JUDGMENT : MR JULIAN FLAUX Q.C. (sitting as a Deputy High Court Judge) 30th September 2003

1. The Defendant in these proceedings seeks a stay of the proceedings pursuant to section 9 of the Arbitration Act 1996, alternatively under the inherent jurisdiction of the Court. The background to the application is as follows.

2. The Defendant, the well-known food retailer, entered into two contracts in 1999 with the Claimants, Amr Amin Hamza El Nasharty ("Amr") and Manar Abdel Alim Nowara ("Manar") for the purchase of shares in an Egyptian company, Egyptian Distribution Group SAE ("Edge") of which those individuals were shareholders. The First Claimant is the brother of Amr, the Third Claimant is their mother, the Second Claimant is the wife of the First Claimant and Manar is the wife of Amr. The Fourth Claimant is an adviser to the El Nasharty family.

3. The first contract dated 9 March 1999 ("the March 1999 Share Sale Agreement") provided for the sale to the Defendant of shares in Edge equivalent to 25.1% of the issued share capital. At the same time the same parties entered into a Shareholders Agreement ("the March 1999 Shareholders Agreement) regulating the relationship between the vendors and the Defendant as shareholders. Both those contracts were signed on behalf of each of the Claimants, Amr and Manar by Amr pursuant to a composite power of attorney dated 10 March 1999. It is not disputed that this duly authorised him to execute those contracts.

4. By a further contract dated 25 October 1999 ("the October Share Sale Agreement") the Claimants, Amr and Manar agreed to sell the Defendant shares in Edge equivalent to a further 55% of the issued share capital. At around the same time, on 2 November 1999, the vendors and the Defendant entered a further Shareholders Agreement ("the November 1999 Shareholders Agreement"). Both those contracts were signed on behalf of each of the Claimants, Amr and Manar by Amr. Again it is common ground that he had authority to do so pursuant to the composite power of attorney.

5. Each of these four contracts contained an arbitration clause in the following terms:

   "The parties agree that any proceedings in relation to this Agreement shall be subject to arbitration:

   (a) in Paris;

   (b) under the rules of the International chamber of Commerce;

   (c) in the English language; and

   (d) before three arbitrators."

6. Under both Share Sale Agreements, the vendors gave various warranties to the Defendant, including warranties as to the trading and financial position of Edge. The two Share Sale Agreements also provided that the vendors should be under no liability in respect of any claim under the warranties unless notice in writing was given to Amr as the Vendor Representative on or before 9 March 2001 ("the warranty deadline"). The two Shareholders Agreements also contained, in clause 13.2, undertakings not to transfer shares otherwise than as permitted by the Agreements. In contrast with the Sale Share Agreements, no limitation was placed upon the period during which a claim for breach of those undertakings could be brought.

7. Under the October 1999 Share Sale Agreement, the consideration payable by the Defendant was in two tranches, an initial consideration payable of LE 163,200,000 and a deferred consideration of LE 61,600,000, the U.S. dollar equivalent of which (U.S. $ 17,803,468) was paid into an escrow account. Under clause 4 of the October 1999 Share Sale Agreement, the vendors had rights ("Deferred Consideration Rights") to be paid a share of the deferred consideration determined in accordance with a formula dependent on the trading performance of Edge during a 12 month period ending in 2001.

8. On about 8 April 2001, the Defendant, Amr and Edge entered into an agreement ("the April 2001 Re-Sale Agreement") whereby the Defendant agreed to sell back to Amr the shares which it had purchased under the two Share Sale Agreements. The April 2001 Re-Sale Agreement provided that the monies held in the escrow account would be paid to the Defendant and the Deferred Consideration Rights would be extinguished. That Agreement also extended the warranty deadline to 30 September 2001. It provided that Amr would make a "Further Purchaser Payment" and subject to his doing so and completion occurring, the warranties in the two 1999 Share Sale Agreements would terminate and be of no further effect. Amr signed the April 2001 Re-Sale Agreement not only on his own behalf but on behalf of each of the Claimants and Manar. The Claimants contend that he had no authority to enter this Agreement on their behalf and that they are not bound by it

