CACV 172/2023
[2024] HKCA 516

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO 172 OF 2023
(ON APPEAL FROM HCCT NO 34 OF 2022)

IN THE MATTER OF a co-investment contract dated 17 March 2014 between CDH Fund V Limited Partnership plus CDH Grand Cattle Holdings Limited with CMBICDHAW Investments Limited, which incorporated the parties' adoption of the laws of the Hong Kong SAR to govern their contract plus their arbitration agreement for disputes between them to be settled by ICC arbitration in Hong Kong

and

IN THE MATTER of the Arbitration Ordinance, Cap 609

BETWEEN

CMBICDHAW INVESTMENTS LIMITED	Plaintiff
and	
CDH FUND V LIMITED PARTNERSHIP	1st Defendant
CDH GRAND CATTLE HOLDINGS LIMITED	2nd Defendant
CDH INVESTMENTS MANAGEMENT (HONG KONG) LIMITED	3rd Defendant

Before: Hon Kwan VP, Barma JA and Coleman J in Court

Date of Hearing: 7 June 2024

Date of Judgment: 10 July 2024

J U D G M E N T

Hon Coleman J (giving the Judgment of the Court):

A. Introduction

1. It is well-settled that it takes two to tango. The question which arises in this appeal is whether it also takes two to create a 'dispute', capable of giving jurisdiction to an arbitrator to resolve that dispute.

2. That question arises in the essential circumstances of this case, as follows:

(1) A contract ("Agreement") made between three parties contained an arbitration clause ("Arbitration Agreement").

(2) By the Arbitration Agreement, the parties to the Agreement agreed to resolve their 'disputes', arising out of or relating to the Agreement, through arbitration.

(3) Arbitration is a form of 'ADR', an alternative dispute resolution process – alternative to resolution by litigation in the Courts.

(4) The foundational jurisdictions for arbitration and litigation are different.

(5) For an arbitrator to have jurisdiction under an arbitration clause, there must be a dispute between the parties for him to

resolve, that dispute falling within the scope of the arbitration clause.

(6) The parties to the Agreement were Fund, Cattle and CMB (all as defined below).

(7) Fund and Cattle (together with three non-contracting parties) commenced an arbitration, with Fund and Cattle claiming as relief a declaration of non-liability to CMB.

(8) CMB had by then asserted claims against the non-contracting parties, in litigation in the High Court.

(9) However, CMB had never asserted any such relevant liability of Fund and Cattle for which they sought the negative declaration of non-liability.

(10) CMB therefore objected to the jurisdiction of the appointed Arbitrator, and did so (a) as regards Fund and Cattle's claim, on the basis that there was no 'dispute' to be resolved, and (b) as regards the non-contracting parties, on the basis that they were not parties to nor could they benefit from the Arbitration Agreement.

(11) CMB asked the Arbitrator to rule on that jurisdiction question as a preliminary threshold question.

(12) The Arbitrator declined to do so, and in passing expressed the preliminary view that the jurisdiction challenge to Fund and Cattle's claim was weak.

(13) The Arbitrator later conducted a substantive hearing where the jurisdiction point was dealt with substantively.

(14) In his final arbitral award ("Award"), the Arbitrator agreed that there was no jurisdiction over the claim asserted by the non-contracting parties.

(15) But he decided that there was jurisdiction over the claim made by Fund and Cattle, and he granted a declaration of non-liability (but in terms varying from those as originally sought).

(16) CMB applied to the Court to set aside that part of the Award (and some other paragraphs of it), on the basis that it was made without jurisdiction and/or was contrary to public policy.

(17) The application was made under section 81 of the Arbitration Ordinance Cap 609 ("AO"), which gives effect to Article 34 of the Model Law.

(18) On such an application, a true question of jurisdiction properly falling within Article 34 falls to be considered by the Court on a *de novo* basis.

(19) Mimmie Chan J, the Judge hearing the application, pointed out the Arbitrator's apparent error (in conflating whether there is a dispute with whether there was a legitimate interest in seeking relief in the form of a negative declaration), and she agreed that the Arbitrator had no jurisdiction.

(20) On that basis, the Judge did not go on to decide the public policy point.

(21) On Fund and Cattle's subsequent application for leave to appeal, the Judge granted leave.

(22) This Court heard the appeal.

(23) In doing so, the Court again approaches the question of jurisdiction on a *de novo* basis.

(24) In other words, the question is not exactly whether the Arbitrator or Judge was correct in his or her approach –

though it is of course useful to consider their respective reasoning (and the criticism of it, as respectively founded the application and the appeal).

(25) The question this Court has to decide afresh on this appeal is whether this Court finds that there was or was not the relevant jurisdiction.

(26) Though much other ground was traversed in the materials and argument, that question turns on the narrow point as to whether there was a 'dispute' between Fund and Cattle on the one hand and CMB on the other – either at the time of the commencement of the arbitration and/or at the time the Arbitrator came to write his Award.

3. The appeal was argued:

(1) for Fund and Cattle by Mr Benjamin Yu SC, leading Ms Sara Tong SC and Mr Keith Chan (none of whom had appeared in the arbitration or before the Judge, except on the application for leave to appeal), and

(2) for CMB by Mr Barrie Barlow SC, leading Ms Eva Leung (Mr Barlow having appeared in the arbitration, and both having appeared before the Judge).

4. We reserved our decision. This is our Judgment.

B. Background

5. There is little dispute as to the relevant background. With our own changes and additions, we can broadly adopt the summary given by the Judge in her Decision dated 15 March 2023, [2023] HKCFI 760.

6. On 17 March 2014, the Plaintiff ("CMB") entered into a Co-Investment Agreement ("Agreement") with the 1st Defendant ("Fund") and the 2nd Defendant ("Cattle"), whereby CMB agreed to invest US$10 million for a minority equity stake in a company ("HC") which specialized in the production, processing and sales of beef and other meat products on the Mainland ("Investment").

7. The Agreement was negotiated between a Mr Li Lei ("L") and Mr Xiong Fei ("X") for Fund and Cattle on the one side, and Mr Qiu ("Q") for CMB on the other.

8. The Agreement was governed by Hong Kong law, and contained an ICC arbitration clause (i.e. the Arbitration Agreement) – clause 10.4 – which provides for all disputes between the parties arising out of or related to the Agreement to be settled by arbitration.

9. CMB, through its solicitors, wrote to Fund and Cattle on 18 December 2019 ("12/19 Letter"), complaining that Fund and Cattle had failed properly to manage CMB's Investment, and had acted in breach of their duties owed to CMB as trustees. The 12/19 Letter ended by stating that legal proceedings would be instituted in the absence of a satisfactory response. However, no such claim or proceedings were ever in fact pursued.

