IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 210 OF 2022 (DDJ)

BETWEEN

(1) REN CI

(2) DAOYI HOLDING LIMITED

PLAINTIFFS

AND

(1) NEBULA (CAYMAN) LIMITED

(2) CHANG SHUAI

(3) WANG YANZHI

(4) ZHANG FAN

(5) HU HAO

(6) JIANG YANMENG

(7) MAN HO KEE HARRY

(8) LCA NINJA PTE LTD

(9) MATRIX PARTNERS CHINA VI HONG KONG LIMITED

(10) ALPHA STARTUP FUND LP

DEFENDANTS

Appearances:	**Mr Jalil Asif KC and Ms Ilona Groark of Kobre & Kim (Cayman) for Ren Ci and Daoyi Holding Limited (the Plaintiffs)** **Mr David Quest KC, Mr Paul Smith and Ms Caitlin Murdock of Harneys for Nebula (Cayman) Limited (the First Defendant)**
Before:	**The Hon. Justice David Doyle**
Heard:	**26 January 2023**
Draft Judgment circulated:	**9 February 2023**
Judgment Delivered:	**16 February 2023**

HEADNOTE

Determination of an application pursuant to section 4 of the Foreign Arbitral Awards Enforcement Act for a stay of legal proceedings; consideration of relevant law; consideration of scope of the foreign arbitration clauses; consideration of issues in dispute and whether they were in respect of any matter agreed to be referred to arbitration; consideration of whether there had been a step in the proceedings preventing the granting of a stay; consideration as to whether a claim for rectification of the registers of directors and members prevents the matters proceeding by way of arbitration and subsequent relief, where necessary, being granted by the courts on the basis of the arbitral determinations

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JUDGMENT

Summary

1. In this judgment I have held that the relevant matters agreed to be referred to arbitration encompass the issues arising or likely to arise in the legal proceedings presently before the court and are accordingly within the scope of the foreign arbitration clauses agreed by the relevant parties.

2. I have further held that filing an application for interlocutory injunctive relief, after it had filed an application for a stay of these legal proceedings, was not a step in the proceedings so as to prevent Nebula (Cayman) Limited (the "Company" or "D1") from obtaining a stay of these legal proceedings. I have also held that the inclusion of a claim for rectification of the registers of directors and members does not prevent the matters proceeding by way of arbitration, and subsequent relief, where necessary, being granted by the courts on the basis of the arbitral determinations.

3. I have granted a stay of these legal proceedings pursuant to section 4 of the Foreign Arbitral Awards Enforcement Act.

4. My reasons for doing so are set out below.

Background

5. D1 was incorporated in the Cayman Islands on 23 March 2021 and was in effect the product of a joint venture between Ren Ci (P1) and Wang Yanzhi (D3) with subsequent further outside investment. P1 and D3 founded D1 and each held shares through their respective corporate vehicles. P1's corporate vehicle was P2 and D3's corporate vehicle was Yanzee Holdings Limited.

6. It is common ground that P1 and P2 and D1 are some of the parties to agreements that contain arbitration clauses (paragraph 23 of the Plaintiffs' skeleton argument dated 20 January 2023).

The SPA

7. On 7 June 2022 the relevant parties entered into a Series B2 Preferred Share Purchase Agreement (the "SPA"). Under clause 1.3 of the SPA it was stated in effect that D1's Restated Memorandum & Articles of Association (the "Restated M&A") and the Shareholders Agreement were part of the SPA and were deemed to be incorporated by reference. Under clause 5.5 one of the conditions to be satisfied at closing was that the Restated M&A shall have been duly amended. Under clause 10.1 of the SPA it was provided that the SPA shall be governed in all respects by the laws of Hong Kong without regard to conflict of law principles. Clause 10.4 of the SPA provided:

> "Entire Agreement. This Agreement, the Shareholders Agreement, and any other Transaction Documents together with all the schedules and exhibits hereto and thereto, which are hereby expressly incorporated herein by this reference, constitute the entire understanding and agreement between the Parties with regard to the subjects hereof and thereof; provided, however, that nothing in this Agreement or related agreements shall be deemed to terminate or supersede the provisions of any confidentiality and non-disclosure agreements executed by the Parties hereto prior to the date of this Agreement, all of which agreements shall continue in full force and effect until terminated in accordance with their respective terms."

The definition of Transaction Documents at clause 1.1 included the SPA, the Shareholders Agreement and the Restated M&A.

8. Clause 10.14 of the SPA provided:

> "Dispute Resolution. Any dispute, controversy, difference or claim arising out of or relating to this Agreement, including the existence, validity, interpretation, performance,

> breach or termination hereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre ("HKIAC") under the HKIAC Administered Arbitration Rules (the "Arbitration Rules") in force when the notice of arbitration is submitted. The law of this arbitration clause shall be Hong Kong law. The seat of arbitration shall be Hong Kong. The number of arbitrators shall be three (3), and shall be selected and determined in accordance with the Arbitration Rules. The arbitration proceedings shall be conducted in English. The award of the arbitral tribunal shall be final and binding upon the parties thereto, and the prevailing party may apply to a court of competent jurisdiction for enforcement of such award. During the course of the arbitral tribunal's adjudication of the dispute, this Agreement shall continue to be performed except with respect to the part in dispute and under adjudication. Arbitration costs shall be borne or shared by the party or parties as determined in the arbitral award."

The SPA included the Restated M&A.

The SHA

9. On 8 June 2022 the relevant parties entered into a Second Amended and Restated Shareholders Agreement (the "SHA").

10. The recitals included the following:

> "WHEREAS, in connection with the consummation of the transactions contemplated by the Share Purchase Agreements, the Parties hereto desire to enter into this Agreement for the governance, management and operations of the Group Companies and for the rights and obligations between and amongst the Shareholders and the Company."

The Company was D1. The Group Companies included D1. The Shareholders included the Ordinary and Preferred Shareholders. The Founder Parties were stated to be P1 and D3.

11. Clause 7 of the SHA contained what were described as protective provisions and clause 8 concerned board representation, committee and senior management and included specific provisions in respect of board quorum and meetings. Clause 12.1 of the SHA provided that the SHA shall be governed in all respects by the laws of Hong Kong without regard to conflicts of law principles.

12. Clause 12.4 provided:

> "12.4 Entire Agreement. This Agreement, the Share Purchase Agreements and any other Transaction Document, together with all the schedules and exhibits hereto and thereto, which are hereby expressly incorporated herein by this reference, constitute the entire understanding and agreement between the parties with regard to the subjects hereof and thereof and supersede all prior agreements and undertakings, both written and oral, among the Parties with respect to the subject matter hereof and thereof; provided, however, that nothing in this Agreement or related agreements shall be deemed to terminate or supersede the provisions of any confidentiality and nondisclosure agreements executed by the parties hereto prior to the date of this Agreement, all of which agreements shall continue in full force and effect until terminated in accordance with their respective terms. Without limiting the generality of the foregoing, this Agreement supersedes all provisions of (i) the shareholders agreement entered into by and among REN Ci … Affiliates of the Series Angel Investors and certain other parties therein dated May 17, 2019, (ii) the shareholders agreement entered into by and among the Group Companies, the Founder Parties, the Series A Investor and certain other parties therein dated June 23, 2021, and (iii) the amended and restated shareholders agreement entered into by and among the Company, the Founder Parties, the Series A Investor, the Series B1 Investors and certain other parties therein dated November 30, 2021, which shall be terminated and replaced by this Agreement in its entirety as of the date herein and any and all rights the Parties (as applicable) may have thereunder shall be waived in exchange for their rights hereunder."