9. At the same time on 8 April 2001, the Defendant, Amr and Edge entered into a further contract contained in a letter purportedly signed by Amr on his own behalf and on behalf of Manar and each of the Claimants whereby, if Amr failed to pay an element of LE 8 million of the Further Purchaser Payment to the Defendant by 30 April 2001, the Defendant could bring a claim under the warranties in the 1999 Share Sale Agreements. Again, the Claimants contend that he had no authority to enter this contract on their behalf and that they are not bound by it.

10. By a further contract contained in a letter dated 27 September 2001 signed by Amr again purportedly on his own behalf and on behalf of Manar and each of the Claimants, it was agreed to extend the warranty deadline to 30 March 2003. Once again, the Claimants contend that he had no authority to enter into this contract on their behalf and that they are not bound by it. For the sake of simplicity, save where it is necessary to differentiate between this contract and those made on 8 April 2001 referred to in the previous two paragraphs, I will refer to all three compendiously as "the 2001 Agreements". The April 2001 Re-Sale Agreement contained an arbitration clause in materially the same terms as that set out in paragraph 5 above.

11. The Defendant contends that the Further Purchaser Payment was not made. On 26 March 2003, Denton Wilde Sapte, solicitors for the Defendant, wrote to Amr as Vendor Representative on behalf of, inter alia, the Claimants giving notice of claims for misrepresentation and/or breach of warranty under the March and October 1999 Share Sale Agreements as to the trading and financial position of Edge. It was alleged that the gross margin had been seriously misrepresented. The Defendant's claims were said to be for at least £130 million. The letter also gave notice of separate claims for breaches of the Shareholders Agreements alleging breach of the undertakings not to transfer shares otherwise than as permitted by the Agreements. The letter referred to these claims being brought before an ICC arbitration tribunal.

12. Faced with these potential claims, the Claimants issued the present proceedings on 1 May 2003. In the Particulars of Claim the Claimants advance their case that the 2001 Agreements were made without authority. They seek declarations from the Court that they are not bound by any of the 2001 Agreements and that, as regards any claim by the Defendant under the warranties in the 1999 Share Sale Agreements, the warranty deadline always remained 9 March 2001 and none of the Claimants ever agreed to extend the warranty deadline to 31 March 2003 or otherwise.

13. In their submissions to the Court through their solicitors and Counsel the Claimants were at pains to emphasise to the Court that their reason for commencing these declaratory proceedings was to preclude the Defendant from pursuing a claim in arbitration for breach of the warranties in the 1999 Share Sale Agreements. The basis for this was that, if they were correct that they were not bound by the 2001 Agreements, the consequence was that the warranty deadline was not extended and the claim made on 26 March 2003 was outside the time limit imposed by the deadline. It was this rather than a desire to pursue a claim to enforce the Deferred Consideration Rights which was said to have motivated these proceedings. For present purposes, I am prepared to accept this explanation, although it seems to me that, at least in considering that part of the Defendant's application which is made under section 9 of the Arbitration Act rather than the inherent jurisdiction of the Court, the Claimants' motive for bringing the proceedings is strictly irrelevant. What matters is the effect of the claim and hence the substance of the real dispute between the parties, an issue to which I return in more detail below.

14. Faced with these proceedings, on 28 May 2003, the Defendant issued the Application Notice which is before the Court, supported by the first witness statement of Gillian Harris, a partner in Denton Wilde Sapte. As already indicated, a stay of the current proceedings was sought under section 9 of the Arbitration Act 1996 alternatively pursuant the inherent jurisdiction of the Court. I will consider these two limbs of the application in turn.