10. On 5 June 2020, CMB commenced legal proceedings in Hong Kong under High Court Action 905/2020 ("HCA") against L, X, a Mr Chen Yangyou ("C"), and the 3rd Defendant in these proceedings ("Management"). L was at all material times the Managing Director of

HC, X was an employee of HC, and C was the controlling shareholder and a director of HC.

11. The claims made in the HCA against these parties were that they had made fraudulent misrepresentations to CMB which induced CMB to enter into the Agreement with Fund and Cattle, and that the named defendants had conspired by unlawful means to defraud CMB. The allegedly fraudulent misrepresentations (as originally pleaded in the Statement of Claim) included that the CDH investment group, of which Management was a part, had a lucrative pre-IPO investment opportunity, that the target company (ultimately HC) would be listed on the Hong Kong Stock Exchange shortly, and that CMB should make the investment which would have a substantial yield. The Statement of Claim sought damages from each of L, X, C and Management.

12. Notably, the only defendants named in the HCA were L, X, C and Management. CMB has highlighted throughout that Fund and Cattle were not defendants in the HCA, and that no claims were made against them in the HCA.

13. On 3 July 2020, Fund, Cattle, Management, L and X (together, "Claimants") commenced ICC arbitration proceedings against CMB ("Arbitration"). According to the Request for Arbitration ("RFA"), the Claimants sought relief including: interim and permanent anti-suit injunctions requiring CMB to discontinue or withdraw the HCA and restraining CMB from commencing or pursuing any other proceedings relating to disputes arising out of or relating to the Agreement otherwise than by ICC Arbitration in accordance with the Agreement.

14. As is obvious, the Claimants were in effect seeking to have the claims made by CMB in the HCA moved to and determined in the Arbitration. We agree with Mr Barlow that the focus of the RFA was the HCA and the position of the non-contracting claimants L, X and Management. Hence, the Claimants also sought declarations that:

(1) CMB's initiation of the HCA was in breach of the Arbitration Agreement;

(2) the Claimants are not liable to CMB with respect to the claims made in the HCA;

(3) CMB has no right to claim against L, X, or Management in respect of matters arising out of or relating to the Agreement;

(4) CMB's allegations against L and/or X with respect to fraud, misrepresentation and conspiracy are false;

(5) Management cannot be vicariously liable for the actions of individuals acting on behalf of Fund, L and X;

(6) The HCA is an abuse of process and/or amounts to the tort of malicious prosecution; and

(7) The HCA is time-barred.

15. Indeed, on 24 June 2020, shortly after the commencement of the HCA, the Claimants had applied for emergency relief against CMB under the ICC Rules, seeking *inter alia* an order that CMB should discontinue the HCA, and that all disputes relating to the Agreement should be pursued by arbitration. That was adjourned until an arbitrator was appointed.

16. On 30 July 2020, a sole arbitrator was appointed by ICC for the Arbitration ("Arbitrator").

17. CMB served its Answer to the Request for Arbitration, in which CMB challenged the jurisdiction of the Arbitrator and requested a ruling on jurisdiction ("Jurisdiction Challenge"). In its Jurisdiction Challenge, CMB claimed that Management, L and X had no contract or arbitration agreement with CMB. It also claimed that there was no actual dispute between CMB and Fund and Cattle, arguing that the claims made in the Arbitration were advanced on behalf and for the benefit of non-parties to the Agreement, which was prohibited under clause 10.2 which states:

> No Third Party Beneficiaries - This Letter Agreement is intended to be solely for the benefit of the parties hereto and is not intended to confer any benefits on, or create any rights in favour of, any person other than the parties thereto.

18. On behalf of CMB, it was pointed out that clause 10.2 was reinforced by clause 10.5 of the Agreement:

> "Entire Agreement - This Letter Agreement represents the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior understandings or agreements, oral or written, among the parties as to such matters."

19. On 29 September 2020, the Arbitrator issued his decision on the Claimants' application for relief by interim measures, and on CMB's application for a ruling first on jurisdiction before any further proceedings in the Arbitration. He dismissed the application for interim measures. In essence, the Arbitrator considered that a party seeking interim anti-suit relief must show to a high degree of probability that there was an arbitration agreement which governed the dispute in question. He pointed out that L, X and Management were not on the face of the Agreement parties to it, particularly in the light of clause 10.2 of the

Agreement, and the Agreement does not define parties to include affiliates of the parties. The Arbitrator considered that CMB did not promise under the Agreement with Fund and Cattle that it would not pursue claims against third parties. Hence, the Claimants' application for anti-suit relief was denied.

20. The Arbitrator also declined to decide the Jurisdiction Challenge at the outset. On the basis that the jurisdictional objections raised were closely linked to the merits of the dispute, and could not be easily separated from them, he ruled that the decision on jurisdiction would be included in the final award.

21. CMB claimed that the Arbitrator should not have declined to rule on jurisdiction as a preliminary question. As the Judge held, the Arbitrator was clearly entitled so to do under Article 16 (3) of the Model Law, which has effect by virtue of section 34 (1) of the Ordinance. But, it seems to us that it did give rise to potential problems arising if the Arbitrator were later to decide – as he did (see below) – that he had no jurisdiction to decide the merits of the dispute between CMB and the non-contracting parties L, X and Management.

22. It was only on 30 September 2020 that, L, X, and Management applied in the HCA for an order that the action be stayed in favour of the Arbitration ("HC Stay Application").

23. On 12 November 2020, CMB filed and served an Amended Statement of Claim in the HCA. This (as the Arbitrator pointed out in his Award) contained expanded claims against L, X and Management, with allegations of fraudulent misrepresentations which they had made

from 2014 to 2018, and pleading of their knowledge of matters which allegedly rendered representations made by them to be fraudulent. The allegations of L, X and Management being parties to a conspiracy to defraud CMB were maintained.

24. It can again be noted that no claims were made against Fund and Cattle, whether in the original Statement of Claim or the Amended Statement of Claim filed in the HCA.

25. On 16 December 2020, the Claimants in the Arbitration served their Statement of Claim in the Arbitration ("SOC"). As the Judge pointed out, the claims and pleadings made are somewhat unusual. After referring to the factual background, the terms of the Agreement, the role of the parties and the HCA which had been commenced, the SOC pleaded amongst other things that:

(1) the fraud and conspiracy allegations in the HCA are not credible;

(2) the claims have no prospect of success;

(3) the claims of inducement cannot be made out;

(4) CMB cannot establish that the alleged representations were made and that there were actionable representations, cannot establish the falsity of the representations, and cannot demonstrate reliance;

(5) CMB has not established that it has suffered any damages from relying on the alleged representations; and

(6) the claims of fraudulent misrepresentation are time-barred.

