

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM2025/0209

BETWEEN:

IN THE MATTER OF WELLTECH GROUP LIMITED

AND

IN THE MATTER OF SECTION 246 OF THE BVI BUSINESS COMPANIES ACT 2004

WELLTECH GROUP LIMITED

Claimant

and

TECHMIX LIMITED

Defendant

Mr Steven Thompson KC, instructed by Conyers, and with him, Mr Richard Evans and Mr Charles Goldblatt, both of Conyers, for the Claimant

Mr Richard Morgan KC, instructed by Collas Crill, and with him, Mr David O'Hanlon and Mr Joshua Hamlet, both of Collas Crill, for the Defendant

2025: November 4 and 5
December 5

JUDGMENT

INTRODUCTION

- [1] **MITHANI J (AG):** In this Claim (“the Claim”, “this Claim” or “these Proceedings”), issued on 15 May 2025, the Claimant is Welltech Group Ltd. I will refer to it in this judgment (“this Judgment” or “the Judgment”) as the “Claimant”, “the Company” or “Welltech”.
- [2] The defendant to the Claim is Techmix Ltd. I will refer to it as “the Defendant” or “Techmix”. I will refer to the Claimant and the Defendant collectively as “the Parties”.
- [3] The substantive relief that the Claimant seeks in the Claim, which was issued by way of a fixed-date claim form on 15 May 2025 (“the Claim Form”), is a declaration under s. 246 of the BVI **Business Companies Act 2004** (“BCA 2004”) in the following terms:
- “(1) ... the Company” is entitled to take all such steps as are or may be required to amend and restate its Memorandum and Articles of Association (“M&A” or “M&As”) in the form of the draft M&A dated 25 March 2025 (the “2025.2 M&A”) by reason of the ‘irrevocable prior consent in writing’ given by all Shareholders pursuant to Clause 4.2 of the Shareholders’ Agreement dated 30 June 2023 (the ‘SHA’) in circumstances where such amendment is made to implement or align the Company’s constitutional documents with the terms of the SHA.
 - (2) That from the date of their registration by the Registry of Corporate Affairs (the ‘Registrar’), the 2025.2 M&A shall constitute the effective and binding constitutional documents of the Company.
 - (3) That pending registration of the 2025.2 M&A by the Registrar, the Company’s M&A as amended and restated on 11 March 2025 (the ‘2025 M&A’) constitute the effective and binding constitutional documents of the Company by reason of their valid adoption by the Company’s sole director pursuant to Regulation 11.1 of the Company’s M&A as amended and restated on 24 March 2023 (the ‘2023 M&A’).”
- [4] I will adopt the above definitions and the definitions and abbreviations used in the documents included in the bundles lodged for the hearing on 4 and 5 November (“the Hearing”) for the purposes of this Judgment.

BACKGROUND

[5] For the purposes of this Judgment, I need only provide a brief background of the relevant facts and circumstances.

[6] The Defendant is a shareholder of the Claimant. Its shareholding in the Claimant, together with those of the other shareholders of the Claimant, is set out in the following table extracted from the Claimant's skeleton argument:

Shareholder	Ordinary	Series A Preferred	Series B Preferred	Series C Non-voting	Total Voting Shares	Percentage
Dealbeta (also known as Horizon)	5,771,458	—	—	—	5,771,458	4.65%
Gitsan	—	25,000,000	—	—	25,000,000	20.12%
Redseed	—	42,078,542	26,050,000	—	68,128,542	54.83%
Techmix	—	25,000,000	350,000	1	25,350,000	20.40%
Total	50,000,000	48,200,000	26,050,000	1	124,250,000	100.00%

[7] The relationships among each shareholder, the other shareholders, and the Company are governed by the SHA.

[8] The relevant provisions of the SHA are to the following effect:

“4.1 The Shareholders agree to:

- (a) take all actions necessary or appropriate to cause the adoption of all resolutions and decisions at any meeting of the Shareholders, any meeting of the Board or any committee thereof or any meeting of the board of directors of any Subsidiary as is required in each case to implement this Deed; and
- (b) exercise their voting rights at any meeting of the Shareholders and to instruct, as far as they lawfully can, their respective nominees or nominee directors (as applicable) on the Board or to the board of directors of any Subsidiary to exercise their voting rights, subject to their fiduciary duties, in a manner consistent with all of their respective obligations under, and other applicable provisions of, this Deed and the Articles.

4.2 To the fullest extent possible under applicable Law, the Shareholders agree that at all times as between themselves the provisions of this Deed shall take precedence over the provisions of the Articles. In the event there is a conflict or

inconsistency between this Deed and the Articles or the Organisational Documents of any Subsidiary, the Shareholders shall take all lawful actions necessary to amend the Articles, or such Organisational Document, if such amendment is permitted under relevant Law, in order to implement the terms of this Deed, and in any event, shall act in accordance with this Deed.

For the purposes of the interpretation of the Articles, the Shareholders agree that any consent to any matter given by a Shareholder under this Deed constitutes the irrevocable prior consent in writing of that Shareholder to that matter where the Articles require such consent to be given.

- 6.1 The Shareholders shall establish a non-statutory advisory board (Advisory Board) which will be responsible for making recommendations and advice on the supervision of the Group's general management, the overall business strategy of the Group and any corporate decisions that may affect the Shareholders' rights. No remuneration shall be payable to the members of the Advisory Board (the Advisory Board Members) for their services in such capacity, except that any independent Advisory Board Member may be paid such remuneration as is approved by the holders of at least 75% of the votes that may be cast by the Advisory Board Members. Each Party shall use reasonable endeavours to procure that any decision of the Advisory Board made in accordance with this Deed is subsequently and as soon as reasonably possible approved (if such approval is required under the Organisational Documents or the applicable Laws) by the Board, or relevant governing bodies of the other Group Companies, and implemented accordingly.
- 26.1 This Deed, and any issues or disputes arising out of or in connection with it (whether such disputes are contractual or non-contractual in nature, such as claims in tort, for breach of statute or regulation, or otherwise) shall be governed by, and construed in accordance with, the Laws of England.
- 26.2 Any dispute arising directly under the express terms of this Deed or the grounds for termination of any rights granted under this Deed shall be resolved as follows:
- (a) Within thirty (30) days from the written request of one Party to another, senior executives of the Parties shall meet to attempt to resolve such dispute. If the Parties have not resolved the dispute within such period any Party may give written notice to the others detailing the specific areas of the dispute, which will require the Parties to enter into formal binding arbitration to finally resolve the dispute.
 - (b) The Rules of Arbitration (the Rules) of the London Court of International Arbitration (LCIA) in effect as of the date hereof shall apply to such arbitration ...
 - (ii) The place of arbitration shall be London, England, and the English language shall be used in the proceedings.

- (iii) The Parties shall not disclose: the existence, content, or status of the arbitration proceedings; any document exchanged, produced or created by the Parties in connection with the arbitration proceedings; any testimony offered by the Parties in connection with the arbitration proceedings; or, the award or other determination of the arbitrators.

Schedule 1 – Reserved matters

Part A – Shareholders Reserved Matters

Save with the prior written consent of a 75% Shareholder Majority, no Group Company nor their respective boards or advisory boards shall (whether directly or indirectly, by amendment, merger, consolidation, or otherwise) effect any of the following matters: ...

- 7 any amendment, modification or replacement of the Organisational Documents¹ of any Group Company, including any change of its name, other than in connection with the raising of any new equity capital as approved by the Shareholders in accordance with this Deed or as required by applicable Law,
 - (a) except for an amendment (1) to align with this Deed, and/or (2) that is required by applicable Law, and/or (3) that is required to implement a decision of the Board² or Advisory Board³ or Shareholders⁴ that has been validly taken in accordance with this Deed, and/or (4) that is approved by the IPO Committee in accordance with clause 5.16 in connection with any Listing; and
 - (b) provided that any amendment, modification or replacement of the Articles pursuant to which an Investor would suffer any loss or diminution of its rights shall require the written consent of such Investor; provided further that granting a Party a pari passu right shall not in and of itself be considered a loss or diminution of rights under such Articles...

[9] In March 2023, the Company's M&As were amended. However, in June 2023, four shareholders and two other then-shareholders executed an amended and restated SHA, which contained terms inconsistent with the 2023 M&As.

[10] As noted above, cl. 4 of the SHA imposed binding obligations on the shareholders (but not the Company) to:

¹ Defined in cl. 1.1 of the SHA to include any articles of incorporation, memorandum of association, articles of association, charter, by-laws ... of a company.

² Defined in cl. 1.1 of the SHA as the board of directors of the Claimant from time to time.

³ As defined in cl. 6.1 of the SHA, reproduced above.

