Neutral Citation Number: [2024] EWHC 2505 (Comm)

Case No: CL-2024-000405

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

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

Date: 03/10/2024

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between:

INVESTCOM GLOBAL LIMITED (incorporated under the laws of the British Virgin Islands) — **Claimant**

- and -

(1) PLC INVESTMENTS LIMITED (incorporated under the laws of The Republic of Liberia)
(2) BENONI UREY
(3) EMANUEL SHAW II — **Defendants**

- -
- -

Stephen Houseman KC and Matthieu Gregoire (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Claimant**
Edward Levey KC and Laurie Brock (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Defendants**

Hearing date: 6 September 2024
Draft judgment circulated to parties: 17 September 2024

Approved Judgment

This judgment was handed down remotely at 2:30pm on 3 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Henshaw:

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(A) INTRODUCTION

1. This judgment follows the return date hearing in respect of anti-suit, anti-enforcement and related relief granted by Foxton J at a without notice hearing on 17 and 18 July 2024 ("***the Foxton Order***").

2. The Foxton Order granted the Claimant ("***Investcom***") interim and ancillary relief in connection with its arbitration claim for declaratory and injunctive relief against the Defendants pursuant to section 37 of the Senior Courts Act 1981, in respect of their commencement and pursuit of two sets of civil proceedings in the courts of Liberia (together, the "***Liberian Proceedings***"). So far as now relevant, those proceedings comprised:

   i) civil proceedings commenced by a "*Petition to Stay Arbitration*" filed by the Second and Third Defendants ("***D2***" and "***D3***") on 10 May 2024 (the "***Second Liberian Proceedings***") seeking a stay of an arbitration which Investcom had commenced under the ICC Rules of Arbitration ("***the ICC Rules***") in March 2024 (the "***Arbitration***"); and

   ii) separate civil proceedings commenced by a "*Petition for Proper Accounting*" filed by the First Defendant ("***D1***") on 27 June 2024 (the "***Third Liberian Proceedings***").

3. The Claimant alleges that the Second and Third Liberian Proceedings were commenced in breach of arbitration agreements contained in clauses 15.3 and 15.4 of a Shareholders Agreement dated 3 June 2000 (the "***SHA***") and/or clauses 13.2-13.4 of a Management and Technical Support Contract dated 11 December 2001 (the "***MA***").

4. The Foxton Order included:

i) interim anti-suit injunctions against D1 in respect of the Third Liberian Proceedings and against D2 and D3 in respect of the Second Liberian Proceedings (together, the "***ASIs***"); and

ii) an interim anti-enforcement injunction against the Defendants in respect of the Liberian Proceedings (the "***AEI***").

5. Before me, the Defendants sought the following relief:

i) the discharge of the ASI and the AEI in respect of the Second Liberian Proceedings, on the ground that the English court lacks jurisdiction to continue them. In outline, the Defendants say the jurisdictional foundation for the relevant ASI and AEI before Foxton J was that the seat of the Arbitration, not yet fixed at that stage, would be London. However, on 1 August 2024 the ICC Court fixed Toronto as the seat of the Arbitration, with the result that (the Defendants say) the English court has no supervisory role to play and no jurisdiction to continue the relevant ASI or AEI. The Defendants also contest the English court's jurisdiction over this claim as a whole;

ii) the discharge of the orders regarding the Third Liberian Proceedings, because those proceedings have been discontinued making the relevant orders redundant; and

iii) the dismissal of the present claim as a whole.

6. For the reasons given below, I have concluded that:

i) the English court has no jurisdiction to maintain any relief in respect of the Second Liberian Proceedings, so those parts of the Foxton Order must be discharged; and

ii) the relief in respect of the Third Liberian Proceedings continues to serve a proper purpose and should be maintained.

The evidence suggests that both sets of proceedings are in flagrant breach of the relevant Defendants' obligations. However, as regards the Second Liberian Proceedings, it appears to me that any court intervention must be a matter for the courts of Ontario following the ICC Court's designation of Toronto as the seat of the Arbitration. I shall hear counsel on the appropriate formulation of the relief in the light of this judgment.

(B) BACKGROUND FACTS/ALLEGATIONS

(1) Commercial background

7. Investcom, incorporated in the BVI, is an indirectly wholly owned subsidiary of MTN Group Limited ("***MTN Group***"), one of the largest telecommunications companies in the world, headquartered in South Africa. D1 is an investment holdings company incorporated on 3 July 1989 in Liberia. Its shares are held by two Liberian entities as 50% shareholders each, Nexus Corporation ("***Nexus***") and IDS Incorporated ("***IDS***").

8. Investcom's case is that, through Nexus and IDS, D2 and D3 (two prominent and well-connected businessmen and politicians in Liberia) are the owners and/or controllers of D1 (though the precise shareholding of each of D2 or D3 in Nexus/IDS is unknown).

9. On 3 June 2000, Investcom and D1 entered into the SHA, which concerns the operation and management of Lonestar Communications Corporation ("***MTN Liberia***"), a company incorporated in Liberia on 15 November 1999 which was granted a licence from the Liberian government on 11 February 2000 to establish and operate telecommunications networks throughout Liberia using the global system for mobile communication (GSM) technology.

10. Investcom says it understands that prior to the SHA, MTN Liberia was owned (or, perhaps, ultimately owned) by D2 and D3. Pursuant to the SHA, Investcom acquired a 60% stake in MTN Liberia. Although Investcom understands that D1 was and remains the shareholder of the remaining 40%, certain business registration forms identify D3 as the owner of 40% of the shares in MTN Liberia as at 17 February 2011.

11. Clauses 15.3 and 15.4 of the SHA provide:

> "15.3 The law of Liberia shall be the proper law of this Agreement and shall be applied in any international chamber of commerce outside Liberia.
>
> 15.4 Disputes arising from or in connection with this agreement shall be settled by arbitration. In such event each party hereto shall nominate an arbitrator and the two arbitrators so nominated shall jointly nominate a third arbitrator who shall chair the arbitration committee. The decision of this arbitration committee must be binding for both parties. Each party agrees to waive to the fullest extent possible at law any entitlement it might otherwise have to seek judicial review."

12. On 11 December 2001, Investcom and MTN Liberia executed the MA (as contemplated by clause 8 of the SHA), under which Investcom agreed to provide MTN Liberia with managerial, technical and administrative assistance, in consideration for 6% of MTN Liberia's monthly gross turnover.

13. Clause 13 of the MA provides:

> "13.1 The law of Liberia shall be the proper law of the present Contract.
>
> 13.2 Disputes arising from or in connection with the present Contract that cannot be solved by an amicable agreement shall be settled by arbitration.
>
> 13.3 The International Chamber of Commerce in London, England will be competent in the settlement of the disputes by arbitration. The decision of the Chamber of Commerce in London shall be binding for both Parties.

13.4 The procedure of arbitration that will take place in London, England will be in English language."

14. On 9 December 2014, Lonestar Cell MTN Mobile Money Inc. ("***Momo Liberia***") was incorporated as a wholly owned subsidiary of MTN Liberia, to provide mobile money products and services in Liberia.

15. In 2014, the Central Bank of Liberia imposed a requirement (under section 6 of the Liberian Mobile Money Regulations 2014) for Liberian investors or Liberian-owned institutions to be given the opportunity to subscribe for at least 20% of the capital of any "*Mobile Money Provider*", which included Momo Liberia.

16. In early 2018, D2 and D3 introduced the former Fourth to Sixth Defendants to the present claim (Julia Krangar, Sam Kono and Comfort Barolle) ("***D4 to D6***") and Ms Kaya Tue, all Liberian nationals, as individuals who would subscribe for shares in Momo Liberia. Investcom's evidence is that, unbeknownst to it at the time, these individuals were all former employees of companies affiliated with D2 and D3, and were merely proxies for them. Investcom's case is that D2 and D3 used D4 to D6 and Ms Tue to seek to control voting power in Momo Liberia so as to take the benefit of any dividends that D2 and D3 might be entitled to as shareholders of MTN Liberia.

