CACV 92 & 93/2015

(Heard together)

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NOS. 92 AND 93 OF 2015

(ON APPEAL FROM HCCT NO. 53 OF 2010)

IN THE MATTER of an Arbitration
and
IN THE MATTER of Section 34C of the *Arbitration Ordinance* (Cap. 341)
and
IN THE MATTER of Article 34 of the Fifth Schedule to the *Arbitration Ordinance* (Cap. 341)

BETWEEN

CHINA PROPERTY DEVELOPMENT (HOLDINGS) LTD	Plaintiff
and	
MANDECLY LIMITED	1st Defendant
TSOI YUK MING	2nd Defendant
CHAN TAT MAN	3rd Defendant
北京明華軒投資諮詢有限公司 (in liquidation)	4th Defendant

北京太平洋城房地產開發有限公司　　5th Defendant

Before: Hon Cheung, Kwan and Poon JJA in Court

Date of Hearing: 10 May 2016

Date of Judgment: 24 May 2016

J U D G M E N T

Hon Cheung JA :

I. The appeal

1. The parties to the two appeals which are heard together, namely, the plaintiff ('CPDH'), 1st defendant ('Mandecly'),2nd defendant('Tsoi'),3rd defendant('Chan'), 4th defendant ('Minghuaxuan') and the 5th defendant ('BPP') were parties to an arbitration proceedings. The plaintiff was the first claimant and the 5th defendant the second claimant. After the arbitral award ('the Award') had been made on 25 May 2010, the plaintiff applied and succeeded before Deputy High Court Judge Simon Leung to set aside part of the Award. The 1st to 3rd defendants now appeal.

II. Background

2.1 The background of the case is set out in the judgment below which I will gladly adopt.

2.2 BPP was set up for the purpose of a real estate development project in the Mainland. It used to be the wholly owned subsidiary of World Lexus Pacific Limited ('World Lexus'). World Lexus was owned by Mandecly and Tsoi. Mandecly in turn was owned and controlled by Chan.

2.3 In 2004, CPDH, through its subsidiaries, acquired 80% of the shareholdings in World Lexus and thus BPP. By an agreement dated 9 August 2004, CPDH acquired the remaining 20% of the shareholdings in BPP ('the 20% Agreement').

2.4 By then, BPP had been involved in litigation in the Mainland in which BPP sought to recover from another company 北京華正時房地産開發有限公司 ('Huazhengshi') certain deposit paid in respect of the real estate development in 2001-2002. The parties agreed to cater for the situation and to provide for their rights and obligations arising out of, among others, the following terms of the 20% Agreement:

Clause 3.6.2(5)

'出讓方及陳先生同意在2005年3月31日前太平洋城公司如未能收回華正時有關協議下轉付將台鄉政府的人民幣1000萬元，受讓方可在2.4.2.2項下應支付轉讓代價餘額人民幣2000萬元中扣除人民幣1000萬元，如在2008年6月30日前太平洋城公司收回全部或部分華正時有關協議下之所付訂金/合同款，太平洋城公司將把所得款項不超于人民幣1000萬元轉付給出讓方及/或陳先生.'

Clause 3.6.2(6)(b)

'出讓方及受讓方同意以下幾種方式可視為款項已收回……(b)將台鄉政府提供付款人為太平洋公司的發票、收據或公函，確認已收到人民幣1000萬元款，並表明此1000萬元款項權益歸太平洋城公司，可用作抵扣太平洋城公司應付將台鄉政府的各種款項包括土地補償款在內.'

2.5 The effect of Clause 3.6.2(5) was that: (i) CPDH would be entitled to deduct RMB 10 million from the consideration payable to the vendors under the 20% Agreement, if BPP failed to recover from Huazhengshi by 31 March 2005 the sum of RMB 10 million, which had been forwarded to the Jiangtai party; and (ii) if BPP recovered any part of the sum from Huazhengshi by 30 June 2008, such amount up to RMB 10 million would be payable to the vendors and/or Chan.