⁴ Defined in cl 1.1 of the SHA as "the Parties from time to time (except for the Company) ..."

- (a) take all necessary actions to cause the adoption of resolutions and decisions at shareholder or board meetings to implement the SHA;
- (b) exercise voting rights and instruct nominee directors to act consistently with the SHA and the articles of association (“AA” or “AAs”) of the Company, subject to the fiduciary duties which they owed to the Company; and
- (c) ensure that the SHA’s provisions took priority over the AA, amend the AA if lawful, and act in accordance with the SHA. Clause 4.2 further provided that shareholder consent under the SHA constitutes irrevocable prior written consent where required by the Articles.

[11] As also noted above, Part A of the Schedule to the SHA delineated “Shareholders Reserved Matters”, requiring 75% shareholder majority consent, expressly including amendments to the M&As, except those made solely to align the M&As with the SHA.

[12] The 2023 Articles reflected cl. 4.2 of the SHA, stipulating the “Shareholder Deed” (defined to include the SHA) prevailed over the M&As. They required shareholders to take lawful action to amend the M&As if they were inconsistent with the Shareholder Deed, and to act in accordance with it. The term “Shareholder Deed” as defined in the M&As incorporated the SHA as amended and restated from earlier agreements dating back to December 2021.

[13] Despite the acknowledged conflict and the contractual undertaking in clause 4.2 of the SHA, no formal amendment to the M&As was made until November 2024. Nevertheless, corporate affairs were conducted in accordance with the SHA, respecting its precedence over the M&As.

[14] By January 2024, the two former shareholders, Fervenza (Genesis) and Arca Enterprises, had assigned their shares and SHA rights to Redseed, leaving four continuing shareholders.

[15] In November 2024, the Company sought to regularise the position. Mr Oleh Andreikiv, on behalf of the Claimant, circulated a draft amended M&As and draft resolutions to adopt the new version, primarily to give effect to the SHA and reflecting the change in membership following the exit of Fervenza and Arca.

[16] The draft included a ‘redline’ version identifying substantial changes from the 2023 M&As.

- [17] The Defendant's representative, Mr Maksym Grekov, requested extensions to review the draft, citing workload and illness, and later indicated the need to retain external legal advisers, though initially without requesting such advice. No other shareholder objected to this.
- [18] The other three shareholders signed the draft resolutions, amounting to nearly 80% approval by voting rights.
- [19] The Claimant contends that, by virtue of cl. 4.2 of the SHA, the Defendant's signature constituted irrevocable prior written consent to the lawful amendment of the M&As, equivalent to the prior affirmative vote required under reg. 12.1(b) of the 2023 M&As. The Company treated the resolution as valid, and the amended M&As were registered on 23 December 2024 (the "2024 M&As").
- [20] Although the Defendant initially challenged certain procedural aspects of this, by April 2025, it allegedly acknowledged the validity of the 2024 M&As.
- [21] Subsequently, in February 2025, the Defendant raised complaints alleging that the Company acted *ultra vires* by amending the M&As without the Defendant's prior affirmative vote as required by the 2023 M&As and BVI law, and by accepting other shareholders' written resolutions.
- [22] Due to ongoing uncertainty caused by Techmix, the Company's sole director approved a streamlined version of the M&As ("2025 M&As"), containing only amendments within her power under clause 11 of the 2023 Memorandum of Association, without requiring shareholder approval.
- [23] The Defendant conceded that the 2025 M&As aligned with the SHA but raised several, mostly minor, alleged discrepancies with the SHA.
- [24] In response, the Company's legal practitioners circulated a further revised draft of the M&As (the "2025.2 M&As") addressing the Defendant's concerns. The Defendant nonetheless objected to the wording of the recitals in the draft resolutions, prompting the Claimant to make further amendments to accommodate those concerns.
- [25] The Defendant made clear it would not sign any version of the M&As reflecting the SHA, instead proposing wholesale changes that gave primacy to rights under the 2023 M&As, which the SHA

had overridden, effectively attempting to rewrite the SHA through leverage by blocking the restatement of the M&As.

[26] Faced with this impasse, the Company resolved to commence the Claim for a declaration in the terms specified above. The Defendant applied to be joined as a party to the Claim and subsequently applied for a stay of the proceedings in the Claim by way of an application dated 10 July 2025 (“the Stay Application”) on the basis that the “dispute” between it and the Company should be referred to arbitration pursuant to the arbitration agreement in cl. 26.2 of the SHA (“the Arbitration Agreement”).

[27] The grounds upon which the Defendant sought a stay of the Claim are set out in the Stay Application in the following terms:

- “1. The Claimant and the Defendant are parties to the 30 June 2023 Shareholders’ Agreement (SHA). The SHA is governed by English Law. Clause 26.2 of the SHA contains a binding arbitration agreement that is valid, operative and capable of being performed.
2. The arbitration agreement requires parties to submit any dispute arising directly under the SHA’s express terms to LCIA Arbitration.
3. The Claimant has not disputed the existence and/or validity of the arbitration agreement.
4. The 15 May 2025 Fixed Date Claim concerns a dispute that arises under the express terms of the SHA, such that the arbitration agreement within the SHA is engaged.
5. The dispute concerns (1) whether the proposed amendments to the Claimant’s memorandum and articles of association are in accordance with the SHA and (2) the meaning and effect of Clauses 4.1 and 4.2 of the SHA.
6. The claim in these proceedings is not one which should have been brought by the Claimant in any event. If and in so far as it was brought and pursued for the benefit or at the behest of shareholders other than the Defendant, then the costs should not fall upon the Company, but should instead fall to be paid by those other shareholders.”

[28] On 25 July 2025, the Company cross-applied to strike out the Stay Application (“the Strike Out Application”) under **CPR 11.15** on the basis that the Stay Application disclosed no reasonable ground for a stay of the Claim to be granted; alternatively, on the ground that the Stay Application was an abuse of process.

[29] I heard the Stay Application and the Strike Out Application over two days at the Hearing.

[30] A helpful and more detailed timeline of the relevant events leading to the Hearing is contained in the chronology prepared by the Claimant for the Hearing. That chronology has not been put in issue by the Defendant. I am assuming, therefore, that the Defendant does not dispute the substance of it.

ISSUES FOR DETERMINATION BY THE COURT, ANALYSIS AND DISCUSSION

Stay Application

[31] The basis upon which the Defendant seeks the stay is set out in the following paragraphs of the Defendant's skeleton argument:

- "8. In December 2024 and March 2025, Welltech purported to amend its Memorandum and Articles ("M&A") in a manner which did not conform to the SHA and where no meeting of shareholders was held. The December 2024 amendment was said at the time to be made in reliance upon the alleged consent in writing given by Techmix under clause 4.2 of the SHA. Having held no meeting of shareholders, Welltech now describes its decision to file the December 2024 amendments altering the rights of the shareholders as "a necessary and reasonable step of self-help" (see page 2 of its letter of 7 August 2025 at sub-paragraph a) at V2/1349): in fact, it was a clear breach of the SHA.
9. Welltech's Claim seeks a declaration that it (as opposed to its shareholders, apparently) is entitled to amend its Memorandum and Articles ("M&A") to the form of the draft dated 25 March 2025 (the "2025.2 M&A") without holding any meeting by reason of an alleged irrevocable consent given in the SHA, and despite the fact that those M&A purport to validate the earlier (invalid) amendments to the M&A. Welltech now apparently accepts that the 2025.2 M&A do not conform with the SHA.2.
10. Welltech also claims a declaration that it is entitled to rely on earlier M&A that themselves record amendments that have been made by Welltech (again as opposed to its shareholders) without any meeting, purportedly relying on the SHA.
11. Techmix disputes the meaning and effect of the wording in the SHA at clauses 4.1 and 4.2 relied upon by Welltech to amend the M&A in the past and by which it now seeks further to amend the M&A.
12. Although properly the matter for an arbitration pursuant to clause 26, the areas of dispute include the facts that:

- 12.1. There has been no meeting of the Shareholders as required by clause 4.1 of the SHA.
- 12.2. None of the versions of the M&A identified in the Claim which Welltech argues the Court should sanction actually conform with amendments required exclusively in order to implement the SHA.
- 12.3. In the circumstances there is nothing that requires the interpretation of the Articles even were clause 4.2 of the SHA to amount to consent given under the SHA.
- 12.4. But in any event, clause 4.2 does not purport to amount to a written consent to a shareholders' resolution so as to engage clause 4.2 of the SHA as "interpretation of the Articles" where clause 4.1 of the SHA requires a vote to occur at a meeting of shareholders (even if the new M&A conformed to the SHA).
- 13. The Claim itself relies on the terms of the SHA to justify the relief sought, yet there is a dispute as to the meaning and effect of the terms relied upon (as set out immediately above). In the circumstances, the dispute is within the terms of the arbitration clause."

