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CACV 88/2010 AND CACV 89/2010

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

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COURT OF APPEAL

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CIVIL APPEAL NOS. 88 OF 2010 AND 89 OF 2010

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(ON APPEAL FROM HCA NO. 961 OF 2008)

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BETWEEN

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廈門新景地集團有限公司 formerly known as Plaintiff
廈門市鑫新景地房地產有限公司

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and

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ETON PROPERTIES LIMITED 1st Defendant
(裕景興業有限公司)

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ETON PROPERTIES (HOLDINGS) LIMITED 2nd Defendant
(裕景興業(集團)有限公司)

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ETON PROPERTIES GROUP LIMITED 3rd Defendant
formerly known as

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ETON PROPERTIES (INTERNATIONAL)
LIMITED

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LEGEND PROPERTIES (XIAMEN)
COMPANY LIMITED

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(利景興業(廈門)有限公司),

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a limited company incorporated in Hong Kong

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LEGEND PROPERTIES (XIAMEN) 5th Defendant
COMPANY LIMITED

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(利景興業(廈門)有限公司),

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a foreign-owned enterprise incorporated in the
People's Republic of China

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Before: Hon Rogers VP, Le Pichon and Kwan JJA in Court

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Dates of Hearing: 1-2 December 2010

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Date of Handing Down Judgment: 15 December 2010

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Hon Rogers VP:

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1. These were appeals from a judgment of Fok J given on 16 March

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2010. There were a number of interlocutory applications before the judge.

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The first and second defendants applied to stay this action for arbitration and, in

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the alternative, to have it struck out and dismissed. The third, fourth and fifth

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defendants sought to strike out or stay the action. The plaintiff, for its part

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applied to file an amended statement of claim and for discovery against the third

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and fifth defendants in aid of an interlocutory injunction granted at the outset of
the action.

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2. The judge permitted amendment to the statement of claim, granted

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a stay of the action as against the first and second defendants for arbitration but

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refused a stay as against the third to fifth defendants, dismissed the application

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to strike out the action, granted the plaintiff an order for discovery against the

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fifth defendant but dismissed the application against the third defendant.

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3. In the course of the hearing of these appeals this court allowed the

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plaintiff's appeal in respect of the stay and reserved judgment in respect of the

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defendants' cross-appeals in respect of striking out the claims or parts thereof.

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The history

4. There is a long history to this matter, much of which is set out in the statement of claim in this action as well as in the judgment of this court dated 22 May 2009 in CACV 106 and 197 of 2008 and in the judgment in the court below, as well as in the arbitration awards, which are the subject of these proceedings. CACV 106 and 197 of 2008 were appeals by the first and second defendants in the present action from a refusal to set aside the *ex parte* order made under sections 2GG and 40B of the Arbitration Ordinance Cap. 341 in relation to an arbitration award made by CIETAC on 27 October 2006. As will be explained below, that arbitration award and its enforcement is the focus of the present proceedings. In order to avoid unnecessary repetition or rephrasing and for convenience, I set out paragraphs 3 to 17 of the judgment of Le Pichon JA in this court in CACV 106 and 197 of 2008:

“3. The applicant (*i.e. the plaintiff in this action*) is a PRC company. The appellants (*i.e. the first and second defendants in the action*) are Hong Kong companies. The first appellant (“Eton”) is wholly-owned subsidiary of the second appellant (“Holdings”). They are companies with the Eton group of companies (“the Eton group”).

4. Until November 2005, the appellants were the sole shareholders of Legend Properties (Hong Kong) Co Ltd (“Hong Kong Legend”), each holding one share of that company in trust for Eton Properties International (No. 3) Limited (“International”). Hong Kong Legend had a wholly owned subsidiary called Legend Properties (Xiamen) Co Ltd (“Xiamen Legend”), a PRC company which is the owner of land in Xiamen (“the land”).