2.6 Clause 3.6.2(6) set out the parties' agreement on the situations where the sum of RMB 10 million under the Huazhengshi Judgment would be deemed to have been recovered by BPP. One of such situations was provided in sub-clause (b) above, namely, the Jiangtai party provided documentary proof of receipt of the sum from Huazhengshi, and confirmed the sum to be held for the benefit of BPP, which could be utilised to set off any amount payable by BPP to the Jiangtai party ('the Deeming Provision').

2.7 BPP eventually succeeded on appeal and was given judgment against Huazhengshi in the sum of RMB 14 million plus interest ('the Huazhengshi Judgment'). But recovery of the judgment debt was still pending.

2.8 Dispute arose between CPDH and its counterpart in the deal pursuant to the 20% Agreement. Amongst other disputes, CPDH claimed to be entitled to invoke Clause 3.6.2(5) for the deduction of RMB 10 million from the consideration payable to the vendors under the 20% Agreement.

2.9 In April 2005, CPDH and BPP commenced the arbitration.

2.10 While the arbitration was pending, by an agreement dated 16 November 2007, World Lexus (then controlled by CPDH) sold the entire shareholdings in BPP to Best China Holdings Limited ('Best China'), which was in turn owned by 北京北大青鳥有限責任公司 ('Jade Bird'). The following terms of the agreement between CPDH and Best China ('the Jade Bird Agreement') are relevant for the present purpose:

> '買方向賣方實際支付的有關對價……該對價已扣除目標公司和BPP的備考合併資產負債表中以下BPP賬目上的應收賬款：
>
> ……
>
> (b) 與華正時應收賬款人民幣壹仟萬元(10,000,000)
>
> ……'
>
> '成交後，在BPP賬目中應作出以下調整：
>
> ……
>
> (b) 與華正時應收賬款人民幣壹仟萬元(10,000,000)的權益實為賣方所有，賣方實際是應收華正時人民幣壹仟萬元之權益的所有人，買方承諾由BPP繼續協助及配合賣方追討與華正時之應收賬款，並在成功追回部份或全部款項時，即時歸還給賣方，歸還後BPP賬上改為買方應付BPP歸還金額.'

2.11 Essentially, credit was given to the RMB 10 million to be recovered by BPP pursuant to the Huazhengshi Judgment in the consideration payable by Best China. In return, World Lexus retained the benefit of the Huazhengshi Judgment after completion of the sale and purchase, so that the same, when recovered, would be payable by Best China to World Lexus.

III. The relevant dispute in the arbitration

3.1 The dispute in the arbitration relevant to the proceedings below is as follow.

3.2 In the arbitration, CPDH (and BPP) claimed that pursuant to Clause 3.6.2(5), it was entitled to deduct RMB 10 million from the consideration payable under the 20% Agreement. The respondents disagreed and contended, among other things, that CPDH and BPP were in breach of the contractual term implied to Clause 3.6.2(5) that they should take reasonable steps and exercise due diligence to recover the RMB 10 million under the Huazhengshi Judgment by the contractual deadline 31 March 2005. They had failed to do so and CPDH was therefore not entitled to make the deduction.

3.3 The respondents further contended that the Deeming Provision was invoked upon the letter from the Jiangtai party dated 6 March 2008 ('the 6/3/2008 Letter'). The letter reads:

> '……其中人民幣壹仟萬元整(RMB1000萬)已於2002年5月間由華正時公司轉付至我公司做駝房營項目的土地補償款。此1000萬元款項的權益屬貴公司。可用作抵扣貴公司應付將台鄉政府的各種款項包括土地補償款在內。但，在貴公司未完成開發用地及代征地上所有拆遷工作之前以及在公司付清應付將台鄉政府的土地補償款之前，不可用於抵扣。具體抵扣的時間及條件屆時雙方另行協商訂立。'

3.4 Essentially, the Jiangtai party acknowledged by this letter the receipt of the sum of RMB 10 million from Huazhengshi, and the sum was held for the benefit of BPP and, subject to conditions, could be applied to set off the amount payable by BPP to the Jiangtai party. On this basis, the respondents claimed to be entitled to the payment of RMB 10 million pursuant to Clause 3.6.2(5).

