2) An order of the court under this section shall cease to have effect in whole or in part if the arbitral tribunal or any such arbitral tribunal or person having power to act in relation to the subject matter of the order makes an order to which the order of the court relates.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case, the court shall act only if or to the extent that the arbitral tribunal vested by the parties with power in that regard has no power or is unable for the time being to act effectively."

51. Finally, and most on point for present purposes, section 54 provides:

"(*1) A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their seat is in the Islands, as it has in relation to the proceedings in court.*

(2) The court shall exercise those powers in accordance with its own procedures and in consideration of the specific principles of international arbitration".

52. It was submitted to the Judge by the Respondents and appears to have been accepted by him at [39] of the Judgment that, for the purposes of issuing interim measures in relation to foreign arbitral proceedings, section 3(1) of the Act operates so as to allow the Cayman Courts to exercise not the powers enumerated in section 43 (above); but pursuant to section 54, any other powers they have to grant interim relief in relation to proceedings before the courts themselves.

Thus, the Section 43 powers, which are expressed to relate only to arbitration proceedings seated in the Islands, were regarded as not being engaged in this case. Minsheng did not argue to the contrary and we accept that, even while section 43 reflects many of the relevant general principles which govern the relationship between a court and arbitral proceedings, that is the correct view of section 43. This conclusion, in light especially of the clearly restrictive provisions of section 43 (5) (above), will be of particular importance for reasons to be developed below.

53. It was also no doubt with the foregoing view of the jurisdiction vested by section 54 in mind, that the Judge had been invited by the Respondents to invoke section 11A of the Grand Court Act which allows proceedings to be brought for the grant of interim remedies in aid of foreign proceedings generally. That recourse was however, not pursued because as the Judge noted at [4] of the Judgment, "*during the hearing it became apparent that the Plaintiffs' claim to injunctive relief was based wholly on section 54 although there was some debate at the hearing as to the relationship between the two sections*".

54. The Judge therefore proceeded to consider what powers he otherwise had to issue interim measures, as he would have, in the words of section 54, "*in relation to proceedings in court*"; leading him to proceed on the basis of the Respondents' (then the Applicants') case, as described by him at [40] of the Judgment, in these terms:

> "*The Applicants as I understand their case, submitted that since they were seeking an interim injunction, the Court was required to apply the approach set out in American Cyanimid v Ethicon Ltd [1975] AC 396. But, since the injunction sought relief in anticipation of a threatened wrong, the additional requirements applicable to a quia timet injunction also needed to be considered and satisfied*."

55. Subject to further discussion below as to the possible application of the Section 11A powers, there is no dispute that the Judge was correct in this approach nor as to the appropriateness of his application of the common law and equitable principles which govern the grant of an interim injunction on the proprietary basis of the *American Cyanimid* test or the grant of a *quia timet* injunction on the basis of the principles applicable to such an injunction. Indeed, it appears from

[55] to [65] and [86] of the Judgment, that the Judge considered and applied those principles carefully and, as he noted at [77] of the Judgment, "*Minsheng accepted that if the Court was satisfied that the dispute regarding its rights to enforce the (Share) Charges was subject to the [HKIAC and CIETAC] Arbitrations so that an application under section 54 could properly be made, then the ordinary American Cyanimid principles applied"*.

56. The real debate about jurisdiction, both before the Judge and before this Court, has been as to the interpretation and effect of Section 54 itself and as to whether it is properly engaged in this case. Mr Lowe KC began his arguments on Ground 1 with the uncontroversial proposition that the jurisdiction vested in the courts by Section 54 of the Act, is purely ancillary to the arbitration in support of which the application is made. Indeed, this may be regarded as implicit from Section 54 itself when read with section 3(3) of the Act, in particular the principle stated in the latter sub-section, that the Court should not intervene in arbitration proceedings except as allowed by the Act itself.

57. This ancillary nature of the Court's jurisdiction, is also well understood as a matter of English law, as it is derived from the provisions of section 44 (1) of the Arbitration Act 1996 U.K. Section 44(1), like section 43 of the Act, relates primarily to local arbitral proceedings while however, being made applicable to foreign proceedings by section 2(3) of the U.K. Act. As explained by the English Court of Appeal on an application for interim mandatory injunctive relief in aid of a London arbitration[6] in *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555, per Anthony Clarke LJ, the purpose of the jurisdiction for the grant of interim measures is as follows:

> "***The whole purpose of giving the court power to make such orders is to assist the arbitral tribunal in cases of urgency or before there is an arbitration on foot.*** *Otherwise, it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process.* ***Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to***

[6] Seeking to restrain the defendant Roust Holdings Ltd from disposing or otherwise dealing with its assets, in particular its shareholding (through a subsidiary) in a Russian Bank which was the subject of a share purchase agreement between the parties and a subject of the dispute referred to arbitration.

ensure, by exacting appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators*." [emphases added]*

58. It is now clear from the case law to be discussed below, that this basic statement of principle is apposite not only to the exercise of the powers given to assist local arbitrations (as in the *Cetelem* case itself or under Section 43 of the Act) but also to those given for the assistance of international arbitrations (as in the case of Section 54 of the Act).

59. The Court also has other statutory power[7] to grant interlocutory injunctions, and to do so specifically and purely in support of foreign arbitrations, as recognized and explained by the House of Lords in *Channel Tunnel Group Ltd v Balfour Group Ltd* 1993 AC 334[8]. In that case, while the dispute between the parties was the subject of arbitral proceedings in Brussels, an application was made to the English courts by the appellants for a mandatory injunction to restrain the defendants from suspending an important part of the works on the Channel Tunnel. Their Lordships ultimately refused the application, heavily admonishing against the grant of such an injunction whenever it would operate to pre-empt any decision ultimately to be made by the arbitral tribunal and recognizing (per Lord Mustill at 367 E - 368 A), the importance of several of what are now regarded as the "*specific features*" or "*principles*" of international arbitration which, in his concluding remarks at 368H, he compendiously described as the "*spirit of international arbitration*":

"*In these circumstances, I do not consider that the English court would be justified in granting the very far-reaching relief which the appellants claim. It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial*

[7] Pursuant to section 37(1) of the Supreme Court Act 1981 U.K at a time when, under the Arbitration Act 1950 U.K., the Courts there did not yet have power (later given by the 1996 Arbitration Act) to grant interim measures in relation to foreign arbitrations. Since the introduction of the 1996 Act, injunctive powers given the courts under it, are seen, along with that under section 37 of the 1981 Act, as "*opposite and complimentary sides of the same coin*" - see *AES Ust-Kamenogorsk LLP v Ust-Kamenogorsk JSC* [2013] 1 WLR 1889 at 1909 [60]. Section 37 of the 1981 Act has been assimilated and adopted in the Cayman Islands by section 11 of the Grand Court Act, as discussed also by the Judge at [94] of the Judgment.

[8] Here citing also *Borden Inc v Meiji Milk Products Co*. 919 F. 2d. 822 (2nd Cir 1990), another case involving an attempt to obtain relief from a court in relation to a foreign-seated arbitration in circumstances where an arbitral tribunal had been constituted. The jurisdiction more generally to grant injunctions over assets belonging to a respondent over whom the court has personal jurisdiction but in aid of foreign proceedings was more recently examined by the Privy Council in *Convoy Collateral Ltd v Broad Idea International* [2023] AC 389

stage of a dispute arising under a construction contract to order the defendant to continue with performance of the works. But the court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief. In the combination of circumstances which we find in the present case I would have hesitated long before proposing that such an order should be made, even if the action had been destined to remain in the High Court. These hesitations are multiplied by the presence of clause 67 ([of the construction contract which provided for the reference of disputes to arbitration]). There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators; between, on the one hand, the need for the court to make tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail. The court has stayed the action so that the panel and the arbitrators can decide whether to order a final mandatory injunction. If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide".

And further 368 B-H:

"*Whatever exactly is meant by the words "competent judicial authority" in article 8.5 of the I.C.C. Rules, the Belgian court must surely be the natural court for the source of interim relief. If the appellants wish the English court to prefer itself to this natural forum it is for them to show the reason why, in the same way as a plaintiff who wishes to pursue a substantive claim otherwise than in a more convenient foreign court ([here citing Spiliada Maritime Corp v Cansulex Ltd [1987] A.C. 460). They have not done so. Apparently no application for interim relief has been made to the court in Brussels.*

> *… If the appellants had wished to say that the Belgian court would have been unable or unwilling to grant interim relief and that the English court is the only avenue of recourse, it was for them to prove it, and they have not done so… I have no doubt that the dispute-resolution mechanisms of clause 67 were the subject of careful thought and negotiation. The parties chose an indeterminate "law" to govern their substantive rights; an elaborate process for ascertaining those rights; and a location for that process outside the territories of the participants. This conspicuously neutral, "anational" and extra-judicial structure may well have been the right choice for the special needs of the Channel Tunnel venture. But whether it was right or wrong, it is the choice which the parties have made. The appellants now regret that choice. To push their claim for mandatory relief through the mechanisms of clause 67 is too slow and cumbersome to suit their purpose, and they now wish to obtain far reaching relief through the judicial means which they have been so scrupulous to exclude. Notwithstanding that the court can and should in the right case provide reinforcement for the arbitral process by granting interim relief I am quite satisfied that this is not such a case, and that to order an injunction here would be to act contrary to both the general tenor of the construction contract and to the spirit of international arbitrat*ion."

