

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0169

IN THE MATTER OF: THE INTERNATIONAL BUSINESS COMPANIES (AMENDMENT AND
CONSOLIDATION) ACT CAP 149 OF THE 2009 REVISED EDITION OF
THE LAWS OF SAINT VINCENT AND THE GRENADINES

AND IN THE MATTER OF THE COMPANIES ACT CHAPTER 143

AND IN THE MATTER OF THE BANKRUPTCY & INSOLVENCY ACT
CHAPTER 136

AND IN THE MATTER IF THE ARBITRATION (NEW YORK) CONVENTION
AWARDS AND AGREEMENTS ACT CHAPTER 119

AND IN THE MATTER OF GENESIS INVESTMENT FUNDS LIMITED (IN
LIQUIDATION)

BETWEEN:

KONINKLIJKE KPN N.V.
AND
KPN B.V.

CLAIMANTS

AND

GENESIS INVESTMENTS FUNDS LIMITED (IN LIQUIDATION)
AND
GUNTER BAUER (LIQUIDATOR)

DEFENDANTS

Appearances:

Mr. Stanley John Q.C. with Ms. Keisal Peters for the Applicants
Mr. Duane Daniel for the Defendants

2020: February 11th
November 11th

JUDGMENT

Byer, J.:

- [1] By Fixed Date Claim Form filed on 24 November 2017 the claimants filed a claim against the first defendant, which was incorporated as an International Business Company (IBC) in accordance with the International Business Companies Act 1996 on 12 May 2005 with Registration No 12168 IBC 2005 and its Liquidator the second defendant, pursuant to Section 125 (5) of the Bankruptcy and Insolvency Act and/or Section 453 of the Companies Act and Section 165 (1) of the International Business Companies (Amendment and Consolidation) Act Chapter 149 ("the IBC Act") for the following reliefs:-
- 1) That the claim of debt received on 24 November 2017 by the second defendant on behalf of the claimants be and is hereby allowed as proved for or that the second defendant be ordered to make a determination that the said claims are proved for or disallowed.
 - 2) That the value of the claimants' said claim representing this debt as at 30 September 2017 shall be the sum of USD\$4,906,414.86 plus interest at the rate of three percent (3%) per annum until the date of full payment.
 - 3) That the second defendant Mr. Gunter Bauer be removed from office as the Liquidator of the first defendant Genesis Investment Funds Limited (In Liquidation) and that *[Mr. Peter Alexander, Chartered Accountants of Sergeant-Jack Drive, Arnos Vale, St. Vincent and the Grenadines or Stanley DeFreitas Chartered Accountant of Suite 200, Griffith Corporate Centre, Beachmont, Kingstown St. Vincent and the Grenadines or Mark McDonald and David Holukoff, Grant Thornton (British Virgin Islands) Limited]* be appointed under Section 165 of the IBC Act to be the liquidator of the first defendant.

Background

- [2] In coming to this point the claimants averred that their entitlement had arisen from a claim that the second claimant had against another Dutch entity called 6G Mobile B.V. ("6GM"). This arose from 6GM's failure to meet its contractual obligations towards the second claimant.
- [3] As security for the fulfillment of its obligations towards the second claimant, 6GM and the second claimant on the 18 November 2010 entered into what purported to be an escrow agreement providing for the deposit by 6GM of 35,552 of its Class A non-voting participating preference shares in the capital of the first defendant.
- [4] The claimant's alleged, that the first defendant confirmed via a written statement dated 5 November 2010 that it was holding a total number of 187,769 of these Class A non-voting participating preference shares in the capital of the first defendant which were to be transferred from 6GM to the second claimant.

- [5] Following 6GM's failure to meet its obligations under the escrow agreement the shares were then transferred from 6GM to the second claimant.
- [6] Consequent upon 6GM's continued failure to fulfill its obligations under its agreement with the second claimant, it transferred a further 37,246 Class A non-voting participating preference shares in the capital of the first defendant, this time to the first claimant.
- [7] The claimants therefore together alleged that they had acquired a total number of 72,798 Class A non-voting participating preference shares in the capital of the first defendant from 6GM.
- [8] On 16 March 2011, the claimants submitted a redemption request of USD 1,935,806 (35,552 shares) to the first defendant, followed by a second redemption request of USD 2,028,045 (37,246 shares) in April 2011.
- [9] The defendants having failed to adhere to the redemption requests, the claimants announced to the first defendant on 28 January 2013 that they would initiate arbitration proceedings in order to enforce their rights.
- [10] In response to this, the first defendant in two letters dated 31 January 2013 and 19 February 2013 respectively, claimed to have cancelled the claimants' shares and to have suspended the redemption. This allegation was brought to the attention of the claimants' Dutch lawyers several months later on 15 June 2013.
- [11] On 17 September 2013 the claimants filed a request for arbitration against the first defendant and Mr. Martin Wiebecke was appointed as sole arbitrator ("Arbitrator") sitting in London, England.
- [12] The Arbitrator found that he had jurisdiction and rejected all arguments raised on behalf of the defendants and made an award in favour of the claimants.
- [13] The arbitral award dated 9 January 2015, which the Arbitrator rendered in favour of the claimants, ordered the first defendant to meet its obligations toward the claimants under the Genesis Technology Fund Offering Memorandum dated 1 December 2006 by:-
- (i) Executing the claimants' redemption requests at net asset value, plus interest at 3% per annum.
 - (ii) In the alternative, the first Defendant was ordered to pay to the claimants USD 3,963,851.10 as damages, EUR 39,056.58 as legal and other costs and EUR 89,146.63 for the fees and expenses of the Arbitrator.

- [14] On 31 December 2013, during the above described arbitration proceedings against the first defendant, the first defendant and its sub funds went into voluntary liquidation pursuant to Section 167(4) of the IBC Act.
- [15] The Plan of Dissolution dated 16 December 2013 filed with the Financial Services Authority ("Plan of Dissolution") to voluntarily wind-up the first defendant and which is required under Section 167(2) of the IBC Act was to be authorised by a resolution of members, (the holders of the outstanding shares of a class or series of shares entitled to vote on the Plan of Dissolution as provided for by the By-Laws Section 7.1 and Section 24.7), however it was stated in the Minutes of the Board of Directors (a copy of which was also filed), as having been authorised by a sole shareholder. It expressly stated that the estimated time required to wind up and dissolve the first defendant was eighteen (18) months from 30 December 2013 and that "... *the company is, and will continue to be able to discharge or pay or provide for the payment of all claims, debts, liabilities and obligations in full...*".
- [16] Notwithstanding the undertaking, the voluntary winding-up was still subsisting as at the date the proceedings were instituted.
- [17] On 1 September 2017 the claimants served a statutory demand ("Statutory Demand") on the first defendant at its Registered Office situate at Trust House, 112 Bonadie Street, Kingstown, St Vincent and the Grenadines.
- [18] The first defendant acknowledged receipt of the Statutory Demand via a letter dated 21 September 2017 from its then solicitors Delany Law by which it asserted, *inter alia*, that (i) following the redemption requests by the claimants there were no transfers made by the first defendant, (ii) the first defendant initiated criminal proceedings in 2016 against an alleged fraudulent share swap, resulting in those shares being declared void as of January/February 2013, and (iii) the first defendant asked that there be an abandonment of the Statutory Demand with immediate effect until the facts in dispute are settled.
- [19] Subsequently, the claimants sought to prove the debt by causing a Claim of Debt and Proof of Debt supported by affidavit, each dated 20 September 2017, to be served on the second defendant on 2 October 2017 via courier mail.
- [20] Upon the matter coming up before this court as presently constituted for case management, the court became aware of a notice of application¹ filed on behalf of the defendant seeking directions for the trial of a preliminary issue that the question of the recognition and/or enforceability of the Arbitral award made on the 9th January 2015..

¹ Notice of Application filed 7/11/18

- [21] The defendants in their application made it clear that all of the reliefs claimed by the claimants hinged on the question as to whether the arbitral award could have been enforced/recognized in the jurisdiction and sought the court's determination as to whether the award could be enforced, that prayer having not been pleaded and in any event whether the award was capable of enforcement the defendants having by their pleadings raised grounds against the said enforcement.
- [22] The determination of these issues was dealt with on submissions and this court issued its determination by way of written decision on the 24th January 2019 in which this court found that the claimants had not in fact pleaded the enforcement of the arbitral award and that they were given leave to file an application to amend their Fixed Date Claim Form to do so, and in light of this the questions of whether the award should be enforced in any event was determined to be premature.
- [23] As a direct result of the judgment of this court, the claimants filed a notice of application² to amend their Fixed Date Claim Form to plead specifically the relief to enforce the arbitral award.
- [24] By that amendment, the claimant sought the following reliefs:
1. That the arbitral award dated 9 January 2015 which was awarded by Mr. Martin Wiebecke who was validly appointed as sole arbitrator ("the Arbitrator") sitting in London, England rendered in favour of the claimants ("the Final Award"), be enforced against the defendants and recognized as binding for all purposes upon the defendants pursuant to section 4 of the Arbitration (New York) Convention Awards and Agreements Act CAP 119.
 2. That the Claim of Debt received on 2 October 2017 by the second defendant Mr. Gunter Bauer as liquidator of the first defendant Genesis Investment Funds Limited (in Liquidation) on behalf of the claimants be and is hereby allowed.
 3. That the value of the claimants' said claim representing this debt as at 30 September 2017 shall be the sum of USD\$4,906,414.86 plus interest at the rate of three percent (3%) per annum until the date of full payment.
 4. That the second defendant Mr. Gunter Bauer be removed from office as the Liquidator of the first defendant Genesis Investment Funds Limited (in Liquidation) and that [A representative of Grant Thornton BVI or Mr. Peter Alexander, Chartered Accountants of Sergeant-Jack Drive, Arnos Vale, St. Vincent & the Grenadines or Stanley DeFreitas Chartered Accountant of Suite 200, Griffith Corporate Centre, Beachmont, Kingstown Saint Vincent and the Grenadines], be appointed under Section 165 of the IBC Act to be the liquidator of the first defendant.