The Transaction Documents include the SHA, the Share Purchase Agreements and the Restated M&A.

13. Clause 12.17 of the SHA provides:

> "Dispute Resolution. Any dispute, controversy, difference or claim arising out of or relating to this Agreement, including the existence, validity, interpretation, performance, breach or termination hereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre ("HKIAC") under the HKIAC Administered Arbitration Rules (the "Arbitration Rules") in force when the notice of arbitration is submitted. The law of this arbitration clause shall be Hong Kong law. The seat of arbitration shall be Hong Kong. The number of arbitrators shall be three (3), and shall be selected and determined in accordance with the Arbitration Rules. The arbitration proceedings shall be conducted in English. The award of the arbitral tribunal shall be final and binding upon the parties thereto, and the prevailing party may apply to a court of competent jurisdiction for enforcement of such award. During the course of the arbitral tribunal's adjudication of the dispute, this Agreement shall continue to be performed except with respect to the part in dispute and under adjudication. Arbitration costs shall be borne or shared by the party or parties as determined in the arbitral award."

14. Clause 12.18 of the SHA was entitled "Shareholders Agreement to Prevail" and provided:

> "In the event of any conflict between any of the terms of this Agreement and any of the terms of any of the Charter Documents for any of the Group Companies, or in the event of any dispute related to any such Charter Document, the terms of this Agreement shall prevail in all respects as regards the Parties hereto except for the Company, the Parties hereto other than the Company shall give full effect to and act in accordance with the provisions of this Agreement over the provisions of the Charter Documents …"

15. The SHA is specifically referred to in the Restated M&A. Article 8 incorporates various provisions of the SHA including those in respect of board representation, committee and senior management as "an integral part of these Articles" and expressly adds:

> "In the event of any conflict or inconsistency between the terms and conditions in the above-mentioned sections of the Shareholders Agreement and any terms or conditions set forth in these Articles, the terms and conditions set forth in the Shareholders Agreement shall prevail."

The SRA

16. Mr David Quest KC, who appeared for D1, also referred to the fact that on 30 November 2021 the relevant parties entered into a Share Restriction Agreement (the "SRA"), clause 2 of which contained repurchase rights which D1 says it exercised on 28 September 2021. Clause 9 provides that the SRA shall be governed by and construed exclusively in accordance with the laws of the Hong Kong Special Administrative Region of the PRC, without regard to the principles of conflict of law thereunder.

17. Clause 12 of the SRA provides:

> "12. Dispute Resolution.
>
> (a) Negotiation Between Parties: Mediations. The parties agree to negotiate in good faith to resolve any dispute between them regarding this Agreement. If the negotiations do not resolve the dispute to the reasonable satisfaction of the relevant parties, then each party to the dispute that is a company shall nominate one authorized officer as its representative. The relevant parties or their representatives, as the case may be, shall, within thirty (30) days of a written request by either party to call such a meeting, meet in person and alone (except for one assistant for each party) and shall attempt in good faith to resolve the dispute. If the disputes cannot be resolved by such senior managers in such meeting, the parties agree that

they shall, if requested in writing by either party, meet within thirty (30) days after such written notification for one (1) day with an impartial mediator and consider dispute resolution alternatives other than formal arbitration. If an alternative method of dispute resolution is not agreed upon within thirty (30) days after the one (1) day mediation, either party to the dispute may begin formal arbitration proceedings to be conducted in accordance with subsection (b) below. This procedure shall be a prerequisite before taking any additional action hereunder.

(b) Arbitration. In the event the parties are unable to settle a dispute between them regarding this Agreement in accordance with subsection (a) above, such dispute shall be referred to and finally settled by arbitration at the Hong Kong International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules") in effect, which rules are deemed to be incorporated by reference into this subsection (b), subject to the following: (i) the arbitration tribunal shall consist of three arbitrators to be appointed according to the ICC Rules; and (ii) the language of the arbitration shall be English. Notwithstanding anything in this Agreement or in the ICC Rules or otherwise, the arbitration tribunal shall not have the power to award injunctive relief or any other equitable remedy of any kind against any Investor unless such award both (x) is expressly appealable to and subject to de novo review by the courts of Hong Kong and (y) would not, if upheld, have the effect of impairing, restricting, or imposing any conditions on the right or ability of such Investor or its Affiliates to conduct its respective business operations or to make or dispose of any other investments. The prevailing party shall be entitled to reasonable attorney's fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled."

18. None of the parties before the court at the hearing fell within the definition of Investors. D8, D9 and D10 did but they have not been served and were not present at the hearing.

The fall out and the nature of the disputes

19. Subsequent to entering into the agreements it appears that there has been a falling out between certain parties and various disputes have arisen. The main disputes at the moment appear based on various resolutions made in September 2022 and whether they are valid or not.

20. The referenced resolutions may be briefly summarised as follows:

- D1 board resolution dated 3 September 2022 signed by D3 referring to the Restated M&A and dealing with the establishment of a special committee to investigate allegations of fiduciary duty violations and other alleged misconduct of P1;

- D1 board resolution dated 19 September 2022 signed by D3 referring to the Restated M&A and dealing with the suspension and removal of P1 as director of D1 and cessation of powers or authority to act on behalf of D1;

- Nebula Asia (Hong Kong) Limited members resolution dated 19 September 2022 re: removal of P1 as director and appointment of new directors of that company;

- P2 members resolution dated 20 September 2022 signed by P1 referring to the Restated M&A and dealing with the removal of D3, D4 and D5 as directors of D1 and the appointment of Cao Rusheng, Li Xiaonan and Chu Weizhen as directors of D1;

- D1 board resolution dated 28 September 2022 signed by D3 referring to the Restated M&A, the SRA and attaching a draft share repurchase notice and resolving that D1 exercise its rights to repurchase all of the shares held by P2 (stated to be wholly owned by P1) in D1; and

- D1 members resolution dated 30 September 2022 referring to the Restated M&A and removing P1 as director of D1, appointment of further directors, ratification of previous resolutions, suspensions and removals, and repurchase of the shares from P2 on 28 September 2022.

21. The following short summary of the dispute through the eyes of the Plaintiffs is taken from paragraphs 5 – 8 of the Plaintiffs' skeleton argument dated 20 January 2023:

> The substantive dispute concerns the management and ownership of D1. D2 – D7 are directors and former or purported directors of D1. D3 is also an initial investor in D1 through his corporate vehicle (not joined). D8 – D10 are later investors in D1.
>
> The Plaintiffs' case is that D2 – D10 have effectively sought to stage an illegitimate boardroom coup to remove P1 from the business that he started and built and to keep the business for their own benefit.
>
> The Plaintiffs challenge the validity of various resolutions allegedly passed on 3, 19, 28 and 30 September 2022 on the basis that such were passed contrary to the requirements of D1's Articles of Association.

22. D1 at paragraph 38 of its skeleton argument dated 20 January 2023 says that the dispute between the parties arises from actions that have been taken following the discovery of serious financial misconduct committed by P1. The actions taken by D1 and its directors include (1) the appointment of a Special Committee, as provided for under Article 84 (b), (2) the repurchase of the shares of P2 held in D1 pursuant to the SRA, (3) the removal of P1 as a director of D1 and Nebula Asia (Hong Kong) Limited ("Nebula Hong Kong"), as well as (4) consequential steps in respect of the operation of Beijing Nebula Technology Co., Ltd ("Nebula Beijing"). P1 challenges the various steps that have been taken asserting that each is invalid and ineffective against him and/or P2.