60. In his arguments on Ground 1, Mr Lowe invites the Court to be guided by Lord Mustill's dicta, especially for the importance it attaches to the fundamental principle, that arbitration is a consensual agreement between parties to submit their disputes to arbitration, based upon the parties' choice of forum for the determination of their rights *inter se* and for the resolution of their dispute, as well as the concomitant heavy burden of persuasion upon a party seeking to displace that choice by recourse to a foreign court. And most emphatically from Lord Mustill (as indeed from Lord Justice Clarke in *Cetelem* (above)), a foreign court should never grant an interim measure which, in effect, would usurp the jurisdiction of the arbitrator. As Section 54 of the Act does not spell out the extent of jurisdiction to order interim measures but refers to the usual powers the court would otherwise have to make such orders, it is important, says Mr Lowe, that such strictures upon the use of the powers (statutory or equitable), are observed. This, as a general proposition, I accept must be regarded as uncontroversial and I will return to it below.

61. As to the meaning and effect of Section 54 where it speaks of "*specific features of international arbitration*", Mr Lowe relies also upon other sources of authority discussed below for propositions which are however, largely controversial and which may be summarized from his written and oral submissions under four headings as follows (with emphases added):

(i) That Section 54 of the Act is patterned on Article 17J of the UNCITRAL Model Law[9] which is aimed primarily at enabling parties to obtain interim relief from national courts of the seat of arbitration when (a) urgent measures are needed such as said here for preventing a transfer of property **but** (b) only if it is not possible for the arbitral tribunal itself to grant effective measures.

(ii) Orders in respect of foreign arbitrations **should only be exceptionally granted** because they derogate from the key objectives which are (a) to centralise the resolution of all disputes in a single forum and limit the involvement of all courts (including national courts) and (b) **to leave assistance and supervision to the Courts of the seat of arbitration**.

(iii) When the power in Section 54 is to be exercised in favour of a foreign seated arbitration, as here, there are especially strong reasons for circumspection because the Court runs the double risk of acting at cross-purposes with the arbitral proceedings and the supervisory jurisdiction of the courts in the arbitral seat (see *Borden Inc v Meiji Milk Products Co* 919 F. 2d 822 (2nd Cir 1990), and here again, *Channel Tunnel Group Ltd v Balfour Beatty Construction* (above).

(iv) A Court being asked to make an order in respect of a foreign arbitration **should refuse relief when the applicant has not first sought an order from the tribunal or Courts of the seat -** here citing the *Owners of the Lady Muriel v Transorient Shipping* [1995] 2 HKC 320, per Godfrey JA, at p325-326.

[9] Where the expression "*specific principles of international arbitration*" is used. As both the Appellant and the Respondents agree, the wording of section 54 is derived from Article 17J of the UNCITRAL Model Law on International Arbitration 1986 (2006 Revision) and, the Judge appears rightly to have proceeded, at [88] of the Judgment, on the basis that the difference in wording was not material.

62. In support of the first two of these four propositions, Mr Lowe relied on the multi-volume work of "*International Commercial Arbitration* by Gary Born ("***Born***") (3rd Edition Chapter 17, headed "*Provisional Relief in International Arbitration*", starting at p2711). However, on a closer reading, apart from the agreed position that Section 54 of the Act is based on Article 17J, the passages from ***Born*** do not provide unqualified support for these propositions. Much appears to depend upon the policies adopted by the particular arbitration legislation of different jurisdictions and the circumstances of the cases themselves.

63. The cases given in support of Mr Lowe's first proposition, - *The Leviathan Shipping Co v Sky Sailing* and *Co A v Co D* cases (both above), are discussed in ***Born*** (pp 2736 -2738) under the sub-headings "*Statutory Limitations on Court-Ordered Provisional Measures*" and "*Judicial Limitations on Court-Ordered Provisional Measures*", where the author simply states what these cases decided. These and the other cases relied upon here by Mr Lowe will be discussed further below.

64. ***Born*** itself provides a broader picture of the current international approach to the use of the interim (or provisional) measures jurisdiction, under the same heading (*op. cit*.) but discussed at pp2728-2729, where the following statements appear. Note especially the breadth and reach of the jurisdiction thought to be attributable to Article 17J of the Model Law and hence, to Section 54 of the Act, in contrast with the more limited jurisdiction vested by section 43 of the Act or in the English Courts, by section 44 of the 1996 Act (U.K.) as read with section 2(3) of that Act [emphases added]:

> "*The concurrent jurisdiction of national courts and arbitral tribunals to issue provisional measures is expressly provided for by many national arbitration statutes. Although a few national laws are to the contrary, reserving provisional measures to national courts alone, the overwhelming weight of national arbitration legislation and judicial authority provides that both arbitral tribunals and national courts may (absent contrary agreement) issue provisional measures in connection with an international arbitration…*

The UNCITRAL Model Law is a prime example of legislation authorizing concurrent judicial and arbitral jurisdiction to grant provisional measures. Article 17 of the 1985 Model Law provides arbitral tribunals the power to order provisional relief (as discussed above), while Article 9 provides that parties do not violate their agreement to arbitrate simply by seeking provisional measures from a national court. The original Model Law thereby plainly contemplates that both arbitral tribunals and national courts will have concurrent power to order provisional measures in connection with international arbitrations (unless the parties have otherwise agreed).

Article 17J of the 2006 Revisions to the Model Law goes further, providing expressly that a national court "shall have the same power of issuing an interim measure in relation to arbitration proceedings" as exist "in relation to proceedings in court". The same paragraph also provides that "[t]he court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration". A court's powers under Article 17J are co-extensive with the arbitral tribunal's authority.

National courts in Model Law jurisdictions have frequently granted provisional measures in aid of international arbitrations… Although there are circumstances in which courts applying the Model Law will decline to exercise their authority to issue provisional measures in aid of international arbitration[10], there is no doubt as to the power of the courts to do so."

65. Further, at §17.04[C][3], under the heading *"Parties' Presumptive Right to Seek Provisional Relief from Both Arbitral Tribunal and National Courts",* Mr. Born states:

"In many jurisdictions, a party is free to seek provisional measures from either the arbitral tribunal or a national court (as a corollary of the principle of concurrent jurisdiction). Most arbitration statutes – including the 1985 Model Law, the 2006 Revisions to the Model Law, the US FAA and the Swiss Law on Private International Law – simply provide for concurrent jurisdiction without requiring a party to seek

[10] Here citing the many examples discussed at Section 17.04 [C][4][b] op cit, including those relied upon by Mr Lowe to be further discussed below.

provisional measures in one forum, rather than another. Absent contrary agreement; parties arbitrating pursuant to national arbitration legislation of this character are free to seek provisional measures from either the arbitral tribunal or a national court."

66. And still further at §17.04[C][6] Mr. Born comments:

"Given the principle of concurrent jurisdiction, an agreement to arbitrate should not (without more) be considered as a waiver of rights to court-ordered provisional measures. Similarly, an agreement incorporating institutional arbitration rules granting an arbitral tribunal (or an emergency arbitrator) the power to order provisional measures should not ordinarily be deemed to waive the right to seek court-ordered provisional measures."

67. As for emergency arbitrators, Mr Moverley-Smith KC pointed to this note by Cameron Sim in his textbook *Emergency Arbitration* at §3.167-8[11]:

"As regards the relationship between the court and arbitral tribunals, prior to the advent of emergency arbitration, it had been depicted that:

> *The handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made their award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.*

The advent of emergency arbitration means that in certain instances this analogy is no longer entirely apt. In the initial stages of a dispute, before the arbitral tribunal had

[11] Oxford International Arbitration Series, Oxford University Press, Citing Lord Mustill, "*Comments and Conclusions"* in *Conservatory Provisional Measures in International Arbitration*: 9th Joint Colloquium (ICC 1993) 118

been formed, under the majority of Emergency Arbitration Rules it is expressly no longer the case that 'the baton is in the grasp of the court.' ***Instead, the baton is in the hands of the claimant, who chooses whether it passes that baton to an emergency arbitrator or to the court in the event that interim measures are required prior to the constitution of the arbitral tribunal."*** [emphasis added]

68. The foregoing commentary from ***Born*** finds ample support in commentary from another source cited by Mr Moverley-Smith as being more authoritative on the subject of International Arbitration – ***Holtzman and Neuhaus "A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary"***[12] There, for instance at page 190, the following commentary appears: "*Article 17J. Court-ordered interim measures: The purpose of Article 17J is two-fold: to clarify that a competent court is authorized to issue interim measures with respect to pending arbitration proceedings: and to extend the court's authority to issue interim measures in support of arbitration to all arbitration proceedings, regardless of whether the proceedings are taking place in the State where the court is located or in another State. … The Working Group viewed the extension of the court's authority to issue interim measures in support of arbitrations taking place in other jurisdictions as necessary to meet the needs of modern international arbitration practice. It was noted that it was a feature of international arbitration to seek to "secure assets, follow a vessel, preserve evidence, or ask for actions to be taken "in jurisdictions other than the place of the arbitration. In addition to expressly providing this authority in the text of Article 17J, the Working Group amended article 1(2) to reflect that Article 17J is an exception to the territorial limitation of the Model Law*."

69. As Mr Moverley-Smith also submitted, the *travaux préparatoires* in relation to Article 17J provide some insight into what he describes as its "open-textured structure". The October 2005 Working Group Report, A/CN.9/589, para. 103, p. 578 records:

"*A view was expressed that article 17 bis might not fully address the potential problems which might arise with respect to the relationship between the power of State courts to*

[12] Published in Kluwer Law International 2015 pp159-586 under the heading: *UNCITRAL Model Law, Chapter IV.A (Articles 17-17J) – as amended [Interim measures and preliminary order*s]

issue interim measures and the power of arbitral tribunals to issue interim orders. It was said that it was unclear whether these powers were coextensive or the exercise of the State court power overrode the power of the arbitral tribunal. That uncertainty could allow parties to defeat the power of arbitral tribunals to issue interim measures by seeking such measures from the State courts. ***It was suggested that to better delineate the interaction of these powers, article 17 ter could provide that a State court could only act in circumstances where, and to the extent that, the arbitral tribunal did not have the power to so act or was unable to act effectively,*** *for example, if an interim measure was needed to bind a third party or the arbitral tribunal was not yet constituted or the arbitral tribunal had only made a preliminary order.* ***The principle upon which that proposal was based received some support but it was agreed that that proposal had far-reaching legal and practical implications and raised complex issues that the Working Group might wish to consider at a later stage***."[13] [emphases added]

70. It is against all that background that Mr Lowe's propositions, and the cases he cites in support of them must be examined.

