

FACV Nos. 3 and 5 of 2019  
[2020] HKCFA 32

FACV No. 3 of 2019

**IN THE COURT OF FINAL APPEAL OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION**

FINAL APPEAL NO. 3 OF 2019 (CIVIL)  
(ON APPEAL FROM CACV NO. 158 OF 2012)

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BETWEEN

|                                                    |                           |
|----------------------------------------------------|---------------------------|
| 廈門新景地集團有限公司<br>formerly known as<br>廈門市鑫新景地房地產有限公司 | Plaintiff<br>(Respondent) |
|----------------------------------------------------|---------------------------|

and

|                                                                                                                                               |                                                          |
|-----------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------|
| ETON PROPERTIES LIMITED<br>(裕景興業有限公司)                                                                                                         | 1 <sup>st</sup> Defendant<br>(1 <sup>st</sup> Appellant) |
| ETON PROPERTIES (HOLDINGS) LIMITED<br>(裕景興業(集團)有限公司)                                                                                          | 2 <sup>nd</sup> Defendant<br>(2 <sup>nd</sup> Appellant) |
| ETON PROPERTIES GROUP LIMITED formerly<br>known as ETON PROPERTIES<br>(INTERNATIONAL) LIMITED                                                 | 3 <sup>rd</sup> Defendant                                |
| LEGEND PROPERTIES (XIAMEN)<br>COMPANY LIMITED (利景興業(廈門)有限公司),<br>a limited company incorporated in Hong Kong                                  | 4 <sup>th</sup> Defendant                                |
| LEGEND PROPERTIES (XIAMEN) COMPANY<br>LIMITED (利景興業(廈門)有限公司),<br>a foreign-owned enterprise incorporated in the<br>People's Republic of China | 5 <sup>th</sup> Defendant                                |

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|----------------------------|----------------------------|
| TAN LUCIO C (陳永裁)          | 6 <sup>th</sup> Defendant  |
| CHUA DOMINGO (蔡黎明)         | 7 <sup>th</sup> Defendant  |
| TAN ENG LIEN MARIANO (陳永年) | 8 <sup>th</sup> Defendant  |
| KWAN KIE YIP (關基業)         | 9 <sup>th</sup> Defendant  |
| CHEUNG CHI MING (張志明)      | 10 <sup>th</sup> Defendant |
| MOK PUI HONG (莫沛杭)         | 11 <sup>th</sup> Defendant |

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FACV No. 5 of 2019

**IN THE COURT OF FINAL APPEAL OF THE  
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FINAL APPEAL NO. 5 OF 2019 (CIVIL)  
(ON APPEAL FROM CACV NO. 158 OF 2012)

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BETWEEN

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

Plaintiff  
(Appellant)

and

ETON PROPERTIES LIMITED  
(裕景興業有限公司)

1<sup>st</sup> Defendant  
(1<sup>st</sup> Respondent)

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

2<sup>nd</sup> Defendant  
(2<sup>nd</sup> Respondent)

|                                                                                                                                               |                                                           |
|-----------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------|
| ETON PROPERTIES GROUP LIMITED formerly<br>known as ETON PROPERTIES<br>(INTERNATIONAL) LIMITED                                                 | 3 <sup>rd</sup> Defendant<br>(3 <sup>rd</sup> Respondent) |
| LEGEND PROPERTIES (XIAMEN)<br>COMPANY LIMITED (利景興業(廈門)有限公司),<br>a limited company incorporated in Hong Kong                                  | 4 <sup>th</sup> Defendant<br>(4 <sup>th</sup> Respondent) |
| LEGEND PROPERTIES (XIAMEN) COMPANY<br>LIMITED (利景興業(廈門)有限公司),<br>a foreign-owned enterprise incorporated in the<br>People's Republic of China | 5 <sup>th</sup> Defendant                                 |
| TAN LUCIO C (陳永裁)                                                                                                                             | 6 <sup>th</sup> Defendant<br>(5 <sup>th</sup> Respondent) |
| CHUA DOMINGO (蔡黎明)                                                                                                                            | 7 <sup>th</sup> Defendant                                 |
| TAN ENG LIEN MARIANO (陳永年)                                                                                                                    | 8 <sup>th</sup> Defendant                                 |
| KWAN KIE YIP (關基業)                                                                                                                            | 9 <sup>th</sup> Defendant                                 |
| CHEUNG CHI MING (張志明)                                                                                                                         | 10 <sup>th</sup> Defendant                                |
| MOK PUI HONG (莫沛杭)                                                                                                                            | 11 <sup>th</sup> Defendant                                |

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(HEARD TOGETHER)

Before: Mr Justice Ribeiro PJ, Mr Justice Fok PJ,  
Mr Justice Cheung PJ, Mr Justice Bokhary NPJ and  
Lord Sumption NPJ

Dates of Hearing: 25-26 August 2020

Date of Judgment: 9 October 2020

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J U D G E M E N T

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**Mr Justice Ribeiro PJ:**

1. The present cross-appeals arise out of the same transaction. The first appeal, FACV3 of 2019, is brought by Eton Properties Limited and Eton Properties (Holdings) Limited, both Hong Kong companies. I will refer to them as D1 and D2 respectively and jointly as D1-D2, this being how they were referred to as defendants in the first instance proceedings and throughout. Their appeal is brought against the Plaintiff, Xiamen Xinjingdi Group Co Ltd,<sup>1</sup> a PRC corporation.

2. The second appeal, FACV5 of 2019, is brought by the Plaintiff as appellant against D1 and D2 as well as three others who were also named as defendants at first instance. They are Eton Properties Group Limited, a BVI company (D3), Legend Properties (Xiamen) Company Limited, a Hong Kong company (D4) and Mr Lucio C Tan (D6), an individual who established and controlled the Eton Group.

3. Another entity and five other individuals were previously joined as defendants but are no longer parties. Two of them will, however, be mentioned and can conveniently continue to be referred to as D5 (Legend Properties (Xiamen) Company Limited, a foreign-owned enterprise incorporated in the PRC) and D10 (Cheung Chi Ming, D6's brother-in-law, a director of D4 and D5 and described as one of the key senior management personnel of the group).

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<sup>1</sup> The name in Chinese: 廈門新景地集團有限公司.

4. These are appeals from the judgment of the Court of Appeal<sup>2</sup> which allowed in part an appeal from DHCJ Stone QC who had entirely dismissed the Plaintiff's claims.<sup>3</sup>

5. In this judgment, I set out the somewhat lengthy course of events leading to these appeals and deal with the issues arising in FACV3, the first appeal. Lord Sumption NPJ deals with FACV5, the second appeal. I have read his judgment in draft and respectfully agree with his reasons and conclusion.

*A. The transactions between the parties*

*A.1 The Agreement*

6. On 4 July 2003, D1-D2 and the Plaintiff entered into an agreement which lies at the root of these proceedings ("the Agreement"). In it, D1 and D2 declared that each owned one share in D4, comprising the whole of D4's issued capital and that D4 had incorporated and owned D5 which had the right to develop and use Lot 22, a piece of land in Xiamen comprising an area of 11,994.59 sq m. D1-D2 warranted that they had "absolute control" over D4 and D5. The Plaintiff agreed to purchase those development and use rights by acquiring the shares in D4 and thus D5. Article 3 provided:

"[The Plaintiff] for the purpose of obtaining the right to develop [Lot 22] in the name of [D5] and obtaining the right to profits, and at the same time for the purpose of compensating [D1-D2] the investment which it has put into the two companies [D4] and [D5] and [Lot 22], agrees to pay [D1-D2] the transfer price of RMB 120,000,000. After [the Plaintiff] has settled the transfer price in full, [D1-D2] agree to transfer all the shares in [D4] for HK\$2 to a legal entity or individual outside the territory of China designated by [the Plaintiff] and exempt repayment of all shareholders' loans advanced to [D4] and [D5]."

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<sup>2</sup> Yuen, Barma and Poon JJA, CACV 158/2012, [2016] 2 HKLRD 1106 (15 April 2016). Unless otherwise indicated, references in this judgment to paragraphs (§§) in the judgment of the Court of Appeal are references to the aforesaid judgment.

<sup>3</sup> HCCL 13/2011 (14 June 2012).

7. The Agreement provided for the Plaintiff's payment of a deposit of RMB5,000,000 on signing (which was duly paid) and payment of the balance of the transfer price by instalments. Delivery of the land was to take place within 6 months of the date of the Agreement,<sup>4</sup> after current residents had moved out and certain structures had been demolished. The Agreement provided for a significant degree of supervision by D1-D2 in the event that the development process should occur. Their consent would, for instance, be required for construction plans, "project finance index" and "change of land use area".<sup>5</sup> Pending payment of the transfer price in full, D1-D2 would have the right to "supervise [the Plaintiff's] development and operation activities", in respect of a series of specified matters.<sup>6</sup>

8. As provided by Article 8, after full payment, D1-D2 were to transfer their shares in D4 to the Plaintiff's nominee:

"When [the Plaintiff] has settled the total transfer price and fulfilled the obligations according to the Agreement, [D1-D2] will agree to transfer all the shares of [D4] to an approved individual or an approved legal entity outside the territory of China designated by [the Plaintiff], the two parties shall jointly sign the 'Sale and Purchase Agreement for Transfer of Shares and Debts of [D4] [annexed]."

9. Importantly for present purposes, Article 13 provided for arbitration and choice of law:

- "1. Parties shall make every effort to negotiate to resolve the disputes arising from the performance of this Agreement. In the case where no agreement is reached through negotiation, any party has the right to submit the dispute to the China International Trade Arbitration Commission ["CIETAC"] in Beijing for arbitration, the arbitration rules of the Arbitration Commission effective at the time when the dispute occurs should be adopted.
2. The Agreement is governed by the laws of the People's Republic of China, but the procedure and validity related to the transfer of shares of [D4] is governed by the laws of Hong Kong Special Administrative Region."

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<sup>4</sup> Agreement, Article 5.

<sup>5</sup> *Ibid*, Article 6.1.

<sup>6</sup> *Ibid*, Article 7.

## *A.2 Renunciation of the Agreement*

10. D6 did not give evidence. However, D10 testified that in September 2003, a mere two months or so after concluding the Agreement, D6 decided to terminate it and instructed D10 to implement his decision.<sup>7</sup> D10 also testified that at around this time, he proposed setting up a real estate investment holding company in the PRC and D6 agreed, leaving it up to D10 to determine when this should be done.<sup>8</sup>

11. On 14 November 2003, D1-D2 wrote to the Plaintiff giving notice that performance of the Agreement would be discontinued, alleging that issues of illegality had arisen and seeking to return the deposit. The Plaintiff replied on 8 December 2003, refusing to accept the termination or return of the deposit.

12. The land should have been delivered to the Plaintiff by 4 January 2004, being six months after the date of the Agreement. That did not occur and, on 17 January 2004, the Plaintiff wrote making a demand for delivery which was not met.<sup>9</sup>

13. Instead, the Defendants took steps to develop Lot 22 themselves, obtaining regulatory and town planning approvals between November 2004 and February 2005. In March 2005, D10 set about incorporating a real estate holding company as discussed with D6 back in September 2003. This led to D3 being incorporated and introduced into the scene.

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<sup>7</sup> Court of Appeal §23.

<sup>8</sup> *Ibid* §35.

<sup>9</sup> *Ibid* §30.

### *A.3 The restructuring*

14. On 8 August 2005, the Plaintiff commenced the CIETAC arbitration in Beijing against D1 and D2.<sup>10</sup> And on 24 October 2005, the tribunal served notice that the first hearing would take place on 23 November 2005.

15. On 16 November 2005, a week before that hearing, the restructuring of the corporate shareholdings relating to Lot 22 began. D3, Eton Properties Group Limited, a BVI company, was brought into the picture and on that date, 9,998 newly-issued shares in D4 were allotted to D3. The restructuring was completed when, on 6 April 2006, D1 transferred its single share in D4 to D3 and D2 declared itself trustee of its single share in D4 in favour of D3. Consequently, D4's 10,000 issued shares were held beneficially by D3 (in place of D1-D2) so that D3, via D4, held D5 which owned the rights to Lot 22. It followed that the promise contained in the Agreement that D1-D2 would, at completion of the development, transfer their shares in D4 to the Plaintiff could not be performed. The Plaintiff was unaware of the restructuring which was not disclosed by D1-D2 until 2 January 2008.

### *B. The arbitration – the First Award*

16. The first arbitration hearing took place as scheduled on 23 November 2005 and a second hearing was held on 18 May 2006. Even though by the start of the arbitration, D1-D2's interest in D4 had been diluted to 0.02% after the allotment of shares to D3, they referred to themselves as the parent

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<sup>10</sup> The Plaintiff nominated Mr Cheng Dejun and D1-D2 jointly nominated Mr Gu Gongyun. The director of CIETAC appointed Mr Liu Yuwu as chief arbitrator. Subsequently, on 3 March 2006, Mr Liu disqualified himself on the ground of conflict of interest and on 7 March 2006, Mr Kou Liyun was appointed as chief arbitrator in his stead.

companies of D4 and D5.<sup>11</sup> On 30 June 2006, D5 started pre-sales of the units being developed on the site.

17. On 27 October 2006, the tribunal made its First Award.<sup>12</sup> It noted the terms of the Agreement including D1-D2's warranty that they had absolute control over D4 and D5; the Plaintiff's agreement to pay RMB120,000,000 to obtain the right to develop Lot 22 in D5's name; the undertaking to deliver Lot 22 to the Plaintiff within 6 months from the date of the agreement; the obligation on D1-D2, after full payment to transfer all the shares in D4 to the Plaintiff for HK\$2; and the Plaintiff's freedom to decide on the details of the development while D1-D2 maintained certain rights of supervision pending settlement of the full transfer price.

18. The tribunal recorded that D1-D2 had repudiated the Agreement and that the Plaintiff refused to accept termination. It noted that D1-D2 asserted that the Agreement was illegal and invalid and claimed that even if it was valid, it had become impossible to perform. This was because construction activities on the ground and sales of the residential units meant that they were unable to transfer Lot 22 to the Plaintiff for development.

