

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 1906 OF 2023**

BETWEEN

TECHTERYX LTD (suing on behalf of itself Plaintiff
and the 1st Defendant)

and

LEGACY TRUST COMPANY LIMITED 1st Defendant
CROSSBRIDGE CAPITAL ASIA PTE LTD 2nd Defendant
ARIA COMMODITY FINANCE FUND 3rd Defendant
TRUECOIN LLC 4th Defendant
CHRISTIAN ALEXANDER BOEHNKE DE 5th Defendant
LORRAINE-ELBEUF (also known as ALEX
DE LORRAINE)

Before: Deputy High Court Judge Jonathan Wong in Chambers
Date of Hearing: 11 November 2024
Date of Decision: 11 February 2025

DECISION

1. Introduction

1.1 On 29 February 2024, Master Lai granted leave to the Plaintiff (“**Techteryx**”) to issue a Concurrent Re-Amended Writ of Summons (“**Concurrent Re-Amended Writ**”) out of the jurisdiction against the 2nd to 5th Defendants (“**29/2/24 Order**”). The Concurrent Re-Amended Writ, issued on 4 March 2024, was served on the 2nd Defendant (“**Crossbridge**”) in Singapore on 15 March 2024.

1.2 By its summons dated 8 May 2024 (“**Summons**”), Crossbridge applies for¹:

- (1) a declaration that the court has no jurisdiction or should not exercise any jurisdiction that it may have over Crossbridge in respect of the subject matter of the Techteryx’s claim, relief, and/or remedy sought in this action (“**Declaratory Relief**”) on grounds that: (a) Crossbridge is entitled to rely on the arbitration agreement contained in clause 7 of the Account Investment Management Mandate dated 1 April 2020 (“**AIMM**”) between the 1st Defendant (“**Legacy Trust**”) and Crossbridge (“**Arbitration Agreement**”) and (b) Techteryx

¹ Counsel agreed at the hearing that , in view of the principal issues debated, it is not necessary to deal with Summons §1(b), namely whether the case against Crossbridge is or is not a proper one for service out of the jurisdiction under RHC Order 11.

has failed to comply with its duty of full and frank disclosure in the course of obtaining the 29/2/24 Order (Summons §1(a));

(2) an order that the 29/2/24 Order be discharged, and consequentially an order that the service of the Concurrent Amended Writ be set aside (Summons §§2 and 3);

(3) further or alternatively, an order that this action as between the Techteryx and Crossbridge be stayed in favour of arbitration administered by the Singapore International Arbitration Centre, in accordance with the Arbitration Agreement (Summons §4).

1.3 On 6 November 2024, Techteryx issued a summons (“**New Evidence Summons**”) for leave to file further evidence by way of the Affirmation of Terence Tai Cheung Wong (“**Wong 1st**”). As indicated at the hearing, I will consider Wong 1st on a *de bene esse* basis.

1.4 At the hearing, Techteryx was represented by Mr Sebastian Hughes and Crossbridge by Mr Norman Nip SC leading Mr Adrian Wong.

1.5 A prominent feature in the present case is that the Arbitration Agreement, as noted above, is one between Crossbridge and Legacy Trust, not Techteryx. A major disagreement between Mr Hughes and Mr Nip is whether Crossbridge is nevertheless entitled to on the Arbitration Agreement where, as here, the claims against Crossbridge are made by Techteryx, not Legacy Trust.

2. Background

(i) Techteryx's case²

2.1 In this action, Techteryx alleges that a fraud has been perpetrated against it by each of the Defendants, whereby Techteryx was induced into purchasing the TrueUSD (“**TUSD**”) digital token business (“**Business**”) of the 4th Defendant (“**TrueCoin**”) by certain representations, including the **Sufficiency Representation** as defined in section 3.15 of the Strategic Alliance Agreement dated 2 December 2020 between Techteryx and TrueCoin (“**SAA**”). The Sufficiency Representation provides:

“TrueCoin, as agent for the holders of TUSD, has established escrow accounts with third-party banks and licensed trust companies for the benefit of TUSD token holders (the “FBO Accounts”) that have maintained, at all times, sufficient (at least 1:1) U.S. dollar reserves for all TUSD. All such U.S. dollar reserves are held for the benefit of TUSD token holders free and clear of any Liens. For the avoidance of doubt, the U.S. dollar balance held in FBO Accounts for the benefit of TUSD token holders equals or exceeds, and has, at all times, equaled or exceeded, the number of TUSD.”