5. The applicant and the appellants were parties to an agreement of 4 July 2003. The agreement contained an arbitration clause. The arbitral tribunal described the agreement in these terms:

“The subject matter of the Agreement is the contractual right to buy and sell the shares in Hong Kong Legend that has an indirect effective control over the [land]. The amount of RMB 120 million is the consideration for the Applicant to obtain the contractual right to acquire all shares in Hong Kong Legend for HK\$2, and also the consideration for the [appellants] to obtain the contractual right to sell all the shares in Hong Kong Legend for HK\$2

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C	...the true intent of the parties is to progressively transfer the right to develop, operate and make earnings from the [land] and, after all the terms and conditions provided in the Agreement are met, to sign the legal instrument on transfer of shares in the target company and to handle the specific procedures. In other words, the main rights and obligations of the parties in the Agreement in this case do not involve how to transfer the shares in Hong Kong Legend in detail but involve how to perform certain specific obligations to cause the said transfer of shares to be effected ultimately.”	C
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F		F
G	6. The appellants never delivered the land to the applicant. Instead, on 14 November 2003, they sought to return the initial deposit on the basis that performance of the agreement would be contrary to PRC law. The applicant did not accept the purported termination and returned the deposit.	G
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I	7. In March 2005, the Eton group decided to establish a holding company. In May 2005, three months prior to the commencement of the arbitration proceedings, legal advice was obtained on the restructuring of the Eton group.	I
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K	8. On 8 August 2005, the applicant commenced arbitration proceedings in Beijing before CIETAC, seeking specific performance of the agreement. The appellants maintained their position that the agreement was contrary to PRC law and, in any event, performance had become impossible because, meanwhile, the appellants had commenced construction work which remained in progress at the time the arbitration was heard.	K
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N	9. The Eton group proceeded with the restructuring notwithstanding the arbitration. In November 2005, Hong Kong Legend issued 9998 new shares to Holdings. Then in April 2006, one share originally held by Eton in trust for International was transferred to Eton Properties Group Limited (“EPGL”) and the one share originally held by Holdings was agreed to be held by Holdings on trust for EPGL.	N
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Q	10. The restructuring of the Eton group which had the effect of diluting and transferring the appellants’ shares in Hong Kong Legend to EPGL, their parent company, was implemented during the course of the arbitration. Yet this transfer and dilution were not made known at the time to the applicant or to the tribunal. No explanation for this state of affairs has been forthcoming.	Q
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T	11. The award published on 27 October 2006 ordered that	T
U	(1) the appellants pay RMB 1,275,000 to the applicant (representing interest on the initial deposit up to 1 June 2005);	U
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- (2) the appellants “shall continue to perform the Agreement”; and
- (3) the appellants reimburse the applicant its arbitration fees of RMB 101,875.

The tribunal rejected the appellants’ argument of impossibility of performance, stating:

“...The Arbitral Tribunal considers that an agreement shall be binding upon the parties thereto once the agreement is executed. Even though any change in circumstances makes it difficult to perform the agreement during its performance, the parties shall exert reasonable efforts in good faith to perform the Agreement completely and fully other than purely emphasize external causes. In this case, as stated by the [appellants], the Agreement is a framework agreement, whose performance may be difficult due to various uncertainties. This needs close cooperation between the parties and reasonable efforts to seek alternative approaches to meet the purpose of the Agreement. The [appellants’] allegations cannot constitute justifiable reasons for impossibility to perform the Agreement and discontinuing performance of the Agreement without consent of the Applicant.”

12. In March 2007, the applicant sought to enforce the award in Xiamen but its application was unsuccessful because the appellants and their assets were not within Xiamen.

13. At about the same time, the appellants sought to set aside the award in an application to the Second Intermediate People’s Court in Beijing but subsequently withdrew its application.

Procedural history

14. As mentioned above, the applicant obtained the *ex parte* order in October 2007. The appellants’ application to set it aside gave rise to the orders under appeal.

15. The parties were notified on 6 May 2008 that the appeals were fixed to be heard on 23 December 2008 before two judges of this court. On 9 October 2008, the appellants took out a summons for a stay pending the determination of the appellants’ application to CIETAC for arbitration (“the second arbitration”) made on 18 August 2008. That application had been made apparently “for further determination on the basis that the Agreement could no longer be performed by the parties and sought a ruling that the parties be discharged from the Agreement”. As appears from §14 of the affirmation of Mok Pui Hong filed in support, he acknowledged that the parties were free to refer the dispute back to CIETAC in order to work out the details.