[32] The Defendant then states that a "dispute" ("the Dispute") of the nature that forms the subject of the Claim should be determined by arbitration pursuant to the arbitration clause contained in the SHA. It points out that an arbitration clause is construed broadly by the Court (see **Republic of Mozambique v Prinvest**),⁵ and is given statutory recognition by s. 18(1) of the **BVI Arbitration Act** and art. 8 of the **UNCITRAL Model Law**, which it adopts for this purpose.

[33] The Claimant accepts that the SHA contains an arbitration clause in the terms specified above. It also accepts that the arbitration clause is valid and enforceable. However, it contests the Defendant's assertion that the arbitration clause applies to the Dispute.

[34] The central – indeed, only – substantive point for the Court to decide on the Stay Application and the Strike Out Application is whether the Dispute should be determined by arbitration pursuant to the arbitration clause in the SHA, or whether the proper forum for its determination is this Court.

[35] In support of its position that the Claim should be stayed, the Defendant (represented by Mr Richard Morgan KC, who appeared at the Hearing with Mr David O'Hanlon and Joshua Hamlet) relies on the following matters.

⁵ [2023] UKPC 32, at [35] and [44] to [80].

- [36] First, it relies on various decisions that purport to support the premise that, in a situation such as this, the arbitration clause is there primarily to resolve disputes of this kind between the parties to a shareholders' agreement and their successors in title.
- [37] The *locus classicus* among the authorities relied on by the Defendant (and indeed also the Claimant) is **Sian Participation Corp'n (in liquidation) v Halimeda International Ltd** ("Sian Participation").⁶
- [38] In that case, the Privy Council held that the decision in **Salford Estates (No 2) Ltd v Altomart Ltd** ("Salford Estates"),⁷ and the cases that followed it, were wrong to grant a discretionary stay of a creditor's petition (or, in the British Virgin Islands, a liquidation application) where an insubstantial dispute about the creditor's debt was raised between the parties to an arbitration agreement.
- [39] The Privy Council confirmed that a winding-up petition did not engage the mandatory stay provisions under the UNCITRAL Model Law or equivalent domestic statutes because such petitions did not resolve or determine the merits of the debt claim, nor did they violate the negative arbitration obligation preventing court resolution of disputes. The Privy Council emphasised that insolvency legislation favoured winding-up petition proceedings (or their equivalent in the BVI) unless a debt was genuinely disputed on substantial grounds, in which case the creditor should first establish their claim through arbitration or a court judgment. The negative obligation in arbitration agreements extended only to preventing courts from prematurely resolving disputes, not preventing creditors from invoking liquidation remedies when debts were undisputed or only insubstantially disputed. Arbitration objectives, such as efficiency and party autonomy, were preserved when winding-up was allowed in these circumstances, as seeking liquidation did not resolve the underlying debt dispute but rather enforced a creditor's remedy when payment fails.
- [40] The Defendant relies upon the following passages of the judgments of Lord Briggs and Lord Hamblen, giving the opinion of the Board of the Privy Council:

"[44] The approach to the interpretation of provisions such as s 18 of the Arbitration Act was addressed by the Board in **FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp**⁸ ("FamilyMart")... in an advice delivered by Lord Hodge. That case was concerned with the equivalent Cayman

⁶ [2024] UKPC 16.

⁷ [2014] EWCA Civ 1575.

⁸ [2023] UKPC 33, at [31] ff.

Islands legislation, but what was there said may be adapted to apply to the Arbitration Act as follows:

- '31. Many countries which are contracting states to the New York Convention have implemented provisions like [section 18 of the Arbitration Act] in accordance with their obligations under the New York Convention. In **Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP** ("Gol Linhas"),⁹ the Board, in a judgment delivered by Lord Hamblen and Lord Leggatt, addressed the correct approach to the interpretation of [such provisions]. In para 21 of its judgment the Board referred to the judgment of the UK Supreme Court in **Enka Insaat** [i.e., **Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"**],¹⁰ in which it observed that more than 160 states had signed the New York Convention and stated: "The essential aim of the Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards. Its success is reflected in the fact that ... the New York Convention has been implemented through national legislation in virtually all contracting states." (Citations omitted)

The Board went on to observe (para 74) that the meaning of a [BVI] statute is a question to be decided by applying the law of the [BVI] but that the international origin of the provision necessitated a particular approach to its interpretation.

The Board stated (para 75):

'As with any statute which incorporates into domestic law the text of an international treaty, the interpretation and application of the statutory language must take account of its origin in an international instrument intended to have an international currency. That entails that, as Lord Macmillan put it in **Stag Line Ltd v Foscolo, Mango & Co Ltd**,¹¹ in the interests of uniformity the words should not be given a local interpretation controlled by what he called 'domestic precedents of antecedent date', but rather should be construed 'on broad principles of general acceptance'; see also **James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd**¹² and **Fothergill v Monarch Airlines Ltd**.¹³ This principle is just as relevant in determining the scope of application of rules incorporating an international convention as it is in interpreting their linguistic meaning ..."

- [45] One of the issues addressed in detail in *FamilyMart* was the meaning of a 'matter' which has been agreed to be referred to arbitration, or, in the language of s 18 of the Arbitration Act, 'which is the subject of an arbitration agreement'.

⁹ [2023] Bus L.R. 1305.

¹⁰ [2020] UKSC 38, at [126].

¹¹ [1932] A.C. 328 at 350

¹² [1978] A.C. 141 at 152, per Lord Wilberforce.

¹³ [1981] A.C. 251 at 281-282, per Lord Diplock.

[46] At paras 34 to 56 Lord Hodge reviewed the international authorities, concluding at para 57:

'... the Board considers that there is now a general consensus among leading arbitration jurisdictions in the common law world that the domestic courts of countries that are signatories of the New York Convention respect and give priority to the autonomy of the parties to arbitration agreements. The statutory provisions of those countries provide for a mandatory stay of legal proceedings at the request of a party to an arbitration agreement when a matter in those proceedings is referable to arbitration. There is also a broad consensus on how to approach the determination of matters which must be referred to arbitration.'

[41] Lord Briggs and Hamblen went on to say:

"[47] Whilst recognising that 'no judicial formula encapsulating the meaning of 'matter' should be treated as if it were a statutory text', Lord Hodge expressed the broad consensus on approach as follows:

- (1) 'The court in considering such an application adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration Agreement' (para 58).
- (2) 'The court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration. It involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into account all reasonably foreseeable defences to the claim or part of the claim' (para 59).
- (3) 'A "matter" is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the "matter" is not an essential element of the claim or of a relevant defence, it is not a matter in respect of which the legal proceedings are brought. The Board agrees with the statement of Sundaresh Menon CJ in para 113 of **Tomolugen** [2016] 1 SLR 373 that a "matter" requiring a stay does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings. The

Board agrees with Foster J's third proposition in WDR Delaware that a 'matter' is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings' (para 61).

- (4) 'The exercise involving a judicial evaluation of the substance and relevance of the "matter" entails a matter of judgment and the application of common sense. It is not a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay' (para 65).

[48] A similar statement as to the proper approach is set out in Lord Hodge's judgment in the Supreme Court decision in **Republic of Mozambique v Prinvest Shipbuilding SAL (Holding)**.¹⁴ The judgment in that case was handed down on the same day as the advice in **FamilyMart**."

[42] Then, in the following paragraphs of their judgment, their Lordships said:

"[50] The first point to be made is that it is common ground that a creditor's winding up petition is not an 'action' within the meaning of s 18 (or a 'claim' within the meaning of s 9 of the 1996 Act). The mandatory stay provisions do not therefore apply to the liquidation application.

[54] This reflects the decision in **Salford Estates** which, on this issue, has been followed by the BVI courts. In particular, it reflects para 31 of Sir Terence Etherton C's judgment in **Salford Estates** in which he explained that a creditor relies on non-payment of a specific debt in a winding-up petition 'as evidence' that the company 'is unable to pay its debts as they fall due'; the petition 'is not a claim for payment of the debt'.

[55] This distinguishes the present case from **FamilyMart** in which it was not disputed that applications to wind up a company on the just and equitable ground were 'legal proceedings' so as to fall within the mandatory stay provisions of the equivalent Cayman Islands statute (see para 33).

[56] **FamilyMart** recognises, however, that there may in appropriate cases be a pro tanto stay of proceedings (see para 60). It follows that even though the bringing of the proceedings may not engage the mandatory stay provisions, it is possible that issues may arise in the proceedings which do. The most obvious example would be if the proceedings involved the determination of a claim which was subject to the arbitration agreement.