2.2 The Business may be described as follows:

- (1) TrueCoin created and maintained a website (“**TrueUSD Website**”), through which it marketed TrueUSD digital tokens (“**Tokens**”);
- (2) A person interested in subscribing for Tokens would create an account on and via the TrueUSD Website;

² The following summary is taken from Mr Hughes’ Skeleton Submissions.

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- (3) The person would then place an order for a quantity of Tokens via the account and send the equivalent amount in USD fiat currency to an account which TrueCoin stated to be with an “independent” licensed bank, deposit-taking institution or licensed trust company (“**Reserves**”);
- (4) TrueCoin would then cause Tokens to be “minted”, on the blockchain on which the Tokens exist, and send to the person the relevant quantity of Tokens;
- (5) A holder of Tokens could trade or lend the Tokens, or use them to pay any person who would accept the Tokens;
- (6) A holder could also redeem the Tokens via the TrueUSD Website, whereupon the Tokens would be “burnt” and the equivalent amount in USD fiat currency would be sent to the holder;
- (7) A central tenet of the Business, as is apparent from the Sufficiency Representation, was that it had sufficient Reserves in cash and cash equivalent assets to back one-to-one all of the outstanding Tokens and it was upon this basis that the Business was marketed.

2.3 It is Techteryx’s case that Reserves initially involving US\$97 million (“**Initial Investment Sum**”) held by Legacy Trust were invested in the 3rd Defendant (“**Fund**”) pursuant to advice provided by Crossbridge to both Legacy Trust and TrueCoin under the AIMM. The AIMM was signed by (1) Crossbridge’s director and CEO, Mr Yai Sukonthabund

(“**Mr Yai**”) and (2) Legacy Trust’s director and CEO, Mr Vincent Chok (“**Mr Chok**”).

2.4 At the time when Techteryx purchased the Business from TrueCoin in December 2020 (“**Acquisition**”), the Reserves under the management of Legacy Trust were transferred by Legacy Trust to its affiliate, First Digital Trust Ltd (“**FDT**”) pursuant to an Escrow and Properties Transfer Agreement (“**EPTA**”).

2.5 Following the Acquisition and the transfer of the Reserves under the EPTA, at the request of D1, Mr Chok, D2 and Mr Yai, P agreed to appoint (1) FDT to hold the Reserves; and (2) Finaport Pte Ltd, a private Singapore company and of which Mr Yai was a “partner” (“**Finaport**”), to provide investment management services in respect of the Reserves.

2.6 Subsequently, Reserves involving the additional sums of US\$468 million (“**Additional Investment Sum**”) were purportedly invested in the Fund pursuant to investment advice obtained from FDT and Finaport. Of that amount, US\$456 million was remitted not to the Fund, but to a bank account held by a company in Dubai managed and controlled by Mr Matthew William Brittain³, but owned by his wife, Aria Commodities DMCC (“**Aria DMCC**”).

³ The chief executive officer and chief investment officer of the Fund and the ultimate beneficial owner of all of the voting shares of the Fund.

2.7 TrueCoin continued to manage the Business for Techrteryx following the Acquisition, pursuant to the Master Services Agreement (“MSA”) dated 2 December 2020, until its termination on 14 July 2023.

2.8 Techteryx became alerted to the alleged fraud and to the loss of the Reserves purportedly invested in Fund when the Fund defaulted on Techteryx redemptions of the Initial Investment Sums and the Additional Investment Sums.

(ii) Procedural background

2.9 Techteryx has separately commenced HCA 161/2023 against FDT, Finaport, the Fund and Aria DMCC. Whilst the present action is primarily concerned with the Initial Investment Sum, HCA 161/2023 is principally concerned with the Additional Investment Sum.

2.10 On 24 November 2023, Techteryx commenced the present action against Legacy Trust. Thereafter:

- (1) On 2 January 2024, leave was granted to join Crossbridge and the Fund as defendants;
- (2) On 1 February 2024, leave was granted to join TrueCoin and the 5th Defendant as defendants;
- (3) On 6 February 2024, the Re-Amended Writ and the Amended Statement on Claim (“ASOC”) were filed;
- (4) As stated earlier, the Concurrent Re-Amended Writ was issued on 4 March 2024.

2.11 As stated in the Concurrent Re-Amended Writ, Techteryx is suing on behalf of itself and Legacy Trust. As against Crossbrigde, ASOC §§35 and 36 make it plain that the claims made are “anchored” in a claim premised on a breach of the express and implied terms of the AIMM, with a further or alternative tortious claim based on a breach of duty of like content and to like effect as the contractual duties under the AIMM.