17. On 20 July 2018, the board of directors of MTN Liberia recorded an action without a meeting (the "***Lonestar Board Resolution***") by which the directors purported to resolve that (a) MTN Liberia held 80% of the shares in Momo Liberia, and the remaining 20% of shares would be divided equally among each of D4 to D6 and Ms Tue; and (b) the "*operations of [Momo Liberia] shall be in the same manner as currently obtains with [MTN Liberia], including the shareholding, operations, management and the distribution of dividends*". The validity of the Lonestar Board Resolution is in dispute between the parties.

18. Also on 20 July 2018, a resolution was allegedly passed by Momo Liberia's board of directors (the "***Momo Liberia Board Resolution***") that (a) Momo Liberia accepted offers from each of D4 to D6 and Ms Tue to subscribe for 5% of the shares in Momo Liberia "*for value received*" (though on Investcom's case none was in fact received), and that 100 shares would be issued to each of them; and (b) the management of Momo Liberia were authorised and directed to sign and deliver to each of those four individuals certificate(s) for 100 shares of the authorized unissued shares of the company. The validity of the Momo Liberia Board Resolution is also in dispute.

19. Investcom's case is that D2 and D3 have improperly sought to extract significant sums and other benefits from MTN Liberia and Momo Liberia through shareholder dividends, management fees, and the diversion of assets owned by MTN Liberia for their own personal gain; and have caused information about the operations of MTN Liberia to be withheld from Investcom.

(2) Legal and arbitral proceedings

20. Investcom states that, over the past year, D2 and D3 have focused efforts on (a) establishing the rights of their proxies, D4 to D6 and Ms Tue, in Momo Liberia and establishing a new board of Momo Liberia not controlled by the majority shareholder, MTN Liberia and, through it, Investcom; and (b) persuading Investcom to write off

debts owed by MTN Liberia to Investcom, amounting to approximately USD 194 million, and to the MTN Group so as to allow the distribution of USD 35 million held by Momo Liberia in dividends to MTN Liberia, and from there to its shareholders including D1, and ultimately to D2 and D3. Investcom relies *inter alia* on minutes prepared by D2/D3 of a meeting between them and Investcom's Mr Blewett (who also sat on MTN Liberia's board of directors and who disputes the content of those minutes insofar as they purport to evidence any agreement) in October 2023 (the "***October 2023 Minutes***").

21. In furtherance of these objectives, Investcom says, D2 and D3 have directly, or indirectly through their proxies, D4 to D6, Ms Tue and D1, issued three sets of proceedings in Liberia.

22. As a result of the matters summarised above, Investcom commenced the Arbitration.

(a) The First Liberian Proceedings

23. On 6 March 2024, Investcom received a petition submitted by D4-D6 to the Liberia Commercial Court to compel Momo Liberia to issue certificates for shares in Momo Liberia to each of the petitioners (the "***First Liberian Proceedings***"). Whilst Investcom and MTN Liberia were also made parties to those proceedings, D1 was not.

24. On 16 March 2024, Investcom, MTN Liberia and Momo Liberia filed their Returns and Motion to Dismiss the petition in the First Liberian Proceedings on the basis that D4-D6's shares were never validly issued (including because they did not acquire them and that D4-D6 are sham investors).

25. On 28 March 2024, D4-D6 filed their Reply to the Returns and Resistance to the Motion to Dismiss and a further Motion to Strike the Returns, alleging i*nter alia* that D4-D6 were "*independent Liberian shareholders and investors, and are not members of [D1] or being controlled or directed by [D1] or by any member of [D1]*". Investcom considers that statement to be untrue.

(b) Commencement of the Arbitration

26. On 15 March 2024, Investcom commenced the Arbitration. Its Request for Arbitration ("***RfA***") named as Respondents D1, MTN Liberia (Second Respondent), Momo Liberia (Third Respondent), D2 and D3 (as Fourth and Fifth Respondents), D4 to D6 (Sixth to Eighth Respondents) and Ms Tue (Ninth Respondent). The relief sought includes requests (on a preliminary basis) for (a) a declaration that D4-D6 and Ms Tue are sham shareholders of Momo Liberia; (b) a declaration that the shares issued to them were not validly issued and/or that the Lonestar and Momo Liberia Board Resolutions are void and of no effect; (c) a declaration that D1 is in material breach of material obligations under the SHA; and (d) an order that D1 sell its 40% shareholding in MTN Liberia to Investcom pursuant to clause 12 of the SHA (which entitles a party to buy out the shares of the "*Defaulting Party*" where *inter alia* it has *"[f]ail[ed] in any material way to perform or procure performance of any material term of*" the SHA).

27. Investcom also alleged in its arbitration claim that:

i) the First Liberian Proceedings were in fact commenced by D1, in breach of the SHA arbitration agreement (and were also a breach by D2 and D3);

ii) D4-D6 are bound by the SHA arbitration agreement; and

iii) the Respondents have acted in concert to defraud Investcom (and MTN Liberia) and deprive it of its economic interest in Momo Liberia.

28. Investcom's RfA cites § 15 of the SHA as the applicable arbitration agreement. It submits that by §§ 15.3 and 15.4, read together, the parties have agreed that all disputes arising from or in connection with the SHA shall be resolved exclusively by arbitration under the ICC Rules.

29. The RfA continues:

> "68. The parties have also elected that the seat of arbitration be anywhere outside Liberia. This means that the seat shall be determined by:
>
> 68.1 party agreement;
>
> 68.2 reference to the arbitration rules; or
>
> 68.3 the Tribunal once it has been constituted.
>
> 69. Investcom hereby invites the Respondents to agree that the seat shall be London, England.
>
> 70. Article 18(1) of the ICC Rules provides that the ICC Court shall fix the place of arbitration in the event that party agreement cannot be reached.
>
> 71. Accordingly, in the event that the Respondents fail to so agree within 30 days from receipt of this Request for Arbitration, Investcom hereby invites the ICC Court (or failing which, the Tribunal) to fix the seat of this arbitration as London, England."

Article 18(1) of the ICC Rules states:

> "The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties".

30. It will be noted that, of the nine named Respondents to the Arbitration, only one (D1) was a signatory to the SHA. The Second and Third Respondents to the Arbitration, MTN Liberia and Momo Liberia, are the entities who are the subject of the dispute. The Fourth and Fifth Respondents to the Arbitration are D2 and D3. In submissions to the ICC Court on Jurisdictional Issues, dated 5 July 2024, Investcom states that:

> "The Second and Third Respondents [i.e. MTN Liberia and Momo Liberia] have been made parties to this arbitration not because of any claim against them, but in order to give effect to the relief sought by the Claimant, particularly the declarations

> with respect to the Sixth to Ninth Respondents' status as shareholders of the Third Respondent, and the validity of the share issuance to those respondents …. The SHA regulates the relationship of the shareholders in the Second and Third Respondents and for this reason, the Second and Third Respondents should also be bound by the Arbitration Agreement. [fn]"
>
> [footnote] "It is further noted that, while not a formal party to the SHA, the Second Respondent gave certain representations and warranties at Clause 3 thereof, and so should be taken to have impliedly consented to the arbitration agreement at Clause 15."