¹⁴ [2023] UKSC 32, at [71]-[77].

- [57] In general, arbitration agreements are concerned with dispute resolution. They resolve disputes between the parties through the arbitration tribunal's determination of disputed rights and obligations, including remedial rights. As *FamilyMart* makes clear, this may include claims for declaratory relief.
- [58] The general need for a determination of disputed rights and obligations is reflected in the approach in **FamilyMart** as to what constitutes a 'matter' in respect of which legal proceedings are brought. As there stated at para 61:
- 'A 'matter' is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute.' ...
- [59] The focus is on issues which are legally relevant to a claim or the defence to a claim – ie substantive issues. The focus is also on the issues which may be 'determined' by the arbitration tribunal.
- [60] This is consistent with the stated object of the **Arbitration Act** which is to facilitate and obtain the fair and speedy 'resolution of disputes' by arbitration (s 3(1)). A foundational principle of the Arbitration Act is that the parties to a dispute should be free to agree on 'how the dispute should be resolved' (s 3(2)(a)). Further, as the heading of art 8 of the Model Law makes clear, it applies where there is a 'substantive claim before court'.
- [61] If no such 'matter' arises in the legal proceedings then the mandatory stay provisions do not apply. If they do not apply, then the policy underlying them equally does not apply. That policy is to enforce the positive and negative aspects of arbitration agreements. Those are only engaged, however, in respect of a 'matter' which is subject to the arbitration agreement.
- [62] It is not the policy of the Arbitration Act, or arbitration law more generally, to fetter the rights of parties in respect of matters which fall outside the scope of the arbitration agreement. The parties' freedom to choose to resolve their disputes by arbitration and how to do so is to be respected but that also means respecting the boundaries of the choice made. That is another important aspect of party autonomy.
- [63] Unless an arbitration agreement provides otherwise, it is not the policy of the **Arbitration Act**, or its English equivalent, to require a creditor to obtain an arbitration award before enforcing a debt which is completely undisputed, by a claim in court. Nonetheless the English courts have set a very low threshold for the identification of a dispute sufficient to require arbitration, and therefore a mandatory stay of any claim in court to enforce the debt, under s 9 of the 1996 Act. All that is necessary is that the debt should not be admitted. It need not be denied, nor need any, let alone any substantial, grounds to be shown for disputing the debt: see *Halki Shipping Corpn v Sopex Oils Ltd* [1998] 1 WLR

726 ('Halki Shipping').¹⁵ The judgments of Henry LJ¹⁶ ... and Swinton Thomas LJ¹⁷ ... explain that this low threshold was introduced in the 1996 Act on the deliberate policy ground of preventing the avoidance of a mandatory stay by the creditor seeking summary judgment in court proceedings to enforce the debt, on the assertion that there was no sufficient dispute of substance to require a trial (or therefore an arbitration). Since 1930, the predecessors to the 1996 Act had permitted this to happen because the predecessor to s 9 had included as a ground for resisting a stay the assertion that 'there is not in fact any dispute between the parties with regard to the matter agreed to be referred'. Thus a creditor could resist a mandatory stay on a basis very similar to that used to resist the dismissal of a winding up petition on the grounds that the debt was disputed, ie by showing that the debt was not genuinely disputed on substantial grounds. This was removed from what became s 9 in 1996. It was to take until 2013 (in **Rusant Ltd v Traxys Far East Ltd** ('Rusant'))¹⁸ for the possible implications of this change in the threshold for a mandatory stay to seep through to the context of winding up.

(Emphasis supplied).

[43] Second, Mr Morgan relies on the Eastern Caribbean Court of Appeal's decision in **Siong Beng Seng v Caldicott Worldwide Ltd**,¹⁹ which established a two-stage test for determining whether a claim fell within an arbitration agreement and should be stayed. The first stage required identifying the substantive matter subject to arbitration, applying a practical, common-sense approach focused on substance over form. The second stage required construing the arbitration agreement to determine whether the parties agreed to arbitrate that matter.

[44] I am unable to accept that the decision in **Siong Beng Seng** assists Mr Morgan's case.

[45] The first limb of the test — that a dispute must exist between the parties for judicial adjudication — is self-evident. The second limb — that the court must respect parties' agreement to arbitrate disputes — is equally straightforward and rooted in common sense; the court must not rewrite their contract. The Privy Council in **Sian Participation Corpn (in liquidation) Ltd** clarified that the dispute must be genuine and based on substantial grounds. As the Privy Council observed:²⁰

“As a matter of BVI law, the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the

¹⁵ [1998] 1 WLR 726.

¹⁶ *Ibid.*, at 750.

¹⁷ *Ibid.*, at 763-763.

¹⁸ [2013] EWHC 4083 (Comm).

¹⁹ BVIHCMAP2021/0007.

²⁰ [2024] UKPC 16, at [95].

application is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds.”

- [46] Thus, in determining whether to grant a liquidation order on a creditor’s application, as was the subject of the “dispute” in that case, the court must decide if the debt is genuinely disputed on substantial grounds. Where such a genuine dispute exists, the application will be stayed or dismissed; in the absence of such, the court may grant the order, subject to its overall discretion.
- [47] The Privy Council’s clarification obviates the need to consider myriad fact-specific cases regarding what amounts to a genuine and substantial dispute. The onus lies on the party denying the applicability of the arbitration clause (here, the Claimant) to prove why arbitration should not proceed. Nonetheless, my conclusions here rest not on the precise allocation of this burden, but on compelling material warranting the outcome reached.
- [48] Third, the Defendant contends that the SHA makes it clear that the dispute between it and the Claimant falls squarely within the arbitration agreement contained in cl 26.2 of the SHA. Clauses 4.1 and 4.2 of the SHA require that any dispute arising under its express terms or relating to the grounds for termination of rights granted under it must be resolved by arbitration once the requisite notice procedure has been followed. Specifically, the Defendant contends that those provisions of the SHA require the shareholders to take all necessary actions to implement the SHA, to exercise voting rights consistently with it, and to ensure that the SHA takes precedence over the Articles so far as possible.
- [49] The Defendant states that the Company unilaterally amended its Memorandum and Articles (“M&A”) on several occasions — in December 2024 and March 2025 — without convening any shareholders’ meeting, contrary to both the AA and the procedural obligations contained in clause 4.1 of the SHA. The Claimant initially sought to justify these amendments on the basis of an alleged “irrevocable written consent” said to arise under cl. 4.2. However, the Defendant disputes that cl. 4.2 constitutes any form of shareholder consent for the purposes of the amendment of the AA, or that it can operate in the absence of a shareholders’ meeting expressly required by cl. 4.1. It argues that the December 2024 amendment and subsequent steps constitute clear breaches of the SHA, which cannot be validated *ex post facto*.
- [50] The essence of the position of the Defendant is encapsulated by the following provisions of its skeleton argument:

- “12. Although properly the matter for an arbitration pursuant to clause 26, the areas of dispute include the facts that:
- 12.1. There has been no meeting of the Shareholders as required by clause 4.1 of the SHA.
 - 12.2. None of the versions of the M&A identified in the Claim which Welltech argues the Court should sanction actually conform with amendments required exclusively in order to implement the SHA.
 - 12.3. In the circumstances there is nothing that requires the interpretation of the Articles even were clause 4.2 of the SHA to amount to consent given under the SHA.
 - 12.4. But in any event, clause 4.2 does not purport to amount to a written consent to a shareholders’ resolution so as to engage clause 4.2 of the SHA as ‘interpretation of the Articles’ where clause 4.1 of the SHA requires a vote to occur at a meeting of shareholders (even if the new M&A conformed to the SHA).
13. The Claim itself relies on the terms of the SHA to justify the relief sought, yet there is a dispute as to the meaning and effect of the terms relied upon (as set out immediately above). In the circumstances, the dispute is within the terms of the arbitration clause.
14. Arbitration agreements facilitate the resolution of disputes in private [expressly recognised in the present case by clause 23 of the SHA] are construed broadly by the Court²¹ and are given statutory protection through the operation of the **BVI Arbitration Act.**”

[51] In conclusion, the Defendant states that if, as both the Claimant and Defendant accept, the arbitration clause is valid, it is no part of the function of the Court to decide whether the present dispute is a “good or a bad dispute”: if there is a dispute, it must be arbitrated, not litigated.²² In other words, if the dispute falls within the terms of the arbitration clause, the Court must not examine the merits or strength of the dispute. If a dispute exists and falls within the clause, arbitration is mandatory.