2.12 ASOC §§38-40 further plead the capacity in which Techteryx sues and make it plain that the loss and damage claimed is that suffered by Legacy Trust:

“[38] As a result of the matters aforesaid, the 1st Defendant - as a fiduciary of the Escrow Amount - suffered loss and damage, being the difference in value between the present value of the Escrow Amount and the value which the Escrow Amount would have had if the 2nd Defendant had not given grossly negligent investment advice.

[39] The Plaintiff makes this claim against the 2nd Defendant as the beneficiary of the trust of which the 1st Defendant was a trustee and whose assets have been lost or dissipated as a result of the 2nd Defendant's acts and omissions.

[40] The Plaintiff does so for the benefit of the trust in circumstances where there has been an inexcusable failure by the 1st Defendant to protect the trust property and/or the 1st Defendant will not take action against the 2nd Defendant, alternatively is unable to do so without placing itself in a position of conflict, because the acts and omissions which give rise to the 2nd Defendant's liability would also demonstrate the liability of the 1st Defendant to the Plaintiff.” (emphasis added)

3. The agreed framework for the disposal of the Summons

3.1 There is no dispute that Techteryx did not specifically bring the existence of the Arbitration Agreement to the attention of Master Lai in its application for the 29/2/24 Order, on the basis that it is irrelevant: 3rd Affirmation of Li Jinmei (“Li 3rd”) §33. Techteryx says that the

Arbitration Agreement is irrelevant “*for the simple reason that [Techteryx] is not a party to (or an assignee or third-party beneficiary of) the Arbitration Agreement*”.

3.2 The Arbitration Agreement in the AIMM provides as follows:

“7. Governing Law and Jurisdiction

This Mandate shall be governed by and construed in accordance with the laws of Singapore.

Any dispute arising out of or in connection with this Mandate, including any question regarding its existence, validity, or termination, will be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the SIAC for the time being in force, which rules are deemed to be incorporated by reference in this clause. The seat of the arbitration is Singapore. The Tribunal will consist of one arbitrator to be appointed by the SIAC. The language of the arbitration shall be English.” (emphasis added)

3.3 Crossbridge and Techteryx have each adduced expert evidence on Singapore law on the issue of whether Techteryx is bound by the Arbitration Agreement. Crossbridge relies on the opinions of Ms Lauren Tang Hui Jing (“**Ms Tang**”) and Techteryx on the opinion of Mr Jonathan Choo (“**Mr Choo**”).

3.4 At the hearing, counsel agreed that the Summons should be determined by reference to the following issues:

- (1) Can Crossbridge rely on the Arbitration Agreement to stay the present proceedings in favour of arbitration in Singapore (“**Stay Application**”) pursuant to section 20 of the Arbitration Ordinance Cap 609 (“**AO**”);

(2) Whilst the foregoing is the alternative relief sought in the Summons, a resolution of that issue would inform on whether the court should grant the primary relief, namely the Declaratory Relief, and consequentially an order discharging the 29/2/24 Order and the service of the Concurrent Re-Amended Writ.

4. The Stay Application

4.1 Section 20(1) of the AO gives effect to Article 8 of the UNCITRAL Model Law. Article 8 of the Model Law provides as follows:

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

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”

4.2 The principles governing a stay in favour of arbitration are well-established. As set out at *Mice Engineering Ltd v Johnson Controls Hong Kong Limited* [2022] HKCFI 2768 §§17-18 (and the further cases cited therein):

(1) On a stay application under section 20 of the AO, the court would consider the following questions: (a) is there an arbitration agreement between the parties, (b) is the clause in question null and void, inoperative or incapable of being

performed, (c) is there in reality a dispute or difference between the parties and (d) is the dispute or difference between the parties within the ambit of the arbitration agreement;

- (2) The onus is on the applicant for stay to demonstrate only that there is a *prima facie* case that the parties are bound by an arbitration clause, and unless the point is clear, the court should not attempt to resolve the issue and the matter should be stayed in favour of arbitration, as it is for the tribunal to decide first on its jurisdiction.