19. The tribunal held that PRC law was applicable. It described the Agreement as "neither an agreement of share transfer nor an agreement of transfer of land-use right". It held, rather, that –

"The subject matter of the Agreement is the contractual right to buy and sell the shares in [D4] that has an indirect effective control over [Lot 22]. The amount of RMB 120 million is the consideration for [the Plaintiff] to obtain the contractual right to acquire all the shares in [D4] for HK\$2, and also the consideration for [D1-D2] to obtain the contractual right to sell all the shares in [D4] for HK\$2."

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<sup>11</sup> Court of Appeal §56.4.

<sup>12</sup> Award [2006] No 0389. References in this judgment to the content of the tribunal's awards are to English translations thereof.

20. So characterised, the tribunal concluded that D1-D2's challenge to the legality and validity of the Agreement failed. It also rejected the argument that performance was impossible:

“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 [D1-D2], 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. [D1-D2's] allegations cannot constitute justifiable reasons for impossibility to perform the Agreement and discontinuing performance of the Agreement without the consent of [the Plaintiff].”

21. The tribunal decided that the Plaintiff's claim for continued performance of the Agreement should be supported and dismissed D1-D2's counterclaim seeking confirmation that the Agreement was invalid. The tribunal awarded the Plaintiff damages for breach of contract of RMB 1,275,000 (representing damages for delay in delivering the land) and ordered that “[D1-D2] shall continue to perform the Agreement...”

*C. Attempts at enforcement of the First Award*

22. The Plaintiff applied to enforce the First Award in Xiamen but, on 30 July 2007, the Xiamen Municipal Intermediate Court dismissed the application principally because D1-D2 were Hong Kong companies whose assets were outside the jurisdiction.<sup>13</sup>

23. The Plaintiff then applied *ex parte* to the Hong Kong Court (in Action HCCT 54/2007) for leave to enforce the award, invoking the statutory procedure provided by section 2GG of the Arbitration Ordinance (“the Ordinance”).<sup>14</sup> Adopting such procedure, an arbitral award is enforceable with

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<sup>13</sup> Court of Appeal §64.

<sup>14</sup> Then Cap 341, since replaced by the Arbitration Ordinance (Cap 609). Relevant provisions are set out in Section J.1 of this judgment.

the court's leave in the same way as a judgment of the court and, if leave is given, the court may enter judgment in terms of the award. By order dated 31 October 2007, Mr Justice A Cheung<sup>15</sup> granted leave to enforce the award and entered judgment in its terms, ordering that D1-D2 "shall continue to perform the [Agreement]..."

24. On 2 January 2008, D1-D2 applied to set aside the aforesaid order and judgment. As the trial Judge noted,<sup>16</sup> it was only in an affirmation filed on that date in support of D1-D2's application that it was first disclosed that the restructuring had taken place. While the Plaintiff had been aware of D5's construction activities and sales of units in the development, this was the first that the Plaintiff had learned that D1-D2 had divested themselves of their shareholding in D4 and of D3's acquisition of that company.<sup>17</sup>

25. With that realisation, on 27 May 2008, the Plaintiff started a fresh action (initially listed as HCA 961/2008 and re-listed as HCCL 13/2011 – "the Action") from which the present proceedings flow. It was a common law action to enforce the First Award. Additionally, it was brought also against D3, D4 and D5 who were not parties to the Agreement or the arbitration. The Plaintiff sought declarations that D3 and D2 each held the D4 shares registered in their names on constructive trust for the Plaintiff and obtained interim injunctions restraining the defendants from further changing the shareholding structure of D4 and restraining D5 from disposing of or diminishing the value of its assets.

26. Meanwhile, the application by D1-D2 to set aside the order granting leave to enforce the award and the statutory judgment came on for

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<sup>15</sup> As Cheung PJ then was.

<sup>16</sup> DHCJ Stone §§41 and 105.

<sup>17</sup> Court of Appeal §71.

hearing before Reyes J.<sup>18</sup> The applicants' main argument was that the outstanding non-monetary obligations imposed on them by the First Award could no longer be performed so that it was contrary to public policy to enforce that part of the award.<sup>19</sup> They contended that performance had become impossible because some 99% of the residential units built by D5 on the Lot had been sold and consequently, that neither D1-D2 nor D5 could deliver possession of the land to the Plaintiff. Furthermore, D1-D2 could no longer transfer the D4 shares to the Plaintiff since the structure of the shareholding had changed and they no longer held those shares, all of D4's 10,000 shares now being held by D3, save one held by D2 on trust for D3.<sup>20</sup>

27. Reyes J rejected the impossibility argument and dismissed the application. He was not persuaded that the Agreement was substantially incapable of performance.<sup>21</sup> Although the viability and merits of the Action were not issues before him, his Lordship took notice of the Action and considered it arguable that execution of the Agreement and payment of the deposit may have given rise to an equitable interest in the shares in favour of the Plaintiff, resulting in a constructive trust being imposed on the D4 shares in the hands of D3 and D2.<sup>22</sup> He noted the Plaintiff's willingness to pay the RMB120,000,000 and the HK\$2 nominal fee and also to bear the properly audited construction costs of the development in seeing through enforcement of the award.<sup>23</sup>

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<sup>18</sup> In HCCT 54/2007, [2008] 4 HKLRD 972 (24 June 2008).

<sup>19</sup> Relying on section 40E(3) of the Ordinance. Reyes J §§2-3.

<sup>20</sup> Reyes J §§86-88.

<sup>21</sup> *Ibid* §§95, 111.

<sup>22</sup> *Ibid* §109.

<sup>23</sup> *Ibid* §133.

28. Dissatisfied with Reyes J's decision, D1-D2 lodged an appeal to the Court of Appeal where once again, their main argument was that the award had become impossible to perform so that enforcement was contrary to public policy. Le Pichon JA, writing for the Court,<sup>24</sup> held that the impossibility argument was misguided since there was no insuperable impediment to the transfer of the shares registered in D3's name to the Plaintiff and since the "impossibility (if any) [was] self-inflicted".

*D. The Second Award*

29. Having failed before Reyes J, D1-D2 returned to the tribunal, applying for a determination that the Agreement could no longer be performed and seeking a ruling that the parties be discharged therefrom. The hearing was held on 21 January 2009 and the tribunal gave its Second Award on 22 April 2009.<sup>25</sup>

30. D1-D2 argued that the Agreement had lawfully terminated in accordance with its terms because there had been a substantial change involving completion of the development; sale of more than 90% of the units; and a change in the shareholding of D4, making the transfer of the shareholding impossible as a matter of fact. This was rejected by the tribunal which held that the change of shareholding was a breach of the Agreement and not a ground for lawful termination. The unilateral notice of termination was invalid and the tribunal was not satisfied that the objectives of the Agreement were incapable of being met. It reiterated that it had made an order for continued performance. The Second Award therefore dismissed D1-D2's application.

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<sup>24</sup> Rogers VP, Le Pichon and Hartmann JJA, CACV 106 and 197/2008, [2009] 4 HKLRD 353 at §31.

<sup>25</sup> Award [2009] No 0144.

31. D1-D2 made one further approach to the tribunal. It will be recalled that in the First Award, the tribunal had pointed out that the Agreement “... needs close cooperation between the parties and reasonable efforts to seek alternative approaches to meet the purpose of the Agreement”. Seizing on this, by letter dated 19 June 2009, D1-D2 wrote to the tribunal seeking a ruling on those “alternative approaches”. They returned to their familiar theme, saying that directions from the tribunal as to how to proceed were needed because “... [the] objective circumstances of this case have changed significantly, the two contracting parties are unable to continue to perform the Agreement according to the original provisions”.

32. The tribunal gave this application short shrift, stating:

“The arbitral tribunal adjudicated the case fully... After investigation, the [First Award] 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 arbitral tribunal does not accept the abovementioned application of [D1-D2]”.

*E. Interlocutory rulings in the present proceedings*

33. The focus of the litigation switched to the Action. Fok J (as Fok PJ then was) noted in his judgment dated 16 March 2010<sup>26</sup> that the Plaintiff asserted proprietary rights over the D4 shares in the hands of D3. Those rights were said to have arisen out of alleged breaches of fiduciary duty by D1-D2 committed in effecting the restructuring, with D3 the recipient of the shares knowing that they were the product of those breaches and thus subject to a constructive trust in the Plaintiff’s favour. A series of interlocutory applications were placed before his Lordship.

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<sup>26</sup> While the Action was listed as HCA 961/2008.

34. He allowed the Plaintiff's application for leave to amend the Writ and Statement of Claim, thereby expanding the Action to add claims in tort for inducing breach of contract and conspiracy against six additional individuals named as D6 to D11, who were associated with D1-D2 and the defendant companies. He also permitted the Plaintiff to add a plea of fraud in connection with the allotment of D4 shares to D3.

35. Fok J dismissed the Defendants' applications to strike out the Action, holding that it was not plain and obvious that the constructive trust claim was bound to fail. However, he granted the application of D1-D2 to stay the constructive trust and conspiracy claims to arbitration holding that they were disputes that fell within the arbitration clause in the Agreement.<sup>27</sup> He dismissed the application for a stay in the Court's inherent jurisdiction mounted by D3-D5.<sup>28</sup>

36. The Plaintiff's appeal against Fok J's order staying the Action against D1-D2 to arbitration succeeded in the Court of Appeal ("the Stay Appeal").<sup>29</sup> Rogers VP considered the effect of the arbitration awards and held that the time and scope for arbitration had clearly passed and that it was now for the Hong Kong courts to enforce the award.<sup>30</sup>

37. Kwan JA elaborated upon this, holding that "the claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendants in this action is primarily an action on an arbitration

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<sup>27</sup> Fok J §§137, 149-150.

<sup>28</sup> *Ibid* §§151, 154.

<sup>29</sup> Rogers VP, Le Pichon and Kwan JJA, CACV 88 and 89/2010, [2011] 1 HKLRD 781 (15 December 2010).

<sup>30</sup> CA Stay Appeal §§15-16.

award, not an action on the performance and obligations of the Agreement”.<sup>31</sup>

As her Ladyship explained:

“The plaintiff has brought this action against the 1<sup>st</sup> and 2<sup>nd</sup> 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 ...”<sup>32</sup>

38. Kwan JA did not consider the statutory judgment obtained by the Plaintiff under sections 2GG and 40B of the Ordinance an obstacle, holding that the Plaintiff “is at liberty to bring an action on the award against the 1<sup>st</sup> and 2<sup>nd</sup> defendants, combined with other claims against other entities and individuals.”<sup>33</sup> She also held that an action on the award did not need to be “mechanistic in nature”, the remedies available depending on the scope of the issues raised.<sup>34</sup>

39. The applications of D1-D2 and D3, D4 and D5 respectively for leave to appeal to this Court against the Court of Appeal’s decision in the Stay Appeal were dismissed by the Appeal Committee,<sup>35</sup> Ma CJ holding that, so far as D1-D2 were concerned, the Action was brought by way of enforcement of the award and that the arbitrators had treated the arbitration agreement as spent.<sup>36</sup> Since the application of D3, D4 and D5 for leave was contingent on the stay of D1-D2’s proceedings being upheld, it was also dismissed.<sup>37</sup>

40. Having staved off the Defendants’ attempts to strike out or stay the Action, the Plaintiff sought to expand its scope further. On 21 December 2011,

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<sup>31</sup> *Ibid* §29.

<sup>32</sup> *Ibid* §30.

<sup>33</sup> *Ibid* §31.

<sup>34</sup> *Ibid* §32.

<sup>35</sup> Ma CJ, Bokhary and Ribeiro PJJ, FAMV 4 and 5 of 2011 (4 May 2011).

<sup>36</sup> Determination §§4-5.

<sup>37</sup> *Ibid* §7.

it obtained leave from Reyes J to re-amend its pleadings to add an alternative claim (in paragraph 35(5)) for damages or equitable compensation in the event that the relief it had been pressing for, namely, transfer of the D4 shares and through them, acquisition of the benefits earned by D4, should prove unachievable. Reyes J also gave directions for expert evidence regarding the valuation of D4 to be adduced in connection with that plea.

41. On the Defendants' appeal against Reyes J's orders, the Court of Appeal<sup>38</sup> noted that the loss and damage pleaded involved "the difference between (i) the existing value of the entire shareholding in [D4] and (ii) the sum of RMB120,000,000 which the Plaintiff agreed to pay under the agreement for acquisition of the same", the Plaintiff alleging that "each of [D1 to D11] is jointly and severally liable whether by means of an award of equitable compensation or by means of an award of damages" in respect of such loss and damage.

42. The Court of Appeal held that those amendments were properly allowed by Reyes J, as they raised arguable issues as to whether such relief was available. However, because of the lateness of the amendments, they ordered a split trial with the issues of quantum raised by paragraph 35(5) to be dealt with, in so far as necessary, after the outcome of the trial was known.

*F. The judgment of DHCJ Stone QC*<sup>39</sup>

43. The Action finally came on for trial before Deputy High Court Judge William Stone QC on 8 March 2012. The hearing lasted 22 days and, on 14 June 2012, his Lordship delivered a meticulous and comprehensive judgment running to 135 pages.

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<sup>38</sup> Hon Cheung CJHC (as Cheung PJ then was) and McWalters J, HCMP 13, 15, 18, 21/2012 (14 February 2012) at §7.

<sup>39</sup> HCCL 13/2011 (14 June 2012).

