

JERSEY / JUDGMENT

Representation of Shinhan Securities Company Limited

[2022] JRC 293 (30 December 2022)

[2022] JRC 293

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the deputy bailiff:

Background

1. Shinhan Securities Co Ltd (formerly Shinhan Investment Corp prior to its change of name registered on 12 October 2022) ("Shinhan") is a company incorporated in Seoul, South Korea in 1973. On 8 April 2022, it issued a Representation in this Court in respect of its investment in the KS Asia Absolute Return Fund IC ("the Fund"). The Fund is an open-ended investment fund incorporated in Jersey on 8 September 2010. 2. The Fund has two directors, Mr Shin Kiyong ("Mr Shin") and Mr Jeongwoo Lee. Mr Shin is responsible for day to day management of the Fund. The Fund has appointed an investment manager Gen 2 Partners Asset Management Limited, a Cayman company ("the Investment Manager") to manage and invest the assets of the Fund on a discretionary basis. Mr Shin is the chief executive officer and shareholder of the Investment Manager. 3. The investment advisor to the Fund is Gen 2 Partners Limited, a Hong Kong company ("the Investment Advisor"). The Investment Advisor is appointed to provide investment recommendations to the Investment Manager. Mr Shin is also the chief executive officer and shareholder of the Investment Advisor. 4. The Fund was suspended by its directors by declaration made on 10 July 2020. The period of suspension was extended by the directors on 2 July 2021 until 2 July 2022 and thereafter for an indefinite period. 5. Following the suspension and the extension of the suspension, Shinhan has made various requests for, inter alia, the suspension to be lifted and has raised various concerns in relation to the management of the Fund. Shinhan said that its request for the suspension to be lifted was supported by some of the persons convened, including the holders of 99% of the total number of shares of the Fund in issue. Shinhan is the majority shareholder in the Fund holding approximately 61% of the shares, although it is said on behalf of the Fund that Shinhan's shares only represent 30.7% of the net asset value. 6. Advocate MacDonald said on behalf of his clients that they own 9.32% of the Fund by overall net asset value in 2020 and opposed the Fund being wound up and assessed the value

of their shareholding as being worth approximately US\$70 million. Advocate MacDonald said that his clients were the only shareholders to actively participate in the proceedings which is correct in terms of participation at the hearing before us. Advocate MacDonald's clients argued that the Court should give effect to the application for the stay to these proceedings sought by the Fund, although accepted that Mr Shin was very closely connected with the ultimate beneficial owner of one of the two clients whom he represented. 7. By reason of the Fund's failure and / or refusal to lift the suspension, Shinhan seeks an order from this Court pursuant to Article 155 of the Companies (Jersey) Law 1991 ("the Companies Law") that the Fund be wound up on the just and equitable basis on the footing that there is, inter alia , a loss of confidence in the probity and impartiality of the management of the Fund and / or a loss of substratum of the Fund. 8. On 1 September 2022 we concluded a two day hearing pursuant to which the Fund sought an order pursuant to Rule 6/7 of the Royal Court Rules 2004 that the proceedings begun by Shinhan be stayed pursuant to Article 5 of the Arbitration (Jersey) Law 1998 ("the Arbitration Law"). The grounds of the Fund's application are in summary that both Shinhan and the Fund were parties to various Arbitration Agreements contained in Subscription Agreements made between Shinhan and the Fund when Shinhan subscribed for shares in the Fund. 9. In particular, reliance was placed on the clause common to the twenty-two Subscription Agreements by which shares in the Fund were subscribed for by Shinhan between 3 April 2019 and 8 August 2019. The Arbitration Agreement 10. The relevant clause containing the "Arbitration Agreement" provided as follows: "The Subscriber agrees that this Subscription Agreement is governed by the laws of Jersey. The Subscriber agrees that if any dispute, controversy, difference or claim between the Subscriber and the Fund arising out of or relating to this Subscription Agreement and the PPM, including but not limited to any dispute as to the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding any equitable, tortious or other non-contractual obligations arising out of or relating to them (a "Dispute"), the parties shall first attempt to resolve the Dispute by discussions and consultations in good faith for a period of 30 days after written notice has been provided to a party (the "Consultation Period"). If the Dispute remains unresolved upon expiration of the Consultation Period, any Dispute shall be referred to mediation at the Hong Kong International Arbitration Centre (the "HKIAC") in accordance with the then current HKIAC Mediation Rules upon a party delivering a written request for mediation referring the Dispute to mediation. In the event that any Dispute remains unresolved within 90 days of the delivery of the written request for mediation, any Dispute shall be referred to and finally resolved by arbitration under the UNCITRAL Arbitration Rules in force at the date of this Subscription Agreement and as may be amended by the rest of this clause. The arbitration shall be administered by the HKIAC in accordance with the HKIAC Procedures for the Administration of International Arbitration in force at the date of this Subscription Agreement. The law of this Arbitration Agreement shall be Hong Kong law. The place of arbitration shall be Hong Kong. There shall be one arbitrator. The appointing authority shall be the HKIAC. The arbitration shall be conducted in English". 11. The Fund stated that the Arbitration Agreement, as quoted above, involved a three-stage process. The Fund argued

that Shinhan had already committed itself to the first two stages of the process. First, on 19 March 2021, Shinhan sent to the Fund a Notice of Dispute. The parties thereafter attempted to resolve the disputes between them by consultation between March and April 2021. Having failed to do so, Shinhan then filed a request for mediation on 19 May 2021 pursuant to the Hong Kong International Arbitration Centre ("HKIAC") Mediation Rules. The mediation subsequently failed. 12. In accordance with the Arbitration Agreement, in such circumstances any dispute 'shall be referred to and finally resolved by arbitration' - with the law and seat of the arbitration being Hong Kong with a single arbitrator with the appointing authority being the HKIAC. 13. The Fund's case, in short, is that arbitration is now compulsory pursuant to the Arbitration Agreement freely entered into by Shinhan and that these proceedings need to be stayed pending conclusion of the arbitration. 14. It is not disputed that the United Kingdom and the People's Republic of China are both contracting parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, which was extended to Jersey in 2002 and that any arbitral award rendered pursuant to the Arbitration Agreement would be prima facie binding and enforceable in Jersey pursuant to Article 42 of the Arbitration Law. 15. By way of background, the Fund justified the suspension on the footing that there had been a decline in market conditions as a result of the public health crisis caused by Covid 19 and the initial period of suspension was for twelve months. Thereafter the period of suspension was extended for twelve months until 1 July 2022 and thereafter for an indefinite period. Various complaints are made about the conduct of the managers to the Fund including amendment of the Subscription Agreements without reference to the shareholders, amending the Fund's Articles of Association without reference to the shareholders, refusing to comply with resolutions at an EGM convened by Shinhan, failure to explain various irregularities in its audited statements and failure to provide audited financial statements since 2020. We recite these allegations but of course make no finding in relation to them. Some, if not all, of these complaints are denied and whether or not they are merited is not relevant for the purposes of consideration of the application made by the Fund save to the extent, if this is something we are entitled to take into account, that Shinhan's case is that the Fund's application is not made in good faith in the sense that it is a tactic merely designed to prevent this Court from determining Shinhan's application to wind up the Fund. 16. Further, by way of background, on 28 April 2022 the Fund delivered eighteen Notices of Arbitration to the HKIAC which said that the disputes between the parties should be referred to arbitration including claims for declarations pertaining to the suspension and management of the Fund, and a declaration that the winding up proceedings brought by Shinhan are in breach of the Arbitration Agreement. It was the notices of arbitration to the HKIAC which foreshadowed the Fund's application to stay these proceedings under Article 5 of the Arbitration Law. 17. On 13 June 2022, Shinhan delivered a response to the Fund's Notices of Arbitration in which it denied that the arbitral tribunal had the jurisdiction to adjudicate the majority of the disputes referred to it. 18. Having set out the relevant provisions of the Subscription Agreement, in particular the Arbitration Agreement, we now turn to the relevant legal principles as we find them to be, the respective contentions of the

parties and thereafter our decision having applied the law to those contentions. The relevant legal principles 19. The Court's power to wind up a Jersey company on the just and equitable basis is contained in Article 155 of the Companies Law which provides, so far as relevant: "155. Power for court to wind up () A company, not being a company in respect of which a declaration has been made (and not recalled) under the Désastre Law, may be wound up by the court if the court is of the opinion that - (a) it is just and equitable to do so; or (b) it is expedient in the public interest to do so." 20. The ' Court ' for the purposes of Article 155 is the Royal Court. The Court has a discretion and the principles upon which the Court acts are well understood from the relevant Jersey case law (see Financial Technology Ventures II (Q), LP & Others v ETFS Capital Limited and Graham Tuckwell

[2021] JCA 176). 21. Article 5 of the Arbitration Law provides: "Mandatory stay of court proceedings where party proves Arbitration Agreement If any party to an Arbitration Agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time before the expiration of a period of 3 weeks from the date on which the action was placed on the pending list or en preuve apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings." 22. As to Article 5 of the Arbitration Law, there was no suggestion that the Arbitration Agreement was null and void, inoperative or incapable of being performed (save that, as addressed below, it was Shinhan's case that the issues raised in the Representation were not arbitrable as a matter of Jersey law) or that there was no dispute between the parties. It was accepted that there was no need for there to be a live arbitration for Article 5 to have effect although the Fund had, as noted in paragraph 16 above, commenced arbitration proceedings. 23. In this case, the Subscription Agreement was governed by the laws of Jersey, but the Arbitration Agreement was governed by the laws of Hong Kong. For that reason we heard expert evidence from two Hong Kong lawyers which we will summarise, so far as is relevant, below. 24. The first case we were referred to was Global Gold Consolidated Resources Limited and Another v Consolidated Resources Armenia