² Filed 1/2/19

[25] In response the defendant in their second amended defence³ pleaded that the arbitral award should not be enforced and relied on Section 6 of the Arbitration (New York) Convention Awards and Agreements Act CAP 119 of the Revised Laws of Saint Vincent and the Grenadines (the New York Convention Act) and in particular subsections 2(b), 2(d), 2(e) and 2(4) (b).

Issues

[26] As a result of the defendant's pleadings and the reliefs of the claimant the court has extrapolated the following issues as the ones to be determined by this court:

1. Can the final arbitral award granted on the 9th January 2015 be enforced in St Vincent and the Grenadines given the provisions of Section 6 of the New York Conventions Act as relied on by the defendants?
2. Whether or not the final award is enforceable, can the claimants seek the intervention of this court to make a determination that the claimants are creditors by virtue of the claim of debt produced to the second defendant as liquidator of the first defendant on the 2nd October 2017.
3. Are the claimants entitled to have the second named defendant removed as liquidator under the voluntary liquidation and for the court to assume liquidation of the same with a court appointed liquidator.

[27] Therefore as this court approaches this exercise, it bears in mind the words of Saunders P of the Caribbean Court of Justice in the case of **BCB Holdings Limited and anr v The Attorney General of Belize**⁴ who succinctly stated, "competing policies are invariably at play when a court is called upon to decide whether to enforce an arbitral Award. The court must balance divergent policies and interests and apply to them principles of proportionality."⁵

[28] Additionally, it is now widely accepted that courts approach the thorny issue of enforceability with the position of pro- enforcement which then clearly places the onus on the party seeking to deny enforceability to prove one of the clearly stated reasons against enforceability under Section 6 of the New York Convention Act. Indeed, it has been accepted⁶ that the grounds identified in Section 6 (Section 103 of the Arbitration Act of the UK) are not "only exclusive but as a general rule ought to be construed and applied narrowly and should never lead to a re- examination of the merits of the award. This approach to construction is said to be part of the "pro enforcement bias" so as to encourage enforcement and recognition of commercial arbitration agreements in international contracts."

³ Filed 9/4/19

⁴ CCJ Appeal No CV 7 of 2012

⁵ Op Cit at paragraph 20

⁶ Jurisdiction and Arbitration Agreements and their Enforcement (3rd Ed) at paragraph 16.64

- [29] Therefore it is the defendants who must demonstrate that one of those subsections under Section 6 apply and do so apply on a balance of probabilities.
- [30] It is therefore imperative to appreciate what the arbitral award consisted of and what orders are contained therein that the defendants have so vigorously argued against.
- [31] On 9th January 2015, the Arbitrator found that not only did he have jurisdiction to hear the matter that was referred to arbitration⁷ but that he made certain findings as against the first defendant.
- [32] In particular the Arbitrator found⁸ and ordered that:
1. The sole Arbitrator had jurisdiction over the claimants' claims.
 2. The respondent is ordered to meet its obligations to the claimants by executing the second claimant's redemption request on 35,552 Class A non-voting participating preference shares and the first claimant's redemption request on 37,246 Class A non-voting participating preference shares plus interest at 3% per annum from 21/7/2011 for the second claimant's redemption and from the 18/8/2011 for the first claimant's redemption.
 3. In the alternative the respondent is to pay the claimants the sum of USD\$3,963,851.10 as damages.
 4. The respondents are to pay costs in the sum of EUR 39,056.58 for legal costs and EUR 89,146.63 for the fees and expenses of the Arbitrator.
 5. All other claims of the claimants were dismissed.

Issue #1 - Can the final arbitral award granted on 9th January 2015 be enforced in St Vincent and the Grenadines given the provisions of Section 6 of the New York Conventions Act as relied on by the defendants?

- [33] As the onus lies on the defendant to prove that the award should not be enforced I will purport to deal with each argument advanced by the defendant with reference to the provisions of the New York Convention Act which they seek to invoke, the response of the claimants and the finding of the court in that regard.

⁷ The defendants having failed to adhere to the redemption requests, the claimants announced to the First defendant on 28 January 2013 that they would initiate arbitration proceedings in order to enforce their rights.

⁸ Paragraph 274 of the Arbitral Award exhibit KPN 18 to the affidavit of Akin John filed 10/4/18.

Section 6 (2) (b): Enforcement would be refused if **“the arbitration agreement is not valid under the law to which the parties have subjected it or in the absence of any indication in that respect, under the law of the country where the award was made...”**

The Defendant’s Submissions

[34] On this issue the defendants submitted that the provision to allow parties concerned with the first defendant company to invoke the provision for arbitration is firmly based on Section 24.6 of the by-laws of the first defendant.

[35] This is the nub of the defendants’ argument and as such the same is worth reproduction in its entirety:

“Section 24.6 Arbitration

Whenever any difference arises between the Company on the one hand and any of the Shareholders or Members or their executors, administrators or assigns on the other hand, touching the true intent and construction or the incidence or consequences of these Articles or of the Act, touching anything done or executed, omitted or suffered in pursuance of the Act or touching any breach or alleged breach or otherwise relating to the premises or to these Articles, or to any Act or Statute affecting the Company or to any of the affairs of the Company such difference shall, unless the parties agree to refer to the same to a single arbitrator, be referred to two (2) arbitrators one to be chosen by each of the parties to the difference and the arbitrators shall before entering on the reference appoint an umpire.”

[36] The submissions of the defendants therefore are that the agreement that needs to be triggered to invoke arbitration has to be triggered by a “shareholder” or a “member” or their executors, administrators or assigns.

[37] In this regard, the defendants relying on the by-laws also define member as someone who holds management shares while a shareholder is defined as the holders of shares in the company⁹.

[38] However the defendant further submitted that even though these definitions exist, the first defendant is an International Business Company (an IBC) that was incorporated under the International Business Companies Act 1996 as amended (the IBC Act) and it must be those provisions in the IBC Act that must govern the workings of any IBC.

⁹The definition section of the By-Laws of the First defendant exhibited as Annex 2 to the Affidavit of the Second defendant filed 31/10/18

- [39] Thus the defendants have submitted that the IBC Act clearly states that the “articles and by-laws of an International Business Company are binding as:
(a) between the company and each member and (b) amongst members...”
- [40] A member is therefore defined in the IBC Act as inter alia a shareholder¹⁰ and a shareholder¹¹ is “in relation to a company, means a person whose name is entered in the register of shareholders as the holder of one or more shares or fractional shares in the company.”
- [41] Therefore the defendants submit that it the only person or entity that can trigger the provision for arbitration must by necessity be a party to the agreement allowing for arbitration... In the defendant’s submissions the claimants do not fall within that category as they are not members or shareholders of the first defendant as defined by the IBC Act.
- [42] The defendants further submit that since the claimants do not appear on the register of the first defendant, they cannot rely on the provision of the arbitration clause. Indeed, even though the claimant may be recognized or considered an assignee of shares held by a named shareholder, the IBC Act does not recognize assignees as binding the company. Additionally the claimants never applied to rectify the register¹² to have their names entered on that register and as such they are not entitled to bind the defendants to arbitration.
- [43] The defendant’s submissions also raised the issue that in any event, even if the by-laws of the first defendant which must be read subservient to the IBC Act could be read to allow for assignees to trigger the arbitration clause contained in the by-laws, that purported assignment was not valid.
- [44] The defendants accepting that an assignment of shares would be equivalent to a transfer of shares which is provided for under Section 41 of the IBC Act, that section makes it clear that any transfer must be in writing¹³ and that further an IBC does not have to accept a transferee of a registered share as a shareholder until the final act of entry onto the share register¹⁴ is effected.
- [45] Additionally, according to the defendants, the by-laws of the first defendant make it clear that a transfer can only be effected by a registered shareholder¹⁵ which must then be entered into the books of the first defendant. The claimants having not done this, the defendants maintain that the claimants could not be considered shareholders within the meaning of the Act.