3.5 Alternatively, if CPDH's deduction of the price was upheld, the respondents sought to subrogate to the rights of BPP in the interest of the Huazhengshi Judgment. This alternative claim was based on the concept of unjust enrichment: if CPDH had the benefit of the RMB 10 million deducted while BPP managed to recover any part of the Huazhengshi Judgment.

IV. The Award

4.1 Issue was taken by CPDH to the following parts of the Award:

Paragraph 342

'To conclude, the Tribunal finds that the 6 March 2008 letter from Jiangtai company satisfies the requirements set out in clause 3.6.2(6) and holds that in accordance with the Deeming Provision, CPDH ought to pay the "Vendors and/or Chan" the sum of RMB 10 million in accordance with clause 3.6.2(5) of the 20% Agreement.'

Paragraph 354

'To conclude, if the Tribunal is wrong in finding of the Deeming Provision and in awarding the Respondents RMB 10 million, the Tribunal would in the alternative, make a declaration that the Respondents are entitled to be subrogated to the rights of BPP under the Huazhengshi Judgment to the extent of RMB 10 million. Any recovery (interest included) short of RMB 10 million should first go to the Respondents. Any excess of RMB 10 million should go to CPDH.'

Paragraph 477(7)

'The Respondents' claim for RMB 10 million under clauses 3.6.2(5) and 3.6.2(6)(d) of the 20% Agreement is upheld and CPDH shall pay the same forthwith.'

4.2 CPDH questioned the correctness of paragraphs 342 and 477(7) of the Award ordering it to pay RMB 10 million to the respondents. CPDH believed it was a typographical error and asked the Tribunal to clarify if it was a clerical mistake to order it, instead of BPP, to pay this sum pursuant to Clause 3.6.2(5).

4.3 On 7 June 2010, the Tribunal answered and confirmed this part of the Award with reasons ('the Tribunal's Letter').

V. Application to set aside

5.1 CPDH then commenced the proceedings below and sought to set aside paragraphs 342 and 477(7) of the Award, which directed it to make the payment of RMB 10 million on the ground that there was irregularity in the arbitration proceedings in that the claim against it for RMB 10 million under the Deeming Provision was not pursued by the respondents.

5.2 The main contest was between CPDH on the one hand and Mandecly, Tsoi and Chan on the other hand. Minghuaxuan was in liquidation and did not enter appearance.

VI. The Decision

6. The Judge acceded to CPDH's application. He set aside paragraphs 342 and 447(7) of the Award. By so doing, the effect is that there is no longer any order directing CPDH to pay RMB 10 million to the respondents. The only relief that they have against CPDH is a declaration that they are entitled to be subrogated to the rights of BPP under the Huazhengshi Judgment to the extent of RMB 10 million. CPDH is content to have this relief made against it.

VII. Basis of the setting aside application

1) Section 34C Arbitration Ordinance (Cap. 341)

7.1 It is common ground that the arbitration below was an international arbitration and was subject to the UNCITRAL Model Law (section 34C of the now repealed *Arbitration Ordinance* ('the old *Ordinance*'), Cap. 341). This *Ordinance* was repealed since 1 June 2011 but applies to the arbitration in question (which was commended in 2005) by virtue of section 111 of the new *Arbitration Ordinance*, Cap. 609 (and section 1(1) of the 3rd Schedule).

7.2 The UNCITRAL Model Law is set out in the 5th Schedule to the old *Ordinance*. Article 34(1) provides that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article. The relevant parts of Article 34(2) are:

> ' (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) ….; or
>
> (ii) the party making the application was …. or was otherwise unable to present his case; or
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) …. ; or
>
> (b) the court finds that:

(i) …. ; or

(ii) the award is in conflict with the public policy of this State.'