44. The Judge dealt first with what he called the “derivative claim” whereby the Plaintiff sought to enforce the Award against D1-D2. Secondly, he addressed what he called the “original action” involving causes of action and equitable claims in the expanded Action against various combinations of the Defendants based on the torts of conspiracy, inducing breach of contract and constructive trust.<sup>40</sup>

*F.1 The enforcement claim against D1-D2*

45. In approaching the enforcement claim, his Lordship was troubled by the existence, alongside the Action, of the statutory judgment entered pursuant to leave granted to enforce the Award on 31 October 2007.<sup>41</sup> He described the Award and judgment as languishing in “procedural limbo” and as the “elephant in the courtroom”.<sup>42</sup>

46. He was puzzled at the Plaintiff’s persistence in pursuing continued performance of the Agreement when, as he saw it, after its breach, which had occurred when it was “torn up” some 21 months before the arbitration was commenced,<sup>43</sup> such performance had become impossible. The Agreement:

“... had been rendered *physically incapable* of continued performance by reason of the plain fact that site at Lot 22 by then had been fully developed by the 5<sup>th</sup> defendant – which, as earlier noted, had been built in a configuration strikingly different from the development plan as earlier proposed by the plaintiff – and in turn the vast majority of the units as erected had been on-sold to third party purchasers.”<sup>44</sup>

47. It may be observed that his Lordship’s view as to impossibility ran counter to the finding of the tribunal in the First and Second Awards. It was also at odds with the views of Reyes J and the Court of Appeal in their

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<sup>40</sup> DHCJ Stone §80.

<sup>41</sup> By A Cheung J in Action HCCT 54/2007.

<sup>42</sup> DHCJ Stone §§51 and 129.

<sup>43</sup> *Ibid* §114.

<sup>44</sup> *Ibid* §117. Italics in the original.

judgments refusing to set aside the statutory judgment on the basis of impossibility and public policy, even after the restructuring had been disclosed. Le Pichon JA could see “[no] insuperable impediment to the transfer of the shares registered in D3’s name to [the Plaintiff]”.<sup>45</sup>

48. While DHCJ Stone recognised that the Action was brought to enforce the implied promise to honour the Award at common law, he regarded this as being “no different *in specie*” from, and permitting no greater latitude in terms of remedy than, the statutory procedure. He held that on either approach, the Court is limited to “mechanistically” converting the award into a judgment in terms of the award.<sup>46</sup>

49. In bringing the Action, his Lordship held that the Plaintiff was seeking to go far beyond such mechanistic enforcement. It sought:

“... to substitute for the ‘continuous performance’ award of the CIETAC tribunal a new claim for damages/equitable compensation, which not only goes beyond the scope of the award as it now exists, but never was contemplated by the tribunal, which was not asked even to consider/countenance such a remedy.”<sup>47</sup>

50. This, he held, was an attempt to “subvert the integrity of the arbitral process” and to get the Hong Kong Court “to usurp the designated dispute resolution body and impose its own remedy under the purported guise of ‘enforcement’” by asking it “to rule upon an issue relating to breach of the Agreement which must lie *solely* within the jurisdiction of the Beijing arbitral tribunal (or, if ultimately became necessary, in the Beijing court of supervisory

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<sup>45</sup> CACV 106 and 197/2008, [2009] 4 HKLRD 353 at §31.

<sup>46</sup> DHCJ Stone §§140-141, 144.

<sup>47</sup> *Ibid* §145.

jurisdiction)”.<sup>48</sup> The enforcement claim against D1-D2 was accordingly held to fall outside the Court’s jurisdiction.<sup>49</sup>

51. The Judge went on to hold that even if, contrary to his conclusion, one were to assume that jurisdiction exists, the enforcement claim would still have to be dismissed since the proper law of the Agreement is PRC law which has no concept of the constructive trust.<sup>50</sup> Moreover, even if one were to assume that Hong Kong law applies, the Agreement was not specifically enforceable because it was a contract requiring constant supervision and conditional in nature. Thus, no equitable interest in the D4 shares passed to the Plaintiff on execution of the Agreement, so that no basis existed for any constructive trust to be imposed on those shares in the hands of D1-D2 and D3.<sup>51</sup>

52. On the assumption that Hong Kong law applied and that the Award could be treated as if it were an order for specific performance, the Judge regarded the principle in *Johnson v Agnew*<sup>52</sup> as a further obstacle to the Plaintiff’s claim against D1-D2. He accepted the argument that since the Award and statutory judgment were obtained on the footing that the contract remained alive, a claim for damages or equitable compensation was excluded by that principle unless the Plaintiff first applied for discharge of the order for continued performance so as to terminate the Agreement.<sup>53</sup>

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<sup>48</sup> *Ibid* §§145-147. Italics in the original.

<sup>49</sup> *Ibid* §170.

<sup>50</sup> *Ibid* §§191 and 195.

<sup>51</sup> *Ibid* §§205, 208-210, 217-219.

<sup>52</sup> [1980] AC 367.

<sup>53</sup> DHCJ Stone §§220-223, 228.

53. The enforcement action was therefore held to fail.<sup>54</sup> The Judge observed that it was up to the Plaintiff to return to the tribunal and, if necessary, to the Beijing supervisory court, to try to obtain substitute orders providing for the relief it sought in the Action.<sup>55</sup>

*F.2 The other claims asserted in the Action*

54. The Judge proceeded also to dismiss the Plaintiff's claims against all the other Defendants.

55. As to the claims based on constructive trust or fiduciary duty (against D3-D6), his Lordship held that those concepts were unknown to PRC law which he found to be applicable.<sup>56</sup> On the alternative basis that the issue was governed by Hong Kong law, he held that the Agreement was not specifically enforceable, requiring constant supervision and being conditional in character, so that no equitable interest passed upon its execution and no constructive trust arose.<sup>57</sup>

56. It was an important premise of the Judge's approach to the Plaintiff's economic tort claims that the only breach of contract committed by D1-D2 was their renunciation of the Agreement in November 2003. He rejected the suggestion that the restructuring which took place two years later entailed any breach or other unlawfulness:

“... I am unwilling to characterize such restructuring as ‘unlawful’ or ‘illegal’ or ‘fraudulent’. It certainly was not a contractual breach, which breach itself had taken place some two years earlier with the tearing up of the Agreement by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.”<sup>58</sup>

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<sup>54</sup> *Ibid* §§229, 236.

<sup>55</sup> *Ibid* §234.

<sup>56</sup> *Ibid* §§195, 200, 270-271, 327-329.

<sup>57</sup> *Ibid* §§205, 207-211, 331-333.

<sup>58</sup> *Ibid* §114.

57. One might pause to observe that this was at odds with the tribunal's ruling in the Second Award that the changes in shareholdings were a breach of the Agreement, referred to above.

58. Nevertheless, in the context of inducing breach of contract, the Judge held that no overt acts of inducement and no causal link to the November 2003 breach had been proved against D3-D5 or any of the individual Defendants (D6-D11).<sup>59</sup>

59. Similarly, the Judge's rejection of the restructuring as involving any unlawfulness led to his decision that neither the alleged conspiracy by unlawful means nor the alleged conspiracy to injure were established for want of any unlawful means and want of a predominant motive to injure.<sup>60</sup>

60. His Lordship also held that since the overt acts relied on had occurred on the Mainland and, since the economic torts in question were not known to PRC law, the Plaintiff failed to meet the double actionability requirement and the causes of action in tort were not actionable in Hong Kong.<sup>61</sup>

61. The Judge further accepted that the principle in *Said v Butt*<sup>62</sup> excluded the individual Defendants, acting as directors and company officials, from being held personally liable for the tort of procuring the relevant company's breach of the Agreement.<sup>63</sup>

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<sup>59</sup> *Ibid* §§290, 304, 366-367.

<sup>60</sup> *Ibid* §§253-254, 291, 296, 298, 317-318, 345-346

<sup>61</sup> *Ibid* §§258-261, 275, 279.

<sup>62</sup> [1920] 3 KB 497.

<sup>63</sup> DHCI Stone §§335, 338-340, 354, 356, 358, 365.

62. And quite apart from the aforesaid legal arguments held to have barred the Plaintiff's claims, the Judge also found fatal evidential weaknesses in the respective conspiracy and inducement cases, especially regarding the elements of intention and purpose.<sup>64</sup>

63. Accordingly, DHCJ Stone dismissed the Action in its entirety.

*G. Judgment of the Court of Appeal*<sup>65</sup>

*G.1 The common law action on the award*

64. Giving the judgment of the Court of Appeal, Yuen JA allowed the Plaintiff's appeal against DHCJ Stone's dismissal of the common law action on the award against D1-D2.

65. Her Ladyship noted that an arbitration award might be enforced by invoking the statutory procedure (under section 2GG of the Ordinance) or by bringing a common law action and proceeded to examine the juridical nature of such an action.

66. Yuen JA pointed out that an action on an award could be brought at common law where there had been a valid submission of a dispute to arbitration; an award had been made in favour of the plaintiff and the defendant had failed to honour that award.<sup>66</sup> Hong Kong law (following English law) implied a mutual promise to honour the award. Failure to do so constituted a fresh cause of action separate and independent from an action based on breach of the underlying contract (which contained the arbitration clause).<sup>67</sup>

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<sup>64</sup> *Ibid* §§248, 250-251, 304-306, 364.

<sup>65</sup> Yuen, Barma and Poon JJA, CACV 158/2012, [2016] 2 HKLRD 1106 (15 April 2016).

<sup>66</sup> Court of Appeal §114.

<sup>67</sup> *Ibid* §§104, 106-108, 111-112.

67. In reaching her conclusion, Yuen JA had to deal with three issues which are presently relevant. First, D1-D2 sought to argue that in a common law action, the court has no jurisdiction to order damages where the arbitrators had not made any award of damages. Her Ladyship did not agree, holding that, unlike in cases involving the statutory procedure, the Court was not limited in a common law action to granting relief which simply mirrors the terms of the award.<sup>68</sup> Accordingly, the Court had jurisdiction to order damages or equitable compensation even though the tribunal had only made an award for “continued performance”.

68. Secondly, D1-D2 contended that the Action was an invalid attempt at circumventing the arbitral process so that the Hong Kong Court ought to refuse relief and stay the Action to arbitration. Yuen JA left open the question whether an issue estoppel, arising out of the decision of the Court of Appeal in the Stay Appeal,<sup>69</sup> prevented D1-D2 taking this point. She held that even if an issue estoppel did not arise, the present action operated at the enforcement phase and was distinct from any dispute falling within the arbitration clause so that no stay was called for.<sup>70</sup>

69. Finally, D1-D2 sought to argue that, by invoking the statutory procedure and entering judgment on the award, the Plaintiff had elected for a remedy involving “continued performance” of the Agreement which was premised on the continued existence of that contract, a position inconsistent with the present claim for damages or equitable compensation which had to be premised on the Agreement having come to an end.<sup>71</sup>

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<sup>68</sup> *Ibid* §§165-167, 177.

<sup>69</sup> Rogers VP, Le Pichon and Kwan JJA, CACV 88 and 89/2010, [2011] 1 HKLRD 781 (15 December 2010).

<sup>70</sup> Court of Appeal §§179-182.

<sup>71</sup> *Ibid* §§190-192.

70. Yuen JA held that in entering judgment under the statutory procedure, the Plaintiff had not made an informed irrevocable election since it had done so while material information concerning the restructuring had been withheld by D1-D2.<sup>72</sup> However, her Ladyship decided that the inconsistent remedies of ordering continued performance of the Agreement on the one hand, and damages or equitable compensation on the other, could not stand together. She therefore gave directions that the Plaintiff, when in a position to make an informed choice, was required to make an election which would determine what orders the Court of Appeal might make as to the further conduct of these proceedings.

#### *G.2 The other claims in the Action*

71. The Court of Appeal dismissed all the other claims. Her Ladyship held that whether breach of the Agreement was constituted by its renunciation or by the restructuring, the Plaintiff had failed to prove that any of D3-D5 or D6 had caused such breach so as to constitute the tort of inducing breach of contract.<sup>73</sup> Moreover, since such a tort was not known to PRC law, the claim fell foul of the double actionability requirement.<sup>74</sup>

72. Similarly, the conspiracy claim involved alleged overt acts occurring on the Mainland where, under PRC law, tortious liability for conspiracy was unknown so that by reason of the double actionability rule, the tort was not actionable in Hong Kong.<sup>75</sup> Furthermore, the Judge had found that

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<sup>72</sup> *Ibid* §§193-195.

<sup>73</sup> *Ibid* §§213-216, 249, 253.

<sup>74</sup> *Ibid* §§217, 220-233.

<sup>75</sup> *Ibid* §262.

there was no common intention to injure by the restructuring, which was fatal to the claim.<sup>76</sup>

73. Yuen JA held that the constructive trust claim failed because, there being no concept of constructive trust in PRC law, execution of the Agreement gave rise to no equitable interest in the Plaintiff's favour and no constructive trust. She held that even if Hong Kong law were applicable, the claim would fail since the Agreement, requiring constant supervision and mutual cooperation at various stages, was "only a framework agreement" and not susceptible to specific performance and thus provided no basis for imposing a constructive trust on D1-D2 or D3-D5.

74. Having allowed the Plaintiff's appeal in relation to the common law action on the award, but having held that an informed election had to be made between an order for "continued performance" and an order awarding damages (or equitable compensation), the Court of Appeal directed that the Plaintiff should make up its mind and then propose a suitable order after consulting D1-D2 or restore the matter before the Court of Appeal.<sup>77</sup>

75. D1-D2 issued a motion applying for leave to appeal to this Court. The Plaintiff notified the Court of its election and, on 20 October 2017, the Court of Appeal ordered that the statutory judgment<sup>78</sup> be set aside and that judgment be entered in favour of the Plaintiff for damages against D1-D2 for breach of the implied promise to honour the Award under HCCL 13/2011. Assessment was to await the quantum stage of the split trial.

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<sup>76</sup> *Ibid* §§264-265.

<sup>77</sup> *Ibid* §278.

<sup>78</sup> In HCCT 54/2007.

*H. Application for leave to appeal to this Court*

76. Having unsuccessfully sought leave to appeal from the Court of Appeal,<sup>79</sup> leave to bring the present cross-appeals was granted by the Appeal Committee<sup>80</sup> as follows.