[2015] (1) JLR 309 (" Global Gold") , a decision of the Jersey Court of Appeal and accordingly prima facie binding upon us. 25. The respondent brought proceedings in the Royal Court seeking the repayment of monies and relief for unfair prejudice. The respondent and the third appellant had entered into a joint venture agreement for the purpose of gold mining in Armenia pursuant to which the first appellant was incorporated in Jersey. The joint venture agreement was expressly governed by and construed in accordance with the laws of the State of New York and contained an arbitration clause with the arbitration to be conducted in New York. A subsequent shareholders' agreement was expressed to be governed by the laws of New York and said to constitute the entire agreement between the

parties and supersede all prior agreements with the exception of the joint venture agreement and other ancillary documents. The relations between the parties broke down and proceedings were brought before the Royal Court seeking unfair prejudice relief under Articles 141 and 143 of the Companies Law, making allegations of failing to comply with the joint venture agreement. An alternative claim (which is often the case in unfair prejudice claims) for the just and equitable winding up of the company under Article 155 of the Companies Law was also made on the grounds of deadlock between shareholders and breakdown in trust and confidence between the parties. The second and third appellants applied to the Royal Court for a stay of the proceedings under Article 5 of the Arbitration Law. The Royal Court refused to grant a stay and the appellants appealed to the Court of Appeal. The appeal was allowed. 26. The Court of Appeal said that there were three issues under the title 'Issue 1 - is there a relevant Arbitration Agreement?'. The Court said as follows: "55. In the present case it is accepted on behalf of Consolidated that Consolidated is party to an Arbitration Agreement contained in the JVA and also to one contained in the Supplemental Letter. Nevertheless there are three questions. First, do these agreements, or does any other Arbitration Agreement, by its terms apply to the disputes now being sought to be raised by Consolidated in these proceedings? Second, who are the parties to any agreements, if there are any, which so apply? Third, are the disputes which any such agreements require to be referred to arbitration capable of being properly referred? The mandatory stay provisions in Article 5 of the Arbitration Law would not apply if the Arbitration Agreement were "null and void, inoperative or incapable of being performed"; but no-one is alleging that that is so."

65. The proper approach to the construction of arbitration clauses in commercial documents was considered by the House of Lords in *Fili Shipping Co Ltd v Premium Nafta Products Ltd*

[2007] Bus LR 1719 . At paragraph 13 of his speech Lord Hoffman said:- "In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational business men, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."

79. The pleaded particulars of the claim for a just and equitable winding up of the Company which have been added to the Order of Justice by amendment repeat all the allegations in section 22. Consolidated also pleaded particulars of deadlock and further particulars of the breakdown of trust and confidence between the parties which are alleged to be such that the future operation of the joint venture is impossible as the affairs of the Company cannot be managed other than by consensus between Consolidated, Global Gold and officers thereof.

81. Advocate Kistler submitted that the substance of the dispute is the deadlock between the parties caused by the Second and Third Defendants' conduct of the Company's affairs in breach of the Shareholders Agreement and in breach of Jersey Companies law. Those Defendants' conduct thwarted the public listing of the shares in the Company which was a fundamental objective of the JVA and is a matter for which no provision was made in the JVA; it only allowed for termination of the agreement in accordance with specific events set out in section 9. Those Defendants also thwarted a private sale of shares in the Company but that was a matter which was never envisaged in the JVA. Thus, he submitted, the dispute does not arise from the JVA and hence does not fall within the scope of the Arbitration Agreement.
82. We cannot accept Advocate Kistler's analysis of the substance of the dispute. The complaint concerns various disputes in relation to the development of the joint venture contemplated by and constituted pursuant to the JVA; these disputes concern the deadlock that has arisen and the allegations of a breakdown of trust and confidence between the parties. The allegation that there is no prospect of the parties working together in furtherance of the joint venture is plainly a dispute that arises from or relates to the agreement under which the parties agreed to be bound together in the joint venture namely from the JVA. ...
84. Consolidated initially raised a further objection to the reference to arbitration of the claims for unfair prejudice and just and equitable winding-up. It claimed that the relief sought is only available under the Companies Law and cannot be awarded by an arbitrator. The Royal Court, it submitted, erred by holding that the claims were capable of arbitration. However, in his oral submissions, Advocate Kistler conceded (correctly, in our view) that the complaints that underpin the claims for unfair prejudice relief and for winding-up on just and equitable grounds are in themselves capable of arbitration." The Court then went on to consider the leading English case of *Fulham FC v Richards* [2012] Ch 333 ("*Fulham*"), an unfair prejudice claim, in which it was alleged that the first respondent, the chairman of the second respondent which was the Football Association had both acted to the detriment of the applicant. The relief sought did not seek the winding up of the second respondent. The respondents sought a stay of legal proceedings pending arbitration under the Football Association's rules. The High Court granted the stay and the appeal was dismissed on the footing that the parties were free to choose how their disputes should be resolved and it was not necessary in a public interest to hold that such disputes could not be resolved pursuant to the arbitration agreement. The Court of Appeal continued: "86. The application in *Fulham* was brought under the Arbitration Act 1996, section 1 of which includes the general principle that "parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest". The Jersey Arbitration Law does not contain an equivalent provision and makes no mention of the "public interest". However the definition of an "Arbitration Agreement" for the purposes of Article 5 "means an agreement in writing ...to submit to arbitration present or future differences capable of settlement by arbitration" (see article 1(2)). The Law does not define which disputes are not capable of settlement by arbitration but they would, in our view, include those which by

reason of public policy are reserved to the courts, such as a claim for a fine or a term of imprisonment or any claim where third party rights were engaged which could not be protected by the arbitrator. An example of the latter would be an application for the winding-up of an insolvent company where third party creditors would not be fully repaid. No one has suggested that the Company in the present matter is insolvent; we have assumed it is not and that any debts and obligations to third parties would be honoured in full if the Company were to be liquidated. [emphasis added]

87. When interpreting the parties' intentions an over-riding principle is, as the Royal Court said, the Jersey law maxim that "La convention fait la loi des parties". In the context of the Arbitration Agreement in the JVA, the effect of the maxim is the same as the general principle in section 1 of the 1996 Act (quoted above). The parties to any agreement are free to agree how their disputes are to be resolved. There is no reason for the courts to interfere unless the public interest requires them to do so. If they did otherwise the courts would not be giving effect to the New York Convention, to which Jersey is a signatory, and that would defeat the objective of the Arbitration Law. [emphasis added]
88. Jersey is a signatory to the New York Convention, which we consider in more detail below. The recital to the Law advises that one of the objectives of the Arbitration Law is to give effect to the Convention, the terms of which are incorporated in Schedule 3 to the Law. The Convention requires contracting states to recognize an Arbitration Agreement where the subject matter is capable of settlement by arbitration. The subject matter of the present dispute, the substance of it, is the allegation by Consolidated that Global Gold, through its officers, is seeking to operate the joint venture in a manner that is prejudicial to Consolidated such that all trust and confidence between them has been dissipated and the consensus required to reach decisions cannot be obtained. It is a private dispute; no third party rights are affected. We are led to believe that the Company is solvent so if it is to be wound-up all third party liabilities will be met. It is only if it is solvent that Consolidated has any interest in its winding up. 89. There are many good reasons why the shareholders in a company may agree to refer future or present disagreements to arbitration. They may wish to maintain confidentiality to preserve commercial secrets, or to avoid tarnishing the public reputation of the company perhaps to protect the price of the company's shares on a stock exchange. They may wish to have a method of achieving a speedier resolution than would be achievable through the courts. There is no public interest in denying parties the opportunity to do so unless there are third parties rights that cannot be protected in the arbitration. The duty of the courts is to hold the parties to the agreement they have reached. [emphasis added]
90. In *Fulham*, the English Court of Appeal addressed the question of whether the party seeking relief under the Companies Act would be deprived of an inalienable statutory right to apply to the courts for relief. In doing so it considered and overruled the decision in *Exeter City Association Football Club Limited v Football Conference Limited*

[2004] 4 All ER 1179. Fulham is not binding on us but we accept the rationale of the decision as the Royal Court also correctly did. We respectfully concur with paragraph 83 of the judgment of Patten LJ in Fulham :- "[83] It is therefore open to us to decide whether the provisions of s 994 are to be construed as restricting the resolution of unfair prejudice disputes to the exclusive jurisdiction of the court free of any binding authority. I have already set out my own reasons for preferring the view that disputes of this kind which did not involve the making of any winding-up order are capable of being arbitrated. Although not necessary for the resolution of this appeal, I also take the view as Austin J did in the ACD Tridon case that the same probably goes for a similar dispute which is used to ground a petition under s 122(1)(g) to wind up the company on just and equitable grounds. In those cases the Arbitration Agreement would operate as an agreement not to present a winding-up petition unless and until the underlying dispute had been determined in the arbitration. The agreement could not arrogate to the arbitrator the question of whether a winding-up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding-up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding-up proceedings would be justified that a shareholder would then be entitled to present a petition under s 122(1)(g). In these circumstances the court could be invited to lift any stay imposed on proceedings imposed under s 9(4). In much the same way, it would, I think, be open to an arbitrator who considered that the proper solution to a dispute between a shareholder and the company was to give directions for the conduct of the company's affairs to authorise the shareholder to seek such relief from the court under s 994. But such cases are likely to be rare in practice. If the relief sought is of a kind which may affect other members who are not parties to the existing reference, I can see no reason in principle why their views could not be canvassed by the arbitrators before deciding whether to make an award in those terms. Opposition to the grant of such relief by those persons may be decisive. Similarly if the order sought is one which cannot take effect without the consent of third parties then the arbitrators' hands will be tied." 91. We conclude that there is no reason of public policy for holding that either an unfair prejudice claim or a claim for a just and equitable winding-up are incapable of arbitration . A reference to arbitration in New York under section 9.12 of the JVA would not deny Consolidated the right to apply to the Royal Court for the relief available under the Companies Law either in respect of unfair prejudice or for a winding-up on just and equitable grounds. If the arbitrator, under New York law is unable to make such an award, he can make an order to the effect of requiring the parties to apply to Jersey courts to obtain whatever relief he has found to be appropriate." [our emphasis] 27. The second issue that was considered by the Court of Appeal was entitled ' Should there be a stay of the proceedings? '. The Court of Appeal noted that Article 5 of the Arbitration Law was headed ' Mandatory stay of Court proceedings where a party proves Arbitration Agreement' and set out the terms of Article 5. At paragraph 97 the Court of Appeal said:

"97. In principle, it is clear by Article 5 of the Arbitration Law the Royal Court had no choice but to order a stay of Consolidated's proceedings, so far as the proceedings include claims agreed to be referred to arbitration. The stay has been duly applied for. There is no suggestion that any Arbitration Agreement in the present case is "null and void, inoperative or incapable of being performed", or that there is in truth no "dispute.... with regard to the matter agreed to be referred." 28. After a lengthy review of the authorities, including the English case law, the Court concluded that there should be a stay of the proceedings notwithstanding allegations of fraud. Accordingly, the claims against the company, including the claims for unfair prejudice relief and winding up, were stayed pursuant to Article 5 of the Arbitration Law. All other claims were stayed under the Court's inherent jurisdiction. 29. Shinhan argue that Global Gold is distinguishable from the facts of this case as the claim for just and equitable winding up of the company was an alternative remedy to the main claims sought by the applicants in that case which were for payment of monies, a claim for an account, and relief for unfair prejudice. Such claims were, in principle, capable of being resolved by way of arbitration. Such remedies only affect the parties and not third parties, and do not involve the Royal Court deciding whether or not to wind up a company. We did not find these arguments convincing and will return to it again in due course. 30. In any event, the decision of the English Court of Appeal in Fulham referred to at paragraph 90 of the Global Gold judgment also expresses the clear view that a petition to wind up a company on just and equitable grounds is amenable to arbitration, although of course the arbitration agreement could not 'arrogate to the arbitrator the question of whether a winding up order should be made. That would remain a matter for the Court in any subsequent proceedings'. But as the English Court of Appeal said, the arbitrator could legitimately decide whether or not the complaint of unfair prejudice, i.e. the grounds for that relief, was made out and whether it would be appropriate to wind up the company. Only if the arbitrator concluded that winding up proceedings were justified would a shareholder thereafter be entitled to present a petition seeking such relief to the Court with jurisdiction to make that order. In reality, as Shinhan conceded in the course of argument, it needed to persuade this Court that the Court of Appeal's decision in Global Gold was wrong and should not be followed by this Court. 31. The English Court of Appeal in Fulham suggested that in the case of a winding up of an insolvent company at the behest of the creditors the Court may not give effect to an arbitration agreement owing to the existence of the bankruptcy regime designed to establish priority as between creditors (see paragraphs 51, 52 and 53 of the judgment). However, the Court held that the power to wind up a company on the just and equitable basis at the behest of the shareholder is 'very different' (paragraph 54 of the judgment). In those circumstances, the shareholders seeking the winding up must be able to establish the company is solvent and that there will be a surplus remaining for distribution after the payment of the company's debts and the costs and expenses of liquidation. 32. As regards the solvency of the Fund in this case, the last audited accounts for the Fund showed assets net of liabilities amounted to \$757 million at 31 st December 2020 and the Court was informed by the Advocate for the Fund that draft accounts for the year ended 31 st

December 2021 showed net assets of approximately \$700 million. 33. We also note that towards the end of the judgment in *Fulham*, Longmore LJ, giving a speech which agreed with the judgment of Patten LJ said at paragraph 103: "It is well settled that the fact that an arbitrator cannot give all the remedies which a court could does not afford any reason for treating an arbitration agreement as of no effect, see *Eras Eil Actions* [1992] 1 Lloyd's Rep 570, 610. The inability to give a particular remedy is just an incident of the agreement which the parties have made as to the method by which their disputes are to be resolved. "

34. We note that the English Court of Appeal dismissed an application by the petitioner for permission to appeal in *Fulham*. 35. Shinhan argued that the position of third party creditors who were not party to the claim they brought in the Representation seeking just and equitable winding up would not be considered in any arbitration and said that shareholders representing 99.9% of the Fund's registered members complained of the Fund's failures to address their various requests particularly in relation to the suspension. The Fund argued, and we accept, that their views are not relevant for the purposes of consideration of the Court's powers under Article 5. Whether they wish to be party to arbitration proceedings themselves is a matter for those shareholders and that is a matter to which we will also return in due course. The advocate for the Fund said that such parties could commence arbitration proceedings if they wished to do so. 36. Our attention was drawn to a number of cases from other jurisdictions. *Quiksilver Glorious Sun JV Limited* was a decision of the Hong Kong Special Administrative Region High Court (HCCW364/2013) ("*Quiksilver*"). The decision was made in June 2014 and concerned an application for a stay of a claim for a just and equitable winding up pending arbitration on the footing that the matters in dispute were covered by an arbitration clause. A stay of proceedings in such circumstances, pursuant to the relevant Hong Kong legislation then in force, was discretionary not mandatory. The parties were participants in a joint venture agreement which contained an arbitration clause. In that case, it was argued that a petition by a shareholder to wind up a company is the exercise of a class right, whether the petition is brought by a creditor alleging insolvency or a shareholder seeking a just and equitable winding up (paragraph 13 of the judgment), and owing to that right the shareholder has an 'inalienable right of access to the Companies Court and the determination of a petition that a company is wound up'. It was further argued that the relevant Arbitration Ordinance did not apply to winding up petitions and that there was no residual inherent jurisdiction that justified staying the petition. The Court referred with approval to the decision of the English Court of Appeal in *Fulham*. At paragraph 17, the Hong Kong Court said: "17. It is correct that a petition issued by a creditor to wind up a company on the grounds of insolvency invokes a class right available to all creditors, which results, if the petition is successful, in a winding-up order that engages the statutory regime for the liquidation of companies for the benefit of all creditors and, if it transpires the company is solvent, its shareholders. ...

18. Commonly a winding-up petition issued on the grounds of insolvency relies on a statutory demand to prove insolvency. If it does so in order for the company to defeat the petition it must demonstrate that it has a bona fide defence on substantial grounds to the claim for the underlying debt. That determination is undertaken by the court. The petition will not be stayed to arbitration if the debt arises under an agreement which contains an arbitration clause: see the decision of Yuen J (as she then was) in *Sky Datamann (Hong Kong) Limited*.
19. The position in the case of a just and equitable petition issued by a shareholder is different. A shareholder must demonstrate a sufficient interest in the winding up. Commonly this is satisfied by the shareholder asserting that the company is solvent and that he will be entitled to a distribution following the liquidation of its assets by a liquidator, but the interest could take some other form. This question should be addressed in the petition. The two petitions before me do not do so, but it seems tolerably clear that at least at the time they were issued it was assumed that the two joint venture companies were solvent. This being the case, and it would normally be the case in shareholder disputes, the "class" interested in the Petitions is limited to the two shareholders both of whom are parties. It does not, as Mr. Barlow argued, effect persons other than the parties. There is nothing in my view in the nature of the right that Quiksilver seeks to exercise that justifies the conclusion that the right is inalienable and that the underlying dispute between the parties is not arbitrable." [Our emphasis] 37. The Court ultimately ordered that the petitions should be stayed pending the outcome of arbitration. 38. The decision in *Quiksilver* was followed and approved in the subsequent Hong Kong decision, namely *Dickson Holdings Enterprise v Moravia*
- [2019] 3 HKLRD 210 (see paragraph 32 of the judgment of Godfrey Lam J). *Fulham* was also cited with approval in the same decision. 39. The third and final Hong Kong case to which we were referred was the recent decision in *China Europe International Business School v Chengwei Evergreen Capital and Others*
- [2021] HKCFI 3513. The case was decided in November 2021. The Court was considering an application to stay a petition seeking the winding up of a company on the just and equitable ground pending arbitration, with the company contending that the substance of the disputes in the petition were within the ambit of arbitration agreements. As the winding up proceedings did not fall within the relevant provision of the arbitration ordinance, the Court was exercising its inherent jurisdiction to grant a stay of the petition presented on the just and equitable ground in favour of arbitration (paragraph 68 of the judgment) and the Court needed to identify the substance of a dispute between the parties and ask itself whether or not the dispute was covered by the arbitration agreement. The Court referred with approval to the decision of Patton LJ in *Fulham* and the Court rejected the submission made that, given the jurisdiction to grant a stay is a discretionary one, the general principles in relation to case management were relevant. The Court said: "72 . I am unable to agree with the

submissions.