71. Among the principles emerging so far, one sees that in the context of the Act, the restrictions imposed by section 43(5) upon curial intervention in local arbitrations must have been regarded by Parliament, by the adoption of the wording of Article 17J for the purposes of Section 54, as not suitable for application to international arbitrations. And we see from the Working Group's Report (above), that Article 17J itself was not intended to be encumbered with the restrictions which had been proposed.

72. And so, to an examination of the case law cited by Mr Lowe. In *Leviathan*, Findlay J, decided to discontinue injunctive orders earlier granted to the plaintiff by the Hong Kong Court over the ship Leviathan, in circumstances where an arbitral tribunal had been constituted in Brussels where the ship was located and had refused to make such an order. He expressed the following views referring to the jurisdiction vested by Hong Kong legislation (op cit, p355 D-J):

[13] See also to the same effect Howard M. Holtmann and Joseph E. Neuhaus, "*A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*" at page 12.

"*So, notwithstanding that the plaintiff's action is referred to arbitration, the court has jurisdiction to deal [with] the applications for interim relief. The question is whether or not the court should exercise this jurisdiction when the arbitral tribunal [in Belgium] has the same powers. For a long time now, the courts have leaned in favour of making the parties who have agreed to settle their disputes by arbitration stick to that method of dispute resolution rather than resorting to litigation when it suits them to do so….* ***The legislature has provided for the intervention of the courts, but, in my view, this jurisdiction should be exercised sparingly, and only where there are special reasons to utilize it. A special reason would be where the arbitral tribunal does not have the power to grant all the relief sought in a single application.*** *Rather than apply to the tribunal for some of the relief and to the court for the other relief, it would be obviously more appropriate for the application to be made in its entirety to the court.* ***But there is, in this case, no valid reason why the main dispute should be referred to arbitration, but the dispute regarding interim relief should be decided by the courts. The tribunal has the power to grant all the relief claimed.***

In the result, the dispute relating to the relief sought by the plaintiff should also be referred to arbitration, and it seems to me for this reason also the orders should be discharged, without fresh orders."

73. In my view, that dictum may not be adopted with the kind of prescriptive meaning proposed by Mr Lowe, so as to delimit the jurisdiction vested by Section 54 of the Act, to circumstances only where an interim measure is sought in aid of a foreign arbitration where such relief is not available (because, for instance, the tribunal is not yet competent to act). Whether or not the court will intervene in the exercise of its concurrent jurisdiction, depends on the circumstances of the case. As Findlay J stated [in the words in emphasis], given that the parties had chosen to arbitrate in Brussels, there must be special reasons for a foreign court's intervention, one of which he recognised, could be where the arbitral tribunal (or a court at the seat of the arbitration) does not have the power to grant the necessary relief. This dictum itself therefore simply begs one of the important questions to be addressed here, which is whether the Judge properly exercised his discretion to grant the Order on the basis, *inter alia*, that the CIETAC Tribunal was not yet able

to grant interim measures. Nor does *Leviathan* provide a basis for some wider and general "*exceptionality*" test, to be met before interim measures can be ordered.

74. Similarly non-prescriptive are the dicta from *The Owners of the Lady Muriel v Transorient Shipping* [1995] 2 HKC 320. There, at the time the judge came to make an order for inspection of a ship (the Lady Muriel), the arbitrators appointed by the parties were seized of the dispute. The Hong Kong Court of Appeal held that it was not appropriate for the court to grant relief, when the claimants had not even sought, let alone obtained, the approval of the arbitrators to their request for relief, even while recognizing that in an appropriate case injunctive orders could be made if the court is satisfied that " *the justice of the case necessitates the grant of relief in order to prevent what may be serious and irreparable damage to the position of the applicant in the arbitration*"[14]. Contrary to Mr Lowe's submission, the Court of Appeal in that case did not support a more general proposition that a Court should refuse relief in relation to a foreign arbitration if the applicant had not first sought an order from the courts of the seat. That is giving a wider cast to the effect of the Court's decision than it stated.

75. Indeed, there is no suggestion, either in the passages cited from ***Born*** by Mr Lowe or elsewhere in the materials presented, that a claimant should invariably apply first to the court of the seat of the arbitration, before applying to a foreign court.

76. Moreover, so far as the present case is concerned, and as Mr Moverley-Smith submits, it is a factor for consideration now (and would have been before the Judge had it then been raised) that, as Ms Li in [13] of Li 3, explains, the PRC Court (as distinct from the CIETAC Tribunal which was not yet constituted or an emergency arbitrator) would not have had jurisdiction to impose preservative measures over a foreign subject-matter such as the shares in LIEG.

77. *Co. A v Co. B* (above), is the other case relied upon by Mr Lowe in support of his second proposition. There, while confirming that a receivership order over shares in a company could be made in support of a Singapore arbitration including even as against a non-party, the Hong Kong Court did not impugn the idea of applying in Hong Kong but simply emphasized the need for a

[14] Per Godfrey JA at p325 I to 326 B, and per Bokhary JA at p326 D-E to similar effect.

clear basis for doing so, at [41]: " *It has to be borne in mind that such a non-party should be brought to proceedings before the court and be subject to an order against which there is no appeal, only if it can be established on clear evidence, and on strong grounds, that the order should be made in aid of and to facilitate arbitral proceedings.*"

78. The application failed on its lack of merits. No mention is made of granting relief only if it is "*absolutely necessary to do so*", as proposed by Mr Lowe.

Summary of the applicable principles of international arbitration

79. With all the foregoing commentary and case law in mind, the nature of the jurisdiction vested by Section 54 and the applicable principles of international arbitration to be contemplated for its application, may, I think, be summarised usefully as follows:

- Based as it is upon Article 17J of the Model Law, the jurisdiction is indeed open textured and uncategorised in nature. The jurisdiction allows the issuance of interim measures in support of arbitrations taking place in other jurisdictions, in the words of the ***Holtzmann and Neuhaus commentary*** "*as necessary to meet the needs of modern international arbitration practice*". While it will be exercised, (like that vested by section 43 in relation to a local arbitration) as ancillary to the arbitral proceedings, the jurisdiction is not codified like that vested by section 43 but is comprised of the other statutory powers[15] as well as the general inherent or common law powers of the court to grant interim relief.

- But first and foremost, in the exercise of the powers vested, it must be remembered that they are indeed ancillary powers and must be exercised with caution. The policy of the Act - and as the Judge notes at [110] of the Judgement as now being also a principle of international arbitration - is limited curial intervention. Parties ought not to be allowed to bypass the arbitral tribunal to seek interim measures from the court merely because curial assistance is conceivably available. Accordingly, the powers are to be used only as

[15] Such as those vested by Section 11 of the Grand Court Act and with similarities to those granted by Section 11A of that Act, as will be discussed further below.

needed for the purpose of assisting the foreign arbitral proceedings. An order must not usurp the powers of the tribunal. As emphasised in *Channel Tunnel* and *Cetelem (both above),* the purpose of an order must be to facilitate the arbitration (e.g.: by the grant of interim measures or the compulsion of evidence) or the enforcement of an award, paying due regard to the fact that the parties have elected arbitration rather than court proceedings for the resolution of their dispute.

- Subject to the foregoing, there is no hard and fast requirement that a party must first apply to the arbitral tribunal itself or to a court at the seat of the arbitration for an interim measure, before applying under Section 54. Still less, any suggestion that there is an obligation to first apply in a parallel arbitral proceeding or to the court at the seat of such a proceeding. It is primarily for this reason in my view, that Mr Lowe's further submission that the Respondents were obliged to have first sought interim measures in Hong Kong before applying here, is unsubstantiated.

- While, if access to the arbitral tribunal or the courts at the seat of the arbitration is available, the burden will be on the party applying to explain why it was not taken (see *Channel Tunnel* above), the Section 54 powers may nonetheless be exercised in appropriate circumstances, such as in cases of urgency or where it is shown that the arbitral tribunal or foreign court (as the case might be) would not have the power to grant the interim measure or measures particularly needed. As shown from the *travaux preparatoires* in relation to Article 17J (above), the suggestion that Article 17J should have limited the court's role to acting only in circumstances where, and to the extent that, the arbitral tribunal did not have the power to act or was unable to act effectively, was not adopted.

- As recognized by the Judge at [99] of the Judgment, a requirement of Section 54 (and another settled principle of international arbitration), is that there must be a sufficient connection between the interim measures sought and the foreign arbitration they purport to assist. Here the Appellant submits that as the enforcement of the Share Charges was not an issue amenable to resolution before the CIETAC Arbitration (or HKIAC

Arbitration for that matter), there was no sufficient connection to justify the making of the Order. This argument will be addressed more specifically below, under Ground 2.

- As the Judge also noted at [114] of the Judgment (citing *Redfern and Hunter*[16] at [7.18]), the need for international enforcement is accepted, as a matter of settled practice in international arbitration, as a justification for applying first to an appropriate foreign court. The foreign court will be appropriate if it sits in the jurisdiction in which assets are located so that its orders can readily and easily be enforced against or in relation to those assets without the need to establish a proper basis for enforcing an interim measure (as distinct from a final award) granted in the foreign arbitration. In this case, this factor became moot because, as the Judge also noted at [114] of the Judgment, he granted the Order on the basis of his conditional acceptance that no interim measures would as yet have been available in the CIETAC Arbitration.