23. I have set out above a very short summary of the respective cases to give a flavour and some indication of the nature of the substance of the disputes between the parties. At this interlocutory stage, of course, I am not in a position to make any findings of facts but I am able to glean a broad understanding of the nature and substance of the corporate disputes between the parties.

The proceedings in the Cayman Islands

24. The Plaintiffs' writ of summons was dated 4 October 2022 and amended on 31 October 2022. In the general indorsement the Plaintiffs' claim is for declarations in respect of purported resolutions of D1's board of directors dated 3, 19 and 28 September 2022 and complaint is made that they were not passed in compliance with D1's Articles of Association. It also seeks separate declarations in respect of the appointment and actions of the Special Committee. Declarations are sought in respect of the purported approval of the repurchase of P2's shares in D1 and the purported share repurchase itself on 28 September 2022. Permanent injunctions are also sought. A declaration is sought that P1 remains a director of D1. A consequential order for rectification of D1's register of directors and register of members is also sought.

25. I have also considered the draft Amended Statement of Claim. I note the references to the Articles and the composition of D1's board of directors and the provisions for calling and conducting of board meetings, the removal of directors, the calling and conducting of meetings of members, the passing of written resolutions and D1's members and directors. There is detailed reference to resolutions purportedly passed on 19, 28 and 30 September 2022. There are claims for declarations and rectification of D1's register of members and register of directors and for permanent injunctions.

26. By letter dated 17 October 2022 from Harneys (the attorneys for D1) to Kobre & Kim (the attorneys for the Plaintiffs), D1's acknowledgement of service was served, "expressly without prejudice to the Company's right to challenge and dispute the jurisdiction of the Grand Court of the Cayman Islands to determine any issue in dispute in these proceedings, pursuant to Order 12 rule 8 of the Grand Court Rules, pursuant to the terms of the parties contractually agreed dispute methods, as

set out in the Second Amended Shareholders Agreement dated 30 November 2021, or otherwise. All rights of the Company are reserved." The acknowledgement of service form itself referred to an intention to contest the proceedings and added in red:

> "By filing this Acknowledgement of Service, Nebula (Cayman) Limited does not waive any of its right (sic) to contest the jurisdiction of the Court to determine these proceedings."

27. By order dated 19 October 2022 I dismissed the Plaintiffs' application for injunctions.

28. On 15 November 2022 D1, pursuant to GCR O12 r 8, provided notice of its intention to defend.

29. By summons dated 15 November 2022 D1 applied for an order, pursuant to section 4 of the Foreign Arbitral Awards Enforcement Act, that the legal proceedings be stayed.

30. On 29 November 2022 I adjourned an ex parte (without notice) summons dated 16 November 2022 by D1 for injunctive relief against the Plaintiffs for the reasons stated in a judgment delivered that day. In the summons dated 16 November 2022 D1 sought wide ranging injunctive relief against the Plaintiffs. In its amended skeleton argument dated 24 November 2022 D1 at paragraph 31 stated:

> "It is the Company's position that those claims should be resolved through arbitration, as agreed between the parties in the SHA/SRA, but whether these proceedings are stayed or continue in the Cayman Court, it is clear that an injunction is required in order to preserve the status quo pending determination of the dispute."

31. D3 in his affidavit sworn on 17 November 2022 on behalf of D1 at paragraph 5 referred to the summons being pursued "in order to protect the assets and business operations of the Company and the Group, and to preserve the status quo, pending determination of the underlying dispute (Interim Relief Summons) … The Company has also filed a summons on 15 November 2022 seeking a stay of these proceedings in favour of arbitration, as contractually agreed between the parties as their chosen dispute resolution method (Stay Summons)." And at paragraphs 54 and 55:

"54. If the Court orders a stay of these proceedings as sought in the Stay Summons, the parties will need to refer their disputes to HKIAC arbitration in accordance with the SHA and SRA. Any arbitral awards made in such arbitration would be rendered futile if the Plaintiffs are allowed to take any further steps to diminish the value of the Company.

55. Even if the Court does not grant the relief sought under the Stay Summons, the injunction sought remains necessary in order to preserve the status quo whilst the dispute between the parties is resolved by way of these proceedings."

32. I have also considered some of the relevant correspondence between the parties, including:

- Letter dated 14 October 2022 Harneys to Kobre & Kim:

"17. We confirm that we have instructions to accept service of the Proceedings on behalf of the Company …

27. In the meantime, all of the Company's rights are expressly reserved, in particular the Company's (sic) to make a jurisdictional challenge in the Proceedings."

- Letter dated 27 October 2022 Harneys to Kobre & Kim:

"All of the Company's rights are reserved, including the right to challenge the jurisdiction of the Court in favour of arbitration."

- Letter dated 9 November 2022 Harneys to Kobre & Kim:

"We write to put your clients on notice that the Company intends to file a summons with the Grand Court of Cayman Islands seeking a stay of the proceedings so that your clients' claims

may be submitted to arbitration in Hong Kong before the HKIAC, as provided for in the Second Amended and Restated Shareholders Agreement dated 8 June 2022 (SHA) and the Share Restriction Agreement dated 30 November 2021 (SRA). As you are aware, the Company has raised this issue in its Acknowledgement of Service, its evidence in opposition to your clients' application for an injunction, and in correspondence, including but not limited to the letters of 14, 17 and 27 October 2022."

- Letter dated 8 December 2022 from Kobre & Kim to Harneys:

> "In light of your client's decision to issue the Injunction Summons, we assume that your client accepts that the Grand Court has jurisdiction in respect of the matters pleaded in the Proceedings and that a stay is inappropriate …"

- Letter dated 16 December 2022 from Harneys to Kobre & Kim:

> "Our client maintains its position that these proceedings should be stayed in favour of arbitration and nothing stated by our client in response to the SJ Summons, or otherwise, should be considered or is intended to be a waiver of our client's rights to challenge the jurisdiction of the Court.
>
> All the Company's rights are expressly reserved."

The Reference to Arbitration

33. On the day of the hearing before me, namely 26 January 2023, a notice of arbitration dated 26 January 2023 was produced. It was signed by Harney Westwood & Reigels on behalf of D1, Nebula HK and Nebula Beijing (Claimants) and P1 and P2 (Respondents). It was stated that the dispute arises out of the SHA and the SRA. There is reference to alleged misappropriation of Group funds by P1. There is reference to resolutions being passed on 3, 19, 28 and 30 September 2022. It is alleged that P1 has engaged in a campaign of disruption against the Group, seeking to strip the

Group of its assets and prevent it from being able to carry out its normal business activities. Under the heading "Breach of contract" there are allegations of breaches of the SHA in respect of written consents. Under the heading "Breach of fiduciary duty" there are allegations that P1's actions amount to a flagrant breach of his fiduciary duties as a director of P1, Nebula HK and Nebula Beijing.

34. The Claimants seek declarations in respect of the resolutions and the repurchase of P2's shares in D1 and that P2 is no longer a shareholder in D1. The Claimants seek permanent injunctions against P1 and P2.

The relevant law

35. I now turn to some of the relevant law.

Section 4

36. Section 4 of the Foreign Arbitral Awards Enforcement Act ("Section 4") provides:

> "Staying of certain court proceedings
>
> 4. 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 the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, 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."