- (1) The considerations for a "case management" stay are different from the considerations of a stay for arbitration. In an application for a case management stay, the plaintiff is not bound by any arbitration agreement and is entitled to bring the action as of right. The Court is asked to stay the action in favour of another forum which the plaintiff has never agreed to. It is for this reason that the Court said that it is only when there are very good reasons and compelling circumstances that a stay would be granted. (2) By contrast, in an application for stay of the petition in favour of arbitration, the petitioner is bound by the arbitration agreement, and the Court is being asked to give effect to that agreement by requiring the petitioner to refer the dispute to arbitration. (3) In my view, once it is shown by the party seeking a stay that the substance of the dispute falls within the scope of the arbitration agreement, the burden then shifts to the petitioner to satisfy the Court as to why it should be allowed to act in breach of the arbitration agreement by pursuing the dispute in Court. This accords with the principle that the Court would normally give effect to the contractual bargains between the parties, whether in a commercial dispute commenced by an action or in a shareholder dispute commenced by a petition, as elaborated in 83-84 below." 40. The judge stayed the petition pending determination of the disputes in the arbitration and made the order having received various undertakings given to the Court. 41. The next decision to which we were referred, which we found both helpful and instructive, was a decision of the Singapore Court of Appeal in *Tomolugen Holdings Limited v Silica Investors Limited*

- [2015] SGCA 57 ("*Tomolugen*"). The judgment of the Court was given by Sundaresh Menon Chief Justice. The Court of Appeal was considering appeals against the decision of the High Court judge who had dismissed applications to stay proceedings in favour of arbitration. At paragraph 2, Menon CJ said: "These appeals raise issues concerning the arbitrability of disputes over minority oppression or unfairly prejudicial conduct, as well as the proper approach to adopt when dealing with potentially overlapping court and arbitral proceedings. They draw out a tension that will mount as commercial transactions and the disputes which they spawn grow in their sophistication and complexity. This tension is one that is likely to arise whenever disputes straddle court and arbitral proceedings, with the two sets of proceedings engaging common, although not necessarily identical, issues and parties. The tension lies in the court's desire, on the one hand, to avoid the complications inherent in having to resolve a dispute across two different fora and, on the other hand, its recognition that it must conform to the statutory mandate laid down in s 6 of the IAA [International Arbitration Act] to direct that any dispute concerning a matter which is the subject of an arbitration agreement governed by the IAA is to be resolved by arbitration. Where these two considerations pull in opposite directions, the latter necessarily prevails because of the mandatory terms of s 6." 42. The case involved a claim in unfair prejudice on the part of a minority shareholder and not a claim for a just and equitable winding up of the company concerned. The judge at first instance rejected the application for a stay because he held the dispute was non-arbitrable because the claim for relief sought under the relevant companies' legislation was the kind which an arbitrable

tribunal could not grant and, further, the dispute involved parties who were not bound by the arbitration clause. It was clear from the decision of the Court of Appeal at paragraphs 48, 65 and 70 that the Singaporean Courts take a different approach to the English Courts when considering an application for a stay under the relevant legislation in both jurisdictions in that in Singapore the Court needed only to be prima facie satisfied that the requirements for the grant of a stay under the relevant statute had been met before ordering a stay. Nonetheless the Singaporean Court of Appeal's observations in relation to arbitrability we found very useful: "Whether a dispute over minority oppression or unfairly prejudicial conduct is arbitrable. The concept of arbitrability 71 We turn now to the question of arbitrability. The absence of arbitrability has come to be associated with that class of disputes which are thought to be incapable of settlement by arbitration. The concept of arbitrability has a reasonably solid core. It covers matters which "so pervasively involve 'public' rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve ... disputes [over such matters] by 'private' arbitration should not be given effect": Gary Born at p

945. However, the outer limits of its sphere of application are less clear. Lord Mustill and Stewart Boyd QC, for instance, suggest that "[i]t would be wrong ... to draw ... any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration": Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1999) at pp 149-150. ... 73 This leads us to the relevance of arbitrability at the initial stage of an arbitration. Section 6(2) of the IAA, which sets out the circumstances in which the court may refuse a stay of court proceedings in favour of arbitration, does not include the non-arbitrability of the subject matter of the dispute as one of the grounds for refusing a stay. Instead, s 6(2) states that a stay may only be refused if the arbitration agreement in question is "null and void", "inoperative" or "incapable of being performed". The exclusion of non-arbitrability in express terms might seem to give rise to an "apparent inconsistency" (see Holtzmann & Neuhaus at p 303). But, as noted in the same work, this has "little, if any, effect" in practice for two reasons: first, Art 1(5) of the Model Law preserves the force of the State's laws on arbitrability; and second, "the term 'null and void' would 'normally' include considerations of arbitrability" (see Holtzmann & Neuhaus at p 304). We accept that a dispute concerning a non-arbitrable subject matter would fall within one or more of the three exceptions in s 6(2) of the IAA that permit a court to refuse a stay of court proceedings in favour of arbitration. The English Court of Appeal expressed a tentative preference for fitting a non- arbitrable dispute within the "inoperative" limb of s 9(4) of the UK Arbitration Act in *Fulham Football Club (1987) Ltd v Richards* and another

[2012] Ch 333 ("Fulham FC v Richards") at [35]-[36]. In our judgment, an arbitration agreement would be either "inoperative" or "incapable of being performed" in relation to a dispute which involves a subject matter that is not arbitrable. The real issue then is as to the proper ambit of arbitrability . [Our emphasis] 75 The concept of arbitrability finds legislative expression in s 11 of the IAA, which reads as follows: Public policy and arbitrability 11 .-

- (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so.
- (2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration. [emphasis added by Singapore Court] It is evident from this that the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration . Beyond this, the scope and extent of the concept of arbitrability has been left undefined, as a consequence of which, it falls to the courts to trace its proper contours (see the 1993 Report on Review of Arbitration Laws at paras 26-28; *Larsen Oil v Petroprod* at [24]). [Our emphasis] 76 In our judgment, the effect of s 11 of the IAA is that there will ordinarily be a presumption of arbitrability so long as a dispute falls within the scope of an arbitration clause. This presumption may be rebutted by showing that (*Larsen Oil v Petroprod* at [44]):
 - (a) Parliament intended to preclude a particular type of dispute from being arbitrated (as evidenced by either the text or the legislative history of the statute in question); or (b) it would be contrary to the public policy considerations involved in that type of dispute to permit it to be resolved by arbitration." The Court then considered the position of claims involving insolvent companies: "78 Another area widely regarded as non-arbitrable is the liquidation of an insolvent company by the court. In *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft*

[1999] 1 SLR(R) 382, we observed in passing (at [23]) that a winding-up order was a relief which was not available in arbitration, and that "[o]nly the court could grant such relief. 83 In our judgment, a dispute over the liquidation of an insolvent company is non- arbitrable because such a liquidation is a process in which the greater public beyond the parties to the dispute have an interest. A creditor's winding-up petition seeks "an order to put a company into an insolvent liquidation that will affect the interests of all creditors as well as of all members": *Gamlestaden Fastigheter AB v Baltic Partners Ltd* and others

[2007] Bus LR 1521 at [32] per Lord Scott of Foscote.... [Our emphasis] 84 In our judgment, a claim for relief under s 216 of the Companies Act stands on a different footing from the liquidation of an insolvent company or avoidance claims that arise upon insolvency because the former generally does not engage the public policy considerations involved in the latter two situations. There is certainly nothing in the text of s 216 to suggest an

express or implied preclusion of arbitration. Nor does the legislative history and statutory purpose of the provision suggest that a dispute over minority oppression or unfair prejudice is of a nature which makes it contrary to public policy for the dispute to be adjudicated by an arbitral tribunal." 43. The Court went on to consider Singaporean and English sources of law, including English case law: "88 This extract from Lord Hoffmann's judgment in *O'Neill v Phillips* makes it plain that the essence of a claim for relief on the ground of oppressive or unfairly prejudicial conduct lies in upholding the commercial agreement between the shareholders of a company. This is irrespective of whether the agreement is found in the formal constitutional documents of the company, in less formal shareholders' agreements or, in the case of quasi-partnerships, in the legitimate expectations of the shareholders. Section 216 of the Companies Act was not introduced to protect or further any public interest. An application for relief under s 216 of the Companies Act almost always arises in the context of a solvent company. The role of this section was, and still remains, that of remedying differences which sometimes inevitably arise as a consequence of persons associating for an economic purpose through the corporate form of a company. Section 216 is concerned with protecting the commercial expectations of the parties to such an association. It seems to us that if those persons choose to have their differences resolved by an arbitral tribunal, they should be entitled to do so. There is, in general, no public element in disputes of this nature which mandate the conclusion that it would be contrary to public policy for them to be determined by an arbitral tribunal rather than by a court." 44. Although the Court is referring in the extract above to unfair prejudice claims, in our view similar principles apply to disputes giving rise to a claim that a company should be wound up on the just and equitable basis. 45. The Court went on to cite with approval the decision of Court of Appeal in *Fulham* and authorities to similar effect in New South Wales, Victoria, the British Virgin Islands and British Columbia. The Court of Appeal then went on to consider the judge's reasons for his findings of non-arbitrability: "95 This brings us to the Judge's reasons for concluding that a claim for relief under s 216 of the Companies Act was non-arbitrable. There were principally two concerns on the part of the Judge: remedial inadequacy and procedural complexity. We address each of them in turn below. Remedial inadequacy With regard to remedial inadequacy, the Judge noted that an arbitral tribunal would not have available to it the full arsenal of remedies which the court was vested with under s 216(2) of the Companies Act. For instance, an arbitral tribunal would not have the power to make awards in rem in the sense of awards which were binding on third parties or the world at large. In particular, it was common ground that an arbitral tribunal would not have the power to order the winding up of a company: the HC Judgment at [100] and [110]. The Judge thought that since the nature of the oppressive or unfairly prejudicial conduct complained of in a claim under s 216 was "inextricably" connected to the relief that might be awarded, "the arbitrability of the remedy sought could affect the arbitrability of the claim": the HC Judgment at [120]. We hear in this echoes of the reasoning of the court in *Cybernaut* (see [81] above). [Our emphasis] 97 We recognise the force of these concerns. But, with respect, we are unable to agree that jurisdictional limitations on an arbitral