4.3 At the hearing, Mr Hughes confirmed that, of the 4 questions under consideration, he was prepared to proceed on the basis that there is a *prima facie* case that the 3rd and 4th questions should be answered in favour of Crossbridge. In particular, I record that Mr Hughes accepted that there is a *prima facie* case that the ambit of the Arbitration Agreement is wide enough to cover both the “anchor” contractual claim and the tortious claim made by Techteryx against Crossbridge.

4.4 In relation to the 1st question, namely is there an arbitration agreement, the issue is whether the Arbitration Agreement arguably binds Techteryx. Mr Hughes asserts, without citing any authority in support, that the 1st question should be determined on the basis of Hong Kong law. I am unable to accept the position advocated by Mr Hughes. Whether as a matter of (1) the law expressly chosen to apply to the Arbitration Agreement, (2) the law applicable to the AIMM, and (3) the seat of arbitration (Singapore), it seems to me quite plain that the 1st question is

one to be determined under Singapore law (although there is unlikely to be a substantive difference with Hong Kong law).

4.5 As regards the 2nd question, Mr Hughes has confined Techteryx's challenge to the contention that the Arbitration Agreement is null and void by reason of public policy.

5. Whether Techteryx a party to the Arbitration Agreement

5.1 The question is, where, as here, Techteryx's pleaded case is that it is suing (1) Crossbridge under the AIMM in its capacity as the beneficiary of the trust of which Legacy Trust was a trustee and (2) for loss and damage suffered by Legacy Trust, there is a *prima facie* case that Techteryx is bound by the Arbitration Agreement. The relevant question to ask is whether there is a *prima facie* or plainly arguable case that the Arbitration Agreement binds Techteryx, and the test is satisfied where the evidence in support of the contention is cogent and arguable, and not dubious or fanciful.

(i) Crossbridge's case

5.2 The general propositions advanced by Mr Nip are these: A beneficiary may be allowed to sue a third party in place of the trustee by way of a derivative action when the trustee commits a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances: *Hayim v Citibank NA* [1987] AC 730 at 747C-D. If it had been Legacy Trust that had sued Crossbridge for breach of the AIMM directly, Legacy Trust would have been bound by the Arbitration Agreement (there being no suggestion that the agreement is unenforceable

between them), and Techteryx cannot be in a better position. It is established that a person who becomes entitled to enforce a contractual obligation can do so only in accordance with its terms: *The Yusuf Cepnioglu* [2016] Bus LR 755 at §46 per Moore-Bick LJ.

5.3 As a matter of Singapore Law, it is Ms Tang’s opinion that:

- (1) Where a beneficiary could sue a third-party for damages on behalf of a trustee in a derivative claim, the beneficiary would be in a position no better than the trustee if it had carried out its duties in a proper manner;
- (2) A third-party who wishes to take the benefit of a contract is bound by the burden of any exclusive jurisdiction clause therein, citing *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] SGHC 20 which considered *Yusuf Cepnioglu*;
- (3) Similarly, a person who becomes entitled to enforce an obligation which is subject to an arbitration clause must do so by arbitration according to the clause. This is so since “*enforcement by arbitration alone is an incident of the obligation which the claimant seeks to enforce and because the defendant is therefore entitled to have any claim against him pursued by arbitration*”: *Yusuf Cepnioglu* at §49, which was considered in *Hai Jiang*.

(ii) Techteryx's case

5.4 Conversely, Techteryx relies on the following propositions:

(1) As a matter of Singapore law, it is established that non-parties to an arbitration agreement cannot participate in an arbitration conducted pursuant to that agreement: *Jiang Haiying v Tan Lim Hui* [2009] 3 SLR(R) 13 at §19;

(2) The above privity rule, whilst strict, is not absolute. There are several situations where non-signatories may be considered a party to the arbitration agreement. Such situations may arise by way of incorporation of an arbitration agreement by reference, or an assumption of rights or liabilities to a contract with an arbitration clause (for example assignment, novation), or where the agreement was entered into by an agent. or the corporate veil-piercing on the basis of alter ego principle, or by the operation of the doctrine of estoppel: *Jiang Haiying* §23;

(3) A third-party beneficiary exception to the privity rule has not yet been recognized in Singapore (outside of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed): *Jiang Haiyang* §§44-45.