2) CPDH's grounds

7.3 CPDH relied on Article 34(2)(a)(ii) and (iii), namely, it was unable to present its case and the Award did not fall within the terms of the submission to arbitration. It also relied on the public policy ground under Article 34(2)(b)(ii). As the Judge had observed, these grounds overlap one another.

3) Principles

7.4 A number of authorities on the setting aside of an arbitral award has been cited to us: *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD 707, *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1 and *Pang Wai Hak v. Hua Yunjian* [2012] 4 HKLRD 113. Guidance on the correct approach discussed in *Brunswick Bowling* was adopted by this Court in *Grand Pacific Holdings*. Instead of reproducing again the guidelines again which contain discussion of the authorities, I will respectfully adopt a summary of these guidance by Recorder Anderson Chow SC (now Chow J) in *Pang Wai Hak* at paragraphs 29 and 30:

1) In determining whether to set aside an arbitral award on the ground that a party was unable to present his case under Article 34(2)(a)(ii) of the UNCITRAL Model Law, the Court is not concerned with the substantive merits of the dispute, or the correctness or otherwise of the award. This is because the Court is not hearing an appeal from the decision of the arbitral tribunal.

2) To justify setting aside an arbitral award on this ground, the Court has to be satisfied that a party has been denied due process.

3) For this purpose, the conduct complained of must be serious or even egregious.

4) It is not possible to set out exhaustively all possible situations of denial of due process. Whether there has been a denial of due process must depend on the Court's evaluation of the relevant facts and circumstances of each individual case.

5) One particular instance in which a party can justifiably complain that he was unable to present his case and thus denied due process is where the tribunal carried out its own investigation or inquiry on primary facts, or decided a case based on a wholly new point of law or fact without giving the parties a fair opportunity to consider and respond to such point.

6) The Court has a discretion not to set aside an arbitral award even if a violation of Article 34(2)(a)(ii) of the Model Law has been established, but this discretion should only be exercised where the Court is satisfied that the outcome could not have been any different. Put in another way, the party seeking to set aside the arbitral award does not have to show that the outcome would have been different had there been no violation of that article; it suffices for that party to show that the outcome could or might have been different.

7) Ultimately, in considering whether a party was 'unable to present his case', the question is one of fairness in the arbitral process.

8) It is not necessary for a party seeking to rely upon the 'unable to present his case' limb in Article 34(2)(a)(ii) of the UNCITRAL Model Law to show any form of dishonesty or reprehensible conduct by the arbitral tribunal or of the other side.

9) The 'unable to present his case' ground is not limited to situations where a party is prevented from presenting legal arguments or deal with evidence on an issue going to the substantive merits of a case, but may extend to a situation where a party is prevented from presenting his case on a procedural issue which is taken by the arbitral tribunal against him of the tribunal's own volition.

7.5 In applying these principles, it is important to bear in mind the principle of finality and comity in a consensual arbitration like the present case: *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111.

VIII. Has CPDH made out its case for setting aside?

1) The letter of 7 June 2010 from the Tribunal

8.1 In reply to CPDH's inquiry whether there was a typographical error, the Tribunal invited further submission from the parties. By its letter of 7 June 2010, it gave further reasons for making the award of RMB 10 million against CPDH instead of BPP. The relevant part of the letter reads:

> ' ….The reasons for coming to this decision has already been discussed and set out in the Final Partial Award. It is not necessary for this Tribunal to reiterate its reasons. Nor will it be appropriate for this Tribunal to expand its reasons as it will then raise question of jurisdiction. Insofar as may be necessary for the purpose of explaining why paragraph 477(7) of the Final Partial Award does not contain the clerical or typographical error as suggested on behalf of CPDH, this Tribunal explains as follows:
>
> (1) This Tribunal is fully aware of the express provisions contained in clause 3.6.2(5) and (6) of the 20% Agreement. Amongst others, this Tribunal is fully aware that clause 3.6.2(5) expressly referred to the entitlement on the part of CPDH to make deduction of RMB 10 million as well as the express reference to BPP's obligation to reimburse the sum of not exceeding RMB 10 million in the event the relevant conditions were fulfilled.
>
> (2) However, properly considered in the context of this dispute and taking into account the arguments advanced on behalf of the parties at the main hearing (including the concept of unjust enrichment), it is the considered view of this Tribunal that clause 3.6.2((5) of the 20% Agreement did not prevent this Tribunal from ordering CPDH to make the payment of RMB 10 million as stated in paragraph 477(7) of the Final Partial Award.
>
> (3) This Tribunal is also fully aware of the fact that at the second application for interim payment (which led to the 3rd Interim Award), the Respondents only targeted the application against BPP and not CPDH. However, such a stance taken at the second interim payment application likewise did not in law preclude this Tribunal from making the order as stated in paragraph 477(7) of the Final Partial Award. Application for interim payment is an interlocutory application. As discussed in the 3rd Interim Award, the burden assumed by an applicant in an interim payment application is an onerous one. It is thus understandable that the Respondents did not at that time and under such a context target the interim payment application against CPDH.

(4) Irrespective of whether CPDH was at the material time justified in making the deduction of RMB 10 million pursuant to clause 3.6.2(5) of the 20% Agreement, CPDH undoubtedly has had the benefit of it. As dealt with in Section G3.5 of the Final Partial Award this Tribunal has ruled that the conditions contained in the Deeming Provision in clause 3.6.2(6) of the 20% Agreement had been satisfied. On top of this, the Jade Bird Agreement provided, *inter alia*, that the benefit of the Huazhengshi Judgment now belongs to CPDH (see the Respondents' contentions as outlined in paragraph 302 of the Final Partial Award, which argument was not disputed by CDPH at the main hearing and which has been accepted by this Tribunal). Further, Jade Bird is not a party to this arbitration. To order BPP to pay the sum of RMB 10 million will have the indirect and inappropriate effect of ordering Jade Bird to make the payment since the shareholding in BPP has already been sold to Jade Bird.

This Tribunal trusts that the above has explained the position. In the circumstances, this Tribunal dismisses the slip rule application made on behalf of CPDH.'

8.2 There are authorities which point to the arbitrator becoming *functus officio* as respects all the issues between the parties once the final award is made and the parties cannot re-open the same matters again before him: *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 Q.B. 630 per Diplock LJ at p.644B and *Opotiki Packing v Opotiki Fruitgrowers* [2003] 1 NZLR 205, per Fisher J at [24] & [25] adopting *Fidelitas* (affirmed on appeal).

8.3 CPDH was only concerned with a possible typographical error in directing the award of RMB 10 million against it instead of BPP. The Tribunal clearly had exceeded its jurisdiction in attempting to explain why it was still justified in making this award notwithstanding clause 3.6.2(5) which expressly stated that it was for BPP to reimburse this sum. This being the case, the further explanation of the Tribunal should be ignored and instead, one should look at the state of pleadings, submissions of the parties and the Award itself to decide whether CPDH had made out a case on irregularity. But I will return to the letter again later to address a point made by Mr Bernard Mak (together with Mr Dixon Co) for the respondents.

2) State of pleadings

8.4 CPDH had expressly pleaded and sought a declaration that it was entitled to deduct the RMB 10 million. Tsoi had raised no counterclaim against CPDH. Mandecly and Chan did not specifically plead a claim against CPDH for this sum. Instead their pleaded case (which, as the Judge stated, was adopted by Minghuaxuan) was that CPDH was required, among other things, to pay RMB 20 million under clause 2.4.2.2 of the 20% Agreement and it had wrongly deducted RMB 10 million. They pleaded that CPDH was liable to pay the RMB 20 million together with other sums.

8.5 As can be seen from the pleadings of the respondents, their contention that CPDH was not entitled to deduct the RMB 10 million was because they alleged there was an implied term that CPDH must take all reasonable steps to recover the RMB 10 million from Huazhengshi and CPDH had been in breach of the implied term ('the implied term issue'). Further as against CPDH there is an alternative claim for a declaration that the respondents were entitled to be subrogated to the rights of BPP under the Huazhengshi Judgment ('the subrogation issue') by virtue of clause 3.6.2(6)(b) of the 20% Agreement if BPP was deemed to have recovered the RMB 10 million ('the deeming provision issue').