tribunal's ability to grant relief are relevant to the question of arbitrability . We would point out preliminarily that the IAA confers wide remedial powers on arbitral tribunals (and the Judge acknowledged as much at [111] of the HC Judgment). Section 12(5)(a) of the IAA stipulates that an arbitral tribunal "may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court". The jurisdictional limitations on the type of relief which an arbitral tribunal can grant may also be overcome if provided for by the express agreement of the parties. There are, of course, boundaries to an arbitral tribunal's power to grant relief even if the parties agree to it; these include public policy considerations and situations which engage the rights of third parties who are not bound by the arbitration agreement in question. [Our emphasis] 98 But, even if such jurisdictional limitations cannot be overcome, in our judgment, the Judge elided the jurisdictional limitations on an arbitral tribunal's power to grant certain types of relief with the separate question of whether the subject matter of the dispute in question is arbitrable. The fact that the relief sought might be beyond the power of the tribunal to grant does not in and of itself make the subject matter of the dispute non-arbitrable. This point is elegantly captured in a slightly different, although nonetheless instructive, context in Lord Mustill & Stewart C Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (Butterworths, 2001) at p 73: ... [Our emphasis] 'It is of course true that an award to the effect that a disputed patent is valid cannot make the patent valid, for the grant of a monopoly right exercisable against the world is a matter for public authorities, and so is the pronouncement of decisions about whether the monopoly was properly granted, whether it still exists, and so on, which affect its enforceability against the whole world. An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no-one else has mandated him to make such a decision, and a decision which attempted to do so would be useless. But this is a question of jurisdiction, not of arbitrability, and we can see no reason why an arbitrator cannot conclude the issue of validity as between A and B if the issue is one which they have mandated him to decide' [emphasis added] 100 In the court below, the Judge developed that point and, as we mentioned at [96] above, observed (at [120] of the HC Judgment) that "the arbitrability of the remedy sought could affect the arbitrability of the claim". But, with respect, it is not clear to us why that needs to be the case. Conceptually, there is nothing to preclude the underlying dispute from being resolved by an arbitral tribunal, with the parties remaining free to apply to the court for the grant of any specific relief which might be beyond the power of the arbitral tribunal to award. In so far as any findings have been made in the arbitration in such a case, the parties would be bound by such findings and would, at least as a general rule, be prevented from re-litigating those matters before the court . The point is neatly illustrated by Patten LJ's observation in *Fulham FC v Richards* that the underlying dispute grounding a winding-up application on the "just and equitable" ground under s 122(1)(g) of the UK Insolvency Act 1986 would be arbitrable even if it might be beyond the power of the arbitral tribunal to grant some of the remedies sought. He said at [83]: ... 'The agreement could not arrogate to

the arbitrator the question of whether a winding up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy.' ... [Our emphasis] 101 Patten LJ's observation was picked up by the Hong Kong SAR High Court in *Re Quiksilver Glorious Sun JV Ltd*

[2014] 4 HKLRD 759 ("*Re Quiksilver Glorious Sun*"). In that case, Quiksilver Greater China Limited ("*Quiksilver*"), a shareholder in two joint venture companies, presented winding-up petitions on the "just and equitable" ground pursuant to s 177(1)(f) of the Hong Kong SAR's Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32). Glorious Sun Overseas Company Limited ("*Glorious Sun*") was the only other shareholder in both joint venture companies, with Quiksilver and Glorious Sun each holding 50% of the shares in these companies. The two joint venture companies had been established pursuant to a comprehensive joint venture agreement between Quiksilver and Glorious Sun which contained an arbitration clause. Glorious Sun applied for a stay of the winding-up petitions in favour of arbitration pursuant to s 20 of the Hong Kong SAR's Arbitration Ordinance (Cap 609). 103 In our judgment, the approach taken by the courts in England (see *Fulham FC v Richards*) and in Hong Kong SAR (see *Re Quiksilver Glorious Sun*) commends itself to us because it seeks to strike a balance between, on the one hand, upholding the agreement of the parties as to how their disputes are to be resolved and, on the other, recognising that there are jurisdictional limitations on the powers that are conferred on an arbitral tribunal. We accept that this has the effect of enhancing the procedural complexity of a dispute which is covered by an arbitration agreement where one or more of the reliefs sought is beyond the arbitral tribunal's powers to grant, and such complexity will be further exacerbated if, in addition, the dispute concerns other parties who are not party to the arbitration agreement in question. It is to this that we turn next; but we are satisfied that an arbitral tribunal's inability to grant certain reliefs which may be sought would not in itself render the subject matter of the dispute non-arbitrable. Procedural complexity In the court below, the Judge was uncomfortable about sending the dispute in the Suit to arbitration, only to have the parties return to the court for their remedy. The Judge thought that this would lead to procedural complexity and cause difficulties at two levels. First, there would be the difficulty of securing the attendance of witnesses and parties who were material to or would be affected by a potential arbitral award, and who might refuse to appear at one or the other of the arbitral and the court proceedings, thus giving rise to the possibility of conflicting findings between the two sets of proceedings: the HC Judgment at [133]. Second, there was the possibility that the court would disagree with the arbitral tribunal on findings of fact or on the appropriate remedy to be granted: the HC Judgment at [123]. [Our emphasis] 105 As a preliminary observation, we reiterate a point we have already alluded to, which is that as a general rule at least, the parties to an arbitration will be bound by the arbitral tribunal's findings and, to that

extent, there would not be any question of the court having to decide on such matters afresh. But, aside from this, we accept that there will be a measure of procedural complexity whenever a dispute involving some common parties and issues has to be resolved before two different fora by virtue of the fact that only part of the dispute falls within the scope of the applicable arbitration clause. The question for us is whether such procedural difficulties render the dispute non-arbitrable. We do not think it does. Of course, some, perhaps even substantial, inconvenience may be caused by such an arrangement and this would be regrettable; but inconvenience is not the threshold that justifies refusing a stay of court proceedings on the basis that the subject matter of the dispute is non-arbitrable. A similar view was expressed by the British Columbia Court of Appeal in *ABOP y Qtrade*, which concerned an application under s 15 of British Columbia's Commercial Arbitration Act (RSBC 1996, c 55) to stay a claim for relief for minority oppression. The British Columbia Court of Appeal granted the stay, and Thackray JA, who delivered the judgment of the court, said at [24] that "procedural complexity" simply "cannot form the basis of the determination of this case". We agree. To put it simply, procedural difficulties fall short of the statutory criterion for non-arbitrability, which is a finding that to enforce the obligation to arbitrate would be contrary to public policy in view of the subject matter of the dispute in question." [Our emphasis] 46. The appeal was allowed. Many of the considerations which were explored so thoroughly by the Singaporean Court of Appeal in its judgment in *Tomolugen* are germane in this case. 47. A case that followed *Tomolugen* was the decision of the Federal Court of Australia in *WDR Delaware Corporation v Hydrox Holdings*

[2016] FCA 1164 ("*Hydrox Holdings*") . The judgment was given by Foster J. Again the parties were subject to a joint venture agreement. The plaintiffs claimed that the affairs of the company had been conducted in an unfairly prejudicial manner and sought an order that the company, inter alia , be wound up on the just and equitable ground. The defendant sought an order that the proceedings be stayed for the purpose of arbitration and pursuant to Australian law it was argued that the Court must grant a stay owing to the terms of the relevant statute. It was common ground between the parties that the disputes raised by the plaintiffs were within the scope of the relevant arbitration agreement and the issue was whether some or all of the claims were arbitrable. In particular, it was submitted that an arbitrator appointed under the joint venture agreement could not make an order winding up the company. Foster J said: "124. In this section of my Reasons, I address the question of whether the "matters" which I have identified as being involved in the present proceeding are arbitrable. The issue of arbitrability goes beyond the scope of an arbitration agreement. It involves a consideration of the inherent power of a national legal system to determine what issues are capable of being resolved through arbitration. The issue goes beyond the will or the agreement of the parties. The parties cannot agree to submit to arbitration disputes that are not arbitrable." 48. The judge recited the plaintiffs' submission that the claim for winding up was not arbitrable at all and that the creation and dissolution of an artificial legal entity such as a company is a matter uniquely the

subject of governmental authority. The plaintiffs said that there was a public interest in ensuring that the procedural steps by which a company is placed into liquidation are governed by the Court's processes and are determined publicly, not in private by an arbitral tribunal. The plaintiffs suggested that the authorities referred to above, including Fulham, Tomolugen and Quiksilver, did not represent the law of Australia and were not persuasive in any event. The judge went on to review those authorities. 49. The judge concluded: "162. In my judgment, the mere fact that a winding up order is sought does not alter the characterisation of the real controversy between the parties in this proceeding as being an inter partes dispute. Of course, it is for the Court, and the Court alone, to decide whether such facts and propositions of law as may ultimately be presented at the hearing of the plaintiffs' winding up application constitute sufficient proof and persuasion entitling the plaintiffs to the declaration and winding up order which they seek. [Our emphasis]

163. For all of the above reasons, I see no difficulty in all of the matters identified at [116] above being referred to arbitration and for further steps in this proceeding to be stayed until such time as those matters have been determined by arbitration. 164. With the exception of that part of the present proceeding which involves the Court forming an opinion as to whether the plaintiffs are entitled to a winding up order, the questions of fact and law which mark out the substantive controversy between the parties in this proceeding are all matters which are capable of resolution by arbitration. Any award or awards which determine those matters will be taken into account when the Court comes to consider whether a winding up order should be made. If, at the end of the arbitral process, the award or awards do not address satisfactorily or comprehensively all of the grounds relied upon by the plaintiffs in support of their claims for relief made in the present proceeding, then it will be open to them to supplement or explain the terms of the relevant award or awards by evidence. The process by which that would be done is the everyday process of applying the law of evidence." [Our emphasis] 50. Accordingly, Foster J's view was that at the end of the arbitration some matters may not have been determined, and in those circumstances it is for the Court to pick up the baton, consider the decisions made in the arbitration and resolve any issues left outstanding. 51. The only decision of significance running contrary to the flow of cases that were drawn to our attention was the decision of the Court of Appeal of the Cayman Islands in *FamilyMart China Holding v Ting Chuan (Cayman Islands) Holding Corporation* ("FamilyMart"). The decision was delivered in April 2020 and cited as CICA (Civil) Appeal Nos 7 and 8 of 2019, and founded much of Shinhan's argument. 52. In *FamilyMart*, a Cayman company had two shareholders who agreed a shareholders' agreement containing an arbitration clause. The majority shareholder presented a winding up petition on the just and equitable basis. The judge at first instance ordered that the petition be stayed pursuant to the relevant Cayman legislation until the complaints in the petition had been arbitrated. The majority shareholder appealed and the Court of Appeal held that the appeals 'require scrutiny of the nature of the Petition and of the tension between the exclusive jurisdiction of the Court to determine whether a company should be wound up [pursuant to the provisions of Cayman law] and the contractual obligations to