5.5 In the present case, Techteryx is not a party of the AIMM and is not an assignee or subrogee of the rights of Legacy Trust under the AIMM. In any event:

(1) Clause 2 of Schedule 1 of the AIMM expressly precludes assignment: “*no assignment or transfer shall be made by the Client or Crossbridge of any of their rights or obligations under this Mandate without the prior written consent of the other*”;

(2) Clause 2 of Schedule 2 of the AIMM expressly precludes third-party rights: “*Any Indemnified Person⁴ shall have the right to enjoy the benefit of or to enforce any of the terms of this Mandate which purports to confer a benefit on them. Save for the Indemnified Persons, no provision in this Mandate should be enforceable, by virtue of the Contracts (Rights of Third Parties) Act (Chapter 53B of Singapore) or otherwise, by any person who is not a party to this Mandate*”.

5.6 Crossbridge has not been able to produce any authority which applies to the facts of the present case, namely where a party has no choice but to bring a derivative action on behalf of a trustee (Legacy Trust), as beneficiary of the trust funds (the Reserves), against a purported investment adviser (Crossbridge), in circumstances where, as pleaded, the trustee (Legacy Trust) cannot (and will not) itself take any action against (Crossbridge).

(iii) Analysis

5.7 In my view, there is a *prima facie* case that Techteryx, subject to the further issue of whether the Arbitration Agreement should be

⁴ Defined in Clause 4 of Schedule 1 as Crossbridge and each of its “Associates”.

rendered null and void by reason of public policy discussed below, is bound by the Arbitration Agreement in pursuing the present claims against Crossbridge. As this issue should be deferred to arbitral tribunal for determination, I will only set out my brief observations.

5.8 First, I do not believe Techteryx can derive much assistance from *Jiang Haiyang*, which is the case principally relied on by Mr Choo:

- (1) In that case, the defendants seeking a stay are not parties to the sale and purchase agreement (“SPA”) containing the relevant arbitration clause;
- (2) The submissions made by the defendants were *inter alia* (1) that claims alleged by the plaintiff against the defendants were intimately intertwined with the SPA such that the doctrine of equitable estoppel applied and (2) that the defendants were the intended beneficiaries under the SPA (§12);
- (3) The Court held that for the defendants’ application for a stay of proceedings to succeed, they would have to show that an exception to the privity rule was applicable such that the plaintiff should be made to arbitrate his disputes with them (§24);

(4) The Court held that the claims alleged by the plaintiff against the defendants were not intertwined with the SPA such that the doctrine of equitable estoppel was applicable. In particular, the Court observed at §42:

“... Unlike the three aforementioned cases where the agreement containing the arbitration clause was heavily relied on and was the basis for the plaintiffs’ and/or defendants’ claims, the SPA, in the present case, had no relation to the claim by the plaintiff. Nor did the SPA need to be pleaded for the defendants to mount their defence that the Dehai Singapore shares were transferred to them in consideration for their help in relation to the proposed listing of Dehai Singapore. As such, the present dispute was not one that was so closely intertwined with the SPA such that the plaintiff was estopped from denying the defendants arbitration.”
(emphasis added)

(5) The Court further observed that a third-party beneficiary exception to the privity rule has not yet been recognized in Singapore. In any event, in the facts the Court did not regard the defendants as intended beneficiaries of the SPA (§§44-46).

5.9 It is therefore quite apparent that the issues dealt with in *Jiang Haiyang* are quite different from those of the present case. *Jiang Haiyang* is certainly not a case that deals with the present situation where Techteryx is suing on the AIMM. Indeed, whilst Mr Hughes has criticized, as set out at §5.6 above, that Crossbridge has not been able to produce any authority which is directly in support of its position on the present factual matrix, as he has acknowledged, neither has Techteryx been able to refer to any in support of its position.

A
B 5.10 In my view, it is arguable that the following propositions
C advocated by Ms Tang may be accepted by the arbitral tribunal, if pursued:

D (1) Techteryx's claims as enumerated in the ASOC are in
E substance claims brought on behalf of Legacy Trust and to
F enforce a contract between Legacy Trust and Crossbridge. It
G arguably follows that in "stepping into the shoes" of Legacy
H Trust, Techteryx is bound to accept that its claims are subject
I to the Arbitration Agreement (Ms Tang's first opinion §§29-
J 33 and Ms Tang's second opinion §9);

K (2) In the context of a beneficiary derivative claim, the
L beneficiary (Techteryx), can sue a third party (Crossbridge)
M for damages on behalf of a trustee (Legacy Trust), but the
N beneficiary would be in a position no better than the trustee if
O the trustee had carried out its duties in a proper manner.

P 5.11 It is pertinent to note that Mr Hughes in his submissions did
Q not go further than arguing that the cases relied on by Ms Tang for the
R propositions are distinguishable on the facts. But it seems to me that the
S propositions advanced by Ms Tang are arguable as a matter of principle.