¹⁰ Section 2 of the International Business Companies (Amendment and Consolidation) Act CAP 149 (the IBC Act)

¹¹ Section 52 of the IBC Act

¹² Section 55 of the IBC Act

¹³ Section 41(1) IBC Act

¹⁴ Section 41(3) IBC Act

¹⁵ By-Law 20.4 of the Articles of Association of the First Defendant

- [46] As such the claimants have not met the threshold of those persons who could invoke arbitration and as such there was no valid agreement in existence to proceed to arbitration.

The Claimants' Submissions

- [47] In response to this assertion of the defendants that there is no valid arbitration agreement, the claimants' fundamental response is that the claimants were at all times an assignee of a registered shareholder and that that assignment allowed them to trigger the clause for arbitration in the By-Laws of the first defendant. It is this assignment that they say was accepted by the defendants themselves in various correspondences up until the purported cancellation and as such they rely on the findings of the Arbitrator that the defendants cannot now claim that the claimants never became shareholders.
- [48] The claimants submit that the first defendant through its directors indicated by correspondence that there were no restrictions on the contemplated transfer of shares to the claimant¹⁶ and that the first defendant is bound by that representation. Additionally the claimants submit that if the claimants had not achieved the status of a shareholder there would not have been necessity to cancel the shares and remove them from the register as they purported to do.
- [49] Further the claimants submitted that even if the transfer to the claimants was not by way of written instrument of transfer as required under Section 41 of the IBC Act, the shares had passed by operation of law pursuant to Section 40 of the IBC Act which together with the acknowledgement of the defendant's directors conferred on the claimants the status of shareholders, and where therefore the proper parties to invoke the provisions for arbitration.

Court's Analysis and Considerations

- [50] In this court's mind, this "subsection is concerned with the validity of the arbitration and who is a party to it."¹⁷ As the learned authors of the treatise Jurisdiction and Arbitration Agreements and their enforcement¹⁸ state "the provision is not concerned with collateral challenge to the validity of the matrix contract obligations or questions of public policy that might arise in that arena. The question of validity is addressed by reference to the arbitration agreement and its governing law not that of the, matrix contract or under the law of the enforcing contract."
- [51] Therefore in saying so, the gravamen of this subsection is to analyse the manner in which the matter came before the arbitration tribunal.

¹⁶ Annex 4 of Exhibit KPN 4 to the affidavit of Akin John filed 24/11/17

¹⁷ Jurisdiction and Arbitration Agreements and Their Enforcement (3rd Ed) para 16.72

¹⁸ Op Cit

[52] In the instant case, the submission of the claimants is that the failure of the first defendant to fulfill the redemption requests made by both claimants triggered the arbitration clause contained in the by-laws of the first defendant.

[53] First and foremost it must be acknowledged that the By-Laws clearly identified that the first defendant had been registered as an IBC within this jurisdiction and as such the governing law must be St. Vincent and the Grenadines. Secondly, since the clause that provided for the requisite parties to engage in arbitration is central to the determination of this issue, it would again be useful in this court's mind to capture it verbatim here:

“Section 24.6 Arbitration

Whenever any difference arises between the Company on the one hand and any of the Shareholders or Members or their executors, administrators or assigns on the other hand, touching the true intent and construction or the incidence or consequences of these Articles or of the Act, touching anything done or executed, omitted or suffered in pursuance of the Act or touching any breach or alleged breach or otherwise relating to the premises or to these Articles, or to any Act or Statute affecting the Company or to any of the affairs of the Company such difference shall, unless the parties agree to refer the same to a single arbitrator, be referred to two (2) arbitrators one to be chosen by each of the parties to the difference and the arbitrators shall before entering on the reference appoint an umpire.”

[54] The operative parts to engage arbitration are that the dispute must be between the company (the first defendant) and any of its shareholders and members or their executors, administrators or assigns.

[55] This clause therefore simply captures the essence of company relations. As a learned author surmised¹⁹, “the essential relationship between a company and its members is evidenced by the ... shareholders.”

[56] It is the shareholders who are given the power to direct the manner in which a company operates and ensure that the company adheres to the best practice for their business functions or purposes.

[57] Thus it cannot be lightly taken that the arbitration clause contained in the by-laws of the first defendant made it clear who would and could bring matters before an arbitrator for settlement.

¹⁹ Order of Practice (AGM)- A Guide to Best Practice for Annual General Meetings

- [58] An arbitration agreement is a contractual relationship between the parties and as such it is imperative to consider whether the parties can and are bound by that contract in all the circumstances.
- [59] It is without doubt that the arbitral tribunal made a finding that the agreement for arbitration was valid and that they indeed had the power to hear the matter. In the arbitral award the Arbitrator clearly indicated that after considering the entirety of the objections raised by the respondent (the defendants herein) via the plethora of correspondence that was sent to him, that he considered that the claimants had the right to invoke the arbitration clause²⁰ and that the claimants were indeed shareholders within the meaning of the clause and as such bound the respondents to the agreement. He stated clearly that it was not relevant whether the claimants were at that time still registered in the shareholders' register but held that in any event "a former position as a shareholder suffices to qualify as shareholder for means of a legal dispute under an arbitration clause."²¹
- [60] However as much as this court may consider that the findings of the Arbitrator are "helpful"²², it has been considered²³ that the tribunal's own view of its jurisdiction has no legal or evidential value when the issue is whether the tribunal had any legitimate authority at all. In saying this however let me make it clear that I consider that "a party seeking to resist enforcement of an award is not entitled to relitigate and revisit the issues subject of the arbitration ...if this was permitted the utility of international arbitration would be diminished markedly as a result of the cost and delay of, in effect repetition of the arbitration proceedings again before an enforcing court."²⁴
- [61] However, be that is it may, this court is satisfied that the mere fact that the very limited reasons that can be advanced to argue against the enforcement of an arbitral award includes the right to question the validity of that very arbitral agreement must mean that a party when relying on this ground, may to some extent request of the enforcing court to take into consideration an issue that may have been decided by the arbitrator as to their own jurisdiction. So in this case at bar, the question now is- did the claimants and the first defendant enter into a valid arbitration agreement upon which the claimants were entitled to rely.
- [62] The answer to this question must be found in a consideration as to whether the claimants could fit themselves into the closed group provided for under By-Law 24.6.

²⁰ Paragraph 178 of the Arbitral Award Exhibit KPN18 to the Affidavit of Akin John filed 10/4/18

²¹ Paragraph 178 Op Cit

²² **Dallah Real Estate and Tourism Holding v Ministry of Religious Affairs, Government of Pakistan** [2010] UKSC 46 at paragraph 31 per Lord Mance

²³ **Dallah case** Op Cit at paragraph 30

²⁴ **Altain Khuder LLC v IMC Mining Inc and IMC Mining Solutions Pty Ltd** [2011] VSC 1 at paragraph 69

- [63] When one considers the by-laws of the first defendant²⁵, a member is defined as a person who holds management shares while a share holder is defined simply as holder of shares in a company.
- [64] However the by-laws cannot and do not operate in vacuum. They must be married with the law of the place in which the same are to operate, in this case, St. Vincent and the Grenadines.
- [65] At the time that the by-laws of the first defendant were created and registered, the law that governed IBCs was the International Business Companies Act CAP 148 as Act #18 of 1996 (the 1st Act).
- [66] By the 1st Act, the definition of shareholder was as it appeared in the definition section of the same, “a person who holds shares in a company, including a limited duration company and a company limited by guarantee with a share capital, and where the context so allows, a person who is liable to contribute to the assets of a company limited by guarantee which does not have a share capital.”
- [67] So for all intents and purposes there was no conflict in how the by-laws had been created and the legislation that was in force at the time.
- [68] By the effluxion of time, the manner in which IBCs were managed within the jurisdiction changed and by 2007, the 1st Act was amended and the legislature passed the International Business Companies (Amendment and Consolidation) Act CAP 149 (the IBC Act).
- [69] The IBC Act introduced several provisions that did not exist in the 1st Act. For instance, shareholder took on a new definition²⁶. In fact shareholder is now defined in relation to a company, as a person whose name is entered in the register of shareholders as the holder of one or more shares, or fractional shares, in the company. Further there are now in the IBC Act several provisions that speak to the specific nature of the relationship between members of the company and the company and how that company is entitled to operate within the parameters of what the members agree. There is in fact now a definition of member provided²⁷. A “**member**”, in relation to an International Business Company, means a person who, as set out in Section 52, is—
- (a) A shareholder;
 - (b) A guarantee member; or
 - (c) A member of an unlimited company who is not a shareholder.