arbitral disputes arising between shareholders.... ' . In paragraph 29 of the judgment, the Court observed that the basis upon which the just and equitable winding up was sought was twofold; first, that the petitioner had a justifiable lack of confidence arising from the lack of probity in the conduct of the company's affairs and, secondly, on the grounds of a breakdown in the fundamental relationship between the shareholders. 53. Under the title ' Arbitrability ' , the Cayman Court of Appeal said: "69. FMCH's primary submission was that the court has exclusive jurisdiction, under s.92 of the Law, to decide whether a company should be wound up on just and equitable grounds. The authorities on which the rival contentions focussed all start with the proposition that only the court can decide whether it is just and equitable to make a winding up order. The issue of arbitrability comes down to the question whether the underlying disputes are themselves susceptible to arbitration and should, in accordance with the SHA, be submitted to arbitration before the Court exercises its jurisdiction to decide whether it is just and equitable to make a winding up order, as Ting Chuan contend." 54. The Court went on to consider certain of the relevant authorities including the ' key authority at the heart of this dispute ' , namely Fulham (paragraph 70 - 81 of the judgment). It was noted that the relevant legislation in Cayman was different from English (and indeed Jersey) law. At paragraph 71 the Cayman Court said: "As this court has regularly emphasised, a petition on the ground of unfair prejudice is not available under Cayman Islands' Companies Law. Under Cayman Islands Law, the court can only consider reliefs as alternatives to winding up once the court has determined whether the company should be wound up on just and equitable grounds (s.92(e) the Law. In a case like Fulham, once the court had reached the conclusion that the petition under section 994 and the underlying dispute did not involve making a winding up order, there was no reason not to submit the issue to arbitration." 55. The Court went on to consider the Hong Kong authority of Quiksilver (paragraphs 88 - 91 of the judgment) and the Australian case of Hydrox Holdings (paragraph 92 of the judgment). 56. The Court also referred to a previous decision of the Cayman Courts called Tianrui (International) Holding Company v China Shanshui Cement Group [CICA 5 April 2019] which was not a case involving a stay pending arbitration. Having considered the authorities the Cayman Court made this observation at paragraph 100: "100. In Fulham and the cases which have followed it the court's quest has been to respect the parties' choice to submit the disputes within the scope of the agreement to arbitration whilst acknowledging the exclusive jurisdiction of the court to determine whether a winding up order on just and equitable grounds should be made. Patten LJ had been astute in making clear how his conclusion would not trespass on the exclusive jurisdiction of the court. He distinguished between winding up and other reliefs available on making good a petition brought on the grounds of unfair prejudice. In that way it was possible to reconcile the primacy of the arbitration agreement and the exclusive jurisdiction of the court to make a winding up order. In Fulham once unfair prejudice had been established the way was open to a number of reliefs, which did not involve the exclusive jurisdiction of the court to wind up a company, similar to the case, under the Australian Corporations Act, in ACD Triton. In neither case could it be said that submission to arbitration might trespass upon the exclusive jurisdiction of the court because resolution of

the disputes in arbitration did not require any consideration of the particular relief which did invoke the exclusive jurisdiction of the court, namely whether the company should be wound up. The identification of discrete issues for the consideration of the arbitrator, distinct from questions of relief, avoided any clash." 57. At paragraph 102, the Court accepted that the authorities maintained the exclusive jurisdiction of the Court to determine whether or not the company should be wound up. Where the petition consisted of complaints of oppression by a majority against minority shareholders, the Court said 'such issues are now well recognised as arbitrable; the courts have regarded the limitations on an arbitral tribunal's jurisdiction to grant relief as irrelevant to the question of arbitrability (see *Tomolugen...*)' . 58. The Court held that the majority shareholder (FamilyMart) had a statutory right to invoke the power of the Court to wind up the company on the grounds of misconduct of its directors and held at paragraph 109 that the cases which have followed *Fulham* 'all depended upon the Court's ability to identify discrete, substantive issues which did not invoke the exclusive jurisdiction of the Court' . The Cayman Court was concerned (at paragraph 119 et seq.) at the prospect of a two stage process with a decision by an arbitrator and then a decision by the Court taking into account the award, where different and conflicting views might be expressed. The Cayman Court thought that this would create real difficulties unless the parties had agreed to be bound by the award of the arbitrator as to the factual disputes which go to the threshold issue as to whether the company should be wound up (paragraph 120 of the judgment). This could leave the Court determining the winding up petition "in the exercise of its exclusive jurisdiction to form a fresh and, if necessary, wholly contrary view of the evidence " (paragraph 120 of the judgment). The Court noted that in *Tomolugen* , the Court took the view that such procedural difficulties did not render the subject matter of the dispute non-arbitrable. However, that did not convince the Cayman Court which expressed the view, at paragraph 122 of the judgment, that 'duplication and possible inconsistency can only be avoided where the parties have agreed that the matters which go to the question whether the company should be wound up on just and equitable grounds should be submitted to arbitration, because they have agreed not to present a petition' . 59. The Court went on to hold that a stay would only be granted in circumstances where the parties had contractually agreed that a petition would not be presented against the company, it being established that such an agreement was lawful (paragraph 124). The Court was not prepared to imply such an agreement on the facts of the case before it (paragraphs 126 - 130). 60. Finally, the Court held (paragraph 137) that as neither the directors of the company or the company itself were parties to the shareholders' agreement, then the arbitration agreement was 'inoperative' as well as the issues raised by the petition being not arbitrable. 61. The Court in *FamilyMart* did not identify any considerations of Cayman public policy which rendered the matters in dispute raised by the petition as not arbitrable. 62. We respectfully differ from the Cayman Court's opinion (*inter alia*) at paragraph 109 where it is suggested that the authorities to which we have referred above (not all of which were cited before the Cayman Court in any event) depend upon the Court being able to identify discrete, substantive issues which do not invoke or trespass on the exclusive jurisdiction of the Court and where such issues are connected to the determination

of statutory questions such as whether a company should be wound up on just and equitable grounds, difficulties arise. However, that is not the case. What we derive from the authorities above to which we have referred is that all issues should be determined by arbitration save where it will be contrary to public policy for there to be such an outcome, accepting that only a Court can (in this context) wind up a Jersey company on the just and equitable basis. There is nothing wrong in principle, assuming the terms of the arbitration clause is wide enough, for each and all disputes between the parties to be resolved by arbitration. On normal principles, one would not anticipate the matters resolved in the arbitration being relitigated, even before a Court in another jurisdiction. 63. Most of the cases referred to by Shinhan related to insolvent liquidations where a mandatory stay may not be granted because of the effect on third parties. It was argued that there was a public interest in ensuring that the Fund in this case, with its multiple investors, is properly liquidated in the same way that the Court has found that it is in the public interest for all businesses to be liquidated where the businesses were insolvent. Furthermore, it was argued that 'hiving off' the dispute between Shinhan and the Fund to arbitration is difficult when many investors are not party to the Subscription Agreements concerned, although it was accepted that all investors were party to similar subscription agreements with identical arbitration provisions. 64. In any event, in the course of argument, counsel for Shinhan accepted that it was not suggested that this was an insolvent liquidation; it was accepted that the disputes between the parties were, as a matter of fact, amenable to arbitration and that unfair prejudice claims under Article 141 and 143 were arbitrable under Jersey law, even though there are particular claims for relief under Article 143 which cannot be granted by the arbitrator. The Court noted that Article 143 gives the Court the power to regulate the company's affairs in future, to require the company to refrain from doing or continuing an act complained of, to authorise civil proceedings to be brought in the name and on behalf of the company, for example against the directors, and to provide for the purchase of the rights of any members of the company. There is no dispute that all matters giving rise to such claims are in principle arbitrable. However, it was argued on behalf of Shinhan that Article 155 relief was qualitatively different from Article 143 relief, in that Article 143 relief is about the vindication or otherwise of personal individual rights arising from the shareholder relationship, whereas Article 155 relief will lead or may lead to a winding up of the company with wider consequences including upon third parties. 65. We were also referred to a number of cases such as the Hong Kong decision of *Re Dingway Investment Limited*

[2020] HKCFI 355, where the Court considered a number of matters relevant to the question as to whether or not a case should be stayed for arbitration, such as cases where part of a dispute could be hived off and referred to arbitration and the balance of complaints stayed until the arbitration was complete. However, those were cases where the Court was exercising a discretion and it needs to be borne firmly in mind that it was the will of the States Assembly, as expressed in Article 5 of the Arbitration Law, that the Courts of Jersey should give effect to arbitration clauses. 66. As to *Global Gold*, the leading Jersey case, Shinhan argued that subsequent authorities including *FamilyMart* had post-dated this

decision, and many of the other relevant authorities cited. It was said that Global Gold was primarily an unfair prejudice action, although the judgment specifically referred to winding up on the just and equitable basis and there was a concession made (correctly in the opinion of the Court) by one of the advocates on behalf of one party that the complaints underpinning the claims for just and equitable winding up were arbitrable. It was accepted that Global Gold was not drawn to the attention of the Cayman Court in *FamilyMart*. 67. As to Shinhan's argument that third parties are affected by a winding up on the just and equitable basis, the Fund accepted that the effect on third parties was equivalent to that which pertains in the case of an insolvency. However, it remains the case that only a Court can grant such relief, so the arbitrator's award would not per se impact third party rights in the same way that a joint and equitable winding up would. Expert evidence as to Hong Kong law 68. The fact that we heard such evidence is best understood in the context of the correspondence that passed between the parties earlier this year. On 27 July 2022 Walkers, on behalf of Shinhan, said that as the Representation sought the winding up of the Fund under the Companies Law (which only the Royal Court could grant) it necessarily followed that this determination must be in accordance with Jersey law, and the power to grant or deny a stay of those proceedings in favour of arbitration belonged solely to the Jersey Court. The letter said that it was 'uncontroversial' that there was an arbitration clause in the Subscription Agreements but the question was whether the Companies Law legislation providing for the exclusive jurisdiction of the Royal Court can be excluded by an arbitration clause in respect of the relief sought in this Representation. The letter went on to say at paragraph 9 that the: "...crux of Shinhan's challenge is that the relief sought by the Fund in its Notice of Arbitration (i.e. entirely separate proceedings) falls out of the scope of the Arbitration Agreement and therefore is not subject to the jurisdiction of an arbitral tribunal. Only the arbitral tribunal can determine the scope of the Arbitration Agreement and it would do so in accordance with the provisions of the Arbitration Agreement by reference to Hong Kong law.... It has no relevance to your client's application to stay the Representation application in Jersey." 69. Mourant's reply on behalf of the Fund dated 27 July 2022 stated: "The Fund's position is a straightforward one. The Jersey Court must consider the stay application on one of two bases -