26. Again, it is clear that the Claimants were seeking to have determined in the Arbitration the issues raised in HCA against L, X and Management (but not raised against Fund and Cattle). The Judge noted Mr Barlow's submission, with which we agree, that the claims made as to the lack of prospect of success of the HCA are akin to claims made in a striking out application, and that the proper forum for such application was in the HCA, for determination by the Court. However, no such application had ever been made by the parties to the HCA.

27. The relief sought in the SOC was for the Arbitrator to:

> (a) Declare that Fund and Cattle, whether directly or on behalf of their agents and representatives (L, X and Management), and each of L, X and Management has no liability to CMB with respect to its allegations of (i) fraud; (ii) conspiracy and (iii) breach of trustee duties, and that all such allegations are false;
>
> (b) Declare that CMB's fraud and conspiracy allegations in respect of its entry into the Agreement are time-barred pursuant to the Limitation Ordinance (Cap. 347);
>
> (c) Declare that CMB's initiation of the litigation and/or its pursuit of the fraud and conspiracy claims against Management, L and X breached;
>
> i. its obligation in Clause 5.2(e)(i) of the Agreement not to 'do any act or thing which would have a material adverse effect on the Right and/or the Project' (as defined);
>
> ii. its obligation in Clause 7.1 of the Agreement to keep confidential the 'Agreement and its terms and the Investment';
>
> iii. its agreement in Clause 8.1 of the Agreement that Fund and Cattle introduced and arranged for the investment and the Project;
>
> iv. its obligation in Clause 8.2 of Agreement to waive liability over the Claimants;

v. the entire agreement provision in Clause 10.5 of the Agreement; and

vi. the Arbitration Agreement in Clause 10.4 of the Agreement.

(d) Declare that Management are not vicariously liable for actions of Fund's representatives and agents, L and X, in relation to the investment;

(e) Declare that CMB's litigation is an abuse of process;

(f) Grant a permanent injunction requiring CMB to discontinue or otherwise formally abandon the litigation;

(g) Grant a permanent injunction restraining CMB from commencing or pursuing any court or other proceedings relating to disputes arising out of or relating to the Agreement otherwise than by ICC Arbitration in accordance with Clause 10.4 of the Agreement;

(h) Award the Claimants' damages for all losses resulting from CMB's breaches of the Agreement and abuse of process;

(i) Order CMB to reimburse all costs and expenses incurred by the Claimants in connection with the preparation and conduct of the Arbitration, including the fees and/or expenses of legal counsel, experts, consultants, witnesses, the Claimants' own staff, the Sole Arbitrator and the ICC; and

(j) Grant any other relief that the Arbitrator considers appropriate.

28. The declaration sought in (a) above – as later granted in amended terms – was the subject matter of the setting aside application heard by the Judge. That declaration as sought focused on, and asserted the falsity of, the allegations made in the HCA. But it can usefully be noted here that whilst CMB had in HCA made allegations and asserted liability against L, X and Management, CMB had never made allegations against Fund or Cattle nor had it asserted that Fund and Cattle, whether directly or indirectly, had any liability to CMB with respect to its

allegations of (i) fraud; (ii) conspiracy; and (iii) breach of trustee duties, made against L, X and Management.

29. In short, Fund and Cattle were seeking a declaration of non-liability in respect of something for which CMB had never asserted they were liable, arising out of allegations CMB had never made against them.

30. On 14 April 2021, the parties in the HCA (namely CMB, L, X, C and Management) applied by consent for the HC Stay Application to be dismissed. This followed correspondence exchanged between the solicitors for the Claimants and for CMB in February and March 2021. However, the attempts to agree also on the terms of the termination of the Arbitration were unsuccessful. Before the Judge, Counsel for the Defendants sought to highlight the fact that CMB refused in March 2021 to agree to a draft Consent Award to be made in the Arbitration, in terms that:

> (Fund), (Cattle), including any individuals acting in their capacity as officers, agents and/or representatives of these entities, have not breached the terms of the (Agreement) and have no liability, whether contractual or non-contractual, to (CMB) arising out of, relating to, or in any way connected with the (Agreement), including in respect of CMB's US$10 million investment thereunder.

31. Mr Yu also sought to highlight this point again before us, but on Mr Yu's own argument as to the time when a dispute must have arisen for the Arbitrator to have jurisdiction – i.e. before the reference to arbitration – this failure to agree proposed terms of an award to end the Arbitration is neither here nor there (whatever may have been the basis of that failure or refusal).

32. After the service of further pleadings, the parties exchanged Opening Submissions in the Arbitration, and the trial took place on 25 October 2021. Prior to the hearing, the Arbitrator had raised queries with the parties on 24 October 2021. In an email that day, the Arbitrator stated and asked:

> 1. (CMB) makes no claims in any forum against (Fund) and (Cattle) under the (Agreement).
>
> 2. Any such claims would need to be pursued in arbitration under Clause 10.4 of the (Agreement).
>
> 3. In any event, no such claim can be advanced in subsequent arbitration proceedings (ie because that would represent impermissible 'holding back' of claims).
>
> To what extent, if at all, are these three points correct?

33. On the first day of the hearing, all the three questions raised by the Arbitrator were answered "yes", by all the parties in the Arbitration.

34. It is not disputed that CMB maintained its Jurisdiction Challenge throughout the hearing of the Arbitration. In the Opening Submissions served on behalf of CMB, it was claimed that the Arbitrator did not have jurisdiction because the Claimants had submitted to the jurisdiction of the Court in the HCA by their abandoning the HC Stay Application, and all parties in the HCA had consented that the determination of their claims or issues was within the exclusive jurisdiction of the Court. It was also contended that by pursuing the claims in the Arbitration, there was *mala fide* abuse of the arbitral process by all the Claimants.

35. On behalf of the Claimants, Counsel highlighted the fact that L had given oral evidence and was extensively cross-examined in the Arbitration. Counsel further pointed out that CMB elected not to call any of its witnesses, and a submission of "no case to answer" was made instead. Such submission was withdrawn the following morning, and Counsel for CMB submitted instead that the Arbitrator should decide the case on the basis of the records before the tribunal, without regard to the statements of their witnesses. Closing submissions were then exchanged and made.

C. The Award

36. The Award was handed down on 10 March 2022.

37. The Arbitrator found that L, X and Management were not parties to the Agreement, and therefore he had no jurisdiction to grant the anti-suit injunction to restrain the HCA at their request.

38. Further the Arbitrator found that the HCA was not a breach by CMB of the Arbitration Agreement, and that no damages for breach should be awarded. We would point out that that finding necessarily encompassed recognition, albeit only implicit, that CMB had made no claim at all arising under or relating to the Agreement as against Fund or Cattle (because, if it had, making such claim in the HCA would have been a breach of the Arbitration Agreement).

