HONG KONG / JUDGMENT

A v. B1 AND ANOTHER

[2026] HKCFI 2444

COURT
Court of First Instance

DECIDED
28 April 2026

CASE / FILE NUMBER
HCCT113/2024

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HCCT 113/2024 and 153/2024 (Heard Together)

[2026] HKCFI 2444

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 113 OF 2024 AND 153 OF 2024

IN THE MATTER of Order 73 Rule 5 of the Rules of the High Court (Cap 4A)

and

IN THE MATTER of an arbitration under the 2018 HKIAC Administered Arbitration Rules

and

IN THE MATTER of Section 81 of the Arbitration Ordinance (Cap 609) and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration

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BETWEEN

A

Plaintiff

and

B1

1st Defendant

B2

2nd Defendant

Before:

Deputy High Court Judge Jonathan Wong in Chambers (Not open to Public)

Date of Hearing: 28 October 2025

Date of Judgment: 28 April 2026

J U D G M E N T

Introduction

The Plaintiff ("P") and the Defendants ("D1" and "D2" and collectively "Ds") were respectively the Claimant and the Respondents in the underlying arbitral proceedings ("Arbitration") conducted under the 2018 HKIAC Administered Rules ("Rules").

By a Partial Award dated 30 June 2024 ("Partial Award"), P's claims in the Arbitration were entirely dismissed by an experienced tribunal ("Tribunal") under the Early Determination Procedure ("EDP"), which procedure was invoked by Ds pursuant to Article 43 of the Rules. The EDP is in substance akin, but not identical, to an application for summary judgment under the court procedures. As will be seen below, the EDP involves a two-stage process, first a screening stage, and if allowed to proceed beyond the screening stage, a determination stage. P complains that the Tribunal's decision to proceed under the EDP and the manner in which its claims was determined give rise to grounds under which the Partial Award may be set aside pursuant to section 81 of the Arbitration Ordinance Cap 609 ("AO") which incorporates Article 34 of UNCITRAL Model Law ("ML").

Following the dismissal of P's claims, on 7 October 2024, the Tribunal issued a Final Award on Costs ("Costs Award") by which P was ordered to pay Ds' costs in the amounts of XXX XXX XXX XXX XXX and XXX XXX XXX ("Principal Sums") together with interest. Were the Partial Award set aside, there is no real dispute between the parties that the Costs Award should consequently be set aside. However, P says that even were the Partial Award not set aside, the Costs Award itself is problematic and ought to be set aside, in that P was unable to present its case on the quantum of the costs claimed by Ds and/or the Tribunal had failed to comply with its duty to act in accordance with Article 34.1 of the Rules and/or section 74(7)(a) of the AO, each enjoining the Tribunal to only allow costs that were reasonable.

This is the substantive hearing of:

P's Amended Originating Summons dated 25 October 2024 under HCCT 113/2024 ("1st OS") seeking an order to set aside the Partial Award;

P's Originating Summons dated 10 December 2024 under HCCT 153/2024 ("2nd OS") seeking an order to set aside the Costs Award;

Ds' summons dated 11 December 2024 under HCCT 113/2024 ("Summons") seeking an order for enforcement of the Costs Award.

The Summons also seeks orders for security for Ds' costs and security for Ds' claim under the Costs Award. Those applications were acceded to by orders made on 2 June 2025. On 12 August 2025, P paid into court XXX XXX XXas security for Ds' costs and the entirety of the Principal Sums as security for Ds' claim under the Costs Award.

At the hearing, I was ably assisted by Mr Anson Wong SC (leading Mr Adrian Lai and Mr Paul Law) for P and Mr Benny Lo (with Mr Jiang Zixin) for Ds.

Background

The relevant background is largely not disputed.

The underlying dispute

P is a private company incorporated in Hong Kong. It is and was at all material times a wholly-owned subsidiary of XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX D1 and D2 are Cayman Islands companies. They were established as special purpose vehicles for the transactions giving rise to the Arbitration. At all material times, they were sponsored and managed by affiliates of XXX XXX XXX.

The Arbitration concerned a dispute between P and Ds arising out of (1) a Merger Agreement ("MA") dated 9 November 2020 and its Deeds of Amendment and (2) a Sale and Purchase Agreement ("SPA") dated 6 December 2021 (collectively "Agreements"). Pursuant to the Agreements, Ds acquired from P, by a 2-phase transaction, several corporate vehicles holding real estate assets located in the vicinity of XXX XXX XXX XXX XXX XXX. In the first phase (governed by the MA and the Deeds of Amendment), following the merger of P's wholly-owned subsidiary with D2, P and D1 would hold XXX XXX shares in D2 respectively, while D1 would pay P cash consideration for its XXX interest. In the second phase (governed by the SPA), P sold its remaining XXX shareholding in D2 to D1.

The underlying disputes between the parties were concerned with what the Partial Award defined as the "Holdback Amounts" set out in the following provisions of the Agreements:

Sections 2.2(e)(i) of the MA provides:

> *"First Tranche Holdback Amount… if the following conditions precedent (the "First Tranche Holdback Amount Conditions") are satisfied (or waived by the [D1] in writing) within eighteen (18) months after Closing (which may be extended by mutual agreement in writing by the [P] and [D1], each acting reasonably), then within six (6) Business Days after all the First Tranche Holdback Amount Conditions are satisfied or waived (as the case may be), [D2] shall pay an amount equal to the First Tranche Holdback Amount… in respect of the First Tranche Holdback Amount to the Seller Bank Account…"*

Section 2.2(e)(ii) of the MA provides:

> *"Second Tranche Holdback Amount… if the following conditions precedent (the "Second Tranche Holdback Amount Conditions") are satisfied (or waived by the [D1] in writing) within twenty-four (24) months after Closing (which may be extended by mutual agreement in writing by [P] and [D1], each acting reasonably), then within six (6) Business Days after all the Second Tranche Holdback Amount Conditions are satisfied or waived (as the case may be), an amount equal to the Second Tranche Holdback Amount… shall be paid by the [D2] to the Seller Bank Account…"*

Section 2.2(e)(i) of the SPA provides:

> *"Holdback Amount. The Parties agree that an aggregate amount equal to the Final Purchase Price minus the Closing Payment (the "Holdback Amount") shall be held back and released to [P] after Closing in accordance with this Section 2.2(e). Subject to Section 6.7, if the following conditions precedent (the "Holdback Amount Conditions") are satisfied (or waived by [D1] in writing) by January 18, 2023 (which may be extended by mutual agreement in writing by [P] and [D1], each acting reasonably), then within six (6) Business Days after all the Holdback Amount Conditions are satisfied or waived (as the case may be)…, [D1] shall pay the USD equivalent of the Holdback Amount to the Seller Bank Account…"*

The Partial Award summarized the dispute between the parties as follows:

> *"[40] For each phase, the Agreements provided for [D1] to withhold a portion of the consideration ("Holdback Amounts"), payable to [P] upon the satisfaction or waiver of certain conditions ("Holdback Amount Conditions") within a certain time limit ("Long Stop Date")…*

[41] Under both Agreements, the Long Stop Date for completing the Holdback Amount Conditions could be extended by mutual agreement in writing by the Parties, "each acting reasonably". In the [MA], the Holdback Amount Conditions were divided into two tranches, and the Long Stop Dates for satisfaction of such were stated to be "eighteen (18) months after Closing" and "twenty-four (24) months after Closing", respectively. The Long Stop Date for performance of the first tranche was later extended by six months by way of the Second Amendment Deed, such that the time limit for satisfaction of both tranches of the Holdback Amount Conditions under the [MA] became aligned to twenty-four months after Closing (ie 19 January 2021). The Long Stop Date for satisfaction of all Holdback Amount Conditions contained in the [MA] and the SPA was fixed to be 18 January 2023 by way of the SPA.

[42] On 14 December 2022, [P] sought an extension of the Long Stop Date for an additional approximately 18 months to 30 June 2024 [("Time Extension Request")]. This was rejected by [Ds] on 3 January 2023.

[43] It is undisputed that as of the Long Stop Date of 18 January 2023, certain Holdback Amount Conditions remained outstanding as they had been neither satisfied nor waived. On this basis, [Ds] contend that [P] is not entitled to the Holdback Amounts. [P], on the other hand, contends that [Ds]are not entitled to retain the Holdback Amounts" (emphasis added)

As will be seen below, the disagreements between the parties are predominantly concerned with the Tribunal's treatment on the rival cases on Ds' rejection on the Time Extension Request, involving issues of construction of the Agreements and the resolution of P's allegations of breach on Ds' part. As to the latter, it is P's case that Ds were in breach of section 2.2(e)(i) of the Agreements, both the express provision to act reasonably and the implied term requiring parties not to act capriciously, perversely or irrationally ("Unreasonable Refusal Issue").

Procedural chronology of the Arbitration

On 24 May 2023, P commenced the Arbitration pursuant to the dispute resolution mechanism set out at section 6.8 of the MA and the SPA, by which it claimed the Holdback Amounts quantified at approximately XXX XXX XXX XXX in the Notice of Arbitration ("NOA"). In the NOA, two broad contentions were advanced. First, P contended that Ds were in breach of their express and implied obligations under the Agreements, in that Ds' refusal of the Time Extension Request was unreasonable, arbitrary, capricious, and/or made in bad faith ("Breach Issue"). Secondly, P contended that, properly construed, the Agreements did not entitle D1 to retain the Holdback Amounts ("Construction Issue").

On 23 June 2023, Ds submitted their Answer to the NOA.

Thereafter, on 26 July 2023, the Tribunal was constituted.

The first case management conference was held on 24 August 2023. After further consultation with the parties, on 6 September 2023, the Tribunal issued Procedural Order No 1 ("PO No 1"), directing that submissions would be in "Memorial style" to be accompanied by all factual evidence, legal authorities, witness statements and expert reports relied upon. PO No 1 also reserved the week of 9 December 2024 for an oral hearing, with post-hearing submissions if necessary.

On 8 December 2023, P filed its Statement of Claim ("SOC"), seeking declaratory relief that it was not, but Ds were, in breach of the obligations under the Agreements and damages in the aggregate total of the Holdback Amounts, interest and costs. The SOC also included an application for interim conservatory relief for the purpose of interim asset preservation ("ICR Application").

Whilst the Partial Award was stated to have been prepared in summary form under Article 43.6 of the Rules, the Tribunal had assiduously set out the allegations advanced in the SOC at Partial Award §§54-57 (on the Construction Issue) and §§58-61 (on the Breach Issue), with extensive cross-references to the SOC. I shall return to the details of P's claims below. What is pertinent for present purpose is that, by a letter of 15 December 2023 issued by Ds' solicitors ("STB"), Ds expressed their intention to make an application for EDP ("EDP Application"), on the basis that Ds considered P's case to be "manifestly meritless as to both law and fact" and proposed that the ICR Application and the EDP Application be heard together.

Article 43, which makes provisions for EDP, is in the following terms:

> *"Article 43 – Early Determination Procedure*

43.1 The arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that:

(a) such points of law or fact are manifestly without merit; or

(b) such points of law or fact are manifestly outside the arbitral tribunal's jurisdiction; or

(c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party.

43.2 Any party making a request for early determination procedure shall communicate the request to the arbitral tribunal, HKIAC and all other parties.

43.3 Any request for early determination procedure shall be made as promptly as possible after the relevant points of law or fact are submitted, unless the arbitral tribunal directs otherwise.

43.4 The request for early determination procedure shall include the following:

(a) a request for early determination of one or more points of law or fact and a description of such points;

(b) a statement of the facts and legal arguments supporting the request;

(c) a proposal of the form of early determination procedure to be adopted by the arbitral tribunal;

(d) comments on how the proposed form referred to in Article 43.4(c) would achieve the objectives stated in Articles 13.1 and 13.5; and

(e) confirmation that copies of the request and any supporting materials included with it have been or are being communicated simultaneously to all other parties by one or more means of service to be identified in such confirmation.

43.5 After providing all other parties with an opportunity to submit comments on the request, the arbitral tribunal shall issue a decision either dismissing the request or allowing the request to proceed by fixing the early determination procedure in the form it considers appropriate. The arbitral tribunal shall make such decision within 30 days from the date of filing the request. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

43.6 If the request is allowed to proceed, the arbitral tribunal shall make its order or award, which may be in summary form, on the relevant points of law or fact. The arbitral tribunal shall make such order or award within 60 days from the date of its decision to proceed. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

43.7 Pending the determination of the request, the arbitral tribunal may decide whether and to what extent the arbitration shall proceed." (emphasis added)

As noted above, the procedure prescribed by Article 43 is two-staged. There is first a screening stage ("Screening Stage") to determine whether a request for EDP should proceed and the form in which it should proceed (Article 43.5). It is only where a request for EDP passes the Screening Stage that a tribunal will determine ("Determination Stage") the "relevant points of law or fact" under the EDP (Article 43.6). Each stage has a prescribed time limit within which the Tribunal is to make its determination.

By an email dated 17 December 2023, the Tribunal directed Ds to address the ICR Application in their Statement of Defence ("SOD") due on 29 March 2024 and indicated that D could likewise make the EDP Application in conjunction with the SOD. The Tribunal further proposed to hold a hearing on both applications during the week of 22 April 2024.

On 12 January 2024, the Tribunal issued Procedure Order No 2 ("PO No 2") which recorded inter alia (1) the Tribunal's determination made on 17 December 2023, (2) the Tribunal's determination to hold a virtual hearing on the IRC Application and the EDP Application on 23 April 2024 from 7-9 pm with the same time on 24 April 2024 held in reserve, (3) the Tribunal's further directions for P to submit its written response to the EDP Application by 15 April 2024 and (4) the Tribunal's intention to issue orders on the two applications by 10 May 2024.

On 29 March 2024, Ds filed the SOD which included the EDP Application (Section III thereof) and its response to the ICR Application. Again, the Tribunal set out in detail in the Partial Award the matters relied on by Ds in the EDP Application to which I shall return. For present purposes, it suffices to point out that the EDP Application (1) relied on Articles 43.1(a) and (c) (SOD §33), and (2) set out its comments in purported compliance with Article 43.4(d) on why the EDP Application would achieve the objectives stated in Articles 13.1 and 13.5 of the Rules (SOD §89).

In compliance with PO No 2:

Ps filed its submission in opposition of the EDP Application on 15 April 2024 ("P's EDP Submissions");

A virtual hearing was held on 23 April 2024 ("23/4/24 Hearing") for the parties to address the Tribunal on the EDP Application and the ICR Application.

On 25 April 2024, the Tribunal directed, inter alia, as follows ("25/4/24 Order"):

Pursuant to Article 43.5 of the Rules, the Tribunal determined that the EDP Application should proceed, and pursuant to Article 43.6 of the Rules, the Tribunal would make its order or award within 60 days from the date of the decision, ie by 24 June 2024;

The parties were to confirm whether they had any final submissions in respect of the EDP Application by close of business on 3 May 2024;

Pursuant to Article 43.7 of the Rules, the Arbitration would be suspended pending the determination of the EDP Application and the Tribunal would confer with the parties on the next procedural steps thereafter. In the meantime, the hearing scheduled for the week of 9 December 2024 was maintained.

On 3 May 2024, Ds confirmed that they did not have further submissions in respect of the EDP Application. On the other hand, P filed further submissions on the EDP Application ("P's Further Submissions").

On 30 June 2024, the Tribunal issued the Partial Award. At §§127-128 thereof, the Tribunal observed as follows:

> *"[127] ... the Tribunal rejects Claimant's construction of the Agreements and its allegations of breach and repudiation of the Agreements by Respondents. As such, Claimant's claim for damages in the amount of the Holdback Amounts cannot stand and are therefore dismissed with prejudice.*

[128] The Tribunal is mindful of the high standard which should apply when considering an EDP application. Although this Award is issued in summary form pursuant to Article 43.6 of the HKIAC Rules, the Tribunal has applied a high level of scrutiny and a demanding and rigorous standard to determine whether Respondents have met their burden of proving that Claimant's claims to the Holdback Amounts are manifestly without merit. In the Tribunal's view, Claimant's claims are patently unmeritorious, and Claimant has advanced no tenable or plausible arguments to support its claims to the Holdback Amounts. The terms of the Agreement are unambiguous. Moreover, the Agreements were negotiated between highly sophisticated business entities with the assistance of counsel. They are well drafted, comprehensive and detailed, and function perfectly well without the necessity for any implied terms. Finally, Claimant has failed to advance a colorable case that Respondents' decision not to extend the Long Stop Date was unreasonable." (emphasis added)

On 15 July 2024, the Tribunal issued Procedural Order No 3 ("PO No 3") directing the parties to make submissions on costs.

In compliance with PO No 3:

Ds provided their submissions on costs ("Ds' Costs Submissions") on 2 August 2024, together with a declaration made by XXX XXX XXX XXX, a senior vice president of XXX XXX XXX XXX XXX, to confirm that the costs claimed had been incurred and paid (or would be paid to the extent unbilled) ("Declaration"). Ds' Costs Submissions requested the Tribunal to award the total sum of XXX XXX XXX which included STB's fees (XXX XXX XXX), disbursements, and Ds' share of arbitration costs;

On 23 August 2024, P provided their submission on costs ("P's Costs Submissions") which, inter alia, sought further information on STB's professional fees by way of a detailed breakdown to include not only the hours but also the personnel involved at each stage of the Arbitration;

On 30 August 2024, Ds provided their reply submissions on costs ("Ds' Reply Costs Submissions"), by which the total costs claim was increased to XXX XXX XXX XXX XXX (of which XXX XXX XXX X represented STB's fees) to take into account the additional costs for STB's fees for the preparation of D's Reply Costs Submissions. As regards P's request for further information on STB's professional fees, Ds stated that (a) they had provided sufficient detail in support of their costs claim, consistent with the typical practice in international arbitration and (b) it was not necessary for P to see - nor would it have been reasonable or proportionate for Ds to incur further legal fees to prepare - a detailed breakdown of the hours spent by different timekeepers at each phase of the case to prove that the costs were reasonably incurred.

On 2 September 2024, the Tribunal acknowledged receipt of Ds' Reply Costs Submissions and stated that no further submissions were invited at that time.

On 10 September 2024, P's solicitors ("DW") sent an email to the Tribunal (copying STB) in the following terms:

> *"We write a place on record that [P] previously requested [Ds] to provide a detailed breakdown of the costs incurred. We also sought an opportunity for [P] to respond to this breakdown. We note that [Ds] had refused to provide such a breakdown in their reply submissions and the Tribunal's direction that no further the submissions are invited at this time. As a result, it is not possible for [P] to make submissions as to whether [Ds'] costs were properly or reasonably incurred or that Article 34.1 of [the Rules] was satisfied in the present case. Accordingly, we wish to formally reserve all rights of [P] in relation to this matter."*

The Tribunal acknowledged receipt of DW's email of 10 September 2024 on the same day but reiterated that no further submissions were invited. The Tribunal stated that it would inform the parties if further assistance was required.

On 7 October 2024, the Tribunal issued the Costs Award in which the Tribunal observed, inter alia, as follows:

> *"[60.2] Second, the Tribunal rejects [P's] submission that [Ds] failed to provide sufficient information for [P] and the Tribunal to assess the reasonableness of the fees of STB. [Ds] provided with the Declaration a detailed breakdown including the time periods during which fees were incurred, the names and billing rates of each fee earner and the time periods during which each fee earner was*

engaged in the case. In the Tribunal's view, [Ps] assertion that a further breakdown of fees for each stage of the proceedings and for each fee earner is necessary for [P] and the Tribunal to assess the reasonableness of [Ds'] legal fees is incorrect and inconsistent with well-established practice in international commercial arbitration.

[61] Turning to the reasonableness of [Ds'] costs for legal representation and other assistance pursuant to Article 34.l(d), the Tribunal notes that [Ds] claim professional fees of STB incurred in connection with the arbitration proceedings in the amount of xxxxxxxxxxxx, disbursements of STB in the amount of USD xxxxxxxx, costs of the court reporter (Epiq) in the amount of USD xxxxxxxx and costs of virtual hearing hosting (HKIAC) in the amount of xxxxxxxx. [P] questions only the reasonableness of STB's professional fees.

[The Tribunal then considered the parties' submissions on the reasonableness of STB's fees at §§62]

[63] Taking all the circumstances into account, and based on its collective experience in determining the reasonable cost of legal fees in numerous international commercial arbitrations, the Tribunal determines in its discretion pursuant to Section 74.7(a) of the Ordinance and Article 34.2 of the HKIAC Rules that [Ds'] legal costs should be reduced by xxxx, i.e., from xxxxxxxxxxxxxxx to xxxxxxxxx.xxxxxxx

[The Tribunal then set out the Principal Sums at §66]"

P's grounds

Article 34(2) of the ML ("ML 34(2)") provides:

"An arbitral award may be set aside by the court specified in article 6 only if:

the party making the application furnishes proof that:

(i)

a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii)

the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii)

the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv)

the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

the court finds that:

(i)

the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii)

the award is in conflict with the public policy of this State."

As set out at Section D of P's Skeleton Submissions, P advances the following grounds to challenge the Partial Award:

Contrary to ML 34(2)(a)(iv), the Tribunal failed to comply with the agreed procedures set out in Article 43 of the Rules in that no point(s) of law or fact had ever been identified throughout the Tribunal's handling of the EDP Application ("Article 43 Complaint");

As a consequence, contrary to ML 34(2)(a)(ii), P did not have a fair opportunity to present its case ("EDP Due Process Complaint");

Contrary to ML 34(2)(a)(iii), the Tribunal exceeded its jurisdiction when it dismissed the Unreasonable Refusal Issue in the Partial Award, on the basis that, at the 23/4/24 Hearing, Ds only requested the Tribunal to determined "some points of construction" and no point of fact was submitted to the Tribunal for determination by way of the EDP ("Excess of Submission Complaint");

Contrary to ML 34(2)(b)(ii), the Partial Award is in conflict with Hong Kong public policy by reason of the above complaints and additionally because the Tribunal failed to deal with P's factual complaints under the Unreasonable Refusal Issue and the Partial Award is therefore infra petita and/or manifestly incoherent ("Public Policy Ground").

As regards the Costs Awards, the grounds set out at Section E of P's Skeleton Submissions are as follows:

Contrary to ML 34(2)(a)(ii) and (iv), P was deprived of a fair and reasonable opportunity to respond to Ds' claim for STB's professional fees as afforded by Article 13.1 of the Rules and/or section 46(3)(b) of the AO as a direct result of the Tribunal's refusal to accede to P's request for a breakdown of the claimed fees ("Costs Due Process Complaint") ;

Contrary to ML 34(2)(a)(iii) and (iv), the Costs Award was rendered in breach of Tribunal's mandate and/or agreed procedure under Article 34.1(d) of the Rules or section 74(7)(a) of the AO, each enjoining the Tribunal to only allow costs that were reasonable ("Failure to Discharge Duty Complaint").

HCCT 113/2024: The applicable principles

I first deal with P's challenges against the Partial Award.

There is no real quarrel between counsel on the principles applicable to HCCT 113/2024.

First, in considering complaints made under ML 34(2), the court is concerned with the structural integrity of the arbitration proceedings. The conduct complained of "must be serious, even egregious", before the court would find that there was an error sufficiently serious so as to have undermined due process: Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No.1) [2012] 4 HKLRD 1 §7.

Secondly, in relation to ML 34(2)(a)(iv), not every breach of the agreed procedure would inevitably lead to annulment of an arbitral award. The court's jurisdiction to intervene is engaged only if P is able to show (1) that there has been a serious violation of agreed arbitration procedures and (2) that the said violation gave rise to a flagrant breach of procedural fairness: Holding Tusculum BV v Louis Dreyfus SAS [2008] QCCS 5904 §125

Thirdly, in relation to ML 34(2)(a)(ii), China Property Development (Holdings) Ltd v Mandecly Ltd, CACV 92/2015, 24 May 2016 §7.4 is authority for the following propositions:

Ultimately, in considering whether a party was unable to present his case, the question is one of fairness in the arbitral process";

It is not necessary for a party seeking to rely upon the "unable to present his case" limb to show any form of dishonesty or reprehensible conduct by the arbitral tribunal or of the other side;

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

Relatedly, a party has a right to be heard on every issue that may be relevant to the resolution of a dispute: LY v HW [2022] HKCFI 2267 §32. It is in fact a basic duty of the arbitral tribunal to listen to both sides of the arguments and give each side an opportunity to submit on all relevant points: Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd [2010] SGHC 80 §§32-33.

Fourthly, in relation to ML 34(2)(a)(iii), Grant Thornton International Ltd v JBPB & Co (A Partnership), HCCT 13/2012, 5 April 2013) 44 is an authority for the proposition that the phrase "decisions on matters beyond the scope of the submission to arbitration" should be construed narrowly to only include those decisions which are clearly unrelated to or not reasonably required for the determination of the subject disputes, matters or issues that have been submitted to arbitration.

Fifthly, in relation to ML 34(2)(b)(ii), an award may be set aside on the basis that enforcement of the Award would be repugnant to recognized and basic notions of justice, or there is substantial injustice arising out of the Award which is shocking to the Court's conscience: Arjowiggins HKK2 Ltd v X Co [2022] HKCFI 128 §44. It has been emphasized the public policy ground is not a catch-all provision and is limited in scope and is to be sparingly applied: LY §9.

Sixthly, on the infra petita ground, AI v LG II [2023] HKC 656 §§21 and 22 provide a useful summary of the court's approach in a claim that the tribunal had failed to deal with an issue which involves, inter alia, the follows considerations: (1) so long as the reasoning of the tribunal is expressed in an award to enable the parties to the award to understand how and why a conclusion is reached on a particular issue as argued, the reasons for the award do not have to be elaborate; (2) the Court has to be satisfied that an "issue" which has been put to the tribunal was not dealt with expressly, or in composition with other issues, and that such failure has caused substantial injustice; (3) it should be reasonably apparent to a reasonable party in the shoes of the applicant for setting aside that all issues the determination of which are crucial to the tribunal's decisions are dealt with; (4) the tribunal does not have to set out each step by which it reaches its conclusion, and a failure to deal with an argument or a submission made is not equivalent to a failure to deal with an issue; (5) the fact that the tribunal has not given adequate reasons for its award, or sufficiently clarified that an issue fell away because of the findings which had been made, is not tantamount to the arbitrator having failed to deal with an issue; (6) if the tribunal has dealt with the issue in any way, it does not matter whether it has dealt with it well, badly or indifferently; (7) a tribunal does not fail to deal with an issue if it does not answer every question that qualifies as an issue and it can deal with an issue where that issue does not arise in view of the tribunal's decision on the facts or its legal conclusions; (8) relatedly, a tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise and (9) if the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute, it will have dealt with all the issues.

The court's approach should be to read the award generously so as to remedy only meaningful and apparent breaches of the rules of natural justice which can cause actual prejudice, rather than to comb an award to order to assign blame or to find fault in the process. It will usually be a matter of inference, rather than explicit indication, that an arbitrator missed one or more important issues, and an inference that an arbitrator missed an issue should not be drawn unless it is "clear and virtually inescapable": AI §23, CNG v G [2024] 2 HKLRD 152 §27 and LY §35.

However, it is not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked. An award should be reasoned, to the extent being reasonably sufficient and understandable by the parties. Readers of the award, namely the parties themselves, should understand how and why the tribunal reached its conclusion on a particular issue, in the contest of how the relevant issues had been argued before the tribunal: A v B [2024] 4 HKC 36 §§20 and 34. As has been pointed out at R v F [2012] 5 HKLRD 278 §37, the way the reasons expected to be given in an arbitral award for a particular issue should be proportional to the complexities of how that issue is contended (or not contended) before the tribunal.

Seventhly, on the complaint that the Partial Award is manifestly incoherent, P relies on BZW v BZV [2022] 1 SLR 1080 §§56 and 60 for the propositions that the "fair hearing rule" is integral to natural justice, requiring the tribunal to pay attention to what is put before it and gives reasoned decision on the arguments and evidence presented. If a tribunal decision is manifestly incoherent, the foregoing requirement would not be met, as a manifestly incoherent decision shows that the tribunal has not understood or dealt with the case at all and would mean that parties have not been accorded a fair hearing. As has been clarified at DKT v DKU [2025] 1 SLR 806 §12, BZW should not be taken to suggest that manifest incoherence, in itself, is a ground to challenge an award for a breach of nature justice:

> *"… Exceptionally, a tribunal's chain of reasoning may breach the fair hearing rule where it was: (a) not one which the parties had reasonable notice of; or (b) one which did not have a sufficient nexus to the parties' arguments (BZW at [60(b)]). It bears emphasising that this was developed as one of the tests that may be deployed for considering whether a tribunal has come to a conclusion on a basis that was never put before it. It was in this specific context that we suggested that a "manifestly incoherent decision" may amount to a breach of the fair hearing rule (BZW at [56]). We make this point in order to emphasise that "manifest incoherence", in itself, is not a ground to challenge an award for a breach of natural justice. The fundamental question that remains is whether the "manifest incoherence" in a particular case:*

(a) results from a chain of reasoning that parties had no reasonable notice of or had an insufficient nexus to the parties' arguments, such that the parties did not have the chance to address the point in that chain of reasoning (see, for instance, BZW at [60]–[61]); or

(b) gives rise to a clear and virtually inescapable inference that the tribunal had completely failed to consider an essential point (likewise, see BZW at [60]–[61]).

In the final analysis, any “manifest incoherence” that is said to infect an award must be tied back to a demonstrable breach of an established rule of natural justice.”

Finally, on the question of waiver, it is stated at CNG §1 is an authority for the proposition that matters which should have been raised with the tribunal, on procedure, pleadings, and timing, but were not so raised or objected to, should not be brought before the court as a matter of complaint at the time of resistance to enforcement or by way of setting aside of the award. See also Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111 at 137H-J.

On the question of waiver, P emphasizes that a party must be fully aware of the facts that have given rise to an infringement of his rights and that party must have acted in such a manner as to convey to the other party and the arbitrator unequivocally the message that he will not rely on his rights: Telestat Canada v Juch-Tech Inc [2012] INSC 2785 §56.

HCCT 113/2024: Invocation of the EDP

In order to put P’s complaints in their proper perspective (especially the Article 43 Complaint), it is necessary to identify the “state of play” at the time when Ds invoked the EDP. As noted from the procedural chronology above, the EDP Application was made in response to how P’s claims were formulated in the SOC.

The SOC

As noted earlier, two broad issues were identified in the NOA, namely the Construction Issue and the Breach Issue.

The Construction Issue as framed in the SOC was summarized at Partial Award §§54-57 as follows (footnotes cross-referencing the SOC omitted):

> *“[54] Claimant submits that Respondents were not entitled under the Agreements to retain the Holdback Amounts, for three primary reasons.*

[55] First, Claimant submits that the words of the Agreements do not support the conclusion that Respondents are entitled to retain any or all of the Holdback Amounts simply on the basis that the Holdback Amount Conditions were not satisfied in their entirety, as advocated by Respondents.

[55.1] Claimant argues that its only contractual obligation in satisfying the Holdback Amount Conditions is that set out in Section 2.6(b) of the Agreements, i.e. that it use "commercially reasonable efforts" to do so... Claimant submits that this imports... there is nothing in the Agreements that can be read as imposing on Claimant an unconditional obligation to satisfy the Holdback Amount Conditions...

[55.2] Claimant further argues that the satisfaction of the Holdback Amount Conditions is a "sufficient but not a necessary condition" to Respondents' release of the Holdback Amounts. Claimant submits that Section 2.2(e) of the Agreements does not provide for the Holdback Amounts to be released "only if' (as opposed to "if') all the Holdback Amount Conditions have

been satisfied, and that adding such a condition would be importing a term that the Parties had not bargained for... Rather, according to Claimant, Section 2.2(e) merely set out what would happen if the Holdback Amount Conditions were satisfied but did not set out what was to occur if they were not. As such, there is a gap in the Agreements to be worked out in the event by the Parties.

[56] Second, Claimant argues that Respondents' assertion that the release of the Holdback Amounts is conditioned upon an "all-or-nothing" satisfaction of the Hold back Amount Conditions is so unreasonable that it could not have been the intention of the Parties. Such an interpretation would mean that the consequence of failing to satisfy any one of the Holdback Amount Conditions would be disproportionate to any adverse effect such failure would have on Respondents' interests.

[57] Third, Claimant sets out three possible hypotheses as to the nature of the Holdback Amounts and argues that Respondents' retention of the any of the Holdback Amounts cannot be justified under any of them.

[57.1] In the first hypothesis, the Holdback Amounts were considered as a purchase price adjustment reflecting the incremental earning potential of the Assets if all Holdback Amount Conditions were satisfied. Claimant submits that this hypothesis is not viable, as it is not supported by any language in the Agreements or any other facts of the case.

[57.2] In the second hypothesis, the Holdback Amounts were intended as liquidated damages for any breach by Claimant under the Agreements. Claimant submits that this hypothesis is also not viable, as it runs afoul of the doctrine against penalties.

[57.3] In the third hypothesis, the Parties left the disposition of the Holdback Amounts to be worked out by the Parties as their respective interests might appear. Claimant submits that this is the correct interpretation of the Agreements, and that the Holdback Amounts should be viewed as a fund from which the residual claims of the Parties against one another may be satisfied after being netted out." (emphasis added)

The Breach Issue as framed in the SOC was summarized at Partial Award §§58-61 as follows (footnotes cross-referencing the SOC omitted):

> *"[58] Claimant advances three primary arguments in support of its contention that, even if the Agreements as written had entitled Respondents to retain the Holdback Amounts, Respondents were precluded by law from doing so due to their own breaches and repudiation of the Agreements.*

[59] First, Claimant argues that Respondents breached express and implied obligations to act reasonably and to cooperate with Claimant in satisfying the Holdback Amount Conditions.

[59.1] Sections 2.2(e)(i) and 2.2(e)(ii) of the [MA] and Section 2.2(e)(i) of the SPA grant Respondents discretionary power as to (i) whether to waive or modify any of the Hold back Amount Conditions, and (ii) whether to accede to any request or proposal that the Long Stop Date be extended to allow for the satisfaction of the Holdback Amount Conditions. Claimant submits

that in the common law, as applied in Hong Kong and elsewhere, such discretion may not be abused and is limited by an implied term that such discretion must be exercised in good faith and not in an arbitrary, capricious or irrational manner. Moreover, Respondents also had an express obligation under Sections 2.2(e)(i) and 2.2(e)(ii) of the Merger Agreement and Section 2.2(e)(i) of the SPA to act reasonably when considering the extension of the Long Stop Date.

[59.2] Claimant submits that Respondents did not act in good faith or reasonably in exercising their discretionary powers to waive the Holdback Amount Conditions or extend the Long Stop Date to allow for the satisfaction of the Holdback Amount Conditions. Claimant argues that for any exercise of discretionary power to be reasonable, it must be consistent with its contractual purpose and in the interest of both parties, not to maximise one party's interest. Claimant says that the contractual purpose of the discretionary power and therefore the interest of all parties involved was to allow for contingencies potentially affecting satisfaction of the Holdback Amount Conditions, and that Respondents' obligation to act reasonably was meant to avoid the premature termination of Claimant's commercially reasonable efforts to achieve the Holdback Amount Conditions so that the contractual purpose might be achieved in accordance with the terms of the Agreements.

[59.3] Furthermore, Claimant contends that Respondents' refusal to extend the time limits for satisfaction of the Holdback Amount Conditions was all the more unreasonable given that Respondents contributed to the failure to satisfy certain Holdback Amount Conditions by their failure to cooperate as needed for their satisfaction. Claimant argues that this duty to cooperate is another implied term of the Agreements breached by Respondents, which discharged Claimant from its obligation to use its commercially reasonable efforts to achieve the relevant Holdback Amount Conditions.

[59.4] Taken together, Claimant submits that Respondents have breached both the implied and express terms of the Agreements by failing to act reasonably - and by acting arbitrarily, unreasonably and in bad faith - in respect of the extension of the time period for the satisfaction of the Holdback Amount Conditions, with the dishonest purpose of effectively renegotiating the Purchase Price under the Agreements, and with the effect of discharging Claimant for any further obligation to complete performance of the Holdback Amount Conditions.

[60] Second, Claimant argues that Respondents also breached their implied obligation to cooperate with Claimant's commercially reasonable efforts to achieve the Holdback Amount Conditions. Following the completion of the second phase of the transaction, Respondents were in full legal and physical possession of the Properties. Claimant therefore required Respondents' cooperation to satisfy the Holdback Amount Conditions, some of the requirements of which were specified by government authorities. Claimant says that by refusing to provide such cooperation, Respondents delayed or prevented the performance of the Holdback Amount Conditions. As such, Claimant contends that Respondents were in breach of their implied obligation of cooperation under the Agreements and that Claimant was discharged from its obligation to use its best efforts to achieve the Holdback Amount Conditions.

[61] Finally, Claimant argues that Respondents' assertion of the right to retain the Holdback Amounts constituted a repudiation of the Agreements by Respondents. Claimant says that it has accepted Respondents' repudiation and is entitled to damages at least equal to the Holdback Amounts, which it characterises as the unpaid portion of the Purchase Price." (emphasis added)

Mr Wong highlighted that P's claims were (factually) complicated, pointing out that 6 witness statements (totaling over 175 pages) and 57 exhibits comprising close to 700 pages were filed together with the SOC.

The EDP Application

As noted above, the EDP Application is set out at Section III of the SOD and relies on Article 43.1(a) and (c) of the Rules and was an application to dismiss P's claims in their entirety. This is acknowledged at Partial Award §62:

> *"Respondents deny Claimant's claim to the Holdback Amounts and seek to dismiss Claimant's claim to the Holdback Amounts in its entirety by way of the EDP under Article 43 of the HKIAC Rules on the grounds that Claimant's claims are manifestly without legal merit and that, even assuming Claimant's interpretation of the Agreements is correct, no award could be rendered in favour of Claimant."*

As is plain from the issues identified by the Tribunal in the Partial Award, a multitude of contentions were advanced in the SOC. Where it was Ds' intention to dismiss P's claims in their entirety, the EDP Application necessarily had to address each of the contentions advanced in the SOC. Whilst the EDP Application set out at Section III of the SOD spanned more than 20 pages and contained 57 paragraphs (SOD §§32-89), it contained relatively full submissions grouped under specific headings which enabled a proper identification of the issues and contentions made in response to the SOC:

Section IIIA dealt with the Construction Issue and relevantly identified the following contentions: (a) Ds' proper construction of the Holdback Amounts provisions, (b) D's argument that P's attempts to rewrite the parties' agreement were meritless, (c) P's argument on penalty failed as a matter of law, (d) P's repudiation claim failed as a matter of law;

Section IIIB dealt with the Breach Issue and was premised on the proposition that P's contention that Ds had breached obligations to act reasonably or cooperatively were both manifestly without legal merit and in any event unable to support an award of the Holdback Amounts to P even accepting P's factual allegations as true. Section IIIB then identified the following issues by subheadings: (a) no breach of express obligation of reasonableness, (b) no breach of implied obligation, (c) P's case on the alleged duty to cooperate should be dismissed (with further subheadings to identify the nonfulfillment of certain Holdback Amount Conditions) and (d) P had articulated no legally cognizable damages claim.

At Partial Award §§63-69, the Tribunal summarized Rs' case on the Construction Issue as follows (footnotes omitted):

"[63] Respondents' position is that, on proper construction of the Agreements, Claimant is entitled to payment of the Holdback Amounts only if (i) Claimant has satisfied the Holdback Amount Conditions by the Long Stop Date, or (ii) Respondents have waived the Holdback Amount Conditions. No other circumstances exist in which the Holdback Amounts can be paid.

[64] Section 2.2(e) of the Agreements expressly states that the satisfaction of the Holdback Amount Conditions in their entirety is a "condition precedent" to payment of the Holdback Amounts. As it is not disputed that the Holdback Amount Conditions have not been satisfied or waived in their entirety, Respondents say that should be the end to Claimant's claims for the Holdback Amounts. Respondents submit that this is a binary "if-then" event trigger.

[65] According to Respondents, whether Claimant made commercially reasonable efforts to satisfy the Holdback Amount Conditions is irrelevant. Respondents assert that Section 2.6(b) of the Agreements cannot be read to entitle Claimant to the Holdback Amounts even if it does not satisfy the Holdback Amount Conditions. If this were the case, the end result would (i) add terms that do not appear in the Agreements; (ii) disregard Section 2.2(e) of the Agreements and the express provision of "conditions precedent"; and (iii) create a conflict in the provisions that would otherwise not exist. In light of the express wording in Section 2.2(e) of the Agreements, the question of whether or not Claimant used commercially reasonable efforts to achieve the Holdback Amount Conditions has no bearing on its entitlement to the Holdback Amounts....

[67] The correct interpretation of the Agreements, according to Respondents, is that satisfaction or waiver (or not) of such the Holdback Amount Conditions gave an "all-or-nothing" entitlement to the Holdback Amounts. This interpretation cannot be considered "so unreasonable that it cannot have been intended" such that it should be overridden by "business common sense", as alleged by Claimant. The effect of many conditions precedent is to deprive a party of an entitlement. The Tribunal cannot rewrite a condition precedent on the basis that it deprives the party of a right when such condition precedent is clearly bargained for by the Parties in the Agreements. There is no need to rely on business common sense to interpret the Agreements, which is a recourse only in the event of two rival interpretations.

[68] Respondents also address Claimant's three hypotheses as to the nature of the Holdback Amounts and argue that only the first of these could possibly be correct.

[68.1] Claimant's first hypothesis was that the Holdback Amounts might be considered as a purchase price adjustment, a position Claimant rejected as unsupported by the language of the Agreements. Respondents submit, however, that on their plain terms, the Holdback Amounts were indeed purchase price adjustments. This is supported by the fact that the Holdback Amounts are described as being held back from the Merger Consideration (under the Merger Agreement) and the Purchase Price (under the SPA}, respectively.

[68.2] Claimant's second hypothesis was that the Holdback Amounts might be regarded as liquidated damages for a breach by Claimant under the Agreements, a position which Claimant rejected as it would run afoul of the doctrine against penalties. Respondents' position is that the penalties doctrine is inapplicable in the present case as it does not operate as a check on primary obligations, but only on secondary obligations triggered by breach (and in order to penalize such breach)...

[68.3] Claimant's third hypothesis was that the Parties left the disposition of the Holdback Amounts to be worked out by the Parties as their respective interests might appear. Respondents, on the other hand, submit that the Agreements, negotiated by sophisticated business entities with the assistance of counsel, left no lacuna as to what consequences would arise in the event the Holdback Amount Conditions were not satisfied. As Section 2.2(e) of the Agreements states express conditions precedent to payment of the Holdback Amounts, the non-satisfaction thereof means that payment is not owed...

[69] During the [23/4/24 Hearing], Respondents clarified that they agreed with Claimant that Claimant's only contractual obligation in respect of the Holdback Amount Conditions was to use commercially reasonable efforts to satisfy them, and that Section 2.2(e) of the Agreements did not impose an obligation on Claimant to satisfy the Holdback Amount Conditions. Rather, Respondents' position is that Claimant's obligation to use commercial reasonable efforts cannot override the "if-then" trigger nature of Section 2.2(e). Respondents' position is that the function of Section 2.2(e) of the Agreements was to allocate risks between the Parties as to the satisfaction of the Holdback Amount Conditions, and that these provisions are agnostic as to the reason that the Holdback Amount Conditions are not satisfied."

The Tribunal summarized R's response to the Breach Issue at Partial Award §§70-75 as follows (footnotes omitted):

> *"[70] Respondents deny that they are in breach of any express or implied obligations under the Agreements.*

[70.1] First, Respondents maintain that they did not breach any express obligation of reasonableness by refusing to extend the Long Stop Date. Respondents say they are entitled to take into account their own commercial interests in acting reasonably, and are not expected to take Claimant's interests into equal or even greater account to be considered acting reasonably. In addition, in assessing the question of reasonableness, the question to be answered is not whether the decision was correct or justified, but whether such decision could have been made by a reasonable person in the circumstances. It is not a for a court or tribunal to substitute its own judgement of what was reasonable. Respondents contend that Claimant has not alleged any facts to indicate that Respondents' refusal to extend the Long Stop Date to 30 June 2024 was unreasonable, other than that Respondents should have taken Claimant's efforts to date into account. Considering the extensions of the Long Stop Date already given and the lapse of time to allow Claimant to satisfy the Holdback Amount Conditions, Respondents submit that the

Tribunal cannot conclude that no reasonable decision-maker could have reached the same decision that Respondents did.

[70.2] Second, Respondents submit that they did not breach any implied obligations of reasonableness, as no such obligation may be implied into the Agreements where express obligations already exist. To the extent that Claimant alleges that Respondents' refusal to extend the Long Stop Date was arbitrary, capricious, in bad faith, or dishonest, such allegations must be sufficiently particularized and held to a high legal standard, which Claimant has failed to do. Respondents submit that Claimant's contentions are conclusory in nature and do not provide for facts which would allow the Tribunal to draw an inference that Respondents engaged in any deliberate or dishonest behavior.

[70.3] Third, Respondents say that they did not have any implied duty to cooperate with Claimant to satisfy the Holdback Amount Conditions. As the Parties have negotiated and agreed on the limits of each Party's obligations in respect of the Holdback Amount Conditions, implying a duty of cooperation on Respondents' part would contradict express terms of the Agreements. This is supported in part by the difference in wording used in Section 2.6(b) (which sets out Claimant's obligations in satisfying the Holdback Amount Conditions) and Section 2.6(a) (which sets out both Parties' obligations in satisfying the respective Closing Conditions Precedent as defined in the Agreements). Per the terms of the Agreements, Claimant alone was responsible for using commercially reasonable efforts to satisfy the Holdback Amount Conditions, Any duty to cooperate would in any event not require Respondents to take active steps or positive action beyond those specified by the Agreements.

[71] In addition, Respondents point out that Claimant has only alleged that Respondents delayed or prevented the satisfaction of four of the unsatisfied Holdback Amount Conditions, namely the Land Consolidation Condition, the Development Project Condition, the Dormitory Condition, and the Road Condition. Respondents deny that they have breached any duty of cooperation (or acted unreasonably) in relation to the four unsatisfied Holdback Amount Conditions. However, even taking Claimant's arguments on Respondents' lack of cooperation to be viable, it is not disputed that other Holdback Amount Conditions remained unsatisfied. On this basis, Respondents contend that Claimant would still not be entitled to any of the Holdback Amounts...

...

[73] Finally, Respondents submit that Claimant has articulated no legally cognizable damages claim to be entitled to the sum of the Holdback Amounts as damages. In order to recover damages, Claimant must show that but for Respondents' breaches, Claimant would have satisfied the Holdback Amount Conditions by the Long Stop Date. The Parties agree that some of the Hold back Amount Conditions were unsatisfied for reasons not attributable to any Party, and it is therefore not possible for the Tribunal to conclude that but for Respondents' breaches of cooperation or reasonableness, Claimant would have satisfied the Holdback Amount Conditions.

[74] Respondents also reject Claimant's allegation that Respondents have repudiated the Agreements and maintain that they have not evinced any intention not to be bound by the Agreements. Indeed, by maintaining the Holdback Amounts on the basis that the Holdback Amount Conditions were not satisfied as of the Long Stop Date, Respondents say they are enforcing the Agreements and their plain terms.

[75] Respondents therefore seek to dismiss the entirety of Claimant's case by way of the EDP Application on the grounds that Claimant's claim for the Holdback Amounts is contrary to the plain terms of the Agreements and that Claimant has not alleged any facts which can sustain an award of the Holdback Amounts in its favor."

HCCT 113/2024: Article 43 Complaint

As pointed out by Mr Lo, the intent behind the introduction of Article 43 of the Rules was to introduce a procedure similar to the "summary judgment or striking-out procedure": HKIAC Administered Arbitration: Article-by-Article Commentary (2018), Article 43 §4 and A Guide to the HKIAC Arbitration Rules, 2nd Ed §12.57.

Mr Lo further highlights that the use of the words "points or law of fact" suggests that the EDP has a broad scope of application. It does not apply only to claims, defences, counterclaims, and cross-claims, but also to any specific legal or factual point. As a result, the arbitral tribunal has the flexibility to determine the entirety or part of a claim or defence, including any point of law or fact raised therein, by way of the EDP: A Guild to the HKIAC Arbitration Rules, 2nd Ed §12.66.

The gravamen of P's complaint is that, in breach of the "cornerstone" of the EDP invoked pursuant to Article 43.1 of the Rules, there was no precise identification of "such points of law of fact" which were said to be appropriate to be dealt with under one of the identified three limbs. Mr Wong relies on HKIAC Administered Arbitration: Article-by-Article Commentary (2018), Article 43 §12:

> *"Article 43.4 sets out the basic information that needs to be included in a party's request for early determination. A party should clearly and concisely state in its request the points of law and/or fact for which it seeks an early determination from the arbitral tribunal, and how they fall under the requirements under Article 43.1." (emphasis added)*

In the same paragraph, it was further observed that:

> *"The requesting party is also required to propose the form of the early determination procedure to be adopted by the arbitral tribunal and provide comments on how the proposed form would achieve the objectives under Articles 13.1 and 13.5. This means that the proposed form of early determination procedure should both be suitable, fair, and efficient and ensure that the parties are treated equally, and each afforded a reasonable opportunity to present their case. The request for early determination in principle is not supposed to contain very elaborate submissions and Article 43.4 establishes clear guidelines for how to organise such requests in an efficient and effective manner."*

Mr Wong developed his submissions as follows.

First. the manner in which Ds invoked the EDP was a glaring but impermissible attempt to invite the Tribunal to conduct a mini-trial over the entire case of P, a good part of which was heavily fact-sensitive.

Secondly, P raised its objections in P's EDP Submissions as follows:

> *"[8] The Respondents' EDP application does not meet the required high degree of clarity and falls well short of the very demanding and rigorous standard for resort to the exceptional procedure set out in Article 43 of the Rules. The Respondent in fact fail to distil for the Tribunal the key questions to be determined in this EDP, by conflating both legal and factual issues, thus demonstrating beyond argument that this is not an appropriate case for summary judgment at this preliminary stage.*
>
> [19] The Respondents' EDP application fails to formulate a clear, coherent question for determination by the Tribunal, instead over-simplifying the dispute without proper regard to the legal issues, as well as factual background issues relevant to construction of the Agreement, raised by the Claimant. Instead, the Respondents' EDP application is a potpourri of poorly-defined conclusory propositions of legal construction with facts thrown in for good measure. The Tribunal is thus faced with a case which is clearly not appropriate for summary determination at this stage and certainly not within the confined timeframe of the EDP.
>
> [57] The EDP is to be invoked and is appropriate for patently simple and straightforward cases. Plainly, the present proceedings is not such as case. The Respondents have failed to identify clear questions for the Tribunal to answer at this preliminary stage. On the contrary, there remain clear factual triable issues, which go to the core of the context required for the Tribunal to make a proper assessment as to the question of construction." (emphasis added)

Thirdly, it was only at the 23/4/24 Hearing that Ds formulated five points of construction orally as follows ("5 Points of Construction"):

> *"Clause 2.2(e) in each of the merger and share purchase agreements operates as a clear condition precedent on payment of the holdback amounts. It is a binary if-then event trigger, if you will, allocating to seller alone, that's XXX, the risk of non-satisfaction without regard to the reason" ("Construction Point No 1");*
>
> *"The holdback amounts are not payable by operation of clause 2.2(e) because it is admitted that not all holdback amount CPs were satisfied as of the long-stop date" ("Construction Point No 2");*
>
> *"On a plain construction of the parties' agreements, there cannot be any implied terms of reasonableness or cooperation on XXX to satisfy the holdback amount conditions because this would effectively rewrite all of clauses 2.2(e), 2.6(b) and 5.3(b) where we've submitted the parties expressed their intention on this very subject" ("Construction Point No 3");*

> *"Even if there were these implied obligations, the breaches that XXX claims do not account for its failure to satisfy all of the holdback amount conditions that it admittedly did not satisfy by the long-stop date. So those alleged breaches do not get claimant home on its claim for the holdback amounts" ("Construction Point No 4");*
>
> *"As respects the express duty of reasonableness in clause 2.2(e) on extensions of the long-stop date it is our submission that XXX has no viable claim there that XXX refused a further 18-month extension on top of two years, arbitrarily, capriciously, or in bad faith" ("Construction Point No 5").*

Mr Wong submits that P was clearly unfairly prejudiced by such ambushing tactics, and was deprived of a reasonable opportunity to consider, prepare and make submissions in response.

Fourthly, just 2 days after the 23/4/24 Hearing, the Tribunal gave the 25/4/24 Order to inform the parties that the EDP would proceed. In the 25/4/24 Order, the Tribunal still did not identify what points of law or fact were to be determined by way of the EDP, let alone explaining why such points was suitable for determination by way of the EDP. Mr Wong submits that the Tribunal acted in serious breach of Article 43 of the Rules since there must be proper and precise identification of the relevant points of fact or law before the Tribunal could proceed to hear the parties' submissions and make its decision as to whether to allow a determination by way of EDP and, if so, what form of procedure should be adopted.

Fifthly, there were other non-compliances with Article 43.5 of the Rules, in that (1) Ds failed to propose any form of EDP procedure for adoption by the Tribunal, as required under Article 43.4(c) and (2) resulting from their failure to propose any form of EDP procedure, Ds also offered no meaningful comments on such proposed form would meet the objectives set out in Articles 13.1 and 13.5 of the Rules, as required under Article 43.4(d).

Taking stock of the above matters, Mr Wong contends that the above non-compliances led to breaches of procedural fairness (at the Screening Stage) in that (1) the Tribunal unfairly allowed Ds to pursue their EDP Application without requiring them to comply with the mandatory requirement under Article 43.4(a) despite the specific objection raised in P's EDP Submissions, (2) the Tribunal consequently did not direct itself to consider whether a case under Article 43.1(a) or (c) was made out for determination by way of the EDP, (3) the Tribunal therefore did not direct itself to consider even where such a case was made out, whether a determination by way of the EDP was appropriate and, if so, what form of procedure should be adopted in all the circumstances and (4) P consequently was unfairly deprived of a fair opportunity to consider such points of law or fact and to present its case on whether such points are suitable for determination by way of the EDP.

Further, prejudice was also caused during the Determination Stage, since when the Tribunal allowed the EDP Application to proceed without indicating the exact points of law or fact to be determined, P was left in the dark as to what were the precise points to be addressed and was thereby unfairly deprived of fair opportunity to present its case on the pertinent points.

Three questions require determination: (1) whether there were in fact non-compliances with Article 43 of the Rules, (2) even if there were, whether such non-compliances amounted to serious violation of the agreed arbitration procedures and gave rise to flagrant breach of procedural fairness and (3) insofar as necessary, whether there was waiver of such non-compliances.

Whether non-compliances with Article 43 of the Rules

In my view, the answer is plainly no, as least on the complaint regarding the lack of identification of the points of law of fact. The express requirements under Article 43 of the Rules are (1) the identification of points of law or fact (Article 43.1) but (2) a request must include a statement of facts and legal arguments supporting the request (Article 43.4).

I have already made a number of observations on the length and structure of the EDP Application above. Whilst I note the salutary comments set out at §§6.3 and 6.4 above, it seems to me how concisely the relevant points of law of fact can be described (as required under Article 43.4(a)) and how lengthy and elaborate are the supporting arguments (as required under Article 43.4(b)) must necessarily depend on the individual case. As observed above, Ds here sought to dismiss P's claims in their entirety and it was necessary to deal with the multitude of contentions advanced in the SOC. Even proceeding on the basis that the EDP Application was lengthy and could have been more concise, the question remains whether the points of law or fact had been identified in the EDP Application.

In my view, they plainly were. I do not agree with Mr Wong that the points of law or fact were only formulated by the 5 Points of Construction orally at the 23/4/24 Hearing or that P was prejudiced by ambushing tactics. As is plain from the transcript of the 23/4/24 Hearing, the 5 Points of Construction was raised by Ds at the outset of the hearing as a summary of the EDP Application. It is clear that the 5 Points of Construction were already included in the SOD setting out the EDP Application:

Construction Point No 1 was already made at, for example, SOD §41 under the subheading "Proper Construction of the Holdback Amounts Provisions";

Construction Point No 2 was already made at, for example, SOD §75 under the subheading "[P's] Case should be Dismissed because [P] Accepts that it Did Not Satisfy the School CP through no Fault of [Ds]";

Construction Point No 3 was already made at, for example SOD §65 under the subheading "No Breach of an Implied Obligation" and SOD §70 under "[Ps] Case on the Alleged Duty to Cooperate Should be Dismissed";

Construction Point No 4 was already made at, for example, SOD §75 under the subheading "[P's] Case should be Dismissed Because [P] Accepts that it Did Not Satisfy the School CP through no fault of Ds";

Construction Point Not 5 was already made at, for example, SOD §§66(c) under the subheading "No breach of an Implied Obligation".

Viewed thus, the points of law or fact were plainly identified by the headings used in the EDP Application, and the paragraphs under each subheading should be understood as the arguments supporting the EDP Application. P's complaint is no more than one asserting that the identification could be done more concisely. At the hearing, I asked Mr Wong to clarify what would be a compliant identification of the points of law or fact in the present case. His formulation was: "Under Clause 2.2(e) were Ds entitled to holdback the amounts as long as one of the Holdback Amount Conditions was not complied with or waived".

The first observation is that the formulation proffered by Mr Wong was squarely raised at SOD §75 which states as follows:

> *"On a true construction of the Agreements, the Holdback Amount Conditions were conditions precedent to [P] receiving the Holdback Amounts. This means that in order to receive the Holdback Amounts, [P] had to satisfy each and every Holdback Amount Condition..."*

The second observation is that the cursory formulation proposed by Mr Wong would not have been a useful identification of the points of law and fact given the multitude of contentions raised in the SOC.

As regards P's reliance on the complaints set out in P's EDP Submissions (§6.7 above), those were only P's own submissions that the points of law or fact had not been properly distilled or were poorly defined in the overall context of its submission that P's case was not simple or straightforward. As pointed out by Mr Lo, Article 43 of the Rules does not specify the level of precision to which the point of law or fact should be articulated and the degree of precision is clearly a matter of case management which is within the discretion of the Tribunal.

Once it has been determined that the points of law or fact have been identified in the EDP Application (as I have), P's further complaints that the Tribunal, in making the 25/4/24 Order, was in breach of Article 43 of the Rules during the Screening Stage fall away (§§6.10 and 6.12 above). For completeness:

As regards Mr Wong's submission that the 25/4/24 Order did not explain why the points of law of fact identified in the EDP Application were suitable for determination by way of the EDP, it is tolerably established that a tribunal is a "master of his own procedure" and it is not necessary for reasons to be given regarding why a particular case management decision has been made. As is plain from Articles 43.5 and 43.6, a tribunal is required to make an order or award only in the Determination Stage and it is plain that the decision under Article 43.5 is only a procedural or case management decision. The court will not interfere with the exercise of a tribunal's discretionary powers for dealing with procedural matters unless the conduct is so extreme toas to warrant removal: Russel on Arbitration, 24th Ed §5-105;

It is plain from P's EDP Submissions that P was well aware of the points of law or fact identified in the EDP Application and submissions were made as to why the EDP Application was considered by it to be inappropriate;

Insofar as there might have been a change of case on Ds' part from that set out in the EDP Application, Partial Award §69 (reproduced at §5.8 above) records a clarification made Ds at the 23/4/24 Hearing that they agreed with P's position that P's only contractual obligation in respect of the Holdback Amount Conditions was to use commercially reasonable efforts to satisfy them. In relation to the foregoing, first, as has been pointed out at Costs Award §60.4, such clarification did not represent a departure from Ds' case and P had sufficient opportunity to address the clarification in its oral submissions at the 23/4/24 Hearing and P's Further Submissions. Secondly, even if there was a departure, it does not change that fact that the point of law or fact in its original scope had been identified but Ds revised the position at the 23/4/24 Hearing having considered, for example, P's EDP Submissions.

Likewise, the complaint that the Tribunal was in breach of Article 43 of the Rules during the Determination Stage (§6.13 above) must be rejected. Pursuant to the 25/4/25 Order, the parties were given leave to file final submissions on the EDP Application, which P did. It is plain from P's Further Submissions that they were clearly aware of the points of law or fact. A cursory perusal of the document already shows that P addressed the points identified by Ds. In particular, there was no complaint in P's Further Submissions that it had any difficulties in identifying the points of law or fact. Indeed, no such submission was advanced even at the 23/4/24 Hearing.

For the above reasons, in terms of identification of the points of law or fact there was no breach of Article 43.

As regards P's complaint that Ds were in breach of Article 43.4(c) of the Rules for failing to propose any form for the EDP for adoption by the Tribunal, it is true that the EDP Application did not do so. However, the foregoing must be viewed in its proper context. After Ds indicated their intention to invoke the EDP, the Tribunal had already given directions in PO No 2 for P to respond to the EDP Application (to be made by Ds) and fixed the 23/4/24 Hearing. It was clear from PO No 2 that the Screening Stage was to be resolved by written submissions and oral submissions to be ventilated at the 23/4/24 Hearing, along with the ICR Application. Further, by the 25/4/24 Order, the Tribunal had already directed that the Determination Stage would be conducted by way of final written submissions and the Arbitration would be stayed in the meantime. In my view, under the then circumstances, D's failure to propose a form for the EDP for adoption by the Tribunal was at most a minor and technical breach.

As regards P's complaint that Ds, in contravention of Article 43.4(d) of the Rules, had offered no meaningful comments on how the proposed form would achieve the objectives stated in Articles 13.1 and 13.5 of the Rules (reproduced at Footnotes 4 and 5 above), for the same reason, such failure was at most a minor and technical breach, for it is plain that the Tribunal in deciding to proceed in the way that it did (conducting the Screening Stage by way of written and oral submissions (together with the ICR Application) and the Determination Stage by way of final

written submissions and the Arbitration be stayed pending determination), the Tribunal was plainly satisfied that the objectives stated in Articles 13.1 and 13.5 were met.

For the above reasons, I have come to a firm conclusion that there was no breach in relation to the identification of the points of law or fact and at most a technical breach on Ds' part in failing to propose a form for the EDP for the adoption of the Tribunal.

Whether flagrant breach and whether procedural unfairness

For the reasons set out in the preceding subsection, there was no flagrant breach of Article 43 of the Rules in respect of the identification of points of law and fact and at most technical breaches in respect of Articles 43.4(c) and 43.4(d) of the Rules. There was no procedural unfairness. As will be seen in section dealing with the EDP Due Process Complaint below, P clearly had a fair and reasonable (multiple) opportunities to set out its arguments in response to the EDP Application.

Waiver

Waiver does not arise in respect of the complaint of lack of identification of points of law or fact as the complaint is not established.

As regards the technical breaches identified above, there was clearly waiver on P's part. No complaint was contemporaneously made and P fully participated in the EDP Application in filing P's EDP Submissions, attending the 23/4/24 Hearing and filing P's Further Submissions.

For the above reasons, the Article 43 Complaint is not made out.

HCCT 113/2024: EDP Due Process Complaint

The EDP Due Process Complaint is closely related to the Article 43 Complaint. It is said that, by reason of the Article 43 Complaint (in particular Ds' failure to identify the points of law or fact), P was deprived of a fair and reasonable opportunity to present its case on procedures and merits. It is said that:

First, without knowing the precise "points", P was deprived of a fair opportunity to address whether Ds were able to make out a case for determination by way of EDP under Article 43.1(a) and/or (c);

Secondly, without knowing the precise "points" and without knowing Ds' proposed form of procedure, P was deprived of a fair opportunity to present its case on whether it is appropriate for those "points" to be determined by way of EDP, particularly in light of the tight timeframe stipulated in Article 43.5 and 43.6;

Third, even were it appropriate for certain "points" to be determined by way of the EDP, it is necessary for P to know the precise "points" to be so determined in order to present its case on merits. When P never knew what points they were asked to answer, it cannot be said that P was given a fair and reasonable opportunity to prepare its response.

The above complaints are predominantly premised upon the lack of identification of the points of law and fact which I have found against. Insofar as the second complaint is premised on the technical breach on Ds' part to propose a form for the EDP Application, as stated above, P fully participated in the process without raising any complaint contemporaneously. Indeed, in P's EDP Submissions and P's Further Submissions comprehensive written submissions were made by P on (1) why the EDP Application was inappropriate and (2) the merits of the "points" raised in the EDP Application, the gist of which were maintained orally at the 23/4/24 Hearing.

P next submits that the Tribunal's error stripped P of procedural rights, specifically the right to discovery and to a full oral hearing as provided under PO No 1. With respect, this is a plainly bad point. P had already made the submission during the EDP Application that the factual disputes were inappropriate for determination by the EDP. As set out at Partial Award §80.4:

> *"Finally, Claimant submitted that the question of whether Respondents' refusal to extend the Long Stop Date was reasonable must be considered in the context of the factual circumstances at that time... This requires an examination of the facts and should not be prematurely resolved under the EDP."*

As such, P had full opportunity to, and did, raise its arguments on how the factual disputes made the EDP Application inappropriate which arguments the Tribunal ruled against. There can no entrenched rights to discovery and a full oral hearing as provided under PO No 1, as the Arbitration was stayed pending the resolution of the EDP Application, and by the Partial Award, P's claims were entirely dismissed.

The complaints that the Tribunal had erred in its treatment on the factual disputes are the subject matters of the Excess of Submission Complaint and the Public Policy Ground which are dealt with below.

Subject to and in conjunction with what it set out below, the EDP Due Process Ground is not made out.

HCCT 113/2024: Excess of Submission Complaint

P's case on the Unreasonable Refusal Issue is recorded at Partial Award §§59.4 (reproduced at §5.4 above and below again for convenience), 115 and 119:

> *"[59.4] Taken together, Claimant submits that Respondents have breached both the implied and express terms of the Agreements by failing to act reasonably- and by acting arbitrarily, unreasonably and in bad faith - in respect of the extension of the time period for the satisfaction of the Holdback Amount Conditions, with the dishonest purpose of effectively renegotiating the Purchase Price under the Agreements, and with the effect of discharging Claimant for any further obligation to complete performance of the Holdback Amount Conditions.*

[115] This leaves Respondents' express obligation under Section 2.2(e) of the Agreements to act reasonably with respect to Claimant's request to extend the Long Stop Date. In this regard, Claimant submits that the purpose of the provision allowing for an extension of the Long Stop Date was intended to allow for known contingencies, such as delays in obtaining

government approvals, and unknown contingencies, such as the COVID-19 pandemic. Claimant says that Respondents' obligation to act reasonably in granting an extension was meant to avoid "premature termination" of Claimant's commercially reasonable efforts so that the contractual purpose might be achieved in accordance with the terms of the Agreements. According to Claimant, by failing to act reasonably in refusing to agree to an extension, Respondents have denied Claimant the opportunity to procure satisfaction of the Holdback Amount Conditions to the extent they remained outstanding at the Long Stop Date. Indeed, Claimant says that the reason it sought an extension of the Long Stop date was to honor its obligation to use its commercially reasonable efforts to achieve all of the Holdback Amount Conditions which could be satisfied.

[119] ... Claimant contends that the extension was necessary due to the COVID-19 pandemic and certain delays which it says were attributable to Respondents. Claimant also says that Respondents acted in bad faith in refusing to extend the Long Stop Date, with the dishonest purpose of effectively renegotiating the Purchase Price without any objective justification."

Mr Wong says that the determination of the Unreasonable Refusal Issue plainly required the Tribunal making determination of factual disputes on Ds' intent, whicb in turn required the Tribunal to carefully hear the witnesses and consider the evidence tendered by the parties. He further submits that, at the 23/4/24 Hearing, Ds had abandoned Section IIIB of the SOD (which as set out at §5.8(2) above dealt with the Breach Issue) and only asked the Tribunal to determine some "points of construction". As such no point of fact was ever submitted to the Tribunal for determination by way of the EDP. However, it is said regrettably, the Tribunal had impermissibly gone beyond the scope of the submissions under the EDP Application and arrived at the factual conclusion that Ds had not acted unreasonably in refusing the Time Extension Request.

At the hearing, I directed counsel to each provide a table identifying all the parts of the transcript of the 23/4/24 Hearing to, inter alia, support/counter the suggestion that Ds had abandoned Section IIB of the EDP Application (respectively "P's Table" and "Ds' Table").

Having considered P's Table and Ds' Table, I have no hesitation in rejecting the suggestion that Ds had abandoned Section IIIB of the SOD. Some of the more significant contentions set out at Section IIIB of the SOD are as follows:

P's argument is that Ds had breached the express term to act reasonably when refusing the Time Extension Request. This argument is based on an incorrect premise of law. P assumes that in order to "act reasonably" D had to consider P's interests in addition or in priority to D's own interests. But that is not the law. Where there is an express or objective requirement of reasonableness in a contract, the decision maker is entitled to take into account his own commercial interests, normally to the exclusion of the interests of the other party. He is not required to subordinate his own commercial interests to those of the other party. The burden is on the party alleging unreasonableness to show that the other party was acting unreasonably. The question is not whether the decision maker made the right decision or whether the decision was justified; it is only whether that decision might have been reached by a reasonable man in

the circumstances: SOD §§57-58 and 60;

Even on the facts as alleged by P, it was eminently reasonable for Ds to refuse P's18-month extension request. COVID-19 was a global pandemic that was first detected in China in 2019, and was declared a worldwide pandemic by the World Health Organization on 11 March 2020. The MA closing occurred on 19 January 2021, well after COVID was a known issue. The Long Stop Date, as extended by agreement, was 18 January 2023. The Holdback Amount Conditions were not satisfied by the Long Stop Date meaning P had failed to satisfy the Holdback Amount Conditions within two calendar years of closing. The MA was executed on 9 November 2020 and specified a period of 18 months post-closing to satisfy the first tranche of Holdback Amount Conditions. The Parties then agreed to a 6-month extension of time when they signed the SPA in December 2021. As of December 2022, a year later, P still had not satisfied the Holdback Amount Conditions and was requesting a further 18-month extension, to take the Long Stop Date to 30 June 2024, with no assurance that it would be able to meet that deadline. P was undeniably in financial distress. Its parent company had announced on 18 August 2022 that "a material uncertainty exists that may cast significant doubt on the Group's ability to continue as a going concern", a message that was reiterated in April 2023, a short time after the Time Extension Request: SOD §62;

In the light of these basic, undisputable facts, it is simply not possible for the Tribunal to conclude that Ds acted so unreasonably in declining a further 18-month extension for P to continue trying to satisfy the Conditions, which it had substantially failed to satisfy in the preceding two years, that no reasonable decision maker ever could have reached that decision: SOD §63;

In sum, there were no facts pleaded, much less evidenced in the SOC from which the Tribunal could infer bad faith, dishonesty, fraud or arbitrary or capricious behaviour. P's case in this regard appears to be that Ds ought to have agreed to indefinite and successive extension requests - lasting as long as it took P to satisfy the Holdback Amount Conditions, however long that was - and that if Ds did not agree to such requests, they were acting arbitrarily and capriciously. This position was simply not sustainable as a matter of law and should be summarily rejected: SOD §68.

The foregoing contentions in the SOD were plainly maintained at the 23/4/24 Hearing and entirely consistent with the summary encapsulated by the 5 Points of Construction, especially Construction Point No 5. Properly understood, the core of Ds' submission was to impress upon the Tribunal that the factual disputes identified by P could be resolved very much in a summary way, in the light of the arguments advanced by Ds, for example on how the Agreements had allocated the risks. This is best illustrated by the following oral submissions made by D's legal representative at the 23/4/24 Hearing:

> *"So for clause 2.2(e) purposes, clearly no amounts are payable. That then brings us to the question of implied terms and whether there are implied obligations of reasonableness or cooperation on respondents in respect of the holdback amount CPs which essentially, from our perspective, alter the risk allocation that is clearly set out in 2.2(e). And this, claimant says, will then mire us in a swap of factual detail because reasonableness and cooperation are fact-senstive questions...*

[Submissions against the implication of terms]

Now, all the difficulties that claimant refers to in their statement of claim: The COVID pandemic; changed government requirements post contract, the supervision agreement is the most blaring example of that; general government intransigence or slowness; the need to change and revise detailed design plans from what was originally agreed to be responsive to changes on the part of the government; and new and different regulatory requirements. This was all allocated to the seller by clause 2.2(e) in respect of further payment of the holdback amounts. That's what it means to have an f-then event trigger of the kind we find in clause 2.2(e)...

That brings us to the reasonableness requirement... and I want to start with claimant's argument that it cannot have been intended that [Ds] get to keep the entirety of the holdback amounts even if, one minor condition precedent CP remains outstanding. First of all, that is exactly the effect of a condition precedent, like 2.2(e)...

But, second, even if the cold rule of law was an unsatisfactory answer to this tribunal... I can offer some further solace because the way this contract tempers, the conceptual unfairness that [P] observes, is with the long-stop date extension clause. So it is tempered by a reasonableness standard. If we were actually in a case where, as of the long-stop date, claimant had some minor outstanding condition or conditions to satisfy, and it asked for an extension of reasonable limited duration to get that minor further work done, [Ds] could not arbitrarily or capriciously refuse that extension.

The thing is that is not the case [P] has put to this tribunal, not by a long way. The legal standard for reasonableness entitles [Ds] to prefer its own commercial interest...We way it is sufficient to dispose of the suggestion that [Ds] was unreasonable that: A majority of the holdback amount conditions precedent was not satisfied, that is admitted, the request for extension was 18 more months... And [P] had publicly stated in its regulatory filings that it was teetering on the verge of being unable to continue as a going concern....

So the law says if a reasonable person objectively could have made the same decision as [Ds], then there is no case for unreasonableness, and we say these undisputed facts are sufficient to reject any case of unreasonableness under clause 2.2(e)..."

In a later stage of the 23/4/24 Hearing, one of the Arbitrators asked Ds' legal representatives whether P's assertion that completion of some of the Holdback Amount Conditions depended on Ds' role raised factual issues which would not be appropriate for the EDP, to which Ds' legal representatives replied as follows:

> *"Firstly, that only becomes an issue if you imply terms into the contract, right, because otherwise on its express terms, the contract on our case provides for an express reasonableness obligation in 2.2(e) with respect to extensions of the long-stop date... but another way to put it is contractually the parties providing a release or relief mechanism, if you will. If they get to the long-stop date and they are taking an evaluation of how close are we and what's left to be done, that is what is in the contract expressly.*

If you're going to say that we had other things that we had to do for them, that you don't find and I think that's common ground. They have to rely on implied terms for that.

Now, what you can't do is you can't construe a contract on the basis of subsequent events, interactions, things that happen...

So to answer your question, I would say that the facts that they propose, the things that they say happened post-contract agreement, where all of a sudden we were in the position, for example, of having to agree or not agree a supervision agreement that came up after contract, or get the government back to 50 metres setback from 100, or, government doesn't like our design plan, doesn't like our road, so we've got to come up with something else, those are all risks that went to [P] under the terms of the agreement and I think - their case, if you were to sum it up, is to say, "You should have helped us more than you did", and that is not a duty you find in the agreement.

I would accept -- I would accept that we couldn't frustrate their performance in order to keep the money, but that's not the case that's before the tribunal, not even close."

As set out in the following section dealing with the Public Policy Ground, the Tribunal agreed with the submissions made by Ds' legal representatives. Given the matters relied on by Ds in the EDP Application which were maintained at the 23/4/24 Hearing, there is no question that the Tribunal's decisions in the Partial Award were on matters beyond the scope of the EDP Application.

Insofar as necessary, I agree with Mr Lo's following submissions:

On its plain wording, ML 34(2)(a)(iii) only applies if the award contains matters "beyond the scope of the submission to arbitration". Whether or not Ds acted reasonably in refusing a time extension is clearly a matter within P's submission to arbitration. The Excess of Submission Complaint is confined to the scope of the EDP Application, as opposed to the scope of the Arbitration. I have some doubt whether ML 34(2)(a)(iii) can be caved out to apply only to the EDP Application. In any event, even on the narrower basis, I have found above that the decisions in the Partial Award were based on the Tribunal's agreement with Ds' submissions;

As set out in the following section, the Partial Award did not arrive at any conclusion on any disputed point of fact.

The Excess of Submission Complaint is not made out. In my view, P's real complaint is that the Partial Award is, it is said, manifestly incoherent to which issue I now turn.

HCCT 113/2024: The Public Policy ground

Insofar as the Public Policy Ground is premised on the Article 43 Complaint, the EDP Due Process and the Excess of Submission Complaint, I have already rejected those complaints. That leaves P's complaints that the Partial Award is manifestly incoherent and/or is infra petita in failing to deal with P's factual case on the Unreasonable Refusal Issue.

I have already set out at §8.1 above Partial Award §§59.4, 115 and 119 which record P's complaints on the Unreasonable Refusal Issue. As noted at Partial Award §§82-84, the Tribunal accepted P's submission that the EDP required a need for rigorous scrutiny and required a determination on an expedited basis. The Tribunal dealt with the EDP Application as follows in the Partial Award.

The Construction Issue

The Tribunal first noted that there was no dispute that several of the Holdback Amount Conditions were not satisfied by the Long Stop Date of 18 January 2023 and none of the unsatisfied conditions had been waived. The evidence showed that only 11 of the 24 Holdback Amount Conditions had been satisfied by the 18 January 2023 (§92). Partial Award §91 recorded the parties' agreement that P's only obligation under the Agreements wase to use commercially reasonably efforts to satisfy them.

The Tribunal agreed with Ds' case that satisfaction of the Holdback Amount Conditions was plainly a condition precedent to Ds' obligation to pay the Holdback Amounts and was a binary "if-then" arrangement in which a party's obligation arose on the condition that the conditions precedent were satisfied (§95.1). Given that Ds' obligation to pay the Holdback Amounts was triggered by the satisfaction or waiver of the Holdback Amount Conditions, Ds' withholding of the Holdback Amounts could not be viewed as penalty or liquidated damages for any breach by P (§95.2). Importantly, given that Ds' obligation to pay the Holdback Amounts was triggered by the satisfaction or waiver of the Holdback Amount Conditions, to the extent that the Holdback Amount Conditions were not satisfied, P was not entitled to payment of the Holdback Amounts regardless of whether P used commercially reasonable efforts to satisfy them (§95.3).

At Partial Award §95.4, the Tribunal held that the Holdback Amount Conditions must be satisfied by the Long Stop Date of 18 January 2023, subject to extension by mutual agreement in writing. In considering whether to extend the Long Stop Date, P and Ds were each required to act reasonably.

Significantly, at Partial Award §98, the Tribunal agreed with Ds' characterization that the Holdback Amounts were an adjustment to the purchase price and the Holdback Amount Conditions were a risk allocation mechanism to allocate risk between the parties for the possibility that the Holdback Amount Conditions would not be satisfied.

At Partial Award §98.4, the Tribunal noted that even if it could be said that the contractual arrangement agreed between the parties had worked out badly for P, under Hong Kong law this would not allow the Tribunal to depart from the natural language of the Agreements.

The Breach Issue

The Tribunal rejected P's case that the following terms should be implied into the Agreements: (1) an implied duty to exercise their contractual discretion in good faith and consistently with the contractual purpose, and not arbitrarily, capriciously or unreasonably (§114) and (2) an implied duty to cooperate with P's commercially reasonable efforts to satisfy the Holdback Amount Conditions (§106).

In relation to whether Ds breached their express duty to act reasonably in considering the Time Extension Request, the Tribunal found as follows:

> *"[115] This leaves Respondents' express obligation under Section 2.2(e) of the Agreements to act reasonably with respect to Claimant's request to extend the Long Stop Date. In this regard, Claimant submits that the purpose of the provision allowing for an extension of the Long Stop Date was intended to allow for known contingencies, such as delays in obtaining government approvals, and unknown contingencies, such as the COVID-19 pandemic. Claimant says that Respondents' obligation to act reasonably in granting an extension was meant to avoid "premature termination" of Claimant's commercially reasonable efforts so that the contractual purpose might be achieved in accordance with the terms of the Agreements. According to Claimant, by failing to act reasonably in refusing to agree to an extension, Respondents have denied Claimant the opportunity to procure satisfaction of the Holdback Amount Conditions to the extent they remained outstanding at the Long Stop Date. Indeed, Claimant says that the reason it sought an extension of the Long Stop date was to honor its obligation to use its commercially reasonable efforts to achieve all of the Holdback Amount Conditions which could be satisfied.*

[117] The Tribunal notes that the initial period for satisfaction of First Tranche Holdback Amount Conditions under the Merger Agreement was 18 months from the Closing, while the period for satisfaction of the Second Tranche Holdback Amount Conditions was 24 months from the Closing. These were both set at 24 months after closing by the Second Amendment Deed. As the Closing of the Merger Agreement took place on 19 January 2021, the date for the satisfaction of all Holdback Amount Conditions was set at 18 January 2023 in the SPA.

[118] On 14 December 2022, Claimant sought an extension of the Long Stop Date for an additional approximately 18 months to 30 June 2024. There can be no dispute that 18 months is a very long extension for the satisfaction of conditions which were intended to be satisfied in 24 months (as extended from 18 months for the First Tranche Holdback Amount Conditions). Respondents submit that it was reasonable for Respondents to reject Claimant's request because, inter alia, (i) Claimant had been unable to satisfy the Holdback Amount Conditions in two years, and Respondents had no confidence that Claimant would be able to do so in an additional 18 months, and (ii) Claimant was undeniably in financial distress, its parent company having announced on 18 August 2022 that "a material uncertainty exists which may cast significant doubt on the Group's ability to continue as a going concern."

[119] As the Party making the allegation of breach, Claimant bears the burden of proving that Respondents' refusal to consent to the requested extension was unreasonable under the circumstances. Claimant contends that the extension was necessary due to the COVID-19 pandemic and certain delays which it says were attributable to Respondents. Claimant also says that Respondents acted in bad faith in refusing to extend the Long Stop Date, with the dishonest purpose of effectively renegotiating the Purchase Price without any objective justification.

[120] Respondents point out that COVID-19 had been detected in China in 2019 and declared a worldwide pandemic by WHO on 11 March 2020, and that the Closing took place on 19 January 2021, well after COVID-19 was a known issue. In addition, Respondents point out that they explained to Claimant, in letters cited by Claimant in its submissions, that they had been unable to dispose of the Properties in a timely manner as required by their investors due to the delay in satisfaction of the Holdback Amount Conditions. Finally, Respondents note that Claimant does not allege that Respondents were responsible for the delay in the satisfaction of all (but only some) of the Holdback Amount Conditions which had not been satisfied by the Long Stop Date.

[121] In assessing reasonableness, the Tribunal is assisted by the standards set forth in Barclays Bank pie v UniCredit Bank AG and another [2012] EWHC 3655 (Comm). The question before the Tribunal is not whether Respondents' decision not to agree to extend the Long Stop Date for an additional 18 months was unjustified or irrational, but rather whether objectively a reasonable person in Respondents' position could have reached this decision. It is not sufficient for Respondents to show merely that their decision was made in good faith . On the other hand, Respondents were entitled to take their own commercial interests into account in refusing consent to extend the Long Stop Date. The test of Respondents' decision is whether any reasonable person in Respondents' position could have reached the same decision.

[122] On the facts of this case, the answer to that question is a resounding "yes". Viewing the facts as presented by Claimant, and taking them all to be true, the Tribunal has no hesitation concluding that a reasonable person in Respondents' shoes could have elected not to extend the Long Stop Date under the circumstances.

[123] The Tribunal further notes that, if the Tribunal were to accept Claimant's suggestion that Respondents were required to agree to extend the Long Stop Date in order to allow Claimant the opportunity to procure satisfaction of the Holdback Amount Conditions (or to avoid "premature termination" of Claimant's commercially reasonable efforts), this would lead to the absurd result that Respondents would effectively be obligated to agree to any such requests by the Claimant indefinitely, so long as Claimant continued to exert commercially reasonable efforts. The presumption under Section 2.2(e) of the Agreements, as amended, was that the Long Stop Date was 18 January 2023. Pursuant to the plain language of the Agreements, this date could be extended by agreement of the Parties, but neither Party was required to agree to extend the date so long as it was acting reasonably.

[124] This does not mean that Respondents had unfettered discretion to refuse to extend the Long Stop Date. If Claimant had been asking for a shorter extension to complete just a few items on a few remaining Holdback Amount Conditions, Respondents' obligation to act reasonably may well have meant that they were obligated to agree to an extension. In the present case, however, Claimant was requesting an additional 18 months, and it is evident that several of the Holdback Amount Conditions were far from being satisfied.

[125] The Tribunal concludes that, even taking all of Claimant's factual allegations as proven, Claimant is unable to show that Respondents acted unreasonably in declining to consent to Claimant's request for an 18-month extension of the Long Stop Date."

The manifest incoherent complaint

Mr Wong submits that the bolded words of Partial Award §§122 and 125 are manifestly incoherent with the bolded words of §119, in that if Ps' factual case was take to be true or proven, the Tribunal could not have reached the conclusion that P was unable to show that Ds acted unreasonably in declining the Time Extension Request.

I am unable to accept Mr Wong's submissions for two reasons.

First, I am of the view that there is no merit in P's submission that the Partial Award is manifestly incoherent. As set out at Partial Award §119, P's case was that a time extension was (1) necessary because of the COVID-19 pandemic, (2) necessary because certain delays were attributable to Ds and (3) refused in bad faith with the dishonest purpose of renegotiating the purchase price:

As noted in the authorities cited above, the manifest coherent complaint is firmly rooted under rubric of breach of natural justice. In considering this complaint, it is incumbent upon supervisory court to look at the Partial Award, the pleadings, the submissions and any other documents that may throw light on what happened in the Arbitration and what cases the parties were running. The supervisory court will then have to analyse the Partial Award in some depth in order to decide whether the allegations made by P to impugn the Partial Award on the basis of breach of natural justice have substance: BZW §54;

With respect, the submission that P can simply rely on the apparent incoherence between §§122 and 125 on the one hand and §119 on the other is unjustifiably superficial;

In relation to the first matter (necessary because of the COVID-19 pandemic), as noted above, the Tribunal held that the Holdback Amount Conditions were a risk allocation mechanism to allocate risk between the parties for the possibility that the Holdback Amount Conditions would not be satisfied. Even were time extension necessary because of the COVID-19 pandemic, the Partial Award, read as a whole, has plainly provided the reason why Ds could not be said to have acted unreasonably in refusing the Time Extension Request by assuming such risk which had already been contractually allocated to P;

In relation to the second matter (necessary because certain delays were attributable to Ds), the Tribunal had already held against the implication of a term to cooperate. This is completely in line with the submission made by Ds at the 23/4/24 Hearing (§8.6 above). In addition, the Tribunal further noted at Partial Award §120 that P did not allege that Ds were responsible for the delay in the satisfaction of all (but only some) of the Holdback Amount Conditions which had not been satisfied by the Long Stope Date. Given the Tribunal's views that (a) the Holdback Amount Conditions were a binary "if-then" arrangement in which a party's obligation arose on the condition that the conditions precedent were satisfied, (b) as at the Long Stop Date several of the Holdback Amount Conditions were far from being satisfied and (c) the length of the extension sought, the Partial Award, in my view, has set out coherent reasons why the second matter did not avail P;

In relation to the third matter (refusal in bad faith by reason of dishonest purpose of renegotiating the purchase price), the Tribunal had already held that the Holdback Amounts were an adjustment to the purchase price and Ds were entitled to take their own commercial interests into account in refusing consent to extend the Long Stop Date. In my view, the relevant fact was that Ds' withholding of the Holdback Amounts effectively amounted to a renegotiation of the purchase price. But as a matter of the contractual bargain, Ds were contractually entitled to do subject to Ds acting reasonably in considering the Time Extension Request. Partial Award §§123 and 124 have provided additional explanations as to why, in the circumstances of the present case, Ps were unable to show that Ds were acting unreasonably in refusing the Time Extension Request.

Secondly, in view of my findings on the Article 43 Compliant, the EDP Due Process Complaint and the Excess of Submission of Complaint, I am of the view that even were there manifest incoherence, P is unable to show that that the manifest incoherence (1) resulted from a chain of reasoning that parties had no reasonable notice of or had an insufficient nexus to the parties' arguments, such that the parties did not have the chance to address the point in that chain of reasoning or (2) gives rise to a clear and virtually inescapable inference that the tribunal had completely failed to consider an essential point.

For the above reasons, the manifest incoherence complaint is not made out.

The infra petita complaint

Mr Wong submits that the concern that the Tribunal failed to consider the factual disputes involved in the Unreasonable Refusal Issue is compelling when the Tribunal did not give the "minimum level of reasoning" to explain why it could conclude that Ds did not act unreasonably when it was prepared to assume that (i) Ds had not acted in good faith but arbitrarily and capriciously with a dishonest purpose, (ii) Ds had been significantly responsible for the delay in satisfying certain Holdback Amount Conditions and (iii) Ds' alleged reason for refusal for the Time Extension Request was dishonest (ie as set out at Partial Award §§59.4 and 119).

The infra petita complaint is a permutation of the manifest coherence complaint. Similar to an assessment of a compliant premised on breach of natural justice, the assessment of whether the Tribunal had failed to deal with an issue has to be undertaken wholistically (§§4.9-4.11 above).

For broadly the same analysis set out above in relation to the manifest incoherence complaint, I am of the view that the infra petita complaint is not made out. Reading the Partial Award generously, it is plain that the factual aspects of the Unreasonable Refusal Issue were dealt with in the Partial Award. I should add that P's submissions are advanced on the wrong premise. Whether Ds acted in good faith is a conclusory in nature – that was the basis on which the EDP Application was pursued (Partial Award §70.2). The EDP Application was not, and could not be, based on the premise that it was an agreed fact that Ds had not acted in good faith or reasonably but was premised on the basis that the Tribunal had to decide whether (as contended by Ds) the facts as presented by P did not warrant a finding that Ds acted in bad faith or unreasonably.

It is plain from the Partial Award that the Tribunal was of the view that, even on the facts presented by P, Ds were reasonable in refusing the Time Extension Request. It is permissible to resolve an issue implicitly (LY §34) and the finding that Ds had acted reasonably, was plainly an implicit finding against the contention the Ds, on the facts presented by P, were acting arbitrarily, capriciously or in bad faith (which the Tribunal refused to imply into the Agreements in any event).

As has been pointed out in the authorities cited above, if the tribunal has dealt with the issue in any way it does not matter whether it has dealt with it well, badly or indifferently. In my view, the Partial Award's treatment of the Unreasonable Refusal Issue is sufficient and understandable by the parties, especially in view of how the case had been argued before the Tribunal.

For the above reasons, the infra petita complaint is not made out.

In summary, given my conclusions on the Article 43 Complaint, the EDP Due Process Complaint, the Excess of Submission Complaint and the Public Policy Ground, the 1st OS falls to be dismissed.

HCCT 154/2024: Challenges against the Costs Award

As stated earlier, P seeks to challenge the Costs Award on the bases of the Costs Due Process Complaint and the Failure to Discharge Duty Complaint, each premised on the fact that Ds failed to provide any meaningful breakdown in its statement of costs attached as Annex 2 to the Declaration which only included the (i) the total costs; (ii) the hourly rate of the 9 fee earners; and (iii) the period within which each fee earner was involved in the case. Annex 2 did not provide the number of hours incurred by each of the 9 fee earners throughout the arbitration proceedings, let alone the hours incurred by each of them at different stages.

Costs Due Process Complaint

P's complaint is that it was deprived of a fair and reasonable opportunity to respond to Ds' claim for STB's professional fees as a direct result of the Tribunal's refusal to accede to P's Request for Breakdown. It is said that even allowing the Tribunal to adopt a broad-brush approach, Annex 2 submitted by Ds rendered it impossible to ascertain (i) whether the number of hours incurred by each of fee earners was reasonable; (ii) whether there was any unreasonable duplication of works; and (iii) whether the time costs incurred at different stages of the arbitration proceedings were reasonable.

P submits that the situation patently called for a further breakdown of Ds' costs, which the Tribunal had rejected. It is said that it was wrong for the Tribunal to do so since it was incumbent upon the Tribunal to take steps to ensure, so far as reasonably possible before they made the award, that each of the parties to the dispute before them knew the case which had been put against them, and had had the opportunity to put forward that party's own case: Montrose Canned Foods Ltd v Eric Wells (Merchants) Ltd [1965] 1 Lloyd's Rep 597.

As pointed out by Mr Lo, Montrose is factually very different. In that case, the arbitrators decided a matter based on a letter setting out what purported to be facts from one of the two parties, which (so far as the arbitrators were concerned) had not been seen or brought to the notice of the other party. In such circumstances, the other party plainly did not know the case put against them, and did not have the opportunity to put forward that party's own case.

Here, the starting point is that in P's Costs Submissions, even without the details sought, P made submissions that Ds incurred excessive costs without sufficient justification, criticizing the hourly rates and excessive staffing for identified activity and periods of time.

As set out above: (1) in D's Reply Costs Submissions, arguments were advanced against the provision for a detailed breakdown and (2) in the Costs Award, the Tribunal agreed with Ds' submission that the further breakdown was necessary to enable it to assess the reasonableness of STB's fees was inconsistent with well-established practice in international commercial arbitration.

At Costs Award §62, the Tribunal took into account the criticisms raised by Ps and reiterated that its task was to assess the reasonableness of STB's fees in the context of the complexity of the case and the work required, including with respect to the hourly rates charged and the number and seniority of the lawyers involved.

At Costs Award §63, the Tribunal stated that after taking all the circumstances into account, and based on its collective experience in determining the reasonable cost of legal fees in numerous international commercial arbitrations, the Tribunal determined in its discretion pursuant to Section 74.7(a) of the AO and Article 34.2 of the Rules that Respondents' legal costs should be reduced by XXX.

It seems to me that P's complaint is in fact one that the Tribunal should have embarked upon a more elaborate taxation process. Where it is accepted that there is no prescribed mechanism applicable for assessment of costs in the arbitration context, the Tribunal was entitled to adopt a broad-brush approach.

In any event, I find considerable force in Mr Lo's following submissions:

if Ds failed to give sufficient details of their costs claim, P could argue that the defendant's case should not be believed, or that the defendant has failed to discharge its burden of proof (in cases where the burden of proof is on the defendant, as where the defendant seeks to claim costs). These are arguments on the merits which P could have raised if P thought its complaint of insufficient particulars was justified. Hence, even if P's allegation of insufficient particularisation were correct, it did not affect P's ability to present its case;

whether or not Ds put forward sufficient particulars to substantiate their claimed costs is a different question which is irrelevant to this setting aside application. This goes to whether the Tribunal's decision was correct, which is a question of merits and is not a question with which this Court is concerned.

For the above reasons, I am not satisfied that the Costs Due Process Complaint is made out.

The Failure to Discharge Duty Complaint

P complains that the Tribunal's decision to proceed, despite the absence of any breakdown, meant it failed to comply with its duty to act in accordance with Article 34 of the Rules and/or section 74(7)(a) of the AO. Further, in doing so, it acted in excess of its jurisdiction in making the Costs Award.

P further contends that even though the Tribunal applied a XXX XXX discount to STB's fees, this was wholly arbitrary and unsupported by any objective foundation, as the Tribunal itself was not given the information necessary for any proper assessment. P highlights the fact that the Tribunal regarded Annex 2 as a "detailed breakdown" when basic information such as the number of hours incurred by each fee earner was missing, and as such, left P in doubt as to whether the duties under Article 34 of the Rules and section 74(7)(a) had been observed.

I do not agree with P. Conversely, I agree with Ds' following submissions:

It was expressly stated the Costs Award that the reduction of XX was based on the Tribunal's collective experience in numerous international commercial arbitrations and the reduction of XX was a discretion exercised pursuant to section 74.7(a) of the AO and Article 34.2 of the Rules;

Under section 74(6) of the AO, the arbitral tribunal is not obliged to follow the scales and practices adopted by the court on taxation when assessing the amount of costs. The Tribunal was perfectly entitled to take a broad-brush approach, assessing the overall reasonableness of the legal fees in light of the complexity of the issues, the amount at stake and their collective (and extensive) experience in international commercial arbitration;

P's criticisms are directed at the merits of the Tribunal's reasoning and decision and therefore not valid grounds for setting aside the Costs Award.

As the Failure to Discharge Duty Complaint is also not made out, it follows therefore that the 2nd OS stands to be dismissed.

Conclusion

For all the above reasons, I dismiss the 1st OS and the 2nd OS. As a consequence, I also accede to Ds' application for enforcement of the Costs Award. I make an order in terms of the drafts submitted as Annexes 3A and 3B of Ds' Skeleton Submissions, which include orders for the sums paid into court be paid out of court towards satisfaction of the Costs Award and costs to be paid by P to Ds on an indemnity basis. For avoidance of doubt, the costs orders are made on a nisi basis.

(Jonathan Wong)

Deputy High Court Judge

Mr Anson WONG, SC leading Mr Adrian LAI and Mr Paul LAW, instructed by Messrs Dorsey & Whitney, for the Plaintiff in 2 cases

Mr Benny LO and Mr JIANG Zixin, instructed by Messrs Simpson Thacher & Barlett, for the 1st - 2nd Defendants in 2 cases

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