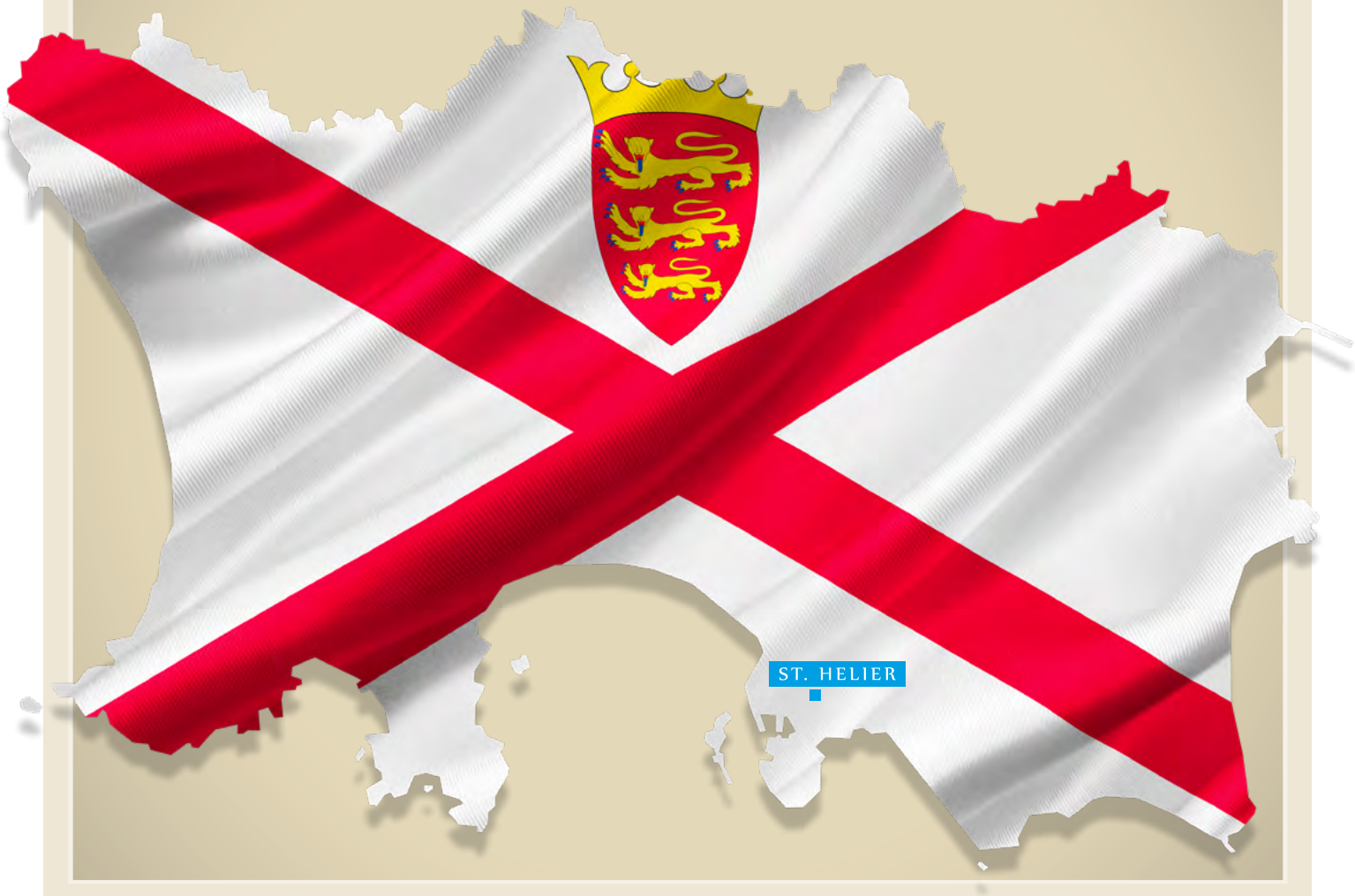
JUST, EQUITABLE, ARBITRABLE?



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In the recent case of the Representation of Shinhan Securities Company Limited [2022] JRC 293, in which Mourant acted for the successful applicant, the Royal Court of Jersey had to determine whether to grant a stay pending arbitration of a petition to wind up a company on the just and equitable basis.

Shinhan Securities Co Ltd (Shinhan) was a shareholder in a Jersey expert fund which took the form of an incorporated cell company (the Fund). The subscription agreements each contained a dispute resolution provision that required the parties first to attempt to resolve this by consultation, failing which, the dispute should be referred to mediation. Finally, should a mediation fail, the dispute was to be resolved by arbitration with the law and seat of the arbitration being Hong Kong (the Arbitration Agreements).