The sanctity of arbitration agreements

37. Smellie CJ in *BankAmerica Trust v Trans-World* 1999 CILR 110 considered Section 4 and at page 119, uncontroversially, stated:

> "The governing principle is that the court will not ordinarily intervene to try a dispute which is one provided by the agreement between the parties to be resolved by reference to arbitration …
>
> The rationale is straightforward: the parties, when they made their bargain, included as part of it the provision for arbitration, and so should ordinarily be required to stick to their bargain …"

And at page 124 perceptively and before *Fiona Trust* added:

> "The modern case law suggests a move away from the strict construction of the formal requirements of contracts toward a reasonable practical construction which seeks to give commercial efficacy to what the parties really intended …"

38. Foxton J emphasised in *NDK Limited v HUO Holdings Limited* [2022] EWHC 1682 (Comm) at paragraph 73 that there is a strong public interest in allowing commercial parties to refer their disputes to arbitration and holding them to their agreements to do so.

39. Foxton J is not a lone voice in this respect. Males LJ, at English appellate level, in *Bridgehouse (Bradford No2) Ltd v BAE Systems Plc* [2020] EWCA Civ 759 at paragraph 73 stated:

> "The law permits commercial parties to choose arbitration and should respect their choice unless there are compelling reasons not to do so."

Males LJ also referred to his statement in another case, namely "where parties agree to arbitrate, it is the policy of the law that they should be held to their bargain."

40. More recently, again at English appellate level, Birss LJ in *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297 at paragraph 145 emphasised the importance of arbitration as follows:

> "In a commercial context arbitration, both international and domestic, is a hugely valuable way of resolving disputes."

McAlpine - construction of arbitration agreements

41. At appellate level the Court of Appeal of the Cayman Islands (Sir John Goldring, President, Sir Richard Field and Alan Moses JJA) in *McAlpine Limited v Butterfield Bank (Cayman) Limited* (unreported judgment 21 November 2019), applying English authorities, gave helpful guidance as to how the Cayman courts should construe arbitration agreements:

> "How the court should approach the construction of this Agreement
>
> 30. As JA Field observed during argument, the seminal decision in the Common Law world on the construction of agreements such as the present, is that of the House of Lords in *Fiona Trust v Privalov* [2007] Bus LR 686 (to which the judge did not refer in her judgment). The House of Lords (as had the Court of Appeal), held that since the introduction of section 7 of the Arbitration Act 1996 (similar in substance to section 4 of the Arbitration Law 2012 in the Cayman Islands), an agreement to arbitrate had to be construed in such a way as to give effect to the reasonable commercial expectations of the parties. In the course of his speech, with which Lord Hope of Craighead, Lord Scott of Foscote, Lord Walker of Gestingthorpe and Lord Brown of Eaton-under-Heywood agreed, Lord Hoffmann "*applauded*" the opinion expressed by Longmore LJ in the Court of Appeal, to the effect that the approach to construction previously taken by the courts, should no longer be followed. He went on to say (pages 1724-5, paragraphs 12 and 13):

"12 … [Section 7] … was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended they intended (sic) to be decided by arbitration. But section 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined.

13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, 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 constructed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would have been comparatively easy to say so.""

31. Lord Hope put it in the following way (page 1727, paragraphs 25 and 26):

> "25 … contracts negotiated between parties in the international market are commonly based upon standard forms, the terms of which are well known. Because they have a well-understood meaning, they enable contracts to be entered into quickly and efficiently … But is must be appreciated that various clauses in these forms serve various functions. In some, a high degree of precision is necessary. Terms which define the parties' mutual obligations in relation to price and performance lie at the heart of every business transaction. They fall into that category. In others, where the overall purpose is clear, the parties are unlikely to linger over words used to express it.

> 26 Clause 41 [the arbitration clause] falls into the latter category. No contract of this kind is complete without a clause which identifies the law to be applied and the methods to be used for the determination of disputes. Its purpose is to avoid the expense and delay of having to argue about these matters later. It is the kind of clause to which ordinary businessmen readily give their agreement so long as its general meaning is clear. They are unlikely to trouble themselves too much about its precise language or to wish to explore the way it has been interpreted in numerous authorities, not all of which speak with one voice. Of course, the court must do what it can to provide … legal certainty … The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if parties wish to have issues as to validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all disputes."

32. As Lord Justice Moore-Bick (with whom Lord Justice McFarlane and Lord Justice Briggs agreed), pointed out in *Transocean Drilling U.K. Ltd v Providence Resources PLC* [2016] EWCA Civ 372, that does not mean the court's task is to re-shape the contract, but is to ascertain the parties' intention, giving the words used their ordinary and natural meaning (see paragraph 23)."

Fiona Trust

42. Relevant to the circumstances of the case presently before me I would also add reference to the following additional extracts from *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951; [2007] UKHL 40. Lord Hoffmann referred to the fundamental question about the attitude of the courts to arbitration and stated:

"[5] … Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

[6] In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

[7] If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

> [8] A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause …".

43. Lord Hope at paragraph 28 referred to statements of Bingham LJ as he then was to the effect that "one should be slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings" and stated:

> "If the parties have confidence in their chosen jurisdiction for one purpose, why should they not have confidence in it for another? …. For them, everything is to be gained by avoiding litigation in two different jurisdictions. The same approach applies to the arbitration clause."

Republic of Mozambique - the two stages

44. Carr LJ, giving the judgment of the Court of Appeal of England and Wales in *The Republic of Mozambique v Credit Suisse International* [2021] EWCA Civ 329, stated:

> "64. There are two stages of inquiry for a court (although there may be overlapping considerations): first, to identify the "matters" in respect of which the proceedings are brought; secondly, to assess whether those matters are "matters" which the parties have agreed are "to be referred to arbitration". That is to be resolved by reference to the scope of the relevant arbitration agreement properly construed in context. Not every matter that could theoretically be arbitrable is one that the parties are necessarily to be taken to have agreed as a matter that must be referred to arbitration.
>
> 65. The relevant principles were summarised neatly and sufficiently for present purposes by Popplewell J (as he then was) in *Sodzawiczny*:

"43. The approach to what constitutes a "matter" in section 9 "in respect of which" the proceedings are brought should be capable of application in all these different circumstances and many in between, all of which are contemplated by the section. As a matter of principle the approach should therefore be as follows:

(1) The court should treat as a "matter" in respect of which the proceedings are brought any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement.

(2) Where the issues have been identified at the time the court is making the inquiry, there is no difficulty in conducting that exercise. Where the issues are not fully identified or developed at that stage, the court should seek to identify the issues which it is reasonably foreseeable may arise. In this respect I agree with Andrew Smith J at paragraph [14] of the Lombard North Central case.

(3) The court should stay the proceedings to the extent of any issue which falls within the scope of an arbitration agreement. The search is not for the main issue or issues, or what are the most substantial issues, but for any and all issues which may be the subject matter of an arbitration agreement. If the court proceedings will involve resolution of any issue which falls within the scope of the arbitration agreement between the parties, the court must stay the proceedings to that extent. This is necessary to give effect to the principle of party autonomy which underpins the Act. If a dispute is arbitral, effect should be given to the parties' bargain to arbitrate it. That applies to any dispute with which the court proceedings are, or will foreseeably be, concerned. Again I would respectfully agree with Andrew Smith J in the Lombard North Central case at paragraph [15] to this effect.

(4) Further, in considering the claim, the Court should look at the nature and substance of the claim and the issues to which it gives rise, rather than simply to the form in which it is formulated in a pleading. As Andrew Smith J put it in the Lombard North Central case at paragraph [14], the latter "would allow a claimant to circumvent an arbitration agreement by formulating proceedings in terms that, perhaps artificially, avoid reference to a referred matter, knowing that any application to stay them must be made before a defence is pleaded." The same is true of identified or foreseeable defences. Section 9 is concerned with substance not form.