77. D1-D2 were granted leave to appeal<sup>81</sup> confined to the following questions of law, namely:

“Whether the jurisdiction of the Hong Kong court as an enforcement court under a common law action to enforce a Mainland arbitral award is circumscribed or otherwise affected by the statutory regime for enforcement of international awards covered by the New York Convention and Mainland awards; and if the answer is ‘yes’, what should the approach of the court be?

Whether the rule in *Johnson v Agnew* [1980] AC 367 and/or legal principle prevents an enforcing court from awarding damages on the basis that the underlying contract was no longer subsisting when there was an extant award for continued performance of the underlying contract?”

78. As for the cross-appeal, the plaintiff was granted leave to appeal<sup>82</sup> in respect of the following questions of law, namely:

“Under the tort of inducing a breach of contract, where the inducement takes the form of the conclusion of a dealing inconsistent with an existing contract, what is the requirement of causation as regards the breach of contract? In particular, where the contracting party is determined to breach the contract with or without the inducement of the defendant, what is the requirement of causation?

Where the obligation owed by a defaulting vendor to a purchaser to continue to perform an agreement for the sale and purchase of shares in a private company is governed by a foreign law, is the Hong Kong court entitled to grant the remedy of a constructive trust pursuant to its equitable jurisdiction over such obligation notwithstanding that the foreign law which governs the agreement does not recognise the concept of constructive trust? If so, what is the correct approach of the Hong Kong court in granting such remedy?

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<sup>79</sup> Yuen, Barma and Poon JJA, CACV 158/2012, [2018] HKCA 940 and [2018] HKCA 942 (10 December 2018).

<sup>80</sup> Cheung PJ, Bokhary and Chan NPJJ, FAMV 6 and 7/2019, [2019] HKCFA 21 (3 June 2019).

<sup>81</sup> In what is now listed as FACV 3 of 2019.

<sup>82</sup> In what is now listed as FACV 5 of 2019.

Where an agreement for the sale and purchase of shares in a Hong Kong private company is by agreement governed by foreign law, does that preclude the law of property and the law of trust under Hong Kong law from operating to transfer the equitable title or interest in the shares to the purchaser upon the making of the agreement or upon the agreement becoming specifically enforceable?

79. Leave to appeal was also granted on the “or otherwise” basis in connection with the following question:

“In circumstances where an agreement for the sale and purchase of the entire issued shares in a private company which ultimately holds land or development rights in land situated outside Hong Kong contains provisions to the effect that:

- (a) pending completion of the sale, possession of the land be given to the purchaser, with liberty to, but no obligation upon, the purchaser to develop or sub-sell interests in the land in the meantime; and
- (b) in the event that prior to completion of the sale, the purchaser does take possession of the land and does carry out development of the land, express powers be reserved to the vendors to regulate the development activities,

but the purchaser does not opt to carry out any development or sub-sale activities prior to completion, is the agreement one which is amenable to specific performance?”

*I. The appeal brought by D1-D2*

80. D1-D2’s basic contention on the present appeal is that the Court of Appeal were wrong because, in awarding the Plaintiff damages to be assessed, they went beyond the relief that can properly be awarded in a common law action on the award. In support, they advance three main arguments which may be referred to as (1) the “mechanistic argument”; (2) the “outflanking argument”; and (3) the “extant award argument”. At the hearing, the submissions advanced by Mr Steven Gee QC<sup>83</sup> predominantly involved variants of the outflanking argument.

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<sup>83</sup> Appearing for D1-D2 with Mr Benjamin Yu SC, Mr Richard Khaw SC and Ms Bonnie Y K Cheng.

*J. The mechanistic argument*

81. D1-D2 argue that the Court of Appeal acted beyond its jurisdiction in awarding the Plaintiff damages because its power to enforce the arbitration award, whether pursuant to the statutory summary procedure or to a common law action on the award, is subject to the same restriction: A court may only enforce an award “mechanistically” by making an order which mirrors and does not go beyond the award.<sup>84</sup> In the present case, the First Award stipulates that D1-D2 “shall continue to perform the [Agreement]...” It says nothing about damages so, the argument runs, awarding damages against D1-D2 exceeded the Court’s powers. It will be recalled that this is a proposition that found favour with DHCJ Stone<sup>85</sup> but not with Yuen JA and the Court of Appeal.<sup>86</sup>

82. This argument is advanced as one of statutory construction. Having referred to the statutory procedure, D1-D2 submit that:

“... as a matter of proper statutory interpretation and having regard to the public interest in giving effect to the parties’ choice of arbitration for dispute resolution, the same mechanistic approach must apply to a common law action on an award.”<sup>87</sup>

It is therefore necessary to examine the applicable provisions.

*J.1 The statutory procedure*

83. The scheme for the enforcement of Mainland awards in the HKSAR, including CIETAC awards, is the result of the Arrangement concerning Mutual Enforcement of Arbitral Awards between the Mainland and

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<sup>84</sup> D1-D2 Written Case §50.

<sup>85</sup> DHCJ Stone §§140-141, 144.

<sup>86</sup> Court of Appeal §§165-167, 177.

<sup>87</sup> D1-D2 Written Case §50. The construction argument is developed at §§43-53. See also D1-D2 Supplemental Case §§9-12.

the HKSAR<sup>88</sup> entered into pursuant to Article 95 of the Basic Law<sup>89</sup> (“the Arrangement”).

84. The Arrangement provides that a party may enforce an award with which the other party has failed to comply.<sup>90</sup> It specifies that the enforcing court “shall handle the application and enforce the award according to the legal procedure of the place of enforcement”.<sup>91</sup> It also provides that the limitation period is governed by the law of the place of enforcement.<sup>92</sup>

85. The Arrangement was implemented by amendments to the Ordinance<sup>93</sup> with section 40B providing for two alternative methods of enforcement, namely, either by a court action or by the summary procedure. It states:

- “(1) A Mainland award shall, subject to this Part, be enforceable in Hong Kong either by action in the Court or in the same manner as the award of an arbitrator is enforceable by virtue of section 2GG.
- (2) Any Mainland award which is enforceable under this Part shall be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong, and any references in this Part to enforcing a Mainland award shall be construed as including references to relying on a Mainland award”.<sup>94</sup>

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<sup>88</sup> People’s Republic of China Supreme Court Notice of 24 January 2000.

<sup>89</sup> “The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other.”

<sup>90</sup> Article 1.

<sup>91</sup> Article 6.

<sup>92</sup> Article 5.

<sup>93</sup> Arbitration (Amendment) Ordinance 2000, entering into force on 1 February 2000.

<sup>94</sup> Now section 92 of Cap 609.

86. Section 2GG referred to in section 40B(1) provides for conversion of the award into a judgment of the court so that it becomes enforceable “in the same way as a judgment”:

- “(1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.
- (2) Notwithstanding anything in this Ordinance, this section applies to an award, order and direction made or given whether in or outside Hong Kong.”

87. As the Rules of the High Court provide, the party seeking to invoke section 2GG may apply *ex parte* for leave to enforce the award,<sup>95</sup> supporting the application with an affidavit which exhibits the arbitration agreement and the original award, states the addresses of the parties and deposes that the award has not been complied with.<sup>96</sup> Upon leave being granted, judgment is entered “in terms of the award”. After being served with the order granting leave, the other party may apply to set the order aside, but only on limited grounds which bear directly on the validity or enforceability of the arbitration agreement or the award itself. Grounds for refusing to enforce an award include incapacity of a party to the arbitration agreement; invalidity of the arbitral agreement under its proper law; lack of notice to the other party of the hearing; the award or the composition of the tribunal falling outside the scope of the arbitration agreement; the award not being binding; and the existence of public policy grounds for refusing enforcement.<sup>97</sup>

88. The section 2GG procedure is therefore summary in nature. The object of the exercise is for the enforcing court to endow the award with the status of a compulsorily executable judgment without itself scrutinising the

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<sup>95</sup> See Order 73, r 10(1)(b).

<sup>96</sup> Order 73, rr 10(3)(a)(ii), 3(b) and 3(c).

<sup>97</sup> Ordinance section 40E.

merits of the arbitrators' award and only entertaining challenges within the limits laid down in the Ordinance.

89. It is therefore unsurprising that the enforcing court is enjoined by section 2GG to confine itself to entering judgment “in terms of the award”. Thus, for example, where the award did not grant the successful claimant post-award interest, it was held that under the summary procedure, the enforcing court could not enter judgment including such a sum of interest.<sup>98</sup> It is in that context that the court’s task has been said to be “as mechanistic as possible”.<sup>99</sup> As Cheung CJHC (as Cheung PJ then was) put it, the “plain intent behind the relevant provisions [is] to make awards to which they apply enforceable with ease, subject to the narrowly confined exceptions, almost ‘as a matter of administrative procedure’”.<sup>100</sup>

## *J.2 Is the common law action on the award similarly restricted?*

90. The alternative modes of enforcing awards provided for by section 40B(1) of the Ordinance – by court action or under section 2GG – are quite separate and procedurally very different. Unlike under section 2GG, an action on the award does not involve the plaintiff obtaining a judgment after an *ex parte* application. The plaintiff must sue on the award and prove his case. As MacKinnon J explained in *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd*:<sup>101</sup>

“In order to sue on an award, it is, I think, necessary for the plaintiffs to prove, first that there was a submission; secondly, that the arbitration was conducted in pursuance

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<sup>98</sup> *Walker v Rome* [1999] 2 All ER (Comm) 961 at 968. It should, however, be noted, that post-judgment interest stands on a different footing: *Gater Assets Ltd v Nak Naftogaz (No 2)* [2009] 1 All ER (Comm) 667.

<sup>99</sup> *Norsk Hydro ASA v State Property Fund of Ukraine* [2009] Bus LR 558 at §12, per Gross J.

<sup>100</sup> *Petrochina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604 §12.

<sup>101</sup> (1927) 28 Ll L R 104 at 106-107.

of the submission; and, thirdly, that the award is a valid award, made pursuant to the provisions of the submission, and valid according to the *lex fori* of the place where the arbitration was carried out and where the award was made.”

91. The rationale for restricting the court to entering judgment mechanistically therefore does not apply to the common law action. There is no reason for thinking that the statutory intent is that remedies which may be granted in a common law action on the award must be circumscribed by requirements designed for judgments entered under the summary procedure.

92. The object of the Ordinance is, as section 2AA states, “to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense”. The intent is to facilitate and not to place obstacles in the way of the arbitral process, including the process of enforcing arbitral awards.

93. Indeed, the purpose of the summary procedure itself is to facilitate enforcement – “ensuring the effective and speedy enforcement” of arbitration awards.<sup>102</sup> It is incongruous to construe a provision forming part of such a facilitative scheme as having a constricting effect on an alternative mode of enforcement which is quite separate from, and not regulated by, a summary procedure.

94. While no authorities supporting the mechanistic argument have been put forward, various decisions can be found which demonstrate that, in a common law action on the award, the Court is not constrained by the requirement that the judgment must be “in terms of the award”.

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<sup>102</sup> Per Gross J in *Norsk Hydro ASA v State Property Fund of Ukraine* [2009] Bus LR 558 at §17; cited in *PetroChina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604 at §12.

95. A clear illustration is provided by the *Dalmia* judgments of Kerr J, upheld by the English Court of Appeal.<sup>103</sup> The plaintiff Dalmia, an Indian company, obtained arbitration awards which it sought to enforce against the defendant Bank in London, invoking the statutory summary procedure.<sup>104</sup> The awards directed the Bank to pay the amounts to the plaintiff “in India”. In his first judgment, Kerr J posed the central question as follows:

“... whether [the Act’s] summary procedure for enforcement is available in relation to awards which specifically require payment in a foreign country, or whether the plaintiff’s only remedy in these circumstances is to bring actions on the awards because the bank has failed to pay in India.”<sup>105</sup>

96. He held that the summary procedure was not available. Entering judgment in terms of the award requiring payment in India would not be a judgment that an English court would issue so that it would not be a judgment enforceable in the same manner as a judgment of the High Court. However, Kerr J held that in these circumstances, “[the] appropriate remedy of the plaintiff ... would be an action for the payment of damages here on account of the defendant’s breach in not making payment abroad”.<sup>106</sup> That would obviously involve bringing an action seeking relief going beyond the terms of the award. That is precisely what Dalmia then did. It brought an action for damages against the Bank, “present and served within the jurisdiction of [the English] Court, for non-compliance with the awards.”<sup>107</sup> In contrast with the summary procedure, those proceedings involved a trial which lasted over two

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<sup>103</sup> *Dalmia Cement Ltd v National Bank of Pakistan* [1975] 1 QB 9; *Dalmia Dairy Industries v National Bank of Pakistan* [1978] 2 Lloyd’s Rep 223. Other illustrations include *Selby v Whitbread & Co* [1917] 1 KB 736 and *Birtley and District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Ltd (No.2)* [1960] 2 QB 1.

<sup>104</sup> Under section 26 of the Arbitration Act 1950, our equivalent being section 2GG(1).

<sup>105</sup> [1975] 1 QB 9 at 23-24.

<sup>106</sup> *Ibid* at 24.