²⁵ Annex 2 of GBI to the Affidavit of the Second defendant filed on the 31/10/18

²⁶ Section 52 IBC Act

²⁷ Definition Section in IBC Act

- [70] It is therefore the individuals who meet the criteria of a member that would be bound by the articles of association and the by-laws as between themselves and the company²⁸. However, the IBC Act makes it clear that the articles and by-laws of an IBC have no effect to the extent that they contravene or are inconsistent with the Act²⁹.
- [71] So the question is now even further defined as to whether there is a contravention of the IBC Act by the by-laws or it is inconsistent with the IBC Act which would invalidate the reliance of the claimants on the agreement contained in the by-laws.
- [72] It is certainly evident to the court that the definition of shareholder in the IBC Act does not extend to the assignees of a shareholder. However the IBC Act³⁰ does say that the registration of the articles of association binds the member from time to time as if he had signed his own name thereto on the part of himself, his executors and administrators. In this court's mind, there was therefore a deliberate indication that the definition of member could not simply be limited to a shareholder *in personam* and not to those persons who claim through or by virtue of that initial shareholder's entitlement.
- [73] I therefore do not find that there was in fact any inconsistency between the IBC Act and the by-laws or articles of association which would render the by-laws ineffective with regard to the party who could invoke the arbitration clause.
- [74] The shareholder is the person whose name appears on the register. From all the correspondence that flowed between the parties I accept that the first defendant recognized that 6GM. was in fact a shareholder and whose name appeared on the share register. They were on that basis, without going behind the alleged circumstances of how they obtained those shares, entitled to assign them to another entity, and in this case the claimants. The fact that the claimants were not named on the share register, in this court's mind does not diminish the act of assignment to the claimants. By the act of transferring shares which had no restrictions on such transference³¹ there was in this court's mind a valid assignment to the claimants, that allowed them to step into the shoes of the registered shareholder 6GM. At that point in this court's mind they became bound by the by-laws as if they were the original shareholder.
- [75] However they failed to have their name inserted on the share register as provided for under the law³² by applying for a rectification of the register. Rather they invoked the power contained in the by-laws for the assistance of shareholders and sent the matter to arbitration.

²⁸ Section 15 IBC Act

²⁹ Section 18 IBC Act

³⁰ Section 15 (1) IBC Act

³¹ Letter dated 17th November 2010 Exhibit KPN4 to the Affidavit of Akin John filed on the 24/11/17

³² Section 55 of the IBC Act

- [76] The claimants therefore would have been considered the beneficial owners of the shares and it is clear that the by-laws and articles of association would bind such beneficial owners and the IBC Act itself made it clear that it so did³³.
- [77] I therefore find that the claimants were entitled to rely on the by-laws to invoke arbitration. They were bound by the by-laws which gave them that power and that the definition of shareholder as contained in the IBC Act could not and did not oust the entitlement of an entity that had become a beneficial owner. Rather I consider that the IBC Act was intended to regulate and identify those persons who would be entitled to hold the company to their obligations. It could not have been in this court's mind an intention to limit the classification to only persons whose names appear on the register. Once it can be traced that the rights being sought to be enforced must have flowed from an individual who was a shareholder then that person or entity is entitled to rely on those rights for which they have bargained. I am fortified in this regard when one considers that the IBC Act itself clearly identifies and recognizes the binding nature of all contractual documents with not just the immediate shareholder but all those who claim through them.
- [78] I therefore find that the arbitration agreement was validly triggered by the claimants. I therefore find that there was a valid arbitration agreement. This however does not address the further issue raised whether the manner in which the claimants' obtained these shares could be void for illegality. That specific inquiry will be addressed later in this judgment.

Section 6(2) (d): Enforcement would be refused if **“the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains a decision on the matter beyond the scope of submission to arbitration.”**

The Defendants' Submissions

- [79] The submission of the defendants on this subsection is that the essence of the arbitration was to really declare the claimants as shareholders in the first defendant and thereby rectifying the register to reflect their name on the register.
- [80] By making such a determination, the defendants submit, the Arbitrator acted outside of the scope of his jurisdiction as the nature of this award was within the sole purview of the court to make. The ambit of the arbitration clause they argue, did not allow for a dispute to be settled as between purported shareholders and the company rather it had to be interpreted to include only those persons who were already declared shareholders. The defendants therefore submitted that it could

³³ Section 15 (1) the IBC Act

only be disputes between the company and those declared shareholders which were amenable to arbitration.

- [81] Therefore what the claimants sought to do was to have an arbitrator not only rectify the register and acknowledge that they were shareholders but also to determine their entitlement to those shares, a determination that could only fall within the exclusive jurisdiction of the court in St Vincent and the Grenadines by Section 55 of the IBC Act.
- [82] In so submitting the defendants made it clear that the issue of whether a matter is capable of submission to arbitration is a determination that only the enforcing court could make not the arbitral tribunal and therefore the arbitral award having purported to do so, should be set aside for those reasons.

The Claimants' Submissions

- [83] The claimants' response on submissions on this issue was that the same by-law that operates to engage arbitration clearly states that the subject matter of such arbitration is for **all** disputes that arise under the articles of association, by-laws or the IBC Act. Therefore a dispute such as this one that emanated from the failure of the first defendant to pay the net assets value of the shares held by an assignee of a shareholder did fall within the ambit of possible disputes that could be referred to arbitration³⁴.
- [84] The claimants also submitted that even though they accept that the IBC Act under Section 197 mandates that for the purposes of determining matters that relate to title and jurisdiction the *situs* of the ownership of the shares, debt obligations or other securities of an IBC is in St. Vincent, this legislative edict does not stop the parties from agreeing to resolve disputes through the means of arbitration in the United Kingdom once they refer to the law of St. Vincent. Thus the parties having agreed to place any disputes before an arbitrator have waived any right to apply to the courts of St. Vincent. The claimants stated categorically that it could not be interpreted that the Act was meant to oust the parties' right to arbitrate on anything that was amenable to arbitration which related to the operations of a company that falls under the purview of the IBC Act.

Court's Considerations and Analysis

- [85] The section of the New York Convention Act which deals with whether the award dealt with matter outside of the scope of the submission to an arbitration contemplates two different scenarios³⁵, firstly that the award deals with a "difference" not contemplated by or not falling within the terms of

³⁴ Paragraph 7.1(i) Closing Submissions of the Claimant

³⁵ Butterworths Challenges in Arbitration: A Guide to Challenges against Arbitrators, Awards and Enforcement
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the submission to arbitration (the defendant's issue that the by-law for arbitration did not encapsulate the dispute between the parties) and secondly that the award contains decisions on matters beyond the scope of the submission to arbitration (the defendants contention that the issue of entitlement to shares and rectification of the share register consequent on any order for entitlement are solely within the province of the court).

- [86] This ground against enforcement is known generally as the principle of arbitrability. That is whether the dispute is one that can be referred to arbitration. Indeed the courts have interpreted that this provision entails an examination of "whether the award exceeds the scope of the [arbitration agreement] not whether the award exceeds the scope of the parties' pleadings."³⁶
- [87] In this court's mind, what needs to be determined is what was the nature of the dispute that was referred to the arbitration tribunal and additionally whether the nature of that dispute was one that could be dealt with by the Arbitrator.
- [88] In the case at bar this court accepts that the clause upon which the claimants relied to invoke arbitration, was sufficiently wide to encompass the claim of the claimants as to the payment of the value of the shares that they held in the first defendant as assignee. The by-law which this court has already examined clearly stated that arbitration may be invoked to decide disputes that touched "the true intent and construction or the incidence or consequences of these articles or the Act, touching anything done in pursuance of the act and touching anything alleging a breach or otherwise related to the Articles or the Act"³⁷.
- [89] It is clear to this court that the issue raised by the claimants' falls squarely into the type of matters that the parties agreed could proceed to arbitration. Indeed it was of course open to the claimants to seek the intervention of the court rather than rely on the arbitration clause, but having done so, I am satisfied that the nature of the dispute was one that could have been determined by arbitration.
- [90] With regard to the second limb, as to whether the award itself was outside the scope of arbitration since the award purportedly made a finding as to the claimants' entitlement to the shares as assignee and therefore entitlement for payment, this court does not find favour with the defendants' argument.
- [91] The premise of the defendants' objection to enforcement on this point is that the arbitral award purports to determine whether the claimants are shareholders and therefore entitled to seek redemption of the held shares.