44. The objection that this approach leads to fragmentation of proceedings is not a sufficient reason for departing from these principles. The desideratum of unification of process must give way to the sanctity of contract, as the mandatory terms of section 9(4) intend. Fragmentation is implicit in the pro tanto wording of section 9, and is in any event often a consequence of the consensual nature of arbitration agreements (for example in string contracts). The risk of fragmentation is reduced by the expansive approach which is taken to the construction of arbitration clauses, but it may be the inevitable result of upholding the parties' bargain. If so, the adverse consequences can be ameliorated, if not altogether avoided, by the case management power of the court to stay proceedings in so far as they fall outside the scope of an arbitration agreement …" …

68. Ultimately, whether or not a matter is one "which under the agreement is to be referred to arbitration" turns on the scope of the relevant arbitration agreement, properly construed in context."

Capital Trust – a step in the proceedings?

45. In the English case of *Capital Trust Investments Ltd v Radio Design TJ AB* [2002] EWCA Civ 135 the claimant issued legal proceedings and the defendant applied for a stay relying on an arbitration agreement. The defendant also applied for summary judgment "in the event that its application for a stay was unsuccessful." The judge held that such was not a step in the proceedings within the meaning of section 9(3) of the English Arbitration Act 1996 which in effect provided, in slightly different terms to the Cayman legislation, that an application for a stay pending arbitration "may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim." The claimant appealed and the appeal was dismissed. It was held that the claims were within the arbitration clause. The headnote reflects the holding that the defendant had not taken any step in the proceedings within section 9(3). There was no expression of willingness that the courts should determine the claims instead of arbitrators. It was clear that the application was only advanced in the event that the application for a stay was not successful. The application made it clear that it was specifically seeking a stay, with the result that a step which would otherwise be a step in the proceedings was not so treated. Leaving the headnote and descending into the judgments Jacob J at paragraph 17 referred to an argument of counsel for the claimant that the application continued until it is disposed of by the court or in some other way and the application continued to be made at least until the Master ruled upon it and by then the application for a strike out had been initiated and was running. So the strike out application was made (or continued to be made) after the step to answer the claim had been made. Jacobs J dealt with these arguments as follows:

> "18. This argument would be right if the strike out application had been simply that. Until the stay application is disposed of it remains an application. So if a party takes an unequivocal step in the proceedings to answer the substantive claim before his stay application is concluded, he is outside the s. 9(3) window. And rightly so, for he would then be blowing hot and cold – on the one hand asking for arbitration and on the other positively inviting the court to rule on the dispute. Mr Steinfeld QC for Radio Designs

accepted as much. But, he said, that is not what his client was doing. Its application for a stay was not an unconditional step in the action – on its face it was only asking the court to rule on the dispute if the stay application was unsuccessful. Such a conditional invocation of the court's jurisdiction was not 'a step in the proceedings'."

46. Jacobs J reviewed some of the earlier English cases and provided further guidance as to what may in law amount to a step in the proceedings in this context:

> "23. Finally, there is a case under the 1996 Act, *Patel v Patel* [2000] QB 551. The plaintiff had obtained judgment in default of a defence. The defendant applied for an order that the judgment be set aside and that he be given leave to defend and bring a counterclaim. At the same time he asked for a stay pending arbitration. The Court of Appeal held that the defendant had not taken a step in the proceedings to answer the substantive claim. Lord Woolf MR (with whom Otton and Ward L JJ agreed) accepted a passage in Mustill & Boyd, *Commercial Arbitration* (2nd edn, 1989) where the authors summarised the old law:
>
> > 'The reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the application must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court.'
>
> Applying that test there was obviously no 'step' – nothing Radio Design did pursuant to their second application indicated any election to abandon its contractual right to a stay. Lord Woolf in *Patel* said 'that it all turns on the language of the summons'. The language in this case was clearer than it was in that case: obviously no election was being made here.
>
> 24. Otton LJ approved two statements in Merkin, *Arbitration Law*:

> 'The old authorities, which remain good law under the Act of 1996, established the following propositions …(e) An act which it would otherwise be regarded as a step in the proceedings will not be treated as such if the applicant has specifically stated that he intends to seek a stay.'
>
> 'The right to apply for a stay will also be lost if the defendant in the judicial proceedings has expressly or impliedly represented that he does not intend to refer the issues in dispute to arbitration. The matter is determined by the usual rules applicable to estoppel, i.e. has the defendant unequivocally represented that there will be no reference to arbitration, and has the plaintiff conducted his affairs on the basis that the matter will be determined by the court, in reliance on that representation?'

Both of these statements are directly applicable here.

Accordingly I hold that a party who has initiated an application for a stay pending an arbitration has not taken a 'step' in the proceedings within the meaning of s. 9(3) of the *Arbitration Act* 1996 if he, either simultaneously or subsequently, invokes or accepts the court's jurisdiction provided he does so only conditionally on his stay application failing. Whether or not the court should consider his conditional application before determination of the stay application is simply a matter of case management."

47. The Court of Appeal of England and Wales (Schiemann, Clarke and Arden LJJ) in *Capital Trust* gave the following guidance:

> "55. It is common ground that, on the assumption that these claims are within the arbitration agreement to which both Radio Design and CTIL are parties, Radio Design is entitled to a stay unless it took a step in the proceedings within the meaning of s. 9(3). Section 9(3) is for present purposes in similar terms to s. 1(1) of the *Arbitration Act* 1975 and s. 4 of the *Arbitration Act* 1950. The question what amounts to a step in the

proceedings has been considered a number of times under those sections and their predecessors: see e.g. *Pitchers v Plaza* [1940] 1 All ER 151, *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357, *Kuwait Airways Corp v Iraqi Airways Co* [1994] 1 Ll Rep 276 and *Patel v Patel* [2000] QB 551.

56. In the *Yuval* case, in a passage which was subsequently followed in the *Kuwait Airways* case, Lord Denning MR put the underlying principle in this way (at p. 361):

> 'On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.'

57. More recently, this court considered s. 9(3) of the 1996 Act in *Patel v Patel*. Lord Woolf MR said (at p. 555G) that the old law was conveniently summarised in Mustill & Boyd, *Commercial Arbitration* (2nd edn, 1989) p. 472, where the editors said:

> 'The reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court.'

As we read Lord Woolf's judgment, a similar approach should be adopted under the 1996 Act. In the same case (at p. 558B) Otton LJ approved the following statement at para. 6.19 of Merkin, *Arbitration Law*:

> 'The old authorities, which remain good law under the Act of 1996, established the following propositions … (e) An act which would otherwise be regarded as a step

> in the proceedings will not be treated as such if the applicant has specifically stated that he intends to seek a stay.'

58. Applying those principles, the judge held that Radio Design had not taken a step in the proceedings within the meaning of s. 9(3) of the 1996 Act. We entirely agree. The facts are shortly these. Radio Design issued an application for a stay on 6 December 1999. On 22 February 2000 the application was amended to refer expressly to s. 9 of the 1996 Act and to make the assertion that Radio Design had filed an acknowledgement of service but that it had 'not taken any step in the action (such as filing a defence) to answer the substantial claim' …

59. Before the application was heard by the master, on 2 May 2000, Radio Design issued a further application notice in which it recited the fact that an application for a stay had been made and continued:

> 'In the event that its application for a stay is unsuccessful, the first defendant [Radio Design] applies for summary judgment against the claimant …'

The ground was that under Swedish law the claim had no real prospect of succeeding because under Swedish law a company is not liable for misrepresentations made on its behalf in connection with an issue of shares.