<sup>107</sup> [1978] 2 Lloyd’s Rep 223 at 225.

months<sup>108</sup> where various arguments attacking the validity of the award were advanced. Dalmia's action succeeded and the judgment was upheld in the Court of Appeal.<sup>109</sup>

97. For the aforesaid reasons, I would reject the mechanistic argument.

*K. The outflanking argument*

*K.1 Action on implied promise caught by arbitration clause*

98. Mr Gee's outflanking argument has two versions. The first is an argument in favour of a stay. The contention is that, instead of awarding damages against D1-D2, the Court of Appeal ought to have stayed the Action to arbitration because the claim is in truth a claim to enforce the matrix agreement and is caught by the arbitration clause contained in Article 13 of the Agreement. Two reasons are advanced for this. First, it is said that suing for breach of an implied promise to perform the award is an action based on and arising out of the Agreement and so is caught by the arbitration clause. Secondly, D1-D2 argue that the damages claimed in the Action are actually damages for loss of the profits of the development flowing from breach of the Agreement and so that the claim comes within Article 13. To award the Plaintiff such damages would be to allow it to outflank the arbitral regime agreed to by the parties:

“... any argument that P's claim for damages falls outside the ambit of the Agreement overlooks the principle that an essential element in a common law action on the award is the implied promise to perform the award. That promise is contractual and the cause of action is based on and arises from nothing but the contract ... The fact that P chooses to advance its claim as damages in an 'action on the award' concerns the cause of action, and does not prevent the damages claim from being within the arbitration agreement ... The damages awarded by the CA are closely connected with and overlap what would be the damages for breach of the Agreement for its non-

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<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid* at 277 *et seq.*

performance or repudiation. Payment of one would be payment on account of the other. Both are subject to the arbitration agreement.”<sup>110</sup>

*K.1a The arbitration clause*

99. I shall deal first with the proposition that the Action falls within the arbitration clause because it is based on and arises out of the Agreement. This requires consideration of the scope of Article 13 which relevantly provides:

“Parties shall make every effort to negotiate to resolve the disputes arising from the performance of this Agreement. In the case where no agreement is reached through negotiation, any party has the right to submit the dispute to [CIETAC] in Beijing for arbitration, the arbitration rules of the Arbitration Commission effective at the time when the dispute occurs should be adopted.”

100. What the parties have thus agreed to refer to arbitration are “disputes arising from the performance of the Agreement”. Is an action to enforce the implied promise to honour the Award a “dispute arising from the performance of the Agreement”?

101. The language of Article 13 suggests that the answer is “No”. The disputes referred to the tribunal arose from D1-D2’s renunciation of the Agreement on 14 November 2003, their failure to deliver the land to the Plaintiff by 4 January 2004 and their failure to transfer their shares in D4 to the Plaintiff.<sup>111</sup> Those were the disputes that arose from D1-D2’s refusal and failure to perform the Agreement. The First Award was issued on 27 October 2006, representing the outcome of the arbitration. When D1-D2 failed to comply with it, a fresh dispute giving rise to a fresh cause of action came into existence. But that was a dispute stemming from breach of the implied promise to comply with the Award, rather than a dispute “arising from the performance of the Agreement”.

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<sup>110</sup> D1-D2 Written Case §74. Authorities cited in this passage have been omitted. Material decisions are discussed below.

<sup>111</sup> The First Award was made without the tribunal or the Plaintiff being aware of the restructuring which occurred between 16 November 2005 and 6 April 2006.

*K.1b The separate causes of action*

102. It is clear that as a matter of law, the implied promise to honour the Award exists as a contractual obligation separate and distinct from the obligations created by the underlying contract. As Otton J put it in *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd*:<sup>112</sup>

“In my judgment, the action on the award and the action to enforce an award is an independent cause of action. It is distinct from and in no way entangled with the original contract or the breach occurring from it, as reflected in the award.”

103. This is evident when one considers what must be proved to sustain such a claim. As we have seen, MacKinnon J pointed out in *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd*<sup>113</sup> that the requirements for suing to enforce an award are that there was a submission; that the arbitration was conducted in pursuance of the submission; and that the award is a valid award, made pursuant to the provisions of the submission, and valid according to the *lex fori* of the place where the arbitration was carried out and where the award was made. These are obviously elements which are quite different from the matters which must be proved to establish breach of the matrix contract – in the present case, proof of the renunciation, the failure to deliver the land, the restructuring and the failure to transfer the shares in the light of the Agreement.

104. The dissimilarity between the two actions is also clearly brought out by the different limitation periods applicable. As we have seen, the Arrangement provides that the limitation period for enforcement of Mainland awards is governed by the law of the place of enforcement, ie, Hong Kong

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<sup>112</sup> [1985] 1 WLR 762 at 772.

<sup>113</sup> (1927) 28 Ll L R 104 at 106-107.

law.<sup>114</sup> That period is laid down by section 4(1)(c) of the Limitation Ordinance:<sup>115</sup>

“The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say ... actions to enforce an award, where the submission is not by an instrument under seal”.

105. The cause of action for breach of the implied promise accrues at the date when the losing party ought to have complied with the award. The limitation period therefore begins to run at a date which will necessarily be later than the date of accrual of the cause of action which led to the arbitration. In the present case, the underlying breaches relied on occurred variously in 2003, 2004 and 2005 (and at the latest on 6 April 2006). The First Award was issued on 27 October 2006, which is the earliest date from which the limitation period relevant to the Action began to run.

106. The relevant limitation period was recognised in *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd*,<sup>116</sup> where Otton J adopted the approach of the learned authors of *Mustill & Boyd, Commercial Arbitration*,<sup>117</sup> who stated:

“... for the purposes of the Limitation Act 1980, it is necessary to classify an action on an award either as ‘an action to enforce an award, where the submission is not by an instrument under seal,’ for which the limitation period is six years, or as ‘an action upon a specialty,’ for which the limitation period is 12 years. But we submit that time begins to run from the date on which the implied promise to perform the award is broken, not from the date of the arbitration agreement nor from the date of the award.”

107. In *National Ability SA v Tinna Oils & Chemicals Ltd* (“*The Amazon Reefer*”),<sup>118</sup> Thomas LJ adopted the same approach. He regarded

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<sup>114</sup> Article 5.

<sup>115</sup> Cap 347.

<sup>116</sup> [1985] 1 WLR 762 at 770-771.

<sup>117</sup> 1982 Edition, at p 368-369, cited by Otton J in [1985] 1 WLR 762 at 771.

<sup>118</sup> [2010] 1 Lloyd’s Rep 222 at §14.

enforcement using the statutory procedure and by a common law action as two procedurally different methods of enforcing the same contractual cause of action, both triggered by breach of the implied contractual promise, to which the same limitation period applies.

108. Moreover, in the present case, the two claims are governed by different systems of law. Suing for breach of the implied promise is an aspect of enforcement (to which I shall return), regulated by the enforcing court according to the *lex fori* (here, Hong Kong law), to be distinguished from the arbitration concerning performance of the Agreement which was governed by PRC law, expressly chosen by the parties.

*K.1c The Bremer decision and the importance of context and purpose*

109. In making the argument that the Action must be stayed because the implied promise to perform the award is “based on and arises out of” the Agreement, D1-D2 place reliance on *Bremer Oeltransport GmbH v Drewry*,<sup>119</sup> in particular, on the passage in Slessor LJ’s judgment where his Lordship states:

“It would appear, therefore, that the greater weight of authority is in favour of the view that in an action on the award the action is really founded on the agreement to submit the differences of which the award is the result.”<sup>120</sup>

110. *Bremer* involved a dispute between parties to a charterparty entered into in London with an arbitration clause providing for arbitration in Hamburg. A dispute arose and the arbitration duly took place, leading to an award made in Hamburg. The plaintiff issued a writ in England seeking to enforce that award and sought leave to serve it on the defendant, a British subject resident in Paris. The question at issue was whether the English court could assume jurisdiction by permitting service of the writ out of the jurisdiction on the ground that the

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<sup>119</sup> [1933] 1 KB 753.

<sup>120</sup> *Ibid* at 764.

action was brought “to enforce a contract made within the jurisdiction” pursuant to what was then Order XI r. 1(e).<sup>121</sup>

111. *Bremer* was therefore not a case about staying to arbitration an action to enforce an award. Slessor LJ’s characterisation of the action as “founded on” the agreement in the charterparty was made for the purpose of assuming jurisdiction. It was in that context that the action on the implied promise was considered as “founded on” the arbitration agreement in the charterparty and thus treated as enforcing a contract made within the jurisdiction.

112. Subsequent cases have stressed the importance of context and purpose when characterising the action on the implied promise. Thus, in *FJ Bloemen Pty Ltd v Council of the City of Gold Coast*,<sup>122</sup> the issue was whether certain sums could be claimed in a common law action to enforce an arbitration award as sums which were, on the contract’s true construction, payable by the defendant *under the contract*. Lord Pearson, giving the advice of the Privy Council, stated:

“It is true ... that when an arbitrator fixes a sum to be paid by one party to the submission by way of damages for breach of contract the award creates a fresh cause of action superseding that arising out of the breach. But it does not appear to their Lordships to follow from that that the cause of action which comes into existence when the award is made cannot be said to arise under the contract which contains the submission. The award of an arbitrator differs materially from a judgment. The plaintiff’s right to sue and the court’s right to give judgment for him if he proves his case are not derived from the agreement of the parties and the judgment when given is an entirely fresh departure. The award of an arbitrator on the other hand cannot be viewed in isolation from the submission under which it was made. It was this sort of consideration which led the Court of Appeal in the case of *Bremer Oeltransport G.m.b.H. v. Drewry* [1933] 1 K.B. 753 to hold that an action brought to recover a sum awarded by an award made in Hamburg under a submission contained in a contract made in London was an action brought to enforce a contract made within the jurisdiction and their Lordships think that the same reasoning applies here. The distinction between an award which merely establishes and measures a liability under the contract and so does not create a fresh cause of action and an award of damages

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<sup>121</sup> The current Hong Kong equivalent is Order 11 r 1(e) which is in the same terms.

<sup>122</sup> [1973] AC 115.

which supersedes the liability under the contract and creates a fresh cause of action, whatever its validity in other contexts, does not, in their Lordships' opinion, govern the broad question at issue here.”<sup>123</sup>

113. His Lordship therefore recognised that while, for certain purposes, the distinction between an arbitration award “which merely establishes and measures a liability” under the matrix contract and an action to enforce the award in pursuance of a fresh cause of action, may be important, in other contexts, that difference is immaterial. In *FJ Bloemen* the fact that the claim for payment was pursued in enforcing the arbitration award did not exclude the amounts claimed from being amounts payable under the contract. *Bremer* is an example where, for Order XI purposes, the enforcement action was treated as arising out of the charterparty contract made within the jurisdiction.

114. *The Bumbesti*<sup>124</sup> fell on the other side of the line with the enforcement action characterised as separate and distinct from the matrix contract. There, an attempt was made to establish Admiralty *in rem* jurisdiction on the basis that an action to enforce an arbitration award arising out of a bareboat charterparty was a claim arising out of an agreement “relating to the use or hire of a ship”.<sup>125</sup> It failed. Aikens J held:

“The arbitration agreement is, at least, one step removed from the ‘use or hire’ of a ship. The breach of contract relied upon to found the present claim has nothing to do with the use or hire of the ship: it concerns the implied term to fulfil any award made pursuant to the agreement to refer disputes.”<sup>126</sup>

115. In *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*,<sup>127</sup> while discussing the separability of arbitration

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<sup>123</sup> *Ibid* at 126.

<sup>124</sup> [2000] QB 559.

<sup>125</sup> Jurisdiction pursuant to Supreme Court Act 1981, section 20(2)(h).

<sup>126</sup> [2000] QB 559 at 571.

<sup>127</sup> [1993] QB 701.

agreements,<sup>128</sup> Hoffmann LJ (as Lord Hoffmann then was) explained how different characterisations may be appropriate in different contexts for different purposes. The pleaded issues in that case raised the question whether the matrix contract was void for illegality. It gave rise to the collateral question whether, if it was void, it had to follow that the arbitration agreement was also void and of no effect. So characterisation of the arbitration agreement had to be considered: Was it part of the matrix contract or was it separable and capable of continued vigour despite the matrix contract's illegality? Parallel issues are raised by D1-D2 in their outflanking argument. Hoffmann LJ's observations are equally applicable to those issues:

“Mr. Longmore's argument is extremely simple. He says that the question raised on the pleadings is whether the retrocession agreement was void ab initio. The arbitration clause formed part of the retrocession agreement. Therefore the issue must involve the validity of the arbitration clause itself.

Mr. Longmore calls this logic. I call it over-simplification. The flaw in the logic, as it seems to me, lies in the ambiguity of the proposition that the arbitration clause ‘formed part’ of the retrocession agreement. In one sense of course it did. It was clause 12 of a longer document which also dealt with the substantive rights and duties of the parties. But parties can include more than one agreement in a single document. They may say in express words that two separate agreements are intended. Or the question of whether the document amounts to one agreement or two may have to be answered by reference to the kind of provisions it contains. In any case, it is always essential to have regard to the reason why the question is being asked. There is no single concept of ‘forming part’ which will provide the answer in every case. For some purposes a clause may form part of an agreement and for other purposes it may constitute a separate agreement. One must in each case consider the terms and purpose of the rule which makes it necessary to ask the question.”<sup>129</sup>

116. Adopting Hoffmann LJ's approach, while it may be correct to hold that for certain purposes (such as founding jurisdiction) the action on the implied promise is “based on and arises out of” the underlying contract so as to be treated in the same manner as the matrix agreement, in the present case there is no justification for lumping the action on the implied promise together with

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<sup>128</sup> As to which see *Heyman v Darwins Ltd* [1942] AC 356; and *Fiona Trust v Privatov* [2008] 1 Lloyd's Rep 254.

<sup>129</sup> [1993] QB 701 at 722.

the arbitration for breach of the matrix contract for the purpose of compelling a stay of the common law proceedings. They are plainly separate causes of action with different elements and features. More fundamentally, they are causes of action that arise at different phases of the arbitral process in which jurisdiction is allocated differentially to the arbitral tribunal and to the enforcing court, as discussed in the section which follows.

*K.1d The nature of the claim for damages in the Action*

117. I turn next to Mr Gee's proposition that the damages claimed in the Action should be viewed as damages for loss of the profits of the development flowing from breach of the Agreement and so caught by the arbitration clause. It is a suggestion which fails to recognise the fundamental difference between proceedings at the arbitration as opposed to the enforcement phase, and the range of remedies open to the enforcing court.