8.6 Whilst there was no express claim for RMB 10 million against CPDH, the respondents expressly sought against BPP for, among other things, an order for payment by BPP of the RMB 10 million.

3) Submissions of the parties

8.7 Mandecly and Chan's written submissions were all along the same lines. Their supplemental written opening submission before the Tribunal was that:

> ' 9. The Respondents have basically three counterclaims:
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> 1) The outstanding balance under the 20% Agreement;
>
> 2) Under Cl 3.6.2(6) of the 20% Agreement, against BPP for the sum of RMB 10m (i.e. the subject matter of the 3rd Interim Award);
>
> 3) —.'

8.8 In their closing written submission, they contended that:

‘ 20. On any notion of justice, it would be outrageous for CPDH to have kept RMB 10m of the Rs’ entitlement on the ground that the Judgment has yield nothing and then keep the benefit of the Judgment.’

They elaborated:

‘ 22. It is not disputed that BPP has obtained the Judgment against Huazhengshi in the sum of RMB 14m with interest and costs and court fee in the sum of RMB 200,000. It is however CPDH’s case that there is “no prospect of recovering the judgment debt”. The issues under this head are as follows:

(i) Whether CPDH and BPP have taken all reasonable steps for enforcement (there are sub-issues as identified below);

(ii) The deeming provision under Cl.3.6.2(6)(b) (CB2/22);

(iii) BPP’s costs and court charges (totalling RMB 804,220);

(iv) The alternative relief of subrogation.

Enforcement

23. The sub-issues are:

(i) The proper construction of Cl.3.6.2(4) and (5);

(ii) The implied term giving rise to a duty on the part of CPDH and BPP to exercise all reasonable care and due diligence in the enforcement of the Judgment (D&CC at A2/37/37);

(iii) Whether all reasonable steps have been taken to enforce the Judgment.’

8.9 In respect of the deeming provision issue, they submitted in their written closing submission:

‘ 36. This is an alternative case of the Rs. First and foremost, BPP has not appeared and disputed this part of the Rs’ case. CPDH is, for obvious reason, not concerned because the operation of Cl.3.6.2(5) (see last 3 lines of the clause at CB2/22) is such that, upon recovery of money, the liability to pay the Rs rests on BPP.’ (emphasis added)

8.10 Then in respect of subrogation issue, the respondents submitted:

‘ Subrogation

53. This is another alterative of the Rs’ case. If the deduction of RMB 10m by CPDH were upheld by this Tribunal and that the deeming provision did not avail the Rs, it is respectfully submitted that the Rs is entitled to a declaration of subrogation right in the terms of Prayer (1A)(A2/97).

……

58. At the end of the day, if the deduction of RMB 10 million under Cl. 3.6.2(5) were upheld by this Tribunal, an equitable right to subrogation would arise in favour of the Rs for the indemnity of RMB 10 million.

> 59. In effect, Rs should be allowed to step into the shoes of BPP under the Huazhengshi Judgment through the remedy of subrogation. Once the claim for subrogation is allowed, the Huazhengshi Judgment will be enforceable by Rs (not by BPP) in Rs' own names.
>
> 60. It is submitted that to deny Rs' claim for subrogation will mean that BPP and/or CPDH will be unjustly enriched because they would be able to recover the sum of RMB 10 million twice at the expense of Rs.
>
> 61. Hence, there can be no inhibition for granting the relief by reason of the Jade Bird Agreement (under which the right to the Huazhengshi Judgment was given to CPDH). Plainly, BPP and CPDH cannot defeat a lawful relief by their own device. In any event, it appears to be CPDH's evidence that these contractual provisions were merely to preserve the matters whilst litigation is on foot.'