60. It appears to us that the application was not a 'step in the proceedings' on the basis of the principles set out above. Thus, it did not (in the words of Lord Denning) express the willingness of Radio Design to go along with a determination of the courts instead of arbitration. On the contrary, it made it clear that the application for summary judgment was only advanced 'in the event that its application for a stay is unsuccessful.' In *Merkin's* words, approved by Otton LJ, the application made it clear that it was specifically seeking a stay, with the result that a step which would otherwise be a step in the proceedings, namely an application for summary judgment is not so treated."

The Determinations

48. It was common ground that the SHA and SRA contained arbitration clauses and that the Plaintiffs and D1 were "some of the parties to the SHA and to the SRA" (see paragraph 23 of the Plaintiffs' skeleton argument dated 20 January 2023). Furthermore the Plaintiffs did not contend that the arbitration clauses in the SHA and the SRA were null and void, inoperative or incapable of being performed, or that there was no real dispute between the parties (see paragraph 24 of the Plaintiffs' skeleton argument dated 20 January 2023).

The two main issues

49. There were two main issues before the court for determination:

(1) I refer to the first issue as the Scope Issue. D1 put it as follows: what matters did the parties agree to refer to arbitration? The Plaintiffs put it as follows: do either of the arbitration clauses in the SHA or the SRA cover the disputes concerning the validity of the resolutions passed on 3, 19, 28 and 30 September 2022 which are the subject of the court proceedings?

The authorities (see for example paragraph 65 of *The Republic of Mozambique*) make it plain that the court should not limit its consideration just to those issues arising on the plaintiffs' pleadings but the court "should seek to identify the issues which it is reasonably foreseeable may arise."

(2) The parties have described the second issue for determination as the Waiver Issue, namely:

Has D1 lost the right to apply under Section 4 as a result of its application for injunctive relief against P1?

The Scope Issue

50. I take a broad brush approach and look at the nature and substance of the disputes and the issues which are thrown up rather than restricting myself simply to the form in which the Plaintiffs have pleaded their side of the disputes. As directed by the leading authorities, I take an expansive approach to the construction of the arbitration clauses in this case.

51. As Carr LJ stated in *The Republic of Mozambique* at paragraph 68:

> "Ultimately, whether or not a matter is one "which under this agreement is to be referred to arbitration" turns on the scope of the relevant arbitration agreement, properly construed in context."

52. Looking at the pleadings and considering the issues it is reasonably foreseeable may arise I have concluded that the issues between the parties fall within the scope of the arbitration clauses.

53. I agree that the issues identified at paragraph 41 (a) to (f) of D1's skeleton argument dated 19 January 2023 are issues which it is reasonably foreseeable may arise: Paragraph 41 (a) to (f) read as follows:

> "(a) Whether the Company was obliged to give Ren Ci notice of the board meetings.
> (b) Whether, if it was so obliged, the Company gave notice to Ren Ci at the right place and in the right way.
> (c) Whether there was an effective waiver of short notice by the board.
> (d) Whether the Company was obliged to give Daoyi notice of the general meeting.
> (e) If the Company failed to give Ren Ci and/or Daoyi notice in accordance with the Articles, whether that nullified the meetings and the resolutions made at them.
> (f) Whether the repurchase of Daoyi's shares under the SRA was valid and effective."

During his oral submissions Mr Quest added "(g) the validity or effect of the Plaintiffs' attempts to replace the directors on 20 September 2022."

54. I agree with Mr Quest (whose keen focus on this case had not been distracted by his recent appointment as a part-time Deputy High Court Judge in England and Wales just 3 days before the hearing) that one of the central questions in the proceedings is whether the purchase of P2's shares under the SRA was valid and effective and this plainly is a dispute regarding the SRA and plainly falls within the scope of the SRA arbitration clause.

55. Although not foreshadowed in his skeleton argument Mr Jalil Asif KC, for the Plaintiffs, in his oral submissions placed a great deal of reliance on two first instance decisions of the High Court of Hong Kong: *Dickson Holdings Enterprise Company Limited v Moravia CV* [2019] HKCFI 1424 G Lam J, as he then was, (which in turn placed reliance at paragraph 44 on *BTY v BUA* [2018] SGHC 213) and *Zpmc – Red Box Energy Limited v Adkins* [2021] HKCFI 3501 Ng J (which at paragraph 39 refers to *Dickson*). G Lam J in *Dickson* at paragraph 40 stated:

> "The presumption of one-stop adjudication, as counsel put it, must be approached in this case having regard to the special features of company law …"

At one stage of his oral submissions Mr Asif submitted that these Hong Kong first instance judgments were binding upon me as the arbitration agreements are governed by Hong Kong law. There are two points here. Firstly, I do not benefit from expert evidence on Hong Kong law. As the Plaintiffs say at paragraph 49 of their skeleton argument dated 20 January 2023 "In the absence of evidence of foreign law, it is permissible for the court to assume that Hong Kong law is the same as Cayman law". In any event it appears that the Hong Kong courts, at first instance and appellate level, have largely followed the approach of *Fiona Trust* (see for two relatively recent examples: at first instance *Best Field Inc v Triangular Force Constructions Engineering Ltd* [2022] HKCFI 1641 at paragraphs 16, 18 and 20; [2022] 5 HKC 44 and at appellate level *C v D* [2022] HKCA 729 at paragraph 46; [2022] 5 HKC 222). Secondly, under the well established doctrine of precedent first instance decisions of the High Court of Hong Kong are not binding on me sitting in the Cayman Islands as a judge of the Grand Court.

56. I decline to follow *Dickson* and insofar as it follows and supports *Dickson* at paragraph 39 I decline to follow *Red Box*. They appear, with respect, to have adopted an unduly strict, narrow interpretation of the relevant arbitration clauses. They appear to have placed little, if any, weight on paragraph 13 of Lord Hoffmann's judgment in *Fiona Trust*. *Dickson* appears to suggest that the presumption of one-stop adjudication has no place in company law cases. Furthermore, Lam J in *Dickson* at paragraph 40 states that the arbitration clause in that case applied to disputes arising out of or relating to the Shareholders Agreement not arising out of or relating to the affairs of the Company adding: "If the parties had intended otherwise, they could have easily devised an arbitration clause that expressly applied to any dispute between them relating to any affair of the Company." With respect, I think that puts it the wrong way round. What the 5 members of the House of Lords were saying in *Fiona Trust* was that the time had come for a fresh start to be made to the construction of arbitration clauses. Such construction should start from the assumption that the parties, as rational people of business, were likely to have intended any dispute arising out of their relationship to be decided by the same tribunal. The relevant arbitration clause should be construed in accordance with that presumption unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. Lord Hope's "golden rule" (at paragraph [26]) is that if the parties wish to have some issues decided by one tribunal and other issues decided by another, they must say so expressly. If they do not say so expressly they will be taken to have agreed on a single tribunal for the resolution of all such disputes. The approach adopted in *Dickson* appears to go against the well established principle followed by the English and Cayman courts that there should be a presumption in favour of adjudication by a single tribunal. There is nothing to detract from that in a company law context. There is no special carve out for company law cases in respect of the *Fiona Trust/McAlpine* approach to interpretation of arbitration clauses under the laws of the Cayman Islands.