31. Investcom contends in the same submission that D2 and D3 are bound by the SHA arbitration agreement on the basis of the *alter ego* principle under Delaware and Liberian law (Delaware law being statutorily incorporated for relevant purposes into Liberian law), alternatively based on estoppel or implied consent. Similarly, Investcom submitted to Foxton J that:

> "[D2 and D3] are not signatories to the SHA. However, as a matter of Delaware Law (which Liberian Law follows in relevant part (see KHD, §84), they are bound the SHA AA, on the basis that, having received direct benefits from the SHA, they are equitably estopped from disavowing the obligations under SHA, and also on the basis of their having accepted and assumed the SHA: …. In addition, either the fact that [D1] served as the alter ego of [D2 and D3] or the fact that [D1] served as [D2 and D3]'s agent constitutes an additional basis for binding them to the SHA AA"

32. It is unnecessary to refer to the basis of alleged jurisdiction over D4-D6 and Ms Tue because the ICC Court decided that the Arbitration would not proceed against them.

33. On 22 March 2024, the ICC notified the Respondents electronically of the RfA.

34. On 22 April 2024, Brodies LLP wrote to the ICC indicating that they were recently instructed on behalf of D1 to D3, and requested an extension of time to provide an Answer to the RfA. Brodies also said:

> "In the meantime, it is agreed that the relevant arbitration agreement provides for a determination by three arbitrators and our clients are content to agree to London as the place of arbitration and English as the language. The first, fourth and fifth Respondents [i.e. D1 to D3] hereby nominate (by way of a joint nomination by those Respondents) Professor Dr Maxi Scherer of Wilmer Cutler Pickering Hale and Dorr LLP as co-arbitrator."

35. Investcom's case is that, as a matter of Liberian law that constituted an acceptance of London as the seat of the arbitration under the SHA arbitration agreement, alternatively a self-standing arbitration agreement (the "***Brodies arbitration agreement***").

Investcom's expert evidence is to the effect that the Brodies arbitration agreement is irrevocable except by further agreement of the parties, as a matter of Liberian law.

36. On 23 April 2024, the ICC Secretariat sent a letter to all parties. The letter noted that the 30-day time limit for submitting Answers to the RfA had expired "*without an Answer having been submitted by Respondents 2, 3 and 6-9*", and invited Investcom to confirm whether it wished to attempt notification by hard copy. It granted D1 to D3 an extension until 22 May 2024 to submit their Answers. As regards the "*Place of Arbitration*", the letter stated

> "The arbitration agreement does not provide for the place of arbitration. Claimant proposed London, England. Respondents 1, 4 and 5 agreed with Claimant's proposal. Respondents 2, 3 and 6-9's did not comment. As the parties have not agreed, the Court will fix the place of arbitration (Article 18(1))."

37. On 30 April 2024, the ICC served a hard copy of the RfA on MTN Liberia, Momo Liberia and the Sixth to Ninth Respondents (presumably at Investcom's invitation following the question posed in the 23 April letter).

38. On 10 May 2024, Brodies wrote to the ICC seeking to contest the jurisdiction of the ICC and the arbitral tribunal, and requesting the ICC not to proceed with Arbitration. In that letter, Brodies (a) alleged that the SHA arbitration agreement was limited to clause 15.4 and made no reference to the ICC, such that the ICC did not have jurisdiction; (b) sought to withdraw their acceptance of London as the seat of arbitration; (c) alleged that there was no arbitration agreement which bound D2 and D3; (d) reserved their rights as to arbitrability and relief sought; and (e) notified the ICC that D2 and D3 would commence proceedings in Liberia, seeking to enjoin the Arbitration (i.e. what became the Second Liberian Proceedings). Investcom's evidence is that this letter could not operate to revoke the agreement contained in the Brodies letter of 22 April 2024 as a matter of Liberian law.

(c) Second Liberian Proceedings

39. On 10 May 2024, D2 and D3 filed a petition before the Sixth Judicial Circuit Court of Liberia ("***SJC***") to stay the Arbitration, and to restrain Investcom, MTN Liberia and the ICC itself from participating in or carrying out any act in furtherance of the Arbitration.

40. On 13 May 2024, the SJC issued an order to stay the Arbitration and restraining Investcom, MTN Liberia and the ICC from "*participating or carrying on any act in furtherance to the arbitration proceeding pending the outcome of the petition*" ("***SJC Order***").

41. Investcom's evidence is that the SJC lacks jurisdiction over commercial arbitrations seated outside Liberia, that the Commercial Court of Liberia has supervisory jurisdiction over arbitrations seated in Liberia (not the SJC), and that the SJC Order is in violation of the Liberian Civil Procedure Law ("***LCPL***"). Investcom also understands that the SJC Order has expired under the LCPL, and applied for it to be formally dismissed.

(d) Further steps in the Arbitration

42. On 14 May 2024, the ICC acknowledged receipt of the Brodies letter of 10 May, stated that a decision would be taken on the jurisdictional pleas advanced therein on payment of the relevant advance, and said this about the "*Place of Arbitration*":

> "The arbitration agreement does not provide for the place of arbitration. Claimant proposed London, England. Respondents 1, 4 and 5 initially agreed with Claimant's proposal, however, we now note that this agreement is withdrawn. As the parties have not agreed, the Court will fix the place of arbitration (Article 18(1))."

43. On 17 May 2024, Brodies sent a letter to the ICC in which, *inter alia*, they notified it that in the Second Liberian Proceedings the Liberian court had issued a temporary stay in respect of the Arbitration.

44. On 28 May 2024, the ICC invited the parties to provide comments on the place (i.e. the seat) of arbitration by 4 June 2024.

45. On 4 June 2024, Investcom filed submissions on the seat of the Arbitration. It noted there was a threshold question about whether D1-D3 had submitted to arbitration under the ICC Rules pursuant to SHA § 15, but that:

> "Notwithstanding the above, the ICC Court should determine that:[fn]
>
> (a) as between the Claimant and the First, Fourth and Fifth Respondents [D1 to D3], the parties have agreed to London as the seat of this arbitration; and
>
> (b) in any event, London should be fixed as the seat of the arbitration pursuant to Article 18(1) of the ICC Rules."
>
> [footnote] "*See* Thomas Webster, Michael Buhler, *Handbook of ICC Arbitration: Commentary and Materials* 5th Ed., 2021, at [18-21] *("If it is not clear whether the parties have agreed on the place of arbitration, the ICC Court will decide whether there has been an agreement on the place of arbitration or whether it falls upon the court to fix the place of arbitration in accordance with art.18(1).")*."

46. Investcom went on to submit that SHA § 15 provides for arbitration "*outside Liberia*"; that the parties "*chose the ICC rules to govern any such arbitration*"; that the agreement to a London seat in the Brodies April letter was binding on D1-D3 and irrevocable under Liberian law; and that "*[i]f the ICC Court does not accept that the parties have so agreed, the ICC Court should fix London, England as the place of the arbitration pursuant to Article 18(1) of the ICC Rules for at least the following reasons …*".

47. Also on 4 June 2024, Brodies requested an extension until 11 June 2024 to provide submissions on the seat of the Arbitration. This was opposed by Investcom, which

"*urge[d] the ICC to uphold the sanctity and exclusivity of this arbitration by proceeding to determine the seat*".

48. On 21 June 2024, Brodies filed submissions on the seat of arbitration on behalf of D1-D3, arguing in summary that: (i) the arbitration agreement in fact provided that the seat of the Arbitration was or should be Liberia; (ii) alternatively, the ICC Court should fix Liberia as the seat; and (iii) the agreement to London as a seat by D1-D3 was capable of being and had been withdrawn.