118. Lord Hobhouse of Woodborough<sup>130</sup> highlighted the different spheres of arbitrators and the enforcing court:

"The essential purpose of arbitration is to determine disputes between the parties to the arbitration. Historically this was what the function of arbitrators was - to say who was right. The decision of the arbitrators could, as a result of the authority given to the arbitrator by the parties' agreed submission to arbitration, declare what were the rights and liabilities of the parties and bind the parties by that declaration. Enforcement lay with the courts. Common law remedies were available besides statutory ones. It is possible to sue on the award or for damages for failing to honour the award; or to rely upon the award as having conferred a right or determined a fact. ... Statutes and International Conventions have since facilitated the direct enforcement of awards with a minimum of formality but still ultimately requiring the assistance of the judicial system. But the situation remains that the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators pursuant to the authority given to them by the parties. As section 58 of the United Kingdom Arbitration Act 1996 says, 'an award made by the tribunal pursuant to an arbitration agreement is

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<sup>130</sup> *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich* [2003] 1 WLR 1041 at §9.

final and binding ... on the parties'.<sup>131</sup> It is an implied term of an arbitration agreement that the parties agree to perform the award."

119. The line drawn is therefore between the determination of the parties' mutual rights and liabilities, being a matter for the arbitrators, and enforcement of that award, being a matter for the court.

120. Mr David Joseph QC<sup>132</sup> referred to a number of legal texts elaborating upon the two phases of the process.<sup>133</sup> Conceptually, the parties' submission to arbitration is contractual, giving a mandate to the arbitrators to resolve the disputes specified and containing a mutual promise, usually implied, that they will comply with the award. Once the final award is made, the arbitrators' mandate is exhausted and, if the award is not complied with, a fresh cause of action arises for breach of the implied promise to honour the award. That cause of action lies within the enforcing court's jurisdiction and is not within the power of the tribunal. Procedurally, enforcement may be pursued summarily (under section 2GG) or by a common law action on the award, as provided for by section 40B(1). As Thomas LJ noted in *National Ability SA v Tinna Oils & Chemicals Ltd* ("The Amazon Reefer") regarding the common law action:

"Enforcement of an award by action is by an ordinary action brought in the High Court. The procedure is not subject to any statutory provision, but it has long been established at common law as an action founded upon the implied promise to pay the award."<sup>134</sup>

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<sup>131</sup> The equivalent for present purposes is section 40B(2) of the Ordinance, set out in Section J.1 above.

<sup>132</sup> Appearing for the Plaintiff with Mr Edward Chan SC, Mr Bernard Man SC, Mr Lee Tung Ming, Mr Keith Lam, Mr Justin Ho and Mr James Man.

<sup>133</sup> Quintin McGarel Hogg, *The Law of Arbitration* (Butterworth, 1936) pp 120-122, 159; Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2<sup>nd</sup> Ed, 1989) pp 416-418.

<sup>134</sup> [2010] 1 Lloyd's Rep 222 at §5.

121. The split functions of the tribunal and the enforcing court were graphically described extra-curially by Lord Mustill as follows:

“Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.”<sup>135</sup>

122. At the enforcement stage, in an action on the implied promise, the enforcing court may grant relief appropriate to the award. If it is a monetary award for payment within the jurisdiction, it may simply be a judgment enforcing the award as a debt. If it is a non-monetary award which has not been complied with, the court may fashion an apt remedy chosen from the full range of remedies available in an ordinary common law action. Thus, in *Agromet*,<sup>136</sup> Otton J approved the approach of Mustill and Boyd who stated:

“Parties to an arbitration agreement impliedly promise to perform a valid award. If the award is not performed the successful claimant can proceed by action in the ordinary courts for breach of this implied promise and obtain a judgment giving effect to the award. The court may give judgment for the amount of the award, or damages for failure to perform the award. It may also in appropriate cases, decree specific performance of the award, grant an injunction preventing the losing party from disobeying the award, or make a declaration that the award is valid, or as to its construction and effect.”

123. The cases involving non-monetary awards granting declarations of rights or specific performance illustrate the remedial flexibility of the enforcing court. Thus, in *Selby v Whitbread Co*,<sup>137</sup> when the defendant company demolished a building, withdrawing support from the plaintiff’s adjoining building and rendering it dangerous, surveyors appointed under an applicable

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<sup>135</sup> Cited in *Redfern and Hunter on International Arbitration* (OUP, 6<sup>th</sup> Ed), §7.07.

<sup>136</sup> *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd* [1985] 1 WLR 762 at 770, approving the Mustill and Boyd approach at 772. See also Merkin *Op cit* at §19.6, citing authorities illustrating the grant of a range of remedies.

<sup>137</sup> [1917] 1 KB 736.

statute made an award which required the defendant to erect a substantial pier to give support to the plaintiff's structure and to do certain minor works. The defendant refused to comply and the plaintiff brought the action to enforce that award. McCardie J held that while "... a decree of specific performance can in some cases appropriately be granted in order to carry out the terms of an award", in the instant case, such a decree should not be made because of difficulties of enforcement and because damages were an adequate remedy. So by way of relief, his Lordship granted the plaintiff a declaration that the award was valid and binding and awarded damages in respect of the erection of the pier and other works.<sup>138</sup>

124. In *Birtley and District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Ltd (No 2)*,<sup>139</sup> an arbitration held pursuant to certain co-operative union rules resulted in an award declaring that the defendant co-operative trading society should not trade in certain geographical areas where the plaintiff was exclusively to provide services. When the defendant refused to be bound by the award, the plaintiff successfully brought an action for a declaration that the award was binding on the defendant, an injunction restraining them from trading contrary to the terms of the award and also an inquiry as to damages.

125. It has been held that a purely declaratory award, including a declaration of non-liability,<sup>140</sup> could be enforced both by a common law action and under the summary procedure. A judgment reflecting such a declaratory award could be relied on by way of an issue estoppel and, if necessary, enforced

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<sup>138</sup> *Ibid* at 753-754.

<sup>139</sup> [1960] 2 QB 1. This decision was held by *Bellshill and Mossend Co-operative Society Ltd v Dalziel Co-operative Society Ltd* [1960] AC 832 to be wrong on an unrelated ground.

<sup>140</sup> *West Tankers Inc v Allianz SpA ("The Front Comor")* [2012] 2 All ER (Comm) 113.

by suitable methods of execution, including in exceptional cases, a writ of sequestration.<sup>141</sup>

126. In the present case, the tribunal made a non-monetary award requiring continued performance of the Agreement. When it was discovered that the possibility of compelling such performance by requiring transfer of the shares had been frustrated as a result of the restructuring, the enforcing Court granted relief in the form of an award of damages. The fact that there is very likely to be a significant overlap between such damages and whatever damages might have been awarded by the tribunal for breach of the Agreement, does not mean that the Court's order "usurps" the function of the tribunal. It is an order made at the enforcement phase, exercising the Court's jurisdiction with a view to fashioning an appropriate remedy to give effect to the award, distinct from any remedy that might have been claimed in the arbitration.

#### *K.2 Enforcement action bounded by the scope of the Award*

127. The second version of Mr Gee's outflanking argument takes as its premise what he submits is the limited scope of the Award. He contends that the only issue referred to and decided by the tribunal, concerned the validity of the Agreement. The Award confirmed merely that the Agreement was binding. Referring to Lord Mustill's analogy, Mr Gee submitted that the parties were only part of the way through the relay race and had not even entered the enforcement phase. Accordingly, the common law action on the award could not legitimately be employed to obtain from the Court of Appeal an order for damages to be assessed. That remedy went far beyond the scope of the Award and fell outside the Court's enforcement jurisdiction. The judgment entered by the Court of Appeal therefore usurped the function of the arbitrators. If the

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<sup>141</sup> *African Fertilizers & Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2011] 2 CLC 761 at §18.

Plaintiff wanted such damages, he argued, it had to return to the tribunal and persuade it to make such an award. Only then could the enforcing Court enter a judgment for such damages by way of enforcement.

128. In my view, the premise of that argument is untenable. The First Award was *not* merely about the validity of the Agreement. The tribunal certainly did decide that the Agreement was valid and not illegal. But it went much further. It held that D1-D2 were in breach of the agreement in several ways and rejected the submission that continued performance was impossible, re-affirming the relief awarded. It made it clear that it had fully adjudicated the case and that the First Award was final, recognising that the matter had reached the enforcement phase before the Hong Kong Court.

129. Thus, one sees from the First Award dated 27 October 2006 that the challenge to the Agreement's validity was unsuccessfully raised by D1-D2 in a counterclaim. The Plaintiff's claims for relief were based on their allegation that D1-D2 had breached the Agreement. It complained about the renunciation, arguing that "[the] contractual breach of [D1-D2] in unilaterally terminating the Agreement [was] against the principle of good faith and [had] no legal basis", submitting that they "should continue performing the Agreement". Such an order, the Plaintiff pointed out, was one form of relief provided for by Article 107 of the PRC's Contract Law which:

"... stipulates that 'Where one party to a contract fails to perform the contractual obligations or its performance fails to satisfy the terms of the contract, it shall continue to perform its obligations, to take remedial measures, or to bear responsibility for breach of contract such as paying damages'."

130. In support of an award for such continued performance (bearing in mind that at the stage of the first arbitration, D1-D2 had concealed the fact that they had divested themselves of control by allotting 9,998 shares in D4 to D3), the Plaintiff submitted:

“Since the [D1-D2] have absolute control over [D5] and development and operation of [Lot 22], they have the ability to actually perform the agreement”.

131. The Plaintiff also complained about D1-D2’s breach by their failing to deliver the land within six months of the execution of the Agreement and claimed damages accruing at a daily rate totalling RMB 1,275,000 calculated up to 1 June 2005, reserving the right to claim further damages from 2 June 2005 until the date of actual delivery.

132. The Plaintiff argued that the challenge to validity was just an excuse and that D1-D2 had “wilfully breached the Agreement for the purpose of exclusively seizing the commercial benefits”.

133. Those arguments were accepted by the tribunal which held that D1-D2 had no justification for discontinuing performance of the Agreement unilaterally, rejecting the suggestion that performance was impossible notwithstanding the site’s development and the unit sales which had occurred. It also awarded the damages claimed for failure to deliver the land in time.

134. The tribunal saw the Agreement as essentially:

“... a share transfer arrangement ... for the contractual purpose of assigning and obtaining the right to develop and obtain earnings from the development of [Lot 22].” To this end, the [Plaintiff] agrees to pay [D1-D2] RMB 120 million by instalments and progressively obtain the right to develop and make earnings from [Lot 22]. After the amount is paid in full, the [Plaintiff] is further entitled and obligated to purchase all the shares in [D4] for HK\$2 ...”

135. It was evidently on the basis of a prospective transfer of all the shares in D4 in exchange for payment of RMB 120 million that the tribunal made the award requiring D1-D2 to continue to perform the Agreement.

136. Almost two years later, by an application dated 18 August 2008, D1-D2 returned to the tribunal, asking it “to order termination of the Agreement” on the ground that continued performance was impossible and claiming an award of RMB 6 million against the Plaintiff as compensation for

alleged financial loss. This resulted in the tribunal's Second Award dated 22 April 2009 which underlines the substantive effect of the tribunal's award disposing of the arbitration.

137. At that stage, the restructuring had been revealed and D1-D2 put this forward as a reason (along with completion of the physical development and sale of most of the units) why continued performance was impossible. They sought to persuade the tribunal that they were entitled to terminate pursuant to Article 11 of the Agreement which specified certain circumstances which would justify termination.

138. The tribunal noted that in the First Award, completion of the development and the unit sales did not satisfy the conditions justifying termination. As to the restructuring, the Second Award stated:

“... [D1-D2] by the representations and warranties in Article 2 of the Agreement ... expressly guarantee that they have the absolute control right of [D4]. [D1-D2's] changes to the shareholding of [D4] during the arbitration procedure of the earlier case have breached the Agreement ... The [tribunal] considers that the change of shareholding of [D4] likewise does not satisfy the condition set out in Clause 2 of Article 11... and cannot be a ground for [D1-D2] to terminate the Agreement.”

139. The Second Award also noted that “the recognition and enforcement of the earlier arbitral award” was being carried out in the Hong Kong Court in accordance with Hong Kong legal procedures and refrained from commenting on the earlier award and the Hong Kong Court's judgment.

140. Finally, it will be recalled that, by letter dated 19 June 2009, D1-D2 made one last attempt to get the tribunal to accept that continued performance was not possible, asking for directions “on how it should be performed and/or what relief (including damages or other appropriate reliefs)” the Plaintiff should have to meet the purpose of the Agreement. The tribunal replied on 27 July 2009 stating that it had “adjudicated the case fully” that the First Award

was final and that the tribunal “did not leave out any matter which would need to be further determined”.

141. It is clear from the foregoing that Mr Gee’s suggestion that the awards were solely concerned with the validity is wholly unsustainable. Quite apart from finding that the Agreement was binding, the tribunal held that D1-D2 were in breach in the abovementioned respects. It awarded damages for the delay in delivering the land and made the order for continued performance as relief for the breaches. The Hong Kong Court translated the award into a judgment under the summary procedure and, after it was discovered that the restructuring had occurred, the Plaintiff started the common law action and sought damages as an alternative remedy in the enforcement proceedings. After failing against D1-D2 at trial but succeeding in the Court of Appeal, the Plaintiff was put to its election and elected for damages which were granted as a remedy within the power of the enforcing court.

142. Mr Gee’s argument that the arbitration was incomplete and that the Plaintiff ought to return to the arbitrators to seek an award of damages ignores the tribunal’s letter 27 July 2009 firmly refusing to entertain further proceedings (including proceedings for “damages or other appropriate reliefs”), asserting that the arbitration was final and comprehensive.

143. While it is conceivable that cases could arise where a remedy sought in a common law action may be refused on the ground that such remedy is unwarranted given the limited scope of the award, the present appeal comes nowhere near to such a case.