39. The Arbitrator found that he had jurisdiction in respect of Fund and Cattle "in so far as they seek declarations of non-liability as

regards their own position". His central reasoning is in §73 of the Award, as follows:

> 73. On the face of it, [Fund and Cattle] appear to have a legitimate interest in the declaratory relief sought at (A) of §197 of the Statement of Claim. [CMB's] jurisdictional objection was, in substance, that neither entity has a dispute with [CMB] and hence could not validly commence arbitration. However, if either or both have a legitimate interest in seeking that declaratory relief then this objection falls away. The relief sought at (A) is a negative declaration.

40. He accordingly made the following declaration ("Declaration"):

> [Fund and Cattle] have no liability to [CMB] with respect to the allegations arising out of the [Agreement] that are the subject matter of the [HCA], and that all such allegations in so far as they are made against [Fund and Cattle] are false.

41. On costs, the Arbitrator then found that since Fund and Cattle had succeeded in part in the Arbitration, in that they had obtained the Declaration of non-liability in respect of the allegations in the HCA arising out of the Agreement, and had overcome the Jurisdiction Challenge in that regard, and further CMB had been slow in providing the unequivocal confirmation that it did not pursue any claims against Fund or Cattle arising out of the Agreement until the first day of the hearing, CMB should pay HK$8,374,125.15 as the legal fees and expenses incurred by Fund and Cattle, in addition to 50% of the costs of the emergency arbitrator proceedings.

42. The Arbitrator stated in the Award that although he had no jurisdiction to issue the anti-suit injunction against non-parties to the Agreement, at the request of L, X and Management (who were the only

named Defendants in the HCA), and as he had found that the HCA was not a breach of CMB's Agreement made with Fund and Cattle, and although it was not necessary for him to decide the points, he nevertheless made observations at §110 of the Award, which CMB sought to set aside as having been made in the absence of jurisdiction and power, and in the absence of any issue or dispute between CMB, Fund and Cattle.

43. The relevant §110 is set out below:

> 110. Given the attention that was devoted to these points and in the hope that these comments may provide some assistance in the (HCA) and although it is not necessary to decide these points, the Tribunal does note:
>
> a. As stated above, given the terms of the (Agreement), (Fund and Cattle) would appear to be the natural respondents to the wide-ranging allegations advanced in the (HCA). In its letter dated 18 December 2019, CMB made allegations against (Fund and Cattle) in relation to the (Agreement). (CMB) did not pursue proceedings against (Fund or Cattle); instead it started the HCA against (L, X and Management).
>
> b. The (Agreement) contains provisions that, on their face at least, confirm that (CMB) would, in effect, take its own view of the investment and not seek to claim any resultant losses from (Fund or Cattle) (or their affiliates); Clause 8.
>
> c. CMB did not support its allegations by oral evidence; the two witnesses who had provided witness statements did not give oral evidence. There was therefore no positive case supported by witness evidence to sustain the very wide-ranging allegations of fraud.
>
> d. (L) did give oral evidence and was extensively cross-examined. CMB accepts (L) is experienced in private equity investment (Amended SoC, §2(1)). Without making detailed

findings about his evidence, the Tribunal generally found his evidence to be credible, open and honest. He explained cogently difficulties encountered with the investment in (HC) and attempts by the CDH Group to counter them.

e. (CMB) has not identified any clear or coherent motive as to why (L, X or Management) would wish to conspire to persuade (CMB) to enter into the (Agreement), only then to run-down (HC). The misfortunes of (HC) also directly affected (Fund's) $70 million investment – it has also not had any return at all on its investment. There is no clear or credible case as to what (L, X or Management) stood to gain from the alleged fraud and conspiracy.

f. The allegations made in the (HCA) are on their face improbable, amounting to the fact that (Management) is conspiring to defraud another entity within the CDH Group by inducing it to invest in (HC) and continued this fraudulent scheme over a long period (2014-2018).

g. The allegations that (L) represented to (Q) that HC's shares could be listed in 2014 (summarised in Claimants' Opening, §72) appear to the Tribunal to be improbable (These are the original or baseline allegations in the (HCA) and have subsequently been substantially expanded to cover events to 2018). A pitch document headed Project Redbull, March 2014, which (Q) sent by email to a Mr Cai, apparently a prospective investor, on 11 March 2014 (i.e. six days before the (Agreement) was signed), and prepared by an All Wins entity, appears to reflect independent analysis which (Q)/All Wins had apparently done on (HC). The document states that 'we believe that (HC) can complete its overseas IPO within 1-3 years' (p.1), set outs 'preliminary' design of a post-listing structure (p.2) and says that the plan and timing of the listing are 'realistic and feasible' (p.2). Recognised next steps include the need to seek approval from regulatory authorities (for the listing) and complete other steps (p.5). This document suggests that whilst (Q)/All Wins were hopeful of a listing within 1-3 years (and not necessarily within 2014) more work was to

be done. Experienced investment professional investors would likely be taken to have realised that the listing plan was just that at that stage, a plan, on which more work expressly needed to be done and hence which could run into trouble. The document does not say that (L or X) (or anyone else) had guaranteed to (Q) that a listing would take place, either within 2014 or at all. (Q) stated in his third witness statement, at §24, that he understood that a listing of (HC) in Hong Kong would take place within 6 months (and/or that there were no significant impediments to a listing) and such a listing would result in returns of 2.5 the initial investment. However, he did not attend to give oral evidence and so no weight can be attached to that statement.

h. Although the Tribunal did not hear oral evidence from (Q), he appears to be an experienced investment professional, and he was closely connected to All-Wins, which itself appears to be a private equity/investment management firm. Q/All-Wins appear to have been in a position to judge the suitability of the investment for themselves, consistently with Clause 8.1.

44. From §§111 to 118, the Arbitrator set out his observations on whether L, X and Management were affiliates for the purposes of clause 8.2 of the Agreement. The Arbitrator stated that Management was plainly an affiliate, Management being an advisor to the manager of Fund, and Fund and Management being part of the CDH Group. The Arbitrator also stated that if it had been necessary to decide the point, he would have decided that L, X and Management were affiliates for the purpose of clause 8.2.

45. Before the Judge, CMB claimed that these paragraphs contain findings and observations which were made in the absence of any jurisdiction on the part of the Arbitrator, in the absence of any arbitration

agreement between CMB, L, X and Management, and in the absence of any dispute between CMB, Fund and Cattle.