49. On 5 July 2024, Investcom filed submissions on jurisdictional matters. As noted above, these set out Investcom's case as to why all the Respondents to the arbitration (including MTN Liberia and Momo Liberia, as well as D2 and D3) are bound by the SHA arbitration agreement. As to the seat of the Arbitration, the submissions reiterated Investcom's point that D1-D3 were bound by Brodies' acceptance of a London seat, and stated:

> "It follows, with respect, that the ICC Court has no power under Article 18(1) to determine the seat, because it has been agreed upon as London by the parties. While there might be a dispute about that agreement, as evidenced by Brodies' subsequent correspondence on this matter in which they have sought to disavow that agreement, that is a dispute which, in the Claimant's respectful submission, only the Tribunal can now resolve." (§ 128, footnotes omitted).

(e) Third Liberian Proceedings

50. Meanwhile, on 27 June 2024 D1 issued proceedings before the SJC against Investcom and MTN Liberia, seeking an account in respect of MTN's alleged liabilities to Investcom and/or the MTN Group. D1 alleged that Investcom had mismanaged the affairs of MTN Liberia under the MA.

51. Investcom alleges that the Third Liberian Proceedings have been issued with a view to MTN Liberia's liabilities to Investcom and/or the MTN Group being wrongfully written off, in order to improve the MTN Liberia balance sheet in order for dividends then to be distributed to D1-D3 from cash held by Momo Liberia. It points out that the Third Liberian Proceedings mirror the approach advocated for by D2 and D3 as recorded in the October 2023 Minutes. Investcom notes that the relevant loan agreements were entered into between MTN Liberia and MTN Dubai Limited (Investcom's parent company), and are governed by English law and LCIA arbitration clauses, seated in the Dubai International Financial Centre.

52. On 5 July 2024, Investcom filed its Returns to the petition for proper accounting, and a motion to dismiss it on the basis that, *inter alia* (a) the SJC lacks jurisdiction as a result of the SHA arbitration agreement and MA arbitration agreement; (b) D1 lacks capacity to bring the proceedings as it failed to approach MTN Liberia's board prior to issuing; and (c) MTN Liberia's audited financial statements for the year ended 31 December 2022 (which are now questioned by D2 and D3), were approved by Ms Danielle Urey (D2's daughter and Chairperson of MTN Liberia's board) and D3 (as a member of MTN Liberia's board).

(f) Subsequent events

53. On 12 July 2024, the Liberian court dismissed a motion to dismiss the Second Liberian Proceedings, which had been filed by Investcom relying on the arbitration agreement in the SHA, on the basis that it appeared that the petitioners (D2 and D3) were not party to that agreement as a matter of Liberian law.

54. On 16 July 2024, Investcom filed with this court its Claim Form and Application Notice for interim relief.

55. On the same day, D1-D3 filed submissions on jurisdictional matters in the Arbitration.

56. On 18 July 2024, Investcom wrote to the ICC responding to those submissions. Investcom did not suggest that MTN Liberia or Momo Liberia (or the Sixth to Ninth Respondents i.e. D4-D6 and Ms Tue) had agreed to a London seat, but contended that the ICC Court was "*bound to confirm that the place of arbitration is London*".

57. The without notice hearing before Foxton J took place on 17-18 July 2024 and the Foxton Order was made. Investcom sought and obtained relief in relation to the Second Liberian Proceedings and the Third Liberian Proceedings: relief was, in the event and following certain observations of Foxton J on the first day of the hearing, not sought in relation to the First Liberian proceedings. In addition, by the time of the second day of the hearing before Foxton J, Investcom indicated that it was no longer seeking relief against D4-D6 and did not intend to keep them in the proceedings. The Defendants note that Investcom failed to draw Foxton J's attention, as it should have done, to the ICC Secretariat's letter of 23 April 2024, though they do not seek to set aside the Foxton Order on grounds of non-disclosure.

58. Paragraph 2 of the Foxton Order restrained D1 from taking any step to pursue or prosecute its claim or seek relief (or any similar claims or relief) in the Third Liberian Proceedings. Paragraph 3 restrained D2 and D3 from taking any step to pursue or prosecute or progress their claims or seek relief in the Second Liberian Proceedings. Paragraphs 4 and 5 provided:

> "4. For the avoidance of doubt, the injunctions in paragraphs 2 and 3 above restrain the Defendants (as applicable) from:
>
> (a) seeking, whether by fresh action or application or otherwise, any interim or conservatory order or relief or remedy or measure from the Liberian Court or elsewhere which is inconsistent with the SHA Arbitration Agreement, Brodies Letter, MA Arbitration Agreement and/or the Claimant's pursuit of the ICC Arbitration; and/or
>
> (b) taking the steps identified in paragraphs 2 and 3 above in or through any other proceedings concerning any rights or interests connected with the SHA before the Liberian Court or any other court in Liberia or elsewhere or otherwise than in accordance with the terms of the SHA Arbitration Agreement and/or Brodies Letter or within the ICC Arbitration.

> 5. Until further order of the Court, each of the Defendants is forthwith restrained from taking any steps to enforce or execute or take advantage of any judgment or order obtained by any of them in any of the Liberian Proceedings."

59. On 22 July 2024, D1 filed a notice of Voluntary Discontinuance at the Liberian court discontinuing the Third Liberian Proceedings, expressed to be "*without prejudice*" and "*with reservation of the right to re-file*".

60. On 2 August 2024, the ICC Secretariat sent a letter to the parties informing them that on 1 August 2024 the ICC Court had: (i) decided that the Arbitration would proceed against Rs 1-5 but not Rs 6-9; and (ii) fixed Toronto, Canada as the place (i.e. the seat) of the Arbitration (the "***ICC Decision***"). The ICC Decision was not accompanied by reasons (which appears not to be unusual: it seems parties rarely request reasons for a decision as to the seat: Webster and Buhler, "*Handbook of ICC Arbitration*" § 18-22 and fn. 51).

61. On 5 August 2024, a notice of discontinuance of the First Liberian Proceedings was filed, expressed to be "*without prejudice*" and "*with reservation of the right to re-file*".

62. Also on 5 August 2024, D1 filed submissions to the ICC Court on jurisdictional issues. (As noted below, it appears that this occurred before D1-D3's representatives had become aware of the ICC Court's decision of 1 August 2024.) It was submitted that the Arbitration should not be proceeding, in the light of the Liberian court's order in the Second Liberian Proceedings. Without prejudice to that position, D1 submitted that the ICC had no jurisdiction as the parties had not agreed to submit disputes arising out of the SHA to the ICC, and that, as a matter of construction of the SHA (including its choice of Liberian governing law), the parties had agreed to Liberia as the seat of the Arbitration.

63. On 6 August 2024, Investcom wrote to the ICC Secretariat stating that the ICC Court's decision as to seat was "*void and of no effect*" because Investcom and D1-D3 had, through the Brodies Letter "*irrevocably agreed to London as the place of arbitration*" and the only remaining Respondents who were not party to that agreement were "*the Second and Third Respondents, both of which are neutral parties to the dispute and in any event raised no objections to London as the seat*".

64. In response, a letter from the ICC Secretariat dated 13 August 2024 stated:

> "While we take note of Claimant's comments in respect of Respondents 1, 4 and 5's alleged agreement to London, England, pursuant to Article 18(1), the "place of arbitration shall be fixed by the Court, unless agreed upon by the parties". Accordingly, in the absence of an express agreement by all parties, the Court fixed Toronto, Canada as the place of arbitration."

65. Meanwhile, despite the Foxton Order, D2 and D3 have continued to prosecute the Second Liberian Proceedings. A hearing on the merits took place on 6 August 2024, in which Investcom submitted to Judge Ousman F. Feika ("***Judge Feika***") that the SJC should first determine a number of legal issues and allow the parties to produce factual evidence into the record before it could determine the stay petition itself. However,

Judge Feika determined that the petition could be determined purely on legal issues. Investcom refused to argue its case, on the ground that it was denied its due process rights, and Judge Feika proceeded with the hearing.