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16. The matter came before Rogers VP who dismissed the applications on 20 October 2008. On that occasion, Mr Yu SC appeared for the appellants.

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17. At the outset of the appeal hearing on the 23 December 2008, Mr Yu SC raised, for the first time and completely out of the blue, a jurisdictional issue which he said only dawned on him that very morning. He submitted that as the appeal is a final appeal, the court was not properly constituted, consisting only of two members. He sought an adjournment so that the appeal could be fixed for hearing before a panel of three judges.”

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5. Le Pichon JA, in her judgment with which I agreed, described that manoeuvre as having all the hallmarks of a filibustering exercise. It was successful to the extent that there was a further hearing by CIETAC, the arbitral tribunal, on 21 January 2009. The tribunal considered that it had jurisdiction in respect of the matter put forward by the first and second defendants but restricted to the new arbitration claims and facts which had not been dealt with in the previous hearing. The new ground which was argued as a basis for termination of the Agreement was that there had been a substantial change mainly based upon the fact that the completion of the development of the No.22 land and the sale of more than 90% of the units, which together with a change in the shareholding of Hong Kong Legend made the transfer of its shareholding impossible as a matter of fact. In its award dated 22 April 2009 the tribunal considered that the first and second defendants were not entitled to rely upon the completion of development or the fact that 90% of the units had been sold. In respect of the change of shareholding the tribunal said:

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“The 2 Applicants’ changes to the shareholding of Hong Kong Legend during the arbitration procedure of the earlier case have breached the Agreement of this case. The Arbitral Tribunal considers that the change of shareholding of Hong Kong Legend likewise does not satisfy the conditions set out in Clause 2 of Article 11 of the Agreement of this case, and cannot be a ground for the 2 Applicants to terminate the agreement.”

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6. The tribunal then went on to hold that the first and second defendants’ notice of unilateral discontinuance of performance of the

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Agreement which was issued on 14 November 2003 was not a valid notice of termination of the Agreement. The tribunal continued further on in the award to say:

“The Arbitral Tribunal notes that, in respect of the 2 Applicants’ defence of impossibility to perform, the arbitral tribunal of the earlier case had made an order for continued performance of the Agreement. The Arbitral Tribunal also notes that, the recognition and enforcement of the earlier arbitral award of the arbitral Tribunal are carrying out in the Hong Kong Court in accordance with the Hong Kong legal procedures. The award of the arbitral tribunal in the earlier case and the judgment made by the Hong Kong court in respect of the recognition and enforcement of the arbitral award of the earlier case have commented on how the Agreement in this case should be performed. The Arbitral Tribunal will not comment on the award made by the arbitral tribunal in the earlier case and the judgment made by the Hong Kong Court.

The Arbitral Tribunal considers that agreements made in accordance with the law should be legally binding on the parties. The parties should perform their own obligations in accordance with the agreements, and shall not unilaterally vary or terminate the agreement. The Arbitral Tribunal considers that the 2 Applicants’ claim to terminate the Agreement lacks factual, contractual and legal bases, and the Arbitral Tribunal does not support this.”

7. The appeal in CACV 106 and 197 of 2008 was eventually heard on 22 May 2009 and dismissed on that date, with the Reasons for Judgment being handed down on 11 June 2009.

8. On 19 June 2009, the first and second defendants made a yet further application to CIETAC seeking a ruling on the Award, specifically

“to make a further ruling on the “alternative approaches” part of “within the framework of the Agreement, use reasonable efforts to seek alternative approaches in order to meet the purpose of the Agreement” referred to in the Arbitral Award, to give directions on how it should be performed and/or what relief (including damages or other appropriate reliefs) the Respondent should have for the purpose of meeting the purpose of the Agreement.