- (a) Either the Court proceeds on the basis that the disputes are or maybe subject to Arbitration Agreements, in which case expert evidence is not required. This is the basis from on which we have proceeded to date in the normal way since, prima facie, the disputes fall within the terms of the Arbitration Agreements. The Fund does not put the issue of arbitrability or the scope of Arbitration Agreements in issue;
- (b) Or the Court proceeds on the basis that the question of whether the disputes are subject to arbitration is now an issue. That is a matter of Hong Kong law on which expert evidence would be required." 70. The letter went on to ask for clarification of Shinhan's position and said that the 'simplest approach' was for Shinhan to agree that the stay application should be heard on the assumption, made for that purpose only, that all of the disputes in the

Representation are arbitrable as a matter of Hong Kong or, at least, that that was an issue within the exclusive competence of the arbitration tribunal. 71. At the directions hearing on 28 July 2022, the Court pressed counsel for Shinhan on this matter and he stated that his position was as set out in (b) in the extract from the letter quoted in paragraph 69 above, i.e. that Hong Kong expert evidence was required as the scope of the arbitration clause was in issue so far as Shinhan was concerned. 72. Shinhan then shifted its position and on 4 August 2022 Walkers wrote to Mourant and stated that although Shinhan's position still was that the grounds for a just and equitable winding up order were not arbitrable they were: "..instructed to propose that the Fund and Shinhan agree that the stay application should be heard on the assumption (made for that purpose only) that all of the issues referred to the Tribunal in the arbitration fall within the scope of the Arbitration Clause as contained in the Subscription Agreement." 73. However, Shinhan went on to say that it was not: "...accepting that the grounds for relief advanced in the Representation are arbitrable (capable of forming the subject of arbitration) or specifically for the purposes of the arbitration itself, the issues before the Tribunal fall within the scope of the Arbitration Clause." 74. In Mourant's reply of 5 August 2022, they noted: "The concession that you propose to make that the stay application should proceed on the assumption that all of the issues referred to the arbitrable tribunal fall within the scope of the Arbitration Clause as contained in the Subscription Agreement. That is helpful. However, in our view, it does not resolve the problem in its entirety since you state very clearly that Shinhan's concession does not extend to accepting that the grounds for relief advanced in the Representation are arbitrable. Whether those grounds are arbitrable is itself a Hong Kong law question, a point that the Royal Court clearly accepted at the hearing last week. If that does not form part of Shinhan's concession, expert evidence of Hong Kong law is clearly going to be required for the stay application." 75. On 16 August 2022, Walkers replied to Mourant and said: "As we have made clear during the hearing of 28 July and the 4 August letter, the grounds for relief advanced in the Representation are not arbitrable and this will be an issue for determination by the Royal Court. Any such determination will be made by the Royal Court based upon Jersey law principles and authorities. The question of whether the Arbitration Clause could be construed under Hong Kong law covering the issues in the Representation may however be a preliminary consideration given that, as the Deputy Bailiff made clear, if your client is unable to demonstrate this then the stay application must necessarily fall away. As such, we agree that Hong Kong law expert evidence will be relevant...." 76. Mourant wrote to Walkers again, noting that there was now agreement that the governing law of the Subscription Agreement as a whole was the law of Jersey, and the governing law of the Arbitration Agreement at Clause 16 was the law of Hong Kong, and expert evidence was required on whether or not the disputes in the Representation were covered by the scope of the Arbitration Agreement, noting that Walkers had said that the application for a stay should proceed on the basis of an assumption that the matters in the arbitration proceedings in Hong Kong fell within the scope of the Arbitration Agreement and were therefore arbitrable as a matter of Hong Kong law, Walkers were drawing a distinction between the disputes referred to arbitration and the disputes set out in the Representation. Mourant sought

clarification as to whether Shinhan were asserting that as a matter of Hong Kong law the matters in the Representation were not arbitrable or whether Shinhan was arguing that as a matter of Jersey law the matters were not arbitrable in the Hong Kong arbitration. 77.

Walkers replied on 23 August 2022 stating that Shinhan was prepared to proceed on the basis, for the purpose of the stay application, that as a matter of construction the issues referred to the arbitration tribunal in the arbitration proceedings, and the 'just and equitable winding up application' fell 'within the language of the Arbitration Clause'. However, Shinhan's position remained that the Representation was not arbitrable as a matter of a Jersey law and accordingly Article 5 of the Arbitration Law was not engaged. 78. On 28 August 2022, Mourant wrote to Walkers a short letter which said: "We would be grateful if your client could state clearly (i.e. yes or no) whether:

- (a) they intend to assert at the hearing of the Stay of the Application that the disputes in the Jersey Proceedings are not arbitrable as a matter of Hong Kong law; and
 - (b) the arbitrability of the Jersey Proceedings under Hong Kong is an issue that the Royal Court is required to determine." 79. Walkers replied on 30 August 2022, the day of the hearing, as follows: "2. Unfortunately, our client's position is not capable of being pigeonholed into a 'yes' or 'no' answer but in the interests of cooperation, we will try to restate our position as best as possible to bring this matter to resolution.
3. As stated in our letters dated 23 August 2022 and 26 August 2022, our client's position is that for the purpose of the stay application, the matters raised in the Jersey Proceedings are not arbitrable as a matter of Jersey law. It has never been our client's argument that the issues in the Jersey Proceedings are (or are not) arbitrable as a matter of Hong Kong law.
 4. Insofar as your client intends to assert at the stay application that the disputes in the Jersey Proceedings are arbitrable as a matter of Hong Kong law, we are instructed to oppose such argument. However, insofar as your client does not intend to raise this argument, our client certainly does not intend to assert any argument that the issues in the Jersey Proceedings are not arbitrable as a matter of Hong Kong law." 80. On 30 August 2022, Mourant wrote to Walkers stating: "We now understand your position to be that you no longer rely on the issues raised in response to the arbitration notice in Hong Kong, you no longer require us to prove Hong Kong law on any issue and, provided that we do not seek to do so, you will not take any point of Hong Kong law. On that basis, we invite you to agree that there is no issue of Hong Kong law for the Jersey court to determine and therefore that no expert evidence (save in respect of issues 8 and 9) need be admitted and accordingly no cross-examination of the experts other than on issues 8 and 9 is required." Issues 8 and 9 were the duration and cost of any arbitration in Hong Kong. 81. In Shinhan's Skeleton Argument filed for the purpose of the application, it said: "For present purposes only, Shinhan is content to proceed in respect of the construction of the Arbitration Agreement only, on the basis that the just and equitable application would in principle fall within the technical wording of the Arbitration Agreements." 82. This appeared to be a concession that the disputes between the parties, whether in Hong Kong as pleaded there or in Jersey as pleaded here, would fall

within the wording / scope of the Arbitration Agreements. However, the Skeleton Argument went on to say that as a matter of Jersey law the 'question of whether a company should be wound up on the just and equitable basis is not arbitrable and therefore the Arbitration Agreements are inoperative to that extent' . 83. So although the position that Shinhan had adopted in correspondence and at previous hearing was confusing, Shinhan's final position was that the disputes between the parties whether raised in Hong Kong or Jersey were within scope of the Arbitration Agreements but whether or not a Jersey company can be wound up on the just and equitable basis was not arbitrable and to that extent any Arbitration Agreement was inoperative. This was different from the position adopted from time to time by Shinhan in correspondence. This particular issue first arose as a consequence of what was said by Mr Kim at paragraph 6 in his second affidavit sworn on behalf of Shinhan where he denied that the disputes between the parties 'fall within the scope of the Arbitration Clause and are capable of arbitration' . He went on to refer at paragraph 16 to the fact that Shinhan's response to the Fund's Notice of Arbitration challenged the jurisdiction of the arbitral tribunal on the basis of the relief sought by the Fund and its Arbitration Notices extended beyond the scope of the Arbitration Agreement. 84. Such arguments were not pursued before us save for, as noted, the assertion made on behalf of Shinhan that the relief sought in the Representation, i.e. just and equitable winding up, could not be granted by the Hong Kong arbitration. At the hearing, Advocate Sanders on behalf of Shinhan, conceded that the factual matters pleaded in the Jersey proceedings supporting Shinhan's claim of loss of confidence, loss of substratum and so on were, for the purpose of the application, within the ambit of the Arbitration Agreement and therefore within scope of the Hong Kong arbitration, but that only the Jersey Court could determine whether or not the Fund could be wound up on the just and equitable basis. Advocate Sanders said that it was important not to conflate scope and arbitrability. Shinhan's key argument was that their just and equitable application could not be susceptible to arbitration in Hong Kong as a matter of Jersey law, as the only forum that could form a view on that issue was the Royal Court. 85. Accordingly, the extent of the expert evidence on Hong Kong law that we heard was limited. We heard from two eminent Hong Kong practitioners. Geoffrey Ma gave evidence on behalf of the Fund. He is, inter alia , former Chief Justice of the Hong Kong Court of Final Appeal (the final appellate court within the court system of Hong Kong) and previously, prior to joining the Hong Kong judiciary in 2001, practiced as a barrister. He was called to the Hong Kong Bar in 1980, appointed Queen's Counsel (now Senior Counsel) in 1993 and is editor-in-chief of ' Arbitration in Hong Kong - A Practical Guide' . As we have said, his evidence was limited to the costs and duration of arbitration proceedings in Hong Kong. Mr Ma said that although 'emergency arbitrations could be conducted within a period of something like six months', the Fund had written to its investors to the effect that the arbitration would probably take two and a half years. Mr Ma accepted that the report from the London Court of International Arbitration for the period 2013 to 2016, said that the medium amount of time for cases involving US\$100 million was about twenty-nine months. Advocate Sanders asserted in the course of cross-examination that so far as Shinhan was concerned this was a US\$100 million plus case and