*L. The extant award argument*

144. D1-D2 contend that the Court of Appeal was wrong to award the Plaintiff damages because such relief “is fundamentally inconsistent with, and

barred by, the extant Award (which requires parties to continue to perform the agreement)”.<sup>142</sup> They argue that:

“... according to [*Johnson v Agnew*], when the decree of specific performance had not been complied with, the innocent party may ‘apply to the court to put an end to the contract’ and the court may, in the exercise of its equitable jurisdiction, order the contract to be dissolved and award damages. In this case, P never applied to the tribunal to give up any of its rights under the Award or for permission to treat the Agreement as terminated. In the circumstances, the enforcing court should not award damages on the basis that the underlying contract was no longer subsisting when there was still an extant award for continued performance of such contract.”<sup>143</sup>

145. The argument is that to enable the enforcing court to grant them damages, the Plaintiff must first return to the tribunal and ask it to rescind its order that “[D1-D2] shall continue to perform the agreement...” Unless that is done, the enforcing Court exceeds its powers in awarding damages which are inconsistent with the extant award.

146. The argument as presently formulated is a modified and diminished version of the argument that had been made before the Court of Appeal. There, the issue was whether the plaintiff was entitled to claim damages in the common law action on the award when it had already entered judgment under the statutory process.<sup>144</sup> D1-D2’s argument was that in entering judgment, the Plaintiff had made its election and could not subsequently seek inconsistent relief in the form of damages. As noted above,<sup>145</sup> Yuen JA held that there had been no election and that the Plaintiff was entitled to an award of damages if a properly informed election for such relief was made. The Plaintiff duly made such election and, on 20 October 2017, the Court of Appeal set aside the statutory judgment and entered judgment in the Action in favour of the Plaintiff

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<sup>142</sup> D1-D2 Written Case §2(4).

<sup>143</sup> *Ibid* §2(6).

<sup>144</sup> Court of Appeal §190.

<sup>145</sup> Section G.1 above.

for damages against D1-D2 for breach of the implied promise to honour the Award, with quantum to be assessed later.

147. Events have thus overtaken that earlier argument and the present proposition is that there is an inconsistency, not with the statutory judgment (which has been set aside), but with the terms of the award which, D1-D2 argue, is still extant. *Johnson v Agnew*<sup>146</sup> is relied on by analogy.

148. I do not accept that argument. It fails to recognise that the relief granted in the common law action falls within the enforcement jurisdiction of the Hong Kong Court and is neither a matter for the tribunal nor relief which in some way requires adjustment to achieve consistency with the terms of the award.

149. *Johnson v Agnew* does not assist D1-D2's argument. That was a decision concerned with consistency of remedies claimed in the same action and when a party may be held to have irrevocably elected for a particular remedy. It was not concerned with any purported requirement of consistency between relief granted in a common law enforcement action and the content of an arbitral award. In any event, the enforcement proceedings in the present case are perfectly in tune with *Johnson v Agnew*. Thus, (in relation to remedies sought in a vendor and purchaser action) Lord Wilberforce noted that the vendor may proceed against the defaulting purchaser by action for specific performance or damages in the alternative but would have to elect which remedy to pursue at trial.<sup>147</sup> He went on to point out that "if the order for specific performance is not complied with by the purchaser, the vendor may *either* apply to the court for enforcement of the order, *or* may apply to the court to dissolve the order and ask

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<sup>146</sup> [1980] AC 367.

<sup>147</sup> *Ibid* at 392.

the court to put an end to the contract.”<sup>148</sup> That is essentially the course followed in the present enforcement proceedings.

150. The so-called “extant award” presents no obstacle to the Hong Kong enforcing Court awarding the Plaintiff damages for breach of the implied promise to honour the Award.

*M. Conclusion as to D1-D2’s appeal*

151. For the abovementioned reasons which agree in large measure with the reasons of the Court of Appeal, I would dismiss D1-D2’s appeal.

**Mr Justice Fok PJ:**

152. I agree with the judgments of Mr Justice Ribeiro PJ and Lord Sumption NPJ.

**Mr Justice Cheung PJ:**

153. I agree with the judgments of Mr Justice Ribeiro PJ and Lord Sumption NPJ.

**Mr Justice Bokhary NPJ:**

154. I agree with the judgments of Mr Justice Ribeiro PJ and Lord Sumption NPJ.

**Lord Sumption NPJ:**

155. I gratefully adopt the account of the facts in the judgment of Mr Justice Ribeiro PJ, which is concerned with the arbitration issues in this complex and long-running dispute. I shall also adopt the terminology that he uses. I agree with the order which he proposes in Appeal FACV 3 of 2019, and

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<sup>148</sup> *Ibid* at 394.

with his reasons. The present judgment is concerned with the Plaintiff's appeal (No. 5 of 2019). The object of that appeal is to challenge the comprehensive dismissal by the courts below of the Plaintiff's non-contractual claims against the D3-D11, who are associated companies of D1-D2 or involved in the management of the group, and were concerned to a greater or lesser degree in the events which have given rise to this dispute. Leave to appeal was granted by this Court, limited to two of those claims.

156. The first is a claim in tort for inducing D1-D2's breaches of contract. It is nominally directed against all nine of the D3-D11, but in this Court has been pursued only against D3-D6. In this Court, this claim is limited to liability said to arise out of the 2005 restructuring of the group to which D1-D5 belonged. D3-D5 participated in the group restructuring that resulted in D1-D2 ceasing indirectly to control Xiamen Legend (D5), the owner of the land use rights for Lot 22. Mr Tan (D6) was the founder and effective controller of the group. The main issues under this head concern the nature of the knowledge and intent required in order to make an ancillary party liable for inducing a breach of contract.

157. The second claim, which is now pursued against D3 alone, has been given the general label "constructive trust" in these proceedings. What is said is that the contractual obligation of D1-D2 to transfer to a company nominated by the Plaintiff the shares in D5's parent company Hong Kong Legend (D4) was amenable in Hong Kong law and practice to specific performance. Therefore, it is argued, the Plaintiff acquired by virtue of the Agreement an immediate beneficial interest in the D4 shares which a Hong Kong Court should recognise. When, in the course of the group restructuring of 2005 D1-D2 transferred the shares in D4 to D3, that beneficial interest subsisted and became enforceable against D3, which had notice of the facts giving rise to it. The main issues under this head are whether Hong Kong law is the relevant

law for the purpose of deciding whether such a beneficial interest existed and, if so, whether D1-D2's contractual obligation to transfer the shares was specifically enforceable as a matter of Hong Kong law.

158. Both of these claims were rejected in the courts below. They also rejected a third non-contractual claim of conspiracy to injure the Plaintiff by the use of unlawful means. Leave to appeal was sought from this Court on a limited issue arising under this head, but was refused. We are not therefore concerned in this appeal with the cause of action for unlawful means conspiracy.

*Inducing a breach of contract*

159. At common law, an act sued on in Hong Kong but committed in another jurisdiction can be tortious only if it is actionable under the law of both jurisdictions. The rule, commonly called the "double actionability rule", is subject to an exception for cases in which the act, wherever committed, is sufficiently closely connected with another jurisdiction. The double actionability rule has been discarded in a number of common law jurisdictions including Australia and Canada, and abolished by statute in others, including England and New Zealand. Its application in Hong Kong may one day need to be reconsidered, but for the moment it is accepted on all sides that the rule, together with the exception, remains the law in Hong Kong. The Judge dismissed the entire claim for inducing a breach of contract on the ground that no such action was recognised by the law of the PRC. The Court of Appeal dismissed the claim on the same ground so far as it arose from the renunciation of the Agreement, and that part of the judgment is no longer in issue. But so far as the cause of action arose from the reconstruction, the Court of Appeal dealt with it purely as a matter of Hong Kong law, presumably on the basis that since the reconstruction was achieved by transactions in the shares of a company incorporated in Hong Kong it happened in Hong Kong.

160. The modern origin of the tort of inducing a breach of contract is the famous decision of the Court of Queen's Bench in England in *Lumley v Gye* (1853) 2 E&B 216. The effect of this decision was to make a person who procured a breach of contract liable jointly with the contract-breaker as an accessory to his wrong. The tort, like other economic torts, gives rise to difficult questions of legal policy which are rarely overtly recognised but never far from the surface. The dilemma is how to protect contractual rights against interference from non-parties without unduly limiting the commercial opportunities of businessmen. In the nature of things, commercial competition causes damage to other traders. What limits can the law legitimately place upon it?

161. Since Victorian judges in England first grappled with these questions, most of the world has adopted the statutory regulation of competition, taking its cue from the case-law on the Sherman and Clayton Acts of the United States. Hong Kong has done so since 2012. Statutory regulation has thus come to assume part of the burden of resolving the economic dilemma. But private law, and in particular the economic torts, still has an important role to play. The main difference is that in private law the relationship giving rise to a duty owed by the Defendant to the particular Plaintiff is of critical importance. It commonly arises from the Defendant's knowledge and intentions in acting as he did. By comparison, public law competition regulation is more concerned with consequences and with objective standards of conduct.

162. The elements of the tort of inducing a breach of contract are (i) a contract, (ii) known to a third party who (iii) does something which induces or persuades a contracting party to break it, (iv) intending to bring about the breach and (v) thereby causing loss. Most of the problems about this area of law have concerned the kind of acts which will be regarded as having "induced" the breach of contract, and the necessary mental state of the alleged inducer. The

tendency of much of the case-law until recently was to systematise and assimilate the various economic torts. This may perhaps have made the law more coherent and consistent, but in the process it lost sight of important differences between the various torts, in particular differences between their economic functions and the control mechanisms required in order to keep them within proper limits. In dealing with the tort of inducement, they also overlooked the accessory nature of the liability which had been a cardinal feature of the tort ever since *Lumley v Gye*. In *OBG Ltd v Allan* [2008] 1 AC 1 the House of Lords, after reviewing a large body of authority, unbundled the principal economic torts and drew attention to the distinct elements of each. It should now be unnecessary to refer to any older authority on the points which *OBG* decided.

163. The principal speeches in *OBG* were delivered by Lord Hoffmann and Lord Nicholls of Birkenhead. They were agreed on the elements of liability for inducing a breach of contract. Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood agreed with both of them on that tort, and proceeded to discuss the points on which they differed, all of which related to other torts.

164. Lord Hoffmann dealt separately with knowledge and intent. He dealt with knowledge at §39:

“To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so.”

It follows that the alleged inducer must know not just the facts but their legal consequence. This is apparent from Lord Hoffmann’s citation of the House of Lords’ decision in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479 as an illustration of his statement of principle. The Defendant was held not

to be liable for inducing a breach of an employee's duty of confidentiality to his employer, because he held the mistaken, indeed unreasonable ("eccentric") view that there was no such breach as the information disclosed belonged to the employee.

165. The test of intention is related to that for knowledge:

"42. ... It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. Mr Gye would very likely have preferred to be able to obtain Miss Wagner's services without her having to break her contract. But that did not matter. Again, people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves. As I said earlier, the Dunlop employees who took off the tyres in *GWK Ltd v Dunlop Rubber Co Ltd* 42 TLR 376 intended to advance the interests of the Dunlop company.

43. On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been 'targeted' or 'aimed at'. In my opinion the majority of the Court of Appeal was wrong to have allowed the action in *Millar v Bassey* [1994] EMLR 44 to proceed. Miss Bassey had broken her contract to perform for the recording company and it was a foreseeable consequence that the recording company would have to break its contracts with the accompanying musicians, but those breaches of contract were neither an end desired by Miss Bassey nor a means of achieving that end."

166. Lord Nicholls' analysis was the same. He spoke at §191 of the inducer's "intentional causative participation" in the breach. He warned against equating liability under this head with negligence. Ignorance, however careless, is a defence. Lord Nicholls identified the element of intent at §192 as follows:

"He is liable if he intended to persuade the contracting party to breach the contract. Intentional interference presupposes knowledge of the contract. With that knowledge the defendant proceeded to induce the other contracting party to act in a way the defendant knew was a breach of that party's obligations under the contract. If the defendant deliberately turned a blind eye and proceeded regardless he may be treated as having intended the

consequence he brought about. A desire to injure the claimant is not an essential ingredient of this tort.”

To the same effect is the brief statement of Baroness Hale at §306:

“[T]he common thread is striking through a third party who might otherwise be doing business with your target, whether by buying his goods, hiring his barges or working for him or whatever. The refinement proposed by my noble and learned friend, Lord Hoffmann, is entirely consistent with the underlying principles to be deduced from the decided cases. It is also consistent with legal policy to limit rather than to encourage the expansion of liability in this area.”

167. The effect of the judgments in *OBG* is that the act said to constitute the inducement must be targeted at the Plaintiff, in the sense the breach of his contract is either an end in itself or the means to an end. The trade union cases in which the union procures a breach of its members’ contracts of employment are generally cases in which breach of the contract is an end in itself. But, as Lord Hoffmann pointed out, it is more usual for the inducer to be out to serve some commercial interest of his own. He is liable because he knows and intends the breach of contract to be a means to that end.

168. The Agreement included, at Article 2.3, a warranty that D1-D2 “has absolute control over [D4] and [D5]” and an undertaking (not in the event honoured) that after the Agreement had been concluded they would convene a board meeting of those two companies to approve its terms. The purpose of this warranty was manifestly to ensure that D1 was in a position to procure compliance with the terms. It makes sense only on the footing that it related to the position not just at the time of the Agreement but throughout the period when the contract was executory. Moreover, even without such a warranty, it must necessarily be implied that D1 would not put it out of his power to perform.

169. The Judge held that the reconstruction of 2005 was not a breach of the Agreement although it involved D1 parting with control of D4-D5. This

was because the relevant breach of contract had already occurred two years before when the Agreement was renounced. This conclusion cannot be correct, and no attempt has been made to defend it in this Court. The renunciation was a repudiation of the Agreement, but the Plaintiff were not obliged to accept it and declined to do so. The contract therefore continued to bind and both sides remained obliged to perform it. That was the overt position of the Plaintiff, who maintained it throughout the two references to arbitration in Beijing and indeed still does. It follows that the reconstruction was a breach of contract. The Court of Appeal accepted that but thought that the prior renunciation of the Agreement by D6 was relevant for a different reason. It explained why at the time of the reconstruction D1-D2 regarded the Agreement as having already been brought to an end for all practical purposes. It followed that the claim for inducing a breach of contract had “no ‘causative’ element” (§249). This was no doubt an echo of Lord Nicholls statement in *OBG* (§191) about “intentional causative participation” in the breach.