57. Foxton J in *NDK Limited v HUO Holdings Limited* [2022] EWHC 1682 (Comm), sitting at first instance in the High Court of Justice of England and Wales Queen's Bench Division Commercial Court, in a persuasively reasoned judgment, declined at paragraph 54 of his judgment to follow *BTY v BUA* (2018) SGHC 2013 and by implication also declined to follow *Dickson* to which he referred at paragraph 41. His reasoning for declining to do so is powerful and I adopt it. I have

little of substance to add to it. Suffice to say I am not persuaded that the presumption of one-stop adjudication must be modified to accommodate "the special features of company law" as G Lam J put it in *Dickson*.

58. I do not agree with the narrow, technical and artificial construction which Mr Asif attempts to adopt when considering the relevant matters and the arbitration clauses. I agree that such an approach is redolent of the approach previously adopted by the English Courts and so heavily criticised by the House of Lords in *Fiona Trust*, as reflecting no credit on English commercial law.

59. Applying Lord Hoffmann's oft cited statement (at paragraph 13 of *Fiona Trust* cited by the CICA at paragraph 30 of *McAlpine*) I start from the assumption that the parties are likely to have intended that any dispute arising out of their relationship be decided by the same tribunal. I also apply Lord Hope's statement (at paragraph 31 of *Fiona Trust* cited by the CICA at paragraph 31 of *McAlpine)* to the effect that arbitration clauses should be liberally construed in the interests of legal certainty and unless the parties make the contrary expressly clear "they will be taken to have agreed on a single tribunal for the resolution of all disputes." The parties in the case before me have not made the contrary expressly clear.

60. In this case the relevant parties in effect entered into a joint venture. Earlier in this judgment I have referred to some of the relevant provisions of the agreements between the relevant parties. By clause 10.14 of the SPA they agreed that "Any dispute, controversy, difference or claim arising out of or relating to this Agreement … shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre ("HKIAC") under the HKIAC Administered Arbitration Rules (the Arbitration Rules) in force when the notice of arbitration is submitted. The law of this arbitration clause shall be Hong Kong law. The seat of the arbitration shall be Hong Kong …"

61. The SHA at clause 12.17 also contained a wide arbitration clause in similar format.

62. Clause 12 of the SRA referred to mediations and arbitrations and in effect provided that if the parties fail to resolve by negotiation or mediation "any dispute between them regarding this

Agreement" then "such dispute shall be referred to and finally settled by arbitration at the Hong Kong Intermediate Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce …"

63. The fact that the SPA and SRA refer to different rules does not prevent the court granting a stay. It will be for the Hong Kong arbitrators to determine the applicable rules. The parties plainly intended their corporate disputes to be determined by way of arbitration in Hong Kong.

64. The Restated M&A and issues of corporate governance, appointment and removal of directors, notice of meetings, written resolutions and repurchase of shares were integral parts of the agreements which contained the arbitration clauses. This cannot be summarily dismissed by arguments that the arbitration clauses are limited to breaches of the agreements as Mr Asif valiantly but ultimately unsuccessfully attempted to do. Mr Asif during his written and oral submissions came dangerously close to suggesting a return to the bad old days of narrow, pointless arguments on various linguistic nuances on the basis of an unduly restrictive interpretation of arbitration clauses pre *Fiona Trust*.

65. In light of the modern authorities I have referred to I simply cannot accept Mr Asif's argument that in effect as the pleaded case does not concern breaches of the agreements, which contain the arbitration clauses then there are no relevant matters to refer to arbitration. Such an argument would fly in the face of and run a coach and horses through *Fiona Trust* and *McAlpine*.

66. Moreover, I do not accept Mr Asif's argument that the *Fiona Trust* presumption does not apply in this case and that objectively it is easy to conclude that the parties intended that the corporate governance issues, of the kind that have now arisen, should be determined by the country where the company in question is incorporated, applying the law of the place of incorporation. The recitals in the SHA specifically referred to the desire of the parties to enter into it for the governance, management and operations of the various companies and for the rights and obligations between and amongst the shareholders and D1. By clause 12.17 the parties, with full knowledge that D1 was incorporated under the laws of the Cayman Islands, expressly agreed, in wide terms, that any dispute "arising out or relating to this Agreement" be referred to arbitration in Hong Kong.

67. Neither can I accept Mr Asif's argument that the court should simply focus on the tightly focused pleadings which raise issues which do not arise out of or relate to the SHA. He says they arise out of and relate to the corporate governance requirements contained in and imposed by the Restated M&A. Such are however incorporated by way of the entire agreement clauses and the wide recital to the SHA which sheds light on the purpose of the agreement and refers to the desire of the parties to enter into the agreement "for the governance, management and operations of the Group Companies and for the rights and obligations between and amongst the shareholders of the Company." Indeed the Restated M&A themselves make express reference to the SHA. It is clear to me that the parties intended that corporate disputes arising from their relationships (such as those which arise in these proceedings) should be dealt with by way of arbitration. They certainly did not make the contrary expressly clear.

68. The purpose of the arbitration clauses in this case was, to adopt the words of Lord Hoffmann in *Fiona Trust* (at paragraphs [6]), to reflect the wish of the parties that they want their disputes decided by a tribunal which they have chosen for the reasons outlined by Lord Hoffmann. In construing the arbitration clauses in this case I start, as directed by Lord Hoffmann at paragraph [13] of *Fiona Trust*, from the assumption that the parties, as rational people of business, are likely to have intended any dispute arising out of the relationship to which they have entered to be decided by the same tribunal. The language in the arbitration clauses in the case before me does not make it clear that the questions which arise and are likely to arise in these proceedings (such as the removal and appointment of directors, the setting up of a committee and the repurchase of shares pursuant to an agreement which itself contained an arbitration clause) were intended to be excluded from the arbitrator's jurisdiction.

69. In my judgment, on a proper construction, the issues raised in the pleadings and the foreseeable issues that may arise between the parties fall within the scope of the arbitration clauses. In my judgment on the proper construction of the agreements, it is clear that the parties intended that the disputes, which have arisen should be determined by arbitration in Hong Kong rather than by court proceedings in the Cayman Islands. I therefore decide the Scope Issue in favour of D1.

The Waiver Issue

70. I can deal with the Waiver Issue quite shortly. The plain wording of Section 4 suggests that the relevant time period to consider whether a pleading or step has been taken is the time period prior to the application for a stay. Mr Asif however submitted, with some considerable force, that despite the plain wording of Section 4 the court must also consider the time period after the filing of the application for a stay. To make this submission good he helpfully referred the court to statements by Jacob J in *Capital Trust* at paragraph 18 which I have set out above. Jacob J cautioned against defendants seeking statutory stays from "blowing hot and cold". He held, on the wording of the English statutory provisions, that if a party takes an unequivocal step in the proceedings to answer the substantive claim (reflecting the specific wording of the English statutory provisions not reflected in the Caymanian statutory provisions) before his stay application is concluded, he is outside the statutory window.

71. It appears to be common ground in the case before me that no pleading was delivered or step taken prior to the filing of the stay application. The Plaintiffs' case is that the subsequent filing by D1 for interlocutory injunctive relief against them was a step in the proceedings and in effect debars D1 from pursuing its stay application to a successful conclusion.

72. I have set out some of the relevant law above. In my judgment the conduct of D1 is not such as to demonstrate an election to abandon its right to a stay. D1 had on numerous occasions indicated to the Plaintiffs that it intended to seek a stay and in fact did so. D1 has not expressly or impliedly represented that it did not intend to refer the issues in dispute to arbitration. No estoppel arises. D1 has not unequivocally represented that there will be no reference to arbitration and the Plaintiffs have not conducted their affairs on the basis that the matter will be determined by the court in reliance on that representation. D1 has not taken any steps which impliedly affirms the correctness of the substantive proceedings and its willingness to go along with a determination by this court of the substantive claims instead of arbitration. D1 in this case prior to making the application for interlocutory injunctive relief, had filed the application for a stay. That application was a clear

message to the Plaintiffs that D1 was seeking a stay of the court proceedings in favour of other agreed arbitration mechanisms. D1 has not been blowing hot and cold.