D. The Decision Below

46. Having set out the background along the lines of that set out above (§§4-34 of the Decision), the Judge turned to consider whether there had been any jurisdiction to make the Award and the Declaration. Having reviewed the Award as a whole and in context, the Judge did not agree (§37) that the Arbitrator had jurisdiction to make the Award (meaning those parts of the Award the subject of the challenge). In reaching that conclusion:

(1) The Judge referred (§40) to the Arbitrator having stated (at §82 of the Award) that Fund and Cattle appeared to be the "natural respondents" to the extensive allegations relating to the Agreement pleaded in the HCA, and that the Arbitrator thought there was potential for the outcome of the HCA to affect the CDH Group including Management and one of its senior employees, L, who had the spectre of claims hanging over them.

(2) The Judge (§41) also considered §82 the Award to contain several contradictions, but thought (§42) it more significant that the Arbitrator had confused the question of whether he had jurisdiction in the Arbitration to deal with the claims made in the Arbitration, with the question of whether he should exercise his power to grant the remedies sought in the Arbitration.

(3) The Judge cited (§43) the trite principle that for there to be a valid arbitration process and a valid award, there has to be a

formulated dispute, and the right of the parties to put an arbitration agreement into effect does not arise until and unless there is a dispute between the parties to the agreement. Unless there is a dispute, there is nothing to be referred to arbitration.

(4) The Judge accepted (§44) the submissions made on behalf of CMB that there was no dispute between CMB on the one part, and Fund and Cattle on the other part. She acknowledged that, as CMB had maintained throughout, no claims had been made against either Fund or Cattle, and the allegations were directed against L, X and C, on the basis that they had acted for themselves and on behalf of Management. Damages were sought against (only) L, X, C and Management.

(5) Nor (§45) were the claims previously made in the 12/19 Letter relevant, when they were different in nature from the claims made in the HCA. The fact that the 12/19 Letter made no mention of fraud and conspiracy against Fund and Cattle is consistent with their not having been sued in the HCA in respect of claims made in those proceedings, directed against other parties.

(6) The Judge held (§§46-48 and §§54-55) that a view that Fund and Cattle had an interest in the pursued negative declaration did not matter if there was no dispute to begin with between CMB, Fund and Cattle. Even if a claim is not essential for a dispute, there must nevertheless be something in the nature of an assertion by one party, and a situation in which the parties neither agree nor disagree about the true position is not one in which there is a dispute. No matter how wide an arbitration clause, it can only cover disputed claims between

the parties to the Agreement, namely claims and disputes between CMB and Cattle and Fund.

(7) The Judge did not agree (§§50-52) that CMB's refusal to agree to a draft Consent Award in February 2021 can evidence a dispute between CMB and Fund and Cattle. CMB had made the jurisdiction challenge, and its stance was that as there was no claim made against Fund and Cattle, the rights under the Arbitration Agreement had not been engaged for them to commence the Arbitration or to confer any jurisdiction on the Arbitrator. In any event, shortly thereafter, CMB confirmed that it had no claim, contractual or non-contractual, against Fund or Cattle – evidencing the absence of any dispute or assertion made as to the liability of Fund or Cattle.

(8) The Judge held (§54) that whether the allegations made against L, X, C and Management are incredible or improbable, or whether there is any operative representation, are for matters finding and determination by the Court in the HCA. If those claims are liable to be struck out, that is for them to pursue in the HCA. Where the Arbitrator had already ruled that he had no jurisdiction to decide the claims of L, X and Management in the arbitration, and that they were not parties as affiliates, the observations made by the Arbitrator in §§110-118 of the Award were all made without jurisdiction, were irrelevant and unnecessary.

(9) The Judge rejected (§56) the suggestion that the dispute which arises under the Request for Arbitration falling within the jurisdiction of the Arbitrator can be "whether the Declaration can or should be made", as that simply begs the

question of whether the Arbitrator has jurisdiction to make the Declaration.

(10) In any event (§57), as evident from the answers given on the first day of the Arbitration to the three questions raised by the Arbitrator, there was no dispute and no issue between the parties.

(11) The Judge rejected (§58) the suggestion that the dispute between CMB, Fund and Cattle can relate to liability for allegations made in the HCA "in so far as they are made against Fund and Cattle", which is clearly academic when CMB had confirmed to Fund, Cattle and the Arbitrator that no claims were made against Fund and Cattle. Either (a) allegations have been made which were denied, for a dispute to arise conferring jurisdiction on the tribunal, or (b) no allegations had been made, which can only lead to the result that there was no dispute, the arbitration agreement was not triggered, and no jurisdiction was conferred. There can be no half-way house.

(12) Further, the submissions made by Mr Barlow were accepted (§59) that all the parties in the Arbitration commenced had the duty of good faith to act *bona fide* in the conduct of the Arbitration. L, X and Management as parties to the HCA had abandoned the Stay Application and submitted to the jurisdiction of the Court for determination of the claims made against them. Fund and Cattle had knowledge of this. Hence, the Claimants in the Arbitration had the duty to discontinue the Arbitration, since the claims which were made in the Arbitration were solely and essentially whether the fraudulent misrepresentation claims which were made in the HCA were false, and those matters were the very matters

agreed by L, X and Management to be decided by the Court. The arbitral process would be abused were duplication of proceedings on the same issues and between the same parties to be permitted.

(13) In light of the finding on lack of jurisdiction, it was unnecessary to address the arguments as to whether the Award is against public policy for ousting or usurping the jurisdiction of the High Court (§60).

47. We have set out this review of the Judge's Decision in some detail because, as will be seen below, we are broadly in agreement with the approach taken by the Judge.

48. The Judge granted leave to appeal because she took the view that, although the case turned on the application of the particular facts and particular circumstances to the individual arbitration clause agreed between the parties, questions were raised as to whether her Decision on the construction of the clause and of the meaning of "disputes" was plainly wrong, in that there can be a dispute between parties to a contract, when non-contractual claims and assertions are made against a third party who was a stranger to the arbitration agreement, on the basis that there is an assertion "arising out of or related to" the contract.

E. Notice of Appeal and Respondent's Notice

49. On the basis that this Court is addressing the question of the jurisdiction of the Arbitrator on a *de novo* basis, the precise way in which the issues on this appeal have been raised through the Notice of Appeal and the Respondent's Notice do not strictly need to be addressed directly.

Nevertheless, those points can provide some useful guidance as to the appropriate process of thought and analysis.

50. The Notice of Appeal identified intended grounds of appeal as follows:

(1) The Judge erred in her construction of the Arbitration Agreement, in holding that there was no "dispute" between the parties such as to engage the Arbitrator's jurisdiction. In particular, the Judge erred in approaching the question of whether there is a "dispute" by considering whether there was a "claim" made by CMB against Fund and Cattle.

(2) The Judge failed to pay any or any sufficient regard to, or misapplied, the relevant principles of construction that:

(a) In the context of arbitration agreements, the word "dispute" is to be construed inclusively and not overly legalistically. For a "dispute" to arise, it is unnecessary for a "claim" (in the sense of a legal claim or legal cause of action) to be made by one party against another. Assertion or adoption of a position by one party which is expressly or by implication rejected or at least not accepted by the other suffices.