15. As originally formulated in Ms Harris' witness statement, the application under section 9 was founded upon two alternative bases: (i) the presence of the arbitration clause set out at paragraph 5 above in the 1999 Share Sale Agreements and, alternatively, (ii) the presence of that clause in the 2001 Agreements. However, in the skeleton argument and oral submissions of counsel for the Defendant for the purposes of the hearing before me, reliance was placed only upon the arbitration clause(s) in the 1999 Share Sale Agreements and not upon those in the 2001 Agreements. The Claimants' counsel criticised this as a tactical manoeuvre on the Defendant's part and, indeed, sought to address submissions to the Court as if the section 9 application was still being made in relation to alleged arbitration clauses in the 2001 Agreements. It does not seem to me that any criticism of the Defendant is justified. No doubt the Defendant did abandon any reliance on arbitration clause(s) in the 2001 Agreements because it realistically and sensibly recognised that the Court could not decide an application under section 9 on the basis of such clauses unless satisfied at this stage that the 2001 Agreements were binding on the Claimants and, as is the case, the Court could not be so satisfied. However, whatever the position is under the 2001 Agreements, that is irrelevant to the question which the Defendant, whose application it is, has left before the Court, namely whether the current Commercial Court proceedings are "in relation to [1999 Share Sale Agreements]" within the meaning of the arbitration clauses in those Agreements.

16. I consider that the current proceedings are "*in relation to*" the 1999 Share Sale Agreements for a number of reasons. First the words "*in relation to*" are wide words. In considering an arbitration clause which referred "all disputes arising out of or in relation to contracts" to arbitration, Mocatta J in ***Faghirzadeh-v-Rudolf Wolff*** [1977] 1 Lloyd's Rep 630 at 641 stated that that clause was in very wide language and that an issue as to whether there had been an agreement subsequent to the agreement in which the arbitration clause was contained was one over which the arbitrators had jurisdiction under the arbitration clause in the earlier contract. The editors of the current edition of Russell on Arbitration (23rd edition: 2003 para. 2-075) refer to "in connection with" and "in relation to" as expressions now well established as having a broad meaning. ***Ashville Investments-v-Elmer Contractors*** [1989] QB 488 concerned an arbitration clause which provided that "any dispute or difference… as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith" should be referred to arbitration. The Court of Appeal considered this clause wide enough to encompass a dispute as to whether the relevant contract containing the arbitration clause should be rectified.

17. I accept the submission made by Counsel for the Claimants that the question whether the present proceedings are within the arbitration clause in the 1999 Share Sale Agreements is essentially one of construction of that arbitration clause and that other cases, even those decided by the Court of Appeal, on other arbitration clauses not in identical terms to the clause in the present case are not binding upon me. However, although neither the ***Wolff*** nor the ***Ashville Investments*** case are therefore binding because the clauses were in different terms, I do find the reasoning of those courts as to the width of expressions such as "in relation to" and "in connection with" of considerable assistance in construing the present clause. Clearly the use of the phrase "in relation to" connotes a

wider scope of arbitration clause than one which is limited to disputes arising under a contract such as whether there has been a breach of contract or not. "In relation to" includes disputes which whilst not arising under the contract, are related to or connected with it. In my judgment, a dispute concerning an alleged variation to a contract is a dispute which is "in relation to" that contract. I would have reached that conclusion unassisted by authority but am reinforced in that conclusion by the fact that Mocatta J so decided in the ***Wolff*** case.

18. Furthermore, it does not seem to me that, either as a matter of logic or as a matter of objective contractual construction, it can make any difference to that conclusion what the nature of the dispute is as to the variation to the contract. Thus whether the dispute is as to the construction or effect of an admitted variation or as to what the terms of the variation were or as to whether there was a variation at all, such disputes are all in relation to the contract which has allegedly been varied. It seems to me that this conclusion is supported implicitly by the decision in the ***Wolff*** case. I reject the Claimants' contrary arguments as to the construction of the present arbitration clause. Thus, in principle, to the extent that the dispute in the present proceedings concerns whether or not the 1999 Share Sale Agreements were varied (to extend the warranty deadline and/or to preclude the Deferred Consideration Rights) the proceedings are in relation to those Agreements.