66. On 9 August 2024, there was a short hearing in Liberia at which Judge Feika handed down a ruling (the "***9 August Ruling***") purporting to stay the ICC Arbitration pursuant to Section 64.2(2) of the LCPL, on the basis of the contents of the original petition (including the point that D2 and D3 were not parties to the SHA). (There is a disagreement between the parties, which I do not find it necessary to resolve, about whether Judge Feika's order purports to stay the Arbitration as a whole or only as against the petitioners i.e. D2 and D3). Judge Feika also fined Investcom's lawyer, Cllr. Negbalee Warner, for what he deemed to be gross disrespect to the court on the previous occasion (a ruling which Cllr. Negbalee Warner has successfully challenged). Cllr. Warner announced Investcom's intention to appeal the court's decision, which the court accepted and granted as of right on 16 August 2024.

67. In a letter of 16 August 2024, D1's representatives wrote to the ICC Secretariat, without prejudice to D1's objection to the ICC's jurisdiction, noting that the ICC's letter of 2 August 2024 notifying the parties of the ICC Court's decision about the seat of the Arbitration had been received only on 5 August 2024, after they had filed D1's submissions of that date on jurisdictional issues. The letter continued:

> "Having had the opportunity to consider it, [D1] respects the Court's Decision (despite the fact that it does not reflect the outcome it had sought) and recognises that the seat of the arbitration has now been fixed (subject to paragraph (6) below). Although the Secretariat has confirmed that it does not intend to transmit further comments to the Court, in light of the Claimant's suggestion (as set out in Skadden's letter dated 6 August 2024) that the Court's decision is somehow "void and of no effect", we nevertheless wish to explain our client's position for the record."

and proceeded to set out reasoning in support of the ICC Court's decision, concluding in § 6:

> "We do not accept that there is any basis for challenging the Decision before the arbitral tribunal (as the Claimant has intimated it intends to do) but reserve the right to make further submissions on behalf of [D1] in relation to the seat of the arbitration should the tribunal be willing to entertain such a challenge."

68. On 20 August 2024, Momo Liberia and MTN Liberia wrote to the ICC Court stating that they "*agree[d] to either choice of co-arbitrator nominated by [D1-D3]*" and that:

> "this arbitration relates to a dispute between the shareholders of Respondent 2 and their beneficial owners. I would also like to take this opportunity to inform you, on behalf of Respondents 2 and 3, that these companies do not intend to participate actively in this arbitration, but they agree to be bound by its outcome".

(C) APPLICABLE PRINCIPLES

69. Section 37(1) of the Senior Courts Act 1981 provides:

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

70. The underlying principle is that the jurisdiction is exercised "*where it is appropriate to avoid injustice*": *Castanho v Brown & Root (UK) Ltd* [1981] A.C. 557, 573.

71. Where there is an arbitration agreement, an ASI will readily be granted if (a) the claimant can demonstrate with a high degree of probability the existence of an arbitration clause to which the defendant is a party and which covers the dispute; and (b) there are no exceptional circumstances which militate against the grant of relief, such as the failure to act promptly (see, e.g., *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep. 87, 96; see also Merkin, *Arbitration Law*, § 8.94).

72. At the interlocutory stage, it has been said that the applicant must show a "*high degree of probability*" that its case on the existence of an arbitration clause is right and that the respondent has breached or is likely to breach the exclusive jurisdiction clause by commencing or pursuing the relevant foreign legal process if not stopped: see, e.g. *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (Comm) §§ 51-52.

73. An ASI may also be granted against a person, who is not a contracting party but who has brought proceedings that would have the effect of outflanking a jurisdiction or arbitration clause: see *Joint Stock Asset Management Company "Ingosstrakh Investments" v BNP Paribas SA* [2012] EWCA Civ 644; *Kallang Shipping SA v Axa Assurances Senegal* [2007] 1 Lloyd's Rep 160 § 20; *REC Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2011] 1 Lloyd's Rep 410 §§ 26-27; *Mace (Russia) Ltd v Retansel Enterprises Ltd* [2016] EWHC 1209 (Comm).

74. As the House of Lords held in *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320, the court has power to grant a final or interlocutory injunction under section 37 only if it has *in personam* jurisdiction over the injunction defendant (see also Raphael, "*The Anti-Suit Injunction*", 2nd ed. (2019) at §3.01, §§3.05-3.06).

75. Where, as in the present case, none of the Defendants is in the jurisdiction, two sets of provisions as to jurisdiction are of particular relevance.

76. First, CPR 62.5, which addresses service out of the jurisdiction of arbitration claims. At the without notice hearing Investcom relied on CPR 62.5(1)(c) and/or CPR 62.5(2A), which provide as follows:

> "(1) Subject to paragraph (2A), the court may give permission to serve an arbitration claim form out of the jurisdiction if -
>
> …
>
> (c) the claimant –

> (i) seeks some remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and
>
> (ii) the seat of the arbitration is or will be within the jurisdiction or the conditions in section 2(4) of the [Arbitration Act 1996] are satisfied.
>
> …
>
> (2A) An arbitration claim form falling within (1)(a) to (c) above may be served out of the jurisdiction without permission if –
>
> (a) the seat of the arbitration is or will be in England and Wales; and
>
> (b) the respondent is party to the arbitration agreement in question."

(Section 2(4) of the Arbitration Act 1996 provides that the court may exercise certain powers for the purpose of supporting the arbitral process where (a) no seat of the arbitration has been designated or determined; and (b) by reason of a connection with England and Wales or Northern Ireland, the court is satisfied that it is appropriate to do so. It was not suggested that this provision has any application to the present case.)

77. The words "*is or will be*" include instances where any arbitration, if any were to be commenced or proposed under the arbitration agreement, would be seated within the jurisdiction (*AES Ust-Kamenogorsk Hydropower Plant* [2013] UKSC 35, [2013] 1 WLR 1889, § 50). The words enable the English court in those circumstances to restrain foreign proceedings in breach of the negative aspect of an arbitration agreement, whether or not any arbitration has commenced (*ibid.*).

78. Secondly, paragraph 3.1 of Practice Direction 6B, which deals with service out of the jurisdiction (with permission) more generally, contains certain gateways capable of application to arbitration claims. For example:

    i) PD6B § 3.1(6)(c) permits service out of an arbitration claim based on an arbitration clause that is governed by English law and/or which provides for arbitration in England; and

    ii) PD6B § 3.1(3) has been held to justify service out against defendants who were not party to the arbitration clause (provided there was an 'anchor' defendant who was party to such clause) if and to the extent those defendants were said to be acting in concert with the 'anchor' defendant in a vexatious manner and contrary to the terms of that clause.

79. The net result is that Investcom needs to show, to the applicable standard, that each of its claims relates to an arbitration (whether started or not) whose seat is or will be in England and Wales.

80. That position dovetails with the fact that only the courts of the seat of an arbitration have supervisory jurisdiction over it: see, e.g., *Dicey, Morris & Collins on the Conflict*

of Laws, 16th ed. (2022) at §16-034; and *C v D* [2007] EWCA Civ 1282, [2008] 1 Lloyds Rep 239, in which Longmore LJ (at § 17) approved as a correct statement of the law the dictum of Colman J in *A v B* [2007] 1 Lloyds Rep § 111 that:

> "…an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration." (emphasis added)

See also *Process & Industrial Developments Ltd v Federal Republic of Nigeria* [2019] EWHC 2241 (Comm) § 43, stating it to be common ground "that *it is the courts of the seat of the arbitration which, alone, will have supervisory jurisdiction over challenges to awards in the arbitration*"; and the statement of Cooke J at first instance in *C v D* [2007] EWHC 1541 § 29 that:

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

81. The applicable standard as regards issues of jurisdiction at the interlocutory stage is a "*good arguable case*", applying the three stage test articulated in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 § 7 and *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 § 9, as explained in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] 1 WLR 3514. As noted above, the standard when granting interim ASI relief on a contractual basis is for the court to be satisfied to a high degree of probability that there is an arbitration clause binding on the defendant which his actions breach or threaten to breach. The usual test for a non-contractual ASI (assuming the court has jurisdiction) is the *American Cyanamid* one requiring demonstration of a serious issue to be tried and an assessment of where the balance of justice lies.