(b) The phrase "arising out of or relating to" is to be given a broad construction. The phrase "relating to" has the widest possible meaning of any expression intended to convey some connection between two subject matters.

(c) The time for determining whether a "dispute" has arisen is at the time of commencement of the

arbitration, and not thereafter. That is what engages the arbitrator's jurisdiction, and if there ceases to be a dispute thereafter, that does not affect the arbitrator's jurisdiction having been validly engaged at the outset.

(3) The Judge failed to have any or any proper regard to relevant matters, and had regard to irrelevant matters, when construing the Arbitration Agreement and applying it to the facts of the case.

(4) Even if matters occurring after commencement of the Arbitration are relevant, the Judge erred in her consideration of them in determining whether a "dispute" existed to engage the Arbitrator's jurisdiction.

(5) Though the Judge noted that the existence of a claim was not essential for a dispute to have arisen, she failed to apply that principle and instead effectively equated the absence of a "claim" by CMB against Fund and Cattle with the absence of a "dispute" between them.

(6) It was an error for the Judge to take into account whether the declaration was "academic", when holding that there was no "dispute", because whether or not the declaration was academic was a matter going to the conditions for granting declaratory relief as opposed to a true question of jurisdiction.

(7) Where there was the clear existence of a dispute between Fund and Cattle on the one hand and CMB on the other, the Arbitrator was entitled to make his observations on the dispute in §§110-111 of the Award, which were in any event not formal factual findings.

(8) Accordingly, the Judge ought to have held on the proper construction of the Arbitration Agreement that there was a "dispute" between Fund and Cattle on the one hand and CMB on the other "arising out of or relating to" the Agreement, such that the Arbitrator's jurisdiction was engaged. No part of the Award should have been set aside, and there was no breach by the Defendants of their duty to act *bona fide* in the conduct of the Arbitration, and no abuse of arbitral process.

51. In the Respondent's Notice, the broad points made included the following:

(1) The Judge was not required to construe the word "dispute" in the abstract or separately from its contractual context.

(2) Within the material contractual context, the absence of any claim or adverse assertion or adoption of a position by CMB against either Fund or Cattle – together with CMB's unequivocal waiver of any such claim against them – required the legal conclusion that no arbitral jurisdiction had been engaged.

(3) The absence of a dispute between the parties deprives any appointed Arbitrator of arbitral jurisdiction, and whenever an earlier dispute ceases to exist, the Arbitrator then has nothing to "finally settle" or resolve or decide.

(4) Contrary to the assertion made by Fund and Cattle, CMB pleaded not only that the HCA Defendants did not act as agents for Fund and Cattle when making the alleged fraudulent misrepresentations or conspiring to injure CMB,

but also that the deceit was simultaneously practised upon the JV Investors who made the Fund's investment.

(5) The Arbitrator's purported findings in §§82, 110 and 125 demonstrated the Arbitrator's lack of conscientious endeavour to decide the issues pleaded and argued in accordance with Hong Kong law.

(6) CMB's pleading in the HCA that L and X forbore from suing Cattle related only to the period after execution of the Agreement.

(7) The impugned parts of the Award also fell to be set aside on the grounds of the public policy challenge mounted by CMB before the Judge.

F. Applicable Principles

52. The relevant principles can almost be sufficiently summarized as by the Judge in §1 of her Decision. On the one hand, arbitration agreements are construed widely, as it is the policy of the Court to uphold a contract made by consenting parties to submit their disputes to their forum of choice. On the other hand, a party is only bound to that choice against its proper contracting counterpart, and it would be artificial for an arbitration to be commenced in order to compel a party to admit the lack of merit in a claim never made by him.

53. We can also point out the following settled principles:

(1) In the arbitration context, the term "dispute" should be construed inclusively and not overly legalistically.

(2) For a "dispute" to exist, it is unnecessary for there to be a "claim" in the sense of a legal claim or legal cause of action asserted by one party against the other.

(3) Various phrases have been adopted in previous authorities to identify the sufficiency of existence of a "dispute", such as "assertion or adoption of a position by one party which is expressly or by implication rejected or at least not accepted by the other" and "a difference of opinion about the central issues".

(4) Therefore, there must be something in the nature of an assertion by one party, and a situation in which the parties neither agree nor disagree about the true position is not one in which there is a dispute.

(5) Further, some cases identified that silence in the face of a claim or assertion does not raise a dispute, as what is required is a rebuttal or denial of the claim or assertion.

(6) The phrase "arising out of or relating to" is to be given a broad construction, and "relating to" has a wide meaning intended to convey some connection between two subject matters.

(7) The time for determining whether a "dispute" has arisen is as at the time of the commencement of the arbitration, when the arbitrator's jurisdiction is invoked, because it is the existence of the dispute which engages that jurisdiction.

(8) In other words, it must be possible to formulate the "dispute" which is said to engage the jurisdiction.

(9) A "dispute" may arise and continue to exist, unless there is a clear and unequivocal admission of both liability and quantum.

G. Did the Arbitrator have Jurisdiction?

54. First, though not strictly necessary as we approach this question *de novo*, we think that the criticism of the Judge's use of the word "claim" at various points in her Decision is unfair. When read as a whole, her Decision was not using the word "claim" only in the sense of a legal claim or cause of action, and she appears to have used the word almost interchangeably with "assertion". Similarly, she used the word "claim" within her Decision in contexts which identified that it was not being used in the limited fashion now put forward as the criticism.

55. Next we note that, at the same time as insisting that the relevant time for considering whether a "dispute" had arisen is at the point of the first RFA (because that is the time when the Arbitrator's jurisdiction was invoked), Mr Yu has nevertheless sought to rely on a number of matters which necessarily occurred after that – including in particular what was or was not said in the pleadings in the Arbitration.

56. Leaving aside whether jurisdiction once founded can be lost if an existing "dispute" somehow goes away, we think it helpful to focus on what had materially occurred up to the making of the RFA on 3 July 2020.

57. In summary, by that point in time:

(1) Whilst CMB had made certain assertions against Fund or Cattle in the 12/19 Letter, no further steps had been taken with regard to those assertions by CMB – or by Fund or Cattle. The 12/19 Letter is irrelevant for present purposes.

(2) CMB had commenced the HCA against L, X, C and Management.

(3) CMB had not included either Fund or Cattle as defendants to the HCA.

(4) Nor had CMB made any assertion anywhere else that either Fund or Cattle were somehow liable for the alleged wrongdoings on the part of the defendants to the HCA.

(5) Fund or Cattle knew that no relevant assertion or claim made by CMB against L, X, C and Management had been made against them.