19. The Claimants sought to challenge that conclusion essentially by two arguments. First, they contended that the real issue in these proceedings is that of authority and specifically whether Amr had authority to enter into the 2001 Agreements on behalf of the Claimants. Accordingly, the Claimants contend that these proceedings have nothing to do with the 1999 Share Sale or Shareholders Agreements in which that issue does not arise and cannot be said to be in relation to the 1999 Share Sale Agreements. However, that seems to me to be an unduly narrow and artificial approach to the question of what the real issue is here. In my judgment the real issue in the present proceedings as between the Claimants and the Defendant is whether the 1999 Share Sale Agreements were varied by the 2001 Agreements. Nor is that conclusion diminished by saying, as the Claimants do, that this is merely the consequence of a ruling as to whether there was authority or not. The reality is that (as the Claimants' Counsel accepted in argument) the Claimants are only interested in the 2001 Agreements at all to the extent that they purport to vary the 1999 Share Sale Agreements and thereby affect the Claimants' rights and obligations under those Agreements by extending the warranty deadline and extinguishing the Deferred Consideration Rights. If the 2001 Agreements had simply involved Amr buying back the shares in Edge with his own money without any impact upon the terms of the 1999 Share Sale Agreements, then the Claimants would have had no interest whatsoever (commercial or legal) in challenging the validity of the 2001 Agreements.

20. Furthermore, the fact that the consequence of a decision one way or the other as to authority will have the consequence that the 1999 Share Sale Agreements have or have not been varied does not mean that the present proceedings are not "in relation to" the 1999 Share Sale Agreements. Quite the reverse. The Claimants freely admitted that the reason why they wanted an early determination by this Court of the present proceedings, in which they are confident of being able to establish that Amr had no authority, is that such a determination would give rise to an issue estoppel or res judicata in any ICC arbitration as regards any attempt by the Defendant to bring a claim for breach of the warranties in the 1999 Share Sale Agreements. In that event, the Claimants would contend that any such claim was time barred by the warranty deadline and that it would not be open to the Defendant to argue in the arbitration that the warranty deadline had been varied by the 2001 Agreements, because that issue would already have been decided against the Defendant in the present Commercial Court proceedings. In other words, the effect of a judgment in the Claimants' favour would be to preclude the Defendant from raising an issue in the arbitration which it would otherwise have been entitled to raise, Once it is admitted and averred by the Claimants that, if they were successful in these proceedings, there would be such an issue estoppel in any arbitration concerning warranty claims under the 1999 Share Sale Agreements, it seems to me impossible to escape the conclusion that these proceedings are indeed "in relation to" the 1999 Share Sale Agreements.

21. Although the Claimants were not disposed to admit at least formally that any judgment in their favour would also give rise to an issue estoppel in relation to any claim they might make in respect of Deferred Consideration Rights, it seems to me that consequence inevitably follows. Such a claim will have to be brought in an ICC arbitration, whether as a counterclaim in the existing arbitration (which I discuss in more detail below) or as a new claim in a fresh arbitration. To the extent that the effect of a favourable judgment for the Claimants in these proceedings would preclude the Defendant from running a defence to such a claim that the Deferred Consideration Rights had been extinguished pursuant to the 2001 Agreements because of an issue estoppel, it must follow that these proceedings, which would have the effect, if successful, of giving rise to that issue estoppel when otherwise the Defendant could run that defence in the arbitration, are in relation to the 1999 Share Sale Agreements under which the Deferred Consideration Rights arose.