(D) RELIEF IN RELATION TO THE THIRD LIBERIAN PROCEEDINGS

82. D1 claims in the Third Liberian Proceedings that Investcom mismanaged the affairs of MTN Liberia under the MA. Clause 13 of the MA, quoted earlier, provides for disputes arising from or in connection with it to be settled by ICC arbitration in London.

83. D1 is not a signatory to the MA arbitration agreement. However, Investcom's evidence is that to the extent that MTN Liberia has any claim against Investcom for an account in respect of the services provided by Investcom pursuant to the MA, and which D1 is able to pursue (in effect, by way of derivative action), D1 is bound, under the governing Liberian law, to arbitrate that claim under the MA arbitration agreement. Alternatively, Investcom claims that the Third Liberian Proceedings are a vexatious attempt to

circumvent the MA arbitration agreement. By way of further alternative, Investcom submits that the subject-matter of the Third Liberian Proceedings is a shareholders' dispute arbitrable under the SHA arbitration agreement.

84. On the evidence, there is in my view a good arguable case that the English court has jurisdiction pursuant to CPR 62.5(2A) in respect of Investcom's claim to restrain the Third Liberian Proceedings, because D1 is bound to arbitrate the dispute under the MA arbitration agreement and/or is vexatiously seeking to circumvent that arbitration agreement.

85. The Defendants submit that the ASI and AEI granted in respect of the Third Liberian Proceedings should be discharged because those proceedings have been discontinued and the relief serves no ongoing purpose. I do not agree. As Investcom points out:

i) paragraphs 2 and 4 of the Foxton Order extend not only to the Third Liberian Proceedings themselves but to any fresh action or application or other form of proceeding which would be inconsistent with *inter alia* the MA arbitration agreement;

ii) through its commencement of the Third Liberian Proceedings, D1 has manifested a willingness to break a contractual promise (or promises) to arbitrate;

iii) it is likely that that occurred at the behest of D2 and D3 who, the evidence indicates, control D1's affairs;

iv) D1 discontinued the Third Liberian Proceedings only after receiving the Foxton Order, and only "*without prejudice*" and "*with reservation of the right to re-file*"; and

v) D1 offers no undertakings in return for the discharge of the Foxton Order as regards the Third Liberian Proceedings.

As to point (iv) above, the Defendants filed on the day of the hearing a letter dated 4 September 2024 from their Liberian counsel, International Law Group, stating:

> "… we confirm, in relation to the discontinuance of the Third Liberian Proceedings that the "without prejudice" and "with reservation" language … is always included – as a matter of course – in any voluntary discontinuance of this kind. The inclusion of this wording was not because – and should not be taken as indicating that – there was (or is) any intention on the part of Plc Investments (or, for completeness and given the nature of Investcom's allegations, Mr Urey or Dr Shaw) to re-file, or otherwise seek to revive, the Third Liberian Proceedings. There neither was, nor is, any such intention."

There was no formal evidence on these points, either as to the usual practice or as to D2/D3's intentions in this regard. Whether reflecting usual practice or not, the discontinuance document expressly reserved the right to refile.

86. Given the history of the matter, and the evidence summarised earlier about the Defendants' collective strategy in relation to MTN Liberia and Momo Liberia and as to how the Third Liberian Proceedings form part of that strategy, there is good reason to believe that the discharge of the Foxton Order would lead to the refiling of the Third Liberian Proceedings or of proceedings to substantially similar effect and equally inconsistent with the MA arbitration agreement. In my view, the relief granted in respect of the Third Liberian Proceedings remains necessary and justifiable, and should continue pending trial.

(E) RELIEF IN RELATION TO THE SECOND LIBERIAN PROCEEDINGS

87. The Defendants submit that the relief granted in respect of the Second Liberian Proceedings must be discharged because, following the ICC Court's designation of Toronto as the seat of the Arbitration, the English court lacks jurisdiction over Investcom's claim in respect of the Second Liberian Proceedings.

88. Investcom submits that the court retains jurisdiction. In summary, it submits as follows:

Contractual analysis

i) There is a high degree of probability that, under the applicable Liberian law, D2 and D3 are irrevocably bound by their agreement, through the Brodies letter of 22 April 2024, to arbitrate in London.

ii) As confirmed by their letter of 20 August 2024, neither MTN Liberia nor Momo Liberia is a participant in (or, in any real sense, a respondent to) the Arbitration. Each has agreed independently to be bound by any future award, nothing more.

iii) As is common ground, the Arbitration will not proceed against R6 to R9, so their position (or lack of it) as to the seat of the Arbitration can be ignored.

iv) Pursuant to section 3 of the Arbitration Act 1996, the seat of an arbitration is, primarily, the seat designated by "*the parties to the arbitration agreement*". As stated in the Webster and Buhler Handbook at §18-16: "*By choosing the place of arbitration, the parties are designating the national court system that will have supervisory jurisdiction over the arbitration. The fact that the parties are free to choose whatever place of arbitration they wish is…an integral part of the respect of the autonomy of the parties in international arbitration*".

v) In the present case, the parties to the arbitration agreement are Investcom and D1-D3, all of whom have agreed the seat should be London.

vi) Investcom and D1-D3 are also the only three substantive parties to the pending reference, hence all "*the parties*" agreed a London seat for the purposes of Article 18(1) of the ICC Rules. The other named respondents, Momo Liberia (R3) and MTN Liberia (R2), are nominal corporate respondents who are neutral and have agreed to be bound by the outcome of the Arbitration though their letter of 20 August 2024 but have not thereby agreed to become party to the arbitration agreement.

vii) There is no support in the ICC Rules or the Webster and Buhler Handbook for the view that "*agreed upon by the parties*" under Article 18(1) means agreed upon by all the [originally named] parties. That view is also inconsistent with section 3(a) of the Arbitration Act 1996.

viii) Any other view would be contrary to basic principles of party-consent to arbitration, and would enable a claimant to avoid a seat agreed with a contractual counter-party by simply joining a third party whom the claimant says may be affected by the outcome. That would deprive the contractual parties of their agreed choice of seat and their inalienable legal right to pursue any curial challenge under the Arbitration Act 1996 (where the agreed seat was in England and Wales). Equally, if Investcom were now to amend to remove Momo Liberia and MTN Liberia as respondents to the Arbitration, or if those companies were now to agree to London as the seat, the arbitral tribunal would be bound to find that the ICC Court had no power to determine the seat under Article 18 (alternatively, would be bound itself to hold the seat to be London). That in turn would mean that an abusive claimant could tactically join a third party in order to obtain an ICC Court seat determination, then withdraw the claim against that third party.

ix) Since the only contest as regards choice of seat is between Investcom and D1-D3, and the latter three are contractually estopped or otherwise conscientiously disabled from resisting London seat as a matter of (unchallenged) applicable legal analysis, there must be at least a high probability that the tribunal will choose London seat. The arbitral tribunal has jurisdiction to determine the seat, and as set out in Webster and Buhler Handbook §18-35:

> "If the ICC Court decides that the arbitration agreement does not contain an agreement as to the place of arbitration and the Tribunal decides otherwise, then the decision of the Tribunal would prevail as that reflects the agreement of the parties".

x) Were the tribunal to reach any other view, there is at least a high probability that a commercial judge in London on a section 67 challenge to the tribunal's determination will find London to be the seat:

> "By virtue of D2/D3's agreement to a London seat, Investcom now has the right for any challenge in respect of the ICC's jurisdiction to be brought in England & Wales and nowhere else in the world: *Minister of Finance (Incorporated) 1Malaysia Development Berhad v International Petroleum Investment Company Aabar Investments PJS* [2019] EWCA Civ 2080, §§38, 57 and 73; *Sodzawiczny v Smith (Re Arbitration Claim)* [2024] EWHC 231 (Comm), §68"

xi) The position is even clearer if the Brodies letter of 22 April 2024 is properly seen as a self-standing arbitration agreement between the four substantive parties as a matter of Liberian law. In that event, the arbitration agreement thereby formed stipulates a London seat, and the only parties to that agreement are Investcom and D1-D3. The seat is therefore London, pursuant to section 3 of the Arbitration Act 1996, and Article 18 of the ICC Rules is irrelevant.

xii) None of the remaining active parties to the Arbitration accepts the ICC Court's designation of a Toronto seat. Investcom considers it to be *ultra vires* for the reasons already outlined. D1-D3 dispute ICC jurisdiction as a whole, and say any arbitration must be seated in Liberia. In effect, both sides are stipulating that Article 18 did not give the ICC Court the power to fix the seat, so the tribunal is bound to follow the same approach.

Non-contractual analysis

xiii) Alternatively, there is at least a good arguable case that D1 is a party to a London-seated arbitration agreement, namely the SHA arbitration agreement/Brodies letter arbitration agreement and/or MA arbitration agreement (the latter being common ground). D1 is therefore the anchor defendant without need for permission to serve abroad (since service can be effected without permission under CPR 62.5(2A)).

xiv) Further, there is at least a good arguable case that D2/D3 are "*necessary or proper*" parties to claims brought against another defendant (D1), in respect of which there is a real issue to be tried, and England & Wales is the "*proper place in which to bring the claim*", pursuant to CPR 6.36; 6.37 and PD 6B § 3.1(3) (*Altimo Holdings & Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 § 71). D2 and D3 are engaging in vexatious and oppressive conduct as against Investcom in pursuing the Second Liberian Proceedings or any similar 'anti-arbitration' process in Liberia or elsewhere which (by definition) seeks or would seek to subvert or nullify such arbitration rights.

xv) The ordinary *American Cyanamid* interlocutory injunction threshold standard of proof - namely, serious issue to be tried - is applicable in non-contractual contexts of this kind: see Raphael, "*The Anti-Suit Injunction*" (2nd ed) §§ 13.41 to 13.46, and *Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA* [2012] EWCA Civ 644 §§ 49 and 57.

xvi) On the evidence, D2 and D3 are the prime movers behind a strategy of corporate manipulation and expropriation. Whether or not they violate arbitral covenants owed personally is not the point here: they are responsible for the behaviour of others (e.g. D1) violating their own arbitral covenants in respect of which the English court has relevant jurisdiction. The claims for final injunctive relief against all three parties are wider than the specific interim relief obtained against D1 (regarding the Third Liberian Proceedings) or D2 and D3 (the Second Liberian Proceedings) and clearly overlap in practice due to the collusive vexation that underpins all actual or threatened engagement of the Liberian court system.

89. I am unable to accept this line of argument.

90. The starting point is that the SHA arbitration agreement did not, at least on Investcom's case, specify the seat of the arbitration. However, it did, on Investcom's case, provide for arbitration under the ICC Rules, and that is the basis on which Investcom has commenced the Arbitration.

91. That agreement to ICC arbitration carried with it an acceptance that Article 18(1) would apply to the determination of the seat of the arbitration.

92. The natural meaning of "*the parties*" in Article 18(1) is the persons who have, at least *prima facie*, been validly named as Claimants or Respondents to the arbitration, in the sense that they are signatories to or otherwise bound by the arbitration agreement alleged to apply to the dispute. That would (at least arguably) exclude persons for whom there is no tenable argument that they are bound by the arbitration clause, as the ICC Court appears to have found to be the position in respect of R4 to R6. But it would include as "*parties*" persons such as D2, D3, MTN Liberia and Momo Liberia, none of whom are signatories to the SHA arbitration agreement, but all of whom are alleged on tenable grounds to be bound by the arbitration agreement and have been named as Respondents on that basis.

93. Investcom now suggests that it, D2 and D3, but not MTN Liberia and Momo Liberia, are parties to the arbitration agreement. However, arbitration being a process founded on consent of one form or another, the arbitration could not bind MTN Liberia and Momo Liberia at all save on the footing that they are bound by the arbitration agreement and parties to it at least in that sense. Indeed, that is the basis on which Investcom named MTN Liberia and Momo Liberia as Respondents to the Arbitration (see § 30 above). Although the theories by which Investcom alleges D2 and D3 on the one hand, and MTN Liberia and Momo Liberia on the other, to be bound may differ, it is difficult to see any distinction between their statuses as parties to the arbitration agreement for the purposes of Article 18(1).

94. Further, the terms of Article 18 do not, on their face, distinguish between persons named as claimants or respondents to an arbitration based on their anticipated level of participation in the arbitration, at the time at which the seat is designated, or based on what (if any) relief is sought against them in the Request for Arbitration. On the premise that they are intended to be bound by the outcome of the arbitration, all such persons may reasonably be assumed to have an interest in it and, in principle, in the determination of the seat (which for example may, in due course, affect the extent to which and means by which they may be entitled to challenge the outcome). Here, the RfA put in issue the validity of purported resolutions of the boards of MTN Liberia and Momo Liberia, and purported issues of shares by the latter company: matters in which those companies would *prima facie* have an interest. There may be a range of degrees to which such a person/entity may choose to participate in an arbitration, and it is unlikely in my view that the ICC Court's powers under Article 18 vary depending on particular parties' individual approaches to participation or non-participation. Further, I find no support for such an interpretation of Article 18 in the language of the ICC Rules or any of the commentaries cited by the parties.

95. I also doubt that the seat of the arbitration is liable to change from time to time, as named claimants or respondents indicate that they will or will not actively participate in the arbitration. Here, for example, MTN Liberia and Momo Liberia's indication that they would not actively participate postdated the ICC Court's designation of the seat. Article 18 by its terms appears to envisage a once and for all fixing by the ICC Court, unless "*the parties*" have agreed on a seat. I would regard as unlikely any construction of Article 18 whose effect would be that, after the ICC Court has designated the seat under Article 18, a person may then cease to be "*a party*" by virtue of indicating an intention not actively to participate, with the result that the ICC Court's Article 18

designation must then be revisited, potentially resulting in a change to the seat of the arbitration.

96. I see no inconsistency between Article 18, construed according to its ordinary meaning, and section 3 of the Arbitration Act 1996 (even assuming that provision to apply in these circumstances). Section 3 provides that:

> "In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated –
>
> (a) by the parties to the arbitration agreement, or
>
> (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
>
> (c) by the arbitral tribunal if so authorised by the parties,
>
> or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

97. The simplest situation within limb (a) is where the arbitration agreement itself designates the seat. All persons bound by the arbitration agreement will be bound by that designation. That must surely be the case whether they are bound as signatories to the arbitration agreement or on some other basis, for example pursuant to the 'conditional benefit' principle or based on other doctrines of the kind relied on in the present case vis-à-vis D2, D3, MTN Liberia and Momo Liberia.

98. Where the arbitration agreement does not designate the seat, then the seat may be determined by later agreement between the parties, but that must entail an agreement made by, or which has by some means become binding on, all the parties against whom the agreed designation is relied on.