accordingly a 'large arbitration' . Mr Ma accepted that the fees of the arbitration tribunal alone could be as much as approximately US\$1 million, excluding legal fees. He accepted that disputes involving large amounts generally result in a longer duration of the arbitration proceedings. 86. The second expert was Anthony Rogers, who was former vice-president of the Hong Kong Court of Appeal. He was called to the English Bar in 1969, subsequently practiced at the Hong Kong Bar and was appointed Queen's Counsel in 1984. He joined the Hong Kong judiciary in 1993 and was vice-president of the Hong Kong Court of Appeal for eleven years until his retirement in February 2011. Mr Rogers generally accepted that it is cheaper to resolve a dispute in the place that has closest connection to the dispute in terms of where the business is located. He observed that 'from what I have seen happen with large arbitrations is the longer it goes on the more expensive it gets and eventually on occasions the client throws up their hands and stops' . He accepted that the relevant Hong Kong ordinance said that the object of the same was to ' facilitate the fair and speedy resolution of disputes by arbitration without necessary expense ' . He said that this was simply ' the mantra ' . Although he had significant experience as an arbitrator, he had not been involved in the costs side and all he could say was 'All I have seen is that the costs are enormous... ' . He accepted that the opportunities to appeal an arbitration award were limited as a matter of Hong Kong law. In view of the difficulty of challenging decisions made by an arbitrator, it was put to Mr Rogers that the Court process may well be quicker and shorter. Mr Rogers laughed at this suggestion and said that his experience of arbitration is that they 'are not cheaper and shorter than Court proceedings' . He went on to say that after a 'full arbitration' he would see the parties' costs and theoretically the parties could obtain taxation of those costs. He said that never happened and that he had never heard of an arbitrator sending lawyers costs to taxation 'because he would never get another arbitration again' . He said ' It is all telephone numbers. You never really look at it. You just write it off. You just sign off on it ' . He confirmed that arbitration fees were far higher than corresponding Court fees and although there was a cap on the fees that arbitrators could charge, no arbitrator would agree to act in a case such as this unless they were being paid the maximum allowable rate. Our decision 87. In order for there to be a mandatory stay under Article 5 of the Arbitration Law the following conditions need to be met: (i) There needs to be an Arbitration Agreement. We have set out the terms of the relevant clause and it is not disputed that there is such an agreement. (ii) Secondly, one of the parties needs to have commenced legal proceedings against another. This has occurred, with Shinhan having issued legal proceedings by way of a Representation seeking a winding up of the Fund on the just and equitable basis. (iii) Thirdly, the Court needs to be satisfied that these proceedings were issued in respect of 'any matter agreed to be referred' to arbitration. That has been agreed for the purposes of this application, as set out extensively above. In the course of argument, the advocate for Shinhan said ' We have to first of all accept that for the purposes of this application we agreed that the matters that are raised...in the representation of the language would fall within the clause ' . It was by reason of this agreement between the parties that the Hong Kong expert evidence was limited to the duration and cost of any arbitration. (iv) Fourthly, we need to be satisfied that an application for a stay was brought within the prescribed time

frame. Again, this is not disputed. (v) Fifthly, the Court must grant the application unless satisfied that the Arbitration Agreement is 'null and void, inoperative or incapable of being performed'. There is no suggestion that the Arbitration Agreement is null and void, but it is suggested that it is 'inoperative' or 'incapable of being performed' in the sense that the disputes are not arbitrable owing to the fact that Shinhan seeks the just and equitable winding up of the Fund. 88. We do not set out again the authorities to which we have referred to above. The Court of Appeal in *Global Gold per Bompas JA* held that claims for winding up on the just and equitable basis are capable of arbitration. Accordingly, they are arbitrable. Further, when interpreting the parties' intentions, an overriding principle of Jersey law is that *la convention fait la loi des parties*. Parties are free to agree as to how their disputes are resolved. There is no reason for the Courts not to give effect to their agreements unless the public interest demands that they do so. To do otherwise than to give effect to Arbitration Agreements would not be giving effect to the New York Convention on the Recognition and Enforcement of foreign arbitrable awards and would defeat the objective of the Arbitration Law. We reject the arguments advanced by Shinhan as amounting to matters of public policy obliging the Court to hold that these matters are incapable of being arbitrated in accordance with the Arbitration Agreements in this case. We accept that different principles may apply in the case of a company that is insolvent, but those principles have no application in this case where the Fund is plainly solvent. The fact that an arbitrator cannot determine whether or not the Fund should be wound up on the just and equitable basis, which is a matter reserved for the Royal Court, does not mean that the underlying dispute is not arbitrable by reason of public policy. The fact that only shareholders participating in the arbitration will be directly affected by the arbitration also does not mean that the dispute is not arbitrable by reason of public policy. The fact that there will be additional costs, additional delay and possibly further proceedings in Jersey in due course again is not a reason for holding that the dispute between the parties is not arbitrable by reason of public policy. None of these matters, nor the other matters urged upon us, override the strong public policy of holding parties to their bargains and of giving effect to Arbitration Agreements in accordance with Article 5 of the Arbitration Law. 89. It was said that there were various disadvantages to arbitration. We have already considered the question of costs and delay. On the evidence we received, arbitration would cost more and take longer than Court proceedings. There will be other disadvantages too. It is possible that not all the issues that are pleaded, or to be pleaded in the proceedings in Jersey, will be dealt with in the arbitration (putting to one side the inability of the arbitrator to wind up the Jersey company). Furthermore, although the principal investors in the Fund were convened to the Jersey proceedings and entitled to be heard, it was said an arbitrator cannot simply convene other investors and that only one shareholder was party to the arbitration process at the moment. Further, it was argued that an arbitrator cannot appoint a liquidator while a Court may do so. The time taken to complete arbitration will delay the shareholders exit from the Fund and their ability to realise some or all of their investment. It was said on behalf of Shinhan that different investors might be joined into different arbitrations with different findings being made years hence, causing confusion and further delay. Having said

that, the interests of the majority of shareholders would appear to be closely aligned. These are all considerations which would be relevant if the Court had a discretion. However, a stay under Article 5 of the Arbitration Law is mandatory, subject to the statutory exceptions to which we have referred. 90. We were nonetheless anxious to assist, to the extent that we could, with a speedy and comprehensive resolution of the disputes by way of arbitration. Accordingly, the Fund agreed to give written undertakings to the Court as a condition of the Court granting a stay. Those undertakings are as follows: (i) The Fund undertook to the Court that it would consent to any other arbitrations involving other shareholders in the Fund being dealt with by the same arbitral panel, assuming the subject matters of those arbitrations were connected. (ii) The Fund undertook to proceed with the arbitration with due expedition. (iii) The Fund undertook to consent to the referral (including by way of counterclaim by Shinhan in the arbitration proceedings) of the grounds for just and equitable relief pleaded in the Representation (namely Shinhan's loss of confidence in the probity and impartiality of the management of the Fund and the loss of substratum of the Fund) to be arbitrated in the arbitration proceedings. (iv) The Fund undertook not to argue in the arbitration that the preliminary dispute resolution mechanisms contained in the Subscription Agreements in the form of a consultation period and / or mediation are applicable (or to the extent necessary when agreed that they are dispensed with) in relation to any of the disputes falling within Shinhan's Representation which are not already the subject of the existing arbitration proceedings between Shinhan and the Fund. 91. On the footing that all such undertakings have been given to the Court, as recorded in the Act of Court, the Court agrees to stay the proceedings for the purpose of arbitration in accordance with the Arbitration Agreement referred to above. 92. The Court was dealing with a mandatory stay under Article 5 of the Arbitration Law. It is not necessary or appropriate for the Court to consider what the decision would have been had the Court been considering a discretionary stay. In those circumstances, the Court would have wanted to balance the importance of upholding the maxim *la convention fait la loi des parties* against the additional costs and delay of arbitration proceedings, as evidenced by the experts. Authorities Companies (Jersey) Law 1991. Royal Court Rules 2004. Arbitration (Jersey) Law 1998. Financial Technology Ventures II (Q), LP & Others v ETFS Capital Limited and Graham Tuckwell

[2021] JCA 176 . Global Gold Consolidated Resources Limited and Another v Consolidated Resources Armenia

[2015] (1) JLR 309. Fulham FC v Richards

[2012] Ch 333 . Quiksilver Glorious Sun JV Limited - Hong Kong Special Administrative Region High Court (HCCW364/2013) Dickson Holdings Enterprise v Moravia

[2019] 3 HKLRD 210. China Europe International Business School v Chengwei Evergreen Capital and Others [2021] HKCFI 3513. Tomolugen Holdings Limited v Silica Investors Limited

[2015] SGCA 57 . WDR Delaware Corporation v Hydrox Holdings

[2016] FCA 1164 . FamilyMart China Holding v Ting Chuan (Cayman Islands) Holding Corporation CICA (Civil) Appeal Nos 7 and 8 of 2019. Tianrui (International) Holding Company v China Shanshui Cement Group [CICA 5 April 2019]. Re Dingway Investment Limited [2020] HKCFI 355 Page Last Updated: 17 Jan 2023 Back to top About JLIB Accessibility Contacts Disclaimer Feedback Privacy policy Site map © Jersey Legal Information Board 2001- This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2022/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/representation-of-shinhan-securities-company-limited-2022-jrc-293-30-december-2022>

Prepared on 22 October 2026 · Esheria