22. The Claimants were somewhat coy at the hearing of the application as to whether or not they were intending to bring a claim or counterclaim in respect of the Deferred Consideration Rights. I agree with Counsel for the Defendant that it is extremely unlikely that, faced with a claim against them in the arbitration for some US$ 8 to 10 million (which is the position as I discuss further below), the Claimants will not counterclaim for the Deferred Consideration Rights which are for a substantial sum. However, my conclusion is unaffected by whether or not they do intend to pursue such a claim or counterclaim. Irrespective of whether they do, the dispute in the present proceedings is "in relation to" the 1999 Share Sale Agreements for the reasons I have given and has to be arbitrated.

23. The second argument which the Claimants raised to challenge that conclusion relies upon the arbitration which the Defendant has in fact commenced before the ICC. The Request for Arbitration was in fact lodged with the ICC on 8th September 2003 only eight days before the hearing of the present application. It is noteworthy that in that Request, the Defendant is not pursuing any claim for breach of the warranties in the 1999 Share Sale Agreements as to the trading and financial position of Edge. The claim pursued is for breach of the undertakings or warranties in the 1999 Shareholders Agreements not to transfer shares otherwise than as permitted by the Agreements which is for the equivalent some US$ 8 or 10 million, much less than the £130 million potential claim intimated in the letter of 26 March 2003. The alleged breach of those undertakings in the Shareholders Agreements is also said to be a breach of warranties in the 1999 Share Sale Agreements that the vendors had complied in all respects with their obligations in the Shareholders Agreements, although it is fair to say that it is not necessary for the Defendant to rely upon that plea to succeed in establishing breach of the Shareholders Agreements.

24. The Claimants sought to make much of this in their oral submissions to the Court, asking rhetorically why it was that the application for a stay was being pursued and whether the Defendant in fact intended to pursue a claim for breach of the warranties in the 1999 Share Sale Agreements as to the trading and financial position of Edge at some later stage. The Claimants suggested that by including in the Request for Arbitration reference to breaches of the warranties in the Share Sale Agreements the Defendant was engaged in tactical manoeuvring. In response, the Defendant through Counsel assured me that the inclusion was not tactical but was because the Defendant was entitled to claim under both sets of agreements and did not know what defences the Claimants would run in the arbitration, I accept that explanation but, in any event, whether or not the claim is limited in substance to one under the Shareholders Agreements seems to me for two reasons to make no difference to the conclusion that the Defendant is entitled to the stay it seeks under section 9 of the Arbitration Act 1996.

25. First, as I have concluded that the present proceedings are "in relation to" the 1999 Share Sale Agreements, the issue or dispute in these proceedings has to be arbitrated under the arbitration clause in the 1999 Share Sale Agreements, irrespective of whether or not there is already an arbitration on foot under those Agreements or such an arbitration is commenced by the Defendant in the future.

26. Second, as I have already concluded, it seems inherently unlikely, to say the least, that the Claimants will not counterclaim in the present arbitration by seeking to enforce the Deferred Consideration Rights. The Defendant would no doubt seek to answer such a counterclaim by relying on the provision in the 2001 Re-Sale Agreement extinguishing those rights. For the reasons I have given, any dispute as to whether or the 2001 Agreements are binding on the Claimants has to be arbitrated and, at that stage, would be a matter for the arbitrators appointed in the current arbitration.

27. Accordingly I conclude that the Defendant is entitled to a stay of the current proceedings under section 9 of the Arbitration Act 1996.

28. In the circumstances, it is strictly unnecessary to determine the Defendant's alternative application for a stay pursuant to the inherent jurisdiction of the Court but since the matter was fully argued, I will deal with it. The Defendant put its application on two distinct grounds which were said to emerge from the decision of the Court of Appeal in ***Al-Naimi-v-Islamic Press Agency*** [2000] 1 Lloyd's Rep 522:

    (1) that the Court should exercise its discretion to stay proceedings where there is an issue as to whether or not there was an arbitration agreement so that that issue is determined by the arbitrator;

    (2) that where there is already an arbitration on foot as here, so that there are two sets of proceedings covering essentially the same subject-matter, good case management should lead the Court to conclude that the whole dispute should be determined in one forum, the arbitration tribunal.