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The 2 Applicants also gave an undertaking to the Court of Appeal of the High Court of Hong Kong on 22 May 2009 to make further

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application to your commission in order to resolve the problem with execution of the No. 0389 Award arising from the significant change of objective circumstances as soon as possible”

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9. On 27 July 2009, CIETAC replied to the first and second defendants stating:-

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“The arbitral tribunal adjudicated the case fully based on arbitration request of the Applicant (*i.e. the plaintiff*) and made ruling based on the Applicant’s arbitration request. After investigation, the Award... issued by the arbitral tribunal on 27 October 2006 is final, there was no mistake in relation to writing, typing or calculation which needs to be corrected. Also the arbitral tribunal in the Award did not leave out any matter which would need to be further determined according to the PRC Arbitration Law and the Arbitration Rules of the Arbitration Commission. Accordingly the tribunal does not accept the abovementioned application of the Respondents (*i.e. the first and second defendants*).”

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10. The judge below considered that that was arguably not an arbitral award as such but a refusal to issue an award or direction. Nevertheless, it was the third occasion when the arbitral tribunal had issued a statement that was in the nature of a decision.

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The judgment below

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11. As already noted, the judge permitted the amendment to the statement of claim. In the amended statement of claim the plaintiff claims that the first and second defendants had held the entire issued share capital of the fourth defendant on trust for the plaintiff on a basis similar to that of a vendor in possession. The plaintiff claims breach of that trust, the requisite knowledge and intention existing because the corporate defendants were all controlled by the sixth defendant. The remedies sought can be categorised as a claim to performance of what the plaintiff claims it is entitled under the Agreement, namely, transfer of all the shares of the fourth defendant. Amongst the amendments to the statement of claim was the inclusion of a cause of action in respect of conspiracy against the defendants who were alleged to have

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defrauded and unlawfully injured the plaintiff. It was also averred that the third to eleventh defendants were guilty of unlawful interference with contractual relations. The loss and damage pleaded in respect of that can be summarised as being the fees and other expenses incurred by the plaintiff in the expectation that the first and second defendants would perform their obligations under the Agreement and, in addition, the unrecovered legal costs and expenses in the arbitrations.

12. The judge considered that there was plainly a dispute between the parties as to how the Agreement was to be performed and that that dispute or difference concerned the nature and consequences of the contractual relations and was, therefore, a dispute arising from the performance of the Agreement. On that basis he stayed the action against the first and second defendants to arbitration, but he refused to strike out the action against them.

13. As regards the third, fourth and fifth defendants' application to strike out or stay the action against them, the judge dismissed the application on the basis that he considered that the matter was arguable. In this respect the judge was not persuaded by those defendants' primary argument that the proper law of the alleged constructive trust was the law of the PRC. Those defendants' alternative arguments, on the basis that Hong Kong law was the relevant proper law of the constructive trust alleged, were, again, not sufficient to persuade the judge that the action should be struck out or stayed against them. The judge also refused to stay the action against the third, fourth and fifth defendants as a matter of case management, even given the fact that the action against the first and second defendants was stayed.

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The appeals by the plaintiff and by the first and second defendants

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14. As already noted, this court allowed the plaintiff's appeal in respect of the stay of the action against the first and second defendants. Mr Chan SC, who appeared on behalf of the first and second defendants, argued strenuously that those defendants should be permitted to have resort to arbitration yet again. His submission was that the third application to the arbitral tribunal had been made on a wrong footing and instead of adopting the appropriate procedure, they had adopted an inappropriate procedure.

15. In my view, the time and scope for arbitration has clearly passed. There are two main stages to an arbitration. The first is the arbitration itself leading to the arbitral award. The second is the enforcement of the award. In my view the arbitral tribunal has given its award. It has ordered that the Agreement should be carried out. Admittedly, the first and second defendants deliberately concealed the machinations which they then were undertaking and which they now rely upon as rendering the carrying out of the Agreement impossible. But the arbitral tribunal has, subsequently, been made aware of those. In the award dated 22 April 2009 the arbitral tribunal stated that what had happened was a breach of the Agreement but it could not be a ground for the first and second defendants to terminate the Agreement.

16. More importantly the arbitral tribunal clearly considered that what had to happen was that the award had to be enforced. It specifically approved the enforcement of the award that was taking place in the Hong Kong courts. In the passage quoted above the arbitral tribunal did so in clear terms. It may be that in some respects the distinction between what should form part of the award and what should be considered part of the enforcement proceedings may

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be blurred. In this case the arbitral tribunal has considered that the award must now be enforced, as best it can given the difficulties which have been created by the defendants in this case. It is now for the Hong Kong courts to enforce that award.