[52] The position of the Claimant can be set out in a series of a few short points.

[53] The Claimant draws attention to cl. 4 of the SHA, under which the shareholders undertook to implement it and agreed that it would take precedence over the M&As. Clause 4.2 provided that

²¹ Referring to **Republic of Mozambique v Prinvest** [2023] UKPC 32, at [35] and [44] to [80].

²² Per para. 18 of the Defendant’s skeleton argument.

"any consent to any matter given by a Shareholder under [the SHA] constitutes the irrevocable prior consent in writing of that Shareholder to that matter where the Articles require such consent to be given." Regulation 27 of the 2023 M&As mirrored this.

[54] Despite the conflict, no steps were taken to amend the M&As until November 2024, when the Claimant circulated draft amended M&As to implement the SHA. The other three shareholders (representing 80% of voting rights) signed the resolutions. The Company contends that the Defendant's signature to the SHA constituted its irrevocable prior consent pursuant to clause 4.2. The 2024 M&As were registered on 23 December 2024.

[55] In February 2025, the Defendant complained that the Claimant acted *ultra vires*. In March 2025, the Defendant raised alleged minor discrepancies. The Claimant promptly addressed these in the 2025.2 M&As on 25 March 2025. On 12 April 2025, the Defendant reversed course, proposing wholesale changes to reintroduce voting rights that had been superseded by the SHA.

[56] In consequence of the Defendant's adoption of what the Claimant characterised as an unreasonable and wholly inappropriate position, the Company issued the Claim pursuant to section 246 of the **BCA 2004** seeking the declaratory relief set out above. The Claimant submits that section 246 expressly permits applications without the necessity of joining other parties, such that claims brought under that provision are by their nature largely non-adversarial and ought to be capable of straightforward determination by the Court. The Claimant contends that the Defendant's stance is not only legally unsustainable but also strategically motivated by a desire to recover voting rights to which it relinquished entitlement under the SHA. As stated at paragraph 112 of the Claimant's skeleton argument:

"It is clear that Techmix now regrets signing the SHA and losing its right of veto. Its actions of the last 12 months lead one to conclude that it is either stalling for time or trying to obstruct the operations and good governance of the Company and be a thorn in the Company's side, with a view to getting bought out. "

[57] The Claimant maintains that a claim for unilateral relief under s. 246 of the **BCA 2004** cannot properly be described as an "action" within the meaning of s. 18 of the **Arbitration Act**, which implements art. 8 of the **UNCITRAL Model Law**. Relying on **Sian Participation**, the Claimant maintains that, like a creditor's liquidation application, a section 246 application does not seek to resolve any claim or dispute about money or any other matter. Rather, it seeks declaratory relief

on the interpretation of constitutional documents — a request that does not trigger the mandatory stay provisions.

[58] The Claimant relies upon the following passages of the judgment in that case in support of that proposition:

- “89. The contractual obligation embodied in the typical arbitration agreement is to refer disputes to arbitration for resolution. The negative obligation is not to have them resolved by any court process. Thus the presentation of a winding up petition (or similar liquidation application) does not offend the negative obligation at all. It is simply not something which the creditor has agreed not to do.
90. Nor are the policies underlying the arbitration legislation which implement the Model Law in any way offended or infringed by a party to an arbitration agreement seeking the liquidation of a debtor party which fails to pay the debt. There is a policy of insolvency legislation that the liquidation route should not be pursued, or even threatened, against a company which genuinely disputes the debt on substantial grounds. Where there is such a dispute, the policy is that the creditor should first establish his claim, by having that dispute resolved in its favour, either by a judgment in court or, if there is an applicable arbitration agreement, by an arbitral award.
91. The clearest legislative signal about the boundary of the policy that a party to an arbitration agreement should arbitrate is the extent of the mandatory stay provision which implements article 8 of the Model Law. That identifies the extent of the negative obligation: not to seek resolution of a dispute in court. A winding up petition or similar application lies outside both that boundary and therefore the extent of the underlying policy.
92. None of the general objectives of arbitration legislation (efficiency, party autonomy, pacta sunt servanda and non-interference by the courts) are offended by allowing a winding up to be ordered where the creditor's unpaid debt is not genuinely disputed on substantial grounds. To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation just adds delay, trouble and expense for no good purpose. Party autonomy and pacta sunt servanda are not offended because seeking a liquidation is not something which the creditor has promised not to do. And by ordering a liquidation the court is not resolving anything about the debt, nor interfering with the resolution of any dispute about it.
93. Above all there is nothing anti-arbitration in this conclusion. In most agreements where one party is likely to be the creditor, (such as any typical loan agreement), it is that party which will generally have the whip-hand in choosing or vetoing the detailed terms of the agreement. Such a party is much more likely to agree to include an arbitration clause if it does not impede a liquidation where there is no genuine or substantial dispute about the debt. And where there is such a dispute, then arbitration will prevail as the means of resolution.”

(Emphasis supplied).

- [59] Leaving aside whether the “dispute” between the parties is caught by the terms of the arbitration clause, which I deal with below, I disagree with the Claimant that (if the dispute falls within the scope of the arbitration clause) the type of claim advanced by the Claimant, or the above passages extracted from **Sian Participation** relied upon by the Claimant, by themselves, establish that the “dispute” must be determined by the Court. If that were the case, a claimant could always resort to the issue of a “neutral” type of claim to avoid a defendant raising a dispute to it.
- [60] Had the Claimant confined its claim to a mere declaration as to which version of the M&As properly represented its constitutional documents, the Court might have been prepared to grant such declaratory relief on a neutral basis, even if the “dispute” fell within the scope of the arbitration clause. Such a scenario parallels cases in which an office-holder seeks the Court’s directions on actions to be taken in an insolvency, a trust claim, or where a person initiates interpleader proceedings over disputed funds he holds without asserting a personal claim to them.
- [61] However, the present relief sought by the Claimant is a declaration that the Claimant is entitled to undertake all steps necessary to amend and restate its Memorandum and Articles by reason of an alleged “irrevocable prior consent in writing” purportedly given by all Shareholders. Given the Defendant’s express denial of any such entitlement, a “dispute” necessarily arises between the parties. The assertion of the Claimant that the Court is being invited to do no more than bring the AA to reflect the terms of the SHA cannot mean that there is no “dispute” between the Parties if the Defendant claims otherwise, as it appears to do by terms of the Stay Application and written evidence furnished in support of it. The Court’s function is then to determine whether the dispute is genuine and made on substantial grounds.
- [62] It follows that, in the present case, the Court must determine: (a) whether the terms of the arbitration clause in the SHA extend to the alleged “dispute” which has arisen between the Parties; and (b) if they do, whether the “dispute” constitutes a genuine dispute on substantial grounds. If the answer to either question is No, the Court retains complete jurisdiction over it; otherwise, the dispute must be arbitrated under the terms of the arbitration clause.
- [63] Does the dispute fall within the scope of the arbitration clause?

[64] It is worth recalling what cl. 26.2 states:

“Any dispute arising directly under the express terms of this Deed or the grounds for termination of any rights granted under this Deed shall be resolved as follows ...”

[65] The Claimant states that the Claim is not a "matter which is the subject of an arbitration agreement" in this case. It contends that applying the two-stage approach set out in **FamilyMart China Holdings** and **Sian Participation**, the Court must: (1) determine what matters the parties have raised or foreseeably will raise; and (2) determine whether each such matter falls within the scope of the arbitration agreement.

[66] The Claimant maintains that the substance of the “dispute” or “matter” is limited to whether the 2025.2 M&As (or the 2025 M&As in the interim) should be treated as effective from registration. This is not a question falling within the scope of the SHA. It is a matter of general concern to the Company in its dealings with the world, not a private matter between shareholders. The M&As are foundational documents: their filing creates the Claimant’s legal existence, they are the principal source of rights and obligations between the Claimant and its members, and the Company has a statutory duty to supply copies to members upon request.

[67] I respectfully agree with the Claimant.

[68] In my assessment, the matters relied upon do not constitute a “dispute” within the contemplation of the arbitration clause when construed objectively and in accordance with the orthodox principles applicable to arbitration agreements. The clause extends only to disputes arising “directly or indirectly under the express terms” of the SHA. The Claim before the Court does not, in substance, require any determination of competing contractual rights or obligations under the SHA, nor does it engage any dispute whose resolution depends on construing the SHA as a source for determining the shareholders' rights *inter se*. Rather, it concerns the regularisation of the Claimant’s constitutional documents and the validity of amendments purportedly made to them. That is a matter grounded in the statutory and constitutional framework governing BVI companies. It is not a dispute “under” the SHA.

