HCCT 38/2021
HCCT 28/2023
HCCT 52/2023
(heard together)
[2023] HKCFI 3366

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 38 OF 2021

IN THE MATTER OF enforcement of order of an arbitral tribunal dated 23 April 2021 and a Partial Award dated 6 April 2023

BETWEEN

G — Applicant

and

N — Respondent

AND

CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 28 OF 2023

IN THE MATTER OF a Partial Award dated 6 April 2023

BETWEEN

G Plaintiff

and

N Defendant

AND

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 52 OF 2023

IN THE MATTER OF a Partial Award dated 28 July 2023 (the "2nd Partial Award")

BETWEEN

G Plaintiff

and

N Defendant

Before: Hon Mimmie Chan J in Chambers

Dates of Hearing: 4 October 2023 and 15 December 2023

Date of Decision: 29 December 2023

D E C I S I O N

Background

1. This case involves the interesting question of the application of public policy in a case where illegality is raised as a defence to a claim, and the extent to which the Court can intervene under Article 34 of the Model Law. This is in the context of a case where the arbitral tribunal had, in the course of reaching its decision on whether to grant or deny relief after a finding on illegality, considered the question of what the tribunal perceived to be the public policy of the relevant jurisdiction. Can it be contended that the tribunal's decision on public policy is erroneous? If the tribunal's decision on public policy is to be challenged, should it be characterized as an error of law, which is not subject to the Court's review? Or is the Court entitled to set aside the award as it finds that the award is in conflict with public policy because the tribunal's view of the public policy was erroneous?

2. In these proceedings, the Plaintiff ("**G**") seeks to set aside the awards on liability and on quantum made by the arbitrator in an arbitration commenced by G ("**Arbitration**") against the Defendant (and respondent in the Arbitration), on the ground that the awards are in conflict with the public policy of Hong Kong on illegality, and contain decisions on matters beyond the scope of the submission to arbitration and not in accordance with the parties' agreement on procedure. In the alternative, G seeks an order to suspend the setting aside proceedings for the matter to be remitted to the arbitrator under Article 34(4) of the Model Law, to give the arbitrator an opportunity to take such action as he considers will eliminate the grounds for setting aside.

3. There have been meticulous arguments raised on behalf of G in this case, on the basis of the Courts' decisions in *Tinsley v Milligan* [1994] 1

AC 340, *Patel v Mirza* [2017] AC 467, *Betamax v State Trading Corp* [2021] UKPC 14, and *Monat Investment Ltd v All Person(s) In Occupation of Part of The Remaining Portion of Lot No 591 in Mui Wo DD 4 No 16 Ma Po Tsuen, Mui Wo, Lantau Island* CACV 448/2020 [2023] HKCA 479. The gist of G's contention is that it is not seeking in this case to challenge the awards of the arbitrator on the ground of any error of law when the arbitrator decided on illegality on the test propounded in *Tinsley* (instead of *Patel*), but that the awards should be set aside as they would be contrary to the public policy of Hong Kong, which is now confirmed by the Court of Appeal in *Monat* to be reflected in and be guided by the decision of the English Court in *Patel*.

The facts

4. The background facts are not in dispute. They have been referred to in the judgment of the Commercial Court in proceedings between the same parties in the BVI, and in the arbitral awards which are the subject matter of these proceedings for setting aside.

5. G is a company incorporated in the BVI. It is a wholly-owned indirect subsidiary of Kaisa Group Holdings Limited ("**K**") which is listed on the Hong Kong Stock Exchange.

6. The Defendant ("**N**") is also incorporated in the BVI, and is a real estate developer and operator which conducted its main business on the Mainland. N is the sole owner of Nam Tai Group Ltd, which indirectly owns significant assets and shares in Mainland companies, including the 100% subsidiary of N Nam Tai Investment (Shenzhen) Co Ltd ("**NTI"**). NTI holds the vast majority of N's assets.

7. At the material time in September 2020, K was the largest shareholder of N, holding such shares through G and controlling the management and board of N.

8. As reflected in the 1st Partial Award issued in the Arbitration on 6 April 2023, N started life as a high-tech company in Shenzhen, but evolved into a successful property investment company and became listed on the New York Stock Exchange.

9. Amongst the shareholders of N was an American investment fund, IsZo Capital LP ("**IZ**").

10. Disputes emerged, when the management of N decided to make a substantial investment of US $100 million in the purchase of more land in Dongguan, but without reference to the board of directors of N. IZ disagreed with the purchase, and having lost confidence in the board of N, IZ and other shareholders supporting it proposed to call a meeting of the shareholders of N to consider a change of some of the directors on the board. As found by the BVI Court and accepted by the arbitrator, had the shareholders' meeting been held, it was likely that the requisitionists would have succeeded, and the composition of N's board of directors would have been substantially altered and the directors related to K would have been removed.

11. On IZ's case, N then arranged for an allotment of shares in order to thwart the likely outcome of a vote by the shareholders of N. On 5 October 2020, N and G entered into a Securities Purchase Agreement ("**SPA**") for a placement known as "**PIPE**" (a private investment in public equity). Pursuant to the SPA, N was to allot 16,051,219 shares to G in exchange for

the price of US $146,868,653 ("**Consideration Monies**"). The allotment would have increased G's shareholding in N from approximately 23.9% to 43.9%. Approximately 4.5% of N's issued shares was offered to one West Ridge Investment Limited ("**WR**"), which had not previously owned any shares in N. The placement under the SPA gave K and its supporters the necessary votes to defeat IZ's requisition for a shareholders' meeting.

12. On 13 October 2020, IZ commenced proceedings in the BVI Commercial Court to seek a declaration that the placement to G and WR was void and should be set aside, on the ground that in breach of section 121 of the BVI Business Companies Act ("**Act**"), the placement was not made in the interests of N and the directors had not exercised their powers for a proper purpose. In a judgment of 3 March 2021 ("**BVI Judgment**"), Jack J set aside the placement on the ground that it was not in the interests of the company. He found that four of the directors of N were controlled by K and heavily committed to supporting K's *de facto* control of N, and that the purpose of the four directors in approving the PIPE was to give K *de facto* control of N and to defeat the shareholders' request for a meeting. The PIPE was executed for an improper purpose under BVI law, and was accordingly held to be void. The BVI Court ordered a special meeting of shareholders of N, which was held on 30 November 2021, when most of the members on the board were voted out and a new board of management was voted in.

13. G and N (by its former board controlled by K) appealed against the BVI Judgment, but the Court on appeal affirmed the decision of Jack J, that the PIPE had been made for an improper purpose and that the allotments to G and WR were void. The Court of Appeal only allowed part of the appeal, by finding that although the directors of N had acted in breach of section 121

of the Act, which require them to exercise their powers as directors for a proper purpose and not in a manner which contravenes the Act or the memorandum or articles of the company, they were ***not*** in breach of their duties under section 120(1) of the Act, which require them to act honestly and in good faith and in what they believe to be in the best interests of the company.

14. The SPA between G and N is governed by Hong Kong law, and contains an arbitration clause in favor of the Hong Kong Arbitration Centre ("**Clause 6.10**").

15. After the judgments in the BVI proceedings, G commenced the Arbitration on 12 March 2021 in Hong Kong, to seek restitution of the Consideration Monies it had paid for the placement under the SPA. In the Arbitration, G made a personal claim against N based on unjust enrichment for mistake or total failure of consideration, and restitutionary claims including proprietary restitution on the basis of constructive trust arising out of fundamental mistake. By way of defence, N claimed illegality of the placement, and contended that G should not be permitted to recover the Consideration Monies by virtue of illegality in respect of G's personal claim, and relying on the principle of unclean hands in respect of G's proprietary claim. N also counterclaimed for costs and damages sustained by it in relation to the SPA and the placement held to be invalid.

16. Shortly after commencement of the Arbitration, G applied to the arbitrator and was granted an interim preservation order ("**IPO**"), which restrained N from disposing of the Consideration Monies, or their traceable proceeds, of approximately US $90 million, in a bank account in Hong Kong

which was in the name of a subsidiary of N. Leave was granted by the Court on 29 April 2021 to enforce the IPO as an order of the court ("**29/4 Order**").

17. On 6 April 2023, the arbitrator published the 1st Partial Award ("**Award**"). By this, the arbitrator applied *Tinsley* in finding that the placement was illegal and in dismissing G's personal restitutionary claim, and further dismissed G's proprietary restitutionary claim on the equitable doctrine of unclean hands. He further upheld N's counterclaim on G's liability to pay damages to N for the latter's loss sustained as a result of G's unlawful act conspiracy and/or dishonest assistance. The 1st Partial Award did not award any specific damages on the counterclaim. It was only in the Second Partial Award of 28 July 2023 ("**2nd Award**") that the arbitrator quantified the damages to be paid by G to N, in the sums of US $11,096,822 and US $1,924,541.53, with interest and costs.

18. Just a few days before the handing down of the Award, the Hong Kong Court of Appeal handed down its decision in *Monat*. The Court held that *Patel* rather than *Tinsley* (which had hitherto been applied in Hong Kong) represented Hong Kong law on illegality.

19. On 20 April 2023, G applied to set aside the Award and to continue the effect of the IPO granted by the arbitrator and recognized by the Court by the 29/4 Order. On 4 August 2023, G likewise applied to set aside the 2nd Award after it was handed down. The grounds for setting aside are that the 2nd Award contains decisions on matters beyond the scope of the submission and the procedure was not in accordance with the parties' agreement.

Public policy ground

20. G recognizes that it is not open to it to challenge the Award and the 2nd Award (together "**Awards**") on the ground that the arbitrator had erred in law in applying *Tinsley* instead of *Patel*, or that *Tinsley* had ceased to be good law since the Court of Appeal's decision in *Monat*. Hence, the grounds of the application to set aside have been framed to be on the basis of public policy, and on the basis that the arbitrator's Awards were premised on an incorrect understanding and application of Hong Kong's public policy.

21. Naturally, N's immediate response is that the claims made by G are a mere disguise of an attack against the findings of fact and law which are within the exclusive powers and jurisdiction of the arbitrator, and that G has no grounds to seek the setting aside of the Awards on the basis of any error of law made by the arbitrator. These are valid objections and I have summarized them below, and carefully considered them.

22. First, Counsel for N has highlighted the well-recognized principles of party autonomy and their choice of arbitration as the manner of resolution of disputes arising out of the SPA. Mr Pao's emphasis is on the finality of awards and the obvious fact that the Court has no ground to set aside an award even if the arbitrator has made any errors in his understanding of the law. On behalf of N, Mr Pao argued that none of the authorities relied upon by G support the proposition that the Court is entitled to interfere with the exclusive power and remit of the arbitrator, to decide whether restitution of the Consideration Monies should be allowed, when he has found the SPA and the placement to be illegal. The Court should not re-visit and review the merits of the illegality case, nor substitute its own views on the illegality issue under the guise of public policy. Mr Pao contended that the denial of

relief on the basis of a breach of s 121 of the Act ("**s 121**") is a question of law for the arbitrator to decide on the factual findings he made and for the reasons which he gave. Mr Pao pointed out that in the Award, the arbitrator had given a comprehensive analysis as to why the breach involved was not in the nature of an "ordinary private wrong", but engaged public interest. He referred to the fact that N's shares were traded on the New York Stock Exchange, that N was incorporated in the BVI and that it is in the interests of investors that companies incorporated there should be operated in accordance with the legislation of BVI. The arbitrator had referred to other reasons such as the fact that the breach of the legislation was not a technical or inadvertent breach, and pertinently, that the breach involved dishonesty on the part of both G and N which had acted in concert to defeat a lawful attempt to change the board of directors.

23. On N's case, the mere fact that the arbitrator had considered and determined what the relevant public policy of Hong Kong was, when he decided on the illegality of the transaction, does not mean that such a decision on public policy is one which can be reviewed by the Court under Article 34 of the Model Law. Counsel relies on the judgment in *Betamax*, where the Privy Council held that the tribunal's decision on fact and law is a decision for the tribunal, and if it holds that a contract is illegal, then that decision will be final, in the absence of fraud, a breach of natural justice or any other vitiating factor. It was held in *Betamax* that the Court was in error in reviewing the decision of the arbitrator on illegality, which decision was final and binding, and that no issue arose as to whether the award was in conflict with public policy. Errors of fact or law made by an arbitrator do not *per se* engage any public interest.

24. Further, it was argued for N that even if the arbitrator had somehow been mistaken as to what Hong Kong public policy was, this amounts at most to an error of law, and does not entitle G to set aside the Award.

25. Finally, Counsel for N submitted that there was no manifest injustice, and nothing shocking to the conscience of the Court to render it contrary to public policy, to enforce an award made by an arbitrator applying the law as it stood at the time of the award. By applying the orthodox approach according to *Tinsley*, it was not unjust to deny relief to a plaintiff who has to rely on a claim founded on illegality.

26. I have carefully considered all the above arguments made for N, which are sound, but on the facts of this particular case, I am persuaded that the Court is entitled to review the decision of the arbitrator to deny relief to G. This is not because the arbitrator had made any error of law. It is a question of the Court's power and duty to consider the issue of whether the Awards are contrary to the public policy of Hong Kong as at today, and whether the arbitrator's consideration of public policy in his decision was made in accordance with the guidelines set out in *Patel* and now recognized by the Court of Appeal in *Monat*, to be applicable to Hong Kong on the question of illegality. These do not appear to have been the guidelines which the arbitrator had followed, and this difference in approach may result in a different conclusion of the Court, when applying the *Patel/Monat* "range of factors approach" to decide whether the Award should be set aside as being in conflict with the public policy of Hong Kong.

27. Significantly, Counsel for G clarified and confirmed at the hearing on 4 October and 15 December 2023 that G does **NOT** seek to challenge the arbitrator's finding on the facts, that the placement under the SPA was made for an improper purpose. Nor does G challenge the arbitrator's conclusion in law that there was, on the facts found, a breach of section 121 because the directors had exercised their powers for an improper purpose.

28. What G seeks to argue is that the arbitrator's conclusion to deny relief to G by virtue of the breach of s 121 is wholly disproportionate and has produced such a harsh and manifestly unjust result, that it would be contrary to public policy to enforce the Awards. G claims that it had been deprived of a very substantial sum (in the region of HK$ 1 billion) which it had paid out for the transaction which was set aside, and that ordinarily, the money should and would have been returned when a transaction is unwound, as G would be entitled to repayment. Counsel for G referred to the judgments of Jack J and the BVI Court of Appeal and the acknowledgment by the BVI Courts that G would "in principle" be entitled to, or be expected to have, a claim to repayment of the Consideration Monies from N.

29. Counsel for G emphasized the fact that G is not seeking to claim that the arbitrator made an error of law *per se*, and that public policy plays an essential and indisputable role when a claim of illegality is raised in the defence and is considered by the court or tribunal. The arbitrator himself acknowledged in the Award that illegality itself as a defence is a principle of policy (paragraph 218 of the Award). In considering whether to grant relief to G, the arbitrator had carefully considered whether there were matters within the public sphere (paragraphs 188 to 189 of the Award). Counsel submitted

that it was therefore necessary and essential for the arbitrator to correctly understand and to apply the relevant public policy, as reflected in the decisions in *Patel* and *Monat* and the guidelines set out therein.

30. In *Patel*, the contract between the claimant and the defendant was itself illegal, but the Supreme Court affirmed the Court of Appeal's decision that the illegality did not bar relief to the claimant. Counsel has referred to the judgment of Lord Toulson, where he stated at para 101:

> "So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law."

31. At paragraphs 107 to 109, His Lordship went on to explain:

> "In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows' list is helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.
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> 108. The integrity and harmony of the law permit - and I would say require - such flexibility. Part of the harmony of the law is its division of responsibility between the criminal and civil courts and tribunals. Punishment for wrongdoing is the responsibility of the criminal courts and, in some instances, statutory regulators. ... Punishment is not generally the function of the civil courts, which are concerned with determining private rights and obligations. The broad principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the

> criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing. ...
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> 109. The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted."

32. On behalf of G, it was contended by Mr Yu that correctly applying the multi-factorial approach in *Patel*, G's claim for restitution should not have been denied simply because the placement was considered illegal as involving a breach of s 121 by the directors. The underlying purpose of the prohibition under s 121 should have been considered and according to Counsel for G, the denial of relief to G would not have advanced such purpose which is to prevent the exercise of power by directors for an improper purpose, and further, such denial would render ineffective the public policy behind the rule against unjust enrichment. Counsel also contended that barring relief to G was disproportionate to the illegality found, and the function of the tribunal should not have been to impose punishment for the breach of the BVI legislation when the Act itself does not impose any penalty. Considered in this light, it was argued that by denying relief to G, the Award is contrary to the public policy of Hong Kong, as the arbitrator had not considered all the relevant matters outlined by Lord Touson in his judgment in *Patel*.

33. Mr Yu pointed out that it is open to the Court to review the decision of the arbitrator on public policy. He highlighted the fact that the

question of illegality involves two distinct stages. The first stage involves the tribunal making findings of facts, and applying the law to the facts to ascertain if there is any illegality in law. The second stage then involves ascertaining the consequences of the illegality found, and although the Privy Council made it clear in *Betamax* that the first stage is not open to review by the Court, at the second stage, the Court must assume jurisdiction to determine whether the award is in conflict with the public policy of the jurisdiction of the supervisory court. G is therefore entitled to seek the Court's intervention on the question of the consequence of the illegality found, and whether G should be deprived of the right to claim restitution of the Consideration Monies simply because there was a breach of s 121.

34. In *Betamax*, the Privy Council made it clear that the question of public policy is for determination by the Courts. At paragraph 3 of the judgment, Lord Thomas observed:

> "In the light of the provisions of the International Arbitration Act, particularly those as to jurisdiction, separability, finality and the unavailability of appeals on points of law, the only route open to the Supreme Court to review the decision of the Arbitrator on the interpretation of the PP Act and PP Regulations [the subject statutory provisions being considered] was under section 39 of the International Arbitration Act. As is recognized by the provisions of the Model Law and as is apparent from a number of cases in different jurisdictions, the question may arise as to the nature and scope of public policy… It was common ground that under section 39(2)(b)(ii) of the International Arbitration Act, it is for the Supreme Court to determine the nature and extent of public policy of Mauritius and whether the Award is in conflict with it; … Betamax accepted that if the Arbitrator had determined that the COA was not exempted from the PP Act and therefore entering into the COA would have been unlawful, then it was for the Supreme Court to determine whether the consequences and effect of the illegality was such as to make the Award in conflict with the public policy of Mauritius." (Emphases added)

35. *Betamax* is a decision of the Privy Council on the meaning of "public policy" in the context of the Model Law, and is highly persuasive as an authority. Section 39(2)(b)(ii) of the Act considered is the equivalent of section 81 of the Ordinance, and Article 34(2)(b)(ii) of the Model Law.

36. The Privy Council decision made it clear that there is no conflict with the need to respect the finality of the award. At paragraph 49, Lord Thomas's observation was as follows:

> "The intervention of the court is specifically limited to setting aside the award on the grounds set out in section 39(2) of the International Arbitration Act. In relation to the issue of whether the award conflicts with public policy, the court's intervention proceeds on the court's application of public policy to the findings (whether of the fact or law) made in the award. To read section 39(2)(b) more widely would be contrary to the clear provisions as to the finality of awards. The provision can be given full application by respecting the finality of the matters determined by the award and confining the ambit of the section to the public policy of the state in relation to the award. The question for the court under section 39(2)(b)(ii) is whether, on the findings of law and fact made in the award, there is any conflict between the award and public policy. For example, if the Arbitrator had held that the COA had been concluded in breach of the PP Act, but the contract was enforceable as it was not contrary to public policy, the court would be entitled to determine under section 39(2)(b)(ii) whether that decision by the Arbitrator conflicted with the public policy of Mauritius. The effect of section 39(2)(b)(ii) is simply to reserve to the court this limited supervisory role which requires the court to respect the finality of the award. It cannot, under the guise of public policy, reopen issues relating to the meaning and effect of the contract or whether it complies with a regulatory or legislative scheme." (Emphases added)

37. In my judgment, where a party makes an application under section 81 of the Ordinance (applying Article 34 of the Model Law) to set aside an award, or under either section 86(2)(b), 89(3)(b) or 95(3)(b) of the Ordinance to resist enforcement of an award, it is open to (and incumbent on) the party to show to the Court that the award or enforcement thereof is

contrary to the public policy of Hong Kong. When such a contention is made, the Court is bound to consider and decide the claim, applying the authorities which define the narrow scope of such a claim. It is not against the spirit or principles of the New York Convention or the Ordinance to do so.

38. As explained in *Betamax*, the finality of the award is not affected when the role of the Court is simply to decide whether there is any conflict between public policy and the award, on the findings of law and fact made by the arbitrator which are not reviewed. As Counsel for G has been quick to accept, G is not seeking to review or disturb the findings made by the arbitrator, that the SPA and the placement were, on the facts, made for an improper purpose, that there was a breach of s 121 of the Act, and that in law, the SPA and the placement are illegal. It only questions the denial of relief to G on the basis that that decision is grounded on public policy.

39. In this case, the arbitrator had considered matters which in his view were relevant to whether or not relief should or should not be granted to G. He had considered the maxim *ex turpi causa non oritur actio* ("from a dishonorable cause an action does not arise") and its meaning, analyzed the cases on the illegality defence, including *Tinsley* and then *Patel*, and concluded that as the Hong Kong Court of Final Appeal has not yet considered whether *Patel* should be followed in Hong Kong, he was required to apply the law of illegality as set out in *Tinsley*. The moral turpitude on the parts of the former directors of N, the place of incorporation of N, the fact that N was listed on the New York Stock Exchange, the interests of investors, the possible deterrence effect of denying restitution, the breach of the duties imposed under ss 120 and 121 of the Act and the fact that no criminal sanction was imposed under the Act, were amongst the matters which were

considered by the arbitrator, in deciding whether the public interest was engaged. The arbitrator then considered the reliance test under *Tinsley*, and concluded that the SPA and the placement "were indivisibly connected and tainted by illegality" and that the claim for reimbursement should fail. He acknowledged that the strict application of the illegality doctrine would inevitably lead to injustice and the unjust enrichment of N, but concluded that that was defensible on the basis that it is not a principle of justice but a principle of policy, as recognized in *Taylor v Bhail* [1996] CLC 377 and *Holman v Johnson* 98 ER 1120. It is clear that the arbitrator did not apply the approach advocated in *Patel* on the basis that it was not part of Hong Kong law. He acknowledged (at paragraph 5 of the 2nd Award) that *Patel* took a less strict approach and gave the Court a degree of discretion.

40. As Mr Pao pointed out on behalf of N, the arbitrator was following what was the approach of the courts prior to the decision in *Patel*, and there should be nothing shocking to the conscience of the courts to enforce his decision.

41. However, I agree with and accept the submissions made by Counsel for G, that when the Court is now asked, on an application to set aside the Awards, to consider the award in the context of public policy, it is bound to consider whether the Awards or enforcement thereof would be contrary to the public policy of Hong Kong as recognized by the Hong Kong Courts at the current date. If, now adopting the "trio of necessary conditions" and range of factors approach in *Patel* as acknowledged by *Monat*, the Court considers that it would be manifestly unjust and against the public policy of Hong Kong to enforce the Awards - whether by reason of disproportionality between the purpose of the Act and the effect of denying relief, or as a result

of weighing the different public policies or interests involved in the spheres of unjust enrichment and illegality - the Court may be compelled to set aside the Award notwithstanding that the arbitrator had decided on matters engaging public interest when he made his award. This may be because the arbitrator had not considered all the matters highlighted to be important in the approach advocated in *Patel* and *Monat*, before determining whether relief should be denied to the claimant. As Counsel for G submitted, it is not necessary for a party seeking a setting aside or remission of the award to show that the outcome would have been different, only that it could or might have been different (*Pang Wai Hak v Hua Yunjian* [2012] 4 HKLRD 113 and *A v B* [2015] 3 HKLRD 586).

42. On the facts of this case, I consider that instead of pronouncing the Court's view on whether the Awards are contrary to the public policy of Hong Kong as it should now be considered, the more appropriate action would be to suspend these setting aside proceedings under Article 34(4) (applied by section 81 of the Ordinance), and remit the matter to the learned arbitrator so that he has the opportunity to resume the arbitral proceedings and take such action as in his opinion will eliminate the grounds for setting aside. The learned arbitrator can then consider *Monat* and decide whether his decision as reflected in the Awards would be affected in any way.

Clause 6.10(e) ground

43. G relies on a further ground for setting aside the Awards. In the Originating Summons, G claims that the Awards contain decisions on matters beyond the scope of the submission to arbitration, and that the procedure was not in accordance with the parties' agreement. In substance, G relies on the arbitration clause in the SPA, Clause 6.10(e) of which states that the

arbitrators appointed "shall have no authority to award consequential, special or punitive damages". G contends that this should be read as a limitation of the tribunal's authority, and not merely as a limitation on the remedies available to or which can be claimed by the parties to the SPA. N's counterclaim seeks "consequential, special or punitive damages" on the basis of conspiracy/dishonest assistance, and G contends that the tribunal had no authority to make any award in favor of N, when it allowed N's claims for the costs incurred in relation to the placement, the costs of IZ incurred in relation to the BVI proceedings, and other losses sought by N as a result of or consequential to the unlawful placement.

44. In my view, this ground of complaint can be quickly disposed of. In substance, G's arguments on the arbitrator's "lack of authority" amount to a claim that the arbitrator had no jurisdiction. However, G did not challenge the jurisdiction of the arbitrator in the Arbitration, to claim that he had no authority at all to entertain N's claim for the consequential, special or punitive damages sought. If there was such a challenge, it would have been natural for the arbitrator to record this in the Awards and to make a ruling on such an important issue as to his jurisdiction. However, there is no record in the Awards that any such challenge had been made, despite the fact that the counterclaim had been filed as early as March 2022.

45. Under Article 16 of the Model Law, any plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, and a plea that the tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

46. In *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111 the Court of Final Appeal made it clear that any irregularity or non-compliance with the governing rules of the arbitration should be raised promptly in the arbitration, and that any failure to do so would be a breach of the party's duties of *bona fides* to preclude it from raising such issue at a later stage.

47. If G is right, that clause 6.10(e) goes to jurisdiction, then by failing to raise the point as to the arbitrator's lack of jurisdiction and authority in respect of the counterclaim for the damages sought, the arbitrator had been deprived of the opportunity to deal with such complaint at the earliest and appropriate stage, and G is estopped from asserting such claim now.

48. Counsel for N pointed out that G had in fact expressly stated, at paragraph 11 of its Amended Reply and Defence to Counterclaim ("**Reply**") in the Arbitration, that its argument on Clause 6.10(e) was ***not*** a jurisdiction challenge. This was despite the fact that it had expressly referred to Article 16 of the Model Law. What G pleaded (at paragraph 10 of the Reply) was simply that "by reason of the contractual bargain reached between the parties, (N) cannot in any event claim the damages pleaded in (N's) counterclaim or to set-off such damages against (G's) claims". G's pleading is inconsistent with and contradicts the assertion now made as a ground to set aside the Awards, that the arbitrator did not have jurisdiction (in reliance on a similar clause in the case of *BAZ v BBA* [2018] SGHC 275, which Counsel argued concerned a question of jurisdiction).

49. In *C v D* FACV No 1 of 2023, Riberio PJ made the distinction between a party's challenge to a tribunal's "jurisdiction" and a challenge to

the "admissibility" of a particular claim. He explained that a challenge on jurisdiction under Article 16 of the Model Law is a contention that a tribunal has wrongly ruled that it has jurisdiction when in law it has no authority to deal with the arbitration. A challenge as to "admissibility" is an objection which alleges that a claim is defective and cannot be proceeded with, as contrasted with a challenge to the authority of the tribunal to conduct the arbitration at all. His Lordship referred to *Arbitral Jurisdiction*, in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook on International Arbitration* (OUP 2018) at p6, where Alex Mills described it thus:

> ".. the question of jurisdiction concerns the power of the tribunal. The question of admissibility is related to the claim, rather than the tribunal, and asks whether this is a claim which can be properly brought."

50. Considered in that light, the plea made by G in its Reply was simply that by virtue of Clause 6.10, there was a limitation on the claims which can be properly advanced in the Arbitration, to fall within the category of a challenge to admissibility, rather than a challenge as to the arbitrator's jurisdiction. It was a claim that the counterclaim for consequential, special or punitive damages was defective and should not be entertained. Charaterized thus, the Court has no power to review the arbitrator's ruling.

51. As pleaded and as argued before him, the arbitrator dealt with the issue as a matter of construction of clause 6.10(e), and whether the damages he should award in the claim which he had the authority to adjudicate should be limited in any way.

52. Mr Pao's case is that the construction of an exclusion clause such as Clause 6.10(e) is a substantive legal question for the tribunal, rather than a

question going to its jurisdiction. In support, he cited *International Commercial Arbitration* (3rd ed) and Born's observation at para 25.04[F][4][h]:

> "A recurrent issue concerns the consequences of an arbitral tribunal's award of relief that exceeds contractual limitations (e.g., an award of consequential damages or lost profits, notwithstanding contractual provisions forbidding such relief). In general, most national courts have (correctly) concluded that these types of awards do not constitute an excess of authority, but instead involve erroneous substantive decisions, not subject to judicial review. Some authorities have suggested that contractual limitations on the tribunal's remedial authority presumptively do not constitute jurisdictional limitations on the arbitrators' authority, but that this presumption can be rebutted. If such an approach is adopted, only clear and explicit language should warrant treating contractual liability or damages limitation as a jurisdictional limitation."

53. I agree with Mr Pao, that whether or not N's claim for damages in this case falls within the exclusion contained in Clause 6.10(e) is a matter of construction of the SPA, and that even if there was any error in the Award which allowed N's counterclaim, it is an error of law which does not come within the Court's review for a setting aside application, whether on the ground of the award falling outside the scope of the submission to arbitration or in accordance with the parties' agreement.

54. For all the above reasons, I consider that there is no ground for this Court to rule that the Awards should be set aside as the arbitrator had no mandate or power to award the damages sought, or that the Awards contain matters beyond the scope of the parties' agreement to submit their disputes to arbitration.

Disposition of the setting aside application

55. I therefore acede to the application made in paragraph 2 of the Originating Summons and make an order under Article 34(4) to suspend these proceedings for 3 months. Parties are given the liberty to apply for this period to be varied when the availability of the arbitrator is ascertained and the timetable for the arbitral proceedings to be resumed has been clarified.

56. G's application to set aside the Awards on ground 2 (the Clause 6.10(e) ground) is dismissed.

57. My assessment is that the arguments on ground 2 took up approximately 20% of the time and costs, and the fair order nisi on costs is that 20% of and occasioned by the Originating Summonses are to be paid by G to N, on indemnity basis, with Certificate for 2 Counsel. The balance of the costs are reserved for determination after the arbitral proceedings which have been remitted are determined.

Continuation of interim injunction

58. By its summons of 20 April 2023, G applied for an order in terms of the 29/4 Order, which order was by way of enforcement of the IPO granted by the arbitrator at the commencement of the Arbitration. In substance, the IPO restrained N and companies controlled by it from transferring and disposing of the Consideration Monies, and the traceable proceeds thereof in the possession, power or control of N. The 29/4 Order and G's summons of 20 April 2023 were both made under section 45 of the Ordinance.

59. N opposes the making of any further injunction order, on the basis that the arbitrator had himself discharged the IPO when he dismissed G's proprietary and personal claims against N. On N's case, the whole substratum of the 29/4 Order has fallen away and there is nothing for the Court to facilitate or aid under section 45.

60. The 29/4 Order of the Court was made ancillary to the arbitral proceedings, for the purpose of aiding and facilitating the arbitral process. Now that the setting aside proceedings are being suspended and the matter is remitted to the arbitrator, the mandate of the arbitrator to reconsider the claims made in the Arbitration has been revived. It follows that the Court is in a position to continue the 29/4 Order or to grant a fresh order in the same terms, to facilitate and aid the arbitration to be resumed. The matters I have taken into consideration are set out below.

61. As demonstrated and explained in the earlier parts of this Decision, I consider that G has a good arguable case on the merits for the setting aside of the Awards on the ground of public policy. The denial of common law and equitable remedies on the basis of illegality triggers considerations of public policy, for both G's proprietary claim and personal claim. If the arbitrator, having considered all the relevant matters on the *Patel/Monat* approach, should allow relief to G, any such award might well be nugatory and futile if the 29/4 Order is discharged and there is no injunction in place.

62. As Counsel for G highlighted, and as N's own evidence shows and acknowledges, N is under huge financial pressure. The board of N admitted in its public disclosure of 4 January 2023 that it did not have

sufficient funds to meet G's claim. N was in the course of being delisted as a result of its continuing non-compliance with listing requirements. On G's evidence, N has made it clear that if the 29/4 Order is discharged, the relevant funds would be used to discharge its debts and expenses, or they would be made subject to a ring-fencing arrangement for the purpose of securing settlement of a judgment debt due from N to WR. The funds would be moved out of Hong Kong and beyond G's reach.

63. On its part, N emphasized that it has been under financial pressure by reason of the Consideration Monies having been frozen. Whilst it claims on the one hand that it only suffers from a short term cash flow caused by G's obstructing efforts, and that it holds subsidiaries and assets worth hundreds of millions of US dollars (such that any judgment or award against it would not go unsatisfied), it claims on the other hand that it stands to suffer "irreparable and existential prejudice" in facing a real prospect of insolvency proceedings because of the liquidity crisis and the continued effect of the 29/4 Order. In gist, N claims that despite having prevailed in the Arbitration, as a result of the 29/4 Order, it cannot discharge its liabilities, cannot fully control and access its own property, and is now at the mercy of its creditors who can commence insolvency proceedings at any time.

64. These concerns are not unreal, but as Mr Yu pointed out, N's claims of financial difficulties and liquidity issues are not new and in fact pre-date the placements in issue. G emphasized that it had paid out and N had received from it US$146 million under the placement, and that the IPO and the 29/4 Order only covered what remained of that money, in the sum of approximately US$90 million. Mr Yu submitted that N had had the money it raised and was in a position to spend for its projects, and that it is not open to

it now to lay the blame on others and to purport (in the evidence of Mr Cricenti) that the lack of continued construction of its projects has placed life and property at risk. On Mr Yu's submission, N's claims of prejudice by reason of any further delay ring hollow bearing in mind the tactics N had employed to postpone and delay the hearing of the Arbitration.

65. I agree with Mr Yu's observation, that the arbitrator has been dealing with the Arbitration fairly expeditiously and that there is no reason to believe that he will not proceed expeditiously with the matter upon its remission. In the meantime, G will continue to fortify its undertaking as to costs and damages.

66. Having considered all the circumstances of the case, I consider that the 29/4 Order should be continued in the interim of the suspension of these setting aside proceedings. An order is made accordingly, with costs to be in the cause of these setting aside proceedings.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Mr Benjamin Yu SC and Mr Tom Ng, instructed by Stevenson, Wong & Co, for the applicant in HCCT 38/2021, the plaintiff in HCCT 28/2023 and the plaintiff in HCCT 52/2023

Mr Jin Pao SC and Mr Zenith Chan, instructed by Gall, for the respondent in HCCT 38/2021, the defendant in HCCT 28/2023 and the defendant in HCCT 52/2023