- While an order under Section 54 could be obtained also as against a third party to arbitral proceedings, it would follow from all of the foregoing, that such an order is likely to be refused where the arbitral tribunal is already duly constituted and the application has either not been brought before it or has been refused by it or by a court at the seat of arbitration. Otherwise, an order against a third party is also a matter for the exercise of discretion by the Cayman Court as a foreign court pursuant to Section 54.

- As regards any presumptive obligation to first seek relief from an emergency arbitrator, as the commentary from *Sim* (above) explains, unless that is otherwise required by Emergency Arbitration Rules which bind the parties, it will be open to the claimant to decide whether to apply to the court (either at the seat or abroad as the circumstances might require) instead of "*passing the baton*" to an emergency arbitrator, in the event that interim measures are required prior to the constitution of the arbitral tribunal.

Discussion and conclusions on Ground 1

[16] Law and Practice of Commercial Arbitration 7th ed.

80. In this case there can be, in my view, no just criticism of the Order as in any way seeking to usurp or infringe upon the role of the CIETAC Tribunal. The Application Condition has put paid to that argument, making expressly clear as it does - for the reasons carefully explained by the Judge at [117] of the Judgment - the intended conditional effect of the Order.

81. Nor, in the circumstances then before the Judge, can he be properly criticized for not first awaiting the views of the CIETAC Commission (per an emergency arbitrator) or the arbitral tribunal, as to the need for the Order. He explained his approach in these terms at [112] and [113] of the Judgment:

> "112 … *The (Respondents) have asserted by way of counsel's submissions that there is currently no basis on which interim remedies including an interim injunction can be granted following the filing of the (CIETAC) Request for Arbitration. I do not believe that this was confirmed in the (Respondents') evidence and there has been no evidence from Ms Li Dongxia as to the applicable CIETAC rules or as to the powers of the Beijing court. I have carefully considered whether I should decline to grant the (Respondents') application and refuse to grant an interim injunction on this basis alone. I have concluded that on this occasion this would not be appropriate in circumstances where Minsheng did not challenge the (Respondents') assertion or adduce contrary evidence. The application was made on the basis or assumption that prior to the constitution of the CIETAC arbitral tribunal the (Respondents) were unable to apply for and obtain interim remedies in the PRC merely as a result of the filing of the (CIETAC) Request for Arbitration. However, it does seem to me that the (Respondents) should be required, as a condition of the granting of injunctive relief, to file a further affirmation confirming at least their position that there is no power or jurisdiction under the CIETAC rules that would permit a suitably qualified person or body (such as an emergency arbitrator) to grant an interim injunction of the type they seek from this court*" [(hence the Confirmation Condition)]

> "113. *On the basis that an interim injunction could not have been obtained in accordance with the CIETAC rules at the time that the Originating Summons was issued and provided that the (Respondents) can establish that there is an urgent need for injunctive relief and that a failure to grant such relief will cause them irreparable harm, I am satisfied that the absence of a prior application within or related to the (CIETAC) Arbitration does not prevent this Court granting the injunction sought by the (Respondents)*."

82. Thus, exceptional circumstances accepted by the Judge for the making of the Order had arisen from Minsheng's action which delayed the convening of the CIETAC Tribunal so that no application could have been made to it and further, that the Order would serve only to "*hold the ring*" pending the outcome of the CIETAC Arbitration (and coincidentally the HKIAC Arbitration) – see also [54] of the Judgment.

83. As the Respondents now submit, that factual premise for the making of the Order was not then in dispute. There was no suggestion then made by Minsheng to the Judge, that the Respondents should have applied to the CIETAC Commission (for appointment of an emergency arbitrator) or to the PRC Court pending the convening of the tribunal. Minsheng's argument before the Judge was that the Respondents were required first to apply either, as Mr Lowe came to insist before this Court - to the Hong Kong Court or the HKIAC Tribunal or to the CIETAC arbitral tribunal. It is therefore impermissible to argue, as Minsheng now seeks to do on appeal, that in the absence of evidence from the Respondents (as distinct from the assertion from their counsel), as to why the Respondents had not so applied, the Judge should have inferred that the Respondents had not done so merely out of choice rather than necessity.

84. Nor is Minsheng's further argument on appeal - that the burden was upon the Respondents and not upon it to establish the unavailability in Beijing or Hong Kong of interim measures – any more persuasive. This argument suggests that the Judge should have awaited the confirmatory evidence before making the Order and that the Judge had improperly pre-empted the issue by proceeding as he did. But once an application to the HKIAC Tribunal had been reasonably discounted (for the reasons explained by the Judge at [116] of the Judgment), and it being

common ground that the CIETAC arbitral tribunal had not yet been constituted, there was no reason for the Judge to expect that the evidence required by the Confirmation Condition would be controversial. It was therefore in no sense unfair of him to have proceeded as he did on the basis of the unchallenged assertion of counsel, bearing in mind also, as the Respondents submit, that as a matter of better case management, applying the Overriding Objective, proceeding as he did was likely to avoid detrimental delay to the Respondents (including of the kind discussed by the Judge at [115] and [116] of the Judgement as likely to arise from unresolved disputes over the conflict of governing laws relating to the different agreements) and the additional costs that would have been incurred had the proceedings been adjourned for the confirmatory evidence to be first obtained.

85. Moreover, if contrary to expectations, the evidence proved to be controversial (as it now has in light of the debate between Li 3 and Dr Wong), such as to give rise to the possibility that the Order should be discharged (whether because the CIETAC Rules, the PRC Court or the CIETAC arbitral tribunal so required), the Judge was perfectly entitled to proceed in the exercise of discretion, on the basis that Minsheng had, by [3] of the Order, been expressly given liberty to apply to discharge or vary the Order.

86. Against that background there is, in my view, no need to decide the controversy raised as between Li 3 and Dr Wong's opinion. Even if in theory an emergency arbitrator could have been appointed as Dr Wong opines, in the circumstances then prevailing the Judge cannot now be faulted for making the Order, having been satisfied as to the legal premises and the need for it, and conditioned as he made it in terms of the Application Condition and subject to Minsheng's liberty to apply.

87. Minsheng raises the still further objection that the Order exceeded what was necessary in the circumstances as it should have been limited to the point in time when the CIETAC Tribunal had had an opportunity to respond as to the need for it. Citing *Next Step Medical Co v Johnson & Johnson Int*. 619 F. 3d 67 (1st Cir 2010), Mr Lowe submits that in the absence of evidence that the CIETAC Tribunal would have had power to respond to the Judge's invitation to say whether the Order should be allowed to continue, the Order should have been made by the Judge to expire

within 7 days, requiring the Respondents to seek urgent relief in one or both of the arbitral seats in the HKIAC or CIETAC, or in the courts there.

88. But in my view, even while such a limited duration of the Order might have been, in a typical case, more appropriate for the reasons submitted by Mr Lowe, conversely the Judge's approach may be seen as preferable in the circumstances where it was as yet unclear whether the arbitral tribunal or courts at the seat in the PRC had power to grant the necessary interim measures. Indeed, a real issue had been raised in this regard by Minsheng itself, in its insistence that the Share Charges were not amenable to the jurisdiction of the CIETAC Arbitration or the PRC Courts, the subject for discussion and resolution next, under Ground 2.

89. In conclusion on this Ground, if the CIETAC Tribunal determined that it did not itself have jurisdiction to grant the necessary relief, that in itself would have been, on the Respondents' case, a reason for the Cayman Court to act. If the CIETAC Tribunal, once constituted, considered that it had jurisdiction to make interim measures or an award in similar terms to the Order, then it could determine whether the Order should continue. It was to achieve that very end that the Judge imposed the Application Condition.

90. Ground 1 must, accordingly in my view, be refused.

91. **[Ground 2: an injunctive order was unavailable because of the competing jurisdiction clause in the Share Charges calling for judicial resolution]**. Here Minsheng's arguments can be taken conveniently from the four points raised in written submissions by Mr Lowe:

92. *1*. They begin with the uncontroversial proposition that "*the only purpose of any interim order under Section 54 of the Act was to preserve the integrity of potential HKIAC or CIETAC arbitration awards. In circumstances where,* [(for the reasons he develops below]), *the foreign arbitral tribunals were not entitled to make any orders in respect of the security affecting the Remaining Shares because of a competing jurisdiction clause, the Judge should*

have held that relief under Section 54 and the common law to assist the foreign arbitrations was unavailable.

2. *When arbitration clauses compete with judicial jurisdiction clauses each must be read as being restricted to their subject matter. Full effect should be given to the choice of judicial forum (see Secretary of State for Transport v Stagecoach South Western Trains Limited [2009] EWHC 2431 and BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA [2018] EWHC 1670 and Lewison Interpretation of Contracts 7th ed pp947-948).*

3. *The choice of jurisdiction clauses set out in the Share Charges must necessarily govern enforcement of the security. The Judge wrongly appeared to consider this was a matter for the arbitral tribunal when it was a matter for the Grand Court/him to determine the application of the jurisdiction Clause in the Share Charges. Two things follow from this:*

   a. *First, the foreign arbitral tribunals in the PRC and Hong Kong were not entitled to make any orders affecting the enforcement of the Share Charges because they contained a Cayman jurisdiction clause. What is significant about this clause (apart from the non-exclusive choice of jurisdiction) is the fact that the parties (sophisticated parties advised by lawyers) have decided that disputes about the Share Charges should be determined in judicial proceedings by the courts and not by arbitrators dealing with the SPA or the Loans.*
   b. *Secondly, the Judge was himself required to determine the scope of the jurisdiction clause in the Share Charges and should have held that an injunction directed at enforcement of the legal charge over the Remaining Shares was covered by the dispute resolution clause in the Share Charges and was not an arbitrable matter under the CIETAC arbitration clause in the Loan Agreements or under the Hong Kong arbitration clause in the SPA.*

4. *It was therefore not open to the Judge to conclude that, even if enforcement of the Share Charges was outside the CIETAC arbitration clause in the Loan Agreements, an injunction*

would nevertheless be in aid of the CIETAC arbitration or the HKIAC arbitration because it was necessary to protect an award that might be made.