17. The judge below recorded that it had been submitted on behalf of the plaintiff that the first and second defendants were serial re-litigators. Whilst he did not accept that submission, I for my part, am tempted to suggest that they are serial prevaricators. From the very time when they should have honoured their Agreement, they appear to have strained every nerve to deprive the plaintiff of the benefit of that Agreement and to have avoided any decision being taken in respect of their acts; when a decision has been taken, they have strained every nerve to avoid the consequences of it. I would simply add that even the stance that the matter should be referred back to arbitration was another attempt at delay and prevarication. When counsel was asked to explain precisely what application would be made to the arbitral tribunal if the first and second defendants' request for a stay were successful, it emerged that it was their intention that it would have to be the plaintiff that made a yet further application to the arbitral tribunal.

18. Since drafting this judgment I have had the advantage of reading the judgment of Kwan JA with which I agree.

The appeal by the third, fourth and fifth defendants

19. Mr Poon SC, who appeared on behalf of the third, fourth and fifth defendants, did not seek to argue separately in respect of the stay which those defendants had contended should be granted consequent upon any stay of the action against the first and second defendants. In that respect the matter

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therefore follows upon the result of the appeal in respect of the stay in relation to the action against the first and second defendants.

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20. Since the plaintiff did not seek to rely on any trust arising under PRC law the arguments that were addressed in respect of that do not fall to be considered. Mr Poon's primary argument in respect of the plaintiff's argument that a constructive trust arose under Hong Kong law was that no constructive trust could arise because the Agreement could not be specifically enforced. In respect of that, the argument was that enforcement of the Agreement would require constant supervision which would debar the grant of that remedy by the court. In the second place it was said that the Agreement only conferred an option to purchase the shares which had not been exercised.

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21. Turning to the first ground, namely, that an order for specific performance in the present case would necessarily require constant court supervision, that matter was not the subject of any sustained legal argument on this appeal. Apart from the legal proposition, as a general matter it was far from established that given the present situation which exists, with the development which has already taken place and the sale of the buildings which has already taken place, this matter would require such supervision as would prevent any constructive trust arising. The second point sought to be raised that the Agreement only conferred an option to purchase the shares which had not been exercised, begs the whole question since, as already noted, it is the plaintiff's case that the defendants should be treated as vendors in possession.

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22. It was also said that no constructive trust could arise because there was an insufficient plea that the requisite knowledge should be imputed to the relevant defendants. These matters were dealt with by the judge in paragraphs 117-122 of the judgment. In my view the judge was correct in his conclusion on the matter, particularly so, given the pleading that the sixth

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defendant beneficially owned and controlled the whole of the group of the defendant companies.

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23. There were a number of complaints which were apparently made in the court below but were also repeated in this court about the statement of claim in its amended form. It is fair to say that they were raised on the basis that the defendants claim to be entitled to have an intelligible pleading, rather than it being an attempt to dismiss the action altogether. Some of the arguments turned upon the use of the words “defraud” and “defrauded”. It is quite clear in the context in which those words were used that the pleading was not pleading the tort of deceit but was using the words to mean that the relevant defendants had acted in a way to deprive the plaintiff wrongfully of what was justly due to it. Some complaint was also made about the adequacy of the plea in respect of damages for conspiracy. In my view the plea is adequate albeit the defendants may if necessary seek to obtain particulars.

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24. In conclusion, having already allowed the plaintiff’s appeal, I would, therefore, dismiss the appeals by the defendants and make an order *nisi* of costs in favour of the plaintiff.

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Hon Le Pichon JA:

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25. I agree with the judgements of Rogers VP and Kwan JA and have nothing further to add.

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Hon Kwan JA:

26. I respectfully agree with the judgment of the Vice-President. As we are in agreement with the judge it has not been demonstrated that the plaintiff's claim is plainly and obviously unsustainable, and the judge has canvassed the relevant authorities cited by the parties in a carefully written judgment, there is no need to say more about the striking out and amendment of pleading aspects. My only observations are on the stay of the claim against the 1st and 2nd defendants, which is the only matter that we differ from the judge.