T 5.12 It must be reiterated that I am not required to finally determine
U the correctness of Ms Tang's propositions. In my view, Crossbridge has
V established a *prima facie* case in relation to the 1st question under
consideration.

6. Whether the Arbitration Agreement null and void

6.1 The propositions advanced by Mr Hughes are set out at his Skeleton Submissions §§43-44:

“[43] Part of Ds’ fraud against P was to fragment any claims which P would bring against Ds and to obstruct the finding of the true facts by putting in place divergent choice of law and dispute resolution clauses in the contractual documents.

[44] In addition to the extant pleadings of fraudulent misrepresentation against both D4 and D5 set out in ASOC §44N, D2 will aver in its further amended pleading to be filed herein – to include claims in respect of the overall fraud and conspiracy against each of the Ds, acting in concert, herein - that the clauses are unenforceable and should not be heeded as contrary to public interest, public policy, and the interest of justice; and specifically that any of the arbitration clauses Ds may seek to rely upon to circumvent the jurisdiction of this Court are null and void.”

6.2 The New Evidence Summons seeks to adduce evidence on the proposed fraud claim to be introduced by amendment. Wong 1st seeks to adduce evidence on a complaint dated 24 September 2024 (“**Complaint**”) filed by the US Securities and Exchange Commission (“**SEC**”) in which various complaints were made against, *inter alia*, TrueCoin. TrueCoin had agreed to settle the charges by consenting to the entry of a final judgment.

6.3 It is pertinent to note that no allegation is specifically advanced in the Complaint by SEC against Crossbridge. Certainly, Crossbridge is not a defendant named in the Complaint.

6.4 It must be noted that in the Complaint, the relevant period is defined to be from November 2020 through at least April 2023 (“**Relevant**

Period”), which postdates the execution of the AIMM. The Complaint, by way of background, refers to an “investment advisor” which is understood to be Crossbridge (Complaint Section II.A). There is specifically no allegation that Crossbridge was part of the Complaint. The allegations of materially false and misleading statements are set out at Complaint Section II.B. There is no allegation against Crossbridge and the earliest date referred to therein is 2 December 2020 (Complaint §57), also postdating the execution of the AIMM.

6.5 In my view, Techteryx’s argument that the Arbitration Agreement is null and void faces at least the following difficulties.

6.6 First, as accepted by Mr Hughes, the Arbitration Agreement must be treated as a distinct agreement and can be void or voidable only on grounds which relate directly to the Arbitration Agreement. *Quaestus Capital Pte Ltd v Everton Associates Ltd* [2021] 4 HKC 605 (at §§39-43) observes as follows:

“[39] Mr Pao submits in response that it is well established that a jurisdiction clause is regarded as a separate agreement from the substantive agreement between the parties, and that unless specific attack is directed against the jurisdiction clause, it is not excluded from application to a dispute involving claims that the agreement as a whole is vitiated such as by fraud, mistake, illegality or the like.

[40] The parties have not made submissions on which law governs this question. It seems to me that again English law as the governing law of the contract should govern, but this is inconsequential as there appears to be no difference between English law and Hong Kong law in this regard. The general principles are not in dispute and they in my view support Mr Pao’s contention. In Fiona Trust, Lord Hoffmann said that an arbitration clause

“must be treated as a ‘distinct agreement’ and can be void or voidable only on grounds which relate directly to the arbitration agreement”

and that

“the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.”

Likewise Lord Hope said in that case:

“The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do.”

[41] Similarly, in *Deutsche Bank AG & others v Asia Pacific Broadband Wireless Communications Inc & another* [2008] 2 CLC 520 at §24, it was said:

“It is only if the jurisdiction clause is itself under some specific attack that a question can arise whether it is right to invoke the jurisdiction clause. Examples of this might be fraud or duress alleged in relation specifically to the jurisdiction clause.”

[42] The courts in Hong Kong have applied the same principles: see *Hiromi Okada v Tomohiro Okada & another* [2018] HKCFI 2310 at §§38-46 per Ng J; *China National Geological & Mining (HK) Ltd v Tianjin Hopetone Co Ltd* [2020] HKCFI 1338 at §§48-57 per DHCJ Le Pichon.