The question was whether the jurisdiction clause in the Share Charges prevented the arbitral tribunals from making awards in relation to the disposition of the Remaining Shares. If not, the Judge did not explain how an injunction would protect an award. It could not sensibly do so if no award could be made."

93. In my view, in agreement with the Respondents, these submissions do not accurately address the Judge's reasons for the making of the Order. The first question before him was whether issues arising between the parties relating to the Share Charges - not the direct enforcement of the Share Charges themselves - were to be dealt with in the CIETAC arbitral proceedings on the basis that the arbitration clause binding on the parties under the Loan Agreements required or permitted that to be done. As the Judge commented in [104] of the Judgment:

> "*It is true that a question arises as to whether the arbitration clauses in the Loan Agreements can apply to a dispute between the (Respondents) and Minsheng regarding the enforcement of the Cayman law governed Charges which contain a non-exclusive submission to the jurisdiction to which the (Minsheng) Lender and the (Leed) Borrower are not parties. But the (Respondents) and Minsheng are parties to the Loan Agreements. Furthermore, the Charges only include a non-exclusive submission to the jurisdiction of the Cayman courts thereby allowing proceedings to be commenced here. They do not prohibit issues arising between the parties to the Charges being dealt with in an arbitration to which they are parties if the arbitration clause binding on them under a different agreement requires or permits that to be done*".

94. And further, as to the way in which the Order could assist to protect an award made in the CIETAC Arbitration, he expressed himself at [105] of the Judgment in these terms:

> "*Even if (the views expressed in [104] above) were incorrect, it seems to me that the application for the interim injunction is within Section 54 because it is needed to ensure the effectiveness and value to (the Respondents) of an award in the (CIETAC)*

Arbitration. The dispute as to whether the Loans have been discharged [by the purported exercise by the Respondents of the Put Option] is very closely linked to the dispute as to the enforcement of the Charges. This is because in law the Loans and the Charges are closely linked. If the Loans are discharged there are no secured liabilities and the security interest ceases to attach to the charged property [(ie: the Second Tranche)]. Even if the second Tranche cannot be treated as property the rights to which are disputed and directly covered by the (CIETAC) Arbitration, it is indirectly covered in the sense that the outcome in the (CIETAC) Arbitration as to whether the Loans have been discharged will determine whether the (Respondents) retain an equity of redemption and an interest in the Second Tranche. The interim relief seeks to preserve and protect that interest."

95. Against the factual background set out above especially at [24], [25], [26], [30] and [31] as to the inter-related nature of the Agreements between the parties, I do not think that those conclusions can be faulted. The Judge clearly recognized that: (i) the relevant jurisdiction clause in the Share Charges provides that the parties "*irrevocably submit to the non-exclusive jurisdiction of the courts of the Cayman Islands*", holding correctly in my view (at [104] of the Judgment (see above)] that given its non-exclusive nature, that clause does not preclude another forum, including an arbitral forum, from having jurisdiction in respect of disputes arising in relation to the Share Charges, and; (ii) as the Respondents submit, the First Loan Agreement provided, at [11], that to secure rights under the Agreement the Respondents agreed to enter into the Share Charges with Minsheng. Further, that as [2(2) and (3)] of both Loan Agreements provide, in the event of default, Minsheng has the right to dispose of the Second Tranche *"which* [the Respondents] *have charged to Minsheng in accordance with the Share Charge Agreements and other provisions of relevant laws and regulations."* The arbitration clause in the Loan Agreements [[19] in the First Loan Agreement] applies to *"all disputes arising from the implementation of this Agreement or related to this Agreement"*. Accordingly, the parties contractually agreed to resolve all disputes "*relating to*" the Loan Agreements by arbitration; thereby giving the CIETAC Tribunal jurisdiction to resolve them.

96. While the Loan Agreements are in Chinese and governed by Chinese law, *prima facie* the referenced Share Charges *"relate"* to the Loan Agreements. (iii) The Judge however, also recognized that the scope of the arbitration clause in the Loan Agreements was properly a matter for the CIETAC Tribunal and that, [at [103] of the Judgment] for the purposes of the Application before him, it was enough if the Respondents could show that there was a serious issue to be tried as to whether the Respondents' challenge to Minsheng's right of enforcement of the Share Charges, fell within the remits of the CIETAC Arbitration.

97. Accordingly, while it is to be accepted, on the basis of the case law and textbook authorities cited above by Mr Lowe, that "*full effect should be given to the parties choice of judicial forum*" instead of arbitration where that is so, in this case it was a non-exclusive choice which the Judge fully understood and took properly into consideration when deciding to grant the Order. He also recognized the proper scope of the issues before the CIETAC Arbitral Tribunal and which, if resolved in favour of the Respondents, could arguably result (subject to conclusions to come on Ground 3 below) in an award declaring them to have an equity of redemption in the Remaining Shares or in an award of an interim measure for the protection of such a declaratory award, which the Order could properly have been granted to protect.

98. For these reasons Ground 2, in my view, also fails.

99. **[Ground 3: No preservation of property order could (properly) be made in the case]**. Minsheng's arguments here may also be helpfully summarized from Mr Lowe's written submissions:

> "(*i*) *The Respondents maintained that the basis of the relief sought under Section 54 was a proprietary injunction to preserve their alleged property rights in the Remaining Shares which were the subject of the Appellant's Share Charges.*[17] *They had not, however, articulated any form of proprietary claim*

[17] The distinction between freezing or Mareva injunctions and proprietary injunctions is discussed in *Mercedes Benz AG v Leiduck* [1996] AC 284 Lord Mustill p300E-F – the former operating only by way of inhibition in personam to restrain dealings in the property in question and not as an attachment to the property itself so as to give a claimant a right of priority of interest, while the latter operating essential in rem, as against the property in question, on the basis that the claimant has a proprietary

for such an order prior to the hearing and had not adduced any evidence directed to such a claim. Such an injunction requires the applicant to prove a seriously arguable property claim (see Madoff Securities v Raven [2011] EWHC 3102 at [140]).

(ii) *The Judge accepted that the Respondents had a proprietary interest to protect and could seek an order on a proprietary basis. He did so on the hypotheses that (a) there was a risk that the Appellant would refuse or fail to comply with any order for specific performance that a tribunal might make and (b) that the Respondents could then choose to treat that as a repudiation of the contract and reclaim the Remaining Shares.*

(iii) *The legal basis for considering that there was a proprietary claim appears to have been set out in Johnson v Agnew [1980] AC 367 where the Plaintiff had elected to abandon the claim for specific performance and sought damages but was not seeking a return of property.*

(iv) *The argument does not work for the Respondents for three reasons.*

a. *First, it is insufficient to show that the Respondents may in the future have a proprietary interest in the Remaining Shares: a property preservation order required proof of an existing, seriously arguable proprietary right. A plaintiff who seeks an injunction to preserve property (who thereby benefits from a less onerous test than would apply to a freezing order) must at the very least establish a seriously arguable right to an existing property right and not injunct property to which the claimant lays no present claim but might do so in the future.*

---

interest in the property which, of course, inhibits the actions of those on notice of the injunction, in relation to the property.

b. *Secondly, the Respondents cannot recover property transferred by "accepting" a (hypothetical) breach of the Put Option which the Respondents already claim to have exercised. Repudiation applies to discharge a contract but does not discharge a transfer of an interest in property: claims are restricted to personal remedies (see Total Oil Great Britain v Thompson Garages (Biggin Hill) Ltd [1972] 1 QB 318). In Johnson there was a claim for damages not restitution of property.*

c. *Thirdly, no order could be made by the arbitral tribunals recognising any form of proprietary interest. In neither of the HKIAC and CIETAC arbitrations will any award result in recognition of the Respondents having any proprietary right in the Remaining Shares. The Respondents' claims in the HKIAC and CIETAC arbitrations were affirmative claims based on the contracts containing the arbitration clauses.*

i. *In the HKIAC arbitration the Respondents relied on the SPA and the alleged Put Option contained in it. In the CIETAC arbitration the Respondents were seeking to enforce the performance of the Loan Agreements.*

ii. *By seeking specific performance of the Appellant's alleged obligation to accept the Remaining Shares under the Put Option and to pay the balance of the price, the Respondents' claim was an affirmation of the alleged Put Option and of the transfer of the Remaining Shares. A claim to the Remaining Shares could not logically be maintained while the alleged Put Option was alive and when [Minsheng] had equitable title.*

iii. *In neither arbitration did the Respondents assert any proprietary claim to the Remaining Shares. The Respondents*

adduced no evidence of any proprietary right and first attempted to articulate such a right on a theoretical basis in the course of oral submissions but without having adduced any evidence of the applicable law (the law of Hong Kong) which governed the issue.

iv. If an order for specific performance was obtained, the Respondents could not claim repudiation without first applying to discharge the arbitral award for specific performance. A new arbitration and a different case would have to be presented for the Respondents to be able to contend that the Remaining Shares could be recovered. This was not the case made. There was no present proprietary claim.

(v) A proprietary injunction must logically relate to an existing or at least clearly anticipated proprietary interest or right, whether by way of full or beneficial title. Assuming an injunction can be obtained in anticipation of the Respondents obtaining a proprietary interest, such relief cannot be granted while (a) the Respondents contend that they can specifically enforce the contract under which [Minsheng] (not the Respondents) was entitled to receive the property (b) there is no claim anywhere made that the Respondents were entitled to the Remaining Shares. It cannot logically relate to <u>future</u> property, necessarily beneficially owned by someone else. No proprietary injunction has ever been granted on that basis. The Respondents did not have an existing, seriously arguable proprietary right to the Remaining Shares.