Shinhan issued a representation to the Jersey court under Article 155 of the Companies (Jersey) Law 1991 seeking a just and equitable winding-up. The Fund issued an application for a mandatory stay pending arbitration under Article 5 of the Arbitration (Jersey) Law 1998.

Shinhan's central argument was that a just and equitable winding-up petition was not 'arbitrable' and the Arbitration Agreements were therefore inoperative or incapable of being performed and consequently fell within one of the exceptions to Article 5. This was on the basis that only the Jersey court could make a winding-up order. The Fund argued that the underlying dispute between Shinhan and the Fund, including the question of whether a winding-up order should be made, was capable of being arbitrated, even if, following the arbitration, the matter had to come back to the Jersey court for any actual winding-up order to be made.

In its judgment, the Jersey court considered relevant case law from Jersey itself and across the common law world, including England, Cayman, Hong Kong, Singapore and Australia.

The Jersey Court of Appeal had previously considered this issue in Global Gold Consolidated Resources v Consolidated Resources Armenia [2015] (1) JLR 309. It had determined that the overriding principle was that "la convention fait la loi des parties". The parties were free to agree how their disputes should be resolved. There was no reason for the courts to interfere with that unless there was an overriding public interest that required them to do so. Having considered the English Court of Appeal decision in Fulham FC -v- Richards [2012] Ch 133, the Jersey Court of Appeal concluded that there was no reason of public policy for holding that a just and equitable winding-up petition was not capable of arbitration.

The Royal Court went on to consider more recent authority from other jurisdictions, paying particular regard to the decisions of the Hong Kong court in Re Quiksilver Glorious Sun JV Limited [2014] 4 HKLRD 759, of the Singapore Court of Appeal in Tomolugen Holdings Limited -v- Silica Investors Limited [2015] SGCA 57 and of the Federal Court of Australia in WDR Delaware Corporation -v- Hydrox Holdings Limited [2016] FCA 1164. These were also consistent with Global Gold and emphasised that, unlike in an insolvent winding-up, there was no public interest that overrode the agreement to arbitrate. Furthermore, arbitrability did not depend on whether the arbitral tribunal had the power to grant the final relief. Consequently, there was nothing to preclude the arbitral tribunal from resolving the underlying dispute, even if the matter had to return to court for it to make the just and equitable winding-up order.

However, there was a recent authority from the Cayman Court of Appeal which went in the other direction, FamilyMart China Holding v Ting Chuan (Cayman Islands) Holding Corporation, CICA (Civil) Appeal Nos 7 and 8 of 2019.

The Cayman Court of Appeal distinguished the other authorities on the basis that they all depended on the court's ability to identify discrete substantive issues which did not invoke the exclusive jurisdiction of the court.

It held that the petitioner had a statutory right to invoke the jurisdiction of the court and was concerned at the prospect of a two-stage process where the decision of the arbitrator and the court might conflict.

The Royal Court did not agree with the Cayman Court of Appeal. It derived from the authorities that all issues should be determined by arbitration in accordance with the arbitration agreement save where it would be contrary to public policy. The fact that only the court could make a winding-up order did not affect that.

The Royal Court held that the parties had agreed to arbitrate and that there was no overriding reason of public policy to depart from that simply because it was only the court that could grant the actual relief sought. On the contrary, there was a strong public interest in holding parties to their bargains. The Royal Court saw no reason to depart from the Jersey Court of Appeal decision in Global Gold which was prima facie binding in any event.

The Jersey Court of Appeal's decision in Global Gold and the Royal Court's decision in Shinhan were clearly correct. This was put beyond doubt when, on 20 September 2023, the Judicial Committee of the Privy Council reversed the Cayman Court of Appeal's decision in FamilyMart, following the same line of reasoning that the Jersey courts and, indeed, most other courts in the common law world had followed.

The Royal Court's decision is a modern confirmation that, as a matter of Jersey law, an application to wind up a company on just and equitable grounds is susceptible to arbitration. It underscores a critical point: courts generally uphold the sanctity of such clauses and refrain from intervening in disputes covered by them. Moreover, in jurisdictions with mandatory statutory stay provisions arising from Article II(3) of the New York Convention, there are limited instances where courts will be willing to decline to stay legal proceedings in favour of arbitration.

Justin-Harvey Hills, Katie Hooper and Stephan Venter acted for the Fund in this matter.