[43] Applying these principles, it seems to me that there is no specific attack on the jurisdiction clause in this case. The fraud alleged is directed against the entire Brokerage Agreement (and indeed against the Loan Agreement and the entire transaction). There is no suggestion that the plaintiff was not aware of the jurisdiction clause or was specifically misled into agreeing to give the English courts exclusive jurisdiction. There is nothing extraordinary about the jurisdiction clause itself, conferring as it does exclusive jurisdiction on the English courts in relation to a contract a party to which is an English company carrying on regulated business there. The plaintiff says that the fraud alleged is a fundamental one that suggests the entire Brokerage Agreement was itself a sham and an instrument of fraud. But

this in my view does not take this case out of the general principles. The reason that, according to the plaintiff, the jurisdiction clause should not have effect is the fraud that led the plaintiff to enter into the Brokerage Agreement, with the consequence that the jurisdiction clause, which was agreed as part of that agreement, is also vitiated. Such an argument is one that, according to the authorities, the doctrine of separability precludes." (emphasis added)

6.7 In Mr Hughes' Skeleton Submissions, there is no articulation on what is the vitiating ground which relates directly to the Arbitration Agreement. Neither is there a proposed amended pleading placed before me. Conversely, on the available material:

- (1) The Relevant Period refers to in the Complaint postdates the date of the AIMM;
- (2) The settlement dates of the investments of the Initial Investment Fund pleaded at ASOC §24 also postdate the AIMM;
- (3) In so far as Mr Hughes relies on the allegation that part of the fraud was the fragmentation of claims, this is not supported by Techteryx's evidence. The fragmentation of claims was advanced in the context of Techteryx position that Hong Kong is the centre of gravity of the present multi-party dispute: Li 3rd §§26-32;
- (4) In this regard, whilst it is accepted that there are different jurisdiction clauses in the various agreements as set out at Li 3rd §29, it appears that the jurisdiction clauses are invariably connected to one of the contracting parties and is not *ex facie* problematic. The suggestion that part of the fraud

was the fragmentation of claims appears to me to be a rather far-fetched proposition.

6.8 Secondly, Mr Hughes has at one point submitted that the issue of whether the Arbitration Agreement is rendered null and void by reason of public policy should be finally determined by the Hong Kong court. He relies on the Canadian case of *Uber Technologies Inc & Ors v Heller (AG of Ontario and others intervening)* [2020] 5 LRD 348. In my view, Techteryx cannot derive any assistance from *Uber*. The *Uber* case in fact adopts a regime not unlike the position in Hong Kong:

[31] The AA is silent on what principles courts should consider in exercising their discretion to determine the validity of an arbitration agreement under s. 7(2). But some criteria were set out in Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, and Seidel v. TELUS Communications Inc., [2011] 1 S.C.R. 531, which interpreted similar arbitration regimes in Quebec and British Columbia. In those decisions, this Court set out a framework for when a court should decide if an arbitrator has jurisdiction, instead of referring that question to the arbitrator out of respect for the competence-competence principle.

[32] Under the Dell framework, the degree to which courts are permitted to analyse the evidentiary record depends on the nature of the jurisdictional challenge. Where pure questions of law are in dispute, the court is free to resolve the issue of jurisdiction (para. 84). Where questions of fact alone are in dispute, the court must “normally” refer the case to arbitration (para. 85). Where questions of mixed fact and law are in dispute, the court must refer the case to arbitration unless the relevant factual questions require “only superficial consideration of the documentary evidence in the record (para. 85).”

[33] In setting out this framework, Dell adopted an approach to the exercise of discretion that was designed to be faithful to what the international arbitration literature calls the “prima facie” analysis test as regards questions of fact and questions of mixed fact and law (para. 83). Under this test, the court must “refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable” (para. 75). To be so manifestly tainted, the invalidity must be

“incontestable”, such that no serious debate can arise about the validity (para. 76, quoting Éric Loquin, “Compétence arbitrale”, in *Juris-classeur Procédure civile (loose-leaf)*, fasc. 1034, at No. 105). Rather than adopting these standards literally, Dell gave practical effect to what was set out in the arbitration literature by creating a test whereby a court refers all challenges of an arbitrator’s jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record (paras. 84-85).” (emphasis added)

6.9 However, the Supreme Court of Canada was of the view that the Dell framework may be departed from should an issue of accessibility arise:

“[38] The underlying assumption made in Dell is that if the court does not decide an issue, then the arbitrator will. As Dell says, the matter “must be resolved first by the arbitrator” (para. 84). Dell did not contemplate a scenario wherein the matter would never be resolved if the stay were granted. This raises obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay.