    The hypothesis upon which both these grounds proceed is that the Defendant has not satisfied the Court that the present proceedings fall within the arbitration clause in the 1999 Share Sale Agreements but that there is some other good reason why the issues in these proceedings should be arbitrated.

29. I am far from convinced that in ***Al-Naimi*** at page 525 Waller LJ is identifying two strands of the inherent jurisdiction. It seems to me that the citation of the judgment at first instance and the discussion in the first column is dealing with the situation under a section 9 application where there is a dispute as to whether or not there is an arbitration agreement. However, whether it is a question of section 9 or of the inherent jurisdiction, Wailer LJ does say that the Court would normally only leave the issue as to whether or not there is an arbitration agreement to the arbitrators if the Court were "virtually certain" that there was such an agreement. Whilst I accept the submission of Counsel for the Defendant that Waller LJ is not setting down some prescription that the Court must be virtually certain, it would require the case to be an exceptional one before the Court would leave that issue to the arbitrator if the Court was uncertain on the material before it whether or not there was an arbitration agreement.

30. In my judgment, the present case is in no sense exceptional. On the hypothesis that the Defendant had not satisfied me that the issues in these proceedings have to be arbitrated pursuant to the arbitration clause in the 1999 Share Sale Agreements, the only basis for an application for a stay under this first strand of the inherent jurisdiction (if such it is) must be that there are arbitration clauses in the 2001 Agreements. That is not an issue on which I can be virtually certain. Indeed, Counsel for the Claimants sought to persuade me that I could be virtually certain that Amr was authorised to enter the 2001 Agreements on behalf of the Claimants so that there were no arbitration agreements applicable to the present disputes and invited me to decide this issue against the

Defendant on a summary basis. I denied that invitation and, since I have decided that the Defendant is entitled to a stay under section 9 and any issue as to authority will thus be decided in the arbitration, it would not be appropriate for me to express any views in relation to whether or not the 2001 Agreements were authorised. All that it is necessary for me to say is that on the material before me, I am not "virtually certain" that the Claimants are bound by arbitration agreements in the 2001 Agreements, so that the first strand of the Defendant's application for a stay under the inherent jurisdiction fails.

31. In relation to the second strand of its alternative application, the Defendant contended that in the light of the CPR and the fact that the power to grant a stay given by section 49(3) of the Supreme Court Act 1981 is untrammelled, the Court should adopt a broad "*good case management*" approach and should conclude that if there is an arbitration on foot, all disputes including that as to authority should be determined in one forum, the arbitration. Reliance was placed not only on ***Al-Naimi*** but on the notes to section 49(3) in the Civil Procedure and on a recent decision of Lloyd J in ***T&N-v-Royal Sun Alliance*** [2002] EWHC 2420 (Ch).

32. Whilst I accept that the Court has wide case management powers and a wide discretion as to whether to grant a stay, I was unconvinced by these submissions. Specifically, this does not seem to me to be one of those cases envisaged by Waller LJ in ***Al-Naimi*** where, having explored the details necessary to found jurisdiction, (here whether Amr had authority to enter the 2001 Agreements and hence whether the arbitration clauses in those Agreements were binding on the Claimants) it would only be a short step to the arbitrators deciding the real issues. If I were against the Defendant on the section 9 application I would be minded to conclude that the issues in the present proceedings should be decided by this Court. However, the point is an academic one since I have concluded that the Defendant is entitled to a stay under section 9 of the Arbitration Act 1996.

Nicholas Stadlen Q.C. and Charles Graham Q.C. (instructed by Withers LLP) for the Claimants
Ian Mill Q.C. and Andrew Green (instructed by Denton Wilde Sapte) for the Defendant