170. Although put as a matter of causation, the Court of Appeal’s point would be better described as a matter of intent. It is, however, the same point albeit with a different label. In cases like *British Motor Trade Association v Salvadori* [1949] Ch. 556 where the inducement consisted of persuasion, or *D.C. Thomson & Co. Ltd. v Deakin* [1952] Ch. 646 where it consisted of threats, difficult questions arose about what kind of act could be regarded as “inducing” a breach of contract. These difficulties do not arise on the present appeal. The reconstruction undoubtedly caused D1-D2 to be in breach of contract because it was itself a breach of warranty and because it made it impossible to procure the transfer of the shares in accordance with the Agreement. Whether that caused loss or damage so as to complete the tort is a different question with its own difficulties. But this appeal is not concerned with the character of the act constituting the inducement or the question what loss can be said to flow from it.

It is concerned with the mental element required of the inducer. The Court of Appeal held that the relevant Defendants cannot have intended the reconstruction to result in a breach of contract because they believed, albeit wrongly, that the contractual obligation to transfer the shares was already at an end once they had already made the decision not to perform it.

171. In my judgment the Court of Appeal was correct. The Judge found that at an early stage, well before the first arbitration award, D6 had directed his brother-in-law Mr. Cheung (D10), a senior member of the group management, to set up an intermediate holding company in the PRC for the property interests of the group in the PRC, in the same way as had been done for its brewery interests in 1995. There were important commercial reasons for doing this, unrelated to the dispute about the Agreement relating to Lot 22. It was necessary in order to make possible intra-group loans and cross-guarantees in a manner consistent with PRC law. The proposal to restructure the group on these lines was set out in a memorandum of 25 August 2005 of Mr. Mok, the group Financial Controller. Mr. Mok's evidence, which the Judge accepted, was that no one had told him to make the transfer of the D4 shares impossible and that this thought never occurred to him. This was mainly because he had read the Agreement and had noted Article 11.3, which provided for purely financial remedies in the event that it was terminated as a result of a breach of the warranty in Article 2. It provided that D1-D2 would be required to refund twice the amount of the deposit, the transfer price paid, and "default compensation" equal to the transfer price paid. D1-D2 disputed the validity of the Agreement in the arbitration proceedings. But even on the footing that it was valid and wrongfully repudiated, Mr. Mok did not believe that there could now be any question of D1-D2 having to transfer the shares. He left the details of the reconstruction to be worked out by Ms. Wong, a senior manager in the company secretarial department. It was she who proposed the form which the

reconstruction ultimately took, namely the allotment of the D4 shares to D3 so as to make the latter its majority shareholder. For her, this was a routine transaction of a kind which she had often set up before. The Judge accepted her evidence that her reason for carrying it out in the way she did was that it made for a simpler transaction, with fewer complications as regards stamp duty and accounting.

172. For present purposes it is irrelevant that because of the Plaintiff's refusal to accept the repudiation the Agreement was still open, because on the findings of fact this was no part of the Defendants' state of mind. Mr. Mok can fairly be convicted of not having appreciated that an unaccepted repudiation is "writ in water", or the implications of the House of Lords' decision in *White and Carter (Councils) Ltd v McGregor* [1962] AC 413. He has that much in common with many reputable common lawyers. I do not know whether there is a corresponding rule in the law of the PRC, which governed the Agreement. But whether there is or not, Mr. Mok's view of the effect of Article 11.3 was not so strange as to suggest that he could not have held it. For present purposes it is enough that both the Judge and the Court of Appeal accepted that the group management regarded the contractual obligations as being at an end. That being so, their state of mind was not significantly different from that of the Defendant in *British Industrial Plastics Ltd v Ferguson* who wrongly believed that in law a trade secret was the employer's property to dispose of, and was therefore rightly acquitted of inducing its unlawful disclosure.

173. It follows that none of the relevant participants in the reconstruction intended to frustrate the contractual obligation to procure the transfer of the shares, even if that was its effect. In fact, however, it was not its effect. The group had already firmly decided not to transfer the shares and (for reasons which I shall explain below) could not have been compelled to transfer them. The reconstruction did not therefore frustrate the transfer. The question

whether that was a foreseeable consequence therefore does not arise on the facts, quite apart from being irrelevant in law. Nor is it relevant that (as the Judge speculated) D6 was likely to have been aware that the reconstruction would make the transfer of the shares to the Plaintiff's nominee impossible, and to have found this "not unwelcome". Knowledge of or satisfaction at the result is not the same as intending it. As far as D6 was concerned, the fate of the Agreement was already sealed.

### *Constructive trust*

174. A constructive trust can exist only if there is a relevant fiduciary relationship. It may arise on either of two juridical bases. It may be derived from the character of the relationship between the beneficiary or the trustee, where the court recognises that relationship as fiduciary. In such a case the trust gives rise to a true proprietary interest in equity. Or it may be imposed by the court on a purely remedial basis in a case where there is no subsisting proprietary interest (usually because it has been extinguished) but the relevant party is a fiduciary and is before the court. I sought to set out the conceptual framework in *Akers v Samba Financial Group* [2017] AC 424 at §82. The Plaintiff in this case claims to derive a fiduciary relationship from the executory contract for the sale of the shares. The principle, which was said in 1876 to have been settled law for at least two centuries, is that "the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold": *Lysaght v Edwards* (1876) 2 Ch. D. 499, 506 (Jessel MR). This well-known statement of principle related to land. But the same rule has long been applied to contracts for the sale of unquoted shares, which are regarded as unique in the same way as land. It gives rise to a true proprietary interest in equity, arising from the fiduciary character of the relationship between vendor and purchaser under an executory contract of sale. The basis of the rule in both cases, and the essential condition for its operation, is that the

contractual obligation to transfer the property should be specifically enforceable. This means that the purchaser's beneficial interest arises as soon as the contract is made or (if later) as soon as a relevant promissory condition precedent to the transfer has been satisfied.

175. The first question for us is by what law the existence of such beneficial interest is to be determined. The existence and incidents of an interest in property is governed by the *lex situs*. In the case of shares, this is the law of the jurisdiction in which the company is incorporated: *Akers v Samba Financial Group* at §19 (Lord Mance), §84 (Lord Sumption). The position is, however, complicated where there is a contract governed by the law of some other jurisdiction. The *lex situs* determines whether an equitable proprietary interest in the shares is legally capable of existing. If it is legally capable of existing, the next question is whether it has actually been created. Where this is said to be the effect of a contract, the *lex situs* refers to the proper law of the contract to determine what it means. The question in such a case is not whether its proper law recognises constructive or indeed any trusts. The question is whether the characteristics which the proper law of the contract treats it as having, are such as the *lex situs* would regard as giving rise to a proprietary interest in equity: *Kuwait Oil Tanker Co SAK v Al-Bader (No. 3)* [2000] 2 All ER (Comm.) 271, at §§190-193 (Nourse LJ); *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* (2012) 15 HKCFAR 569 at §§66-70 (Lord Collins of Mapesbury NPJ). As applied to the present case, the result of these principles is that the law of Hong Kong, as the *situs* of the shares, determines whether an equitable interest in shares of a Hong Kong company is capable of subsisting. The answer to that question is that it is, if the contract is specifically enforceable. It is then necessary to refer to the law of the PRC, as the proper law of the Agreement, to determine whether the contract has the characteristics which make it specifically enforceable in the law of Hong Kong. For this purpose, the arbitration award is

a decisive source. The D3 was not party to the arbitration agreement. But the D3's liability as a constructive trustee depends on the position as between D1-D2 and the Plaintiff, all of whom are bound by the arbitration agreement.

176. The Judge and the Court of Appeal found that the law of the PRC did not recognise the concept of trusts. Both of them thought that that was the end of the matter. For the reasons which I have given I do not agree. They should have gone on to ask themselves whether the characteristics of the Agreement in PRC law were such as to make it specifically enforceable in Hong Kong law. But their decision to dismiss the claim in constructive trust was nevertheless correct, because the Hong Kong courts would not specifically enforce a contract with those characteristics. There are, as it seems to me, two related reasons for this.

177. First, subject to limited exceptions, it is a bar to specific performance of a contract that the obligation to be enforced has not arisen because it is subject to a condition precedent which has not been satisfied. Until it is, there is no equitable proprietary interest: *Wood Preservation Ltd v Prior* [1969] 1 WLR 1077, 1092 (Goff J). The exceptions follow from the logic of the rule. Specific performance may nevertheless be ordered and the purchaser's beneficial interest will subsist if either (i) it is wholly within the power of the obligee to satisfy or waive the condition, or (ii) the obligor is bound to satisfy the condition and that obligation is itself specifically enforceable.

178. Secondly, it is a bar to specific performance that it would require what the courts have called "supervision". This is the ground on which the courts refuse to enforce a contract to carry on a business or to build a house. Of course, the court does not literally supervise anything. It makes orders which are enforceable by proceedings for contempt. What is meant by references to supervision in this context is that specific performance will not be ordered if the

relevant obligation depends on disputable questions, such as whether a given standard of performance has been achieved, which might have to be referred for decision to a court before it could be known whether the obligation was enforceable. As Lord Lane, delivering the advice of the Privy Council on appeal from Hong Kong, said in *Anstalt Nybro v Hong Kong Resort Co. Ltd.* [1980] HKLR 76, 82: It is a vain exercise to try to force one person against his will to co-operate with another and it would not be proper to attempt by order to produce that effect.

179. The terms of the Agreement give rise to both problems. The critical feature of the Agreement was that the land comprised in Lot 22 was to be delivered to the Plaintiff well before the shares were to be transferred. The terms contemplate, although they do not expressly require, the development to be begun between delivery of the land and the transfer of the shares. Most of the terms are concerned with the rights and obligations of the parties in relation to the development during that period, the satisfaction of which was a condition precedent to the transfer of the shares. Article 5 provided that the land was to be delivered to the Plaintiff after all the current residents had been moved out, but in any event within six months of the date of the Agreement. D1-D2 were to carry out the demolition of the Legend Commercial Building. It provided that the Plaintiff was to carry out the demolition of other buildings on the site with D1-D2's assistance. Articles 6 and 7 provided that the Plaintiff was to decide how the land should be developed and the development marketed, but subject to D1-D2's right to approve certain aspects of the development plans and the financing, and to "supervise" the development and operations on the site. D1-D2 also had a veto on the Plaintiff's choice of builder "if it has proper ground". Until the transfer price of the shares was paid there were restrictions on the proportion of the development that the Plaintiff could dispose and the disposal of any proceeds of sale. Article 4 dealt with the payment of the transfer price of

the shares. It was to be paid in installment, on signature of the Agreement, on delivery of the land, within a year after the delivery of the land and within two years after the delivery of the land. Under Article 8, the transfer of the shares was to occur “when [the Plaintiff] has settled the total transfer price and fulfilled the obligations according to the Agreement.” The arbitrators, who analysed the terms in detail in the First Award, did not regard the Agreement as a straightforward contract for the transfer of shares or land use rights. They described it as a “complicated arrangement of rights and obligations closely related to the transfer of shares,” and a “framework agreement whose performance may be difficult due to various uncertainties”. For that reason, they considered that it “needs close cooperation between the parties”.

180. Against that background, I return to the question of specific performance. It will be apparent that there were a number of conditions to be satisfied before the shares could be transferred. The satisfaction of those conditions was not within the Plaintiff’s sole control. Nor was the Plaintiff in a position to waive them, since they were inserted at least in partly for the protection of the unpaid vendor. Some of the conditions related to demolition, design and construction and had to be satisfied before the transfer of the shares. They called, as the arbitrators observed, for a high level of cooperative performance, and were inherently disputable. I would not go as far as the courts below did when they described the Agreement as a joint venture for the development of Lot 22. But it clearly had much in common with a joint venture during the period of up to two years which would intervene between the delivery of the land and the transfer of the shares. In my judgment, an agreement with these features was not one which a Hong Kong court applying its own law would specifically enforce.

*Conclusion*

181. For these reasons I would dismiss the Plaintiff's cross-appeal FACV 5 of 2019.

**Mr Justice Ribeiro PJ:**

182. The Court unanimously dismisses both appeals. The parties are at liberty to lodge written submissions as to costs within 21 days after the date of this judgment, to be dealt with on the papers.

(R A V Ribeiro)  
Permanent Judge

(Joseph Fok)  
Permanent Judge

(Andrew Cheung)  
Permanent Judge

(Kemal Bokhary)  
Non-Permanent Judge

(Lord Sumption)  
Non-Permanent Judge

***FACV 3/2019***

Mr Steven Gee QC, Mr Benjamin Yu SC, Mr Richard Khaw SC and Ms Bonnie Y K Cheng, instructed by Mayer Brown, for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (1<sup>st</sup> and 2<sup>nd</sup> Appellants)

Mr David Joseph QC, Mr Edward Chan SC, Mr Bernard Man SC, Mr Lee Tung Ming, Mr Keith Lam, Mr Justin Ho and Mr James Man, instructed by Anthony Siu & Co., for the Plaintiff (Respondent)

***FACV 5/2019***

Mr David Joseph QC, Mr Edward Chan SC, Mr Bernard Man SC, Mr Lee Tung Ming, Mr Keith Lam, Mr Justin Ho and Mr James Man, instructed by Anthony Siu & Co., for the Plaintiff (Appellant)

Mr Steven Gee QC, Mr Benjamin Yu SC, Mr Richard Khaw SC and Ms Bonnie Y K Cheng, instructed by Mayer Brown, for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (1<sup>st</sup> and 2<sup>nd</sup> Respondents)

Mr Benjamin Yu SC, Mr Paul Shieh SC and Ms Elizabeth Cheung, instructed by Wilkinson & Grist, for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants (3<sup>rd</sup> & 4<sup>th</sup> Respondents)

Mr Ronny Tong SC and Ms Kate Poon, instructed by Baker & McKenzie, for the 6<sup>th</sup> Defendant (5<sup>th</sup> Respondent)