³⁶ UNCITRAL Secretariat Guide on the convention on the recognition and enforcement of foreign arbitral awards (New York 1958); **Ministry of Defense of the Islamic Republic of Iran v Gould Inc and ors** Court of Appeals Ninth District USA 30/6/92

³⁷ By-Law 24.6 Annex 2 to Exhibit GB1 of the Affidavit of Second Defendant filed 31/10/18

- [92] At the outset, I wish to make it clear that it is not doubted that the court in St. Vincent has been given jurisdiction pursuant to Section 197 of the IBC Act to deal with all matters that arise in relation to the entitlement in and operations of IBCs. Indeed I would tend to agree with many of the authorities relied upon by the defendants that it would be preferable for that to be the position. However in looking at the authorities relied upon by the defendants I do not accept that any of them provided either binding precedent or even a clear and unequivocal statement of law mandating that the court of the registering jurisdiction should be the only entity to make any determinations but rather it was clear from the decisions of the courts that it was eminently preferable that the courts of registration of the company were better positioned to grasp and apply the law as required.
- [93] I am fortified in this view when one carefully considers the authorities relied upon by the defendants. In the case of **Yanania Karpovich f/k/a Yanania Loginova v Green Cove Holding and Lorrie T Olivier**³⁸ the District Court of Florida indicated that the place of preference for the adjudication of the matter which involved a BVI registered company should be the BVI. In that regard the court had this to say basing it on the principle of *forum conveniens* that there was an adequate alternative forum. In that “an alternative forum is available because the British Virgin Islands provide an adequate alternative resolution of this dispute. First a judgment obtained in the British Virgin Islands will be enforceable. Second, the foreign court has an interest in adjudicating the controversy, Gulf Oil Corp. v. Gilbert, 330 U.S. 508-509, 67 S. Ct 843, (1947), since Green Cove is a British Virgin Island company and the legislation of the British Virgin Islands International Business Corporation Act, specifically provides that in regard to issues of title and jurisdiction of the shares of Green Cove, the situs is the British Virgin Islands. [See The International Business Companies Act, 1984, 116 – Exhibit 7]. And finally, since British Virgin Island law will control the disposition of the case, a court familiar with the laws of the British Islands should adjudicate the dispute.”
- [94] Further in the case of **160088 Canada Incorporated, 151095 Canada Incorporated and 152931 Canada Incorporated v Socoa International Limited**³⁹ the Grand Court in the Cayman Islands did assume the jurisdiction of the matter on the basis that the relevant law relating to transfer of shares in a Caymanian company could only be dealt with under Caymanian law but also recognized that if there had been a dealing with the shares in another place other than Cayman that that jurisdiction may also assume an interest in the matter. In quoting from the case of **Williams v Colonial Bank**⁴⁰ the Grand Court relied on the ratio decidendi of the case delivered by Lord Herschell wherein he stated: “*I agree that the question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by a reference to the law of the State of New York. But I think that the right arising out of a transaction entered into by parties in*

³⁸ 2006 WL 3034735 (S. D. Fla.)

³⁹ 1998 CILR 256

⁴⁰ (1888) 38 Ch.D 388 on appeal Colonial Bank v Cady (1890) 15 App Cas 267

this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here.”

- [95] So although there is indeed recognition in these two cases that the court of the jurisdiction in which the company had been registered may be the better court or body to make determinations with regard to IBC under the IBC Act in this court's mind this is not all encompassing and exclusive. What also must be noted upon a review being undertaken of these cases is that they did not deal with an arbitration clause and whether the parties had or could agree to deal with all matters by way of referral to arbitration.
- [96] In any event I am satisfied that when one considers the findings of the Arbitrator his primary finding was not that the claimants were entitled to the shares but that the first defendant could not arbitrarily cancel the share allocation to the claimants without more. As the Arbitrator stated clearly⁴¹ “... the same way as it is not in the arbitrary discretion of a company to strike shareholders from its share register in order to avoid the resolution of a legal conflict, it is not in the arbitrary discretion of a company to just nullify or annul shares in order to avoid a legal dispute”.
- [97] It is this finding determining that the cancellation was unlawful that was the nub of the determination of the Arbitrator and I do not accept that this included any subject matter that was outside the scope of the arbitration agreement or beyond the scope of matters that could be submitted to arbitration.

Section 6(2) (e) Enforcement would be refused if **“the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement was not in accordance with the law of the country where the arbitration took place.”**

The Defendants' Submissions

- [98] The nub of the defendants' submissions on this subsection is that By-Law 24.6 gave clear indications as to how the arbitration was to be undertaken. The arbitration agreement made it clear that it was with the agreement of the parties that one arbitrator was to be appointed but if they were unable to agree on one arbitrator then each party was to appoint one and those two arbitrators were to appoint an umpire.
- [99] The defendants submit that the failure to adhere to this agreement was not simply a procedural irregularity but that this agreement on the manner in which arbitration is to be dealt with must be respected and enforced and went to the root of the arbitration being wholly improper.

⁴¹ Paragraph 178 Arbitral Award Exhibit KPN 18 to the Affidavit of Akin John filed on the 10/4/18

[100] It was therefore not open to the claimants to appoint a sole arbitrator to undertake the arbitration and bind the defendants to their action. Nor was it open to the Arbitrator to rely on the law of the United Kingdom and function as sole arbitrator. In the submission of the defendants, the Arbitrator obtained his powers solely from the agreement entered into by the parties and as such it was only where the agreement did not provide for the procedure that he was then entitled to rely on the law of the seat of arbitration. Having not adhered to the procedure set out in the agreement, the defendants submit that the Arbitrator had no power to hear the matter and the same should not be enforced.

The Claimants' Submissions

[101] In response the claimants state that the procedure that was adopted by the Arbitrator was in fact consistent with the laws of St. Vincent even though he may have indicated that he was acting pursuant to the laws of the United Kingdom.

[102] Pursuant to Section 9 of the Arbitration Act of St Vincent and the Grenadines⁴², (the Arbitration Act) the claimants submit, the Arbitrator was empowered, where there was a failure of one side to appoint an arbitrator after a period of seven days, to have himself appointed as sole arbitrator and once that was done the arbitrator is seised of the referral to himself and the award given becomes binding.

[103] The arbitral award therefore as far as the claimants are concerned was therefore enforceable.

Court's Analysis and Considerations

[104] In assessing this subsection, what must be considered is substantial and not minor or technical irregularities⁴³.

[105] There are therefore two parts to the process of determining whether the arbitral tribunal has run afoul of this provision to establish a basis to resist enforcement. The learned authors of Russell on Arbitration⁴⁴ put it this way. "The first relates to the composition of the tribunal.....the second ground for opposition rests on the departure from a procedure agreed by the parties or failing their agreement the procedure of the place where the arbitration took place."

⁴²CAP 17 of the Revised Laws of Saint Vincent and the Grenadines

⁴³Jurisdiction and Arbitration Agreements and their Enforcement (3rd Ed) at paragraph 16.78

⁴⁴ 22nd Ed at paragraph 8-019

- [106] So the first step must be to see what in fact was the contractual arrangement entered into by the parties as “the parties are obliged to comply with that contract.”⁴⁵
- [107] In the case at bar, By-Law 24.6 makes it clear that unless the parties agree to refer the dispute to the same single arbitrator then each party was to nominate their own arbitrator and those two were to appoint an umpire. However what happens as in this case, where one party refuses to participate in the process. Can the one party that has nominated their arbitrator have that arbitrator be the sole arbitrator? The defendants say no.
- [108] In this court’s mind it is an entirely correct statement of the law to say that unless it can be shown that the parties in some form waived their right to the procedure as agreed to, then they must be bound by the agreed procedure.
- [109] In the instant case only one of the parties invoked the right under the agreement, as it is not refuted that the defendants did not “participate” in the arbitration.
- [110] Therefore the only party who appointed an arbitrator were the claimants. That agreement did not make provision for what would occur if one of the parties failed to invoke their right under the agreement. The claimants’ contention is that the law by way of statute must prevail. The defendants say, if there is no adherence to the agreement then the next step must be s court proceedings, not a continuation of the arbitration in flagrant disregard of the agreement itself.
- [111] When this court considers the learning surrounding this provision for resistance to enforcement, the agreement must take precedence. However this court must also be cognizant as to the wording of Section 9 of the Arbitration Act of this jurisdiction, which in large measure is similar to Section 17 of the Arbitration Act of the United Kingdom. Section 9 states clearly that “where an arbitration agreement provides that a reference shall be to two arbitrators ...unless the arbitration agreement expresses a contrary intention...” this is what will happen. Either the arbitrator appointed and cannot act is replaced or the party who gives notice of their appointment and there is still no appointment by the other side, that appointing party may appoint their nominee as the sole arbitrator. Further any such appointment may be set aside on application to the court. This section as indicated is in similar words to Section 17 and to which the Arbitrator purported to act and appointed himself as sole arbitrator.⁴⁶
- [112] This court accepts that the supplementing of the arbitration agreement should have come from the provisions of the statute in this jurisdiction if there was to be any void filled, however the fact that the Arbitrator relied on the provision in the United Kingdom, in this court’s mind did not present a

⁴⁵Jurisdiction and Arbitration Agreements and their Enforcement (3rd Ed) paragraph 16-79

⁴⁶Paragraphs 123 – 136 of the Arbitral Award Exhibit KPN18 attached to the affidavit of Akin John filed on 10/4/18

procedure that was so diametrically opposed to the local statute and therefore the adoption of that procedure could not and would not have caused any injustice to the parties.