73. It is, however, somewhat curious that D1 left its reference to arbitration until 26 January 2023 the day of the hearing before me but such does not equate to an election to abandon D1's statutory right to a stay. D1 by words and/or conduct has not demonstrated a willingness to go along with a determination by this court of the substantive claims instead of arbitration. On the contrary, D1 made it abundantly clear that it was seeking and did in fact seek a statutory stay. D1 in applying for interlocutory injunctive relief cannot be taken to have abandoned its statutory right for a stay.

74. I have set out above the relevant facts and do not repeat them again here. In my judgment they amply demonstrate that there has been no "waiver" by D1 and I must therefore decide the Waiver Issue against the Plaintiffs.

75. In accordance with the usual practice (see Grand Court Practice Direction No 1/2004) an advance copy of this judgment was provided to the attorneys to submit any written suggestions in respect of typing errors, wrong references of fact or citation of authority or other minor corrections of that kind. Kobre & Kim responded by letter dated 15 February 2023 indicating that paragraphs 70 – 74 of the judgment did "not appear to address the submission that the court should imply waiver from (a) the terms of the draft order sought by the First Defendant on its application for an injunction (b) the First Defendant's offer to give a cross-undertaking in damages and the submission to the court's jurisdiction that that entails, and (c) from the fact that the First Defendant moved the application for an injunction on 29 November 2022."

76. It is well established that "… it is not necessary for a judge to recite the parties' submissions in detail. His task, as has frequently been emphasised, is to express his own reasoning for his decision in a manner intelligible to the parties and to any appellate court" (*Al Sadik v Investcorp Bank* [2018] UKPC 15 at paragraph 51). It is also well established that the trial judge has an "obligation to address at least the central arguments raised by the losing party and to explain why they were rejected" (*Crinion v IG Markets Ltd* [2013] EWCA Civ 587 at paragraph 14). It is, of course, important that the losing party knows why it has lost. I endeavoured at paragraphs 70 to 74 to

explain concisely why the Plaintiffs had lost on the Waiver Issue but I am content to provide some additional reasons in respect of the argument specified in the Kobre & Kim letter dated 15 February 2023, which in turn refers to an agreed transcript of Mr Asif's oral submissions on the point.

77. I say first of all that Mr Asif in his skeleton argument and in his oral submissions has referred to the wrong test. Mr Asif, referring to English cases on submission to the jurisdiction, says the relevant test is whether a disinterested bystander with knowledge of the case would regard the acts of the defendant as inconsistent with the making and maintaining of a challenge to the validity of the writ or to the jurisdiction (paragraph 44 of the Plaintiff's skeleton argument dated 20 January 2023 and Mr Asif's oral submissions on the Waiver Issue were littered with references to the "disinterested bystander" test). D1 was, as a company incorporated within the Cayman Islands, already within the jurisdiction so the usual test in respect of a submission to the jurisdiction was not applicable.

78. The correct test, in an arbitration stay context, is as specified in *Capital Trust* and the underlying authorities as outlined above. Nothing much may turn on this as there is not much between the two tests and my decision on the Waiver Issue would have been the same whether I applied what I am referring to as the test outlined in *Capital Trust*, which I did, or as Mr Asif suggested the "disinterested bystander" test.

79. Applying the correct test as outlined in *Capital Trust*, I do not accept that the terms of the draft order, the cross-undertaking in damages, and the request for the injunction on 29 November 2022, in the context of the facts as a whole, are such as to demonstrate an election to abandon the right to a stay. Indeed the evidence, as outlined above, is to the contrary. D1 made it clear that it maintained its right to dispute the jurisdiction of the court in view of the parties contractually agreed dispute method, namely arbitration (see Harneys's letter dated 17 October 2022 and the acknowledgement of service filed that day). The affidavit sworn on 17 November 2022 in support of the application for urgent interim injunctive relief expressly referred to the earlier summons seeking a Section 4 stay. The skeleton argument in support made it clear at paragraph 31 that D1's position was that the claims should be resolved through arbitration but, whether the proceedings were stayed or not, the injunction was required in order to preserve the status quo pending determination of the

substantive dispute. D1 did not "blow hot and cold". In Harneys letter to Kobre & Kim dated 16 December 2022 it is clear that the application for a Section 4 stay had not been abandoned and D1 made it clear that there was no intention to waive its rights to challenge the jurisdiction of the court. D1 had actually applied for an order pursuant to Section 4 that the legal proceedings be stayed on 15 November 2022 the day before the application for the injunctive relief.

80. In my judgment D1's conduct in providing a draft order in the terms it did and in offering the cross-undertaking in damages and requesting the injunction at the initial hearing on 29 November 2022 was not such as to demonstrate an election to abandon its right to a Section 4 stay. D1 did not at any stage indicate a willingness to go along with a determination of the court in respect of the substantive legal proceedings instead of arbitration.

81. It was for the reasons stated in this judgment that I rejected the Plaintiffs' arguments in respect of the Waiver Issue.

Rectification

82. The Plaintiffs' 20 page skeleton argument dated 20 January 2023 devoted just 5 lines to this issue without citing any case law in support. The issue was not significantly developed during oral submissions.

83. Mr Asif submitted that as the Plaintiffs' claims included a claim for rectification of D1's register of members and directors and such relief could only be granted by the court (section 46 of the Companies Act (2023 Revision)) this was an additional reason as to why the court should conclude that the claims in the pleadings are not within the scope of the arbitration provisions in this case. As the law presently stands there is nothing in this submission and I can dismiss it briefly, again engaging the valuable assistance of Foxton J who at paragraph 61 of *NDK v HUO* stated:

> "The fact that NDK has claimed relief in court of a kind which could not be obtained from the arbitrators (in particular rectification of the register of members) does not have the result that the matters raised in the Cyprus Proceedings fall outside the LCIA Arbitration

> Agreement. In some cases, the inability to obtain relief of a particular kind from the parties chosen tribunal is simply a "practical consequence" of their choice … Where the availability of a particular form of statutory relief from the court cannot be (or has not been) precluded by an agreement to arbitrate the underlying dispute, then it is possible to adopt a bifurcated approach, in which the relevant facts are determined by the parties' chosen tribunal, and relief then sought from the court on the basis of the arbitrators' determination …"

Foxton J at paragraph 70 added:

> "… the fact that the arbitration tribunal does not itself have power to grant part of the relief sought, by altering the terms of the register of members of a company so as to give effect to its determination, does not render the underlying dispute non-arbitrable, albeit it may require the successful party to bring court proceedings for the purpose of giving effect to the arbitral determination in that context …"

84. I concur and have nothing useful to add, other than to say that we await the decision of the Judicial Committee of the Privy Council in *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* (heard in the Cayman Islands in November 2022) with great interest.

Conclusion

85. I grant a stay of the legal proceedings. I am minded to do so with costs against the Plaintiffs on the standard basis but am content to receive concise written submissions on costs (no more than 5 pages) within the next 14 days and will thereafter determine the issue of costs on paper without the need for a further hearing.

86. I am grateful to the attorneys for their valuable assistance to the court. The attorneys should within the next 7 days file a draft order for my approval reflecting the determinations in this judgment.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT