[2023] UKPC 33
Privy Council Appeal No 0055 of 2020

JUDGMENT

FamilyMart China Holding Co Ltd (Respondent) *v* Ting Chuan (Cayman Islands) Holding Corporation (Appellant)

On appeal from the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Hodge
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON
20 September 2023

Heard on 15 and 16 November 2022

Appellant
Charles Kimmins KC
Mac Imrie KC
Paul Smith
Ryan Hallett
Mark Tushingham

(Instructed by Charles Russell Speechlys LLP (London), Maples and Calder (Cayman) LLP and Sidley Austin (Hong Kong))

Respondent
Tom Lowe KC
Hilary Stonefrost
Gemma Lardner
Corey Byrne
(Instructed by Sharpe Pritchard LLP and Ogier (Cayman) LLP)

LORD HODGE:

1. This appeal raises the question whether an agreement to settle disputes arising out of a shareholders' agreement by arbitration may prevent a party to that agreement from pursuing a petition to wind up the company whose management is the focus of those disputes. The other side of the coin is whether an application to the Grand Court to wind up that company on the just and equitable ground makes all matters which are the subject matter of those court proceedings non-arbitrable, thereby rendering inoperative the agreement to resolve such disputes by arbitration.

2. Ting Chuan (Cayman Islands) Holding Corporation ("Ting Chuan") and FamilyMart China Holding Co Ltd ("FMCH") are the shareholders of China CVS (Cayman Islands) Holding Corp ("the Company") which is the company that is subject to the winding up proceedings. Ting Chuan owns 59.65% and FMCH 40.35% of the issued shares in the Company.

3. The relationship between Ting Chuan and FMCH so far as is relevant is governed by a shareholders' agreement dated 11 May 2011 ("the SHA"), pursuant to which four of the Company's seven directors are nominated by Ting Chuan (referred to as "the majority directors") and three are nominated by FMCH (referred to as "the minority directors"). FMCH alleges that there was an understanding between it and Ting Chuan as to how the Company would operate its business.

4. The Company through nine subsidiaries operates a very substantial convenience store business in the People's Republic of China ("PRC") under the brand name "FamilyMart". As at 31 December 2021 the business had an annual turnover in excess of US $1.32 billion. The Company was licensed to operate through its subsidiaries the FamilyMart brand in the PRC in return for a royalty of 1 per cent on all revenues. The Company is solvent and operates as a going concern. As explained below, nobody intends to wind up the business, but establishing the grounds for winding up the Company on the just and equitable ground is a necessary step in the company law of the Cayman Islands in order to obtain a court order for the buy-out of the shareholding in the Company of the majority shareholder (here, Ting Chuan).

1. Factual background

5. FMCH is a Japanese company whose owners are two enterprises, Taiwan FamilyMart Co Ltd and FamilyMart Co Ltd (referred to as "the FM parties"), one of which has had considerable success in the convenience store business in Japan and elsewhere in Asia for over 40 years under the brand name "FamilyMart". The owner of Ting Chuan is Ting Hsin (Cayman Islands) Holding Corporation ("Ting Hsin") which was until 2006 the majority shareholder of the Company. Ting Chuan and Ting Hsin are

part of a group of companies founded by the Wei family which includes entities related to or associated with Ting Chuan or Ting Hsin (referred to as "the Ting Hsin Group").

6. Members of the Ting Hsin Group have experience in the food industry but lacked expertise in the convenience store business. To make up for that lack of expertise they required the assistance of staff provided by the FM parties to act as departmental heads with a view to transferring those responsibilities to Ting Hsin's own staff at a later date. FMCH believes that the Ting Hsin Group is owned and controlled by the majority directors who are members of the Wei family, and their family members.

7. FMCH presented a petition to wind up the Company to the Grand Court on 12 October 2018. In that petition FMCH alleges that the Company was incorporated as a joint venture vehicle to develop and conduct a convenience store business in the PRC. The Ting Hsin Group sought by the joint venture to combine the FamilyMart brand and the expertise of the FM parties with the infrastructure which the Ting Hsin Group had established in the PRC. Relations between Ting Chuan and FMCH became strained because FMCH believed and believes that since about 2012 the majority directors of the Company have diverted profits of the Company to members of the Ting Hsin Group which are suppliers of the Company, being food factories and the suppliers of logistics and information processing services to the Company, and have prevented the minority directors from gaining access to information relating to the Company's business, including the identity of those related party suppliers. FMCH asserts that, by so acting, Ting Chuan acted in breach of an understanding that the contracting of such services would be transparent and disclosed by the Ting Hsin Group to the FM parties and would be on a footing that the terms were fair and reasonable.

8. In its petition FMCH alleges that Ting Chuan and/or Ting Hsin have caused, permitted and/or procured the majority directors to act in breach of their duties to the Company. FMCH alleges (i) that it has lost trust and confidence in the conduct and management of the Company's affairs as a result of that lack of probity and (ii) that its relationship with Ting Chuan has irretrievably broken down. FMCH avers that it is just and equitable that the Company be wound up. In the alternative, and this is the real aim of its application, FMCH seeks an order from the Grand Court that Ting Chuan be required to sell its majority stake in the Company to FMCH at a value to be determined by the Court, if not agreed.

9. Ting Chuan, relying on the arbitration agreement in the SHA, applied to strike out the winding up petition or, alternatively, for an order dismissing or staying the petition under section 4 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) ("FAAEA") or under the inherent jurisdiction of the court until the disputes which underlay the petition had been arbitrated. By the Citation of Acts of Parliament Act 2020 legislation which previously was referred to as a "Law" is now referred to as an "Act". The Board adopts that nomenclature in this judgment.

10. The Grand Court (Kawaley J) in an order dated 25 February 2019 granted Ting Chuan's application to stay the winding up proceedings for arbitration under section 4 of the FAAEA. By order dated 14 July 2020, Kawaley J, in an exercise of his powers under the Companies Winding up Rules O.3 r 12(1)(a), (b) and (d), allowed the Company to defend the proceedings if so advised, and ordered that the petition be treated as an inter partes proceeding and that the advertisement of the petition be dispensed with.

11. As discussed more fully below, the Court of Appeal by order dated 27 July 2020 set aside Kawaley J's order of 25 February 2019 and refused to grant a stay of the winding up petition. Ting Chuan has obtained the permission of the Board to appeal against that decision.

2. The arbitration agreement

12. Section 20.3(a) of the SHA provides that it is governed by the laws of the Cayman Islands. The SHA contains the arbitration agreement (section 20.3(b)) which, so far as relevant, provides:

> "Any and all disputes in connection with or arising out of this Agreement shall, insofar as is possible, first be settled amicably by the Parties hereto. … If the Parties cannot come to an amicable settlement within twenty (20) days of the onset of any dispute, *any and all disputes in connection with or arising out of this Agreement [shall be] submitted for arbitration* in accordance with and finally settled under the Rules of Arbitration of the International Chamber of commerce [sic] in effect at the time of the arbitration, except as may be modified herein or by mutual agreement of the Parties. The arbitration shall be confidential and conducted in the Chinese language. The Parties agree that the arbitration shall take place in Beijing, PRC. The award of the arbitration tribunal shall be final and binding upon the disputing Parties, and the prevailing Party may apply to a court of competent jurisdiction for enforcement of such award. …" (Emphasis added)

13. FMCH initially argued that the dispute between it and Ting Chuan did not fall within the scope of the arbitration agreement, but it abandoned that contention in the course of the hearing before the Court of Appeal. It is now a matter of agreement that the dispute falls within the scope of the arbitration agreement. The central dispute between the parties is now whether FMCH's petition in the Grand Court for the winding

up of the Company has made the matters raised in that petition not susceptible to arbitration.

3. The relevant statutory provisions

14. The Companies Act (2022 Revision) provides in section 90 that a company may be wound up compulsorily by order of the Court. Section 92 provides that a company may be wound up by the Court on various grounds including if "(e) *the Court is of opinion* that it is just and equitable that the company should be wound up" (Emphasis added).

15. Section 95, which sets out the powers of the court, provides in subsection (2):

> "The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company."

Subsection (3) provides for several remedies, including the remedy which FMCH is seeking by its presentation of the winding up petition. It provides so far as relevant:

> "If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely – …
>
> (d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly."

This provision was introduced into the Companies Act by the Companies (Amendment) Act 2007. As is well known, the Cayman Islands has not provided in its company law for a self-standing petition (separate from a winding up petition) by a member of a company for a remedy where the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to the interests of members. Such a remedy was introduced into United Kingdom company law by section 75 of the Companies Act 1980 and is now contained in sections 994-996 of the Companies Act 2006.

16. The Cayman Islands has separate legislation governing foreign arbitrations and domestic arbitrations. The FAAEA addresses foreign arbitrations and gives effect to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("the New York Convention"). Section 4 of the FAAEA, which gives effect to article II of the New York Convention, provides:

> "If any party to an arbitration agreement … commences any legal proceedings in any court against any other party to the agreement … in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is … inoperative …, shall make an order staying the proceedings."

Domestic arbitration agreements in the Cayman Islands are governed by the Arbitration Act 2012, which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) and the English Arbitration Act 1996.

4. The judgments of the courts below

17. Kawaley J in his judgment of 25 February 2019 observed (para 17) that the petition had been drafted in a "somewhat obtuse way" to sidestep the argument that the complaints arose in relation to the SHA and were caught by the very broad arbitration agreement. He held (para 61) that it was "clear beyond sensible argument" that the allegations in the petition related to the subject matter of the SHA. He rejected FMCH's submission that the underlying disputes were not arbitrable because only the court can grant a winding up order, holding that there was a fundamental difference between the resolution of the underlying disputes and the grant by the court of statutory relief (para 66). He attached no significance to the fact that neither the Company nor the majority directors were parties to the SHA because the genuine dispute was between the minority shareholder and the majority shareholder (para 67). He granted a mandatory stay of the winding up petition under section 4 of the FAAEA.

18. The Court of Appeal (Rix, Martin and Moses JJA), in a judgment dated 23 April 2020, overturned Kawaley J's decision, holding that the court had exclusive jurisdiction to determine whether a company should be wound up on the just and equitable ground and that, as a result, the underlying disputes were not susceptible to arbitration, notwithstanding that they fell within the scope of the arbitration agreement contained in the SHA. In so deciding, the Court of Appeal discussed as a key authority the judgments of Patten, Longmore and Rix LJJ in the Court of Appeal of England and Wales in

Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855; [2012] Ch 333 ("*Fulham*"), in which the court granted a stay of an unfair prejudice petition under section 994 of the Companies Act 2006 to enable the parties to resolve their underlying dispute by arbitration. The Cayman Islands Court of Appeal, in the leading judgment by Moses JA, also considered other cases, including the judgment of Harris J in the Hong Kong High Court in *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759 ("*Quiksilver*"), in which the judge stayed a petition seeking a winding up on the just and equitable ground to enable the substantive dispute between the parties, which was within the scope of an arbitration agreement, to be determined by arbitration; and a judgment of the Federal Court of Australia in *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164 ("*WDR Delaware*"), which followed the *Quiksilver* judgment by granting a stay for arbitration of a petition on the grounds of oppressive or unfairly prejudicial behaviour in which a winding up order was only one of several available remedies. The rationale of those cases was that an essentially private dispute between shareholders, in which discrete issues could be identified, should be resolved, in accordance with the parties' agreement, by arbitration.

19. Moses JA distinguished those cases, holding that under section 92 of the Companies Act the court's consideration of whether it is just and equitable that a company should be wound up is a threshold question and not a question of relief. Section 92 was the sole gateway to obtaining alternative relief under section 95(3): *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2019] CILR 481 ("*Tianrui*"). *Tianrui* did not involve a conflict between an arbitration agreement and a petition to wind up a company but its reasoning was central to the Court of Appeal's reasoning. *Fulham* was to be distinguished on the basis that in that case there was no need to prove conduct that would justify winding up the company. By contrast in the context of an application to wind up a company on the just and equitable ground, Moses JA summarised the question in these terms (para 98):

> "In cases where there is an arbitration agreement the scope of which embraces disputes of fact which are also raised in the petition, the question of a stay to arbitration turns on whether it is possible to submit such disputes to arbitration without trespassing upon the exclusive jurisdiction of the court to make a winding up order."

He stated that in *Fulham* and the cases which had followed it, the courts had identified discrete, substantive issues which did not invoke the exclusive jurisdiction of the court. But where a petitioner was invoking a statutory right to bring the petition and the underlying issues were central and inextricably connected to the question whether the company should be wound up on the just and equitable ground, it was difficult to identify discrete issues outside the exclusive jurisdiction of the court.

20. Moses JA held that in determining the threshold question the court did not have to determine only questions of primary fact but had to evaluate all the circumstances of the case. The court had to decide whether the conduct of the majority directors and the breakdown of the relationship between the shareholders justified the winding up of the Company. If matters were hived off to arbitration, there would be a risk of inconsistent decisions where there was first a decision by an arbitrator and then a further decision by the court which took into account the arbitrator's award where some of the parties to the petition would not be bound by the arbitrator's award. This outcome could be avoided only if the parties had agreed not to present a winding up petition. No such agreement was expressly stated in the SHA and none could be implied. As a result, section 95(2) of the Companies Act did not apply.

21. Moses JA held that because neither the majority directors nor the Company were parties to the SHA and thereby to the arbitration agreement, it was not permissible to apply the mandatory provisions of section 4 of the FAAEA to the petition in its entirety and because the allegations against Ting Chuan could not be separated from the threshold issue, section 4 could not operate pro tanto. The arbitration agreement was therefore inoperative. Finally, there was no basis for the court to grant a discretionary stay in the exercise of its powers of case management.

5. The parties' positions in this appeal

22. Ting Chuan submits that the Court of Appeal erred in refusing to grant a stay of the winding up petition to allow disputes under the SHA to be determined by arbitration. Ting Chuan asserts that (i) it and FMCH are parties to an arbitration agreement, (ii) FMCH has commenced legal proceedings against it, (iii) those legal proceedings are in respect of matters agreed to be referred to arbitration, and (iv) therefore it is entitled to a mandatory stay unless the Board is satisfied that the relevant matters are non-arbitrable.

23. Ting Chuan identifies the matters which it argues are arbitrable and entitle it to a mandatory stay under the FAAEA. It argues that the petition for winding up contains five matters, the first four of which should be determined by arbitration. The five matters are:

> (1) Whether FMCH has lost trust and confidence in Ting Chuan and in the conduct and management of the Company's affairs. Ting Chuan particularises this matter into three sub-headings: (i) whether the majority directors owe various duties to the Company, (ii) whether the majority directors have breached those duties or engaged in misconduct, and (iii) whether Ting Chuan caused, permitted or procured the majority directors to act in breach of their duties or to engage in the alleged misconduct.

(2) Whether the fundamental relationship between FMCH and Ting Chuan has irretrievably broken down. In particular: (i) whether an understanding was reached between the shareholders by 2003 and, if so, what were the terms of that understanding, (ii) was the understanding superseded at any point in time after 2003, for example by reason of the conclusion of the SHA, and (iii) whether Ting Chuan acted contrary to that understanding after 2012.

(3) Whether it is just and equitable that the Company should be wound up.

(4) Whether FMCH should be granted the alternative relief, which it prefers, under section 95(3)(d) of the Companies Act, namely an order requiring Ting Chuan to sell its shares in the Company to FMCH, and, if so, what is the value of those shares.

(5) Whether, if such alternative relief is not appropriate, an order winding up the Company should be made and whether the persons identified by FMCH should be appointed as joint official liquidators.

In the alternative, Ting Chuan argues that the first two matters listed above are arbitrable, that there should be a mandatory stay of the winding up petition pro tanto under the FAAEA, and that the Board should grant a discretionary stay of matters (3) to (5) above.

24. FMCH invites the Board to uphold the judgment of the Court of Appeal. It characterises the principal question raised in the appeal as being whether and, if so, in what respect and to what extent a petition to wind up a Cayman Islands registered company on the just and equitable ground is arbitrable. It argues that the legislation does not allow a private arbitral tribunal to make the critical threshold decision that it is just and equitable that a company should be wound up. It advances two principal reasons for that view. First, it submits that the proceedings are inherently unsuited to arbitration, and, secondly, it argues that the legislature has recognised that there is a public interest in the judicial determination of winding up petitions in open court, which excludes the use of private arbitration to any extent in the process. It points out that a court in deciding whether it is just and equitable that a company be wound up has regard to all the facts as they exist at the date of the hearing and exercises its discretion at that date. The proceedings must be conducted expeditiously because section 99 of the Companies Act may render void dispositions of property and other transactions made after the presentation of the petition. By contrast, the reference to arbitration of matters encompassed by the winding up application might require multiple and successive arbitrations which would not bind all of the parties to the winding up petition. This cannot have been what a rational businessperson would have contemplated. The winding up petition has been stayed since 2018 while the parties, on Ting Chuan's

insistence, engaged in a very expensive arbitration before the ICC International Court of Arbitration which lasted three and a half years dealing with claims which Ting Chuan advanced, unsuccessfully, against FMCH.

6. The structure of The Board's analysis

25. In addressing those submissions, the Board first considers by way of background the uncontested view that, as a general rule, the law of the Cayman Islands, like English law and the laws of many other jurisdictions, respects the right of parties to agree to have their disputes determined by a private arbitral tribunal. Secondly, the Board addresses the interpretation of section 4 of the FAAEA, and in particular the meaning of (i) "legal proceedings", (ii) "matters", and (iii) "the arbitration agreement is … inoperative". The Board, thirdly, considers whether the petition for winding up on the just and equitable ground is an unum quid, excluding any possibility of arbitration, or whether there should be a partial stay under the FAAEA so that matters within the scope of the arbitration agreement can and should be hived off for arbitration. Fourthly, the Board considers the application for a discretionary stay of the winding up petition; and, finally, the Board briefly addresses a submission relating to section 95(2) of the Companies Act.

7. Background: the approach to arbitration agreements

26. It is common ground in this case that the disputes between Ting Chuan and FMCH, which are articulated in the winding up petition, fall within the scope of the arbitration agreement. No question therefore arises as to the interpretation of the arbitration agreement itself. Case law in England and Wales, and the Cayman Islands, which adopts a liberal interpretation of an arbitration agreement, is not directly in issue. Nonetheless, such case law on interpretation is indicative of the respect which the courts of many jurisdictions give to the autonomy of parties to choose how they wish their disputes to be resolved. In *Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] UKSC 38; [2020] 1 WLR 4117, ("*Enka Insaat*") Lord Hamblen and Lord Leggatt, giving the leading judgment of the court, stated (para 107):

> "In *Fiona Trust & Holding Corpn v Privalov* [[2007] UKHL 40;] [2007] Bus LR 1719, the House of Lords affirmed the principle that 'the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal' (see para 13, per Lord Hoffmann).

> Contrary to a submission made on behalf of Chubb Russia, this is not a parochial approach but one which, as the House of Lords noted in the *Fiona Trust* case, has been recognised by (amongst other foreign courts) the German Federal Supreme Court (Bundesgerichtshof), the Federal Court of Australia and the United States Supreme Court and, as stated by Lord Hope at para 31, 'is now firmly embedded as part of the law of international commerce'. In his monumental work on *International Commercial Arbitration,* 2nd ed (2014), p 1403 Gary Born summarises the position as follows:
>
> 'In a substantial majority of all jurisdictions, national law provides that international arbitration agreements should be interpreted in light of a "pro-arbitration" presumption. Derived from the policies of leading international arbitration conventions and national arbitration legislation, and from the parties' likely objectives, this type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums).'"

The Court of Appeal of the Cayman Islands has adopted a similarly expansive approach to the interpretation of arbitration agreements in order to give effect to the reasonable commercial expectations of the parties: *McAlpine Ltd v Butterfield Bank (Cayman) Ltd* (Appeal No 30 of 2019) (unreported) 21 November 2019 at paras 30-31.

27. The legislature of the Cayman Islands in enacting statutory rules for its domestic arbitration in the Arbitration Act 2012 stated the principles on which the Act was founded and by which its provisions should be construed: section 3(3). Those principles are:

> "(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial arbitral tribunal without undue delay or undue expense;
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> (b) *the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*; and

> (c) in matters governed by this Law the court should not intervene except as provided in this Law." (Emphasis added)

Those principles are articulated in substantially the same terms in section 1 of the Arbitration Act 1996 in England and Wales and in section 1 of the Arbitration (Scotland) Act 2010. The respect which they show to the autonomy of the parties is not a new phenomenon. In England and Wales, the courts until the later nineteenth century often took the view that a contract to oust the jurisdiction of the courts was against public policy and would not enforce such a contract. This approach was altered by legislation in the Common Law Procedure Act 1854, section 11 and in section 4 of the Arbitration Act 1889. Such a judicial approach to arbitration agreements did not exist in Scotland as the House of Lords explained in *A Sanderson & Son v Armour & Co Ltd* 1922 SC (HL) 117, in which Lord Dunedin expressed the matter pithily (p126): "[i]f the parties have contracted to arbitrate, to arbitration they must go." More recently, similar statements have been made about English law: in *Nori Holding Ltd v PJSC Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm); [2019] Bus LR 146, at para 66, Males J stated: "[w]here parties agree to arbitrate, it is the policy of the law that they should be held to their bargain." See also Mustill & Boyd, *Commercial Arbitration,* 2nd ed, Companion Vol (2001) p 75.

28. Ting Chuan prays in aid section 26 of the Arbitration Act 2012 which provides:

> "(1) Any dispute that parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law of the Islands, such a dispute is not capable of determination by arbitration.
>
> (2) The fact that any other law confers jurisdiction in respect of any matter on the court but does not refer to the determination of that matter by arbitration, does not mean that a dispute about that matter is incapable of determination by arbitration."

In the Board's view FMCH is correct in its submission that the 2012 Act, which is concerned only with arbitrations where the seat of the arbitration is in the Islands (section 3(1)), is not of itself a valid tool for interpreting the FAAEA, which was enacted at an earlier date and is concerned only with arbitrations with a foreign seat. Nonetheless, the section is consistent with a position in relation to international arbitration which has extensive support internationally. See for example, in England and Wales, *Wealands v CLC Contractors Ltd* [2000] 1 All ER (Comm) 30 ("*Wealands*"), Mance LJ paras 17, 18 and 21; *Bridgehouse (Bradford No 2) Ltd v BAE Systems plc*

[2020] EWCA Civ 759; [2020] Bus LR 2025, Newey LJ paras 56-57; and *Fulham*, Patten LJ paras 27-33; in Singapore, *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57; [2016] 1 SLR 373 ("*Tomolugen*"), Sundaresh Menon CJ paras 75-76; in Australia, *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 ("*Tridon*"), Austin J paras 192-194, *WDR Delaware* Foster J para 147; in Hong Kong *Quiksilver*, Harris J para 14. The Board observes a similar approach in the jurisprudence of the Supreme Court of the United States: see, for example, *Green Tree Financial Corp-Alabama v Randolph* (2000) 531 US 79, Rehnquist CJ at p 90. It is important in cases which arise out of domestic legislative provisions implementing the New York Convention to have regard to jurisprudence in other contracting states to promote legal certainty in the jurisprudence relating to international arbitration.

29. The Board therefore accepts Ting Chuan's submission that effect should be given to the arbitration agreement unless the agreement is contrary to the public policy of the Islands or there is a rule of law or statutory provision which renders the matters within the scope of the arbitration agreement incapable of resolution by arbitration.

8. The interpretation of section 4 of the FAAEA

30. Section 4 of the FAAEA (para 16 above) implements article II(3) of the New York Convention which provides:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

31. Many countries which are contracting states to the New York Convention have implemented provisions like section 4 of the FAAEA in accordance with their obligations under the New York Convention. In *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21 ("*Gol Linhas*") the Board, in a judgment delivered by Lord Hamblen and Lord Leggatt, addressed the correct approach to the interpretation of the FAAEA. In para 21 of its judgment the Board referred to the judgment of the UK Supreme Court in *Enka Insaat* at para 126 in which it observed that more than 160 states had signed the New York Convention and stated:

> "The essential aim of the Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards. Its

> success is reflected in the fact that … the New York Convention has been implemented through national legislation in virtually all contracting states." (Citations omitted)

The Board went on to observe (para 74) that the meaning of a Cayman Islands statute is a question to be decided by applying the law of the Cayman Islands but that the international origin of the provision necessitated a particular approach to its interpretation. The Board stated (para 75):

> "As with any statute which incorporates into domestic law the text of an international treaty, the interpretation and application of the statutory language must take account of its origin in an international instrument intended to have an international currency. That entails that, as Lord Macmillan put it in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350, in the interests of uniformity the words should not be given a local interpretation controlled by what he called 'domestic precedents of antecedent date', but rather should be construed 'on broad principles of general acceptation'; see also *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152 (Lord Wilberforce); *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281-282 (Lord Diplock). This principle is just as relevant in determining the scope of application of rules incorporating an international convention as it is in interpreting their linguistic meaning."

It is appropriate therefore to consider the jurisprudence of several countries as guides to the interpretation of section 4 of the FAAEA in so far as they have statutory provisions which are worded in a similar way to the Cayman Islands provision.

32. The Board has set out the relevant text of section 4 of the FAAEA in paragraph 16 above. Several questions of interpretation arise. They are (i) the meaning of "legal proceedings" commenced by a party to an arbitration agreement, (ii) the meaning of any "matter" which the parties have agreed to refer to arbitration, (iii) whether a stay of legal proceedings can be a partial stay, and (iv) the meaning of "inoperative" in the phrase "the court, unless satisfied that the arbitration agreement is ... inoperative… shall make an order staying the proceedings".

(a) The meaning of "legal proceedings"

33. It was not contentious and the Board sees no reason to question that "legal proceedings" in section 4 of the FAAEA can include a petition to wind up a company of which the parties to an arbitration agreement are members. In *Fulham* (para 33) the Court of Appeal of England and Wales treated as legal proceedings under section 9(1) of the Arbitration Act 1996 a petition under section 994 of the Companies Act 2006 alleging that a company's affairs had been conducted in a manner which was unfair to the petitioner as one of its members. In *Quiksilver*, Harris J in the Court of First Instance in Hong Kong dealt with a petition for the winding up of a solvent company on the just and equitable ground. The relevant provision of the Arbitration Ordinance (differing from those of the Cayman Islands and England and Wales) spoke of "a court before which an action is brought" having the power to refer the parties to the petition to an arbitration. He observed that winding up proceedings were not an action and distinguished the case of *Fulham* on that ground; but, as the parties did not dispute that the court had a discretionary power to stay the petition, the difference in wording between the Hong Kong provisions and the English provisions did not have a material impact on the matter which he had to decide (paras 20-21).

(b) The meaning and ascertainment of "matter"

34. There is now considerable jurisprudence in several countries which casts light on the meaning of a "matter" in domestic legislation implementing the New York Convention.

35. In *Fulham* Patten LJ, giving the leading judgment of the Court of Appeal of England and Wales, treated as "matters" falling within the arbitration clause of the rules of the Football Association Premier League Ltd ("the FAPL") the allegation that there had been unfair prejudice to Fulham Football Club (1987) Ltd ("the Club") in the conduct of the affairs of the FAPL and the remedies, which the Club sought, of an order restraining the chairman of the FAPL from participating in future player transfer negotiations and an order that he cease to be chairman of the FAPL. In para 33 Patten LJ observed that it was common ground that an arbitrator could make the orders which the Club sought. In substance, the subject matter of the Club's petition under section 994 of the Companies Act 2006 was treated as a matter to be referred to arbitration and the section 994 petition was stayed. The principal question which was in dispute in that case was whether the matters were arbitrable; a similar question arises in this appeal which the Board addresses below.

36. In *Lombard North Central plc v GATX Corporation* [2012] EWHC 1067 (Comm); [2013] Bus LR 68 ("*Lombard North Central*") Andrew Smith J in the High Court of England and Wales addressed an application under section 9 of the Arbitration Act 1996 for a stay of legal proceedings for arbitration. The arbitration agreement was contained in an agreement for the financing of train vehicles which provided for the establishment of a joint venture by the claimants and another company. The arbitration

agreement covered disputes which arose relating to the joint venture. The claimants sought declaratory relief in the High Court concerning the meaning of a clause in the agreement which provided for the establishment of the joint venture. The defendants applied for a stay of those proceedings. The case involved a dispute as to the scope of the arbitration agreement, a subject with which the Board is not concerned in this appeal, and the meaning of section 9 of the 1996 Act. In his judgment Andrew Smith J focussed on the words "in respect of" a matter rather than the word "matter" in section 9. What he said is nonetheless important with regard to the meaning of "matter" as his statements on the subject in paras 13-17 of his judgment have been relied on in the English cases which the Board discusses below.

37. In his discussion in those paragraphs Andrew Smith J, first, recognised that section 9 empowers the court to grant a stay of part of legal proceedings, where those proceedings were in respect of a referred matter and other matters. He held that the express words of section 9(1) permitted such a stay as they referred to a stay of the proceedings "so far as they concern that matter". Secondly, he stated that the court determines whether the proceedings relate to a referred matter by having regard to the nature of the claim or claims rather than relying only on the formulations in the claim form and any pleadings. In so doing, the court should consider what questions will foreseeably arise for determination in the proceedings, and whether they include, or would foreseeably include, referred matters. Such foreseeable questions would, in the Board's view, include matters raised in defences yet to be pleaded. Thirdly, he held that a party to an arbitration agreement is entitled to a stay unless he could have no real or proper purpose for seeking the stay. Fourthly, the risk of proceedings both before the courts and an arbitral tribunal is inherent in an arbitration agreement which refers only certain disputes to arbitration. Referring to the speech of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, at 353, he stated that that is the price of respecting the parties' agreement and the risk that they are to be taken to have chosen to take. Fifthly, he stated that a defendant would not necessarily be entitled to stay the legal proceedings where the referred matter was peripheral to the proceedings as a whole. The proceedings could be partly stayed to allow the referred matter to be determined by arbitration while the proceedings could otherwise proceed.

38. In *Quiksilver* the Court of First Instance in Hong Kong addressed an application to stay or dismiss petitions by a shareholder to wind up two solvent joint venture companies on the just and equitable ground. The shareholders of the companies had entered into a detailed joint venture agreement which contained an arbitration clause and a buy-sell procedure as a means of resolving disputes by enabling one party to buy out the shares of the other. After difficulties had arisen in the buy-sell procedure, Quiksilver Greater China Ltd presented the winding up petitions. The other shareholder, Glorious Sun Overseas Co Ltd, invoked the arbitration agreement and sought a stay of the winding up petitions pending the outcome of the arbitration. Before the judge, the principal disputes between the parties were whether the winding up petitions amounted to class actions and whether a shareholder had an inalienable right of access to the court to seek the winding up of a company rather than any question of statutory interpretation

as to what would amount to a "matter" to be sent to arbitration. Because, as mentioned above, the Hong Kong legislation referred to an "action" rather than "legal proceedings" the Hong Kong equivalent to section 4 of the FAAEA was not in play and the judge was addressing a discretionary stay rather than a mandatory stay under the Hong Kong legislation. Harris J recognised, and it was common ground between the parties, that an arbitrator could not make a winding up order which affected third parties but he held that the precise relief sought in the winding up petitions was not critical. He stated (para 22) that the correct approach is "to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement." Harris J analysed the substantive dispute between the parties to be the basis on which the joint venture was to end, being either a buy-out by Glorious Sun or a winding up at the instance of Quiksilver. That commercial dispute was arbitrable and, if Quiksilver were to prevail in the arbitration, the stay of the winding up petitions could be lifted and the court would not need to re-hear the substantive arguments, which would have been determined in the arbitration.

39. In *Tomolugen* the Court of Appeal of Singapore addressed an application under section 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") by Lionsgate Holdings Pte Ltd ("Lionsgate") for a mandatory stay for arbitration of court proceedings raised by a minority shareholder, Silica Investors Ltd ("Silica"), under section 216 of the Companies Act (Cap 50, 2006 Rev Ed) for relief for oppressive or unfairly prejudicial conduct. The defendants in the court proceedings were the company, the shareholders of the company, including Lionsgate, and the directors and former directors of the company and related companies. Lionsgate, which was the wholly owned subsidiary of Tomolugen Holdings Ltd, the majority shareholder in the company, had sold shares in the company to Silica in a share sale agreement which contained an arbitration clause. Lionsgate argued that part of the dispute in the court action fell within the arbitration clause of the share sale agreement and to that extent the legal proceedings should be the subject of a mandatory stay. It, and the other defendants, sought a discretionary case management stay of the remainder of the legal proceedings, pending the outcome of the arbitration. Much of the judgment of the Court of Appeal, delivered by Sundaresh Menon CJ, concerned the question of arbitrability, which the Board considers below in this appeal. But the judgment also contained an important discussion of the concept of a "matter".

40. The Court of Appeal (paras 15-19) analysed the allegations made in the section 216 application under four broad categories (1) the share issuance allegation, (2) the management participation allegation, (3) the guarantees allegation, and (4) the asset exploitation allegation.

41. It will assist the understanding of the judgment if the Board quotes the relevant provision (section 6) of the IAA which provides:

> "(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to *stay the proceedings so far as the proceedings relate to that matter.*
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings *so far as the proceedings relate to the matter*, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed." (Emphasis added)

42. Between paras 108 and 122 of the court's judgment Sundaresh Menon CJ addressed the question whether a "matter" should be interpreted broadly by identifying the essential dispute or the main issue, as Silica urged, or more granularly, as Lionsgate submitted. He stated (para 108) that establishing whether the dispute pertained to a matter that is subject to the arbitration agreement involves two stages:

> "(a) the court must first determine what the matter or matters are in the court proceedings; and
>
> (b) it must then ascertain whether the matter(s) fall within the scope of the arbitration clause on its true construction."

At the first stage, the court proceedings which are sought to be stayed may involve more than a single matter. In addressing the differing submissions of the parties, Sundaresh Menon CJ stated (para 113) that the starting point of the analysis was the language of section 6 of the IAA. Section 6 of the IAA mandates a stay only "so far as" the court proceedings relate to the matter or matters which are the subject of the arbitration agreement. This, he stated, militates against taking "an excessively broad view of what constitutes a 'matter' or treating it as a synonym for the court proceedings as a whole". He continued (para 113):

> "In our judgment, when the court considers whether any 'matter' is covered by an arbitration clause, it should undertake a practical and common-sense enquiry in relation to

> any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In *most* cases, the matter would encompass the claims made in the proceedings. But, that is not an absolute or inflexible rule." (Emphasis in the original)

43. In support of this view Sundaresh Menon CJ then addressed jurisprudence from Australia (*Tridon*), the British Virgin Islands (*Ennio Zanotti v Interlog Finance Corp* Claim No BVIHCV 2009/0394 (8 February 2010)) and England (*Lombard North Central*) before concluding at para 122:

> "We therefore consider that a 'matter', for the purposes of s 6 of the IAA, should not be construed in either an overly broad or an unduly narrow way. On the specific facts of this case, each of the four categories of allegations made in the Suit raises substantial issues that are neither peripheral nor tangential to Silica Investors' claim for relief under s 216 of the Companies Act. We accordingly find that each category is a separate 'matter' for the purposes of Lionsgate's stay application under s 6 of the IAA."

44. Thereafter, the court analysed the arbitration clause to determine which of the categories of allegation (para 40 above) fell within the scope of the arbitration agreement. It was not in dispute that the third and fourth categories did not, and the court therefore focused on the first two categories. In each category the court examined the substance of the controversy and concluded that the share issuance allegation was not within the scope of the arbitration agreement but that the management participation allegation was.

45. In *WDR Delaware* Foster J in the Federal Court of Australia addressed an application for a stay under section 7(2) of the International Arbitration Act 1974 and article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration which has the force of law in Australia. Hydrox Ltd was a joint venture company. The legal proceedings in question were for (i) a declaration that the affairs of Hydrox Ltd had been conducted in a manner oppressive to, unfairly prejudicial to or unfairly discriminatory against WDR, and (ii) an order for the winding up of Hydrox Ltd. It was common ground that the disputes between the shareholders were within the scope of the arbitration clause in the joint venture agreement. The principal dispute before Foster J was whether some or all of the claims in the court proceedings were arbitrable and, if so, whether the whole or only part of the court proceedings should be stayed.

46. The relevant statutory provisions were as follows. Section 7(2) of the International Arbitration Act 1974 provided:

> "Subject to this Part, where:
>
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) the proceedings involve the *determination of a matter that*, in pursuance of the agreement, *is capable of settlement by arbitration*;
>
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings *or so much of the proceedings as involves the determination of that matter*, as the case may be, and refer the parties to arbitration in respect of that matter." (Emphasis added)

Article 8(1) of the Model Law provides:

> "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."

47. Foster J set out his analysis of how the court identifies the matters which are the subject of the legal proceedings between paras 102 and 123 of his judgment. In summary, he reasoned: (i) that the nature and extent of the matters are ordinarily to be ascertained from the pleadings and from the underlying subject matter upon which the pleadings, including any defence, are based; the task is to ascertain the substantive questions in dispute, (ii) multiple matters may exist within the one court proceeding; (iii) 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, (iv) a matter may or may not comprise the whole subject matter of any given proceeding, and (v) the court must first identify the matter or matters to be determined in the court proceeding before asking whether those matters fall within the scope of the arbitration agreement, and, if so, whether they are arbitrable.

48. In support of his third proposition, that a matter is something more than a mere issue or question which might fall for determination in proceedings, Foster J cited the judgment of the High Court of Australia in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 ("*Tanning")*. That case was concerned principally with section 7(2) and (4) of the Arbitration (Foreign Awards and Agreements) Act 1974 (renamed in 1989 the International Arbitration Act 1974, as considered in *WDR Delaware*) and the question whether a liquidator was a person "claiming through" the company in liquidation, which was a party to an arbitration agreement, and therefore entitled to a stay of legal proceedings for arbitration. The High Court held that the liquidator, who had rejected a creditor's proof of debt for goods allegedly sold under a licence agreement which contained an arbitration clause, was a person claiming through the company under section 7(4) and was entitled to a stay under section 7(2). Deane and Gaudron JJ in a joint dissenting judgment discussed the meaning of the word "matter" in section 7(2) at pp 351-352. They observed that "matter" was not defined in the 1974 Act but that, in any context, it was "a word of wide import" and stated:

> "In the context of s. 7(2), the expression 'matter … capable of settlement by arbitration' may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, the expression 'matter … capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. … It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy."

Deane and Gaudron JJ went on (p 353) to reject the argument that section 7(2) did not apply to proof of debt proceedings, stating that the operation of the section is not confined to proceedings in which the parties seek the same relief as might be sought in arbitration proceedings.

49. In *Sodzawiczny v Ruhan* [2018] EWHC 1908 (Comm); [2018] Bus LR 2419 ("*Sodzawiczny*") Popplewell J in the High Court of England and Wales addressed an application for a stay of legal proceedings under section 9 of the Arbitration Act 1996 which refers to proceedings having been brought "in respect of a matter which … is to be referred to arbitration." The basis on which the defendants sought a stay of proceedings was that their defence to legal proceedings against them fell within the scope of the parties' arbitration agreement. The claimant opposed the stay, arguing that section 9 was not engaged if the claim itself did not fall within the arbitration agreement.

50. Popplewell J recorded that it was common ground that section 9 of the 1996 Act allowed a stay for arbitration of one or more matters within the legal proceedings while leaving other matters to be pursued in court. It was also common ground that there were two stages in the court's inquiry under section 9: first the court must determine what the matter or matters are in respect of which the court proceedings have been brought; and, secondly, the court must then determine in respect of each such matter whether it falls within the scope of the arbitration agreement (paras 35-36).

51. The material difference between the parties was as to the meaning of "matter". The claimant's counsel submitted that "matter" in section 9 was to be equated with a claim or cause of action and the fact that a defence is raised which falls within an arbitration agreement does not engage section 9. The defendants' counsel argued that "matter" meant an issue and that the court had to search for issues which were the subject matter of the arbitration agreement. Popplewell J referred to various authorities, including *Lombard North Central* and *Tomolugen*. He observed that the thing which parties referred to arbitration was a dispute or difference, words which were in this context synonymous. A dispute could be constituted in general terms, or it might be well defined before legal proceedings were commenced. A cause of action might involve several issues and sub-issues, some of which might be arbitrable and some not, and a commercial action often might involve several causes of action. Defences to a claim might involve a completely different set of facts and legal principles from those involved in the claim itself.

52. Popplewell J rejected the claimant's argument that section 9 was not concerned with a defence but only with a claim. He set out in para 43 what he considered to be the principled approach to what constitutes a "matter". He stated:

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

53. He continued his analysis in that paragraph by stating, secondly, that where the issues had not been fully identified in the legal proceedings by the time the court addressed the application for a stay, the court should seek to identify the issues which it was reasonably foreseeable might arise. He stated, thirdly, that the court should stay the proceedings to the extent of any issue which falls within the scope of an arbitration agreement. The search, he said, "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". This applied to any dispute with which the court proceedings were, or would foreseeably be, concerned. Fourthly, section 9 was concerned with substance and not form, and the court should look at the nature and substance of the claim and the issues to which it gave rise and not simply the formulation in the

pleadings. The same approach should be adopted to identified or foreseeable defences. In para 44 of his judgment Popplewell J recognised that this approach could lead to a fragmentation of proceedings but opined that this was the result of the sanctity of the parties' arbitration contract and the requirement in section 9 that the court uphold the parties' bargain. The risk of fragmentation could be reduced either by an expansive construction of the arbitration agreement or by the court's use of its case management powers to stay proceedings in so far as they fall outside the scope of the arbitration agreement.

54. In *Republic of Mozambique (acting through its Attorney General) v Credit Suisse International* [2021] EWCA Civ 329; [2022] 1 All ER Comm 235 ("*Mozambique*") the Court of Appeal of England and Wales addressed the meaning of "matter" in section 9 of the 1996 Act. Carr LJ, in a judgment with which Singh and Henderson LJJ agreed, stated:

> "63. 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. And a mandatory stay under s. 9(4) can be applied pro tanto (as reflected in the words 'so far as they concern that matter' in s. 9(1)).
>
> 64. There are two stages of inquiry for a court (although there may be overlapping considerations): first, to identify the 'matters' in respect of which the proceedings are brought; secondly, to assess whether those matters are 'matters' which the parties have agreed are 'to be referred to arbitration'. That is to be resolved by reference to the scope of the relevant arbitration agreement properly construed in context...."

55. Carr LJ then stated that the relevant principles were summarised in the judgment of Popplewell J in paras 43 and 44 of his judgment in *Sodzawiczny* and quoted in full those paragraphs, which the Board has summarised in paras 52 and 53 above. She stated (para 66) that the position identified by Popplewell J was consistent with and followed the earlier decision of the Singapore Court of Appeal in *Tomolugen* which the Board has discussed in paras 39-44 above. Carr LJ summarised the position under the title "Discussion and analysis" at paras 70-72 of her judgment stating:

> "70. It is trite law that an arbitration agreement is a contractual agreement to which statute dictates that mandatory effect must be given in so far as it applies: *Sodzawiczny* at para 44. The application of s. 9 can give rise to particular

> difficulties both as a matter of analysis and procedure, but the sanctity of the parties' agreement takes priority.
>
> 71. Thus, whether or not there is futility in practical terms of any stay is immaterial. Equally, the fact that there may be (on the facts of this case particularly acute) unwelcome case management complications if all or parts of claims are stayed is irrelevant. These are complexities which flow from s. 9 and ones which will often arise in multi-party, multi-issue litigation such as this.
>
> 72. 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."

56. The Supreme Court of the United Kingdom has reviewed the decision of the Court of Appeal in *Mozambique* in a judgment handed down on the same day as this judgment is promulgated. The approach of that court to the question of what is a "matter" and how the court ascertains what is a "matter" is consistent with the approach which the Board adopts on this appeal in the following paragraphs.

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 referrable 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).

59. The court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration. It involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into account all reasonably foreseeable defences to the claim or part of the claim. (See *Lombard North Central*, para 37 above; *Quiksilver*, para 38 above, *Tomolugen*, para 42 above, *WDR Delaware*, para 47 above; and *Sodzawiczny*, para 53 above).

60. Secondly, while article II(3) of the New York Convention, which requires that the court refer a matter to arbitration, is silent as to the stay of the court proceedings, legislation implementing this provision of the New York Convention has generally made express provision for a stay pro tanto. Examples include section 9 of the Arbitration Act 1996 in England and Wales, section 10 of the Arbitration (Scotland) Act 2010 in Scotland, section 7 of the International Arbitration Act 1974 in Australia, and section 6 of the IAA in Singapore. In the Cayman Islands section 4 of the FAAEA speaks of "staying the proceedings" and makes no reference to the possibility of a stay pro tanto. Nonetheless, the context is a domestic statute implementing an international convention, in which broad and generally accepted principles should be adopted in interpreting such a statute: see *Gol Linhas* which the Board discussed in para 31 above. In *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed. 2020) the authors state at section 9.3: "Unless the contrary intention appears, the legislature is presumed to intend an enactment to be read in light of the principle that the greater includes the less." This principle is derived from Roman law ("non debet cui plus licet, quod minus est non licere": Corpus Juris Civilis, Digest 17.21 (Ulpian)). In the Board's view in this context the greater includes the lesser. Counsel did not argue otherwise in this appeal. Accordingly, the Board considers that section 4 of the FAAEA allows a pro tanto stay of legal proceedings.

61. Thirdly, in the Board's view, 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.

62. A focus on the substantial nature and relevance of a referred matter to the legal proceedings is consistent with international jurisprudence, including *Lombard North Central*, *Quiksilver*, and *Tomolugen*. It is also consistent with the Australian jurisprudence in *Tanning* and *WDR Delaware*. In those cases, the judicial formulation was influenced by the statutory wording of section 7(2) of the International Arbitration Act 1974 which refers to a matter "capable of settlement by arbitration". But there is no material difference between that formulation and the other judicial formulae as a stay of legal proceedings should be granted only in respect of a dispute which falls within an arbitration agreement and is capable of settlement by arbitration.

63. The judgment of Popplewell J in *Sodzawiczny* is in part consistent with this approach but the passages in his summary of the law in para 43 of his judgment which suggest that a "matter" is any issue which is capable of constituting a dispute or difference within the scope of an arbitration agreement cannot be accepted without qualification in the light of the wider case law discussed above. Popplewell J referred to *Lombard North Central* and *Tomolugen* as the background to his analysis. Those judgments contain further qualifications which are not expressly articulated in his summary, although he may have taken them as read. In para 43 he spoke of a "matter" as "any issue which is capable of constituting a dispute or difference" within the scope of the arbitration agreement and as covering "all issues which may be the subject of the arbitration agreement". These formulae expressly draw on the judgment of Andrew Smith J in *Lombard North Central.* But no mention is made of Andrew Smith J's concern about the abusive application for a stay which the Board discusses in para 64 below nor of his recognition that peripheral matters may not merit a stay of the legal proceedings. The emphasis in *Tomolugen* on the evaluation of the matter as being of reasonable substance and not peripheral to the legal proceedings is not reflected in the relevant paragraph of the *Sodzawiczny* judgment.

64. No judicial formula encapsulating the meaning of "matter" should be treated as if it were a statutory text. A court facing an application for a stay under section 4 of the FAAEA should approach the question in a practical and common-sense way. The court must respect the agreement of the parties to arbitrate their disputes. An agreement to arbitrate a dispute is an agreement not to resolve that dispute in court proceedings. Thus, any substantial matter in the legal proceedings, which is relevant to the claim or foreseeable defence, and which is within the scope of the arbitration agreement, will give rise to a mandatory stay of the legal proceedings pro tanto on the application of one of the parties. There is considerable authority to support the view that the procedural complexity caused by a reference to arbitration does not of itself render a matter non-arbitrable: see, for example, *Wealands*, Mance LJ para 26, *Fulham*, Patten LJ para 25, *Tomolugen*, Sundaresh Menon CJ para 105. That does not mean that procedural complexity is irrelevant in all circumstances because the court, when addressing an application to stay legal proceedings to enable the determination of a dispute by arbitration, should be careful to prevent an abuse of process. The Board agrees with Andrew Smith J in *Lombard North Central* (para 37 above) that the court could refuse an otherwise mandatory stay if the applicant has no real or proper purpose for seeking

the stay. That could include not only an application for a stay in relation to issues that were peripheral to the legal proceedings but also an application that amounted to an abuse of process. In this regard the Board respectfully disagrees with the statement of the Court of Appeal in England and Wales in para 71 of the judgment in *Mozambique* (para 55 above) that the practical futility of a stay will in all circumstances be irrelevant. There may be circumstances in which a party seeks a stay for an improper purpose and it would be contrary to justice if the court could not act to prevent an abuse of process. For example, if matters (1) and (2) were referred to arbitration and an arbitral tribunal were to determine those matters in FMCH's favour and FMCH acted promptly to remove a stay on the legal proceedings before the Grand Court, the court would be entitled to look with some care at any application for a stay for a further arbitration.

65. Fourthly, the exercise involving a judicial evaluation of the substance and relevance of the "matter" entails a matter of judgment and the application of common sense. It is not a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay. In so far as the summary of the law in para 43 of *Sodzawiczny* suggests otherwise, it is in error.

66. The approach to the word "matter" in section 4 of the FAAEA set out in paras 59-65 above may involve the fragmentation of the parties' disputes with some matters being determined by an arbitral panel and other matters being resolved by the court. Such fragmentation may on occasion be inconvenient to one or more of the parties to the court proceedings. Rational businesspeople may as a general rule prefer that their disputes are determined in the same forum: see Lord Hoffmann in *Fiona Trust & Holding Corpn v Privalov* [2007] UKHL 40; [2007] Bus LR 1719 ("*Fiona Trust*"), paras 5-8. An arbitration agreement may be interpreted generously to achieve that end if the court can ascertain that as the parties' commercial purpose and the wording of the agreement can bear that meaning. But, where, on a proper interpretation of the arbitration agreement, the parties have contracted to refer to arbitration disputes which do not extend to all the matters raised in the legal proceedings, giving effect to the parties' contract will involve fragmentation of the disputes. The disadvantages caused by such fragmentation can be mitigated by effective case management by both the court and the arbitral panel.

67. In the light of the case law discussed above, the Board considers that the obiter comments of Carswell LCJ in the Northern Ireland Court of Appeal in *In re Wine Inns Ltd* [2000] NIJB 343, 358-359, should not be followed. He stated that the just and equitable winding up petition or the application for relief against the conduct of the management of a company in an unfairly prejudicial manner in that case, which related to allegations of the breakdown of trust and confidence in a quasi-partnership, each

raised an indivisible issue and not a series of discrete disputes or matters. That is not consistent with the case law which the Board has discussed above.

68. As discussed below, the meaning of "matter" is relevant to the question of whether an arbitration agreement is operative. The Board now turns to that question.

(c) The meaning of "the arbitration agreement is … inoperative"

69. As set out in para 30 above, article II(3) of the New York Convention, which is enacted in domestic law by section 4 of the FAAEA, provides exceptions to the obligation of a court of a contracting state to refer a matter to arbitration if the arbitration agreement is "null and void, inoperative or incapable of being performed." Section 4 uses the same words in defining the exceptions. In this case, the questions whether the subject matter of the dispute between the parties is indivisible or whether the remedies sought are arbitrable would not, in the Board's view, fall within the exception that the agreement was null and void or the exception that that agreement was incapable of being performed. The Board is concerned with the exception that the agreement is inoperative. The essence of the dispute between the parties on this appeal turns on this question. It is whether the arbitration agreement is inoperative or, in other words, the matters at issue between the parties are incapable of being settled by arbitration or the remedies sought are unavailable to an arbitral tribunal.

70. On the authorities there are two broad circumstances in which an arbitration agreement may be inoperative. The first is where certain types of dispute are excluded by statute or public policy from determination by an arbitral tribunal. The second is where the award of certain remedies is beyond the jurisdiction which the parties can confer through their agreement on an arbitral tribunal. The Board refers to the first type as "subject matter non-arbitrability" and to the second as "remedial non-arbitrability".

71. Subject matter non-arbitrability can arise where the state intervenes by statute to preserve a right of access to the courts. Examples of such in English law in the field of employment and discrimination can be found in section 203 of the Employment Rights Act 1996 and section 144(1) of the Equality Act 2010, which, subject to specified exceptions, prevent parties by agreement from contracting out of an employee's right to have access to an employment tribunal, or in the latter Act the courts. Subject matter non-arbitrability may also arise as a result of public policy considerations. In the Singaporean case of *Larsen Oil and Gas Pte Ltd v Petropod Ltd* [2011] 3 SLR 414, ("*Larsen*") V K Rajah JA, delivering the judgment of the Singapore Court of Appeal, at para 44 recognised two grounds for excluding from arbitration a dispute which fell within the scope of an arbitration agreement. The first was where the legislature had precluded the use of arbitration to determine the particular type of dispute and the second was where "there is an inherent conflict between arbitration and the public

policy considerations involved in that particular type of dispute". *Larsen* was concerned with claims by the liquidator of an insolvent company for the avoidance of unfair preferences and payments made with an intention to defraud a creditor which arose only on the onset of insolvency and could be pursued by the liquidator of the insolvent company for the benefit of the company's creditors. The court refused the application by Larsen, the recipient of the alleged preference, to stay the legal proceedings for arbitration of the dispute on grounds of public policy, namely that it would affect the substantive rights of the company's creditors and undermine the policy aims of the insolvency regime.

72. The underlying concept of subject-matter non-arbitrability is that there are certain matters which in the public interest should be reserved to the courts or other public tribunals for determination. But there is no agreement internationally as to the kinds of subject matter or dispute which fall within subject matter non-arbitrability. In the 2001 Companion Volume to their book on Commercial Arbitration Lord Mustill and Stewart Boyd stated (p 71):

> "Since different states have their own traditions and precepts, differing radically from state to state, on matters of politics, economics, morality and the like, it is not surprising that equally radical divergences can be found when each state identifies the matters which are regarded as too important to be left to private dispute resolution."

73. A similar statement can be found in Born, *International Commercial Arbitration*, 3rd ed (2021) Vol I, p 1029, para 6.01 in which the author states:

> "Although the better view is that the [New York] Convention imposes international limits on Contracting States' applications of the nonarbitrability doctrine… the types of claims that are nonarbitrable differ from nation to nation. Among other things, typical examples of nonarbitrable subjects in different jurisdictions include selected categories of disputes involving criminal matters; domestic relations and succession; bankruptcy; trade sanctions; certain competition claims; consumer claims; labor or employment grievances; and certain intellectual property matters. Over the past several decades, the scope of the non-arbitrability doctrine has materially diminished in most developed jurisdictions.
>
> As these examples suggest, the types of disputes which are nonarbitrable nonetheless almost always arise from a common

> set of considerations. The nonarbitrability doctrine rests on the notion that some matters so pervasively involve either 'public' rights and concerns, or interests of third parties, that agreements to resolve such disputes by 'private' arbitration should not be given effect." (Footnotes omitted)

74. It would be wrong, however, to overstate the differences of approach in the commercial sphere between jurisdictions which share the same common law heritage. In the Board's view, the jurisprudence of the courts of other common law jurisdictions in this sphere can provide the generally accepted principles for the commercial law of the Cayman Islands. It is also relevant to bear in mind, when considering these commentaries, the relatively granular meaning of "matter" in the FAAEA, which the Board discussed in paras 61-63 above, when addressing the question whether a matter is excluded from arbitral determination by subject matter non-arbitrability.

75. The second circumstance in which an arbitration agreement may be inoperative, ie where there is remedial non-arbitrability, is concerned with the circumstance in which the parties have the power to refer matters to arbitration but cannot confer on the arbitral tribunal the power to give certain remedies. In the common law world there appears to be a general consensus that an arbitration agreement cannot confer on an arbitral tribunal the power to make an order to wind up a registered company on the application of a creditor where the company is insolvent and there is strong authority in support of such an exclusion when the application is by a contributory where the company is solvent. This is because the power to wind up a company lies within the exclusive jurisdiction of the courts, which alone have the discretion as to whether to make such an order. See in English law, *Fulham* at paras 76 and 83, in Hong Kong, *Quiksilver* para 14, in Singapore, *Tomolugen* para 83 (in relation to a creditor's application), in Australia, *WDR Delaware* para 26. In *Quiksilver* and *WDR Delaware* the inability of an arbitral tribunal to make a winding up order was common ground; it is also common ground between the parties on this appeal.

76. There is a general consensus that an arbitral tribunal has the power to grant inter partes remedies, such as ordering a share buy-out in proceedings for relief for unfairly prejudicial conduct in the management of a company under section 994 of the Companies Act 2006 in the United Kingdom and similar legislation in other jurisdictions. See *Fulham*, Patten LJ at paras 77-78, Longmore LJ at paras 96 and 99; *Tomolugen*, Sundaresh Menon CJ at paras 88-89 and 103; *WDR Delaware*, Foster J at para 147 quoting para 194 of *Tridon.* Although the court is given the power by statute to make such orders, an arbitral tribunal may also grant such a remedy because third parties, who are not involved in the dispute, do not have a legal interest in the dispute and there is no public element in a dispute of that nature.

77. Similarly, in an application to wind up a company on the just and equitable ground there may be matters in dispute between the parties, such as allegations of breaches of a shareholders' agreement, which can be referred to an arbitral tribunal for a determination, which is binding on the parties, notwithstanding that only a court can make a winding up order: *Fulham*, Patten LJ at para 76; *Quiksilver*, Harris J at paras 14, 21-22; *Tomolugen*, Sundaresh Menon CJ at paras 96-103; *WDR Delaware*, Foster J at paras 161-164. The researches by the appellants' counsel demonstrate that a similar approach can be found in case law in Quebec, Canada (*Capital JPEG Inc v Corporation Zone B4 Ltd* [2019] QCCS 2986) in relation to mediation, Cyprus *(In re Kissonerga Development Co Ltd* (Application no 7/20) (unreported) 9 July 2020 which was an interim decision, Jersey (*Consolidated Resources Armenia v Global Gold Consolidated Resources Ltd* [2015] JCA 061 ("*Consolidated Resources*"), and Zambia (*Vedanta Resources Holdings Ltd v ZCCM Investment Holdings plc* [2020] ZMCA 104). See also in Hong Kong *China Europe International Business School v Chengwei Evergreen Capital LP* [2021] HKCFI 3513 ("*China Europe*"). Counsel did not address these cases in any detail, but they are consistent with the main cases which the Board has discussed above and support a conclusion that there is substantial agreement among common law jurisdictions as to the correct approach.

78. In *WDR Delaware* Foster J summarised his conclusion on this matter at para 164:

> "With the exception of that part of the present proceeding which involves the Court forming an opinion as to whether the plaintiffs are entitled to a winding up order, the questions of fact and law which mark out the substantive controversy between the parties in this proceeding are all matters which are capable of resolution by arbitration. Any award or awards which determine those matters will be taken into account when the Court comes to consider whether a winding up order should be made. If, at the end of the arbitral process, the award or awards do not address satisfactorily or comprehensively all of the grounds relied upon by the plaintiffs in support of their claims for relief made in the present proceeding, then it will be open to them to supplement or explain the terms of the relevant award or awards by evidence. The process by which that would be done is the everyday process of applying the law of evidence."

The Board agrees as a general rule with this approach to discrete matters which involve inter partes disputes in the context of a winding up application. Matters, such as whether one party has breached its obligations under a shareholders' agreement or whether equitable rights arising out of the relationship between the parties have been flouted, are arbitrable in the context of an application to wind up a company on the just and

equitable ground and the arbitration agreement is not inoperative because the arbitral tribunal cannot make a winding up order.

9. The application of the FAAEA to the facts of this case

79. The first matter which the Board must address is the interpretation of the Companies Act. As stated in para 14 above, section 92 of that Act sets out the grounds on which the court may wind up a company including the ground which is relevant in this appeal, ie that the court is of the opinion that it is just and equitable that the company should be wound up. Section 95 of that Act sets out the powers of the court, which include the power to make a winding up order or on a contributory's petition on the just and equitable ground, an alternative order providing, among other things, for the purchase of the shares of any members of the company by other members of the company.

80. The Board agrees with Moses JA that the court's consideration under section 92 of the Act whether it is just and equitable that the company should be wound up is a threshold question which is to be answered before a petitioner can get access to any of the remedies available under section 95. That is clear from a straightforward reading of the wording of the Act. The Board also accepts, as Moses JA held, that the court has exclusive jurisdiction to make a winding up order. A winding up order is an order in rem which only a court can make. It is beyond the jurisdiction of an arbitral tribunal as parties cannot confer such a power on an arbitral tribunal by private agreement. An arbitral agreement that purported to confer such a power would be inoperative to that extent.

81. Further, in deciding whether to make a winding up order on the just and equitable ground, the court conducts a wide-ranging enquiry into and evaluation of the facts. The court takes the decision whether it is just and equitable to wind up a company with regard to all the relevant circumstances at the date of the hearing: *Lau v Chu* [2020] UKPC 24; [2020] 1 WLR 4656 ("*Lau v Chu*"), para 43 per Lord Briggs, giving the judgment of the Board. A decision by an arbitral tribunal on whether it was just and equitable to wind up the company by reference to the circumstances which existed on an earlier date could not determine the issue which the court has to consider. Such a decision would be an ineffective legal judgment. The Board therefore respectfully disagrees with the obiter suggestion by Patten LJ in *Fulham* at para 83 (and its endorsement by Sundaresh Menon CJ in *Tomolugen* at para 100) that an arbitrator could make a ruling on whether it would be appropriate for a complainant to initiate winding up proceedings or be limited to some lesser remedy. A ruling by an arbitral tribunal that it was of the view that it was just and equitable that a company be wound up would be ineffective; it could not bind the parties in a hearing before the court and, given the interests of third parties in a possible winding up of the company, it could not bind the court. In deciding on the appropriate remedy under section 95 the court takes into

account the interests of third parties, including the company's directors and employees, and businesses which have dealings with the company, who will be affected if a winding up order is made. See, by way of analogy, *Fulham* para 46; *In re Neath Rugby Ltd* [2009] EWCA Civ 291, [2010] BCC 597, para 84; and *In re Asia Television Ltd* [2015] 1 HKLRD 607, paras 55-58.

82. The parties were therefore correct in their agreement that an arbitral tribunal does not have the power to decide the fifth matter listed in para 23 above, ie whether a winding up order should be made and whether the persons identified by FMCH should be appointed joint liquidators of the Company. Further, for the reasons set out above, the Board agrees with Mr Thomas Lowe, counsel for FMCH, that an arbitral tribunal does not have power to make a ruling on matters (3) and (4), ie whether it is just and equitable that the company should be wound up or whether the remedy of a share buy-out should be granted under section 95 of the Companies Act.

83. That leaves the first and second matters set out in para 23 above. The first is whether FMCH has lost trust and confidence in Ting Chuan and in the conduct and management of the Company's affairs. FMCH allege that Ting Chuan caused, permitted or procured the majority directors, whom it appointed, to act in breach of their duties to the Company and to engage in misconduct in the management of the Company's affairs. The second is whether the fundamental relationship between FMCH and Ting Chuan has irretrievably broken down as a result of Ting Chuan's having acted contrary to the understanding between the parties as to how the business of the Company would be operated. Those two matters raise questions of mixed fact and law.

84. Moses JA further reasoned that, as the majority directors and the Company were not parties to the SHA and to the arbitration agreement which it contained, and as the allegations made against Ting Chuan could not be separated from the threshold issue of whether the court was of the opinion that it was just and equitable that the Company be wound up, the arbitration agreement was inoperative. His conclusion has been summarised in a first instance decision of the High Court of England and Wales in these terms:

> "Where … a necessary precursor to any form of relief is a decision by the court that it would be just and equitable to wind up the company, then bifurcation will not be possible."

See *Riverrock Securities Ltd v International Bank of St Petersburg* [2020] EWHC 2483 (Comm); [2021] 2 All ER (Comm) 1121, para 68 per Foxton J. See also *NDK Ltd v HUO Holding Ltd* [2022] EWHC 1682 (Comm); [2022] Bus LR 761, para 64 in which Foxton J recorded the proposition from *Riverrock* as common ground between the

parties. The issue before the Board in relation to matters (1) and (2) is whether that statement is correct.

85. Mr Lowe advanced several submissions as to why the Court of Appeal had decided this case correctly. On the question of statutory interpretation, he argued that the Companies Act made it clear that no private arbitral tribunal could make the critical decision whether it is just and equitable to wind up the Company. The Board agrees for the reasons discussed above but that argument goes only to matters (3) and (4).

86. Mr Lowe can derive no support from the judgment of the Court of Appeal of England and Wales in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575; [2015] Ch 589 ("*Salford Estates*"). That case concerned a winding up petition on the ground that the company was unable to pay its debts under section 122(1)(f) of the Insolvency Act 1986. The petitioner cited several debts in its petition as evidence of the company's inability to pay its debts, only some of which arose out of the transaction to which the arbitration agreement applied. Sir Terence Etherton C opined that in those circumstances there was no basis for a mandatory stay of the winding up proceedings under section 9 of the Arbitration Act 1996 (para 34). He then expressed the view (para 35) that it seemed "highly improbable" that Parliament intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order "striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts". In the Board's view, whether or not this view is correct, it has no bearing on a petition in which a member of a company seeks a winding up order on the just and equitable ground.

87. Mr Lowe also advanced an argument that the Cayman Islands was unique among Commonwealth countries in not introducing either a remedy for oppression, such as the former section 210 of the Companies Act 1948 in the United Kingdom, or a remedy for unfairly prejudicial conduct in the management of the company, such as that which has been available in the United Kingdom since 1980 and is now contained in sections 994-996 of the Companies Act 2006, which was separate from an application to wind up the company. He inferred from the legislature's decision not to introduce such remedies as separate proceedings from a winding up petition that the legislature had evinced an intention that disputes between shareholders concerning the conduct of the management of Cayman Islands companies were to be conducted in open court in the public interest. He pointed out that the Cayman Islands is a very significant jurisdiction for the incorporation of companies which operate in other jurisdictions or internationally and that there was a public interest in maintaining the confidence of incorporators in the competence of the Cayman Islands courts in resolving shareholder disputes. He submitted that, while the Cayman Islands had ambitions to host international arbitrations, it was not a significant centre for such proceedings in contrast to its role as one of the largest offshore incorporation centres. The problems with this argument are, first, that neither party produced or suggested that there were any pre-legislative materials which explained why the Cayman Islands legislature had not

introduced free-standing remedies for oppression and unfair prejudice. The submission therefore is simply speculation. Secondly, in any event, on the basis that matters (3)-(5) are to be determined exclusively by the courts, there will be court proceedings in public in which the critical decisions are made and the factual basis on which those decisions are made will be manifest. The Board is not persuaded that there is a public interest in making the Cayman Islands an outlier in relation to the treatment of international arbitration.

88. FMCH further submitted that winding up was intended to be a quick and efficient process. The presentation of a winding up petition offered protections to the petitioner as section 99 of the Companies Act serves to maintain the status quo by nullifying retrospectively on the making of a winding up order any disposition of the company's property or transfer of shares or alteration in the status of its members after the commencement of the winding up, unless the court orders otherwise. The Court of Appeal of the Cayman Islands clarified the purpose of this provision in *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2020] CILR 417. A prolonged process involving an arbitration in relation to matters (1) and (2) followed by a court process to determine matters (3)-(5) would not achieve the speedy resolution of the disputes and would leave hanging over the Company the possibility of the retrospective nullification of transactions under section 99. Mr Lowe pointed out that the parties had already been involved in a lengthy arbitration at the instance of Ting Chuan which had been very expensive and had taken over three and a half years to complete.

89. This is an argument relating to public policy. Mr Lowe further submitted that the complexity and delay involved in a bifurcation of the proceedings between an arbitral tribunal and the court would frustrate the expectations of reasonable businesspeople. In the Board's view the reference to such expectations is a relevant consideration principally in the interpretation of an arbitration agreement, viz Lord Hoffmann in *Fiona Trust*, rather than a distinct ground of public policy. In any event, there is no necessity that an arbitration of matters (1) and (2) would involve undue delay if the arbitral tribunal exercises robust case management in fulfilment of their task in reaching a speedy resolution of an arbitrated dispute. The Board is not persuaded that the determination of matters (1) and (2) by an arbitral tribunal is excluded on grounds of public policy because of the risk of some delay. In invoking the jurisdiction of the Court on the just and equitable ground FMCH is seeking a statutory remedy of an equitable nature: *In re Westbourne Galleries Ltd; Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379 per Lord Wilberforce; *Lau v Chu*, para 64 per Lord Briggs. The clean hands doctrine applies. Further, in the Board's view, in the exercise of this equitable jurisdiction the court must have regard to a party's contractual obligations, which may include an agreement to refer to arbitration disputes which fall within the scope of the relevant arbitration agreement.

90. There is no substance in the submission that a sword of Damocles is hanging over the Company through the operation of the avoidance provisions of section 99 of the Companies Act. As Mr Charles Kimmins KC pointed out on behalf of Ting Chuan, Kawaley J issued a consent order on 16 November 2018 which prevents payments made for the purpose of paying debts and expenses of the Company in the ordinary course of its business after the date of presentation of the winding up petition from being avoided under section 99 of the Companies Act.

91. The Board is not persuaded that an agreement to refer to arbitration disputes arising out of the SHA amounts to a contractual prohibition on initiating a petition to wind up a company. The Board discusses this matter below when it considers section 95(2) of the Companies Act. The submission that an arbitration would deny a party the protections of section 99 of the Companies Act is misconceived both because the arbitration agreement does not prevent the presentation of a winding up petition and because the parties have chosen to limit the application of section 99 in this case.

92. A further submission by FMCH in support of the argument that the just and equitable jurisdiction was indivisible was that the court alone could decide the facts in conducting the broad enquiry which was required when deciding whether it was just and equitable that a company should be wound up. Mr Lowe went so far as to suggest that the court needed to hear and test all the evidence. When questioned by the court he conceded, correctly, that there was nothing to stop the parties presenting the court with a statement of agreed facts. In the Board's view, such a statement could include, in principle, that FMCH had lost trust and confidence in Ting Chuan and that the fundamental relationship between those parties had broken down. A party could admit such facts, if it wished. As the court in exercising its jurisdiction under section 92 of the Companies Act would be bound by such an agreed statement or admission as between the parties, there is no reason in principle why the court should not be bound in a question between Ting Chuan and FMCH by the determination of an arbitral tribunal, which would set out its reasoning and its findings of fact.

93. The Board recalls that Kawaley J in his order of 14 July 2020 ordered that the petition be treated as an inter partes proceeding between those parties. See para 10 above. A finding by the arbitral tribunal on matters (1) and (2) would be binding on the parties under article 35(6) of the ICC Rules of Arbitration which provides:

> "Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

There is therefore no danger of duplication of effort or inconsistent findings in relation to matters (1) and (2).

94. Finally, FMCH submits that section 4 of the FAAEA requires a stay only in respect of a matter which is capable of settlement by arbitration. It submits that a matter must be a determination of a right or liability and not merely a declaration. It prays in aid a statement by Deane and Gaudron JJ in their joint judgment in the High Court of Australia in *Tanning* at 351 in which they interpreted the meaning of "matter" in the Australian legislation, which includes the words "capable of settlement by arbitration" in this way:

> "It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy."

FMCH referred also to a more recent joint judgment of Kiefel CJ and Gageler, Nettle and Gordon JJ in the High Court of Australia in *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, para 68 in which, paraphrasing the judgment of Deane and Gaudron JJ in *Tanning*, they stated that it was sufficient that the defence puts in issue "among other things, some right or liability which is susceptible of settlement under the arbitration agreement as a discrete controversy". But the Board notes that the meaning of the judgment in *Tanning* was not a matter of controversy in that appeal.

95. The Board does not accept this submission, which is that an arbitrable matter must be a dispute which leads to the determination by an arbitral tribunal of a right or a liability, if by that FMCH means that the arbitral panel must have the jurisdiction to make an award such as an order for payment to enforce the right or require a party to fulfil its obligation. The Board does not interpret the judgment of Deane and Gaudron JJ as excluding the possibility of the determination of a dispute or controversy by means of a declaration, where the dispute is a matter of substance. See paras 59-62 above.

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.

10. The application for a case management stay of the winding up proceedings

98. Ting Chuan seeks a discretionary stay of the winding up proceedings so far as they are formally directed against parties other than itself. Kawaley J in para 75 of his judgment opined that section 95(1)(d) of the Companies Act, which provides that the court may make "any other order that it thinks fit" gave him the power to do so. The Court of Appeal between paras 138 and 141 of Moses JA's judgment discussed the court's power to grant a discretionary case management stay but considered that there was no room to exercise such discretion as the petition to wind up the Company on the just and equitable ground involves an indivisible factual evaluation.

99. As the winding up process is intended to be conducted with expedition, the court will, as a general rule, rarely wish to grant a stay of such proceedings. But a stay for arbitration is a special case. Where the shareholders of a company are engaged in an inter partes dispute which is within the scope of a binding arbitration agreement and an essential precursor to the determination of a winding up petition on the just and equitable ground, there are strong grounds for granting such a stay. In *Salford Estates* the Court of Appeal of England and Wales held that the court's discretionary power under section 122(1) of the Insolvency Act 1986 ("A company *may* be wound up by the court if …") had to be exercised consistently with the parties' agreement as to the proper forum for resolving their disputes and in accordance with the legislative policy of the Arbitration Act 1996. The case concerned a disputed debt alleged to arise under a lease and the lessor presented a petition seeking the winding up of the tenant. Sir Terence Etherton MR, giving the judgment of the court, stated (para 39) that section 122(1) of the Insolvency Act 1986 conferred on the court a discretionary power to wind up a company. He said that it was "entirely appropriate" that the court should, "save in wholly exceptional circumstances", grant a discretionary stay as that was consistent with the pro-arbitration policy of the 1996 Act.

100. The statutory provisions under which the Cayman Islands courts are operating in this case are contained in the FAAEA. The FAAEA does not contain provisions stating the well-known principles that parties are free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest, and restricting the intervention of the court, such as are found in section 1 of the 1996 Act, on which the Court of Appeal of England and Wales relied in *Salford Estates*, and in section 3(3) of the Arbitration Act 2012 in the Cayman Islands, which relates to domestic arbitrations. Nonetheless, such principles are wholly consistent with the wide international consensus in favour of a pro-arbitration policy in relation to international arbitrations governed by the New York Convention, which provides in article II(1):

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

101. Thus, in *Tomolugen* the Court of Appeal in Singapore in an unfair prejudice petition granted a mandatory stay under section 6 of the IAA of one of the matters which fell within the scope of the arbitration agreement and granted a discretionary case management stay of the other matters which did not: see Sundaresh Menon CJ at paras 187-190. In *WDR Delaware*, a case involving a winding up petition arising out of allegations of oppressive conduct, Foster J granted a stay of the whole of the winding up petition although only certain matters were arbitrable. Similarly, in *Consolidated Resources* the Court of Appeal in Jersey granted a mandatory stay of the matters within the scope of the arbitration agreement and, using the court's inherent jurisdiction, a discretionary stay of the remaining claims in the proceedings for unfair prejudice and winding up (para 159). In *China Europe*, Linda Chan J in the Court of First Instance in Hong Kong granted a discretionary stay for arbitration of a winding up petition on the just and equitable ground, where the disputes between the shareholders which grounded the petition fell within the scope of an arbitration agreement. It will be recalled that in Hong Kong section 20 of the Arbitration Ordinance, which provided for a mandatory stay, referred to an "action" and did not extend to a winding up petition; *Quiksilver* para 20.

102. The Board is inclined to think, in agreement with Kawaley J and Sir Terence Etherton MR, that in the Cayman Islands as in England and Wales there is a statutory basis for the grant of a stay of a winding up petition. The Board therefore does not need to determine whether and to what extent a discretion exists under the court's case management powers apart from statute. In *In re Nanfong International Investments Ltd* [2018] CILR 321 ("*Nanfong*") the Cayman Islands Court of Appeal adopted a restrictive approach to the grant of a discretionary stay, applying the principles set out by Lord Bingham of Cornhill CJ in *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 ("*Reichhold*"). Moses JA adopted the same approach in this case, holding at para 138 that a stay will be granted only in rare and compelling circumstances. The Board observes that in *Reichhold* and *Nanfong* the basis on which a stay was sought did not involve an assertion that all or some of the matters in the legal proceedings fell within the scope of a binding arbitration agreement. While it is not necessary for the Board to decide this matter, it questions the proposition that a discretionary case management stay of winding up proceedings on the just and equitable ground where a substantial part of the dispute between the parties or some of the parties to the petition falls within the scope of a binding arbitration agreement should be granted only in rare and compelling circumstances. Such a conclusion appears to be inconsistent with the support which the courts give to arbitration and the trend of case law internationally.

103. The determination of matters (1) and (2) will be an essential precursor to the court's formation of its opinion whether it is just and equitable to wind up the Company, which in turn is the threshold for giving a remedy under section 95 of the Companies Act (ie matters (3)-(5)). The Board is satisfied that it is appropriate to grant such a stay.

11. Section 95(2) of the Companies Act

104. It will be recalled that section 95(2) states that the court shall dismiss or adjourn a hearing of a winding up petition if the petitioner is contractually bound not to present a petition against the company. In this case there is no contract binding FMCH not to present a winding up petition. The arbitration agreement in the SHA requires certain matters to be determined by arbitration but is silent as to the presentation of a winding up petition against the Company. The Board is satisfied that 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. It does not amount to a contractual prohibition against the initiation of winding up proceedings. Section 95(2) is therefore not relevant to the dispute between the parties and the Board will say no more about it.

12. Conclusion

105. Matters (1) and (2) are substantive disputes between FMCH and Ting Chuan which provide the factual basis for the winding up petition on the just and equitable ground. Those matters fall within the scope of the parties' arbitration agreement and must be determined by an arbitral tribunal unless the parties waive their right to arbitration. There must therefore be a mandatory stay of the winding up petition in relation to matters (1) and (2) under section 4 of the FAAEA and a discretionary stay in relation to matters (3)-(5). In relation to the Company, which is the other party to the winding up petition, the Board is satisfied that there should be a stay of the winding up petition. The determination of matters (1) and (2) is the precursor to the determination of the petition which Kawaley J in his order dated 14 July 2020 has ordered be treated as an inter partes proceeding between FMCH and Ting Chuan.

106. The Board will humbly advise His Majesty that this appeal should be allowed.

ABI Committee White Paper on Mediation in Insolvency Matters

The Special Committee of the IBBI on mediation in insolvency matters has asked the International Committee of the American Bankruptcy Institute[1] to (1) describe the framework, operational aspects, and common challenges and solutions of successful insolvency mediation in the U.S. and (2) provide insights from a U.S. perspective on how insolvency mediation might be productively adopted in India. The International Committee has asked the authors of this white paper, primarily senior U.S. bankruptcy judges with considerable experience in mediation, to do so.[2]

Mediation is well accepted in all types and sizes of U.S. bankruptcy cases and proceedings[3] because of its long-standing use and proven track record for reducing the time for case and proceeding resolution, reducing the parties' costs, and reducing the burdens on the bankruptcy courts' dockets. The authors thus welcome the chance to describe lessons learned and procedures adopted that have led to the mediated resolution of disputes in U.S. bankruptcy cases becoming common practice.

We approach the IBBI's second topic more cautiously; having only an outsider's knowledge of Indian insolvency law and practice, we ask the Special Committee's insight if our

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[1] The ABI connects bankruptcy, insolvency and restructuring professionals with the relationships, insights and resources they need to be successful. The ABI accomplishes this by being the leading experience-provider and generator of content for professionals working in the bankruptcy, insolvency and restructuring industries around the globe.

[2] The authors of this white paper are the Honorable Kevin J. Carey, the Honorable Robert D. Drain, the Honorable Mary Jo Heston, the Honorable Christopher S. Sontchi, and Sylvia Mayer, Esq. Their CVs are attached. In addition, they were assisted by Steve Spitzer, Michael Brandess, Caleb Chaplain, Laura Coordes, Stephen Lerner, Danielle Mashburn-Myrick, and Daryl Smith.

[3] U.S. bankruptcy courts handle all types of bankruptcy cases under the U.S. Bankruptcy Code for eligible corporate, individual and occasionally governmental debtors (e.g., Chapter 7 liquidations, Chapter 13 individual repayment plans, farmer and fishermen reorganizations, Chapter 11 reorganizations or liquidations, Chapter 9 governmental cases and Chapter 15 cross-border cases) as well as proceedings arising in such cases, arising under the Bankruptcy Code and those proceedings related to the bankruptcy cases (i.e., generally affecting the outcome of such cases).

limited understanding of the Indian context has led some (we hope not all) of our recommendations astray. We have tried to focus on those aspects of mediation in insolvency cases that transcend any particular jurisdiction, or at least that may require relatively minor adjustments to comport with key aspects of Indian law and practice.

Mediation in U.S. Bankruptcy Cases

Definition

We begin with our definition of "mediation": a structured setting yet internally flexible means to enable parties to resolve a dispute or disputes or a shared problem with the assistance of an impartial, neutral person.[4] It differs from "conciliation" in that the mediator is not necessarily expected after hearing the parties out to propose a compromise that they may or may not accept, and while the mediator should have sufficient stature to merit the parties' respect, he or she lacks the imprimatur, with the exception of a judicial mediator, of a government appointed conciliator's view of a fair outcome. On the other hand, consistent with mediation's internal flexibility, a mediator may at some point suggest alternatives to the parties.[5] In fulfilling the overall goal of assisting the parties to agree, the mediator may consider parties' interests as well as the strength of their legal positions; a mediator also may take an evaluative approach, letting each party separately know his or her view of the merits, but ultimately the mediator uses whatever techniques best help the parties to agree.

The key elements of the mediation framework are:

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[4] Generally, there are two types of mediation styles: (i) facilitative, in which mediators assist the parties in reaching a mutually satisfactory resolution, and (ii) directive, in which mediators analyze the strengths and weaknesses of each party's case based on the mediators' understanding of the facts and law to make recommendations and offer their own opinions and suggestions.

[5] *See In re LeClairRyan PLLC*, 2022 Bankr. LEXIS 1817, at *21 (Bankr. E.D. Va. June 28, 2022) (at the end of the final day of mediation judicial mediator proposed a global "take-it-or-leave-it" settlement proposal with a five-day deadline to accept).

(1) the mediation is voluntary, in two respects -- the parties should not be directed to mediate unless willing to do so, and the parties are not required to agree, only to negotiate in good faith;[6]

(2) the mediation is confidential, also in two respects -- during the mediation the mediator should communicate a party's position to the other party or parties only if authorized to do so, and the information exchanged in the mediation remains confidential,[7] including between the parties to the mediation and the mediator, on the one hand, and the judge presiding over the dispute, on the other, with the exception of the terms of any agreement reached to the extent that court approval of it is required;

(3) to facilitate negotiation, the mediation must involve the parties necessary to resolution of the dispute,[8] and the mediator must have access to those with authority to make a decision;

(4) the mediation should have a fixed duration no longer than reasonably perceived to be required for the parties to reach an agreement; and

(5) there should be a means to document, approve and enforce the material terms of the agreement reached during the mediation.[9]

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[6] The definition of good faith at a minimum requires compliance with the court order, the strictures of confidentiality and directives to have a decision-maker in attendance together with a general willingness to discuss the issues. A few jurisdictions by law require more for the compliance of good faith.

[7] *But see In re RDM Sports Grp., Inc.*, 277 B.R. 415, 431 (Bankr. N.D. Ga. 2002) ("The mediation privilege should operate to protect only those communications made to the mediator, between the parties during the mediation, or in preparation for the mediation.").

[8] It is fairly rare for someone to object to mediation on the basis that they have not been named as a party to it. In such situations the court will assess whether the putative party would be constructive or is instead seeking to participate in order to delay or hinder the mediation. Because the mediator usually has considerable power to reign in such behavior, courts generally will let the party participate in some capacity.

[9] Judicial mediators usually will read the material terms into the official court record as well as retain jurisdiction over the enforcement of the settlement agreement should disputes arise over any of the material terms of the agreement reached. Private mediators usually will require a term sheet of the material terms be signed by the parties to the mediation.

Even these fundamental elements of a mediation may be modified at the margins,[10] but always with the goal of facilitating a voluntary settlement. Long experience has shown that these elements, coupled with the mediator's listening and people skills together with well tested pre-mediation and post-mediation techniques,[11] build the necessary trust that the mediation will not be time wasted.

Role of the Courts. When Is Mediation Mandatory?

Mediation, like other forms of alternative dispute resolution, is authorized by statute in U.S. bankruptcy cases[12] but is not mandated on a national basis. Instead, consistent with the U.S. Judicial Code, bankruptcy courts in the various judicial districts have local rules or standing orders setting forth procedures for mediation that reflect the key elements discussed above. Many courts also have local rules designed to facilitate the training and appointment of private mediators using mechanisms such as mediator panels which may be required to provide some services for smaller cases on a *pro bono* basis or at a lower hourly rate as a condition of participation.[13] The local adaptation of mediation practices and procedures within the U.S.

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[10] For example, to facilitate trading in distressed debt claims, it has become fairly common for U.S. mediation orders to provide for the public "blowout" of information from the mediation if the mediation fails. Also, it is fairly common, especially in larger, multi-party insolvency mediations, to extend the mediation deadline if the parties are making meaningful progress in the negotiations.

[11] These techniques include: the use of both confidential and shared mediation statements with the former outlining their acknowledged weaknesses of a party's position as well as their view of the key monetary and non-monetary parameters of a successful resolution of the case and the latter including factual and legal summaries together with the party's position on the issues and the negotiation history; the mediator's strategic use of pre-mediation conferences with individual parties which permits the mediator to better understand the issues to make more efficient use of everyone's time during the joint mediation; and the use of post-mediation conferences with individual parties in cases where a final resolution was not reached at the mediation but where the parties made meaningful progress.

[12] *See* 28 U.S.C. § 651 ("Each United States district court shall authorize, by local rule . . . the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy . . . ."); 11 U.S.C. § 105(c) (stating that bankruptcy judges are not excluded from the operation of chapter 6 of title 28).

[13] *See, e.g.*, WDWA Bankruptcy Court Local Rules 9040-1 through 9050-1. Even in the absence of local training programs there is an abundance of mediation training programs available in the U.S. for judicial and nonjudicial mediators, some of which are provided by the courts, and some are provided by private organizations.

bankruptcy courts has allowed mediation within the U.S. insolvency system to evolve organically to meet the needs of different locations based on the size and nature of their respective cases.

As discussed below, notwithstanding the general U.S. policy that mediation should be voluntary, some local rules or standing orders prescribe mandatory mediation in relatively simple matters of a recurring nature, although otherwise they, too, recognize that mediation works only if it is non-mandatory,[14] with the following additional nuances:

° Bankruptcy courts in specific cases may enter orders, after wide notice and a hearing, setting forth procedures to be followed in that case to liquidate certain types of claims, such as personal injury claims against the estate or avoidance claims by the estate,[15] that contain a prescribed mediation step. Consent to mediation in such cases is implied by the lack of objection to the proposed order after due notice; if someone objects, the Court may reason with them at the hearing that the mediation will cost less than litigation (usually this works) or carve the objector out of the order.

° Bankruptcy courts at times also may strongly recommend, generally during status conferences,[16] that parties to a dispute enter mediation. The courts may also encourage mediation through the effective use of case management tools including the timing of making decisions that could significantly alter the parties' relative positions in respect to each other regarding the legal

[14] *See* FLMB-2019-6 (Sixth Amended Administrative Order Prescribing Procedures for Mortgage Modification Mediation); *see also* Bankr. D. Del. R. 9019-5 (matters subject to mediation).

[15] *See* Order, *In re The Great Atl. & Pac. Tea Co., Inc.*, Case No. 10-2459 (Bankr. S.D.N.Y. Oct. 21, 2011), ECF No. 2752 (order on mediation and liquidation of personal injury claims); Order, *In re HFV Liquidating Trust*, Case No. 20-51066 (Bankr. E.D. Mich. Oct. 7, 2022), ECF No. 904 (order approving procedures governing the avoidance and recovery of preferential transfers).

[16] *See* 11 U.S.C. § 105(d)(1) ("The court, on its own motion or on the request of a party in interest shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case.").

issues involved in the case or proceeding.[17] While these techniques often put considerable pressure on the parties to mediate, parties are still generally allowed to decline the use of mediation.

° Finally, in a small number of very high-profile cases, such as the bankruptcy case of the City of Detroit, Michigan, a court may at the start of the case appoint a team of mediators with a lead mediator to be at the parties' disposal should they choose to mediate disputes, which of course also strongly encourages the parties to mediate.

In almost all cases except the high profile ones mentioned above, the parties, not the court, choose the mediator.[18] That choice usually is then memorialized in an order of the court appointing the mediator; stating the topics to be mediated; stating the outside date (which the parties should have agreed but in the absence of agreement the court will set) for the mediation to end, subject to extension either by the mediator or for cause on request of the mediator or a party; requiring the parties' decision-makers to be present when reasonably requested by the mediator; giving the mediator the power to set the dates and places for the mediation within the prescribed period;[19] mandating the confidentiality of the mediation; and specifying the mediator's compensation[20] and immunity from testifying and from liability related to the

[17] For example, a judge may defer a decision on a summary judgment motion or a motion to appoint a trustee in a case pending mediation. *See* discussion at p. 7 re: the judge's discretion and the balancing of interests.

[18] If the parties are unable to agree on a mediator, the court might name one.

[19] Often the mediator will combine an in-person session or sessions with all of the parties and separate sessions or telephone calls with individual parties or their representatives.

[20] In two-party mediations, mediators are generally paid by the parties equally; in multi-party mediations, mediators are compensated by the debtor's estate with a first priority, unsecured, administrative claim. Of course, if the mediator is a sitting judge, he or she receives no compensation in addition to their salary. Unless the mediator is a member of a mediation center, in-person mediation meetings usually are held at the offices of one of the parties' advisors, although mediations often involve more telephone calls than in-person meetings.

mediation with the exception of his or her willful misconduct. We have attached two forms of such mediation orders.

U.S. courts take violations of such orders seriously, especially confidentiality provisions, punishing breaches with contempt sanctions and perhaps other remedies such as damages or claim subordination for any harm caused. Such breaches are very rare. Indeed, we are aware of only one reported decision in the bankruptcy context addressing the breach of a confidentiality provision in a mediation procedures order.[21] On the other hand, given the voluntary nature of mediation, courts generally limit sanctions for other alleged bad faith behavior to egregious conduct antithetical to the policy that parties should participate in the mediation with an open mind, not the mere refusal to alter one's negotiating position if they have shown genuine willingness to discuss the strengths and weaknesses of each party's case.[22]

The court has considerable discretion whether to continue the underlying litigation during the mediation. Deadlines of course often encourage settlements, but so, too, does saving the cost of litigation. Thus, the court will balance these considerations in deciding whether to proceed on two tracks, or with at least the initial aspects of litigation, while the mediation is pending or if the initial deadline for concluding the mediation is sought to be extended. Notwithstanding the mediation confidentiality requirement, when faced with such a choice the court will often ask the parties and/or the mediator to disclose (in a public status conference or a report to be filed with the court) whether the parties are making meaningful progress toward an agreement and whether a continued litigation pause will encourage or retard such progress.

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[21] *See In re Teligent, Inc.*, 417 B.R. 197, 213 (Bankr. S.D.N.Y. 2009) (finding a breach of the confidentiality provisions but declining to impose sanctions as the breaching party had not acted in bad faith).

[22] *See Bank v. Fluent, Inc.*, 2020 U.S. Dist. LEXIS 263029 (E.D.N.Y. May 11, 2020); *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374 (S.D.N.Y. 2011).

The court also has considerable discretion when a mediation should commence (unless the court has adopted a uniform set of mediation rules for a particular type of disputes, which usually require mediation to be conducted early in the matter). Successful mediations of multi-party disputes have occurred at the very early stages of chapter 11 cases, the first mediated issue being the sequence of disputes to be mediated and the timetable for developing necessary information for the parties to meaningfully negotiate. On the other hand, successful multi-party mediations also have begun shortly before a scheduled trial. In each instance when asked to approve entry into mediation, the court must decide whether it will be productive, as genuinely sought by the key parties, or premature or a stalling tactic, and what the timetable should be. One of the key considerations is whether the parties have sufficient available information on the claims to understand the essential factual and legal issues in their respective cases. The court's power over the allowance of professional fees helps check gamesmanship.

Types of Mediated Insolvency Disputes

There are two general categories of mediated disputes in U.S. insolvency cases: (1) two-party, or "x vs. y" disputes, such as objections to claims against the debtor's estate, or claims by the estate against another party such as claims to avoid pre-bankruptcy transfers or to enforce contracts or other property interests of the debtor, and (2) multi-party disputes generally pertaining to the contents of an acceptable chapter 11 plan (because a class vote by those agreeing to a plan can bind dissenting class members or those who did not vote on most issues affecting plan confirmation).[23] The latter category of mediation may primarily involve creditors or creditors, the debtor and/or shareholders. Such multi-party disputes also may involve discrete

[23] Note, however, that secured creditors generally are in their own class and confirmation of the plan over their objection and vote for the plan must meet certain statutory standards including retention of their liens, payment of the present value of their liens and that the plan is fair and equitable.

legal issues, such as the priority or secured nature of a class of claims, or factual issues, such as the debtor's valuation; however, because they so affect prospective distributions within the capital structure, multiple parties must necessarily participate for there to be a meaningful agreement.

Mediation is rarely if ever used in the U.S. to facilitate the negotiation of out-of-court restructurings of financially distressed companies. Perhaps simplistically this is because the parties do not believe they need such help. There clearly are times, though, when a mediator might assist in avoiding an unnecessary or contentious chapter 11 filing. Thus, it may be that the use of mediation in this context is an innovation waiting to happen.[24]

Types of Mediators

As noted above, the parties generally choose their mediator. For larger disputes and multi-party disputes, they often choose a sitting or former bankruptcy judge or district judge, but they are not required to (and sitting judges are not required to accept the invitation to serve). Several respected practitioners also are successful mediators. Some disputes, such as over a construction contract or an insurance policy, may warrant mediators with a specialty in that area. As noted, it is fairly common for a court to direct mediation of relatively small, repeat disputes either in a particular case or district wide. In such instances the order or local rule will generally appoint a team of mediators who quickly become familiar with recurring facts and legal arguments and then divide the disputes among themselves for mediation. Notwithstanding that such programs are mandatory, they generally succeed in resolving all of the hundreds or

[24] Other reasons for mediation not being used in out-of-court restructurings may be the absence of a pending litigation alternative with its own timetable and the fact that the mediator would not have the benefit of a court order shielding him or her from subsequent discovery proceedings and most types of liability related to the mediation.

thousands of avoidance claims subject to mediation, likely because the parties readily see the merit in settling their disputes without incurring the cost and risk of litigation.[25]

Many courts and private companies offer mediation training, but parties generally choose mediators on a free market basis in light of their success record. The respect with which mediation is held is in large measure due to sitting judges' willingness to take on the work in their colleagues' cases, without, of course, additional compensation; if they see the merit in devoting time and effort to the task, the parties and other mediators generally do, too.

Enforcement of Mediated Settlements

Under the U.S. Bankruptcy Code, proposed actions out of the ordinary course by a trustee or debtor in possession require court authorization after notice to parties in interest and the opportunity for a hearing; mediated settlement agreements therefore typically provide that they are not binding on the estate until the trustee or debtor in possession obtains such approval, often with an express deadline for seeking such approval in good faith.[26] On the other hand, pending such a court determination, the non-debtor parties to a mediated settlement are bound by the settlement and of course will continue to be bound if the settlement is approved.

To minimize litigation and expedite the administration of the bankruptcy estate, settlements are favored in U.S. bankruptcy cases.[27] The standard for court approval of a

[25] Similar use of mediation as part of an ADR process has also been successfully applied to large numbers of personal injury claims in particular cases and to restructure large numbers of home mortgage loans in personal bankruptcies in particular courts, again because such disputes share common facts and legal issues and the cost of mediation and settlement is much lower than the cost of litigation. A few courts have combined mediation training with encouraging practitioners to mediate on a *pro bono* basis (many U.S. States require lawyers to devote a certain number of hours each year to *pro bono* matters), especially in individual, personal bankruptcy cases where a party lacks counsel.

[26] Local rules or orders in cases specifying procedures for the mediation of multiple types of relatively simple disputes with common issues, as discussed above, often provide streamlined procedures for seeking and granting such approval.

[27] *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996).

settlement (an issue within the court's discretion) is fairly low: it must have been the result of arms-length bargaining by the estate representative and be fair and equitable and within the lowest bounds of reasonableness taking into account the delay, costs, and risks to the bankrupt estate of the alternative of continued litigation, including any issues relating to the collectability of a judgment.[28] It also generally should not allocate the estate's assets at variance from the Bankruptcy Code's plan confirmation priority scheme, although this is not an absolute prohibition for settlements not contained in a plan,[29] and increasingly "global settlements" set forth in a chapter 11 plan that offers similarly situated parties as a group the opportunity to accept the compromise are favored.[30]

To decide a motion for approval of a settlement, the court is discouraged from even conducting a mini-trial on the merits of the underlying dispute, as the cost and delay of such a focus would defeat in large measure the basis for the settlement; instead, the court should canvas the issues at stake to assure itself that the trustee or debtor in possession has exercised reasonable business judgment in taking them into account.[31] Many U.S. courts have noted that the fact that the settlement was reached after mediation strongly supports its arms-length nature and

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[28] *Protective Committee Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968); *In re Iridium Operating LLC*, 478 F.3d 452, 462 (2d Cir. 2007); *In re Energy Future Holding Corp*, 527 B.R. 157, 163 (D. Del. 2015); *In re Chemtura Corp.*, 439 B.R. 561, 594 (Bankr. S.D.N.Y. 2010). A settlement with insiders generally requires close scrutiny, however, regarding whether the insider exploited its position. *In re Innkeepers USA Trust*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010).

[29] *In re Iridium Operating*, 476 F.3d at 464-65; *see also Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 467-68 (2017).

[30] *In re Easterday Ranches, Inc.*, 647 B.R. 236, 250 (Bankr. E.D. Wash. 2022); *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761, 771 (Bankr. D. Del. 2018).

[31] *In re Richardson Foods, Inc.*, 2023 Bankr. LEXIS 20, at *9 (Bankr. S.D.N.Y. Jan. 5, 2023). A court may disagree with the estate representative's assessment of the merits and still grant approval because of other factors favoring approval, including widespread creditor support, avoided cost and delay, the settlement's elimination of other roadblocks in the case, as well as the court's appreciation that most litigations are not black and white and its current level of knowledge is imperfect before an actual trial (and often after an actual trial).

fairness.[32] Some courts have faulted a party who objected to a mediated settlement for choosing not to participate in the mediation and instead waiting to object to the ensuing agreement.[33]

Recommendations for Insolvency Mediation in India

Our Understanding of the Basic Context

Indian insolvency law and practice differ substantially from the U.S. model. Enacted in 2016 largely in response to the widespread belief that previous insolvency regimes gave corporate debtors ways to unduly delay the resolution and payment of their debts, the Indian Insolvency and Bankruptcy Code ("IBC") establishes a framework that is creditor-led (by a statutory committee mainly comprising financial creditors) and court-monitored (by the National Company Law Tribunal ("NCLT") comprising judges and other members with technical (economic) expertise.

Unlike in the U.S., the first stage of the insolvency process is the NCLT's determination, in a setting involving the putative debtor and often just one creditor or a subset of creditors, whether the debtor meets the criteria for admission to insolvency proceedings. If so found, the insolvency is formally admitted, triggering a relatively tight timeline whereby the statutory committee is constituted and, also unlike in the U.S., a "resolution professional" is appointed to take control and management of the debtor and tasked with the development of a resolution plan, although acting with the permission of the committee. The tight timeline extends to the proposal, agreement by at least 66% in amount of the claims held by members of the statutory committee, and consideration for approval by the NCLT of a resolution plan or plans on notice to creditors.

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[32] *See, e.g., In re Purdue Pharma, L.P.*, 633 B.R. 53, 85-86 (Bankr. S.D.N.Y. 2021), *aff'd*, 69 F.4th 45 (2d Cir. 2023); *In re Residential Capital, LLC*, 2013 Bankr. LEXIS 2601, at *70 (Bankr. S.D.N.Y. June 27, 2013).

[33] *In re Peabody Energy Corp.*, 933 F.3d 918, 927 (8th Cir. 2019); *see also In re Residential Capital, LLC*, 497 B.R. 720, 745 (Bankr. S.D.N.Y. 2013) (although objectors were not participants in mediation, objectors were well aware of it and had full and fair opportunity to object to the settlement).

The NCLT also considers the allowance of claims and claim priority disputes, as well as claims by the resolution professional on behalf of the corporate debtor, which may also affect the confirmability of the plan and lead other parties who are not on the committee to object and be heard on whether the plan should be confirmed.

We understand that although mediation and/or conciliation are well established under Indian law for some types of disputes, they do not play a meaningful role in the insolvency process (or, for that matter, in major commercial disputes, where we understand parties routinely circumvent mandatory pre-litigation mediation procedures).

This is not because the IBC prohibits mediation, although the absence of clear, standard mediation procedures in insolvency cases probably discourages the use of mediation. We understand that other factors discouraging mediation of Indian insolvency disputes include (1) the concern that it would permit delay that the IBC now avoids; (2) a related concern that mediation would interfere with the IBC's statutory timelines for proposing and considering confirmation of a resolution plan; (3) a concern over the lack of a "mediation culture" for insolvency and complex commercial disputes, including (a) a dearth of sufficiently sophisticated mediators, (b) a concern over the cost of mediation, including balancing economy with the need to pay enough to retain talented mediators (or the need to train sitting judges to perform mediations for each other), (c) the need to train NCLT members to use mediation as a case management tool, (d) the concern that parties would not maintain mediation confidentiality, and (e) the concern that governmental entities, including many of the financial creditors that often sit on the statutory committee, would be reluctant to engage in mediation and to make actual decision-makers available; and (4) a legal system that heavily emphasizes litigation, including extensive litigation over the approval of settlements.

All of these concerns must be addressed when trying to apply the lessons learned in developing a U.S. mediation culture to the Indian context. We have also asked whether existing avenues to negotiation of insolvency issues suffice without adding a mediation option. For example, mediation of multi-party plan disputes developed in the U.S. in large part because the proliferation of different layers of secured debt, the incentives fostered by an active market in trading distressed debt, and the increasingly aggressive role of private equity sponsors often leaves the debtor in possession unable to play a neutral leadership role in plan negotiations and intercreditor disputes with no one in the capital structure filling the vacuum. The same dynamic may not apply to the interaction of the resolution professional and the statutory committee under the IBC. Nevertheless, we make the following recommendations in the reasonable belief that they will ultimately shorten and reduce the cost of insolvency cases in India.

1. Recognizing that these recommendations would be an experiment, they should be implemented not nationwide but, rather, in a pilot program or programs in one or two benches of the NCLT.

2. We have considered the introduction of mediation for three categories of Indian insolvency disputes:

° disputes over whether a company should be admitted into insolvency proceedings ("Admission Disputes"),

° disputes involving certain post-admission commonly recurring types of claims, both against and on behalf of the debtor estate, as well as for claims for amounts under a specified monetary threshold ("Recurring or Small Claims"), and

° other post-admission disputes where the amount in controversy exceeds the threshold for Recurring or Small Claims or the issues are so important to the development of a resolution

plan that the participation of multiple parties is required for their negotiation ("Multi-Party," "Plan" or "Large Claims" Disputes).[34]

3. We are not qualified to recommend whether mediation should be made available for Admission Disputes. We understand that Indian law does not require negotiation to impasse as part of the admission process. We also understand that introducing mediation, whether on a mandatory or voluntary basis, in this context might disrupt the IBC's salutary acceleration of the insolvency process. Further, we understand that in this context the success of a mediation might well be pyrrhic because it would involve only the petitioning creditor, leaving other creditors free to seek admission. To overcome these concerns, one would have to believe that the admission process too often leads companies into insolvency proceedings that could have been avoided by facilitated negotiations, a topic we are not competent to consider.[35] Based on our admittedly limited understanding of the underpinnings of the IBC, though, we would not recommend mandatory mediation of Admission Disputes, including disputes over the petitioning creditor's claim.

4. We recommend mandatory post-admission mediation of Recurring or Small Claims including disputes related to proof of claims submitted by creditors for debts owed as of

[34] Mediation may assist in settling or narrowing disputes before parties even begin negotiating plan confirmation and related issues. Recurring or Small Claims would not include claims that would otherwise qualify as such if the resolution professional determines, with the committee, that they should be addressed in the aggregate in a plan or multi-party mediation. Such an approach is often taken in negotiating the chapter 11 plan for U.S. debtors whose financial distress results in large part from mass torts. *See, e.g.*, *In re N. Am. Health Care, Inc.*, 544 B.R. 684, 687 (Bankr. C.D. Cal. 2016); *In re Purdue Pharma, L.P.*, 633 B.R. 53, 70, 78, 82-83 (Bankr. S.D.N.Y. 2021), *aff'd*, 69 F.4th 45 (2d Cir. 2023). Mediators, for example, may identify the individual tort victims who are entitled to recovery, determine the amounts of potential settlements, and apportion of those amounts among various debtor entities.

[35] In light of the bar to consensually dismissing an admitted insolvency proceeding, which materially exceeds the vote necessary for a resolution plan, we believe that mediation over dismissal of an admitted insolvency proceeding will seldom if ever be warranted. Additionally, the relatively high monetary threshold for a payment default resulting in admission (i.e., INR 10 million) supports the notion that insolvency is rarely sought unless a debtor has serious financial issues that are no likely resolvable without a collective insolvency proceeding.

admission and disputes relating to post admission claims to the extent such claims are resolvable under the IBC (as long as they fall into the types of matters covered by the definition of Recurring or Small Claims Disputes) perhaps with a party's right to opt out within a short time after the filing of the claim and before the mediation starts.

For Recurring or Small Claims:

° mediation procedures can be adopted either nationwide or bench-wide, including

(i) a form for the claim and any additional support for it, to be submitted to the mediator and the other side,

(ii) a timetable for submission of the form and any response directed by the mediator, for a meeting (including telephonically) with the mediator and the parties, and for obtaining an agreement, or not, and

(iii) simplified procedures for seeking approval from the NCLT, if such approval is necessary under Indian law, of any agreements reached;[36]

° mediation panels can be appointed and fairly easily trained for the mediation of such claims; provided, that the mediators will be assured of sufficient compensation from the estate and the other parties without negating the benefits of the mediation process over litigation.

° confidentiality concerns and issues raised by governmental actors' participation in mediation should be minimal; and

° it is important to the success of these procedures that each side understands that the court will decide the underlying claim reasonably promptly if they do not reach an agreement.

[36] Such procedures might include "negative notice" – that is, a notice that the court may approve the settlement if there is no objection to it by the objection deadline – or deemed approval if the motion represents that (a) the settlement is not with an insider and (b) the statutory committee has approved the settlement.

Our experience has shown that with such procedures in place hundreds and at times thousands of such claims are resolved promptly without court involvement.

5. For Multi-Party, Plan or Large Claim Disputes, mediation should be voluntary, not mandatory and subject to the following procedures:

° A request to mediate may be made to the NCLT by the resolution professional and/or a specified percentage of the statutory committee at any time during the insolvency case[37];

° Such request should be publicly filed and supported by sufficient allegations to enable the NCLT to decide not only whether the request should be granted but also what time limitations should be placed on the mediation, whether and how litigation should continue during the mediation, whether the applicable IBC deadlines should be extended, and the parties to the mediation if the request is granted.[38] The request should identify the proposed mediator or a means to name the mediator. The NCLT should have the discretion to explore at the hearing or conference on the request a recalcitrant party's reasons for not wanting to mediate and the authority to tailor a mediation order to address any valid concerns, as well as to try to persuade the objector of the benefits of mediation in the particular instance;

° The NCLT should decide such request and any opposition to it promptly. The decision should be memorialized in a generally standard form of mediation order that contains the types of confidentiality provisions identified herein and protects the mediator from discovery, from being compelled to appear in court, and from liability in connection with the mediation with the exception of his or her willful misconduct;

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[37] There should not be a requirement for seeking NCLT approval for use of mediation for such types of claims and it should be clear that where the relevant parties have voluntarily agreed to mediate their dispute NCLT is not required so long as the law is clear on this issue..

[38] Alternatively, the procedures could provide that no mediation shall last more than x days without further approval by the NCLT of a request to extend the deadline for cause.

° Sitting NCLT judges should be encouraged to mediate each other's Multi-Party, Plan or Large Claim disputes and receive training therefor, as well as a measure of relief from their other caseload, if they agree to do so. The NCLT should also receive training in the new mediation procedures, including on the consideration of requests for mediation;

° The NCLT should adopt general guidelines for mediation, to be included in any mediation training, that emphasize the four critical aspects of mediation highlighted in this white paper, the definition of good faith in mediation, and the importance to the insolvency process of enforceable settlement agreements. Such guidelines also should address the role of governmental entities in mediation, especially the obligation to provide the mediator and other parties to the mediation with a clear idea of the entity's decision-making process over the issues at stake and the obligation of those conducting negotiations on behalf of the entity to keep the entity's ultimate decision-maker(s) informed.[39] The IBBI should consider whether either the foregoing guidelines, the form of mediation order or both should provide protection for governmental entities from rules requiring transparency and prohibiting *ex parte* contacts that might otherwise arguably preclude their participation in mediation.

° Compensation for non-judicial mediators should be commensurate with the skills and stature required to conduct the mediation successfully, including a priority claim against the estate;[40] Depending on the parties' agreement, and the court's decision in the absence of

[39] The presence of governmental entities can complicate mediations in U.S. bankruptcy cases, primarily because of their decision trees but also because governmental entities at times are more reluctant than private parties to make a decision, preferring instead to leave matters for decision by the court. Nevertheless, insolvency mediations involving governmental entities often succeed. For example, in the *Purdue Pharma* case, a mediated settlement was agreed among all 50 U.S. States and hundreds of city and local governments, representatives of thousands of unsecured creditors, the debtor, and third parties.

[40] We believe that once payment is reasonably assured, a free market in qualified mediators should develop so that talented mediators will command commensurate compensation.

agreement, compensation can be split between the parties, including the estate, pro rata or paid entirely by the estate. In either case, billing for such compensation should be made relatively easy.

° The NCLT/IBBI should consider the adoption of a standard for deciding requests to approve a mediated settlement that focuses on canvasing the issues in the light of the hypothetical costs, delay and results of the litigation alternative, as well as creditor support and the experience and good faith of the party negotiating the settlement on the estate's behalf, and confers a measure of deference in favor of the settlement if it was mediated among the true parties to the dispute and not at the expense of another party that was not permitted to mediate;

° Because of its confidential nature, the mediation of Multi-Party or Plan issues at times may make an insolvency proceeding seem unduly opaque to other parties and the public. This may be exacerbated by the IBC's placement of so much control in the hands of a small statutory committee comprising mostly financial creditors. The guidelines that we recommend the NCLT/IBBI adopt therefore should recognize the possibility that non-parties to a Multi-Party or Plan mediation be allowed to state their plan-related concerns or views to the mediator or to the resolution professional, either in a private or court-approved setting; provided, that such process would not slow the timeline for the mediation;[41] and

° The NCLT or IBBI should establish a date, perhaps three years from the pilot programs' adoption of such recommendations, to review their efficacy.

[41] We have found that the ability to address the desire to have certain types of insolvency claims, such as mass tort claims, aired publicly, even if not actually decided by the court, can be key to the acceptance of a settlement by parties in the case as well as the public. That is, it is often more important for the holders of such claims to be heard in a respectful way than for their claims to be litigated.

It will be important to have "buy in" from both the judges and the potential parties to a mediation. To help mediation gain acceptance from these parties, we recommend the dissemination of information about mediation in several ways. First, providing training programs[42] on mediation in the bankruptcy context for judges, lawyers, and financial professionals can serve the dual purpose of familiarizing parties with the concept of mediation in practice and allowing them to develop critical skills to mediate efficiently and effectively.

In addition to trainings, publication and dissemination of articles on mediation will help spread the word about mediation's usefulness and spur discussion about how mediation practices can be refined and improved. To the extent possible, publications of all sorts—blogs, academic papers, white papers, empirical studies, etc.—should be made widely accessible to the insolvency and bankruptcy community. Papers that draw inspiration from other jurisdictions and from other practice areas outside of bankruptcy may also be valuable resources.

Finally, if and when mediation is incorporated into Indian bankruptcy proceedings, it would be ideal to collect data for the purpose of analyzing whether mediation is working and for further promoting its usefulness. Although aspects of the mediation itself may be confidential, publishing information about when and how mediation is used in a case; who decides whether to use mediation (e.g., whether the judge suggests it or whether the parties ask for it); which, if any, parties objected to mediation; how mediation affected the outcome of the case; and the duration of the mediation can all be gathered and disseminated to interested parties.

[42] An example of one such training program held in the U.S. may be found here: https://www.abi.org/events/9th-annual-forty-hour-bankruptcy-mediation-training.

GRAND COURT PRACTICE DIRECTION No. 3 OF 2022

JUDICIAL MEDIATION GUIDELINES

Purpose

1. The Courts of the Cayman Islands are committed to resolving disputes in the most efficient manner possible, including the use of non-adjudicative processes. Accordingly, Judges and Magistrates will in appropriate cases encourage parties to engage in mediation.
2. By the Overiding Objective the Court's duty is to manage cases so as to help the parties to settle the whole or part of the proceedings. To this end several members of the judiciary have been trained and certified as mediators. They are ably supported by a professionally trained co-ordinator.
3. The purpose of this practice note is to set out the guidelines for the referral of matters to judicial mediation and the procedures for the conduct of judicial mediations in other than family cases. The mediation procedure applicable to the Family Division will continue to apply.

Referral to Judicial Mediation

4. A matter may be referred by the Court to judicial mediation at any stage in the proceeding in keeping with the Overriding Objective, the MIAMs procedure in the Family Division of the Grand Court and Practice Direction 4 of 2022 on the Listing of Civil Proceedings in the Civil Division Short Summonses and Assigned Judges.
5. By virtue of section 29 of the Grand Court Act, a judge acting as a judicial mediator has the same immunity as a judge acting judicially.

Criteria for Referral to Judicial Mediation

6. A matter referred to mediation will usually have one or more of the following features:
    - an earlier unsuccessful private mediation;
    - one or more parties with limited resources;
    - a substantial risk that the costs and time of a trial would be disproportionately high compared to the amount in dispute or the subject matter of the dispute;
    - an estimated trial length that would occupy substantial judicial and other court resources; or

- aspects that otherwise make it in the interests of justice that the matter be referred to judicial mediation.

7. There are proceedings which, as a matter of policy, may not be appropriate for mediation. The following disputes will not ordinarily be referred for mediation:
   - cases involving the resolution of a matter of public importance which, in the public interest, ought to be heard in open court;
   - cases in which the Court is to review the exercise of a statutory power or discretion;
   - cases in which the commission of a crime or serious misconduct is alleged in the context of a civil proceeding; and
   - cases in which there is a litigant in person.

Preparation for the judicial mediation

8. Directions regarding preparation for the mediation will be made at a MIAM or preliminary case conference.
9. The parties will be told when and where the mediation will take place and who is to attend. Parties will usually be provided with a statement of the proposed course of the mediation. Representatives are welcome to attend.
10. Parties will be informed prior to the commencement of a mediation of any pre-conditions, expectations or particular requirements. These may include a requirement to provide specified documents and other information, position papers or confidential offers.

Confidentiality

11. Parties and other participants are to protect the confidentiality of all that is said and done by any person in the course of the conduct of a mediation.
12. It will be the usual practice of the mediator to destroy all materials provided to or prepared by the mediator and any other court officer participating in the mediation, following completion of the mediation, whether successful or not.

Attendance at mediations

13. A mediator may authorise the attendance at a mediation of persons other than the parties and their legal representatives. Participation of all persons in the mediation will be under the direction and control of the mediator.

14. In the absence of the mediator's express authorisation to the contrary, it is expected that the mediation will be attended by parties or representatives of the parties who have full authority to settle the proceeding. Participation by telephone or video-link will be allowed only in exceptional circumstances.

15. The mediator will inform the parties of the identity of all attendees prior to the commencement of the mediation.

Legal advice or assistance

16. A A mediator will not evaluate issues in dispute or provide legal advice to parties, and will not assist with the preparation of any terms of settlement. When agreement is reached the mediator may give guidance for the settling of the terms of agreement

16.B. The settled tenns of agreement, may with the consent of the parties, be embodied in an order of the Court to be executed by the mediator in that mediator's judicial capacity and in which event, will become binding as such.

Meeting Separately with the Parties - Caucusing

17. Mediation styles and practices will differ between judicial mediators. Some mediators may be prepared to caucus, depending on the nature and circumstances of the case. Other mediators may not be prepared to do so.

18. A mediator will not meet separately with a party and their legal representatives, or with the legal representatives of a party, in the absence of some or all of the other parties, without the express approval of all parties to the mediation.

19. Information provided by a party to a mediator in a separate session will not be disclosed to any other party unless the mediator has been expressly authorised to do so. This will not restrict the mediator from terminating the mediation upon receiving information which by its nature is open to an interpretation of illegal, improper or unethical conduct.

Adjournment

20. A mediator may adjourn the mediation to continue at a later date, either under the conduct of the same or a different mediator.

21. If the proceeding fails to settle at mediation, the mediator may give directions for the further conduct of the proceeding in their capacity as a judge or associate judge.

Subsequent trial

22. No member of the Court will hear and determine an issue in a proceeding in which that person acted as a mediator, or where that person has become acquainted with any confidential information relating to the mediation of the dispute (e.g. where confidential information was provided in preparation for a mediation that was subsequently conducted by another judicial officer.

15 August 2022

abiLIVE Faculty: Unraveling ADR in Restructuring & Insolvency Cases: A Global Perspective

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Hon. Robert D. Drain is Of Counsel with Skadden, Arps, Slate, Meagher & Flom LLP in New York and previously served for 20 years as a U.S. bankruptcy judge for the Southern District of New York, presiding over many impactful business and consumer cases. Before retiring from the bench in 2022, Judge Drain oversaw proceedings ranging from large chapter 11 corporate restructurings — including Loral, RCN, Cornerstone, Refco, Allegiance Telecom, Delphi, Coudert Brothers, Frontier Airlines, Star Tribune, Readers Digest, A&P, Hostess Brands, Christian Brothers, Momentive, Cenveo, 21st Century Oncology, Tops, Global A&T, Sears, Full Beauty Brands, Sungard, Windstream, Purdue Pharma, Jason Industries, OneWebb and Frontier Communications — to chapter 15 and other cross-border cases, such as Varig, S.A., Yukos (II), SphinX, Galvex Steel, TBS Shipping, Excel Maritime, Nautilus, Landsbanki Islands, Roust and Untrapetrol. He also served as a court-appointed mediator in numerous cases, including New Page, Cengage, Quicksilver, Advanta, LightSquared, Molycorp, Breitburn Energy, China Fishery

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