- [113] Additionally, this court accepts that the agreement would have been the point of first reference but that it could not purport to act in vacuum. Rather it was clear to this court that the provisions of Section 9 (or section 17) were for this very purpose. That is, where the agreement failed to adequately provide for certain eventualities that the Act would fill the lacuna. In this court's mind Sections 9 or 17 were a means of ensuring that the non-participating party would be unable to hold the participating party to ransom by refusing to make the necessary appointments.
- [114] This court further does not accept that the factual matrix of this case circumvents the restrictive interpretation of the subsection relied on against enforcement as to the composition of the tribunal. The agreement was invoked, the law provides a method to assist in the non cooperation of another party to the agreement, that was invoked and even though it may have been the wrong law applied the procedure was exactly as that which would have pertained if the correct law had been triggered.
- [115] In this court's mind the subsection relied on may have been fulfilled if the actions of the Arbitrator as sole arbitrator would have caused substantial injustice to the defendants. However, I do not accept that what transpired reached that threshold and this is more so when it was clear from the Arbitrator's own record that the respondent never made any attempt to apply to the court to set aside the appointment as they were entitled to do upon receipt of the final terms of reference since the 14th July 2014.
- [116] It is therefore clear that there was critical inaction on the part of the defendants upon this appointment being made and this court considers that even though they did not actively participate in the process they had sufficient opportunity to do so and have their objections ruled on by a court even at that stage.
- [117] I therefore do not find that the defendants can rely on this subsection to resist enforcement.

Section 6(4) (b): Enforcement would be refused if “**enforcement of the award would be contrary to the public policy of Saint Vincent and the Grenadines.**”

The Defendants' Submissions

- [118] The defendants position on this subsection is that the underlying contract that resulted in the claimant's predecessor in title obtaining the shares in the first defendant was based on a fraudulent share swap transaction.

- [119] The defendants submitted that the purported share swap brokered by one Harry van Streun was never validly effected in that there was no proper or effective consideration to bind the contractual arrangement as between the parties. There having been no binding contract for the share swap the same was void and fundamentally tainted by illegality in the misrepresentations proffered by the said Van Streun. The transfer to the claimants was therefore *void ab initio* and should not be enforced.
- [120] To therefore to allow the claimants to rely on their contract of transfer which has its roots in an initial illegal transaction, would effectively be rewarding the claimants and those through whom they claim for illegal behaviour and force the defendants to honour an agreement from which they derived no benefit. That is that the defendants would have to pay for the shares on the redemption request, having not received any benefit themselves.
- [121] Finally the defendants submitted that in any event the first defendant is in liquidation and to allow the claimants to succeed on their claim would be to disadvantage the other creditors of the first defendant who would be properly entitled to have their debts met by the first defendant.
- [122] The defendants therefore submitted that to allow enforcement of the award would be fundamentally contrary to the public policy of St. Vincent and the Grenadines.

The Claimants' Submissions

- [123] The claimants submit that the defendants did not participate in the arbitration process. However in spite of this, the Arbitrator painstakingly examined the issues raised by the defendant by way of their correspondence and took the same into account when he came to his final determination.
- [124] The claimants therefore submit that the defendants are not now able to argue that the underlying share swap was fraudulent. In fact the claimants argue that this was far from the truth when the defendants themselves acknowledged the shareholding of the claimants in the plethora of correspondence that flowed between the parties as well as being contained in the evidence of the second defendant. Further in any event, the pleading of fraud by the defendants does not establish any fraudulent act on the part of the claimants themselves and as such any reliance to that effect would be unsustainable.
- [125] In fact the claimants have submitted that the allegations of fraudulent misrepresentation that the defendants claim undermine the claimants' ability to seek enforcement of the arbitral award, do not implicate the claimants in any way. The claimants are therefore not seeking to rely on any illegal acts of their own. This provision in the New York Conventions Act is therefore inapplicable to these claimants.

- [126] The claimants also argued that misrepresentation in both tort and contract did not apply in the circumstances of this case in that the evidence that would be required to be proven as against the claimants was missing from the factual matrix. None of the allegations implicated the claimants and as such the pleadings of the defendants in both of these causes of action were misplaced as against the claimants.
- [127] The final submission by the claimants was that it was entirely without merit to rely on the public policy principle to deny the claimants' enforcement of the arbitral award by saying that if the award is allowed it would affect the voluntary liquidation of the first defendant. Indeed the submission was that the presentation of claims by creditors is the whole point of a company being wound up and that further by indicating their "concern" that the award if enforced may cause an unfair preference in favour of the claimants once again shows that the defendants acknowledge that the claimants are in fact proper creditors of the first defendant.
- [128] As such the claimants submit that this subsection is of no assistance to the defendants in seeking to resist enforcement of the arbitral award.

Court's Consideration and Analysis

- [129] This reliance on this subsection by the defendants, in this court's mind was the most substantial one of all the grounds raised against enforcement.
- [130] When this court considers this subsection, it is satisfied that the same encompasses the fundamental principle that no court will lend its aid to a man who founds his cause of action on an immoral or an illegal act⁴⁷.
- [131] That being said, invoking the public policy exception is a safety valve to be used in exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundamentals on which it is based⁴⁸.
- [132] So in this regard what would have to be proved by the defendants is that "the enforcement of the award would be clearly injurious to the public good or possibly enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."⁴⁹

⁴⁷ Lord Mansfield CJ in **Holman v Johnson** (1775) 1 Cowp 341 at 343 cited with approval by the Court of Appeal in **Saint Lucia Motor and General Insurance Co. Ltd v Peterson Modeste** HCVAP2009/0008 (unrep. St Lucia)

⁴⁸ UNCITRAL Guide Ibid at page 240

⁴⁹ **Deutsche Schachtbau-und Tiefbohegesellschaftm.b.H v Shell International Petroleum Co. Ltd** [1990] 1 A.C.295

- [133] So in this court's mind in real terms, the defendants have a high threshold to reach and as such the basis of the resistance must be clear and further in this court's mind must also be clearly identifiable to the party seeking enforcement, bearing in mind that the basic contention on arbitral awards is that the courts should approach them with a pro-enforcement mindset.
- [134] The nub of this argument for the defendants is that acting upon a representation by one van Streun, they entered a share swap in kind to obtain what they considered valuable shares in another company. They further state that it was the facts that they had negotiated for what they considered valuable shares that they were induced to enter the agreement. Upon the agreement having been arrived at the defendants then discovered that the company van Streun represented as being the owner of the shares was not in fact in ownership of such shares and they therefore had nothing to legitimately swap for the shares in the first defendant. The shares in the first defendant were therefore transferred without consideration and were therefore void. It is with reference to this transaction that this court therefore is required to perform a "balancing exercise between the competing public policies of finality and illegality, the nature and seriousness of the alleged illegality and the extent to which it can be seen that the same was addressed by the arbitral tribunal..."⁵⁰
- [135] When one therefore considers this issue it has been held⁵¹ that the court at this stage is not precluded from looking at the agreement relied upon by the claimants and what was considered by the Arbitrator.
- [136] Before I however proceed on this assessment I wish to adhere to the pronouncements made by Saunders P in the said **BCB Holdings** case⁵² in which he made it clear that there is no precondition in order to rely on the public policy exception that the party who seeks to so rely had to have participated in the arbitral process. Indeed he went on to say: *"While it is public policy that arbitral awards, and in particular foreign awards, should be enforced, it is also public policy that awards which collide with foundational principles of justice ought not to be enforced. These two facets of public policy may sometimes appear to be, but are really not, mutually inconsistent. When a municipal court considers whether to decline to enforce an Award on public policy grounds, the court is not concerned with favouring or prejudicing a party to the arbitral proceedings. The Court is concerned with protecting the integrity of its executive function. In the process, the Court seeks simultaneously to guarantee public confidence in arbitral processes generally and to respect the institutional fabric of the country where the Award is to be enforced"*.
- [137] The claimants have relied on the escrow agreement that was entered into between themselves and 6GM. From the mere fact that the claimants executed the said agreement, it is clear to this court

⁵⁰ **BCB Holdings Limited and The Belize Bank Limited v The Attorney General of Belize** [2013] CCJ (AJ) at para 31

⁵¹ **BCB Holdings** Op Cit at paragraph 32

⁵² Op Cit at paragraph 57

that the claimants were completely unaware of any issue with the transfer of shares as between the 6GM and the first defendant. This is even more so since the claimants had specifically requested of the first defendant prior to the enforcement of the escrow agreement whether there were any restrictions on the transfer of the shares. The defendants have sought to minimize the effect of this correspondence in seeking to intimate that directors can change their minds at any time and withdraw what amounted to an unconditional undertaking. However it is clear in this court's mind that the mere fact that the claimants had made this inquiry which was answered by the parties who could bind the company (regardless of the submission of the defendants) was a clear indication that the claimants were not privy or a party to any alleged illegality.