8.11 CPDH in its written closing submission had referred to the respondents' claim against it for RMB 10 million. But as apparent from the transcript of the arbitration proceedings, the claim for RMB 10 million which was directed to both CPDH and BPP was in respect of the implied term issue only. In the words of the respondents' counsel, 'if they breached the implied term, the consequence must be that they have to repay to us what they had deducted'. When the issue came up on who is to be responsible to pay for the RMB 10 million under the deeming provision issue, the respondents' counsel expressly informed the Tribunal, that the deeming provision issue and hence the payment of RMB 10 million was only directed against BPP.

3) The Tribunal's decision

8.12 The Tribunal first addressed the issue of implied term and found against the respondents on this issue. The result is that CPDH is not required to repay RMB 10 million under this ground. The Tribunal then dealt with the deeming provision issue. Although it had repeated the respondents' written submission that the liability to pay rested with BPP, at the end it held CPDH was liable for this sum. This can be seen from paragraph 342 of the Award.

8.13 The Tribunal also granted the relief for subrogation. This is based on the unjust enrichment argument advanced by the respondents. As indicated in paragraph 354 of the Award, the Tribunal said that this is an alternative relief in the event 'if (it) is wrong in the finding of the Deeming Provision and in awarding the respondents RMB 10 million'.

4) Irregularity established

8.14 In the light of the express and clear indication from the respondents' counsel that the deeming provision issue was directed towards BPP only, an irregularity had clearly occurred when the Tribunal actually ordered CPDH to pay RMB 10 million pursuant to the deeming provision. That was the only ground that CPDH was held liable. In so doing, not only was CPDH prevented from presenting its case on this issue under Article 34(2)(a)(ii), more importantly, the Tribunal had actually fallen into the Article 34(2)(a)(iii) error, namely, the award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or contains decisions on matters beyond the scope of the submission to arbitration.

8.15 In my view this point is unanswerable. In attempting to answer this, Mr Mak sought assistance from the letter of 20 June 2014 where the Tribunal said that the Award against CPDH was made on the basis of unjust enrichment. I had earlier held that it was not permissible to look at that letter. But just for the sake of argument, if the award of RMB 10 million against CPDH was on the basis of unjust enrichment, this was certainly not apparent from the Award itself. Unjust enrichment became an issue only under the subrogation issue and not under the deeming provision issue. This is clearly the position when the Tribunal expressly stated that the subrogation award is an alternative award if it was wrong to order CPDH to pay under the deeming provision. This award was made beyond the scope of the arbitration. Further the Tribunal had certainly not invited CPDH to make submission at the arbitration if its intention was to rely on the unjust enrichment ground. CPDH was indeed prevented from presenting its case.

8.16 Mr Mak submitted that the attack was in substance a criticism of the adequacy of the reasons rather than an assertion of irregularity by reference to the judgment of Tomlinson J in *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1 at paragraph 80. He also relied on the following part of the judgment.

‘ 67. All of these authorities and judicial observations emphasise the restricted ambit of the jurisdiction under section 68. It is not a ground for intervention that the court considers that it might have done things differently or expressed its conclusions on the essential issues at greater length. Furthermore it is particularly to be borne in mind in the context of international arbitrations that the arbitrators may not all have been brought up in the same legal tradition. In order to express the reasons for their award they must find language with which each is comfortable. Directing myself in accordance with these principles I turn to consider ABB’s challenge to this award under each head.’

8.17 In considering the English authorities, it is important to bear in mind the caution mentioned by Johnson Lam J (as he then was) in *Brunswick Bowling*:

‘ 33. One must bear in mind the difference in the legislative frameworks between England and Hong Kong in this connection when reference is made to English cases. Section 68(2) of the English Arbitration Act 1996 specifically defines serious irregularity (that provides the ground for setting aside an arbitration award in England) as an irregularity that the court considers as having caused or will cause substantial injustice to the applicant.