27. The 1st and 2nd defendants successfully obtained a stay from the judge by relying on the fact that they were parties to the Agreement which contained an arbitration clause in article 13(1) and contending that the dispute in the present action against them was a "dispute arising from the performance of [the] Agreement" in article 13(1) and therefore liable to be stayed in favour of arbitration by virtue of section 6 of the Arbitration Ordinance, Cap. 341 and article 8(1) of the UNCITRAL Model Law. The judge accepted that submission. Having analysed the nature of the dispute in this action, he concluded that the issues raised here concerned the nature and consequences of the contractual obligations arising from the Agreement and the economic tort claims against these defendants were also related to the performance of the Agreement. He therefore held that the dispute in this action is within the ambit of the arbitration agreement and granted a stay.

28. The judge fell into error in that he failed to draw a distinction between the determinative jurisdiction and powers, and the enforcement jurisdiction and powers of the court. The present action is concerned not with the former but with the latter.

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29. As submitted by Mr. Barlow, SC, the nature of the claim against the 1st and 2nd defendants in this action is primarily an action on an arbitration award, not an action on the performance and obligations of the Agreement (*Mustill & Boyd on The Law & Practice of Commercial Arbitration in England*, 2nd ed, p. 417; *Imperial Gas Light and Coke Co. v. Broadbent* [1859] VII HLC 600; *Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd.* (1927) Times Law Reports 541; *Birtley and District Co-operative Society Ltd. v. Windy Nook and District Industrial Co-operative Society Ltd.* [1960] 2 QB 1).

30. The plaintiff has brought this action against the 1st and 2nd defendants on the basis that these defendants were in breach of their implied promise to perform a valid arbitration award. This is within the enforcement jurisdiction and powers of the court, which have not been ousted by article 8 of the UNCITRAL Model Law, as the latter is concerned with the determination of disputes as to liability or entitlement, not the enforcement of arbitration awards. Further, the arbitrators of CIETAC do not have the powers and jurisdiction of the court to enforce the award or jurisdiction over any individual or entity not a party to the Agreement.

31. Mr. Poon, SC made the point that under the registration proceedings brought by the plaintiff under sections 2GG and 40B of Cap. 341, the plaintiff has obtained judgment against the 1st and 2nd defendants in the Hong Kong courts and there is no need for it to sue for breach of an implied promise of these defendants to perform the award in a separate action. I regard this as immaterial. Instead of seeking further relief in the registration proceedings, the plaintiff is at liberty to bring an action on the award against the 1st and 2nd defendants, combined with other claims against other entities and individuals.

32. Mr. Chan, SC submitted on behalf of the 1st and 2nd defendants that the issues raised in this action demonstrated that the plaintiff is not seeking a “mechanistic” enforcement of the award, relying on dicta in *Norsk Hydro ASA v. The State Property Fund of Ukraine & Ors.* [2002] EWHC 2120 (Comm) at paras. [17] and [18], and hence this action should not be regarded as an action for enforcement of the award. In my view, his reliance on such dicta is misplaced. The order sought to be impugned in that case was made in proceedings for enforcement of a New York Convention award in terms other than those of the award. It was in that context the court remarked that the task of the enforcement court should be as “mechanistic” as possible and was at pains to emphasise that the enforcing court should not stray into the arena of the substantive reasoning and intentions of the arbitration tribunal. This is not to say an action on the award must be mechanistic in nature. It all depends on the scope of the issues that may be raised in dispute in that action.

Hon Rogers VP:

33. There will therefore be an order in terms of paragraph 24 above.

(Anthony Rogers)
Vice-President

(Doreen Le Pichon)
Justice of Appeal

(Susan Kwan)
Justice of Appeal

Mr Barrie Barlow SC & Mr Anson Wong, instructed by Messrs Stephenson Harwood, for the Plaintiff/Appellant in CACV 88/2010

Mr Chan Chi Hung SC & Mr Richard Khaw, instructed by Messrs Mayer Brown JSM, for the 1st & 2nd Defendants/Respondents

Mr Winston Poon SC, Mr Jin Pao and Ms Elizabeth Cheung, instructed by Messrs Wilkinson & Grist, for the 3rd to 5th Defendants/Appellants in CACV 89/2010