(6) Fund and Cattle apparently even formed the view that the exclusion of Fund or Cattle from the HCA was to avoid the arbitration proceedings which would have been triggered or necessitated had there been a claim against them falling within the Arbitration Agreement.

(7) None of L, X, C or Management had yet made any application to stay the HCA in favour of arbitration.

(8) Nor had L, X, C or Management made any application to strike out any part of the claims made against them in the HCA.

(9) Hence, on the face of it, allegations or assertions had been made against L, X, C or Management in the HCA, and would fall for determination by the Court in the HCA.

(10) But no relevant allegations or assertions had been made against Fund or Cattle in the HCA or by any other means.

58. On those facts, it is difficult to see that any dispute between CMB on the one hand and Fund and Cattle on the other, falling within the

terms of the Arbitration Agreement, had come into existence. Nevertheless, the Arbitrator proceeded on the basis that he had jurisdiction. Like the Judge, we think he was wrong.

59. First, we agree with the Judge that the Arbitrator erred in §73 of the Award – which we have set out above – by conflating whether he had jurisdiction with whether Fund and Cattle had "a legitimate interest" in seeking the negative declaration. We acknowledge that at §34 of the Award the Arbitrator correctly identified the two stages of first finding whether he had jurisdiction and secondly, if so, whether to grant relief. But we think that when it came to his analysis, he in fact conflated those two questions. We also think that Mr Yu's offered reading of what the Arbitrator meant in §73 – namely, if there was a real interest in getting a negative declaration then plainly there was a dispute – also conflates the two separate questions, or 'puts the cart before the horse'.

60. It also seems to us that the Arbitrator further demonstrated his error when in §82 of the Award – following his consideration of whether the requirements for grant of declaratory relief had been satisfied – he said:

> 82. … [Fund and Cattle] are properly entitled to at least ask for confirmation in the form of an award that they have not committed a series of frauds or otherwise relevantly breached the [Agreement]. The Tribunal is clear that the negative declaration sought does serve a useful purpose and would serve the interest of justice. The Tribunal does not therefore need to make any findings about the extensive evidence that it heard in respect of the [Agreement] for the purpose of this particular declaration in the light of [CMB]'s confirmations given at the oral hearing that [CMB] has no claims against [Fund or Cattle].

61. With respect, that turns the proper reasoning on its head. The Arbitrator was holding that because no claim to any liability had been made against Fund or Cattle, there could be no objection to their being granted a negative declaration that they had no liability. However, the correct position is that where CMB had not asserted any liability, as well as having subsequently expressly confirmed that it was not asserting any such claim to liability, there was no relevant dispute between CMB and Fund and Cattle as might have founded jurisdiction for the Arbitrator.

62. It is difficult to follow why Fund and Cattle might need, let alone be entitled to, confirmation in the form of an award that they have not committed a series of frauds or otherwise relevantly breached the Agreement when no one has asserted that they have.

63. The Arbitrator's comment earlier in the same §82 of the Award that Fund and Cattle appeared to be the "natural respondents" to the extensive allegations relating to the Agreement pleaded in the HCA also ignored the point that Fund and Cattle were not the subject of the allegations, or any relevant allegations, either in the HCA or any other forum. We would also note that the suggested justification of concern about reputational damage would not likely be assuaged by obtaining an arbitration award, in private arbitral proceedings.

64. We also share the Judge's view (§41 of her Decision) that the above passage contains several contradictions. As she pointed out: (1) it referred to CMB's confirmations that it had no claims against Fund or Cattle; (2) it pointed to the fact that the Arbitrator did not need to make any findings on the evidence; yet, (3) the Arbitrator then proceeded to make various findings on the evidence, albeit in the form of what he says

he "noted". We shall return to this point under the consideration of public policy below.

65. We would add that if the Arbitrator did not need to make findings, first that rather suggests there was no dispute which he had to resolve, and further it raises the question as to how he felt able in the absence of making any findings to make a declaration of falsity.

66. As already indicated, the Declaration granted by the Arbitrator was in terms different from that sought in §197(a) of the SOC, which was:

> Declare that Fund and Cattle, whether directly or on behalf of their agents and representatives (L, X and Management), and each of L, X and Management has no liability to CMB with respect to its allegations of (i) fraud; (ii) conspiracy and (iii) breach of trustee duties, and that all such allegations are false

67. The Declaration he made was:

> [Fund and Cattle] have no liability to [CMB] with respect to the allegations arising out of the [Agreement] that are the subject matter of the [HCA], and that all such allegations in so far as they are made against [Fund and Cattle] are false.

68. In particular, it can be noted that:

(1) The Arbitrator removed the reference to the alleged two routes of liability, being liability arising "directly" and that arising "on behalf of their agents and representatives".

(2) The Arbitrator changed the "allegations" referred to from CMB's "allegations of (i) fraud, (ii) conspiracy and (iii) breach of trustee duties" (which were the allegations

made in the HCA) to "allegations arising out of the [Agreement]", which is not the same thing.

(3) The last phrase "that all such allegations in so far as they made against [Fund and Cattle] are false" is inconsistent with, and appears to overlook, the fact that no such allegations had ever been made against Fund and Cattle.

69. His rewording and the addition of the last phrase "that all such allegations in so far as they made against [Fund and Cattle] are false" was presumably to cater for the position reached by his decision that he had no jurisdiction over the dispute between CMB and the other claimants. But the changes were fundamental, not least in the change of definition of the relevant allegations. With respect, the addition of the last phrase was in effect meaningless, where no such allegations had ever been made against Fund and Cattle. Again, it might also be asked how, when no such allegations had been made, they could have been decided to be false.

70. We do not think it was open to the Arbitrator to make such amendments to the relief actually sought, when those very changes pointed to the absence of jurisdiction.

71. Mr Yu sought to avoid the difficulties by giving an example, which he said was factually equivalent to the present case: (1) there is an agreement between A and B, containing an arbitration clause, where (2) B had acted by its human agents C, and where (3) A claims that the agreement has been brought about by fraud on the part of C. Therefore, Mr Yu says, there is a dispute between parties A and B, and jurisdiction

does arise because B says the agreement was not induced by fraud, and it is not liable for it.

72. As he put it by reference to the parties, Mr Yu suggested that the dispute arose because Fund and Cattle were saying that the Agreement made with CMB was not the result of any fraudulent misrepresentation, and this was contrary to the assertion made by CMB in the HCA. In other words, CMB had made an assertion or claim relating to the Agreement – namely that the existence of the Agreement itself was the result of fraudulent misrepresentations – but Fund and Cattle disputed that allegation.