- [138] The Arbitrator in his assessment did not rule on the agreement that the defendants have sought to avoid for "illegality" and lack of proper consideration. Rather the Arbitrator's findings were mainly based on what he considered the "evasive behaviour" of the defendant⁵³ and that he made a definitive finding that the defendants could not cancel the shares issued to the 6GM having made a "binding confirmation" that the shares had been validly issued⁵⁴.
- [139] It is therefore clear that the Arbitrator made no finding as to the illegality of the underlying contract, a contract I may add to which the claimants were not a party, but it may be considered a fair inference that he did reach the conclusion that the underlying agreement was not illegal based on the consistent and clear acceptance by the defendants of the terms of the said agreement.
- [140] Thus this court in undertaking its own assessment as to whether there is any illegality that can be attributed to the underlying agreement upon which the claimants obtained their rights does not agree with the defendants that the same is illegal and enforcement would be contrary to the public policy of St. Vincent and the Grenadines. In fact this court cannot agree that the enforcement of this arbitral award would be "clearly injurious to public good or wholly offensive to ordinary reasonable and fully informed members of the public."⁵⁵
- [141] When this court considers what transpired, this court determines that two things occurred. One, the claimants were not (and no allegation has ever been made against them) involved in the initial share swap agreement whereby their judgment debtor obtained the shares and two, that the timing of the defendants "calling foul" on the issue of the legality of the share swap agreement appears too coincidental and inextricably linked to the claimants insisting on their right to redeem the shares obtained through their arrangement with 6GM.
- [142] On the 18th November 2010 the first claimant entered into an escrow agreement with 6GM. Attached to the escrow agreement was correspondence from the directors of the first defendant

⁵³ Paragraph 96 of the Arbitral award exhibit KPN 18 to the affidavit of Akin John filed on the 10/4/2018

⁵⁴ Paragraph 205 of the Arbitral Award exhibit KPN18 to the Affidavit of Akin John filed on the 10/4/2018

⁵⁵ **Deutsche Schachtbau** case Op Cit

giving approval for the transfer of 6GM's shareholdings in the first defendant upon the obligations of 6GM becoming operative to the first claimant without restrictions. Upon the default of 6GM to the claimants, transfers of shares were made to both claimants by virtue of two different transactions, an initial 37,246 of class A non-voting shares and then a further 72,798 of class A non-voting shares.

- [143] By redemption requests in March 2011 and then in April 2011 the claimants sought to redeem a portion of their shares. In response the first defendant's fund manager Herald Janssen acknowledged receipt of the redemption request, gave instructions as to the proper party who must submit the redemption request and told the claimants that once the appropriate request was received the redemption date would be announced. By a further email dated July 2011 the first defendant's fund manager then informed the claimants that redemption of shares had been suspended but that arrangements were being made to address the issue of liquidity in order to meet the requests for redemption. Having not heard anything on the submitted redemption requests the claimants issued a letter from their lawyers in April 2012 demanding that the redemption request be honoured. The claimants waited a further year and in January 2013 announced that they would be taking the issue to arbitration. By letter dated February 2013 the first defendant issued a letter purportedly nullifying the shares held by the claimant through 6GM and further stating that the transfers to the claimants were void on the basis that the first defendant had been induced to enter into a baseless share swap. The defendant's position was therefore that the shares held by 6GM were tainted by fraud and the transfer should not stand.
- [144] When this court however makes an assessment of this factual matrix, I however do not agree that the defendants are entitled to rely on the applicability of the public policy exception to enforcement based on the circumstances as they existed.
- [145] When the pleadings of the defendants are considered and the evidence that was led to substantiate this ground, this court determines that neither the pleadings nor the evidence in any way impugned the actions of the claimant, nor 6GM with any specificity which would cause this court to consider pronouncing against enforcement. This court is not satisfied on a balance of probabilities that enforcing this award would be "so fundamentally offensive to [the enforcement jurisdiction]'s notions of justice that despite being a party to the Convention it cannot reasonably be expected to overlook the objection."⁵⁶ Indeed "the fraud complained of must go to the substance of the dispute and not be merely ancillary to it."⁵⁷
- [146] In the case at bar the dispute between the claimants and the first defendant is premised on the failure to honour the redemption requests of the claimant after the same were submitted and the

⁵⁶ **Hebei Import & Export Corp. v Polytek Engineering Co Ltd** [1999] 2 HKC 205

⁵⁷ **Vendort Traders Inc v Evrostroy Group LLC** BVIHCVAP2012/0041 at paragraph 27

pleading of fraud is so nebulous and unspecific that this court agrees that the same have not been made out. Indeed, I find that the first defendant could not admit the request and then when forced to come to the table to arbitrate for failure to pay on those same requests, seek to raise a fundamentally detrimental argument against the claimant for the first time that a third party has voided the claimant's right. I do not agree that this is open to the defendants and if it were, there would have had to plead a more precise and specific claim upon which the court could make a determination. In these circumstances I therefore do not accept this argument against enforcement.

[147] The court is first and foremost concerned with the award and its enforcement⁵⁸ and in this regard I am satisfied that the claimants have established the right to have the arbitral award enforced and I so order.

Issue #2: Whether or not the final arbitral award is enforceable, can the claimants seek the intervention of this court to make a determination that the claimant is a creditor by virtue of the Claim of Debt produced to the second defendant as liquidator of the first defendant on the 2nd October 2017?

[148] When this court considers this issue, it is clear in its mind that there is now no need to consider whether the proof of claim could have independently been proven without the arbitral award the court having found in favour of the enforcement of the award. In fact, this court is satisfied that in determining that there are no barriers to enforcement that an inextricable part of that finding is that the arbitral award has in fact been recognized. As was noted by my sister Corbin-Lincoln M in the case of **Dantzer Inc v Galloway Hardware & Building Materials Ltd**⁵⁹ quoting from Redfern and Hunter on International Arbitration: *"Recognition on its own is generally a defensive process. It will usually arise when a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings. The party in whose favour the award was made will object that the dispute has already been determined. To prove this, he will seek to produce the award to the court and ask the court to recognize it as valid and binding upon the parties in respect of the issues with which it dealt ... By contrast, where a court is asked to enforce an award, it is asked not merely to recognize the legal force and effect of the award but also to ensure that it is carried out, by using such legal sanctions as are available. Enforcement goes a step further than recognition. A court that is prepared to enforce an award will do so because it recognizes the award as validly made and binding upon the parties to it and, therefore suitable for enforcement. In this context, the terms recognition and enforcement do run together. One is a necessary part of the other."*

⁵⁸**Soinco S.A.C.I. and Another v Novokuznetsk Aluminum Plant and ors**[1997] EWCA Civ J1216-22

⁵⁹MNIHCV2014/0024 at paragraph 18

- [149] Having therefore made that determination, this court has no intention of considering this limb of the claimants' case which in this court's mind amounts at this juncture to an entirely academic exercise.
- [150] In this court's mind the need to examine whether the claimants had established themselves as a creditor of the first defendant by reliance on the proof of debt would only have arisen if the court had made the determination that the arbitral award was not enforceable. It would therefore have been imperative that the court consider whether the claimants were otherwise entitled to their alternate claim against the first defendant. The claimants have been given their right to enforce the arbitral award and how they do so now is entirely up to them.
- [151] Additionally, this court is also satisfied that its jurisdiction to review the proof of claim and make a determination on the same would only have arisen at the point if and when the liquidator had made a determination on the same. He having refused to do so, (which is part and parcel of the Claimant's argument) this court is satisfied that the power of the court to review would not have in any event arisen and the most that the court would have been in a position to order is that the claimants re-submit the proof of debt and mandate that the liquidator (the second defendant) to undertake his duties towards the same.
- [152] I therefore make no determination on this issue as to the viability of the proof of debt as submitted by the claimants.

Issue #3: Is the Claimant entitled to have the Second named defendant removed as liquidator and for the court to assume liquidation of the same with a court appointed liquidator.

- [153] At the heart of this issue is the Claimants complaint of the failures of the liquidator.

The Claimants' Submission

- [154] The nub of the claimants case in this regard is that by a Plan of Dissolution dated the 16th September 2013, filed with the Financial Services Authority, the first defendant resolved to voluntarily wind up its operations and expressly stated that the same would be completed within eighteen months. The first defendant also indicated that "the company is and will continue to be able to discharge or pay or provide for the payment of all claims, debts, liabilities and obligations in full..."⁶⁰

⁶⁰ Exhibit KPN 11 to Affidavit of Akin John filed on the 24/11/17

- [155] To substantiate this indication, the first defendant by their director also filed a statutory declaration of solvency on the 30th December 2013 making it clear that the company **was** able to meet all its claims.
- [156] The claimants submitted that by the time that this instant suit was filed in 2017, however the liquidation was still subsisting and the second defendant had failed to file any documents to indicate that the company was either still solvent or was now insolvent. This the claimants submitted was further compounded by the clear indication made by way of affidavit evidence filed on behalf of the defendants through their foreign legal counsel that in any event if the first defendant made payment of the arbitral award the company would cease to be solvent⁶¹.
- [157] The claimants therefore argued that the circumstances of non-payment by the first defendant was a clear indication that the company was in fact no longer solvent and that the liquidator had failed in all his duties to the claimant as required under the IBC Act. This inaction on the part of the liquidator towards the claimants either as creditors based on the final award or as contributories and in either case as an interested party, equated to a breach of the liquidator's duties sufficiently to warrant his removal.
- [158] It is on this basis that the claimants seek the removal of the liquidator and that the voluntary liquidation be brought to an end and that the first defendant be wound up pursuant to an order of the court.
- [159] In scouring the extensive submissions of the defendants this issue of the removal and replacement of the liquidator was not specifically addressed by the defendant. The only reference this court could find was in the evidence filed on behalf of the second defendant by the second defendant himself as liquidator in which he stated⁶² that he was under no duty to "...notify the claimants that their proof of debt was examined and admitted or rejected or that the debts of the first defendant were paid or that the claimants were included in the distribution of the surplus assets as a member as the claimants are not proper shareholders of the first defendant ...". Additionally, the second amended defence of the defendants⁶³ clearly pleaded that "given the totality of the circumstances mentioned in the defence an order stating the first defendant should be wound up by the court would be unreasonable..."⁶⁴
- [160] There were no submissions made on this issue.

