

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

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

CLAIM NO. BVIHCOM2023/0006

IN THE MATTER OF XIN GANG POWER INVESTMENTS LIMITED

**AND IN THE MATTER OF SECTION 159(1) (a) and 162(1) (b) OF THE BVI
INSOLVENCY ACT, 2003**

BETWEEN:

KENWORTH INDUSTRIAL LIMITED

Applicant/Respondent

AND

XIN GANG POWER INVESTMENTS LIMITED

Respondent/Applicant

IN CHAMBERS

Appearances:

Robert Nader and Sam Robertson for the Applicant/Respondent.

Stephen Moverley-Smith KC with him James Noble and Yan Chng for the
Respondent/Applicant

2023: August 16, Further Written Submissions October 6,
Decision December 6,
2024: February 1, Finalized Written Judgment.

JUDGMENT

- [1] **Mangatal J:** This judgment concerns the Notice of Application filed 21 June 2023 on behalf of the Applicant Xin Gang Power Investments Limited ("**Xin Gang**") seeking a stay of the Originating Application filed by Kenworth Industrial Limited ("**Kenworth**") on 11 January 2023 ("**the Originating Application**"). The application ("**the Stay Application**") is made pursuant to section 18 of the **Arbitration Act 2013** ("**the Arbitration Act**").
- [2] The Originating Application is an application by Kenworth, the respondent to the Stay Application, for the appointment of liquidators to Xin Gang pursuant to ss.159(1)(a) and 162(1)(b) of the Insolvency Act, 2003 ("**the Insolvency Act**") on the basis that it is just and equitable that liquidators should be appointed.
- [3] The Stay Application was heard by me on 16 August 2023, with further written submissions submitted on 6 October 2023. On 6 December 2023, I ruled in favour of Xin Gang as follows:

"The Applicant Xin Gang's Application filed 21 June 2023 seeking a stay of the Originating Application filed by Kenworth on 11 January 2023, pursuant to section 18 of the Arbitration Act 2013 is granted as prayed. My orders are as follows:

- (1) The Originating Application is stayed until further order.*
- (2) The Applicant is awarded its costs against the Respondent.*
- (3) The Applicant's costs are summarily assessed in the sum of US \$201,449.03, based on the Schedule provided pursuant to Rule 70.11(3)*

and 65.11(5) of the Civil Procedure Rules 2023 (“the CPR 2023”). The Respondent is ordered to pay these costs within 14 days of the date hereof.”

- [4] It was also agreed, and I so ordered, that the time for applying for leave to appeal from my decision was to run 28 days from the date of delivery of the finalized judgment. I had hoped to provide my written reasons/ finalized judgment in mid-December. However, due to the volume of work, I regret not being able to do so until January 2024. I now set out herein my reasons for the decision made in December 2023.
- [5] This application engages some very topical issues having to do with the interplay of appointments of liquidators/winding up proceedings, and the mandatory stay provisions under the Arbitration Act. The recent decision of the Privy Council in ***Family Mart China Holding Co. Ltd. v Ting Chuan (Cayman Islands) Holding Corporation***¹ (“Family Mart”), in a case emanating from the Cayman Islands, has brought the issues into sharp focus.
- [6] The Stay Application was heard on 16 August 2023, and was part-heard, for reasons that are dealt with below. On 21 September 2023, I ordered further submissions, and these were provided by the parties on 6 October 2023.

Procedural Background

- [7] As described in Xin Gang’s Written Submissions prepared for the Long Vacation Hearing in August, this matter has a storied history. I would add that the storied history extended all the way through hearings before me in February and June 2023 and is also an apt description for the way dates for hearing came to be fixed before

¹ [2023] UKPC 33.

me in August 2023 (the stay application), and provisionally, September 2023, (the trial of the Petition), all during the Long Vacation.

- [8] The Originating Application is Kenworth's second application to wind up Xin Gang on just and equitable grounds. An earlier liquidation application in the same terms was issued on 25 March 2022 (the "**First Liquidation Application**") and expired automatically pursuant to section 168(3) of the Insolvency Act when Kenworth did not seek to extend the validity of the same.
- [9] The fact of the expiry of the First Liquidation Application was not appreciated by the parties at the material time, with the result that an application in similar terms to the Stay Application was considered by Jack J (Ag) on 31 October 2022 and (in Xin Gang's view), was wrongly dismissed by a judgment of 11 November 2022 ("**the First Stay Application**" and "**the First Judgment**"). Xin Gang filed an appeal against the First Judgment. Kenworth, the successful party, maintained that the First Judgment was correctly decided.
- [10] Thereafter, and after Xin Gang, had changed its legal practitioners, the parties came to appreciate that the First Liquidation Application stood dismissed, with the ultimate result that Kenworth issued the Originating Application.
- [11] On the application of Xin Gang, with contest by Kenworth on certain issues, on 28 February 2023, I declared that the First Liquidation Application was deemed dismissed with effect from 25 September 2022, pursuant to section 168(3) of the Insolvency Act. At this stage there was already an extant appeal fixed for hearing before the Court of Appeal for 23 May 2023 in respect of the First Judgment and in respect of which both Jack J as well as a single Judge of the Court of Appeal had given leave to argue various issues on appeal. All of these developments occurred after 25 September 2022, when the First Liquidation Application was already, for all intents and purposes, dead. On 28 February 2023, faced with that rather invidious position (an appeal existing in respect of the First Judgment where the First Liquidation Application was effectively defunct) as a judge of concurrent

jurisdiction, I also declared/ordered that the deemed dismissal shall not affect the validity of the orders made by Jack J on 11 November 2022 on the Company's first stay application filed on 1 June 2022 and amended on 7 June 2022, heard on 31 October 2022, (the subject of the appeal), and also the proceedings in BVIHC(COM) 2022/0053, the Injunction Application.

[12] The First Stay Application was considered by the Court of Appeal on 23 May 2023 (the "**Appeal**"). It had been thought by the parties (and this Court) that the Appeal would resolve the issues now before the Court in the context of the Stay Application. However, that was not the result of the Appeal. In summary, the result of the Appeal was as follows: (a) That the Court of Appeal found that there was nothing to appeal, the First Liquidation Application having been automatically dismissed; (b) That the Court of Appeal found that the issues in the First Stay Application would have to be considered anew in the context of these proceedings; and (c) That the Court of Appeal stated that the judge considering the Stay Application would not be bound to follow the decision in the First Stay Application.

[13] Although the Court of Appeal indicated that there was nothing to appeal and that the appeal had been rendered academic, the Court did not go further or say that the First Judgment was decided *per incuriam* although it was in point of fact delivered in respect of proceedings that had automatically expired under the Insolvency Act before the application was heard.

[14] At the status hearing in this Court on 26 June 2023, held after the Court of Appeal result in May, Kenworth sought a speedy trial of its winding up application. When told that there were no four-day slot periods available for a hearing before the dates fixed for the Arbitration in December 2023, Kenworth pressed for a speedy trial during the summer vacation, insisting that procedural directions that did not allow for expert evidence or cross-examination would be adequate. The Stay Application was correspondingly fixed for 16 August 2023 since it logically had to be heard and determined before the trial of the winding up application. Kenworth having pressed

for the trial during the only 2.5 days available during the Long Vacation for a hearing by this Court, only resiled from the position it had taken about expert evidence and cross-examination at the very last stage of the conclusion of the stay application on 16 August 2023. Had Kenworth indicated this sooner, both the hearing of the stay application, at least during the Long Vacation, and the head-on preparation for an expedited trial, could have been avoided.

[15] However, that was not to be. At the end of the Stay Application August Hearing, after Kenworth's indication, I vacated the dates that had been provisionally set in September for the trial of the winding up application. I adjourned the Hearing of the Stay Application part-heard, for a date to be fixed, if necessary, since I was of the view that now that things were being analysed more clearly, there should have been room for agreement as the Arbitration was now obviously going to come on before the trial of the Winding Up Application. At the end of the hearing, there were also three issues outstanding if the parties could not agree and they were as follows:

- (a) The extent to which this Court should be able to view and there should be admission into evidence of the Ruling of the 30 July 2023 (the "Ruling") of the arbitral tribunal (the "Tribunal") in HKIAC/PA22212 (the "Arbitration"). Whilst Xin Gang had maintained that the Court should see the Ruling, Kenworth had refused to agree to that.
- (b) Kenworth's continued insistence that Disclosure should take place; and
- (c) The question of costs.

[16] However, there was another development after the August Hearing, which was part-heard for reasons set out above. At the August hearing, Kenworth sought to rely on the decision of the Court of Appeal in the Cayman Islands in ***Family Mart China Holding Co Ltd. v Ting Chuan (Cayman Islands) Holding Corporation***² ("**Family Mart**"). At the time of the hearing in August an appeal to the Judicial Committee of the Privy Council had been heard and the Board's judgment was

² CICA Nos. 7 and 8 of 2019, delivered 23 April 2020.

reserved. Xin Gang sought to distinguish the Court of Appeal's decision in **Family Mart**. Indeed, Counsel for Xin Gang, Mr. Nader, boldly submitted that the Court of Appeal's decision was wrong. He turned out to be correct.

[17] On 20 September 2023, the Privy Council delivered its decision in **Family Mart**, overturning the Cayman Islands' Court of Appeal decision.

[18] On 21 September 2023, I referred the parties to the fact that the Privy Council had now handed down its decision in **Family Mart**. Since the parties were still unfortunately not able to agree on outstanding issues, I gave directions to the parties to file further submissions on the three outstanding issues, as well as in relation to the decision of the Privy Council in **Family Mart**. I ordered that the parties do so by 3:00 p.m. on October 6, 2023, and they helpfully complied.

[19] It was against this background that the Stay Application was issued and now falls to be considered. The twists and turns in the storied history of this matter also involve this Court having to consider submissions about the effect of the First Judgment and whether there is issue estoppel or whether this Court is in any way constrained by the First Judgment.

Factual Background

[20] For the purposes of the Stay Application, the salient facts are that arbitration proceedings in respect of this matter have been ongoing since June 2022 (the "**Arbitration**") and that the Arbitration will be/has been considered by the Arbitration Tribunal ("**the Tribunal**") from 19 to 23 December 2023. The issues to be determined in the Arbitration are: (a) Whether Kenworth's shares are paid up or are to be treated as paid up; and (b) If not, whether Xin Gang has an entitlement to forfeit the shares, ((a) and (b) together, the ("**Paid Up Shares Issues**")).

Grounds of the Stay Application

[21] In summary, the grounds of the Stay Application are that the Originating Application should be stayed on the basis of s.18 of the Arbitration Act, s.174 of the Insolvency Act or rule 26.1(2)(q) of the Civil Procedure Rules and/or in the Court's inherent jurisdiction for the following reasons:

- (a) The parties are bound by an arbitration agreement contained in Xin Gang's Articles of Association;
- (b) All issues raised by the Originating Application are within the scope of the arbitration agreement and are arbitrable;
- (c) Alternatively, at minimum, the Paid-Up Shares Issues are within the scope of the arbitration agreement, are arbitrable and are, in fact, the main issues raised by the Originating Application; and
- (d) Consequently, either: i. The Originating Application must be stayed in its entirety, and Kenworth must not be permitted to rely upon any one of the issues raised by the Originating Application unless and until that issue has been determined by arbitration; ii. The Originating Application must be stayed so far as the Paid-Up Shares Issues are concerned and ought to be stayed so far as the balance of the application is concerned; or iii. The whole of the Originating Application ought to be stayed.