73. However, that seems to us to leave out further important factual matters, including that (1) CMB (A in the lettered example) does not seek to challenge the existence of the Agreement or seek any remedy impugning its terms, (2) CMB does not assert any form of liability on the part of Fund or Cattle (B in the example), in relation to the Agreement or otherwise, (3) CMB's assertions of fraud etc against L, X, and Management (C in the example) made in the HCA are not asserted against nor said to give rise to any liability on the part of Fund or Cattle, and (4) CMB has asserted that Fund was a co-victim of the fraud. Once those additional facts are put into the example, then the position remains that there is no relevant dispute falling within the terms of the Arbitration Agreement between CMB (A) and Fund and Cattle (B).

74. It is also of note that Fund and Cattle did not seek a declaration that the Agreement was not induced by fraud – which is the point of 'dispute' Mr Yu seemed to assert (and which is anyway what falls to be determined by the Court in the HCA, see below). Rather, they

sought a declaration that they had no liability, direct or indirect, for the alleged fraud, conspiracy and breach of trustee duties alleged against others – when no one had suggested they had any such liability.

75. Perhaps another way to test the jurisdiction question is as follows:

(1) On the Arbitrator's own findings (with which aspect we agree), none of L, X or Management had the right under the Arbitration Agreement to commence arbitration proceedings against CMB.

(2) This was because they were neither parties to, nor could they benefit from, the Arbitration Agreement.

(3) But it is also because their dispute arose as a result of being sued in the HCA, and (after originally making the Stay Application) they expressly submitted to the jurisdiction of the High Court to resolve that dispute.

(4) In any event, before that, at the material time the Arbitrator's jurisdiction was invoked, there was no reason to think that the Court was not going to resolve that dispute.

(5) Therefore, the position as regards Fund and Cattle ought to have been addressed on the basis that their position was divorced from that of L, X and Management.

(6) Once L, X and Management are removed from – and analytically properly ignored in the context of – the Arbitration, the lack of any actual "dispute" between Fund and Cattle is rendered stark.

(7) The allegations made against L, X and Management in the HCA – and made only against them – have no place in an arbitration, and can only be resolved in a Court.

(8) CMB has never asserted any liability on the part of Fund or Cattle arising from the matters comprising the allegations made against L, X and Management.

(9) Hence, the pursuit by Fund and Cattle of the negative declaration of non-liability can be seen even more clearly to be an attempt to clothe an arbitrator with jurisdiction by engineering a dispute which has not in fact ever arisen, because no assertions have ever in fact been made as could give rise to that dispute.

76. Indeed, we think that had the Arbitrator been faced with an arbitration claim brought only by Fund and Cattle, he might more readily have seen that there was in reality no dispute as could found his jurisdiction, and he would unlikely have been led into offering his thoughts on issues which only the Court could decide.

77. That point also lends some support to Mr Barlow's submission, made throughout, that Fund and Cattle were in reality pursuing a proxy claim on behalf of the non-contracting parties. This is another aspect potentially relevant to the consideration of public policy below.

78. Lastly, we think the very fact that Fund and Cattle were seeking a negative declaration – a declaration of non-liability – tends (at least on the facts of this case) to point to the artificiality of the suggestion that there was a dispute. In the factual context, we think that this form

of relief sought should have set alarm bells ringing as to whether there was an attempt to engineer the existence of a dispute, so as to bring into the arbitral process for determination those matters which already arose for determination in the HCA involving persons not themselves parties to, or able to take the benefit of, the Arbitration Agreement.

79. We do not rule out the possibility that there can be a 'dispute' between parties to a contract, when non-contractual claims and assertions are made against a third party who was a stranger to the arbitration agreement, on the basis that there is an assertion "arising out of or related to" the contract. But each case must turn on its own facts, and the particular facts and peculiar circumstances of this case do not fall within that.

H. Public Policy

80. The question of public policy is separate from that of jurisdiction, and can arise even if the Arbitrator had jurisdiction (though we think he did not).

81. We accept Mr Yu's submission that the public policy ground identified in section 81/Article 34(2)(b)(ii) is not a 'catch-all' provision to be used whenever convenient. It is limited in scope and sparingly applied, and there must be something which is contrary to fundamental conceptions of morality and justice.

82. But we are persuaded that there has been conflict within the Award with the public policy of Hong Kong, that would (in addition to

the jurisdiction point) lead to the setting aside of the parts of the Award set aside by the Judge.

83. This is, first, because there was a clear abuse of process:

(1) After being sued in the HCA, L, X and Management commenced the Arbitration.

(2) They did so in their own names – notwithstanding that they were not parties to the Arbitration Agreement.

(3) They also did so as the controllers or directing minds of Fund and Cattle.

(4) The Claimants' clear purpose of the Arbitration was to seek to have the issues raised in the HCA dealt with in the Arbitration.

(5) The Claimants failed to obtain interim anti-suit injunction orders from the Arbitrator.

(6) Thereafter (and only thereafter), L, X and Management made the Stay Application in the HCA.

(7) However, they subsequently abandoned the Stay Application, and instead submitted to the jurisdiction of the Court to determine the issues in the HCA.

(8) Nevertheless, notwithstanding that fact, all of the Claimants maintained their claims in the Arbitration and pursued them to a trial in the Arbitration.

(9) Those claims included seeking final relief anti-suit injunction orders, as well as the determination of the substantive factual and legal issues in the HCA.

(10) That could have no legitimate purpose, where the Court had the exclusive jurisdiction to determine the issues before it in

> the HCA, and where any purported findings in the Arbitration on those issues (a) were incapable of determining the issues, and (b) would be of no weight or relevance to the Court's consideration as to what findings it would make in exercise of its exclusive jurisdiction.

84. In those circumstances, it is unfortunate that the Arbitrator – even after having recognised that he need not decide anything on the evidence – went on to give a declaration that the allegations made in the HCA were false, and further offered his "notes" as potentially providing "some assistance in" the HCA on the matters he thought not necessary for him to decide. With respect, that at least risked giving the impression that the Arbitrator was seeking to "poison the well".

85. In any event, it put those relevant parts of the Award in conflict with the public policy of Hong Kong.

I. Result and Costs

86. Therefore, we dismiss the appeal.

87. At the end of the hearing before us, Counsel were in agreement that costs should follow the event of the appeal. In the circumstances, the Defendants should pay the Plaintiff's costs of the appeal.

88. The question arises as to whether that costs order should be taxed, if not agreed, on the indemnity basis (as opposed to on the party and party basis). We note that the costs below were ordered by the Judge to be payable on the indemnity basis, as has become the usual

practice in the context of challenges to arbitration awards. In any event, on the materials which are set out above, we also agree that the costs following the event of this appeal should also be taxed, if not agreed, on the indemnity basis.

(Susan Kwan) Vice President	(Aarif Barma) Justice of Appeal	(Russell Coleman) Judge of the Court of First Instance

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