34. There is no equivalent provision under the Model Law. As Ms Cheng pointed out by reference to the *travaux préparatoires* of art.34, an attempt by the representative of the United Kingdom to graft in a similar qualification to the Model Law was rejected, see *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary,* pp.981–982, 1003. At para.303 of the Commission Report A/40/17, the following understanding on art.34 is recorded:

> It was understood that an award might be set aside on any of the grounds listed in para.(2) irrespective of whether such ground had materially affected the award.

35. Against such background, I do not think one can import the English requirement of causation of substantial injustice into our law. In other words, a party applying to set aside an award does not have to show that a violation under art.34(2) has caused substantial injustice.

36. On the other hand, there is much to be said for making reference to the jurisprudence under the New York Convention as a guide to how the discretion under art.34 is to be exercised. Article V of the New York Convention is worded basically in similar terms and Ms Cheng accepted that the drafters of the Model Law did have regard to the Convention.’

8.18 In my view this is a clear case of irregularity when the respondents' counsel expressly disavowed a claim against CPDH on the deeming provision issue and yet the Tribunal had taken upon itself to make a finding against CPDH contrary to the respondents' stand. Whilst this is an international arbitration, the arbitrators are all Hong Kong based with two of them being barristers. Hence there is no issue of language or different legal background and for which a margin of appreciation should be accorded to the Tribunal. This is clearly not an attack simply on the reasoning of the Tribunal. The reference to the pleadings, submission of the parties and the Award is solely for the purpose of establishing the irregularity.

5) Residual discretion

8.19 The Court has a discretion not to set aside an award even when irregularity has been established.

8.20 Mr Mak criticized the Judge for not exercising the discretion properly or at all. This is what the Judge said:

> ' 72. It is suggested that even assuming that the decision of Tribunal set out in §§342 and 477(7) of the Award is liable to be set aside and re-opened, the result would have been the same notwithstanding the contention and argument advanced. The court should therefore exercise its discretion not to set aside the Award.
>
> 73. It is not for this court to share that speculation. Further it should be noted that the Tribunal also (at §354) provided for the alternative remedy of a declaration that the respondents are entitled to be subrogated to the rights of BPP under the Huazhengshi Judgment to the extent of that sum in the event that it is wrong in its findings in respect of the Deeming Provision and in awarding the respondents RMB 10 million.'

8.21 The irregularity must in the first place satisfy the serious and egregious requirement. But on that basis, the nature of irregularity must be different in each case and in my view, in exercising the discretion, the Court must consider the nature of the irregularity. In respect of some irregularities, the Court having considered the circumstances of the case will have no difficulty in refusing to set aside the award. On the other hand, some irregularities may be so fundamental and the structural integrity of the arbitration proceeding is so seriously damaged that the Court will have no hesitation in setting aside the award. In between these two extremes there is a range of irregularities, the consequence of which really depends on the circumstances of the case. In this case, the irregularity clearly falls under the serious end of the two extremes when the issue decided by the Tribunal was not even part of the issues submitted for arbitration and when the respondents themselves had not even relied on unjust enrichment against CPDH under the deeming provision issue. The Judge was clearly correct in the circumstances to exercise the discretion in favour of CPDH by setting aside part of the Award.

IX. Conclusion

9. Accordingly this appeal is dismissed.

X. Costs

10. There will be an order *nisi* that CPDH is entitled to the costs of the appeal with certificate for two counsel.

Hon Kwan JA :

11. I agree with the judgment of Cheung JA.

Hon Poon JA :

12. I agree with the judgment of Cheung JA.

(Peter Cheung)	(Susan Kwan)	(Jeremy Poon)
Justice of Appeal	Justice of Appeal	Justice of Appeal

Mr Horace Wong SC and Mr Paul Mak, instructed by Reed Smith Richards Butler, for the plaintiff

Mr Bernard Mak and Mr Dixon Co, instructed by Anthony Siu & Co., for the 1st and 3rd defendants (appellants in CACV 93/2015)

Mr Bernard Mak and Mr Dixon Co, instructed by W.K. To & Co., for the 2nd defendant (appellant in CACV 92/2015)

Attendance of King & Wood Mallesons, for the 5th defendant, was excused