[69] In my judgment, therefore, the regularisation of the M&A is not a matter that can properly be characterised as arising directly or indirectly under the “express terms” of the SHA, still less as engaging a “substantial issue” that is legally relevant to a claim or defence arising between the shareholders of the Claimant. What the evidence discloses is, at best, a divergence in view

between the Defendant on the one hand and the Claimant (supported by the other shareholders) on the other as to the status of various iterations of the M&As. The Claimant seeks declaratory relief to resolve that divergence. However, the dispute is not one between shareholders in their capacity as such; it is a dispute as to the Claimant's own constitution and the consequences of steps taken (or not taken) by the directors and others responsible for ensuring that the Company's constitution is accurate and reflects what the shareholders agreed. The attempt to recast the Claimant as a proxy for a group of shareholders and, thereby, to engineer the appearance of an inter-shareholder dispute, is conceptually untenable. The Claimant is a distinct legal person. It is the claimant in the Proceedings. Its invocation of the Court's jurisdiction does not transform a constitutional question into a dispute arising under the SHA for arbitration purposes.

- [70] It follows that the statutory preconditions for a stay under section 18(1) of the **Arbitration Act** are not met. The Defendant has not demonstrated that the Claim concerns a matter which is "the subject of" an arbitration agreement. The Stay Application must, therefore, be dismissed.
- [71] As I indicated at the outset of the Hearing, it remains unclear what the Defendant ultimately seeks to achieve through its present stance in this litigation. If the Defendant's objective is to leverage these proceedings so as to obtain additional rights — whether voting rights or other strategic advantages — by impeding what appear, on the evidence before me, to be reasonable and bona fide steps by the Claimant to regularise the position under the AA, that objective is misconceived. The Court will not permit procedural objections or tactical obstruction to operate as a vehicle for enhancing a party's rights beyond those to which it is substantively entitled.
- [72] It follows that even if I had found that there was a "dispute" which was arbitrable, I would have had no hesitation finding that it was not a bona fide dispute raised on substantial grounds.
- [73] Given that conclusion, it is unnecessary to address the remaining points in disposing of the Stay Application. However, for completeness, and in case the matter proceeds to appeal, I set out below certain provisional observations on issues that were included in the Parties' written submissions and ventilated in argument.
- [74] The observations that follow are necessarily tentative. They concern issues that lie at the heart of the substantive claim and would ordinarily be resolved only after full evidence and submissions at trial. In particular, aspects concerning the possible engagement of the **Duomatic** principle (i.e.,

Re Duomatic)²³ — whether shareholder consent may be inferred in circumstances where the formalities for holding a meeting of the Company did not take place — would require a more developed argument and a firmer evidential foundation, especially as summary judgment is unavailable under **CPR 15.3** in proceedings of this nature. Nonetheless, if the Defendant eventually serves a defence, the question whether that defence is susceptible to strike-out under **CPR 26.3** may well arise. That is an entirely different enquiry, conceptually and procedurally, from the present Strike Out Application, which is directed solely to the Defendant's application for a stay.

- [75] The Claimant's case is that the alleged disputes concerning the SHA — namely, whether the proposed amendments conform thereto and the proper construction of clauses 4.1 and 4.2 — lack substance. It submits that all save one of the Defendant's objections have been substantively accommodated in the last version of the draft AAs ("2025.3.M&A"), and that the sole remaining issue (pertaining to appointments under regulation 23.2(b) of the AA) arises from the Defendant's failure to recognise that Redseed acquired additional rights upon its acquisition of shares in the Claimant in January 2024. Put differently, the only provision within the 2025.3 M&As which the Defendant identified as inconsistent and which the Claimant has not amended is reg. 23.2(b) of the AA. The Claimant contends that the Defendant failed to take into account that, following the execution of the SHA, Redseed acquired all rights previously held by Fervenza/Genesis (and, incidentally, Arca Enterprises) under the SHA when those entities transferred their shares to Redseed in January 2024, thereby enlarging the number of members Redseed was entitled to appoint to the Advisory Board. The Defendant had expressly consented to that transaction by written consent at the material time. The Claimant's legal representatives drew these matters to the Defendant's attention by letter sent within days of the Defendant raising the point, and furnished a copy of the written consent, yet the Defendant neither responded nor acknowledged that its complaint was without foundation.
- [76] The Claimant contends that the aforesaid transaction proceeded with the Defendant's express written consent. If established, this would tend to undermine the Defendant's contention that a justiciable dispute exists for determination by arbitration concerning the nature and extent of Redseed's rights under the SHA.

²³ [1969] 2 Ch. 365

- [77] I agree with the Claimant. The Defendant has not answered this point satisfactorily either in its written or oral submissions.
- [78] The Claimant further states that its position in support of the declaration it seeks is supported by the **Duomatic** principle (confirmed as applicable in this jurisdiction in **Ciban v Citco**)²⁴, which provides that where all shareholders who have a right to vote assent to some matter which a general meeting could carry into effect, that assent is binding as a resolution. The principle extends to agreements between all the shareholders of a company to amend the articles of association of the company: see **Cane v Jones**.²⁵
- [79] I am not persuaded that provisions such as clauses 4.1 and 4.2 of the SHA can properly be construed as conferring a blanket consent on shareholders to permit resolutions initiated by a majority, or any requisite majority, to effect changes to a company's constitution without further formality (including compliance with the **Duomatic** principle). Were such an interpretation adopted, it would enable a majority of shareholders to impose amendments to the articles of association without complying with procedural safeguards governing the convening of general meetings, including requirements for notice, quorum, and the conduct of meetings. More fundamentally, such a construction would permit a majority to impose its will on a minority without affording the minority any meaningful opportunity to be heard, to advance contrary arguments, or to seek to dissuade the majority from the proposed course of action. I consider that such a consequence would be inconsistent with basic principles of company law and corporate governance, which balance majority rule with protection of minority interests.
- [80] I do not construe clauses 4.1 and 4.2 as permitting such open-ended, prospective consent to vary the articles of association in the manner contended for by the Claimant. At the very least, the Court would require clear and unambiguous language before giving effect to an alleged consent of such breadth and significance. The wording of the relevant provision, contained in the final paragraph of clause 4.2, does not satisfy this requirement. That provision expressly limits shareholders' consent in three material respects: first, it operates only "for the purposes of the interpretation of the Articles"; second, it applies only to consent given "under [the SHA]"; and thirdly, it is restricted to matters "where the Articles require such consent to be given." When these limitations are read together and given their natural and ordinary meaning, I am unable to conclude that they constitute blanket, irrevocable consent to all future matters that may require

²⁴ [2021] A.C. 122, PC.

²⁵ [1980] 1 W.L.R. 1451.

amendment to the articles of association, particularly amendments of which the nature, scope, and effect are not known at the time the SHA was executed.

[81] I understand this to have been the substance of the submission advanced by Mr Morgan when he contended that these provisions “do not constitute consent to amend the articles of association without a vote”. Mr Morgan accepted that there may be an obligation on shareholders to exercise their voting rights in a particular manner to bring the articles into conformity with the SHA, consistent with their undertakings under clauses 4.1(a) and 4.1(b). However, he submitted — and the Court accepts — that it is not permissible for the Company to treat the purported consents in clauses 4.1 and 4.2 as constituting consent *in limine* for any and all amendments that may be proposed in the future. At the very least, such amendments would require either that a duly convened meeting of shareholders be held in accordance with the procedural requirements of the **BCA 2004** and the articles, or that a resolution satisfying the requirements of the **Duomatic** principle be passed on each specific occasion to which that resolution relates, demonstrating the informed and unequivocal assent of all relevant shareholders to the specific matter in question.

[82] In any event, the **Duomatic** principle, properly understood, is primarily concerned with the relaxation of procedural requirements with which a company and its shareholders would otherwise be obliged to comply. It does not — and is not intended to — abrogate or diminish a shareholder's substantive rights under the company's constitutional documents. Moreover, the principle is not without limits.²⁶ For example, it cannot be invoked to circumvent statutory provisions enacted for the protection of third parties or the public interest, nor can it be used to validate actions that are *ultra vires* the company or contrary to mandatory provisions of law. The principle operates as a procedural accommodation in circumstances where all relevant shareholders, with full knowledge of the material facts, have manifested their unequivocal assent to a particular course of action. It does not operate as a mechanism by which advance, generalised consent can be given to unspecified future actions, the nature and consequences of which are unknown at the time when the purported consent is given.