In the circumstances, the Respondents were not entitled to a proprietary injunction, they were not entitled to any other freezing injunction to prevent enforcement of the Share Charges by [Minsheng], having advanced no good arguable case on the merits to the Judge and having adduced no evidence to show that [Minsheng] had threatened to act

wrongfully by enforcing a valid legal share charge according to what they considered to be their entitlement"

100. In response to these arguments, the Respondents say that the primary basis upon which they contend for a proprietary interest justifying the grant of the proprietary injunction in the Order which restrains dealings with them, is overlooked in those arguments on behalf of Minsheng. It is that they have an existing equity of redemption in the Remaining Shares themselves. They say that the Share Charges (whether regarded as legal or equitable charges) provided Minsheng with a security interest in the Remaining Shares which, while also proprietary in nature, nonetheless left intact the Respondents' equity of redemption which is also proprietary in nature and enforceable as against the Remaining Shares themselves once the Loans have been discharged and Minsheng's security interest ceases to attach to the Remaining Shares. That was indeed the basis upon which the Judge concluded at [105] of the Judgment[18], that whether the Loans have been discharged will determine whether the Respondents retain an equity of redemption and so a proprietary interest, in the Remaining Shares. As the rights under the Loan Agreements lay at the heart of the dispute before the CIETAC Tribunal, the outcome there, as to whether the Loans have been effectively discharged by the Respondents' exercise of the Put Option under the SPA, will be indirectly determinative also of whether they are entitled to exercise their asserted equity of redemption over the Remaining Shares. It is also primarily for that reason that they say the Judge was correct to focus on whether or not the Order would assist or facilitate the outcome of the CIETAC Arbitration, rather than the HKIAC Arbitration, where the more tangential question of the rights under the Put Option within the SPA itself, is the subject of the dispute. It might therefore suffice, for present purposes, to determine whether there is in law, a proper arguable basis for the Judge's conclusion that the Respondents are entitled to the equity of redemption which is itself, a present, not merely a future, proprietary interest in the Remaining Shares.

101. The Respondents rely in this regard, as a matter of first principles, upon dicta from the House of Lords in *Re Bank of Credit and Commerce International* (No. 8) [1998] AC 214 where at 226 D-G, Lord Hoffmann provided the following non-exhaustive description of an equitable charge, including the equity of redemption deriving from it:

[18] See as set out herein above.

"*There are several well known descriptions of an equitable charge (see, for example, that of Atkin L.J. in National Provincial and Union bank of England v Charnley [1924] 1 K.B. 431, 449-450) but none of them purports to be exhaustive. Nor do I intend to provide one. An equitable charge is a species of charge, which is a proprietary interest granted by way of security. Proprietary interests confer rights in rem which, subject to questions of registration and the equitable doctrine of purchaser for value without notice, will be binding upon third parties and unaffected by the insolvency of the owner of the property charged. A proprietary interest provided by way of security entitles the holder to resort to the property only for the purpose of satisfying some liability due to him (whether from the person providing the security or a third party) and, whatever the form of the transaction, the owner of the property retains an equity of redemption to have the property restored to him when the liability has been discharged."*

102. The Respondents also rely upon the following commentary from *Gore-Browne on Companies*[19] to explain how it is that their asserted equity of redemption arises:

"As Slade J explained in Re Bond Worth Ltd [FN12: [1980] Ch 228.] the technical difference between a 'mortgage' and a 'charge' lies in the fact that a mortgage involves a conveyance of property subject to a right of redemption, whereas a charge conveys nothing and merely gives the charge holder certain rights over the property as security for the loan. [FN13: [1980] Ch 228 at 250] In other words, a mortgage involves the transfer of rights of ownership whereas the word 'charge' is a general umbrella expression to cover a right of recourse to property for security purposes. [FN14: See also the comments of Buckley LJ in Swiss Bank Corporation v Lloyds Bank Ltd [1982] AC 584 at 595.] ***The charge holder has certain rights over the property of the chargor to ensure the payment of money due or the performance of some other obligation. The charge holder is entitled to resort to the property only for the purpose of satisfying some liability due to him, and, whatever the form of the transaction, the chargor has***

[19] Gore-Browne on Companies, Part VII "*Loans*", Chapter 30, "*Creating Charges, Nature of a Charge*".

an equity of redemption to have the property restored to him once the liability has been discharged." (emphases added).

103. Relying on these principles, Mr Moverley-Smith emphasizes that it is the Respondents' case that, pursuant to clause 14(4) of the First Loan Agreement and clause 13(4) of the Second Loan Agreement and following their exercise of the Put Option provided by clause 8.1 of the SPA to sell the Second Tranche to Minsheng, the Loans have been discharged and that Minsheng is now in breach of clause 15.1 of each of the Share Charges in failing to release the security constituted in them. Further, that by clause 3.4 of each of the Share Charges, each of the Respondents agreed with Minsheng that, pending the discharge of the security created by the Charge, the respective Respondents would remain the legal and beneficial owner of the Second Tranche, subject only to that security.

104. It follows, said Mr Moverley-Smith, (in response to a question from the Court during the hearing of the Appeal), that, given that a charge does not operate like a mortgage as a conveyance of legal interests (see *Gore-Browne* above), it may be that the need for the Respondents to rely upon an equity of redemption in this case is "*a bit of a red-herring*". On the basis of the Loan Agreements and Share Charges themselves, the Respondents, he therefore argued, never parted with the legal title to the Remaining Shares and so retain not just an equity of redemption but a proprietary interest by way of legal title which they would be free to exercise, once the Loans have been declared in the CIETAC Arbitration to have been discharged. And only then would the Respondents need to have recourse to the Cayman Courts for enforcement of an award as against the Share Charges, if Minsheng fails to honour the award by not accepting their discharge.

105. However, says Mr Moverley-Smith, to the extent the Respondents needed to establish to the Judge that they had at least an arguable case for a proprietary interest in the Remaining Shares, the equity of redemption is indisputably a form of interest in property – here citing ample authority for that proposition: *Gore-Browne on Companies*, *op cit, ibid*, (which confirms that a chargor of shares has an equity of redemption); *Leon v Her Majesty's Attorney General and others* [2018] EWHC 3026 (Ch) at [27] and *Snell's Equity, 34th Ed.* at 36-003 - discussing more generally the status of an equity of redemption as property.

106. In *Snell's Equity*, the passage relied upon is to be found at section 3 [36-003] in these terms:

> "*An equitable charge is created when property is appropriated to the discharge of a debt or other obligation. There is no mortgage, because no estate or interest in the land [(or shares in this case)] has been conveyed or agreed to be conveyed, either at law or in equity; but there is an equitable charge because the property stands charged with the payment of the stated sum, and the chargee is entitled to have this realized in judicial process.*
>
> *Charges were historically recognized only by courts of equity, but statute has now allowed the creation of a charge at law where land is mortgaged by deed expressed to be by way of legal mortgage [here citing the Law of Property Act 1925 UK].*
>
> *The rights of an equitable charge are for the most part similar to those of an equitable mortgagee. Included in this category are a number of charges specifically created by statute, such as charging orders [here citing the Charging Orders Act 1979 UK]*"

107. It appears from Mr Lowe's submissions above, that what Minsheng claims primarily to have are legal, rather than equitable Share Charges over the Remaining Shares. No full discussion appears to have been had before the Judge (nor before this Court) as to the distinction and its importance, if any, in this case. For the following reasons, I do not think that the distinction ultimately matters for assessing whether the Respondents have an arguable case for a proprietary interest in the Remaining Shares.

108. The Share Charges themselves[20] are comprised of deeds entered into as between respectively the Respondents as chargors and Minsheng as chargee. They are each respectively supported by Share Transfer Forms executed by the chargors, *qua* transferors, in blank form. These Share Transfer Forms are not yet signed by Minsheng as transferee. The Share Charges are also supported by Undertakings given by LIEG (as the subject company), confirming that LIEG has been instructed by the transferors (as the shareholders in LIEG and as chargors of the Shares) to

[20] Copies are exhibited as LHT-1 to the First Affirmation of Li Hangtao, at pp488 -515 and 522-549

record the existence of the Share Charges upon its register of members. This is stated to have been done by LIEG in keeping with its articles and so with authority to make that annotation in its register of members, as well a record thereupon, of the existence of the security interests created in favour of Minsheng by the Share Charges, in the terms required by the Share Charges. The Share Transfer Forms and Undertakings are scheduled to the Share Charge Deeds themselves.

109. Also scheduled to the Share Charge Deeds (at Schedules 3 and 4 respectively) are Notices of Charge Over Shares (issued from the Respondents as chargors and as the registered holders of the Remaining Shares) to LIEG through its registered offices at Vistra (Cayman) Limited) and Letters of Instructions from the chargors to Vistra (Cayman). By the Notices of Charge, the chargors notify LIEG of the grant of the Share Charges in favour of Minsheng and by the Letters of Instructions, LIEG notifies Vistra (Cayman), that the chargors have granted a security interest in favour of Minsheng as chargee over the Shares in LIEG and that LIEG agrees that " *At any time after the Chargee notifies you in writing that an Event of Default (as defined in the Share Charges) has occurred, Vistra (Cayman) are authorized and instructed to rely upon the instructions of the Chargee to register the Chargee or its nominee (as the Chargee may direct) as the registered holder of the Shares pursuant to the Charge and otherwise to comply with any directions or instructions from the Chargee in relation thereto"*.

110. Further provisions of the Letters of Instructions require Vistra (Cayman) to make the required annotations of the existence of the Share Charges and the security interests created thereby, in LIEG's register of members in the form stipulated in the Letters of Instructions.

111. Thus, one might safely conclude from this compendium of documentation, that there have been created in favour of Minsheng, valid charges over the shares in LIEG, recognizable and enforceable under LIEG's articles as security interests in keeping with their terms, but which, on the present state of the evidence, and in the context of the dispute between the parties, have not yet resulted in the registered transfer of the Remaining Shares to Minsheng.