⁶¹ Paragraph 26 of the Exhibit KPN 13 of the Affidavit of Akin John filed on the 24/11/17

⁶² Paragraph 18 of the Affidavit of the Second defendant filed on the 31/10/18

⁶³ Filed on the 9/4/19

⁶⁴ Paragraph 30 of the Second Amended Defence

Court's Analysis and Considerations

- [161] In looking at this issue, it is clear that, the first defendant had the authority under its by-laws⁶⁵ and the IBC Act⁶⁶ to enter into voluntary liquidation.
- [162] That is, that the company itself makes the determination that it is no longer sensible to maintain a corporate presence and they are given the ability to determine how that would be done.
- [163] Primarily, voluntary winding up is commenced by virtue of a resolution of the directors⁶⁷ or if the company issued shares it may be wound up by members⁶⁸.
- [164] In the case at bar, the winding up and dissolution of the company was resolved by virtue of a resolution of a sole shareholder that the first defendant should be wound up and made provision for the appointment of the second defendant's predecessor⁶⁹. The said reason given for the winding up and dissolution was that "the regulatory environment to manage the Fund, market the Fund and administer the Fund ha[d] changed in Europe as a result a continuation of operation is considered to be no longer feasible".
- [165] Together with this document the first defendant filed a statutory declaration of solvency declaring that the first defendant was solvent and that it could continue to meet all its obligations.
- [166] It was therefore clear to the regulatory body that the voluntary liquidator was well positioned to undertake the liquidation and bring the operations of the first defendant to an end.
- [167] The reality is this did not happen.
- [168] Within a year of the claimants invoking the arbitration clause as against the first defendant, the first defendant passed the resolution sending itself into liquidation. In this court's mind the timing of this action is not without suspicion and this court considers that on a balance of probabilities that the taking of this action was once again an attempt by the first defendant to derail the efforts of the claimants to recoup any of their debt.
- [169] In any event it is now 2020 almost 7 years since the first defendant went into liquidation on a plan that was to take 18 months to complete. At the trial of the matter there was no information

⁶⁵ By-Law 24.7 in the Exhibit Annex 2 GB1 to the Affidavit of the Second defendant filed 31/10/18

⁶⁶ Section 163

⁶⁷ Section 163 (1) IBC Act CAP 149

⁶⁸ Section 163 (2) IBC Act CAP 149

⁶⁹ The Winding up and Dissolution of the company is KPN11 to the Affidavit of Akin John filed 24/11/17 (the said dissolution was signed by Herald Janssen acting on behalf of the shareholder Genesis Capital Management Ltd.)

forthcoming as to the state of the liquidation and this court is entitled to infer that the liquidation is in fact not completed and the reasons advanced initially for its commencement can no longer be considered relevant.

- [170] In this court's mind, there is a need to jump start this liquidation and take it to its natural conclusion or to rescind it. It is not open to any company for whatever reason to commence a procedure that effectively protects the assets of the company from creditors by forcing them to undergo meticulous scrutiny while at the same time preventing the company being declared insolvent resulting in control of the company being vested in persons whose primary duty is to the creditors and not the company.
- [171] The claimants have sought to rely on Section 165 of the IBC Act to prompt the removal of the second defendant but I do not accept that this section empowers the court to remove the second defendant as pleaded.
- [172] Section 165 states at subsection (1):
*"1. If for any reason whatever there is **no liquidator acting** in the case of a winding-up, the Court may, on the application of a member, creditor or other interested party appoint a liquidator or liquidators, and the Court may on due cause being shown remove any liquidator and appoint another liquidator to act in the matter of a winding-up."*
- [173] When this section is considered this court is satisfied that it can only operate where in circumstances of a voluntary liquidation there was no liquidator appointed to act **at all** under the resolution at which time the court is then empowered to appoint a liquidator. When such a liquidator is appointed and there is due cause shown, it is in those limited circumstances that the liquidator so appointed by the court may also be removed by the court. I however do not accept that this section gives the court the authority to remove a voluntarily appointed liquidator because of their inaction in the completion of the liquidation.
- [174] What is however clear as well is that nowhere in the IBC Act, is a voluntary liquidator empowered to continue the liquidation ad infinitum and this court in assessing the reasons advanced by the second defendant as to why he has been unable to produce the documents required under Section 165(2) IBC Act,⁷⁰ finds that they are wholly without merit.

⁷⁰ Section 165 (2): A Liquidator shall, upon his appointment in accordance with this Part and upon the commencement of a winding-up and dissolution, proceed to –

- (a) Identify all assets of the company;
- (b) Identify all creditors of and claimants against the company;
- (c) Pay or provide for the payment of, or to discharge all claims, debts, liabilities and obligations of the company;
- (d) Distribute any surplus assets of the company to the members in accordance with the articles and by-laws;
- (e) Prepare or cause to be prepared a statement of account in respect of the actions and transactions of the liquidator; and

[175] By the Affidavit of the second defendant filed on the 31st October 2018, the second defendant stated that⁷¹:

“16. The Plan of Dissolution dated September 16th, 2013 filed with the Financial Services Authority to voluntarily wind up the First Defendant stated that the estimated time required to wind up and dissolve the First Defendant was eighteen (18) months from December 30, 2013. The voluntary winding up is still subsisting. Given the totality of the circumstances (force majeure i.e. ebola effecting heavily the major assets of the Genesis Funds) and having regard to the inaction of the previous liquidator and the ongoing criminal/liability proceedings, I am not in a position to have a Statement of Account prepared in relation to the First Defendant or request an accounting firm to give clearance for such accounting based on unclear legal situations.”

[176] At no time does he purport to give a statement as to the present state of the liquidation nor does he produce any document that may have been filed on behalf of his predecessor in the liquidation but simply and finally states that he is unable to produce any documentation as required by the legislation and purports to lay the blame at the feet of his predecessor's actions, a nebulous criminal case and an inability to gather the requisite information.

[177] Nevertheless this court is satisfied, that however unsatisfactory the present state of affairs is with the second defendant and his inaction, the IBC Act does not vest the court with the power to remove him. The claimants reliance on the case of **Popely v Ayton Limited and Ors**⁷² from this jurisdiction and the court's use of Section 101 of the IBC Act in that case did not apparently appreciate that Section 101 referred to in that case was as provided for by the 1st IBC Act which was not reproduced for whatever reason in the present IBC Act.

[178] However what this court must accept is that even though the voluntary liquidator's responsibilities are primarily to the company over which he has been appointed and to shareholders or members and creditors of that company and there is no direct supervisory role given to the court in those circumstances, I am also satisfied that the court must still retain an ability to intervene where needed. Indeed when Buckley LJ was considering the issues surrounding whether the court is bound by the decisions of the creditors in bankruptcy to rescind a receiving order or annul adjudication⁷³ he made it clear that the court was duty bound to regard the commercial morality of the country.

(f) Send a copy of the statement of account to all members if so required by the plan of dissolution required by section 167.

⁷¹Paragraph 16 of the Affidavit of the Second defendant

⁷²SVGHCV2005/0001

⁷³**In Re Telescriptor Syndicate Ltd** [1903] 2 Ch. 174 at 180

[179] In this court's mind this role of the court was contemplated by the references to the court being able to appoint a liquidator where none has been appointed and none is acting⁷⁴ or where provision is made for liquidation and dissolution of an IBC can also be ordered by the court⁷⁵. Thus although there is no power conferred by the IBC Act on the court to order the removal of a voluntary liquidator, this court is satisfied that they must still be empowered to ensure that the commercial morality of Saint Vincent is upheld.

[180] I therefore will make no order to remove the liquidator but I do order that the second defendant is to ensure that he has complied with Section 165(2) (a) to (f) of the IBC Act and any communications and reports are also to be provided to the claimants herein within one hundred and twenty days(4 months) of the date of this order.

The order of the court is therefore as follows:

1. The arbitral award dated the 9th January 2015 rendered in favour of the claimants is recognized and enforced against the defendants.
2. No order is made as to the allowance of the proof of debt received on the 2nd October 2017 but the claimants are at liberty to resubmit their proof of debt to the second named defendant if they so desire.
3. If the same is produced, the second named defendant is therefore required to make a determination on that proof of debt within 30 days of receipt of the same.
4. The order seeking the removal of the second named defendant is denied but the second named defendant is required to carry out his statutory duties under Section 165 (2) (a) to (f) of the IBC Act within 120 days of the date of this order.
5. Costs to the claimant on a prescribed basis at 70% having been only partially successful on the said claim pursuant to Part 65.5 CPR 2000.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar

⁷⁴ Section 165 IBC Act

⁷⁵ Section 170 IBC Act