[83] As I have already indicated, there is much to support the contention advanced by the Claimant that the Defendant has no real purpose for seeking the stay and that the Defendant's conduct

²⁶ See, for example, the commentary in **Buckley on the Companies Acts**, Eds: Rt Hon Lord Richards JSC *et al*, LexisNexis, loose-leaf publication, at [318A] ff.

demonstrates no proper purpose. As Mr Thompson says, if the matter proceeded to arbitration, it would not bind anyone except the parties, requiring joinder of all shareholders despite the other three having accepted the 2025.2 M&As without objection.

[84] The lack of the “real purpose” point is made by the Claimant in the following paragraphs of its skeleton argument:

“68 ... as the Privy Council made clear in **FamilyMart** at [64], even if the Court were faced with circumstances justifying a mandatory stay, it could refuse to grant it if Techmix has no real or proper purpose for seeking the stay.

69. It is hard to discern any proper purpose behind Techmix’s demand for a stay. If the question on the fixed date claim form went to arbitration, it would not bind anyone except the parties thereto. That means that the Company would have to join all shareholders to the arbitration, even though the other three have accepted that the 2025.2 M&As have been validly adopted without demur.

70. Consider too Techmix’s decision to join in this action: it is clear from the face of the provision that a claim under s.246 BCA can proceed and be determined with only the Company as a party. Techmix chose to join, but only in order to seek a stay of the very action it desired to join. That is perverse: if a party considers it is being sued in the wrong forum, an application under s.18 AA is legitimate and understandable. But why would a party insist on being joined to a claim only to insist it ought to be stayed?

71. To put it another way, what advantage (other than delay, and the application of pressure, with a view to improving its contractual position) does Techmix obtain by having this action stayed in favour of arbitration?

72. These considerations show that Techmix has no real or proper purpose for seeking the stay, even before considering its abusive approach to the underlying issue (which is addressed below).

[85] I agree with the Claimant.

[86] As previously observed, the Defendant’s ultimate objectives in maintaining its present position in these proceedings remain opaque. Absent mutual agreement on the Claimant’s constitutional documents or declaratory relief from this Court delineating their status, uncertainty persists not merely for the Claimant but also for third parties dealing with the Claimant in good faith.

[87] The Defendant’s motive for opposing the Claim is material. As the Privy Council held in **FamilyMart**:²⁷

²⁷ [2023] UKPC 33, at [64].

“ ... when addressing an application to stay legal proceedings to enable the determination of a dispute by arbitration, should be careful to prevent an abuse of process. The Board agrees with Andrew Smith J in **Lombard North Central**²⁸ that the court could refuse an otherwise mandatory stay if the applicant has no real or proper purpose for seeking the stay. That could include not only an application for a stay in relation to issues that were peripheral to the legal proceedings but also an application that amounted to an abuse of process. In this regard, the Board respectfully disagrees with the statement of the Court of Appeal in England and Wales in ... the judgment in **Mozambique**²⁹ ... that the practical futility of a stay will in all circumstances be irrelevant. There may be circumstances in which a party seeks a stay for an improper purpose and it would be contrary to justice if the court could not act to prevent an abuse of process. For example, if matters (1) and (2) were referred to arbitration and an arbitral tribunal were to determine those matters in FMCH’s favour and FMCH acted promptly to remove a stay on the legal proceedings before the Grand Court, the court would be entitled to look with some care at any application for a stay for a further arbitration.”

[88] Whilst not persuaded that the Defendant’s position constitutes an abuse of process — as elaborated below — I concur with the Claimant that the rationale underlying its resistance to the Claim remains obscure. Clarity may emerge upon service of the Defendant’s formal “defence” to the Claim.

[89] In consequence, the Stay Application lacks a legitimate purpose and is therefore dismissible on that ground as well.

Strike Out Application

[90] The Strike Out Application is made pursuant to **CPR 11.15**, which provides that the Court may strike out an application where:

- (a) it does not disclose a reasonable ground for bringing the application; or
- (b) it constitutes an abuse of the Court’s process or is likely to obstruct the just disposal of the proceedings.

[91] The rule confers a discretion which must be exercised sparingly and only where the defect or complaint is clear.

²⁸ I.e., **Lombard North Central plc v GATX Corpn** [2012] EWHC 1067 (Comm).

²⁹ I.e., **Republic of Mozambique v Credit Suisse International** [2022] 1 All ER (Comm) 235.

[92] There is no direct equivalent of **CPR 11.15** in the Civil Procedure Rules of England and Wales. The English authorities have long emphasised that the statutory power to strike out an interlocutory application made within existing proceedings is not available in that jurisdiction, because the power to strike out extends only to claims by which processes are initiated or to pleadings within a claim: see, by way of example, **Port v Auger**.³⁰ However, in **Port v Auger**, Harman J held that the court had an inherent power to strike out an application that was vexatious and frivolous (in the sense of being wholly unfounded upon legally recognisable grievances).³¹

[93] One reason why particular care is required not to exercise the power (whether statutory in the case of the BVI or inherent in the case of both the BVI and England and Wales) is that it tends to fragment litigation and encourage satellite disputes over satellite disputes. A court needs to be extra-vigilant if it is invited to exercise the power. To exercise it too freely would create a mountain or proliferation of interlocutory strike-out applications, each seeking to challenge the procedural propriety of the other. The underlying concern — that the procedural tail should not wag the substantive dog — must be crucial to the application of the Court to the principled exercise of the **CPR 11.15** (or the Court's inherent) jurisdiction.

[94] The grounds upon which the Strike Out Application is made are set out in the Strike Out Application in the following terms:

- “1. The Stay Application discloses no reasonable ground for a stay of the proceedings. Contrary to the evidence filed in support of the Stay Application, there is no “dispute” which could justify a stay of these proceedings.
2. The Defendant has failed to engage with the Company's most recent correspondence which further demonstrates, beyond argument, that no dispute exists... The Stay Application is therefore bound to fail, and there is no need for it to proceed further. Any delay caused by its continuation would prejudice the Company, which reasonably requires certainty as to its constitutional affairs.
3. Further, or alternatively, the Stay Application is an abuse of process. Based on the Defendant's conduct since December 2024 ... and the manner in which the Stay Application has been pursued ... the application does not appear to have been brought in good faith or for bona fide reasons. Rather, it forms part of the Defendant's continuing strategy of delay and disruption, which has persisted since issues concerning the Company's memorandum and articles of association (“**M&A**”) first arose. The Defendant has, by issuing the Stay Application, and the manner in which it has pursued it, used the Court process

³⁰ [1994] 3 All ER 200.

³¹ [1994] 3 All ER 200 at 214b-f. The decision in **Port v Auger** was decided under the previous Order 18 r. 19 of the **RSC** of England and Wales. However, it has also been held to apply under the current English and Welsh **CPR**: see **Re John Holmes, Sadler v Holmes** (unreported 20 February 2006), Ch.D, Mr Registrar Jaques.

to frustrate the legitimate rights of the Company, and all of the shareholders.

4. The Defendant has adopted this course in an effort to exert pressure on the Company and its other shareholders, in the context of what should be a straightforward application by the Company to obtain certainty as to its constitutional documents and internal governance. The Company contends that it is an abuse of process for the Defendant (acting in its capacity as a shareholder) to pursue an application that is plainly driven by an ulterior motive and not pursued in good faith. A shareholder should not deliberately seek to frustrate the Company's lawful and necessary efforts to regularise its constitutional affairs, uncertainty that has arisen solely as a result of the Defendant's conduct.
5. If the Stay Application is not struck out, it is certain (and no doubt intended) to obstruct the just and efficient disposal of the proceedings. Its continuation will serve only to delay matters further, increase costs, and enable the Defendant to hold the Company and its other shareholders to ransom, with a view to improving its own contractual position.
6. On the basis that there is no dispute, and/or no dispute arising under the terms of the shareholders' agreement in the context of the Company's application, and for all of the reasons set out above, the Company respectfully invites the Court to strike out (or, in the alternative, dismiss) the Stay Application."

[95] Applications for strike out and applications for summary judgment are, as a matter of ordinary procedural practice, determined prior to the trial or final hearing of the substantive claim. Had the Strike Out Application been listed and heard in advance of the Stay Application — consistent with the usual sequencing — there might have been some procedural utility in the Claimant pursuing it. I accept the Defendant's submission that the consolidation of both applications for hearing on the same occasion does little to advance the Claimant's position in relation to its Strike Out Application.

[96] The Strike Out Application is advanced on two discrete bases:

- (a) that the Stay Application discloses no reasonable grounds upon which the Court could grant a stay; and
- (b) that the Stay Application constitutes an abuse of the Court's process.

[97] The Claimant's submissions on the first basis have been addressed substantively earlier in this Judgment and do not require repetition. However, several observations of principle remain pertinent.