112. This being the case, and in light of the authorities discussed above[21], there is also at least a serious issue to be determined on the merits[22] in the CIETAC Arbitration, whether the Respondents, as the registered holders of the Remaining Shares, have retained a present (as distinct from a future contingent) proprietary interest in them, either by way of legal title or by an equity of redemption subject to Minsheng's security interests, sufficient to have grounded the injunctive relief embodied in the Order in aid of the CIETAC Arbitration.

113. The foregoing conclusion proceeds of course, as discussed above, on the basis that it is in the CIETAC Arbitration that it is to be directly determined whether the Loans have been discharged as a consequence of the Respondents' exercise of their rights under the Put Option, even while it is in the HKIAC Arbitration that it is to be determined whether the Respondents or Minsheng had the respectively asserted rights under the Put Option as contemplated by clause 8.1 of the SPA. The fact that the Share Charges are governed by Cayman law and subject to the non-exclusive jurisdiction of the Cayman Courts, does not preclude any of those inquiries.

114. And, as Mr Moverley-Smith explained contrary to Mr Lowe's submissions above, and as I accept is seriously arguable on the merits of the case, the Respondents do seek a vindication of their property rights in the CIETAC Arbitration, namely their entitlement to the equity of redemption (if such, it is instead of a redemption of legal title itself in the Remaining Shares) untrammelled by any claim by Minsheng to enforce the Share Charges, as the result, as the Respondents claim, of the Loans having been discharged.

115. In other words, contrary to the bases upon which Mr Lowe's arguments above on this Ground proceed, the Respondents are not seeking to recover property which has already been transferred to Minsheng pursuant to the Option Contract (in which event questions of specific performance and/or repudiation could arise), rather they are seeking to preserve property over which Minsheng

[21] As well as the longstanding decision of *Harrold v Plenty* [1901] 2 Ch 314, where it was decided that where a certificate of shares is deposited by way of a pledge as security for a debt but without the transfer being registered in the name of the lender, an equitable interest in the shares is created but the lender does not acquire legal title until the transfer is registered in the register of members of the subject company.

[22] This is the proper expression of the first limb of the *American Cyanamid* test (as recognized by the Judge at [77] of the Judgment,. See also *Madoff Securities v Raven* [2011] EWHC 3102, also cited above by Mr Lowe wherein, at [126] to [147], where Justice Flaux provides a very clear and comprehensive discussion of the full *American Cyanamid* test and compares and contrasts it with the more stringent test for Mareva injunctive relief

has on their case, wrongfully maintained a security interest. It is in this regard, that the Judge's analysis at [104] – [105] of the Judgment cannot, in my view, be faulted.

116. And so also emerges perhaps a further principle from the complicated and unusual circumstances of this case, which is that pursuant to Section 54[23] of the Act and as the Judge concluded at [104] of the Judgment, interim relief may be granted even if the right in respect of which relief is sought is not itself in issue and sought to be enforced in the foreign arbitration, provided (as asserted here) that the right arises out of and is closely connected with the claim made in the arbitration and interim relief is needed in order to secure the enjoyment of and to protect the value of, the rights claimed in the arbitration.

117. Having arrived at these conclusions, there is, to my mind no need, for the present purposes of Ground 3 - to resolve the rather more complicated issues, i.e.: whether the Respondents also have an arguable case for a proprietary interest in the Remaining Shares sufficient to have grounded the Order, based upon whether they have (i) the asserted right to specific performance of either the Loan Agreements or the Option Contract under clause 8.1 of the SPA[24] and/or (ii) a right of repudiation which could result in their interests in the Remaining Shares being unencumbered by Minsheng's security interest.

118. Accordingly, Minsheng also fails on its arguments on Ground 3.

119. **[Ground 4: there can be no injunction to restrain enforcement of security]**. Mr Lowe's arguments on this Ground are also helpfully summarized as follows from his written submissions:

---

[23] In this instance akin to the power, as Mr Moverley- Smith submits, which derives from Section 11A of the Grand Court Act (2015 Revision) which provides that "*The Court may by order appoint a receiver or grant other interim relief in relation to proceedings which (a) have been or are to be commenced in a court outside of the Islands; and (b) are capable of giving rise to a judgment which may be enforced in the Islands under any Law or at common law*". Thus the Courts have the same power as set out in section 11A of the Grand Court Act (now also similarly recognized at common law since the decision in *Broad Idea* (above)) in respect of interim relief granted in support of arbitration under section 54 of the Act.

[24] Nor is there, in my view, need for an inquiry here into whether or not once a specifically enforceable contract of sale is entered into, the vendor retains no proprietary interest in the subject matter, as Minsheng also suggests and as sought to be refuted also by Mr Moverley-Smith on behalf of the Respondents at [104] of his written submissions, citing Lord Cains' dicta from *Shaw v Forster* (1871-72) L.R. 5 H.L. 321 at 338.

(i) *The Judge held [(at [125] and [126] of the Judgment)] that the principle preventing a Court from enjoining enforcement of a security did not apply when the debtor argued that the debt had been contractually eliminated or reduced even if the secured creditor disputed that the debt had been so eliminated or reduced.*

(ii) *In general, a mortgagee's claim to enforce a mortgage cannot be defeated by a cross-claim or a set off as that which the Respondents claim to have. They would have to place the whole money claimed into court (see Inglis v Commonwealth Trading Bank of Australia [1972] 126 CLR 161, Mobil Oil Co. Ltd. v Rawlinson [1981] 43 P&CR 221 at pp226-7, Ashley Guarantee Plc v Zacaria [1993] 1 WLR 62). In particular:*

a. *A mortgagee has the legal title and can take over the asset as soon as the ink is dry on the mortgage.*

b. *If the mortgagor wants to argue that the mortgage has been paid then that is a defence of "tender".*

c. *Tender must be of the amount due (which might leave room for argument that the debt had been reduced by contractual set-off).*

d. *However the mortgagee does not have to accept the tender (see Fisher & Lightwood, 'Fisher and Lightwood's Law of Mortgage' (15th Edition), Chapter 47 p978ff, Bank of New South Wales v O'Connor [1889] 14 AC 273 at 283-4, and Shearer v Spring Capital [2013] EWHC 3148 [123]).*

e. *The mortgagor would then have to bring an action and demonstrate that the mortgagor is to be taken to have been paid by tender or other means.*

(iii) The general rule applies when the security is valid. It also applies even if it is alleged that there are grounds as would render it voidable. Thus, the mortgage or charge remains in being until the money due has been tendered and accepted (see Cukurova Finance International Ltd and Anor v Alfa Telecom Turkey Ltd (No 3 to 5) [2016] AC 923 at [80]).

(iv) The general rule that the debt must be paid into Court is an important aspect of domestic policy applicable to maintain confidence in security. Any other rule would substantially diminish the value of security. The borrower is not deprived of his remedy as it is always open to it to fall back on a remedy in damages.

(v) Here [Minsheng], as the mortgagee, disputes any valid "tender" has been made. It has not accepted the set-off. The right of set-off has been disputed and is the subject of the CIETAC arbitration. It is not in breach of its obligations. The Respondents have to bring an action to maintain that the mortgage has been released and cannot short-circuit this by obtaining an injunction without proving that the payment was made. No interlocutory injunction could be granted against the mortgagee who is exercising his rights.

(vi) Here, there is no dispute as to the charged debt or the amount the disputed question is (sic). The Respondents' contention was that they were entitled to set off their liability against the sum due under the Loans by Clause 8.1 of the SPA and claim to repay the secured debt in that way whether under Clause 7 of Each of the Share Charges the conditions for enforcement arise. [Minsheng] disputes the allegation that it is liable under Clause 8.1 of the SPA and the quantum of that alleged liability and that is the subject of the arbitration.

(vii) [Minsheng] acknowledges that if it forfeits the security under the Share Charges otherwise than by way of sale, it would give credit for the value of the Remaining Shares but that value is not determined by Clause 8.1 [of the SPA] but is the present-day actual value of the Remaining Shares".

120. It must be noted here in this regard, that Mr Lowe did not persist in his further argument before this Court as he did before the Judge below, that the injunctive relief should have been refused also on the distinct basis that damages would be a suitable remedy for the Respondents instead of the restraint, on the interlocutory basis granted, of Minsheng's rights to enforce the Share Charges by sale. However, he did conclude on this point on appeal by submitting that if his arguments on Ground 1 were refused, then this Court should exercise the discretion vested by section 54 of the Act afresh and order nothing more than is necessary to protect the Respondents' equity of redemption which on Minsheng's case, would allow for the sale by it of the Remaining Shares and the payment into Court of the proceeds to await the outcome of the dispute between the parties. This alternative argument will be addressed at the end.

121. In response, Mr Moverley-Smith submits that none of the authorities relied upon here by Mr Lowe supports his fundamental argument that "*In general, a mortgagee's claim to enforce a mortgage cannot be defeated by a cross-claim or a set-off as that which the Respondents claim to have. They would have to place the whole money claimed into court."*

122. As a matter of first principles, he also submits that, unlike in the cases relied upon by Mr Lowe, here the securities in question are not legal mortgages (where legal title is deemed to be conveyed to the mortgagee with an equity of redemption remaining with the mortgagor) but, as may be gleaned above from the examination of the documentation, the Share Charges are supported by incomplete and unregistered transfers to Minsheng, which have left the registration of legal title in the Remaining Shares in the names of the Respondents in LIEG's register of members.

123. However, we see from *Cukurova Finance v Alfa* (cited above by Mr Lowe), highly authoritative support from the Privy Council for the proposition that a security arrangement by which charges over shareholdings were granted to secure loans with the right in the lender to appropriate the shares in event of default by the borrower, operated by way of equitable mortgages, such that, among other things on the facts of *Cukurova,* the Courts' equitable jurisdiction to grant relief from forfeiture could be engaged.

124. Accordingly, the assertion above in Mr Lowe's submissions that Minsheng has what is akin to a mortgage and so "*has legal title and can take over the asset as soon as the ink is dry on the mortgage*" while arguably correct, is nonetheless a proposition which is also at least arguably inapplicable in this case, where the Respondents say that Minsheng is not entitled to deal with the Remaining Shares as its own, unless and until there has been a failure to repay the Loans or other event of default which, on the Respondents' case, has not occurred. Here the real debate therefore, is about whether the rules of equity developed for the preservation of interests secured by mortgages, should be superimposed upon the contractual terms entered into between the parties for the regulation of the security arrangements embodied in the Share Charges.

125. With that important juxtaposition of the arguments in mind, it is to be emphasized that the cases relied upon by Mr Lowe here concerned mortgages, not charges and so must be approached with caution. In particular, this must be so when examining Mr Lowe's proposition that, if the charger/ mortgagor seeks to argue that the amount secured by the charge/mortgage has been paid, such an argument must proceed on the basis of "tender" by first placing the whole of the money claimed into court.

126. As for the first of Mr Lowe's cases, *Inglis v Commonwealth Trading Bank of Australia* (above), decided in 1972; as Mr Moverley-Smith submits, the principles it espouses have since been clarified and refined in a further Australian case (which does not appear from the Judgment to have been cited to the Judge); ie: *Maviglia Investments Pty Limited (as trustee for the Maviglia Family Trust) v BKSL Investments Pty Ltd (in liq.)* & Ors [2017] NSWSC 490. There at [56] – [59], Slattery J made the following observations:

> *"56. Payment into court is generally required where the mortgagor seeks to restrain the mortgagee from selling, prior to any contract of sale having been made, where the mortgagee acted properly.* ***But the mortgagor need not offer to redeem and therefore need not pay into court where it is alleged that the power of sale is not exercisable:*** **Inglis, particularly at 164-5 (per Walsh J)..**

57. *Although the ultimate correctness of this decision has been questioned, Hamilton J summarised* ***a trend towards the widening of the Inglis principles in recent years****, in Parist Holdings Pty Ltd v Perpetual Nominees Ltd (2006) NSW ConvR 56-161 (at 59,925), [16]–[23]:*

> *'16. Over the last 15 years, there have been* ***various expressions of judicial opinion which are to the effect that the requirement in Inglis should be widened****. For this to be done, it will need to be found either that there should be an additional exception to the general rule or that the time has come when the general rule should itself be revised and restated.*
>
> ..

58. *"There are established limited exceptions to* Inglis*. If the mortgagor is alleging that the power of sale has not arisen or is alleging a lack of good faith there may be no need for any payment into court, but if the mortgagor is seeking to stop the sale for any other reason, payment into court is necessary: Harvey v McWatters (1948) 49 SR NSW 173, at 177 (McWatters).* ***Other examples of these exceptions are where the validity of the mortgage is in issue, or where there is a question of whether or not there has been a breach of the terms of the mortgage, or where the issue is whether notice of breach has been effective.***"

59. *Where a mortgagor in default seeks an interim injunction to restrain the improper sale of the mortgaged property by the mortgagee, the mortgagor is required either to repay all the principal and interest claimed, or to pay it into court. A mortgagor in default who is unable to repay the money secured is almost invariably denied equitable relief and relegated to a pecuniary claim.* ***But an exception exists where the mortgagee is exercising its powers "in a manner which is not a proper exercise of them and which does infringe the rights of the mortgagor****": Inglis.* ***Other exceptions are where the amount claimed by the mortgagee is obviously wrong, and where there is a question as to whether the***

***mortgagee's power has become exercisable at all**: McWatters."* [emphasis added]

127. As Mr Moverley-Smith submits, even if the security arrangements under the Share Charges are regarded as enforceable as mortgages, the exceptions identified in the passages in emphasis above support the conclusion that there is a seriously arguable case on this issue sufficient to justify the injunctive relief in the Order.

128. A similar view must be taken of an English case which has clarified the High Court decision of *Mobil Oil Co v Rawlinson* (above) upon which Mr Lowe relied also before the Judge and which is quoted extensively at [80] of the Judgment. The clarifying case, *Ashley Guarantee Plc v Zacaria* (above), was cited in the Judgment at [79] but does not appear to have been further considered. It concerned a legal mortgage in relation to a dwelling house and the mortgagee's right to possession upon the mortgagor's failure to repay the loan secured by the mortgage. Nourse LJ (who at first instance was the judge in *Mobil Oil*) stated as follows in his judgment on behalf of the Court of Appeal (at p.66 C-H):

> "*The principle, which Slade L.J.* [in *National Westminster Bank Plc v Skelton (Note)* [1993] 1 WLR 72]*, post, p. 78B called "the Mobil Oil principle," can be stated thus.* ***Contract and statute apart**, a legal mortgagee's right to possession of the mortgaged property cannot be defeated by a cross-claim on the part of the mortgagor, even if it is both liquidated and admitted and even if it exceeds the amount of the mortgage arrears…*
>
> *Slade L.J. then considered a submission by counsel for the mortgagors that the Mobil Oil principle was not applicable in a case where the cross-claims were not mere cross-claims but claims which would give the mortgagors rights by way of equitable set-off. As to that submission, he said, post, p. 78C–D:*
>
> *"**I say nothing about the case where a mortgagor establishes that he has a claim to a quantified sum by way of equitable set-off. Possibly such a claim might have the effect of actually discharging the mortgage debt**. In my judgment, however, the Mobil Oil*

principle is applicable both where the cross-claim is a mere counterclaim and where it is a cross-claim for unliquidated damages which, if established, would give rise to a right by way of equitable set-off. In none of the decisions mentioned has any distinction been drawn between the two."

Later, after referring to observations in Mobil Oil Co. Ltd. v. Rawlinson, 43 P. & C.R. 221 and Samuel Keller (Holdings) Ltd. v. Martins Bank Ltd. [1971] 1 W.L.R. 43 , he continued, post, p. 78F: "I cannot accept the submission that the Mobil Oil principle is not applicable where the mortgagor has a claim to unliquidated damages by way of equitable set-off, and in my judgment it makes no difference that such a claim may in the event prove to exceed the amount of the mortgage debt." ***It is to be noted that Slade L.J. expressed no view as to the effect of a cross-claim for a liquidated sum giving rise to a right of equitable set-off.*** "[emphases added].

129. Accordingly, and even assuming for present purposes that the Share Charges are to be regarded as operating as mortgages with legal title resting with Minsheng (contrary to what appears from the actual documentation), the English cases (including *Samuel Keller (Holdings) Ltd* mentioned above by Nourse LJ and discussed extensively by the Judge at [81] and [125] of the Judgment) do not support Minsheng's contention for the applicability here of the general rule that a mortgagee's claim to enforce its security may not be defeated by a cross-claim or a set-off, such as here, where the alleged debtor claims that the secured debt has been contractually eliminated.

130. Minsheng seeks further to rely on the Privy Council decision of *Cukurova v Alfa* (above) in support of the proposition that even if it is alleged that there are grounds that would render a security voidable, the mortgage or charge remains in being until the money due has been tendered and accepted. But not only was that issue considered and addressed at [79], [80] and [125] – [126] of the Judgment, *Cukurova* had nothing to do with voidable securities: the issues in that case were whether the chargee (or mortgagee) was entitled to refuse a tender of the mortgage debt because the tender was made too late (the Privy Council held that it was); whether the enforcement of the security was vitiated by bad faith on the part of the lender or undertaken for an

improper purpose and whether there was an entitlement to invoke the jurisdiction to grant relief from forfeiture.

131. Accordingly, *Cukurova* does not address or negate the finding at [125] of the Judgment of an arguable case, that the indebtedness secured by the Share Charges could have been completely discharged by set-off or by being applied against the liability owed by the Respondents under the bi-lateral agreement embodied in the Share Charges.

132. As Mr Moverley-Smith emphasized, the Respondents do not rely upon a defence of tender asserting that the secured debt has been tendered but not accepted, in which case on the basis of the cases a payment into court might have been required. Here they contend and are contending before both the HKIAC and the CIETAC Tribunals respectively, that under the terms of the Loan Agreements and the agreed contractual mechanisms of the Put Option under clause 8.1 of the SPA, the debt has been eliminated in its entirety.

133. The further cases relied upon by Minsheng (including *Bank of New South Wales v O'Connor* and *Shearer v Spring Capital*, also both cited by Mr Lowe above) do not, in my view, support the proposition that the Respondents' case is unarguable and an improper basis for the grant of the injunction.

134. Mr Lowe concluded his oral arguments with the still further proposition that, if this Court were to reject his arguments on his Grounds of Appeal, we should nonetheless find that the Order by its complete restraint of Minsheng's dealing with the Remaining Shares pending the outcome in the CIETAC Arbitration, is too exorbitant in its terms and goes further than is necessary. Accordingly, as mentioned above, that we should exercise the discretion vested by Section 54 afresh and order instead that Minsheng is allowed to sell the Remaining Shares provided it pays the proceeds into an escrow account, pending the outcome.

135. For my part, I do not consider that such an order would be appropriate. By allowing Minsheng to dispose of the Remaining Shares, such an order would operate as exactly the kind of interference with the possible outcomes before the CIETAC (and for that matter the HKIAC) Arbitrations

which the case law on international arbitration admonishes. I would therefore refuse the making of such an order.

136. For all the foregoing reasons, the appeal should be dismissed.

137. **Birt JA**: I agree.

138. **Goldring P**: I also agree. The appeal is accordingly dismissed. Unless Minsheng seeks by written submissions (filed with the Court and served upon the Respondents within 10 days of the date of this Judgment) to argue otherwise, the Respondents shall have their costs of the Appeal on the standard basis, to be taxed if not agreed.