99. Further, and in any event, section 3 envisages that the seat may be designated by an arbitral institution vested by the parties with powers in that regard. On Investcom's case here, the parties have agreed to arbitration under the ICC Rules, Article 18 of which vests the ICC Court with power to determine the seat unless all the parties have agreed it. It is not inconsistent with section 3 for Article 18 to empower the ICC Court to designate a seat unless all persons named in the Request for Arbitration have agreed it, regardless of the legal basis on which they are alleged to be bound by the arbitration agreement. (I also note that *Russell on Arbitration* (24th ed.) § 5-077 fn. 329 cites Article 18 as an example of institutional designation within section 3.)

100. I do not find persuasive Investcom's argument that this approach would open the way to abuse by a claimant seeking to avoid an agreed choice of seat. If the parties have selected the seat in the arbitration agreement itself, then that will bind any person bound by the arbitration agreement. Any purported joinder by a claimant of a person who on no tenable view is bound by the arbitration agreement should not affect the application of Article 18.

101. On the other hand, if the arbitration agreement does not designate the seat, and some but not all of the persons bound by an arbitration agreement and named as parties later agree upon a seat, then the ICC Court's power to determine a different seat is part of the bargain to which the parties have bought into, by agreeing to ICC arbitration but without designating the seat in the arbitration agreement. Again, any attempted abuse by naming as a party a person who on no tenable view is bound by the arbitration agreement should not affect the application of Article 18.

102. It is not necessary to decide what the position would be if Investcom were now to drop its arbitration claim against MTN Liberia and Momo Liberia, or if both those companies were to agree to a London seat. Neither has occurred. I am inclined to think that that would not, under the ICC Rules, result in a need to reapply Article 18, but that may be an argument for another day.

103. The current position, therefore, is that the ICC Court has, acting within its powers (assuming ICC jurisdiction to exist at all), determined the seat of the Arbitration; and I see no basis on which the arbitral tribunal can reasonably be expected to overturn that determination. I note that the Webster and Buhler Handbook suggests that a tribunal might take a different view from the ICC Court about which parties have agreed to a choice of seat. However, even assuming that to be possible in principle, I see no reason in this case to anticipate that the tribunal will be obliged to, or will, take a different view about the meaning of "*the parties*" in Article 18 and decide that the ICC Court lacked power to designate the seat, or will conclude that the ICC Court erred in designating Toronto as the seat.

104. For completeness, I note that, whilst the ICC Secretariat's Guide to ICC Arbitration explains that:

> "While not specifically referred to in the Rules, the Court has in the past provisionally fixed a place of arbitration. Such a decision may be required where the Court is unable to interpret contradictory or conflicting agreements between the parties. It has happened, for example, that the parties' contract mentions two different places of arbitration or an amendment to the contract specifies a place different from that mentioned in the original contract and it is not clear which one prevails. A final decision on the place of arbitration will, in these rare cases, be left to the arbitral tribunal after allowing the matter to be fully argued by the parties. …"

The ICC Court in the present case evidently did not consider it appropriate to go no further than provisionally to designate the seat of the Arbitration.

105. The above analysis is not, in my view, affected by any argument that the Brodies 22 April 2024 letter gave rise to a freestanding arbitration agreement between Investcom and D1-D3. First, that is not the natural construction of the relevant events. The named Respondents (plural) to the Arbitration were invited to agree to Investcom's proposal that London be the seat. That invitation was made, and Brodies responded, in the context of a set of rules which provided for the ICC Court to designate a seat unless all parties agreed one. The exchange with Brodies was directed to the choice of seat pursuant to the arbitration that Investcom had commenced, pursuant to the SHA

arbitration agreement, and I see no reason to construe it as instead being concerned with the creation of an entirely new arbitration agreement. Secondly, even if a freestanding arbitration agreement was created, it could not provide a basis for the Arbitration as currently constituted, to which MTN Liberia and Momo Liberia are also Respondents but who are not alleged to be parties to the freestanding agreement.

106. Nor does it matter, in my view, that neither Investcom nor D1-D3 are likely to submit to the arbitral tribunal that the Arbitration is or should be seated in Toronto. Logically, the tribunal will first have to decide whether or not the arbitration agreement provides for ICC arbitration at all, which D1-D3 dispute. If the answer is yes, then a question may then arise about the seat. At that stage of the analysis, it appears that Investcom will contend that the seat must be London, whereas D1-D3 (based on the contents of D1's letter of 16 August 2024, referred to in § 67 above) will contend that the designation of Toronto is valid. The question for this court is whether Investcom has a good arguable case that the tribunal will find the Arbitration to be seated in London. For the reasons given above, I consider the answer to be no.

107. Nor does it assist Investcom, in my view, to suggest that any adverse decision by the tribunal will be the subject of an arguable challenge under section 67 of the Arbitration Act 1996. The passages from *Minister of Finance (Incorporated) 1Malaysia Development Berhad* and *Sodzawiczny* which Investcom cites make clear that parties who agree to arbitration with a seat in England & Wales become subject to the court's supervisory jurisdiction under sections 67 and 68 of the Act. However, (a) the consensus between Investcom and D1-D3 as to a London seat in the present case must be seen in the broader context of their agreement (on Investcom's case) to the ICC Rules of Arbitration, and hence the ICC Court's power under Article 18 to designate a different seat; and (b) even if the English court had jurisdiction under section 67, there is (for the reasons already given) no reason to believe that it would conclude that the arbitral tribunal in some way lacked jurisdiction to conclude that Toronto had validly been designated as the seat of the Arbitration.

108. For all these reasons, I do not consider there to be a good arguable case (nor a high degree of probability) that the Arbitration is or will be seated in London.

109. Turning to the non-contractual analysis, insofar as it relies on D1 being party to the SHA arbitration agreement, for the reasons given above there is no good arguable case that any arbitration under that agreement is or will be seated in London. To the contrary, the Arbitration that Investcom has commenced in relation to the Second Liberian Proceedings is brought pursuant to the SHA arbitration agreement and is seated in Toronto; and there is no good arguable case to the effect that that designation was *ultra vires* the ICC Court or that it can, must or will be altered to a designation of London.

110. Insofar as the non-contractual analysis relies on D1 being party to the MA arbitration agreement, I do not consider that it assists Investcom in relation to the Second Liberian Proceedings. Those proceedings do not concern a dispute arising out from or in connection with the MA. On the contrary, the dispute as formulated in the RfA arises out of or in connection with the SHA, and Investcom's arbitration claim (which the Second Liberian Proceedings seek to stop) is founded purely on the SHA and its arbitration agreement, not on the MA or its arbitration agreement. There is no good arguable case that the Second Liberian Proceedings are an attempt to outflank the MA arbitration agreement, as opposed to the SHA arbitration agreement. Indeed,

Investcom's witness statement in support of its application set out Investcom's case that the Second Liberian Proceedings had been brought in breach of the SHA arbitration agreement and/or the Brodies arbitration agreement (Davies 2nd w/s § 135), rather than the MA arbitration agreement. Thus, even if D2 and D3 might be regarded as necessary and proper parties to the claim against D1 to restrain the Third Liberian Proceedings, that would not give the court jurisdiction over any of the Defendants in respect of a claim – necessarily based on the SHA arbitration agreement (and/or perhaps the alleged Brodies arbitration agreement) – to restrain the Second Liberian Proceedings. I do not therefore consider Investcom to have a good arguable case that the court can assume jurisdiction in respect of the claim for relief concerning the Second Liberian Proceedings by reason of its jurisdiction over D1 (and/or D2/D3) to grant relief concerning the Third Liberian Proceedings.

(F) CONCLUSIONS

111. For these reasons, the relief granted by Foxton J pertaining to the Third Liberian Proceedings should continue pending trial, but the relief pertaining to the Second Liberian Proceedings must be discharged. I shall hear counsel on the appropriate form of order. I am grateful to counsel for their cogent written and oral submissions.