[22] In particular, the grounds are that (a) pursuant to Article 103(a) of Xin Gang's Articles of Association (as amended with effect from 5 January 2022 or, alternatively, Article 103 of Xin Gang's original Articles of Association dated 14 February 2003) , Xin Gang and its members (including Kenworth) agreed to and are required to refer to arbitration inter alia any difference or dispute which arises between them relating to any of the affairs of Xin Gang (the "Arbitration Agreement"); and (b) The subject of the main ground of the Originating Application, namely the Paid Up Shares Issues, relates to capital calls and forfeiture notices which were issued by Xin Gang to Kenworth on the basis that Kenworth's shares in Xin Gang are unpaid.

Xin Gang's Submissions for the August Hearing

- [23] Mr. Nader, on behalf of Xin Gang, submitted that the dispute over whether those shares are unpaid is a discrete and foundational matter which is capable of being arbitrated, is capable of creating issue estoppels via arbitration, falls within the scope of the Arbitration Agreement, and is the subject of the Arbitration. The Arbitration has been ongoing for considerable time, having been commenced by Xin Gang on 27 June 2022 (more than six months before the filing of the Originating Application) and has been set down for hearing from 19 to 23 December 2023 (less than five months from the hearing in August). Xin Gang submitted that the outcome of the Arbitration is likely to determine whether Kenworth remains a member of Xin Gang with the requisite standing to pursue the Originating Application (which is only available to Xin Gang's registered members) and whether the main ground of the Originating Application has been made out.
- [24] Xin Gang deprecates Kenworth's argument insofar as it claimed that the Paid-Up Shares Issues needed to be dealt with first in the winding up application, in case the outcome of the Arbitration should deprive Kenworth of its locus standi to seek the appointment of liquidators to Xin Gang. He asserts that the parties agreed to these issues being determined in arbitration. This, Counsel describes as a sovereign fact. Further, he posited that nothing in the Insolvency Act indicates that the parties' choice to resolve disputes in arbitration should be disregarded, that s.18 of the Arbitration Act should be circumvented or disapplied, or that the pro-arbitration policy laid down by the legislature in this jurisdiction should be subverted. This simply so that members of companies do not lose the rights attaching to their shares (including their right to access the Court's exclusive winding up jurisdiction) notwithstanding that those shares are subject to forfeiture.
- [25] It is trite, the argument continues, that public policy favours the freedom for persons to agree to resolve disputes by arbitration. That well-established policy is reflected in s.3(2) of the Arbitration Act which provides (inter alia) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved;

and the Court shall not interfere in the arbitration of a dispute, save as expressly provided in the Arbitration Act.

- [26] Section 18 of the Arbitration Act gives effect to Article 8 of the UNCITRAL Model Law on International Commercial Arbitration as adopted by the UN Commission on 21 June 1985 and as amended by the UN Commission on 7 July 2006. It provides that: “Article 8 of the UNCITRAL Model Law, the text of which is reproduced below, has effect:

“Article 8. Arbitration agreement and substantive claim before court (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. ...”

- [27] Section 18(4) provides that: *“Where the Court refers the parties in an action to arbitration, it shall make an order staying the legal proceedings in that action.”*

- [28] Accordingly, where a matter is within the scope of an arbitration agreement, Xin Gang’s position is that a party to the agreement has a right to a stay of Court proceedings provided that the agreement is not null and void, inoperative or incapable of being performed: Reference was made to the very helpful decision of Leon J in ***Hualon Corporation (M) Sdn Bhd v Marty Limited***³. In such cases, it is no part of the Court’s function to examine the merits of the claim of the party seeking a stay. An assertion of the existence of a dispute is enough: ***Halki Shipping Corporation v Sopex Oils Ltd***⁴

- [29] Mr. Nader follows up by saying that, where there is an arbitration agreement, the parties have agreed not only that the matters within the agreement should be

³ (BVIH (COM) 2014/0090; 8 April 2016), at paragraphs {79}-{81}.

⁴ [1998] 1 WLR 726.

arbitrated but also that they should not be decided by a court. There may be some disputes between the parties that are within the arbitration agreement and others that are not. In such a case, the stay will apply only to the former. This may lead to fragmentation of forum, Counsel submits, but desirability of unification of process must give way to the sanctity of contract. Reference was made to **Tugushev v Orlov**⁵.

[30] A “matter” referred to arbitration includes any issue capable of constituting a dispute under the arbitration agreement. Mr. Nader referred the Court to **Republic of Mozambique v Credit Suisse International**⁶ where the Court noted that: “A “matter” is not the same as a cause of action; it includes any issue capable of constituting a dispute under the relevant arbitration agreement.”

[31] Where court proceedings involve matters some but not all of which are within the arbitration agreement or arbitrable, the obligatory stay of court proceedings is only to the extent of the matters referred to arbitration. In **Republic of Mozambique** at [65] (referring to **Sodzawiczny v Ruhan**⁷ it was held that: “*The court should stay the proceedings to the extent of any issue which falls within the scope of the 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.*”

[32] Where the compulsory stay concerns only part of court proceedings, the question whether the remainder of the proceedings ought to be stayed pending the arbitration is a discretionary one. As per Lord Hoffman at paragraph 13 of the oft-cited decision in **Fiona Trust and Holding Corp v Privalov**⁸:

: “*In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have*

⁵ [2021] EWHC 926 (Comm) per Sir Nigel Teare at [23].

⁶ [2021] EWCA Civ 329 at [63]

⁷ [2018] Bus. L.R. 2419 at [43])

⁸ [2007] Bus LR 1719.

intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so":

- [33] Counsel referred to the decision of the UK Supreme Court in **Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"**⁹ where Lord Hamblen at [107] endorsed Lord Hope's statement in **Fiona Trust**, at paragraph 31, where he stated that this approach to the issue of construction "*is now firmly embedded as part of the law of international commerce.*"
- [34] In very limited circumstances, posits Mr. Nader, the law restricts the scope of matters that are capable of being referred to arbitration, but there is a presumption of arbitrability: that is, party autonomy means that the starting point is that the law does not seek to prevent parties from arbitrating a matter that is within the scope of their agreement. Reference was made to a number of decisions, viz. **Bridgehouse (Bradford No. 2) Limited v BAE Systems Plc**¹⁰ referring to **Larsen Oil and Gas Pte Ltd v 7 Petroprod Ltd**¹¹; and see **Fulham Football Club (1987) Ltd v Richards**¹² which treats the English equivalent of s.3(2) of the Arbitration Act as being of relevance to questions of arbitrability. Counsel also referred to the statement of Leon J that wherever, whenever and to the extent possible the Court should support the public policy favouring arbitration: **Hualon** at [95]. Mr. Nader also went on to quote Leon J at paragraph [143] of **Hualon** where he described the role of the Court, "*consistent with the pro-arbitration public policy, is to do its utmost*

⁹ [2020] 1 WLR 4117.

¹⁰ [2020] Bus LR 2025 at [44]-[54]

¹¹ [2011] SGGA 21, [2011] 3 SLR 414 at [44]-[45]

¹² [2012] Ch 333 at [98] per Longmore LJ and [107] per Rix LJ (c.f. [29] per Patten LJ) [AB/14/387-388, 367]

to find that an arbitration agreement remains operative and to implement the agreement of the parties to determine their disputes in arbitration.”

- [35] Once, it was submitted, it is shown by the party seeking a stay that the substance of the dispute falls within the scope of the arbitration agreement, the burden shifts to the other party to satisfy the Court that the arbitration agreement is null and void, inoperative or incapable of being performed: see ***Joint Stock Co Aeroflot Russian Airlines v Berezovsky***¹³ This accords with the principle that the Court would normally give effect to the contractual bargains between the parties, whether in a commercial dispute commenced by an action or in a shareholder dispute commenced by a petition: ***China Europe International Business School v Chengwei Evergreen Capital LP***¹⁴.
- [36] It does not follow from the fact that a statutory provision gives a power to the Court that it would not have at common law that a dispute of the kind contemplated by the statutory provision is within the exclusive jurisdiction of the Court and is not arbitrable. For example, Counsel submits, a claim for unfair prejudice relief pursuant to s.184I of the BVI Business Companies Act, 2004 (the “**BVI BCA**”) is arbitrable (at least where no relief affecting third parties is sought) (see ***Ennio Zanolli v Interlog Finance Corp*** (BVIHC2009/0394; 8 February 2010) a decision of Bannister J.
- [37] The issue, in a context like the present, Counsel asserts, is whether a particular statutory provision expressly or, by reference to public policy considerations, impliedly gives the Court exclusive jurisdiction. So, it is well established that the Court’s power to appoint liquidators is exclusive and not arbitrable. It is accepted that to the extent that an arbitration agreement would, as a matter of construction extend to a dispute as to whether a company should be wound up, the agreement

¹³ [2013] 2 C.L.C. 206 per Aikens LJ at [74] and [77].

¹⁴ [2021] HKCFI 3513 at [72].

is to that extent “null and void, inoperative or incapable of being performed” for the purposes of s.18(1) of the Arbitration Act and the Court has no power of stay.

[38] But, submits Counsel, merely because the Court is vested with exclusive power does not mean that there may be no resort to arbitration in respect of the dispute, i.e. “a matter”, between the parties that forms the grounds upon which such relief may be sought. Specifically, it does not mean that disputes or differences, i.e. matters, that arise in relation to a liquidation application are not arbitrable.

[39] Counsel submits that in the present case, no question of disputed arbitrability arises. The Paid-Up Shares Issues are unquestionably arbitrable and this was, Mr. Nader points out, in fact, found by Jack J in the First Judgment. At the time of the hearing in August, the Decision of the Privy Council in ***Family Mart China Holding Co. Ltd v Ting Chuan*** had not yet been handed down. Thus, in August it was submitted that it follows from that that the arbitrability issue addressed by the Court of Appeal of the Cayman Islands in ***Family Mart China Holding Co. Ltd v Ting Chuan*** (Cayman Islands) Holding Corporation¹⁵ does not arise.

[40] A specific issue has arisen in the case law in the context of liquidation applications that are made on the basis of disputed debts as to the existence and extent of the Court’s power to refuse a stay, and the issue as to whether, and to what extent, the Court should investigate whether the alleged debt is bona fide disputed on substantial grounds or whether (consistent with ***Halki***) an assertion of a dispute is sufficient.

[41] In England, Mr. Nader opines, the approach is that there is no right to a mandatory stay of a winding up application, but a stay should be granted save in wholly exceptional circumstances, it not being necessary to establish a bona fide dispute as to the debt on substantial grounds: ***Salford Estates (No 2) Ltd v Altomart Ltd***

¹⁵ (CICA (Civil Appeal Nos 7 & 8 of 2019; 23 April 2020).

(No 2)¹⁶ (see also Revenue and Customs *Comrs v Changtel Solutions Ltd*¹⁷ The same approach was adopted in this jurisdiction in *Applied Enterprises Limited v Interisle Holdings Ltd*¹⁸ referred to by the Court of Appeal in *C-Mobile Services Limited v Huawei Technologies Co. Limited*¹⁹.

- [42] In the present case, however, the Originating Application is not made on the basis that Xin Gang is insolvent and no question of a disputed debt arises. The Originating Application is a member's application and is made on the just and equitable ground.
- [43] The question whether a company should be liquidated on the just and equitable ground is not itself one that is arbitrable. But "matters" that arise in a just and equitable liquidation application are, Mr. Nader points out, arbitrable. If such "matters" arise in a liquidation application, then the legal questions that arise are as follows: (a) Must the liquidation application be stayed pending arbitration so far as concerns those matters, or does the Court simply have a discretion to stay the liquidation application so far as concerns those matters? (b) If the Court must stay the liquidation application pending arbitration so far as concerns those matters, what is the nature and content of the discretion to stay the remainder of a liquidation application? (c) If a partial stay is not mandatory, what is the nature and content of the discretion to stay the liquidation application?
- [44] The proper approach (at least in the context of a just and equitable winding up), Mr. Nader submits, is to decide whether any of the relevant issues are within the scope of the arbitration agreement. If they are, s.18 of the Arbitration Act is engaged in relation to those "matters" and the Court is obliged to stay the liquidation application pending the arbitration to the extent of those "matters". Whether the balance of the

¹⁶ 2015] Ch 589 at [21], [38]-[41].

¹⁷ [2015] 1 WLR 3911 at [48].

¹⁸ 9 (BVIHCV (COM) 2012/0135; 21 June 2013) at [26]-[28].

¹⁹ (BVIHCOMAP2014/0017; 2 October 2014) at [17]-[18].

liquidation application should be stayed is then properly considered as a discretionary matter, although it is, frankly, difficult, it was submitted, to envisage the discretion not being exercised in favour of the grant of a stay.

[45] Counsel submitted that the mandatory stay of “matters” raised in a just and equitable liquidation application that are the subject of an arbitration agreement follows from the wording of s.18 and the principles set out above. That the mandatory provisions of s.18 apply to liquidation applications was confirmed by the Court of Appeal of the ECSA in ***Sian Participation Corp v Halimeda International Limited***²⁰.

[46] Counsel contends that the correct approach to the mandatory stay in s.18 of the Arbitration Act was set out by the Court of Appeal in ***Siong Beng Seng v Caldicott Worldwide Ltd***²¹ (“**Caldicott No. 2**”) Mr. Nader points out that this judgment postdated Jack J’s decision refusing to stay the First Liquidation Application.

[47] At [84]-[104], Theodore JA discussed the two-stage test to be followed. At [85]- [86] and [89]-[90] the approach taken by Carr LJ in ***Republic of Mozambique*** at [72] The full paragraph from Carr LJ reads:

“I also accept that there is a two-stage test (although the considerations that arise may overlap and it may be convenient to consider the questions together): first to identify the matter and secondly to decide if that matter is one that the parties have agreed can only be arbitrated. Further, the court looks to substance and not form, adopting a practical and common-sense approach. It should guard against placing undue weight on what may be nuanced emphases or artificial characterisations adopted for tactical or other purposes. This is of course not to say that the parties’ pleaded position is to be ignored, but rather to emphasise that the search is for the reality of the dispute.”

²⁰ (BVIHMAP2014/0017; 2 October 2014) at [17]-[18].

²¹ (BVIHMAP2021/0007; 22 March 2023).

[48] Mr. Nader contends that in the present case, the Arbitration Agreement in Xin Gang's Articles requires the company and its shareholders to arbitrate all disputes between them relating to any of the affairs of Xin Gang. He submits that applying the two-stage approach: (1) all the matters on which Kenworth seeks to rely in support of the Originating Application fall within the scope of the Arbitration Agreement; and (2) the parties have agreed that those matters can only be arbitrated.

Distinguishing Family Mart (In August)

[49] Kenworth's position, at least as articulated historically, had relied on the decision of the Cayman Court of Appeal in **Family Mart**.

[50] **Family Mart** is a decision of the Cayman Islands Court of Appeal, in which the Court declined to stay a just and equitable winding up petition brought by a minority shareholder. An appeal from it to the Privy Council remained reserved at the time of the hearing. Before the Privy Council's decision, Xin Gang thus attempted to distinguish the decision. However, the Privy Council's decision was handed down in September 2023 and it overturned the judgment of the Court of Appeal. I will therefore consider Xin Gang's later submissions which I requested in relation to the judgment of the Privy Council.

No estoppel arising out of the First Judgment

[51] Mr. Nader rightly anticipated that Kenworth would seek to argue that the First Judgment has created estoppels such that this Court is constrained to dismiss the Stay Application. Paragraph 17 of Kenworth's written submissions dated 23 June 2023, filed ahead of the status hearing on 26 June 2023, stated that: "[T]here is of course a real question as to whether the New Stay Application is precluded by virtue of the doctrine of issue estoppel or is otherwise an abuse of process (there having been no material change of circumstances since Jack J's judgment)."

[52] That averment is wrong for at least five reasons, submits Mr. Nader:

- (a) the Court of Appeal has already expressly found that this Court is not bound by Jack J's judgment when considering the Stay Application. At the appeal hearing on 23 May 2023, Levy JA (Ag) said the following: *"But if these proceedings are defunct, they are deceased, then it doesn't occur to me that it would be appropriate to make observations in relation to a matter which will come back on before Justice Mangatal if she was convinced, and she knows the test because she's applied it in Cayman proceedings, if a learned judge was convinced that Mr. Justice Jack erred, she would be free to write a judgment which disagrees with it"* (see page 29 of the transcript);
- (b) no "issue" between the parties, to which the doctrine could apply, has been decided in any case;
- (c) in the present case, special circumstances arise from the combination of (i) the Court of Appeal's decision *in Caldicott No. 2*, which shows that Jack J's approach was simply wrong, and (ii) Kenworth's failure to apply for an extension under s.168(2) of the Insolvency Act, which rendered Xin Gang's appeal from Jack J's decision academic and thereby deprived it of the opportunity to have the matter corrected on appeal. It would be quite unfair, as well as wrong in law and principle, to visit Xin Gang with the consequences of Kenworth's failure;
- (d) with respect to Xin Gang's application for (in the alternative) a discretionary stay, the doctrine of issue estoppel cannot possibly extend to matters that are in the Judge's discretion. This is also apparent from the transcript of the appeal hearing. In response to a submission from Xin Gang's counsel about how Mangatal J could "seek to distinguish or disagree with Justice Jack" when a fresh application for a stay of the fresh winding up application is heard, Chief Justice Pereira said: *"Why is she not exercising her own discretion? Based on the facts, she's exercising a fresh discretion"* (see page 7 of the transcript); and
- (e) there has been a change of circumstances. As Pereira CJ stated at the appeal hearing, *"As I understand Section 168 of the Insolvency Act, the*

application is deemed to be dismissed. You start it again. And so, you have a fresh application to wind up the Company” (see page 5 of the transcript.)

The Liquidation Application is, therefore, an entirely new process, and it was filed by Kenworth more than six months after Xin Gang’s commencement of the Arbitration. When Jack J considered whether to stay the First Liquidation Application in November 2022, those proceedings were more advanced than the Arbitration. Now, the Arbitration is more advanced than these new BVI proceedings: in the Arbitration, the parties have filed their evidence and a final hearing will take place in December; whereas in the BVI, further evidence is yet to be filed and a hearing date has been set down only provisionally. The circumstances based on which the discretion would fall to be exercised are materially different.

- [53] In all the circumstances then the Court should allow the Stay Application and grant Orders in the terms of the draft order filed with the Stay Application.

Kenworth’s Submissions for the August Hearing

- [54] Learned King’s Counsel Mr. Moverley-Smith, who appeared on behalf of Kenworth comments that this Stay Application is not new. The Company made the First Stay Application more than a year ago on 1 June 2022 on the exact same grounds in respect of an identical winding up application filed by Kenworth on 25 March 2022. The parties exchanged full evidence and skeleton arguments in respect of the First Stay Application, and their respective counsels argued the application at a full-day hearing before Justice Jack on 31 October 2022. At the consequential hearing on 11 November 2022, Jack J dismissed the First Stay Application and set out his full reasoning in the First Judgment. The Company appealed against the First Judgment dismissing the stay application. Learned Counsel submits that the Court of Appeal dismissed the appeal on 23 May 2023 on the basis that it had been rendered academic. It was Kenworth’s submission that the Court of Appeal did not disturb the First Judgment or findings of Jack J.

[55] In respect of the Stay Application, Kenworth submits that:

- (a) there are strong reasons for this Court to adopt and affirm the findings in Jack J's Judgment. Jack J's reasoning in arriving at his conclusion to dismiss the First Stay Application, Learned Counsel submitted, was logical and compelling, and based on a holistic consideration of all the relevant facts and law. There has been no material change in the factual circumstances since the hearing of the First Stay Application and the First Judgment, he asserts, and the Company's legal position has not changed. This Court, it was submitted, should not lightly depart from the decision of a court of concurrent jurisdiction on an identical point, since that would create inconsistencies and uncertainties;
- (b) in any event, Xin Gang is estopped from challenging the findings in the First Judgment, since it is a final and binding decision;
- (c) the issues raised in the just and equitable Winding Up Application are within the exclusive jurisdiction of the Court and not arbitrable;
- (d) there is no mandatory stay of just and equitable winding up applications under section 18 of the Arbitration Act;
- (e) the arbitration agreement is inoperative and therefore the Court should not grant a stay of these proceedings under section 18 of the Arbitration Act; and
- (f) the Court should not exercise its discretion under section 18 of the Arbitration Act and/or its inherent jurisdiction and/or section 162 of the Insolvency Act and/or CPR 26.1 in favour of a stay of these proceedings.

Background to the Stay Application

[56] The Winding Up Application is founded on the basis that there is a lack of probity on the part of the Company's management and/or board of directors in the conduct of the affairs of the Company, giving rise to a justifiable lack of trust and confidence of Kenworth in the management and/or board of directors of the Company. This, Mr. Moverley-Smith indicates, arises in relation to a number of wide-ranging issues.

The First Judgment

- [57] On this point, firstly, learned King's Counsel argues that this Court has declared that the First Judgment is valid. Reference was made to orders granted on 28 February 2023 (the "**28 February 2023 Orders**") This includes a declaration that: "2. *The Deemed Dismissal [of the aspect of the Originating Application dated 25 March 2022, in BVIHC(COM) 2022/0065, that sought the appointment of joint liquidators over the Company] shall not affect the validity of any other aspects of the proceedings in BVIHC(COM) 2022/0065, including the validity of the orders made on 11 November 2022 on the Company's stay application filed on 1 June 2022 and amended on 7 June 2022, heard on 31 October 2022, and the proceedings in BVIHC(COM) 2022/0053.*"
- [58] Accordingly, King's Counsel submits that this Court has already considered and determined the effect of Jack J's Order and the First Judgment and held that they remain valid. The 28 February 2023 Orders were not appealed, and the time to appeal against them has lapsed. Hence, they stand as binding and effective orders of this Court. This Court should, learned Counsel asserts, follow its own order made on 28 February 2023 that the First Judgment is valid.
- [59] Learned Counsel states that Jack J dismissed the First Stay Application, and set out his written reasons for doing so in the First Judgment. The First Judgment was challenged by Xin Gang and the Appeal came on before the Court of Appeal on 23 May 2023. Given the deemed dismissal of the first winding up proceedings, the Court of Appeal simply held that the Appeal would be academic, and that they would not have the jurisdiction to rule on the merits. Importantly, opines learned Counsel, the Court of Appeal did not overturn or overrule the findings by Jack J. The First Judgment remains a binding decision, which has precedential value in this jurisdiction – a point which Xin Gang's counsel has expressly acknowledged before the Court of Appeal -page 490 of the Transcript. Save that the Company has abandoned its reliance on section 174(1) of the Insolvency Act in the current Stay Application , "... *the integrity of this jurisdiction [is a real concern, because] you have a rogue judgement out there now, which doesn't give effect really to party authority*

or arbitration policy" []. To the extent, argued King's Counsel, that this Court would have fresh jurisdiction (by virtue of the new winding up proceedings), and a fresh discretion to consider the exact same matters, such discretion should be exercised with a view to ensuring consistency in this jurisdiction. The First Judgment is a decision by a court of co-ordinate jurisdiction on identical points and facts, and it is well established that: "[n]o court lightly disregards a decision of a court of concurrent jurisdiction on an identical point—the uncertainties that would be created and the resulting damage if this course were too readily adopted are all too obvious.": **Desmond Alphonso v Commissioner of Police**²².

[60] This principle, argued King's Counsel, is axiomatic and has been readily acknowledged by the Company. In the Company's own words: "*[Mangatal J] is going to be in some difficulty in how she seeks to distinguish or disagree with Justice Jack... And let's say, whereas Justice Jack said X, she says Y, or black versus white, or however you want to call it, the diametric opposite on precisely the same facts, although the procedural position has shifted slightly due to the effluxion of time... if Mrs. Justice Mangatal produces an opposite judgement at first instance, in my submission, that would be deleterious for the law in this jurisdiction...*" (emphasis added)

[61] Further, Mr. Moverley-Smith posits, Xin Gang is estopped from challenging the findings in the First Judgment. The Company contended, before the Court of Appeal, that there was an agreement between the Parties that any appellate decision on the First Judgment would be binding on the new winding up proceedings: page 487 of the Transcript - "*And so, what you have here embodied through the three orders of Mangatal J... is a pragmatic agreement by the parties that they effectively agree – they agree to transpose the outcome of this appeal onto the new liquidation application, as if 168 didn't exist and there had only ever been one application running throughout*" (emphasis added).

²² BVIHCV2006/0242 at [31]

[62] The corollary to the Xin Gang's contention, says King's Counsel, is that the Company necessarily accepts that (i) the First Judgment is and remains a final and binding decision that would be (ii) operative and binding in these new winding up proceedings (by virtue of the Parties' agreement).

[63] Such an outcome is in any event sound, the argument continues, as a matter of principle and law. The First Judgment, Mr. Moverley-Smith argues, remains a final and binding decision. That is the case, even if Jack J did not have jurisdiction (and no such finding was made), until the First Judgment is set aside (which it has not been). As the Privy Council made clear in **Strachan v The Gleaner Co Ltd and Another**²³: "*An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside...*"

The Arbitrability Issue-The Law

[64] The Winding Up Application is made on the just and equitable ground pursuant to sections 159(1) and 162(1)(b) of the Insolvency Act. It is trite, argues King's Counsel, that the Court has the exclusive jurisdiction to make a winding up order.

[65] As was the case with Xin Gang's case, Kenworth at the August Hearing referred to the Cayman Court of Appeal's decision in **Family Mart**.

Section 18 of the Arbitration Act

[66] It was submitted that Xin Gang has formulated its position in inconsistent ways taking two different positions. It is at the same time seeking: a. a mandatory stay of "matters" that are the subject of an arbitration agreement, rather than a mandatory stay of the whole Winding Up Application; and b. a mandatory stay of the whole of the Winding Up Application as the "matters" therein are within the scope of the arbitration agreement. These positions, the argument continues, are inconsistent with the order sought in the Stay Application, which is an order "staying the

²³ [2005] UKPC 33.

Originating Application in these proceedings" pursuant to section 18 of the Arbitration Act.

[67] The inconsistent positions belie the Company's difficulty in formulating a consistent argument in respect of the effect of section 18. Section 18 does not allow, it was asserted, a partial stay in respect of the "matters" which fall within the arbitration agreement i.e., it does not allow the winding up proceedings to be sliced up such that arbitrable matters are referred to arbitration while non-arbitrable matters stay within the Court's jurisdiction. Regardless of which position is taken by the Xin Gang, it was submitted that there can be no mandatory stay.

[68] Section 18 is not applicable to a Winding Up Application. It was Mr. Moverley-Smith's submission that it is well-established law in this Territory that a just and equitable winding up is not subject to the mandatory stay provisions under section 18(1) of the Arbitration Act. In **C-Mobile Services Ltd v Huawei Technologies Co Ltd**²⁴ ("**CMobile**"), the Court of Appeal considered the interaction between winding up proceedings and a mandatory arbitration stay. Pereira CJ held at [19] that:

"...the Mandatory Stay Provision does not apply to a wind up proceeding. A wind up application, although it may be premised on the underlying debt, is not an action or proceeding on the debt or under the contract. Winding up is a class remedy. It is a collective remedy being undertaken for the benefit of all creditors who will no doubt rank according to any priority to be accorded to their proofs of debt in the scheme of the liquidation." (emphasis added) Pereira CJ further held at [21] that "winding up proceedings are not intended to be caught within the ambit of the mandatory stay provisions contained in the [Arbitration Act] unless the arbitration agreement itself is so drawn as to encompass such a proceeding. The Legislature did not intend that winding up proceedings be so caught..."

²⁴ BVIHCMAP 2014/0017.

- [69] Subsequent cases decided after **C-Mobile** have, it was submitted, spoken in one voice – that is, a just and equitable winding up cannot be subject to mandatory stay provisions. In **Jinpeng Group Limited v Peak Hotels and Resorts Limited**²⁵ ("**Peak Hotels**"), the Court of Appeal held at [49] that an applicant in a liquidation application under section 162(1) of the Insolvency Act does not need to show exceptional circumstances before a court will exercise its discretion not to grant a stay.
- [70] While Mr. Moverley-Smith conceded that these cases principally concern winding up applications brought by creditors, it was submitted that the same principles apply where the winding up application is brought seeking the appointment of liquidators on just and equitable grounds relying on a want of probity. Such a winding up is equally a class remedy, argues King's Counsel, providing for the recovery and distribution of the company's assets to its creditors and members and one in keeping with the public policy of liquidating companies where a want of probity is shown. It is only the court which has the power to appoint liquidators and institute the winding up process.
- [71] Insofar as Xin Gang is seeking a mandatory stay solely on the basis that the issues in the Winding Up Application fall within the scope of an arbitration agreement (without regard to whether those issues are arbitrable), this is misconceived, it was argued, as it ignores the weight of authority, and more fundamentally, the underlying considerations.
- [72] Learned Counsel argued that this treatment of non-arbitrable claims is entirely consistent with the recent judgment of the Court of Appeal in **Caldicott (No. 2)**. On that occasion, the Court of Appeal had to assess if a matter should be stayed in favour of arbitration. Critically, there were no considerations of arbitrability which would preclude an arbitration stay as the application had been brought under section 184I of the BVI Business Companies Act 2004. The Court of Appeal therefore

²⁵ BVIHCPMAP 2014/0024 and BVIHCPMAP 2015/0003/

extracted and applied (at [86] and [89]) the English Court of Appeal's two-stage inquiry in **Republic of Mozambique** where Carr LJ accepted that the test was a two-stage one in which the court is required: '*...first to identify the matter and secondly to decide if that matter is one that the parties have agreed can only be arbitrated*'.

- [73] Carr LJ's two-stage inquiry accommodates considerations of arbitrability when assessing if a mandatory stay should be granted; the inquiry being informed by "overlapping considerations", one of which was whether the matter "could theoretically be arbitrable". This, it was submitted, is evident in his explanation of how the two-stage inquiry was intended to operate (at [61] of **Republic of Mozambique**).
- [74] 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.
- [75] The need to maintain an underlying awareness of the arbitrability of the dispute is paramount, Kenworth submitted. For Xin Gang to secure a mandatory stay, it will need to show this Court that the dispute which forms the subject of BVI litigation: a. falls within the arbitration agreement as a matter of contractual construction (the Construction question); and b. is a dispute which is capable of being subject to arbitration as a matter of BVI law (the Arbitrability question).
- [76] Just as filing a non-arbitrable claim does not result in a mandatory stay, submitting a non-arbitrable claim to the BVI court does not give rise to a breach of the arbitration agreement, argues Kenworth. The starting premise (per **Riverrock** at [67]) is that

"[t]he practical consequence of a particular claim not being arbitrable is that the law in question will not enforce an arbitration agreement" (i.e. BVI law will not insist upon non-arbitrable claims being submitted to arbitration).

[77] The English cases, such as ***Fulham Football Club (1987) Ltd v Richards***²⁶ ("**Fulham**") which have granted a stay of proceedings only to the extent of select issues which fall within the arbitration agreement (i.e. a partial stay), learned King's Counsel argued, are as a result of the permissive language under the relevant English statutory provision (section 9 of the English Arbitration Act 1996). This, however, is not an available outcome under section 18 of the BVI Arbitration Act. It was argued that the language of the English provision is plainly different from section 18 of the BVI Arbitration Act as it envisages that court proceedings can be stayed "*so far as they concern that matter* [referred to in the arbitration agreement]".

[78] In light of the differences between section 18 of the Arbitration Act and the English legislation, it is clear, Mr. Moverley-Smith posited, that section 18 adopts an "entire proceedings" approach, whilst English law focuses on "matters" which are subject to an arbitration agreement and allows a stay of the proceedings "so far as they concern that matter".

[79] In ***China Europe International Business School v Chengwei Evergreen Capital LP***²⁷ ("**China Europe**"), Chan J's observations at [68] support the view that the Winding Up Application is to be considered as a whole under section 18. Her Ladyship adopted a categorical approach in deciding that winding up proceedings by their very nature do not fall within section 20 of the Hong Kong Arbitration Ordinance.

[80] Thus, it was submitted that the alleged arbitration agreement is inoperative.

²⁶ [2011] EWCA Civ 855.

²⁷ [2021] HKCFI 3513.

- [81] Learned Counsel pointed out that the case of **Peak Hotels** concerned a creditor's application for a winding up on the just and equitable ground. The Court of Appeal referred at [44] to an earlier decision of the BVI High Court in **C-Mobile**, in which Pereira CJ dealt with the nature of a creditor's winding up application and concluded at [9] that "[i]t is important to bear in mind that in winding up proceedings one is considering always a class remedy and not a private [one] between the petitioner and the company".
- [82] The Court of Appeal further found that, although the dispute between the parties was covered by the arbitration clauses in question, once the appellant submitted the dispute to the court as the basis of a creditor's winding up application, it became an issue between the respondent and its creditors over the company's ability to pay its debts as they fall due. This form of proceeding was not covered by the arbitration clauses in the agreements or section 18(1) of the Arbitration Act (see **Peak Hotels** at [45]).
- [83] Further, the Court of Appeal in **Peak Hotels** expressed the view that in any event the court should not grant an automatic stay of the application under section 18(1) just because the respondent has raised a dispute over the appellant's status to apply for a winding up order (see **Peak Hotels** at [45]).

Issues in the Winding Up Application are not arbitrable and cannot be hived off.

- [84] Xin Gang accepts that the disputes between Kenworth and the Company in the Winding Up Application are wider than simply the Forfeiture Issue which is the subject of the Arbitration: see Zhang WS 1 at [21]. All the issues in dispute in the Winding Up Application are inextricably linked to the Court's determination of whether there are sufficient grounds to justify a winding up on the just and equitable ground, argues Mr. Moverley-Smith. The Forfeiture Issue cannot be hived off to arbitration. As a matter of fact, the argument continues, the Forfeiture Issue cannot be considered separately from various other mismanagement and/or lack of probity issues raised in the Winding Up Application and the parties' evidence.

[85] The Eastern Caribbean Supreme Court of Appeal in **Siong Beng Seng v Caldicott Worldwide Ltd**²⁸ held that the discretionary power to grant a stay should only be exercised in "*rare and compelling circumstances*". It stated at [42] "*The legislative basis for granting a stay of proceedings in the Virgin Islands is section 18(a) of the Eastern Caribbean Supreme Court (Virgin Islands) Act, and CPR 26.1(2)(q). The court also has an inherent jurisdiction to grant a stay of proceedings (Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited). The power should only be exercised in rare and compelling circumstances (Amlin Corporate Member Ltd and others v Oriental Assurance Corporation).*"

[86] For these reasons Kenworth submitted that the Court ought to dismiss the Stay Application with costs to Kenworth.

Written Submissions of Xin Gang Power Investments Limited Pursuant to the Court's Directions of 21 September 2023

Family Mart

[87] Paragraph [3] of Xin Gang's Ordinary Application dated 1 June 2023 states that: "*By this application, [Xin Gang] asks the Court under s.18(1) of the Arbitration Act, 2013 to refer the parties to arbitration with respect to each of the matters the subject of the Arbitration Agreement. Under s.18(4), the Court must stay these proceedings, and Xin Gang is entitled to a mandatory stay as of right, insofar as the proceedings involve any of those matters. Since those matters comprise the entirety of the grounds of the Originating Application, the Court must stay the whole of the Originating Application. The stay must continue until those matters have been determined by arbitration, and Kenworth must not be permitted to rely upon any one of those matters in support of the Originating Application unless and until that matter has been determined by arbitration.*"

²⁸ BVIHCPMAP2020/0020 ("**Caldicott (No. 1)**") [AB/33].

[88] The **Family Mart** decision shows this to be the correct formulation, asserts Mr. Nader. The Privy Council held, relevantly, as follows. First, it approved the two-stage approach for how to determine which matters must be referred to arbitration for the purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and legislation giving domestic effect to it. The legislation in **Family Mart** was s.4 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) of the Cayman Islands (the “**FAAEA**”). At [57]-[58], the Board said that:

*“57. From this brief review of international authorities 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.***

58. 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. (See Tomolugen, para 42 above; WDR Delaware, para 47 above and Sodzawiczny, para 50 above).”

(My emphasis)

[89] Second, the Board addressed what constitutes a “matter” for this purpose. At [61], it held that:

“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. 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 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.” (emphasis added)

[90] The Board considered each of the following to be “matters” for this purpose (see [23], [82], [96]):

“(1) Whether [the petitioner] has lost trust and confidence in [the majority shareholder] and in the conduct and management of the Company’s affairs ... (2) Whether the fundamental relationship between [the petitioner] and [the majority shareholder] has irretrievably broken down ... (3) Whether it is just and equitable that the Company should be wound up. (4) Whether [the petitioner] should be granted alternative relief ... (5) Whether, if such alternative relief is not appropriate, an order winding up the Company should be made

[91] Third, the Board addressed arbitrability and concluded that the first two of these matters were arbitrable (and that they fell within the scope of the arbitration agreement) hence the winding up proceedings must be stayed insofar as they concerned those matters. At [96]-[97], it said:

“96. Matters (1) and (2) are controversies relating to legal or equitable rights which are of substance. They are matters which lie at the heart of the legal

proceedings in the Cayman Islands for an order under section 95 of the Companies Act. A declaration, for example, that Ting Chuan had breached FMCH's equitable rights and that their relationship had irretrievably broken down would be highly relevant to FMCH's application for a just and equitable winding up of the Company or in the alternative a share buy-out. They are also matters which the parties accept fall within the scope of the arbitration agreement.

97. For the reasons set out above, the Board concludes that matters (1) and (2) which it has set out in para 23 above are "matters" in terms of section 4 of the FAAEA for which a stay pro tanto of the winding up proceedings is mandated."

The other three matters met the definition of "matters" but were not arbitrable (at [82]).

[92] Fourth, the Board held that s.4 of the FAAEA provides for a pro tanto mandatory stay of legal proceedings, whereby some (but not all) matters arising in legal proceedings are subject to a mandatory stay. Domestic legislation in some jurisdictions provides expressly for a stay pro tanto, for instance s.9 of the Arbitration Act 1996 in England and Wales, which provides for a "*stay [of] the proceedings so far as they concern that matter*". In contrast, FAAEA s.4 provides for the making of "*an order staying the proceedings*" where a party to an arbitration agreement "*commences any legal proceedings ... in respect of any matter agreed to be referred*". Nevertheless, on the basis that "*the greater includes the lesser*" (at [60]), the Board held that s.4 of the FAAEA allows for the mandatory stay of the part of proceedings involving matters subject to an arbitration agreement.

[93] It was submitted that these rulings in **Family Mart** apply to the circumstances of this case.

Disclosure

[94] These proceedings must be stayed. Disclosure cannot be ordered in breach, submits Xin Gang, of the stay. In those circumstances, discretionary considerations do not arise, but if they did: a.. It would be wasteful for the parties to undertake a disclosure exercise in relation to the “paid up shares” matter, given that the Tribunal’s ruling will estop the parties from re-litigating that matter in this Court, should the winding up application eventually proceed. The Court notes that Kenworth in its Further Submissions filed 6 October 2023 now finally states that it is prepared to defer the issue of disclosure in the Winding Up Proceedings until after the outcome in the Arbitration is known. This it says is without prejudice to Kenworth’s position that Xin Gang is in breach of the Civil Procedure Rules (“CPR”) by failing to respond to Kenworth’s disclosure requests.

The Ruling

[95] The Tribunal has now declared that the Ruling, which Xin Gang filed on 15 August 2023 may be put before this Court by Xin Gang. Xin Gang does not need the Ruling to prove its entitlement to a stay, since the Privy Council’s decision in **Family Mart** makes this perfectly clear. However, it remains relevant to the question of costs. While Kenworth was disputing Xin Gang’s arguments why these proceedings should be stayed, it was making the same arguments itself before the Tribunal, as to why the Arbitration should be stayed. This two facedness provides a further reason to award Xin Gang its costs of the stay application.

[96] In particular, Kenworth submitted to the Tribunal that it does not make sense for these proceedings and the Arbitration to run concurrently, and that maintaining concurrent rather than consecutive proceedings would risk making inconsistent findings and waste significant time and costs (MGP-5 at [98] paras 33, 36). This is what Xin Gang argued in its Submissions at [45], [51]-[52], [62]. Yet, in its Skeleton at [88], Kenworth submitted to this Court that there was “no merit” in those arguments. Kenworth’s Skeleton asserted (at [4(c)], [13]) that the issues raised in its winding up application are within the exclusive jurisdiction of the Court and are not arbitrable. However, in the Arbitration, the Tribunal noted that “*it is not in dispute*

that the issues in this arbitration are both capable of being arbitrated and also fall within the scope of the arbitration agreement” (at [63]; MGP-5 at [103]). Paragraph [8] of the Ruling also reveals the inconsistent approaches taken by Kenworth to the “paid up shares” matter before the Tribunal and in this Court. Before the Tribunal, Kenworth argued that it needed to adduce expert evidence to address the accounting records produced by Xin Gang, and filed an application seeking this on 15 June 2023. At the status hearing in this Court on 26 June 2023, however, Kenworth sought a speedy trial of its winding up application during the summer vacation, with procedural directions that did not allow for expert evidence, from which position it did not resile until the conclusion of the stay hearing on 16 August 2023.

[97] Additionally, if (contrary to Xin Gang’s submission) the Court finds that it needs to consider whether to stay these proceedings on discretionary grounds, the Tribunal’s analysis in the Ruling at [58]-[79] is instructive, particularly the following findings:

- (a) “[Kenworth] has not explained satisfactorily or at all why it did not commence an arbitration pursuant to the arbitration agreement in order to determine the (arbitrable) underlying issues it relies on in either set of winding up proceedings. That appears to have been both possible and necessary to give proper effect to the arbitration agreement and the principle of the supremacy of the arbitration agreement. The Arbitral Tribunal agrees with [Xin Gang] that [Kenworth’s] decision apparently to ignore the arbitration agreement and seek to determine the arbitrable issues before the courts of the BVI, on the basis that the relief it seeks can only be granted by those courts, appears to be in breach of the arbitration agreement” (at [64]);
- (b) “[T]here appears to be a prima facie breach of the arbitration agreement by the Respondent and, in any event, to find that the underlying issues which are currently (for the second time) before the BVI courts could and should first have been determined by arbitration pursuant to the arbitration

agreement because of the principle of the supremacy of the arbitration agreement. The result of an arbitration would have informed the appropriate action (and remedy) before the BVI courts” (at [66]);

- (c) “[T]he large amount of overlap of underlying issues between the BVI proceedings and the arbitration proceedings is a good reason that argues against the arbitration being stayed. The arbitration proceedings are the more appropriate forum to determine them (on the basis that that is what the parties are taken to have agreed), and they should not be stayed for that reason. The more [Kenworth] identifies similarities between both sets of proceedings, the harder it is to argue that arbitration is not the appropriate forum to determine them” (at [69]);
- (d) “While it might be true that the BVI courts may have to determine the same underlying issues as the Arbitral Tribunal is being asked to, in order to decide whether to order winding up on the just and equitable ground, that does not amount to them ‘unequivocally assuming jurisdiction’, any more than the Arbitral Tribunal would presume to ‘assume jurisdiction’ over the powers of the BVI Courts by determining the arbitrable issues brought before it. How the BVI Courts choose to consider findings made by this Tribunal are a matter for it and whether or not some issues would be determined by virtue of issue estoppel or otherwise for reasons for abuse of process are matters for the BVI Courts” (at [74]); and
- (e) “There is also no risk of inconsistent findings or any waste of time and costs, if the correct sequence, anticipated in the arbitration agreement, is followed. First, comply with the arbitration agreement to determine all arbitrable issues. Depending on the result, then move the BVI courts to wind up the Claimant on just and equitable grounds. The risk of inconsistency and waste, it seems to the Tribunal, lies in [Kenworth] doing the exact opposite, purporting to ignore the arbitration agreement altogether, and cause both litigation and arbitration in two separate jurisdictions with considerable overlap” (at [77]).

Costs

[98] Under CPR rules 70.11(2) and 65.11(2), the general rule is that the successful party on an ordinary application should be awarded its costs. A stay should be granted, so Xin Gang should have its costs.

[99] It is no answer to this, says Mr. Nader, that **Family Mart** was only handed down after the hearing of the stay application. The fact is that Xin Gang has been correct all along: all the Privy Council did was confirm this. In any event, the same outcome follows from **Caldicott No. 2**, which binds this Court and was handed down months before the stay application was filed.

Costs orders sought

[100] Xin Gang's costs of the stay application between 1 June 2023 and 17 August 2023 (the "**Period to the Hearing**") are set out in the schedule in MGP-5 at [15-35], which meets the requirements of rules 70.11(3) and 65.11(5). The amount claimed is approximately US\$200,000. As the hearing occupied the Court for one hearing day or less, the Court, it was posited, should assess Xin Gang's costs for the Period to the Hearing summarily under rule 70.11(4). The amount claimed should be awarded in full. Payment should be ordered to be made within 14 days, in accordance with rule 70.11(5).

[101] Should the Court not assess Xin Gang's costs summarily, Mr. Nader suggests that a payment on account should be ordered under rule 70.13(1). An appropriate figure would be 75% of the costs claimed for the Period to the Hearing, being approximately US\$150,000. In those circumstances, Xin Gang claimed that it would reserve its right to claim additional costs from 18 August 2023 up to and beyond the date of their submissions.

[102] Any request by Kenworth for costs to be reserved or for payment to be delayed should be rejected, Mr. Nader declared forcefully. Kenworth is a foreign (Samoan) company, ordinarily resident outside the jurisdiction, whose only known BVI asset is its shareholding in Xin Gang that is (on Xin Gang's case) subject to forfeiture. If

Xin Gang prevails, it will have no realistic ability to recover its costs. Even if Xin Gang could enforce a costs order in Samoa and procure the appointment of liquidators to Kenworth, Counsel decries that there is no credible prospect of any recoveries being made. Kenworth has not provided any security for Xin Gang's costs despite multiple requests (see Forbes Hare's letter dated 6 September 2023 at [13]-[15]).

Discretionary considerations

- [103] Insofar as discretionary considerations are relevant, the Court should, the argument continued, also mark its displeasure with Kenworth's atrociously wasteful behaviour, especially in its waiting until the conclusion of its oral submissions at the hearing of the stay application before finally admitting that the trial of the winding up application could not proceed during the summer vacation. That ought to have been plain from the outset, and much time and expense could have been saved had Kenworth faced up to it sooner.
- [104] Had Kenworth done this, declared Mr. Nader, the hearing of the stay application could have been avoided. Xin Gang had written to Kenworth on 26 May 2023 – before the stay application was even filed – correctly predicting the procedural issues that inevitably arose and proposing a case management stay of these proceedings pending the determination of the Arbitration. Kenworth rejected this proposal outright on 1 June 2023. Kenworth's leading counsel took the Court specifically to this correspondence at the status hearing on 26 June 2023. When told at that hearing that no other trial dates were available until after the Arbitration hearing, Kenworth ought, it was asserted, to have acquiesced to a stay.
- [105] The hearing of Xin Gang's stay application during the summer vacation was, therefore, brought about by Kenworth's blinkered insistence on pushing through with the listing for trial of its winding up application, in circumstances where the only available trial dates prior to the hearing of the Arbitration were never viable.

Kenworth's Written Submissions dated 6 October 2023

- [106] Xin Gang's Stay Application was part-heard on 16 August 2023, and adjourned for Parties to agree on further directions. Multiple rounds of correspondence have since been exchanged between the Parties, but unfortunately, indicated Kenworth in written submissions, the Parties have not been able to agree on two matters.
- [107] First, the Parties disagree on whether this Court should determine the Stay Application. Kenworth submits that there is no need for such a determination because the Stay Application has been rendered academic. By adopting a deliberate strategy of delay, Xin Gang has engineered a situation where there will be a *de facto* stay of the Winding Up Proceedings. There is no real reason, in these circumstances, why the Court should grant a stay and the Stay Application should accordingly be dismissed. Such an approach would save time and costs and would be consistent with the principles set out *in Family Mart*.
- [108] Second, the Parties disagree on the matter of costs. Kenworth submits that, if there is no determination on the merits of the Stay Application, then an appropriate order would be for costs to be reserved.
- [109] It was submitted that Xin Gang' position on these two matters is speculative, self-serving, and contrived.
- [110] Kenworth's summary position on the outstanding issues was stated to be as follows.
- (a) There is no need for this Court to consider the Arbitration Tribunal's Determination as the Stay Application has been rendered academic. In any event, Kenworth does not object to the release of the Arbitration Tribunal's Determination;
 - (b) Kenworth is prepared to defer the issue of disclosure in the Winding Up Proceedings until after the outcome in the Arbitration is known. This is without prejudice to Kenworth's position that Xin Gang is in breach of the CPR by failing to respond to Kenworth's disclosure requests; and
 - (c) The costs of the Stay Application should be reserved or, alternatively, costs in the cause. There is no basis for Xin Gang to seek an interim costs award.

Family Mart

[111] Family Mart represents a convenient starting point, submitted Mr. Moverley-Smith. It is a decision of the Privy Council which should inform the approach this Court takes in these Winding Up Proceedings. Learned Counsel opined that the key relevant principles from ***Family Mart*** may be distilled as follows.

- (a) the Privy Council established that a Court would be entitled to refuse an arbitration stay application, if the applicant has "*no real or proper purpose*" for seeking a stay, or when the stay would be practically futile in the circumstances;
- (b) the Privy Council made clear that an arbitration agreement contained in a shareholder's agreement does not "*amount[t] to a contractual prohibition on initiating a petition to wind up a company*";
- (c) the Privy Council had overturned the decision of the Cayman Court of Appeal and ruled that the just and equitable winding up jurisdiction of a court was not "*indivisible*"; and
- (d) the Privy Council confirmed that, when the parties' disputes were fragmented between arbitration and court proceedings, then "*effective case management by both the court and the arbitral panel*" would be essential to mitigate any disadvantages caused.

[112] Kenworth argues that ***Family Mart*** accordingly corroborates the following conclusions:

- (a) the Stay Application should now be dismissed. There is no real or proper purpose for Xin Gang to seek a stay, since scheduling developments in the Winding Up Proceedings (which were preceded by Xin Gang's prolonged and cumulative delays before filing the Stay Application) have ensured that a stay would be practically futile;
- (b) Kenworth's decision to commence the Winding Up Proceedings does not amount to a breach of the arbitration agreement;
- (c) Kenworth had acted correctly, and in accordance with the existing state of law, when it opposed the Stay Application; and

(d) Fourth, case management directions should be issued in these Winding Up Proceedings to manage the fragmentation of the dispute.

- [113] It was further submitted that to the extent that Xin Gang is now attempting to progress the Stay Application, that should properly be viewed as an abuse of this Court's process as Xin Gang already has a *de facto* stay of the proceedings.
- [114] Additionally, that Xin Gang is essentially asking the Court to resolve a question of law that is entirely academic, and that will have no practical bearing on the conduct of the Winding Up Proceedings. That is not a real or proper purpose for seeking a stay. The Court's time and resources should, it was asserted, not be wasted in a consideration of wholly hypothetical issues and arguments.
- [115] The true reason why Xin Gang insists on pursuing the Stay Application, posits Kenworth, is because it wishes to immediately recover its costs (on an indemnity basis), and because it wishes to exert improper pressure on Kenworth to provide Security for Costs in the Winding Up Proceedings.
- [116] If Xin Gang takes issue with Kenworth's conduct, then that is a matter that can be raised in due course and for holistic consideration at a later juncture.
- [117] The Stay Application should accordingly be dismissed. If the Court is not minded to do so, then Kenworth submits, in the alternative, that it would be appropriate for "No Order" to be made in respect of the Stay Application. It was asserted that Kenworth was/is entitled to commence the Winding Up Proceedings.
- [118] To the extent that Xin Gang may assert that the Arbitral Tribunal has held otherwise, that would also, it was argued, be false and/or a misrepresentation of the true position. Further, that Kenworth has acted correctly in opposing the Stay Application.

[119] Kenworth states that unfortunately, and after further consultation with its legal team, Kenworth reached the view that 2.5 days would be ultimately insufficient. Kenworth then informed the Court, on 16 August 2023, that the September 2023 hearing dates should be vacated. It was further argued that Kenworth cannot be faulted for its conduct at the hearing on 16 August 2023. Kenworth had acted correctly in opposing the Stay Application and in objecting to an otherwise indefinite stay of the Winding Up Proceedings. Kenworth also claims that it did not make inconsistent representations to the Tribunal and to the Court. It had accurately stated the position that it would be taking in each of the proceedings. At the status hearing on 26 June 2023, Kenworth indicated that it would be willing to proceed with the hearing of the Winding Up Proceedings, and that a single round of further evidence would likely be sufficient. Such concession was made, it is claimed as part of Kenworth's best efforts to work towards the provisional September 2023 hearing date which the Court had offered. The situation in the Arbitration was markedly different, since, Mr. Moverley-Smith argued, Xin Gang has not dragged its feet in that matter. Kenworth opted to adduce expert evidence, because the pleadings and evidence in the arbitration were at a more advanced stage, and the hearing was fixed for a later date in December 2023.

[120] In closing, Kenworth argued that the fact that the Stay Application has now been rendered practically futile is something that is directly attributable to Xin Gang's conduct and its deliberate strategy of delay. Kenworth opined that Xin Gang's conduct should not be condoned or rewarded by an order for costs.

DISCUSSION AND ANALYSIS

The release to the Court of the Arbitration Tribunal's Ruling.

[121] As at the date of Kenworth's October 2023 Written Submissions, it now has taken the position that the Court can receive and consider the Tribunal's Ruling, although obviously not bound by the Ruling. Indeed, upon the application of Xin Gang, the Tribunal has by a ruling on 29 September 2023, ruled that its earlier Ruling can be disclosed to the Court. In any event, as Xin Gang itself had maintained, it was free

to rely upon the Ruling in order to protect its legal rights or interests in proceedings before the Court. Indeed, sub-section 16(2) of the Arbitration Act expressly in effect provides that a party may publish, disclose or communicate information relating to the arbitral proceedings if it is in aid of protecting or pursuing a legal right or interest in proceedings before the Court.

Disclosure

[122] Kenworth has now agreed that the issue of disclosure in the Winding Up Proceedings should be deferred until after the outcome in the Arbitration is known. In my view, in any event, ordering disclosure in the Liquidation Application would be inconsistent with an order for a stay of these proceedings.

Whether it is necessary or just for this Court to rule on the Stay Application

[123] In my view, it is plainly right and just for the Court to rule on the stay application, not least of all because this is precisely what the Court of Appeal had in mind when it made the pronouncements that it did in May 2023. The suggestion by Kenworth that the question has now become academic is ironic since in my judgment, once it was obvious that the Arbitration would proceed before the Winding Up Application, (from at latest the August hearing) Kenworth should have agreed to a stay of some kind. It is also the case that Kenworth's suggestion that the timing issues have arisen because of any dragging of its feet by Xin Gang is fallacious and entirely misconceived. Furthermore, particularly after the decision of the Privy Council in ***Family Mart*** in September 2023, it is important that in this jurisdiction there be some clarity on the law in relation to the relevant issues surrounding the interplay of arbitration agreements and liquidation applications.

The First Judgment- of Jack J in respect of the First Stay Application

[124] I will deal with these points shortly. The Court of Appeal plainly expressed the view that this Court would not be bound by the judgment of Jack J, and indeed, Pereira CJ expressed the view that this Court would be exercising a fresh discretion and

that this was a new application. As was argued by Xin Gang's Counsel before the Arbitration Tribunal (paragraph 52 of the Ruling), "*Jack J's order dismissing the stay application is a thing writ in water; its effect is merely that proceedings no longer on foot have not been stayed.*" In my judgment, that is a very apt description and represents the true position in these uncommon circumstances.

[125] I am concerned with a situation that is quite distinguishable from that dealt with in the First Judgment. First, my judgment is in relation to extant proceedings and there is/ was no question of the proceedings being defunct. Further, I agree with Mr. Nader's submission that in the present case, special circumstances arise from the combination of (i) the Court of Appeal's decision *in Caldicott No. 2*, which arrived at different conclusions from Jack J. This was so particularly in relation to the language of the Arbitration Act as compared to that in other jurisdictions, and *Caldicott No. 2* post-dated the First Judgment and (ii) Kenworth's failure to apply for an extension under s.168(2) of the Insolvency Act, which rendered Xin Gang's appeal from Jack J's decision academic and thereby deprived it of the opportunity to have the matter corrected on appeal. I agree that it would be quite unfair, as well as wrong in law and principle, to visit Xin Gang with the consequences of Kenworth's failure. Further, the Court of Appeal in May 2023 expressly issued its guidance that a fresh application for a stay should be made by Xin Gang, and considered by the Court afresh, in the instant proceedings. It cannot be correct or just that Xin Gang cannot pursue an appeal regarding the First Judgment, yet it also be stymied by that First Judgment by not being able to obtain a fresh ruling on a stay application in the Liquidation Application before a different judge.

[126] In my judgment, Xin Gang is in no way estopped from pursuing the Stay Application before me. Nor is this Court bound by the First Judgment. To hold Xin Gang estopped would in my view not auger well for the reputation of the justice system in this jurisdiction. If Kenworth's arguments on estoppel were to be accepted, this would put Xin Gang in a sort of Catch 22, lose-lose paradoxical quagmire. I roundly reject Kenworth's estoppel argument.

[127] Additionally, Kenworth has argued that, because of the 28 February 2023 Orders that I made, I should follow my own order that “the [First] Judgment is valid.” It seems obvious to me, as Levy JA (Ag) recognized, that this Court made those orders in a particular context when an appeal was extant (trying to assist in an unusual situation). Further, in point of fact, it was a declaration that was made by this Court, not an order. Now that the Court of Appeal has dismissed the appeal from the First Judgment, without considering its merits, and stated that I must consider the matter afresh, that is precisely what I as a judge of first instance must do—consider the matter afresh. It should be noted that there is a world of difference between saying that something is valid, and saying that it is correct. Further, and in any event, whilst a judge of coordinate jurisdiction should not lightly depart from the decision of a judge of coordinate jurisdiction on the same issues, a judge should, in certain circumstances, do so if convinced that the earlier judgment is wrong.

Mandatory Stay Under the Arbitration Act

[128] In its submissions before Jack J in the context of the First Stay Application and in the Court of Appeal, both of which pre-dated the handing down of judgment in **Caldicott No. 2**, Kenworth argued that differences between the wording of s.18 of the Arbitration Act and the legislation relied upon in the English and other decisions on which Xin Gang relies, meant that those authorities should be distinguished. However, I accept Mr. Nader’s submission that that argument cannot survive the decision in **Caldicott No. 2** where at paragraph [88] Theodore JA held that the test in the BVI and under the overseas legislation is “quintessentially the same”.

[129] I am bound by the decision in **Caldecott No. 2**. Theodore JA, in my humble view, gave expression to the consensus approach to be taken to the statutory provisions in various jurisdictions that 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. This was described by the Privy Council in **Family Mart** sometime after **Caldicott No. 2**. At paragraph 88, discussing section 18 of the Arbitration Act, Theodore JA stated clearly and lucidly:

*“[88] Although the provisions under consideration in **Tomolugen and Republic of Mozambique** speak to ‘matters’ in proceedings whereas the current BVI Act refers to ‘a matter’ in ‘an action’, the test in the BVI is, in my view, quintessentially the same.”*

(Underlining emphasis mine)

[130] In my view, that is indeed a logical and fundamentally sensible position because the various jurisdictions are seeking to implement Article 8 of the UNCITRAL Model Law, so their effect should be interpreted harmoniously. The fundamental point is that the approach should be the same, in order to fulfill not just the letter, but the spirit of Article 8: thus the Court is called upon to examine substance and not so much form.

[131] Indeed, I am of the view that s. 7. of the Arbitration Act points the way and expressly guides as to the correct way to interpret s.18. It makes plain that the approach in **Caldicott No. 2** is “spot on”. It states as follows:

“s.7. Article 2A of the UNCITRAL Model Law, the text of which is reproduced below, has effect:

Article 2A. International origin and general principles

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly stated in it are to be settled in conformity with the general principles on which this Law is based.”

(My emphasis)

[132] Further or in the alternative, in the event that the First Judgment does still have standing, I regret to say, that after careful consideration, I am respectfully convinced

that Jack J's decision was wrong, as it does not appear to have given sufficient weight to the paramountcy of the agreement between the parties to arbitrate. The First Judgment also appears to have given disproportionate weight to the "salami slic[ing]" issues without fully demonstrating an appreciation that there was no risk of inconsistent factual or legal findings, or any waste of time and costs, if the correct sequence, anticipated by the arbitration agreement, was followed (see paragraphs [31] and [34] of the First Judgment). I entirely accept Mr. Nader's submission that insofar as Kenworth argued before Jack J, or before me, that the Paid-Up Shares Issues need to be dealt with first in the winding up application, in case the outcome of the Arbitration should deprive Kenworth of its locus standi to seek the appointment of liquidators to Xin Gang, that represents bootstraps logic and puts the cart before the horse. The parties agreed to these issues being determined in arbitration. As paragraph 104 of **Family Mart** teaches:

"..... the contractual obligation on the parties to determine those matters by arbitration entails an obligation not to have those matters determined by a court. That obligation is enforced by the court's grant of a stay of the winding up petition pro tanto."

- [133] I regret to have had to arrive at the conclusion that I have in relation to the First Judgment, or indeed, to have been placed in a position where I have had to do so. However, there are a number of relevant matters that bolster me in my view that I should make plain my own views. Firstly, the First Judgment was delivered fairly recently, in November 2022. It therefore has not been around for sufficient time to become an established precedent. Secondly, just as the order was a thing "*writ in water*", the First Judgment was arguably of a similar nature. In any event, it amounted in effect simply to deciding not to stay proceedings that were no longer on foot. It seems to me that as a matter of logic, it could in those circumstances arguably be of no greater precedential value than *obiter dicta*. It is also obvious to me that if it had come to Jack J's attention on 31 October 2022 when he heard the First Stay Application, that the First Liquidation had automatically expired, he would very likely not have heard the application, made the Order or delivered the First

Judgment. Thirdly, it is important to have a first instance judgment on the points raised in the Stay Application, indeed, that can be tested if necessary, in a higher Court. This is particularly so because, as far as I am aware, and based on the submissions made before me, there has been no previous decision in the BVI that discusses the principles to be applied in relation to an application on the just and equitable ground. **Jinpeng** was an application on the just and equitable ground, but it was made by a creditor who alleged insolvency and thus the Court of Appeal dealt with it on the basis that it was a creditor's application. Indeed, see paragraph 20 of the First Judgment. The importance of deciding these issues afresh is increased by the **Caldicott No. 2** decision, which post-dated the First Judgment, as well as the recent decision of the Privy Council in **Family Mart** which it is common ground decided issues that are very relevant to the Stay Application. At the time of the First Judgment Jack J did not have the benefit of either **Caldicott No. 2** or the Privy Council's decision in **Family Mart**. It is in all these circumstances that I have departed from the reasoning in the First Judgment.

Application of reasoning in *Famil Mmart* to the present case.

[134] I accept that the rulings in **Famil Mmart** support Xin Gang's arguments that it had been making all along, and apply to the circumstances of the present case as follows. First, this Court must apply the two-stage approach by determining (i) "what the matters are which the parties have raised or foreseeably will raise in the court proceedings" and (ii) "in relation to each such matter whether it falls within the scope of the arbitration agreement". This was not in doubt anyway. As noted in Xin Gang's Submissions at [34]-[35], the Eastern Caribbean Court of Appeal had held the same thing in **Siong Beng Seng v Caldicott Worldwide Ltd** and **Caldicott No. 2**" at [85]-[86] and [89]-[90] , relying on the same authorities as the Privy Council later did in **FamilyMart**. Earlier attempts by Kenworth to distinguish **Caldicott No. 2** (described in Xin Gang's written submissions at [37]- [38]) were not maintained in Kenworth's skeleton argument dated 14 August 2023 ("**Kenworth's Skeleton**") or at the hearing on 16 August 2023.

[135] Second, in my judgment, it is plain that the ground on which Kenworth seeks a winding up order against Xin Gang is a “matter” for the purposes of s.8 of the Arbitration Act. Paragraph [17] of Kenworth’s Originating Application dated 11 January 2023 states that: “In the circumstances, [Kenworth] seeks a just and equitable winding up of [Xin Gang] on the basis there is a lack of probity on the part of [Xin Gang’s] management and/or board of directors in the conduct of the affairs of [Xin Gang] giving rise to a justifiable lack of trust and confidence of [Kenworth] in the management and/or board of directors of [Xin Gang].”

[136] In **Family Mart** (which, unlike this case, was alleged to involve a quasi-partnership company) the questions whether there had been a loss of trust and confidence and a breakdown in the relationship between the shareholders were both held to be “matters”. It stands to reason that so must be the question whether there is a lack of probity giving rise to a justifiable lack of trust and confidence. Moreover, each of the particularised issues relied upon in paragraph [17] of Kenworth’s Originating Application in support of the alleged lack of probity, as well as those said to be relied upon in Kenworth’s Skeleton at [12], also satisfy the definition of “matters”, being “substantial issue[s] that [are] legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and [are] susceptible to be determined by an arbitrator as a discrete dispute”.

[137] Third, these matters are arbitrable and fall within the scope of the arbitration agreement between Xin Gang and Kenworth. In **Family Mart**, the arbitrable “loss of trust and confidence” and “breakdown in relationship” matters fell within the scope of an arbitration agreement which provided for the submission to arbitration of “any and all disputes in connection with or arising out of this Agreement” (at [12]). A *fortiori*, so must the arbitrable “lack of probity” matter (and each of its component matters) in this case fall within the scope of the arbitration agreement in Article 103(a) of Xin Gang’s Articles of Association, which requires the referral to arbitration of “any difference or dispute ... relating to ... any of the affairs of [Xin Gang]”.

[138] Fourth, a pro tanto stay is mandatory under s.18 of the Arbitration Act for the same reasons that the Privy Council gave with respect to s.4 of the FAAEA. Whilst s.4 of the FAAEA mandates “*an order staying the proceedings*” where a party to an arbitration agreement “*commences any legal proceedings ... in respect of any matter agreed to be referred*”, s.18 of the Arbitration Act mandates “*an order staying the legal proceedings in that action*” where “*an action is brought in a matter which is the subject of an arbitration agreement*”. In each case, where any part of the proceeding concerns a matter that is the subject of an arbitration agreement, the proceeding must be stayed insofar as it concerns that matter.

[139] I accept Mr. Nader’s argument adapting to this case what was said in ***Family Mart*** at [96]-[97] as follows:

- (a) The “lack of probity” matter is a controversy relating to legal or equitable rights which are of substance. It is a matter which lies at the heart of the legal proceedings in the BVI for an order under section 162 of the Insolvency Act;
- (b) A declaration that there is a lack of probity on the part of Xin Gang’s management and/or board of directors in the conduct of its affairs giving rise to a justifiable lack of trust and confidence of Kenworth in the management and/or board of directors of Xin Gang would be highly relevant to Kenworth’s application for a just and equitable winding up of Xin Gang; and
- (c) That is a “matter” in terms of s.18 of the Arbitration Act for which a stay pro tanto of the winding up proceedings is mandated.

[140] In my judgment Xin Gang is entitled to a mandatory stay as of right, insofar as the proceedings involve any matter covered by the arbitration agreement in Article 103(a) of Xin Gang’s Articles of Association. I accept Xin Gang’s argument that since the “lack of probity” matter (and each of its component matters) comprise the entirety of the grounds of the Originating Application, the Court must stay the whole

of the Originating Application. The stay must continue until those matters have been determined by arbitration, and Kenworth is not to be permitted to rely upon any one of those matters in support of the Originating Application unless and until that matter has been determined by arbitration.

[141] In my judgment, it is not just the “paid up shares” matter that must be stayed: it is every matter relied upon by Kenworth in support of its allegation of a lack of probity that is subject to the stay mandated by s.18(4) of the Arbitration Act.

[142] The Court of Appeal had held in **FamilyMart** that the “loss of trust and confidence” and “breakdown in relationship” matters relied upon by the petitioner were not arbitrable, based in part on the stage at which those matters arose for consideration under the Cayman Companies Act. Xin Gang argued in its Submissions at [53]-[59] that, due to the differences between the Cayman Islands legislation and the BVI’s Insolvency Act, the matters relied upon by Kenworth arose at a different stage, and so the Court of Appeal’s reasoning on non-arbitrability could not apply in the BVI. However, the Privy Council has now held (as argued in Xin Gang’s Submissions for the August hearing), that those matters are arbitrable, even under the Cayman Islands legislation. The basis on which it did so, makes it clear that the Privy Council’s approach to arbitrability would apply equally to both regimes. In my judgment the Privy Council’s reasoning cannot be distinguished.

[143] Kenworth had argued that the stay application is otiose and need not be considered, because the Arbitration will be determined before any trial can be held here. However, in my judgment, Xin Gang has a statutory entitlement to a mandatory stay. It has formally invoked that right and has pursued it against vigorous opposition from Kenworth.

[144] Further, **FamilyMart** makes the resolution of the stay application straightforward, and I accept Mr. Nader’s contention that there is a public interest in holding that the decision applies in the BVI as well as in the Cayman Islands.

Further Analysis of Section 18 of the Arbitration Act

- [145] It is the case that in some jurisdictions some amount of emphasis has been placed on finding that winding up petitions are not generally considered an “action”, the word used in certain Arbitration Acts, including section 18 of the Arbitration Act. See for example, the decision of Chan J in **China Europe**, referred to at paragraphs 77 and 101 of **China Mart**.
- [146] However, it is of note in passing that the BVI Interpretation Amendment Act 2013 (“**the Interpretation Act**”) gives a wide meaning to the word “action”. Section 2 of the Interpretation Act states that: “*action*” means a civil proceeding commenced in such manner as may be prescribed by rules of court and includes a claim under the Eastern Caribbean Civil Procedure Rules, 2000 but does not include a criminal procedure by the Crown”.
- (My emphasis).
- [147] The Insolvency Rules are also rules of court. Section.3 of the Interpretation Act states that the provisions apply to every enactment whether made before or after the commencement of the Interpretation Act. The wide definition of “action” and an application of the consensus approach and the need for uniformity and conformity with general principles referred to in section 7 of the Arbitration Act, incorporating Article 2A of the UNCITRAL Model Law, suggests to me that s. 18’s mandatory stay provision should be given a broad interpretation consistent with this approach.
- [148] As pointed out by Xin Gang, in its submissions before the Court of Appeal (dated 10 May 2023) which replied to Xin Gang’s submissions regarding **Caldicott No. 2**, Kenworth argued that **Caldicott No. 2** is distinguishable because it was an unfair prejudice case, rather than a winding up application. This argument, is however, fallacious, as Theodore JA’s analysis of s.18 is in my view clearly of general application.

[149] As Mr. Nader pointed out, in this context it is to be noted that the arbitration clause in **Caldicott No. 2** was materially identical to the Arbitration Agreement in Xin Gang's Articles (see at [6]). It covered disputes between the company and its shareholders, but not between the shareholders inter se. The primary judge had stayed the unfair prejudice claim against the company; that Order was not appealed. Instead, the Court of Appeal's judgment concerned whether the minority shareholder's claims against the majority shareholders should also be stayed. Kenworth suggested that this is a reason to distinguish **Caldicott No. 2**.

[150] However, I accept Mr. Nader's submission that these factual differences in fact clearly support Xin Gang's case. The Originating Application is brought against the company (i.e. Xin Gang) and not against the majority shareholders. Applying Theodore JA's two-stage approach, Kenworth's application should therefore be stayed for the same reason that the claim against the company in **Caldicott No. 2** was stayed: I.e., all the matters complained of fall within the Arbitration Agreement and must be arbitrated. The only distinction is the ultimate relief sought (i.e. a winding up order, rather than unfair prejudice relief) but that does not affect the arbitrability of the matters raised by the Originating Application.

[151] Also important in **Caldicott No. 2** is Theodore JA's analysis at [97]-[102]. Applying the presumption in favour of arbitration (**Fiona Trust** at [13]) and the principles of contractual interpretation (**Arnold v Britton** [2015] AC 1619 at [15], the question for the Court, is whether the parties would have intended that their agreement to arbitrate disputes over the matters complained of could be avoided by the transparent device of applying for a winding up order instead of bringing a claim for unfair prejudice or other relief against Xin Gang. Plainly, they would not have done so.

[152] Other than final remedy, and hence the legal characterisation of proven circumstances as "just and equitable" within the meaning of s.162(1)(b) of the Insolvency Act, I agree that that it is difficult to see what discrete substantive issues

fall outside of the bounds of that which is arbitrable. Kenworth has made some so-called “mismanagement” complaints, but in my view, they are entirely peripheral to the main dispute.

[153] But regardless of whether or not the remainder of the issues raised by the Originating Application are themselves arbitrable, Xin Gang’s position is that it is clear that they should simply await the determination of the Paid-Up Shares Issues in the Arbitration. Further, that it makes no sense to attempt to proceed further in the meantime on a contingent or inchoate basis. That would be the essence of curial inefficiency, says Counsel; **Caldicott No.2** at [92]-[93]. I accept those submissions.

[154] Whether to stay any matters depends on the relative utility and efficiency of adopting a pure consecutive approach (full stay) or allowing some cumulative process (partial stay). The latter may be justified where the Court can make meaningful independent determinations in parallel with the arbitral process. But in my judgment, that could not occur here, due to the centrality of the Paid-Up Shares Issues and their determinative impact upon Kenworth’s standing to seek appointment of liquidators.

Discretionary Stay

[155] Further or in the alternative, in my judgment, in just and equitable applications under s.162(1)(b) of the Insolvency Act – or, at any rate, in nondebt contexts – the Court should stay its process as a matter of circumscribed or presumptive discretion either at an interim stage (s.174(a)) or by deferring any final remedy (s.162(1)) pending the outcome of arbitration even if s.18 is not applicable. To do otherwise, would afford no meaningful role to arbitration policy and would jeopardise curial efficiency. In any event, either the inherent, or general discretionary jurisdiction of the Court can be used to effect the same stay that would take place under section 18 of the Act. This is what happened in **China Europe**.

[156] I further accept Xin Gang’s position that where (contested) members of a company have agreed to refer disputes about their corporate status or stakes to private

arbitration – vis. “relating to ... any of the affairs of the Company” – there is no good reason to thwart such bargain by permitting parallel court determination of the same disputes; and certainly not by reference to cases involving creditors’ applications or disputed debts. Insolvency policy, as Counsel argued, is protected because the Court retains its exclusive statutory jurisdiction.

[157] This sensible outcome is achievable even without following the “wholly exceptional circumstances” test in **Salford Estates**²⁹. Consistent with all discretionary/jurisdictional stays, and the correlative grant of anti-suit relief, the unitary question is, I agree with Mr. Nader, whether the obligor (here, Kenworth) can show “good reason” or “strong reason” against enforcement of the arbitral bargain by imposition of a stay. This approach, unlike that previously deployed by the decision in the First Judgment, in my humble view gives proper effect to arbitration policy.

[158] It was Mr. Nader’s contention that there is no good or strong reason for refusing a stay of the Originating Application in circumstances where: (a) the Paid Up Shares Issues are central and potentially dispositive, (b) such issues have been properly referred to arbitration, (c) the Arbitration has been on foot for over seven months longer than the Originating Application and (d) determination of such discrete substantive dispute will create an issue estoppel (which is common ground). The Arbitration will, therefore, determine that Kenworth either (i) lacks standing (qua member: s.162(2)(c)) or (ii) has standing and has proven the central allegations in support of its application to appoint liquidators over Xin Gang.

[159] Xin Gang’s position is that the Paid Up Shares Issues represent the vast majority of the factual and juridical foundation of the Originating Application. Such substantive dispute is discrete and capable of prior determination in arbitration, as is now occurring. If such dispute were decided in its favour by the Court first, it is obvious,

²⁹ (c.f. [24]-[28], [35] [AB/20/588-590]).

the argument runs, that Kenworth would seek to set up an issue estoppel against Xin Gang in the Arbitration.

[160] At the August hearing, Mr. Nader surmised that the Court will no doubt be invited to consider the purported “real problem” identified in the First Judgment at paragraphs [33]-[34] (the so-called “salami slicing” issue) However, Xin Gang asserts that such a problem, exemplified (according to Jack J) by potentially inconsistent findings as to credibility of witnesses, remains present without a stay in favour of arbitration. Counsel asserts that the salami may not be sliced, but it will instead be addressed in materially overlapping part by “different tribunals of fact” in parallel concurrent proceedings. This, Counsel opines, is distinctly less desirable than consecutively sliced determinations. Further, that such an approach magnifies curial inefficiency. Counsel opined that it is not mandated by the wording of the Insolvency Act or by insolvency policy.

[161] It was submitted that further, even if an arbitral tribunal’s determination as to the honesty or reliability of a witness does not (and cannot) bind the Court, such prior finding may be of some assistance. This is one of the pragmatic advantages of adopting a consecutive approach rather than condemning the parties to parallel concurrent determinations. I accept these submissions.

Costs

[162] In my judgment, Xin Gang have acted eminently reasonably in pursuing the Stay Application and is entitled to its costs which I have summarily assessed. Xin Gang is so entitled for the reasons set out in paragraphs [95],[96], and [100] –[105] above, where its submissions as to costs are set out.

Disposition

[163] It is for these reasons that I made the order for a stay until further order, pursuant to section 18 of the Arbitration Act. Alternatively, the stay is made until further order pursuant to the Court’s discretionary and/or inherent jurisdiction. I have made the order for costs set out in paragraph [3] of this judgment.

[164] It only remains for me to thank Counsel on both sides for their very comprehensive and illuminating submissions. They have greatly assisted this Court in distilling its reasoning and arriving at its conclusions and decision.

**Ingrid Mangatal
High Court Judge**

By the Court

Registrar