[39] One way (among others) in which the validity of an arbitration agreement may not be determined is when an arbitration is fundamentally too costly or otherwise inaccessible. This could occur because the fees to begin arbitration are significant relative to the plaintiff’s claim or because the plaintiff cannot reasonably reach the physical location of the arbitration. Another example might be a foreign choice of law clause that circumvents mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law. In such situations, staying the action in favour of arbitration would be tantamount to denying relief for the claim. The arbitration agreement would, in effect, be insulated from meaningful challenge.

...

[47] Turning to the appeal before us, we would first observe that Mr. Heller has made a genuine challenge to the validity of the arbitration agreement. The clause is said to be void because it imposes prohibitive fees for initiating arbitration and these fees are embedded by reference in the fine print of a contract of adhesion. Second, there is a real prospect that if a stay is

granted and the question of the validity of the Uber arbitration agreement is left to arbitration, then Mr. Heller's genuine challenge may never be resolved. The fees impose a brick wall between Mr. Heller and the resolution of any of the claims he has levelled against Uber. An arbitrator cannot decide the merits of Mr. Heller's contention without those — possibly unconscionable — fees first being paid. Ultimately, this would mean that the question of whether Mr. Heller is an employee may never be decided. The way to cut this Gordian Knot is for the court to decide the question of unconscionability.

[48] We would therefore resolve the arguments Mr. Heller has raised against the validity of Uber's arbitration agreement rather than refer those arguments to arbitration in the Netherlands." (emphasis added)

6.10 Mr Hughes has not cited any cases to show that the exception carved out in *Uber* premised on the issue of accessibility has been considered in Hong Kong. In any event, in the present case, given the apparent resources of Techteryx, there can be no issue of accessibility.

6.11 Thirdly, and as alluded to above, not only is there presently no precise formulation of any vitiating grounds which relate directly to the Arbitration Agreement, it has not been suggested by Mr Hughes that, even when formulated, it is compelling to the extent that it is, using the phrase at *Uber* §33, "incontestable". It seems to me that the allegation to be introduced by the proposed amendment is the type of argument which *Quaetus* §43 has observed as being precluded by the authorities, namely the jurisdiction clause should not have effect by reason of the fraud that led the plaintiff to enter into an agreement, with the consequence that the jurisdiction clause, which was agreed as part of that agreement, is also vitiated. In the present case, as in the case of *Quaetus*, there is no suggestion that Legacy Trust was not aware of the Arbitration Agreement or was specifically misled into agreeing to refer disputes to an arbitral tribunal.

6.12 For the above reasons, I am also of the view that the 2nd question under consideration, if pursued, should also be deferred to the arbitral tribunal.

7. Disposition

7.1 It follows from the above analysis that I would have granted the Stay Application. This being the case, it follows that I should accede to the Declaratory Relief sought in the Summons and also the consequential orders setting aside the 29/2/24 Order and the service of the Concurrent Re-Amended Writ.

7.2 Whilst it is strictly unnecessary to consider whether Techteryx failed to give full and frank disclosure in the course of obtaining the 29/2/24 Order, for completeness, I am of the view that it did. As is trite, the issue of materiality is for the court and Techteryx cannot justify its non-disclosure of the Arbitration Agreement based on its own (as it turns out erroneous) assessment of relevance. However, I am prepared to proceed on the basis that the non-disclosure was only as a result of poor judgement, but in the light of my views on the Stay Application, there can be no issue of regrant.

8. Conclusion

8.1 I therefore grant an order in terms of Summons §§1(a) and (c), 2 and 3, save that the words “*has no jurisdiction or*” in the first sentence of Summons §1(a) should be deleted. I also dismiss the New Evidence Summons, as Wong 1st does not have an important effect on the outcome of the Summons.

8.2 I also grant an order *nisi* the costs of the present action, including the costs of and occasioned by the Summons and the New Evidence Summons, be paid by Techteryx to Crossbridge on an indemnity basis, to be taxed if not agreed with a certificate for 2 counsel. For avoidance of doubt, the higher basis is justified by the arbitration element, and not by reason of any views on material non-disclosure.

(Jonathan Wong)
Deputy High Court Judge

Mr Sebastian HUGHES, instructed by Messrs Loeb & Loeb LLP, for the Plaintiff

Mr Norman NIP, SC leading Mr Adrian TY WONG, instructed by Messrs Stephenson Harwood, for the 2nd Defendant