[98] The jurisdiction to strike out a statement of case (and, by extension, an interlocutory application) on the ground that it fails to disclose any reasonable grounds for bringing or defending a claim (or application) is materially narrower than the Court's jurisdiction to grant summary judgment. Strike out focuses primarily — and often exclusively — on the adequacy of the case as “pleaded” or “set out” on the face of the relevant document; it is not an evaluative jurisdiction that involves a review of the totality of the evidential record. As Lord Wilson JSC (with whom Baroness Hale DPSC and Lords Clarke, Hughes and Hodge JJSC agreed) explained in **Wyatt v Vince (Nos 1 and 2)**:³²

“It is indeed common practice in civil proceedings to join an application to strike out under rule 3.4 with an application for summary judgment ... But in **Swain v Hillman**,³³ Lord Woolf MR observed that the power under rule 24.2 ... was wider than the power under rule 3.4 and that under the latter, unlike the former, the general focus of the court was only on the statement of case which was alleged to disclose no reasonable grounds for bringing the claim. Or, as my Lady, then Hale J, crisply put it three months later, ‘the essence of a strike out is that one does not look at the evidence on the claim’: **Bridgeman v McAlpine-Brown**.”³⁴

[99] The Claimant's argument on the first ground of strike out mirrors, in substance, its opposition to the Stay Application itself. While the Claimant has succeeded on the Stay Application, that success does not automatically entail the consequence that the Stay Application discloses no reasonable grounds. This is consistent with the position articulated in **FamilyMart**, where the Privy Council recognised that a court “... could refuse an otherwise mandatory stay if the applicant has no real or proper purpose for seeking the stay. That could include not only an application for a stay in relation to issues that were peripheral to the legal proceedings but also an application that amounted to an abuse of process.”³⁵

[100] This passage makes clear that the criteria for abuse of process — and, by analogy, the criteria for establishing that there exist “no reasonable grounds” — must be satisfied before a court will strike out an application. The mere fact that an application ultimately fails does not, without more, render it unreasonable or abusive.

³² [2015] UKSC 14, at [24].

³³ [2001] 1 All ER 91.

³⁴ 19 January 2000, unreported; [2000] CA Transcript No 39, at p 4.

³⁵ [2023] UKPC 33, at [64].

- [101] The relevant terms of the Stay Application have already been reproduced above. There is nothing on their face which compels the conclusion that it lacks any reasonable basis. It is only when the Stay Application is read in conjunction with the SHA, the AAs, and the communications exchanged between the parties that its lack of merit becomes apparent. The arbitration clause in the SHA provides, at least *ex facie*, some (though not very convincing) basis for the stay request. It is only once the surrounding and contextual material is considered that the Defendant's arguments fail to withstand scrutiny. Had a summary judgment application been procedurally available, the position might conceivably have been different. However, confined to the "pleaded" terms of the Stay Application, I cannot find that the first ground of the Strike Out Application is made out.
- [102] The second ground — abuse of process — must likewise fail on the evidence before the Court. The Claimant's case may be summarised briefly.
- [103] The Claimant submits that the Defendant has not acted in good faith, and that the Stay Application forms part of a tactical pattern designed either to engineer delay or to obstruct the Company's governance so as to secure a buy-out of the Defendant's shareholding. The Claimant argues that the Defendant's conduct cannot be understood as the bona fide exercise of contractual or procedural rights but instead evidences a deliberate pattern of obstruction inconsistent with any legitimate invocation of the arbitration clause.
- [104] The chronology — set out earlier in this Judgment — is integral to the Claimant's abuse of process argument, but is worth expanding in more detail.
- [105] Prior to 24 December 2024, the Defendant's concerns were confined to issues of procedural timing and internal review of proposed amendments to the AA. No substantive objections were raised to the content of the 2024 M&A, notwithstanding that the drafts had been in the Defendant's possession for approximately four weeks. When correspondence resumed seven weeks later, the Defendant's practitioners continued to articulate only procedural concerns, identifying no substantive inconsistency with the SHA.
- [106] It was not until 14 March 2025 — over three months after the drafts were first circulated — that the Defendant first asserted inconsistencies between the 2024 M&A and the SHA. These alleged inconsistencies appeared in an appendix to a letter otherwise concerned with procedural matters, and were largely technical, minor, or peripheral.

- [107] The Claimant nevertheless responded swiftly, circulating revised drafts (the 2025.2 M&A) on 25 March 2025, which addressed all issues identified. The Defendant subsequently objected to wording in the preamble to the proposed resolutions, which the Company corrected the following day.
- [108] Thereafter, the Defendant abruptly altered its position. By letter dated 12 April 2025, it demanded an entirely new set of M&A, which would have displaced the SHA and reinstated the unanimity requirements contained in the 2023 M&A — precisely the provisions which the SHA was intended to amend.
- [109] The Defendant requisitioned a general meeting to pursue this proposal. At the meeting on 29 May 2025, no other shareholder supported its position.
- [110] Following the commencement of the Claim, the Defendant initially resisted joinder, requiring the Claimant to amend the Claim to add the Defendant as a party. When the Defendant ultimately applied for joinder, it sought five weeks to prepare responsive evidence, but then filed only a short affidavit exhibiting the 2024 M&A with illegible orange highlighting intended to denote inconsistencies with the SHA.
- [111] Repeated requests for a legible version were made; one was eventually produced on 14 July 2025. The readable version revealed that the Defendant had shifted to an entirely new set of objections, again largely minor, and bearing little resemblance to those raised in March.
- [112] On 17 July 2025, the Claimant identified a single non-trivial remaining issue, relating to Advisory Board appointments under reg. 23.2(b) of the AA. Clear documentary evidence was provided showing that the Defendant expressly consented in writing to the underlying share transfer that gave rise to the relevant appointment rights. The Defendant has not addressed this point in any meaningful way in support of its case.
- [113] The Claimant subsequently circulated a further revised draft (the 2025.3 M&A), removing all provisions highlighted by the Defendant save for reg. 23.2(b), whose amendment would have prejudiced another shareholder's rights. The remaining shareholders agreed to adopt the revised draft. The Defendant alone refused to do so, and has remained silent on the Advisory Board issue despite being confronted with documentary evidence contradicting its position.

[114] The Claimant contends that the cumulative chronology reveals four clear patterns:

- (i) repeated and unexplained delay before raising objections;
- (ii) successive, non-overlapping iterations of complaints
- (iii) an emphasis on procedural points rather than substantive concerns; and
- (iv) a refusal to engage with evidence addressing the sole substantive issue of any significance.

[115] From this, the Claimant invites the Court to infer a strategy aimed at frustrating the Company's governance or engineering conditions conducive to a buy-out. The Claimant emphasises that, nearly six months after the Claim was issued and five months after the Defendant was joined, the Defendant has yet to articulate any coherent substantive case, relying instead on vague assertions of further undisclosed objections to be revealed "in due course". The Claimant argues that this conduct reflects dissatisfaction with the loss of veto rights under the SHA and an attempt to impede the Claimant's operations to secure a more advantageous exit.

[116] While the Claimant's suspicions may ultimately prove well-founded, they cannot be accepted on assertion alone. The Court must proceed on the basis of evidence, not inference alone.

[117] For conduct to constitute the species of abuse alleged, the Court must have before it cogent and compelling evidence. No evidence in opposition has been filed by the Defendant addressing these allegations. The Court is therefore unable to assess whether any explanation offered by the Defendant, if one exists, may justify its conduct. In the absence of clear and probative evidence establishing bad faith or improper collateral purpose, this ground of the Strike Out Application must be dismissed.

Conclusion, Consequential Matters And Acknowledgments

[118] For the reasons set out above, I make the following orders:

- (a) The Stay Application is dismissed; and

(b) The Strike Out Application is likewise dismissed.

- [119] As indicated during the Hearing, all consequential matters arising out of this Judgment — including costs — are to be addressed at a separate consequential hearing to be fixed by the Court on the application of the Parties.
- [120] Time for seeking permission to appeal and for any other procedural steps arising from this Judgment is extended to the date of that hearing and will be subject to directions given at the hearing.
- [121] I wish to record my sincere appreciation to counsel and their respective legal teams for the clarity and professionalism with which they presented their clients' cases, and for their cooperation throughout the Hearing.
- [122] I regret that I was unable to deliver an *ex tempore* judgment and for the slight delay in providing this written version. On reflection, it is fortunate that I did not attempt to do so, as I might otherwise have overlooked a number of the compelling arguments presented, both in written submissions and orally by both counsel. While this Judgment does not address every point raised during the Hearing, nor is it required to, I am satisfied that it addresses all substantive issues necessary for the determination of the Applications.

Abbas Mithani KC

High Court Judge (Ag)

By the Court

Registrar

