

HONG KONG / JUDGMENT

G, G v. CNG AND SIL

[2026] HKCFI 902

COURT

Court of First Instance

DECIDED

11 February 2026

CASE / FILE NUMBER

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bjbj HCCT 66/2023 HCCT 17/2025 HCCT 123/2025 (heard together)

[2026] HKCFI 902 HCCT 66/2023 IN THE HIGH COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION COURT OF FIRST INSTANCE CONSTRUCTION AND
ARBITRATION PROCEEDINGS NO 66 OF 2023

IN THE MATTER of the enforcement of a partial award dated 8 February 2023 in an arbitration administered by the Hong Kong International Arbitration Centre and IN THE MATTER of section 84 of the Arbitration Ordinance (Cap 609) and IN THE MATTER of Order 73 rule 10 of the Rules of High Court (Cap 4A)

BETWEEN G 1st Applicant G 2nd Applicant and CNG 1st Respondent SIL 2nd Respondent

AND HCCT 17/2025 CONSTRUCTION AND ARBITRATION PROCEEDINGS NO 17 OF 2025

IN THE MATTER of the enforcement of a partial award dated 21 November 2023 in an arbitration administered by the Hong Kong International Arbitration Centre and IN THE MATTER of section 84 of the Arbitration Ordinance (Cap 609) and IN THE MATTER of Order 73 rule 10 of the Rules of the High Court (Cap 4A)

BETWEEN G 1st Applicant G 2nd Applicant and CNG 1st Respondent SIL 2nd Respondent

AND HCCT 123/2025 CONSTRUCTION AND ARBITRATION PROCEEDINGS NO 123 OF 2025

IN THE MATTER of Section 21L of the High Court Ordinance (Cap 4)

BETWEEN G 1st Plaintiff G 2nd Plaintiff and CNG Defendant

Before: Hon Mimmie Chan J in Chambers Dates of Hearing: 7 and 8 January 2026 Date of
Decision: 11 February 2026

D E C I S I O N

Background

This is the latest chapter in the long saga of the dispute and the legal proceedings between CNG and the G Parties. Much of the relevant background history has been set out in the Decisions/ Reasons for Decision of this Court (of 27 February 2024 and 13 August 2025), and will not be repeated here. The current applications which are contested are:

- (1) the G Parties Originating Summons issued on 1 September 2025 seeking an injunction to restrain CNG from pursuing a new arbitration commenced by CNG on 23 July 2025 in HKIAC/25187 (Bribery Arbitration), referred to below as the Injunction Application ; and
- (2) summonses issued by CNG on 26 June 2025 (Stay Summonses) to stay execution of the enforcement orders made by this Court on 24 February 2025 and 21 March 2025 (Enforcement Orders), whereby leave was granted to the G Parties to enforce the 1st Partial Award and the 3rd Partial Award in the arbitration which had been commenced by the G Parties against CNG in November 2020 (Original Arbitration), pending conclusion of investigations by the National Supervisory Commission () into bribery allegations made by CNG, or conclusion of the Bribery Arbitration, whichever is the later. By way of recap of the pertinent background facts, the dispute between the parties arose out of a Share Purchase Agreement dated 18 December 2013 () made between the companies referred to as the G Parties and CNG, whereby the G Parties agreed to sell to CNG 65% of the shareholding in a company (). A Shareholders Agreement () was made between the relevant parties including SIL on 17 March 2014. On 13 November 2020, the G Parties commenced the Original Arbitration in Hong Kong against CNG. The SPA, SHA and the Original Arbitration all relate to the parties interests in SIL which owns and operates an exploration and mining project in the Republic of Congo (Project). The Original Arbitration was brought pursuant to arbitration agreements contained in the SPA and the SHA (Arbitration Agreements). Four partial awards (collectively referred to as Awards) have so far been issued in the Original Arbitration:

- (1) 1st Partial Final Award dated 8 February 2023 (PFA 1), whereby CNG was ordered to transfer its 65% shareholding in SIL to the G Parties for the purchase price of US\$86.32 million (Share Transfer);
- (2) 2nd Partial Final Award dated 26 June 2023 (PFA 2), whereby CNG was found liable to pay damages, arising from its failure to implement an extensive exploration plan and for other operational breaches relating to the Project;
- (3) 3rd Partial Final Award dated 21 November 2023 (PFA 3), whereby directions were granted on specific performance of the Share Transfer following CNG s non-compliance with PFA 1; and
- (4) 4th Partial Final Award dated 30 August 2024 (PFA 4), whereby CNG was found liable for its failure to develop Phase 2 of the Project under the SHA. On 24 February 2025, leave was granted by this Court to enforce PFA 1. By the history of the proceedings since PFA 1, including the institution of the related proceedings in the BVI, it is difficult not to describe what has transpired as anything other than an enforcement war to avoid the enforcement of the Awards. This term is borrowed from the judgment of Andrew Smith J in the case of *Nomihold Securities v Mobile Telesystems Finance* [2012] 1 Lloyd s Rep 442. Whilst Counsel for CNG instructed to act in this application may not agree with this description of CNG s actions, CNG s own counsel in one of the hearings before the Tribunal in the Original Arbitration, on 22 April 2024, appeared to be less enthusiastic in defending the relentlessness of the steps taken by CNG, on the basis that it should only be penalized in costs. His submission to the Tribunal was as follows: I am also acutely aware that you are likely fed up with how my client is behaving both in and outside of this arbitration. To this I say to you that every litigant should be entitled to take any points as are available to them in law, and if they take them wrongly or they take them in a hopeless situation, most legal systems, and certainly the BVI and Hong Kong that are relevant to us in this case, will punish that litigant in costs. Costs should be the extent of punishment. Bad behavior should not be punished by removing other fundamental procedural rights. As part of this enforcement war, CNG has initiated a series of other related arbitrations against the G Parties and SIL. This is apart from the steps taken to (unsuccessfully) resist enforcement of the Awards obtained by the G Parties, in Hong Kong and in the BVI where SIL is incorporated, leading to contempt proceedings in both jurisdictions with the G Parties claiming that CNG is in contempt of court by its failure and refusal to comply with the relevant Awards and orders made by the courts in recognition of the Awards. Prior to the Bribery Arbitration referred to in the Stay Summonses, the other related arbitration proceedings commenced by CNG against the G Parties and SIL are:
 - (1) HKIAC/A 24085 commenced on 5 April 2024, seeking SIL declaration of a dividend in favor of CNG, and alternatively claiming unjust enrichment (Dividend/UE Arbitration); and

- (2) HKIAC/A 24269 commenced on 4 October 2024, by which CNG sought rescission of the SHA and SBA, and damages for alleged fraudulent misrepresentations by the G Parties as to the amount of mineral resources in the project (Misrepresentation Arbitration). Both these arbitrations have now been consolidated into the Original Arbitration. The substantive hearing of the Dividend/UE Arbitration took place in October 2025, and a hearing on a preliminary issue is due to take place in February 2026 in the Misrepresentation Arbitration. In the interim, hearings on quantum have taken place in respect of PFA 2 and PFA 4, with awards pending. According to the G Parties, the total value of these claims exceed US\$2 billion including interest. Whilst the proceedings continue, the G Parties claim that CNG has been systematically, and in disregard of the Awards, stripping SIL of its assets, preventing the G Parties to take and exercise control over SIL, obstructing the registration of the Share Transfer in the name of the G Parties, and failed to comply with orders made by the BVI court to repatriate SIL funds and to return same to SIL (Repatriation Orders). On 16 July 2025, the BVI court ordered the rectification of SIL register to reflect the relevant G Party as 100% registered shareholder, and further found CNG to be in contempt of court for deliberately breaching the Repatriation Orders, with a fine of US \$2.5 million imposed on CNG. This Court has not been referred to any evidence that the fine has been paid, or that its contempt has been purged. CNG has apparently appealed against the finding of contempt. The enforcement war is further demonstrated by the description used by the BVI Court in the contempt proceedings, when the learned judge referred to the steps taken by CNG as follows: There are only a few cases I have come across where this type of scandalous and deliberate conduct, designed to abuse the process of this Court, has been so blatant. It was on 24 February 2025 and 21 March 2025 that this Court made the Enforcement Orders, whereby leave was granted to the G Parties to enforce PFA 1 and PFA 3 as judgments of the Court. Not long thereafter, on 8 April 2025, CNG issued the original summons for stay of enforcement, on the original ground that compliance with the Enforcement Orders was impossible due to a receivership order over the SIL shares. After the BVI Court ordered the rectification of SIL s register on 16 July 2025, CNG ground for the stay had to be, and was, abandoned. However, on 26 June 2025, CNG applied to amend the Stay Summonses, to introduce new materials in support of the ground that the Enforcement Orders should be stayed as there were investigations by the NSC into the G Parties bribery of Mr A (), who was at the time of the negotiations for the SPA and the SHA between 2010 and 2013 the Deputy Manager in the Resources Development Department of the CNG Group, and the Manager/ Deputy Manager in the Overseas Resources Development Department of the CNG Group (Bribery Allegations). CNG has separately issued summonses to stay the enforcement of two costs orders made against CNG, pending the resolution of the Bribery Arbitration. On 23 July 2025, CNG then issued a Notice of Arbitration to commence the Bribery Arbitration. For the determination of the disputed applications now before this Court, it is important to consider the claims made and the relief sought in the Bribery Arbitration. The essential issue is whether CNG should be permitted to pursue the Bribery Arbitration, and if yes, whether the Enforcement Orders should be stayed pending its determination. The Amended Notice of Arbitration The Notice of Arbitration was first served in HKIAC/25187 on 23 July

2025. CNG has emphasized that that Notice was re-amended on 16 December 2025, and that it is the Re-Amended Notice of Arbitration which this Court should be concerned with for the purpose of the current disputes. For convenience, the Re-Amended Notice of Arbitration will be referred to hereinafter as the . The claims advanced in the NOA are referred to by Counsel for CNG as the Rescission/Damages Claim and the Set Aside Claim . It was emphasized that these are plainly separate and distinct, which can be made independently of one and other, that each may succeed with or without the other, and that the Court should not grant any injunction against the continuation of either of these claims. On the part of the G Parties, it was contended that the claims made in the NOA are a collateral attack against the Awards; constitute an impermissible recourse against the Awards when an application to set aside the Awards should have been made under section 81 of the Arbitration Ordinance (Ordinance) within the 3 months time limit set out, which application had been made in April 2023 and was dismissed by the Court, and any further application to set aside under section 81 is now out of time; and are otherwise vexatious, oppressive and an abuse of process. Before dealing with the parties contentions on the effect of the Bribery Arbitration and whether it should be allowed to proceed, I turn first to the details of the pleading in the NOA. The NOA first set out the SPA and the SHA made between the parties in relation to the Project, and the Awards obtained by the G Parties in the Original Arbitration. At paragraph 2A of the NOA, CNG states that it rescinds and disaffirms the SPA and the SHA . At paragraph 4 of the NOA, CNG pleads its case on the alleged bribery, as follows: It is the case of CNG that the SIL Transaction, the SPA, and the SHA were procured by and/or are tainted by the fraudulent acts of the G Parties, specifically their continued bribery of at least CNG s lead negotiator in the SIL Transaction, XXXXXX (Mr XXX), via an agent, Mr XXXXX (). The bribery was effected by sham consultancy agreements between Mr XX s corporate vehicles and the G Parties, which were never disclosed to CNG and pursuant to which significant fees (i.e. bribes) were channelled from, or promised to be paid by, the G Parties to at least Mr XXX via the conduit or white glove , Mr XX. Further, Mr XXX was a key witness in the Original Arbitration and neither the historical nor continued bribery of (at least) him was revealed to the tribunal presiding over it, such that the Impugned Awards and associated costs and interim orders in the Original Arbitration (as well as subsequent enforcement orders) were also tainted by fraud and bribery. According to paragraph 6A of the NOA, CNG s investigations into the circumstances giving rise to the Project and the Awards are continuing, and it reserves the right to provide additional particulars of any further irregularities affecting these matters. CNG s pleading on the Awards is at paragraph 45, and is set out below:

45. In relation to the Impugned Awards specifically, the G Parties bribery of Mr XXX via Mr XX had a material impact on both the shape and outcome of the Original Arbitration and was an operative cause of the Impugned Awards, in that: 45.1A But for the bribery of at least Mr XXX, CNG would not have entered into the SPA and SHA and consequently the Transfer Notice. 45.1B Had XXX or the G Parties revealed the bribery in the Original Arbitration those proceedings would have taken a very different course and it is highly unlikely that the G

Parties would have been granted the relief that was ordered. As a result, the Tribunal in the Original Arbitration was misled and made its decisions in ignorance of the true state of affairs and in the belief that the agreements were valid and binding, as opposed to tainted by bribery and fraud. 45.1 Mr XXX was the person who participated in formulating CNG's litigation strategy in response to the Original Arbitration generally. 45.2 Mr XXX was the key witness for CNG whose evidence CNG depended on in substantiating its case in the Original Arbitration. In particular, Mr XXX submitted two witness statements in the Original Arbitration, which were critical to CNG's case as to how the SPA and SHA came to be negotiated (including the ROFR clause which went to the heart of the 1st Partial Award). 45.3 Mr XXX's impact on the Original Arbitration is as much evidenced by the critical omissions in his testimony as by the actions and statements he made in the course of managing the SIL Project and during the Original Arbitration:

- (a) Mr XXX failed to disclose the Purported Consultancy Agreement with Mr XX, let alone its true purpose: a front for the payment of bribes by G to Mr XXX to procure CNG's entry into the SIL Transaction.
- (b) Mr XXX failed to disclose that under terms of the Purported Consultancy Agreement he was still due to earn (via Mr XX) a substantial fee (or rather, bribe) in the form of a profit interest payment and that therefore he remained in G's pocket throughout the management of the project up until today, including throughout the course of the Original Arbitration.
- (c) Mr XXX made a number of statements that were relied upon by G in support of its claim that CNG breached its extensive exploration obligation, which the Tribunal then found CNG to have breached in the 2nd Partial Award.:
 - (i) During an SIL board meeting on 17 June 2015, Mr XXX stated that [t]he management should enhance the exploration as it is the weak sector of their work. (ii) During an SIL board meeting on 25 June 2018, Mr XXX again stated that SIL needs to enhance the exploration work to anchor new resources to support the long term development of the company.
- (d) There are strong reasons to suspect that Mr XXX sent or arranged to be sent a confidential Investigation Report about the copper ore resources of SIL in Congo (Brazzaville) dated 23 October 2010 to G because there is no other credible explanation as to how G obtained this report. G subsequently leveraged data from this report against CNG in their extensive exploration claim (i.e. the subject matter of the 2nd Partial Award) to assert that CNG had acknowledged substantial underground resources of the SIL Project. However, CNG disputes the legitimacy of G having obtained and relying on the report in the first place and has reason to believe that it was supplied to G by Mr XXX on the basis of the bribes he received.
- (e) Critically, the failure to disclose the above matters deprived CNG of a fair hearing, as it could not raise defences based on fraud and bribery in the course of the Original Arbitration. In particular, the fraud and bribery tainted the underlying SIL Transaction and the arbitral process itself. Had CNG been aware of the bribery from the time of its inception, that would have changed CNG's course of action. CNG would have exercised its right to rescind the SPA

and SHA. As regards the Original Arbitration, CNG would not have called Mr XXX as a witness and would have altered the way in which it approached the arbitration, and the tribunal would have assessed the credibility of the witnesses (and the G Parties) differently. In relation to the G Parties, both Mr XXXXXX and XXXXXX are implicated by the evidence in the Consultancy Agreement arrangements - they are senior personnel who were key G witnesses in the Original Arbitration; their involvement in the bribery and their non-disclosure of such bribery in the Original Arbitration is a relevant factor in impugning the Impugned Awards. Pertinently, CNG pleads at paragraphs 46 and 46A as follows:

46. By reason of the G Parties fraudulent acts and bribery of at least Mr XXX in connection with procuring the SPA and the SHA (which would entail acts of dishonest assistance, bribery, procuring breach of contract and unlawful means conspiracy), (a) the SPA, the SHA are tainted by bribery and are liable to be, and have been, rescinded, avoided and/or set aside as appropriate; and (b) CNG is entitled to damages and/or equitable compensation, restitution and an account of profits against the G Parties. 46A Further, by reason of the G Parties fraudulent acts and bribery of Mr XXX in the Original Arbitration, the Impugned Awards and associated costs and interim orders in the Original Arbitration (as well as subsequent enforcement orders) are liable to be avoided and/or set aside. (Emphases added) The Damages Claim is in fact particularized at paragraph 47 of the NOA. For better understanding of the submissions made by Mr Wong SC on behalf of CNG, the pleading at paragraph 47 is set out below with the amendments made, and showing the deleted parts of the pleading as a result of the re-amendments of December 2025:
47. Loss and damage incurred by CNG by reason of the G Parties wrongful acts include but are not limited to: 47.1A Losses flowing from expenditure and investment (including management, employment, financing, operational and other expenses) in connection with and as a result of the SIL Transaction. 47.1 Legal, administrative and investigatory expenses incurred by CNG in dealing with the Original Arbitration (including CNG's counterclaims in the Original Arbitration) and subsequent court enforcement proceedings against the G Parties across various jurisdictions; 47.2 Legal, administrative and investigatory expenses incurred by CNG in dealing with the Congolese government and Congolese court proceedings; 47.3 Losses due to the difference between the price paid or payable by CNG under the SPA and SHA and the real value of the Subject Shares Diminution in value of the mining business and project under the SIL Transaction; 47.4 Loss in profits and business opportunities payable on alternative transactions into which CNG would have entered but for the bribery of Mr XXX; If 47A. Insofar as the SPA, the SHA and/or the Impugned Awards are not set aside, loss any sums paid and/or benefits advanced by CNG to the G Parties are liable to be restored to CNG whether by reason of the value of the Subject Shares. unjust enrichment or otherwise. By way of relief, CNG seeks the following in the Bribery Arbitration: In relation to the SPA and SHA specifically: 48.1 48.1A A declaration that the SPA and the SHA were procured and/or are tainted by fraud and bribery on the part of the G Parties; and have been or are liable to be rescinded and set aside; and/or 48.1B An order rescinding and setting aside the SPA and SHA with such ancillary and consequential relief as

is appropriate, including restitution and/or an indemnity in respect of all benefits received by the G Parties and all payments made or liabilities or obligations assumed by CNG under the SPA and SHA, including by virtue of CNG's investment and services set out at paragraph 33A above; and/or 48.1B1 Restitution in the amount of the bribes; and/or 48.1B2 Damages and/or equitable compensation to be assessed for all losses, including consequential loss, suffered by CNG directly flowing from the entry into the SPA and the SHA induced by bribery (namely, the losses at paragraph 47 above) and/or; 48.1B3 An account of profits earned by the G Parties by reason of their dishonest assistance of Mr XXX's breaches of fiduciary duty; and/or 48.1C Such orders as are necessary to cause the G Parties to take all necessary steps to reverse the effects of the SPA and the SHA; and/or 48.1D A declaration that the Subject Shares are subject to a lien in favour of CNG pending the full and final execution of the relief sought hereunder; and/or In relation to the Impugned Awards specifically: 48.1 A declaration that the Impugned Awards were procured and/or tainted by fraud and bribery on the part of the G Parties; and/or 48.2 An order that the Impugned Awards be set aside, consequential to paragraph 48.1 above; and/or 48.3 An order that the G Parties be enjoined from relying on or enforcing the Impugned Awards, including any orders already obtained from the Hong Kong or BVI courts for enforcement of the same; and/or 48.4 An order that the G Parties take all necessary steps to reverse the effects of any orders obtained from the Hong Kong or BVI courts for enforcement of the Impugned Awards, whether or not such orders have been executed; and/or 48.5 An order that pending the final resolution of this arbitration, the effect of the Impugned Awards be suspended and the G Parties be restrained from relying on or enforcing the Impugned Awards, including any orders already obtained from the Hong Kong or BVI courts for enforcement of the same; and/or 48.6A An order that the G Parties do restore to CNG any value howsoever received (including but not limited by virtue of 47A above) and account for any profits received by reason of their fraudulent and dishonest conduct; and/or In all cases: 48.7 An order that CNG is entitled to set off its claim herein in extinction or diminution of the G Parties purported entitlements (if any); 48.8 Interest (including compound interest where appropriate); upon all sums found due; 48.9 All costs of the arbitration proceedings, including without limitation, all fees and expenses of the arbitration tribunal, all fees of the HKIAC, CNG's legal fees and disbursements and all other costs incurred by CNG in connection with this arbitration, on an indemnity basis; and 48.10 Any other relief that the Tribunal deems just and appropriate. (Emphasis added) On behalf of the G Parties, Counsel argued that looking at the substance of the claims that are made in the Bribery Arbitration, the claim that the Awards should be set aside for fraud, as alleged, and that the alleged bribery permits CNG to rescind the SHA and SPA which underpin the Original Arbitration, is an undisguised attempt to attack and set aside the Awards. It was pointed out that the amendments made to the NOA were only made after the first hearing of the Stay Summonses. In relation to the Awards, the NOA clearly seeks declarations that the Awards should be set aside consequential to the fraud and alleged bribery. In respect of the so-called Rescission/Damages Claims, Mr Yu SC argued that they are simply aimed to set aside the Awards, as they operate on a premise which is fundamentally different and contrary to that

of the Awards. Under the Awards, the SPA and SHA remain valid and subsisting, but in respect of or consequential to the Rescission/Damages Claims, CNG are seeking orders to rescind and set aside the SPA and SHA, with such ancillary and consequential relief as is appropriate, including restitution and indemnity for all benefits received, and such orders as are necessary to cause the G Parties to take all necessary steps to reverse the effects of the SPA and the SHA. The Grounds for the Injunction Application The G Parties fundamental objection to the Bribery Arbitration is that under the Arbitration Agreements contained in the SPA and the SHA, CNG had agreed not only to submit disputes relating to the SPA and the SHA to arbitration in Hong Kong, but had further agreed to accept Hong Kong as the seat of arbitration and that the Hong Kong courts should have exclusive supervisory jurisdiction over any challenge that may be made to the awards made in the arbitration (pursuant to section 81 of the Ordinance and Article 34 of the Model Law). It is accordingly a breach of the Arbitration Agreement to challenge the Awards in any other forum, whether by way of a fresh arbitration, or otherwise. This has been referred to as the Contractual Ground of the G Parties Injunction Application. Counsel for the G Parties contend that the breach of the Arbitration Agreements is particularly egregious in this case, because the exclusive recourse against an arbitral award as provided for in section 81 must be made within a strict 3 month time limit, and CNG has already attempted but failed to set aside the Awards within that time. According to the G Parties, the Bribery Arbitration is a transparent attempt at resurrecting a challenge to the Awards, and a blatant attempt to circumvent the statutory regime provided for in section 81 of the Ordinance, such that the Injunction Application should be granted to restrain such egregious breach and to protect the rights of the G Parties under the Arbitration Agreement. The G Parties also rely on the Abuse Ground to support the Injunction Application. It was argued that the claim to set aside the Awards on the ground of alleged fraud/bribery is:

- (1) collateral attack abuse, as it seeks to collaterally attack the Awards of the Tribunal and the judgment of the Court to enforce the Awards;
- (2) inconsistency abuse (citing *Re Shun Tak Holdings Ltd* [2009] 5 HKLRD 743, paras 83-19), since CNG has already affirmed the SHA and SPA, inter alia because of its position taken in the related arbitrations, and cannot be permitted to raise the alleged bribery; and
- (3) Finzi abuse (relying upon *Finzi v Jamaican Redevelopment Foundation Inc* [2024] 1 WLR 541), because CNG's claim is based upon materials and evidence which could have been raised in the Original Arbitration, and it has failed to show why the relevant evidence now relied upon could not have been obtained earlier, with reasonable diligence. The Contractual Ground Counsel for CNG maintained that section 81 of the Ordinance is plainly inapplicable to the claims made in the Bribery Arbitration, and it is not a breach or contravention of section 81 to commence and pursue such claims. In summary, the submissions made by Mr Wong for CNG are as follows:

- (1) Fraud gives rise to a separate and distinct cause of action. Fraud unravels all, vitiates judgments, contracts and all transactions whatsoever (referring to *Takhar v Gracefield Developments Ltd* [2020] AC 450, *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] 1 All ER (Comm) 349, *Federal Republic of Nigeria v Process Industrial Development Ltd* [2021] 1 Lloyd s Rep 121, and *Lazarus v Beasley* [1956] 1 QB 702).
- (2) Section 81 does not preclude a fresh cause of action independent of the award, and does not preclude a fresh arbitration (which is not a recourse to a court) to set aside an award for fraud.
- (3) By its express wording, section 81 (adopting Article 34 of the Model Law) is only concerned with an application for setting aside arbitral awards, within a strict time limit.
- (4) The effect of Article 34 is to regulate only recourse to a court to set aside awards. Paragraph 45 of the Explanatory Note to the Model Law (Explanatory Note) refers to the regulation of recourse , as meaning the means through which a party may actively attack the award .
- (5) Paragraph 45 of the Explanatory Note also refers to Article 34 as regulation of recourse in any procedural law of the State, and that it is expressly confined to active challenges to the validity of the award.
- (6) Accordingly, Article 34 does not extend to regulating the pursuit of independent causes of action that arise out of a particular contract or transaction or tort. An action to set aside an earlier judgment for fraud is not a procedural application, but a legal cause of action - which is independent of the cause of action asserted in the earlier proceedings, and relates to the conduct of the earlier proceedings, and not to the underlying disputes (*Takhar and Lu Yongliang v Bank of China Ltd* [2020] HKCA 1089).
- (7) There is accordingly nothing in section 81 which restricts CNG from arbitrating its claim to reopen a previous award tainted by bribery/fraud, as it is not a direct or active attack against any of the Awards, nor a recourse to the court. The claim of rescission has not been determined by the Tribunal in the Original Arbitration or any other arbitration, and is a claim which falls within the scope of the Arbitration Agreements.
- (8) Particularly in respect of the Rescission/Damages Claims, these do not seek or require the Awards to be set aside in order to succeed. It was highlighted that CNG does not, by the NOA, seek to recover losses flowing from the obtaining of the Awards themselves (evidenced by paragraph 48.1B2, and the deletions at paragraphs 47.1 and 47.2 of the NOAA). There is accordingly no recourse against the Awards within the meaning of section 81, and CNG does not seek by the Rescission/Damages Claims to actively attack any of the Awards. As part of his submissions, Counsel for CNG has highlighted section 3 of the Ordinance which sets out the object and principles, and section 3(2) which states that the court should interfere in the arbitration of a dispute only as expressly provided for in the Ordinance. Despite Mr Wong s endeavors, I am not persuaded that CNG is entitled to pursue the claims in the Bribery Arbitration on the basis that there is no breach of or non-compliance with section 80 of the

Ordinance. Section 81 is contained in Part 9 of the Ordinance which provides for Recourse Against Award . The relevant parts of section 81(1) are set out below:

- (1) Article 34 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5) Article 34. Application for setting aside as exclusive recourse against arbitral award Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article. Article 34(2) sets out the grounds upon which an award may be set aside by the court, and Article 34(3) provides that the court does not have jurisdiction to set aside or remit an award on the ground of errors of fact or law. These provisions are not material to the present application. Although section 2(4) of the Ordinance provides that a note located in the text of this Ordinance, a section heading of any provision of this Ordinance or a heading of any provision of the UNCITRAL Model Law has no legislative effect, the subsection recognizes that they are for reference . It is clear from section 81 that the application for setting aside provided for is the exclusive recourse which may be made against any arbitral award. Counsel for both parties have referred to paragraph 45 of the Explanatory Note. This states as follows: The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34(1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34(3)). In regulating recourse (i.e., the means through which a party may actively attack the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades). The Model Law is aimed at providing a sound basis for the desired harmonization and improvement of national laws (paragraph 2 of the Explanatory Note). The rationale behind Article 34 is to harmonize the national laws of the party states with regard to the manner in which an arbitral award may be challenged in enforcement. It therefore provides for the sole recourse , which is by an application to a court for setting aside. Counsel for CNG argued that paragraph 45 of the Explanatory Note refers to allowing one type of recourse to the exclusion of any other recourse regulated in any procedural law of the state , and that this supports his submission that the recourse is only a mechanism of procedural law . In Mr Wong s submission, there was no intention to exclude a legal cause of action for challenging an award. As pointed out by Counsel for the G Parties, CNG has not been able to refer to any decided cases of any court to support any of the restrictive reading it propounds for Article 34(1). In view of the stated purpose of the Model Law, the needs and desirability of uniformity of the law of arbitral procedures, with the emphasis and preference for finality and expediency of the arbitral process, I accept the submissions made for the G Parties, that there is no justification to construe Article 34, and its reference to recourse , narrowly. Article 44 of the Explanatory Note reflects the concern of those involved in international commercial arbitration: The disparity found in national laws as

regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based. Bearing in mind the concerns Article 34 was meant to address, the intention behind Article 34 must be that in the interests of universal clarity and certainty, and to advance the finality of arbitral awards, the setting aside application on the grounds and in the manner set out in Article 34 must be the only permissible method to challenge an arbitral award once it has been made. The manner is by way of an application, which is made to a competent authority designated to be the Court of First Instance in Hong Kong (section 13(5)(b) of the Ordinance), and the application is for the award to be set aside, on the grounds exhaustively set out in Article 34(2), and within the time period of 3 months set out in Article 34(3). If Article 34(1) only has effect to govern the procedure, but not the cause of action, as Mr Wong contended for CNG, that would mean that it would be open to any party to avoid Article 34(1) by commencing an action before a court to obtain (for example) a declaration that an award is null and of no effect, by reason of any vitiating factor such as mistake or misrepresentation, or that a party is otherwise not bound by the award, by relying on a cause of action for vitiating the award or the contract leading to the award, and distinguishing it from an application to set aside the award normally made under section 81 of the Ordinance (which by procedure is governed by Order 73 Rules of the High Court, necessitating the issue of an Originating Summons and for evidence to be filed by affidavits). That cannot be the intention when the purpose of and rationale for Article 34 is to provide for one standard and exclusive manner of recourse for uniformity purposes. Nor do I accept that recourse should only cover a direct attack, and not any form of indirect attack, against the award. As in any case before the court, the focus should be on the substance of the application and dispute, and not how it is framed or articulated in technical lawyers jargon. The real issue for determination by the Court is whether the substance of the application is to impugn the award and seek to relieve the parties from their obligations and rights under the award. I agree with Counsel for the G Parties, that any application or action to resist recognition or enforcement of the rights conferred and obligations imposed by an award should be considered as a recourse, and that a broad definition of recourse is necessary to give effect to the statutory purpose of harmonization. On behalf of CNG, Counsel further made the distinction that Article 34 only provides for exclusive recourse before a court, and it follows that Article 34 does not prohibit further recourse before a tribunal. He referred to paragraph 45 of the Explanatory Note, which states: Article 34 is limited to action before a court (ie an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades). On that basis, it was argued that Article 34 itself envisages that where parties agree, there can be a second recourse to the arbitral tribunal. It is indisputable that the Arbitration Agreement contained in the SPA and the SHA does not contain any provision which provides for appealing against an award to a

tribunal of second instance, nor for any reference to a second tribunal to reopen a previous award. Nor can I, as a matter of construction, accept that the arbitration clause in question provides implicitly for the parties ability to reopen and seek the setting aside of the Award after the statutory time limit of 3 months has expired. Such implication cannot be made when it is clearly against the express statutory provisions. Counsel for CNG has repeatedly highlighted the fact that in this case, CNG is seeking to challenge and to set aside the SHA and SPA on the ground of fraud, which it only discovered after the Awards were issued. The claim of fraud can, of course, be a basis to set aside an award under Article 34(2), on the ground of public policy, or invalidity of the arbitration agreement if applicable. Fraud itself does not take the recourse outside the scope of Article 34(1). Further, the fact that there is a strict time limit imposed under Article 34 does not provide a reason for an alternative recourse against an arbitral award, as CNG contends. Mr Wong argued that Article 34 should not be interpreted or enforced as a Thieves Charter, which would be the case if a party procures an award by fraud, and can be allowed to conceal its dishonesty for the statutory period of 3 months in order to render the award unassailable. However, the authorities are clear, that the three month period for a challenge to be made under Article 34(1) is absolute, and cannot be extended by the court even where fraud is alleged (*AW v PY* [2022] HKCFI 1397, *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 1 SLR 1045). Pertinently, at paragraphs 82 and 97 of her judgment in *Bloomberry*, Judith Prakash JCA held:

82. While the appellants emphasis on fraud and corruption may provide a strong policy reason in favor of the court s retention of discretion to extend the time limit where such grounds are present, the fact is that Art 34 (3) of the Model Law is clear on its face and does not suggests that any carve-out is available for fraud or corruption, or indeed any ground at all
97. The appellants argued that the absolute time limit in Art
- (3) of the Model Law would cause absurd and unjust results . We do not agree. While the very mention of fraud tends to induce an emotive response aimed at avoiding injustice, in the context of arbitration awards substantial injustice may be avoided despite the existence of fraud (Emphasis added) To construe Article 34 and the time limit provision in the way contended by Mr Wong (as not applying in the case of fraud not discovered within 3 months) would create an unacceptable and indefinite uncertainty in the status of an arbitral award. It will mean that an award issued at the conclusion of the arbitration is final if there is no application to set it aside within 3 months, or if any such application is dismissed, BUT that the validity and finality of the award is still subject to there being no action or claim made, any time thereafter, that the award should be set aside or rendered invalid and of no effect by reason of fraud, or illegality, or other vitiating factors, which may be discovered any time after the award. This is fundamentally contrary to and undermines the primal importance of enforcing and upholding arbitration agreements and awards as binding, final, and conclusive. Parties to an arbitration, and third parties dealing with property the subject matter of the arbitration, will not be able to deal with and manage their affairs on the basis

of the findings made in the award with certainty and finality. As opposed to what Mr Wong claims to be a Thieves Charter if claims of fraud are shut out by the 3 months time limit, it is no less desirable to create a situation which enables a losing party in an arbitration to make yet another attempt to attack the award by looking for any possible defects in the arbitral process not hitherto considered to be a serious irregularity, and then wave the fraud banner to get around the 3 months time limit imposed under Article 34, by claiming that the irregularity was hitherto unknown and that the party had been deceived. In my judgment, the finality and effective enforcement of arbitral awards will suffer a serious blow if the above should be permitted. Any injustice to victims of fraud which remain undetected in the 3 months after the issue of the award can only be addressed by either amendment to the Model Law or to section 81 of the Ordinance. My conclusion is that the legislative intent is clearly opposed to CNG's contention. The preference for finality, consistency and harmonization under the Model Law weighs against any suggestion that the Court retains the power or discretion to extend the 3-month time limit, even where fraud is discovered after the award, and in this case, the time limit has long expired for CNG. On the facts, even after the alleged fraud or bribery was discovered, there had been delay in the commencement of the Bribery Arbitration and the application for stay, which delay has not been satisfactorily explained. This will be dealt with later in the Judgment. As set out in the summary in the preceding paragraphs of this Judgment, the NOA claims that the alleged bribery was an operative cause of the Awards. It was claimed that but for the alleged bribery, CNG would not have entered into the SPA and SHA and the Transfer Notice, that if the alleged bribery had been revealed in the Original Arbitration, the proceedings would have taken a very different course, and the Tribunal was allegedly misled. Accordingly, it is claimed that the Awards, the associated orders in the Original Arbitration and the enforcement orders of the courts are liable to be avoided and/or set aside. The relief claimed includes a declaration that the Awards were procured and/or tainted by fraud and bribery, and should be set aside, with the effects of the orders reversed, and that the G parties should be enjoined from enforcing the Awards. These are obviously claims which attack the Awards, and CNG are seeking by the Bribery Arbitration to avoid the consequences of the Awards and the rights and obligations created by the Awards. The Set Aside Claim in the Bribery Arbitration is without doubt a direct attack against the Awards, otherwise than by way of an application to the Court for setting aside. The application by the Bribery Arbitration was initiated in July 2025, long after PFA 1 was issued on 8 February 2023, PFA 2 issued on 26 June 2023 and PFA 3 issued on 21 October 2023. It does not cause injustice to the claimant in the arbitration, and the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process. There is no question of interference with a foreign court, for there to be comity concerns against the grant of such injunctions (*Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389, and the more recent case of *Sodzwiczny v Smith* [2024] 1 Lloyd's Rep 466, where the court observed at paragraph 65 (i) that considerations of comity bear less heavily). There are 3 categories in which AAI applications are often made, and these are identified in the judgment of Foxton J in *Sodzwiczny*. On behalf of the G Parties, Counsel pointed out that the 1st category

corresponds to the Contractual Ground relied upon by the G Parties, whereas the 3rd category corresponds to the Abuse Ground. In his judgment, Foxton J explained that the 1st category is essentially the equivalent of the contractual anti-suit injunction, and the strong presumption in favor of holding parties to the promises is said to be equally applicable. At paragraph 67 of the judgment, the court explained in respect of categories of AAIs which fall within category 1, as follows: However, there is a further category of AAIs which have been rationalised on the basis that the applicant is protecting a contractual right arising from the agreement to arbitrate, namely where the parties have agreed that an arbitration will have its legal seat in England and Wales, and a losing party then seeks to challenge the award otherwise than in accordance with sections 67 to 70 of the 1996 Act (a Non-Compliant Challenge): It is well established that parties who agree to arbitrate with a seat in England and Wales agree to the supervisory jurisdiction of the English courts and, as a result, agree that any challenge to an award can only be made in the courts of England and Wales in accordance with the provisions of the 1996 Act (Emphasis added) The court in *Sodzwiczny* referred to the decisions in *C v D* [2007] 2 Lloyd s Rep 367, *Noble Assurance Co v Gerling-Konzern General Insurance Co* [2008] Lloyd s Rep IR 1, *Sheffield United Football Club v West Ham United Football Club plc* [2009] 1 Lloyd s Rep 167 and *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] 1 Lloyd Rep 442. In *C v D* (2007), the English court referred to *A v B (No 2)* [2007] 1 Lloyd s Rep 358, which held that where the governing law of the agreement to arbitrate is English law, there is a contractual promise made by each of the parties, to treat the courts of the seat of the arbitration as having exclusive supervisory jurisdiction. At paragraph 16 of his judgment in *A v B (No 2)*, Colman J stated that parties to an arbitration agreement governed by Swiss law and stating the seat of the arbitration to be Geneva were under an obligation to refer to the Swiss courts any issue between them going to the supervisory jurisdiction in relation to the arbitration, including the arbitrator s decisions as to his own competence. He further observed: To have invoked the jurisdiction of the English courts for this purpose was as much a breach of the agreement as the attempt to invoke the jurisdiction of the English courts for the purpose of determining the parties disputes as to the substantive issues in the arbitration, including those which under Swiss law fell within B s Kompetenz-Kompetenz jurisdiction. Were it otherwise, the whole structure of the supervisory jurisdiction of the seat of an international arbitration would be completely undermined. (Emphasis added) Cooke J explained, at paragraph 53 of his judgment in *C v D*:

53. Whilst a challenge to the award in accordance with the terms of the arbitration agreement (here the Arbitration Act 1996) or in accordance with the law of the agreed supervisory jurisdiction (here English law) does not constitute a breach of contract, the attempt to invoke the jurisdiction of another court is such a breach, of the contract to arbitrate, the agreement to refer and the agreement to the curial law. Such a challenge usurps the function of the English court which has power to grant injunctions to protect its own jurisdiction and the integrity of the arbitration process. In such a case there is an infringement of the legal rights of C (both contractual and statutory rights) under English law and an abuse of the process of

this court in the usurpation of its exclusive jurisdiction to supervise arbitrations with their seat in this country.

54. When Colman J in *A v B* (No 2) at page 363 stated that the whole structure of the supervisory jurisdiction of the seat of an international arbitration would be completely undermined, unless there was exclusive jurisdiction in the court of the seat of an international arbitration, it was suggested that he was overstating the case. The difficulties which would arise, however, if there was not such exclusive jurisdiction or if the exclusive jurisdiction agreement was ignored, are manifest. No challenge has been made to the partial award in this country and it is to be regarded as binding therefore in this jurisdiction. If proceedings were brought in New York and the challenge was successful there, what would a third party country's courts do when faced with an application to enforce the award? (Emphasis added) In *C v D*, therefore, the AAI was granted to restrain the defendant's intended application to set aside the award in New York, and on appeal, the injunction was upheld, with the Court of Appeal observing (at paragraph 17 of the judgment) that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award. In *Noble Assurance Co v Gerling-Konzern* (2007), the defendant Gerling lost in an arbitration which was seated in London, and commenced fresh proceedings before the court in Vermont to (1) seek rescission of the underlying insurance contract, and (2) vacate the arbitral award, claiming that there was misrepresentation, non-disclosure and bad faith in the arbitration. Whilst the injunction to restrain the Vermont proceedings was not continued by the English Court, as it considered that it was more appropriate to make summary declaratory judgments as to the interpretation, scope and validity of the award issued, the Court considered that it did have jurisdiction to grant an injunction against Gerling to protect the rights and interests of Noble in the English proceedings. This was because the whole object of the Vermont proceedings was to undo the finding of the arbitrators as to Gerling's obligation to indemnify Noble under the reinsurance contract, and the issues sought to be raised in Vermont had to a large extent been decided by the English court, or ought properly to have been raised there. The Court pointed out that a collateral attack on a binding judgment or award of a properly constituted tribunal is capable of being oppressive conduct. Considering that the issue identified for decision in the arbitration was whether or not the Gerling contract provides coverage, and a rescinded contract does not provide coverage, it would have been open to Gerling to raise that point before the arbitrators. By electing not to run a misrepresentation or non-disclosure case in the arbitration when it could have done so, and by informing the arbitrators that it would not run such a case, the Court considered that the Vermont proceedings were properly to be described as vexatious, oppressive, an abuse of process and/or unconscionable. The observations made in *Noble* are pertinent to the present case, as CNG is seeking by the Set Aside Claim and the Rescission Claim to undo the findings of the Tribunal as to CNG's obligations under the SHA/SPA, thus rendering the Bribery Arbitration oppressive and abusive. CNG made the point that it was not open to it to raise either the Set Aside Claim or the Rescission/Damages Claim in the Original Arbitration, since it did not have knowledge of the alleged bribery until much later. This leads to the question whether

there was delay after it had made the discovery, and whether CNG had by steps taken in the Original Arbitration affirmed the SPA and SHA (which will be dealt with later in this Judgment). In *Nomihold* (2012), the Court took a similar approach when it dealt with a party's new arbitration proceedings to invalidate an award on the ground of misrepresentation, mistake and breach. In that case, the tribunal had made an award ordering MTSF to pay to Nomihold US\$170 million under an SPA, and rejected the claims made by MTSF with regard to misrepresentation, mistake, breach or failure of consideration. MTSF then submitted an Amended Request in another arbitration, claiming that Nomihold was in the business of money-laundering, had made false representations and was in breach of warranties under the SPA, that MTSF was not obliged to carry out the award, and sought damages as a result of the money-laundering complaints. It made further claims for rescission, damages on the basis of unjust enrichment, and a declaration that MTSF be released from any obligation to pay the price due. Nomihold applied to the Court for an injunction to require MTSF to discontinue the new arbitration, on the basis that it sought to be arbitrate matters already determined by the tribunal. In his judgment, Andrew Smith J set out a careful and considered analysis of the court's jurisdiction and powers to grant the AAI sought, with reference to the decisions in *C v D* and *A v B*, and with due consideration given to section 9 of the 1996 Arbitration Act, which is equivalent to section 20 of our Ordinance, and states that where an action has been brought in a matter which is the subject matter of an arbitration agreement, then the court before which such action is brought must refer the parties to arbitration (unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed). The conclusion of the Court was set out from paragraphs 44 and 45 of the reported judgment:

44. I agree with Mr Flynn's submission, therefore, that, if the New Arbitrations proceed, the arbitrators in them would be entitled to determine Nomihold's contention based upon estoppel per rem judicatam, issue estoppel and what it calls the principle of *Henderson v Henderson* (and might more exactly be called the doctrine of *Smith v Johnson*). I cannot see, and it was not suggested, that there is any relevant difference between the ambit of the powers available to tribunals in the New Arbitrations to dispose of claims and the power that a court would have to dispose of complaints on the basis of argument such as Nomihold's re-arbitration complaints including the principle in *Henderson v Henderson*.
45. However, in my judgment that is not enough to establish that the legal proceedings brought by Nomihold are in respect of matters to be referred to arbitration within the meaning of section 9 of the 1996 Act. This expression connotes that the parties agreed that the matters must be referred to arbitration. The objective of section 9 is to ensure that the parties' arbitration agreement is observed and enforced, and a party to an arbitration agreement is entitled to a stay to this end. However, by making the arbitration agreements Nomihold and MTSF also agreed to the supervisory jurisdiction of the English court. So long as its application seeks relief in accordance with that part of the agreements, Nomihold cannot be said to be acting in breach of the arbitration agreements. (Emphasis added) At paragraph 49, His Lordship's observations were as follows:

49. As I see it, the crucial question in determining whether section 9 applies to Nomihold legal proceedings by way of its application is not whether it is in respect of matters covered by the arbitration agreements but whether it is about matters that can also fall to be decided when the court is exercising its supervisory jurisdiction. For this reason I reject Mr Flynn's argument that there would be an inconsistency between the court refusing MTSF's application for a stay and (as is certainly the case) that, unless the arbitration agreement otherwise provides, the court has no jurisdiction under the 1996 Act to dismiss summarily an unarguable claim covered by an arbitration agreement. There is no supervisory jurisdiction (using the expression in its wide sense) for the court to dismiss unarguable claims and so no question of an overlapping or concurrent jurisdiction.
50. As I have said, it is Nomihold's case that the New Arbitrations are part of what it calls MTSF enforcement war to avoid the enforcement of the award, and to challenge it in ways not contemplated by either the arbitration agreements or the 1996 Act; and that they are collateral attacks on the award (such as described by Toulson LJ). It submits that, if this is so, the challenge to the New Arbitrations falls within the purview of the court's supervisory jurisdiction to protect the award and to support its enforcement. I agree with that submission, and so, in my judgment, to the extent that the adjudication of Nomihold's application involves determining the re-arbitration complaints, the court is not precluded by the arbitration agreements from determining them for that purpose. They are not matters to be referred to arbitration, notwithstanding they in themselves are matters properly to be determined in a reference when raised in another context.
51. If I am wrong to recognise an area of overlapping or concurrent jurisdiction so that matters can fall within the compass both of an arbitration agreement and of a (typically implicit) agreement to supervisory jurisdiction, then there is, I think, a different route to the same conclusion which some might prefer. If there is no area of overlap, I would consider it necessary in order to give a proper and workable effect to section 9 to define more specifically the matter to which it refers. Thus, in this case the matter that MTSF contends is to be referred to the arbitrators in the New Arbitrations is whether in view of the First Option Agreement Arbitration and the award they should reject the claims on the grounds of the re-arbitration complaints. Correspondingly the matter that is the subject of the legal proceedings, Nomihold's application, is whether in view of the re-arbitration complaints the court should exercise its supervisory jurisdiction in view of the First Option Agreement Arbitration and the award. The distinction between this approach and that of recognising an area of concurrent jurisdiction, which I have preferred to adopt, appears to me one of arid semantics.
52. For this reason I reject MTSF's contention that Nomihold's application is in respect of a matter which is to be referred to arbitration, and therefore reject its application under section 9. I add that in reaching this conclusion I take no account of the claims that MTSF included in the New Arbitrations but is willing to undertake to the court not to pursue. I also add that it seems to me that, but for the undertakings, it would have been appropriate to

restrain those claims not only by way of exercising supervisory jurisdiction in respect of the award but also to protect the integrity of the orders of Gloster and Burton (Emphases added) For the avoidance of any doubt, the claims which were the subject matter of MTSF s undertaking not to pursue in the new arbitrations were (as recorded at paragraph 23 of the judgment)

- (a) any claim for a declaration (i) that MTSF is not obliged to carry out the award and (ii) that so far as they Award is concerned MTSF is not bound or (b) a claim for an order that MTSF be released from any obligation to pay the purchase price of \$179 million to be paid under the Option Agreement . That was described to be the most blatantly abusive part of the process , but before the conclusion of the hearing MTSF undertook not to pursue such claims. As made clear in paragraph 52 of the judgment, however, the court would have exercised its supervisory jurisdiction to restrain those claims, but for the undertaking offered. Counsel for the G Parties also referred to the decisions in *Minister of Finance v International Petroleum Investment* [2019] EWCA Civ 2080, and *Sheffield United Football Club v West Ham United Football Club plc* [2009] 1 Lloyd s Rep 167. In *Minister of Finance*, a consent award was made in an arbitration, and more than 12 months thereafter, a party commenced a second arbitration to set aside the consent award, on the basis that the tribunal did not have substantive jurisdiction to make it, that the consent award was procured by fraud or was contrary to public policy and should be set aside or declared non-binding. Although the first instance judge allowed the second arbitration to proceed, the Court of Appeal overturned that decision and granted an AAI, emphasizing the public interest involved. In his judgment, Sir Geoffrey Vos referred to section 67 and 68 of the 1996 Act providing for challenges to an award under the statutory regime. Then at paragraph 38 of his judgment, His Lordship made the following observations: The jurisdiction of the court under sections 67 and 68 is therefore founded on the agreement of the parties to an arbitration with a London seat. It is, however, also founded on wider considerations of the public interest. (Emphasis added) His Lordship referred to the balance struck in the Act, between limiting court intervention in arbitral proceedings to those expressly permitted, and the right conferred on parties to challenge awards by making applications to the court on the grounds set out in section 67 and 68, notwithstanding any agreement to the contrary. At paragraphs 43 and 44 of the judgment, Sir Geoffrey Vos explained that the court is performing an important and public function when it determines a challenge made under section 67 or 68 of the Act, as it is acting in the public interest to facilitate the fairness and well-being of a consensual method of dispute resolution. What was stated at paragraph 45 is as follows:
45. It is worth exploring a little further the public interest which is engaged when an award is challenged. It is in the public interest that a valid arbitration award should be recognized and enforced and, in this jurisdiction, such an award may be enforced by making use of the coercive powers of the state to enforce a court judgment. Internationally, an award which is valid in accordance with the law of the seat can be enforced pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the NY Convention), with only limited grounds on which recognition or enforcement may be

refused by the enforcing court. Conversely, it is against the public interest for the powers of the state to be utilized to enforce an award in a case where the arbitrators had no jurisdiction or which is the result of a serious irregularity. Thus, when the court is exercising its supervisory jurisdiction under section 67 or 68, it is deciding whether the award is one which should benefit from the coercive power of the state both in this country and worldwide for its recognition and enforcement.

46. Until a challenge under section 67 or 68 is determined by the court of the seat of the arbitration, the status of the award is uncertain. Some jurisdictions may enforce such an award; others may not. The scheme of the NY Convention is that it is the court of the seat which will determine the validity of the award. For so long as a challenge remains unresolved, there is a risk that the same issue will be litigated in a number of jurisdictions, where enforcement is sought. (Emphases added) I would add that the observations made by Sir Geoffrey Vos above on public interest are apposite to the functions and duties of the courts of Hong Kong as a party to the New York Convention - notwithstanding that the statutory regime under the English Arbitration Act is not identical to that provided for in the Ordinance. The Ordinance which adopts Article 34 in relation to the grounds and exclusive recourse for challenges against an arbitral award is based on the same principles of and the obligations under the New York Convention, with the same emphasis and focus on the finality of arbitral awards and the recognition and support of arbitration agreements and awards. The approach under the Ordinance and the Model Law is the same as that propounded by Sir Geoffrey Vos against the background of the 1996 Arbitration Act, with regard to the court's exercise of its supervisory jurisdiction over arbitrations agreed to take place at the seat. Fraud was raised in *Minister of Finance*, and although the trial judge allowed a second arbitration to proceed, the Court of Appeal overturned that decision and granted an AAI, emphasizing the public interest involved. In *Sheffield United Football Club v West Ham United Football Club plc* (2009), an award was issued in an arbitration which was seated in England, and the claimant succeeded in obtaining an AAI to prevent the defendant from challenging the award before the Court of Arbitration for Sport in Switzerland. In the judgment, the English Court highlighted the important distinction between a dispute as to whether the court should exercise its supervisory jurisdiction, and a dispute as to issues relating to the underlying contract, such as whether there was a breach. At paragraph 40 of his judgment, Teare J explained: As was stated by Lord Hoffman in *The Front Comor* [2007] 1 Lloyd's Rep 391 at para 19 the English courts have for many years exercised a jurisdiction to restrain parties from pursuing foreign proceedings in breach of an arbitration clause. He described such jurisdiction as part of the court's supervisory jurisdiction over the arbitration. Whilst an arbitral tribunal can determine issues of breach between the parties and whilst the remedies available to the tribunal include making orders restraining a party from acting in breach the court nevertheless has its supervisory jurisdiction which includes its powers under section 44 of the Arbitration Act. Moreover, whilst the parties have agreed that disputes between them should be referred to arbitration they have also agreed, by reason of the seat of the arbitration being England, that the English court is the forum which

can exercise a supervisory jurisdiction in support of the arbitration; cf *C v D* [2008] 1 Lloyd's Rep 239 at paragraph 17 per Longmore LJ (Emphasis added) This distinction can also be found in *Nomihold* (2012), where the Court, after referring to the basis of the jurisdiction as found in *A v B*, and *Sheffield United Football Club*, observed at paragraph 32 of the judgment: Unless it is prevented by section 9 of the 1996 Act (corresponding to section 20 of the Ordinance providing for stay of proceedings to arbitration), therefore, the court does have jurisdiction to determine whether the New Arbitrations involve an unlawful attempt to invalidate the award or an impermissible collateral attack upon it, and if it concluded that they do, it has jurisdiction to grant relief to restrain MTSF from pursuing them if it is just and convenient to do so. Counsel for CNG pointed out that CNG does not dispute that the Court has jurisdiction to grant an AAI. However, the above observation of the court is still relevant, because it explains the basis on which the jurisdiction and power of the court is exercised, and what the court's determination involves: namely, to decide whether the new proceedings involve an unlawful attempt to invalidate the award, or an impermissible collateral attack upon it. Whether the Rescission/Damages Claims can be pursued outside Article 34 The observations made by the courts in the cases referred to above are relevant to CNG's contention, that the Rescission/Damages Claims fall within the scope of the parties Arbitration Agreements, and that there is no basis for the Court to restrain the pursuit of these claims since they are patently outside the ambit of section 81 of the Ordinance, and (on CNG's case) outside the jurisdiction of the courts. According to CNG, the Rescission/Damages Claims are properly for determination by a tribunal, the court has no power to strike out these claims on the merits, and in particular, as these claims have not been determined by the Tribunal in the Original Arbitration, there is no issue of *res judicata* involved. The pursuit of the Rescission/Damages Claims cannot be said to be vexatious or oppressive. There is no dispute, that the Arbitration Agreement covers any dispute, controversy or claim arising out of or relating to the underlying SPA and SHA, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to the agreements. Citing *Fiona Trust v Privalov* [2007] Bus LR 1719, it was argued that a dispute as to whether the underlying contract could be rescinded for alleged bribery falls within the scope of the Arbitration Agreement. Dealing first with Mr Wong's reliance on *Fiona Trust*, notwithstanding the fact that the claim made in that action was to rescind the relevant contract on the basis of bribery, there was no prior award made in *Fiona Trust*, and no question of an award being challenged on the basis of the claim of bribery, nor any inconsistency between the claim of rescission and an award on the contract. Further, as Mr Yu pointed out, there is nothing from the judgment of Lord Hoffman in *Fiona Trust* which suggests that on the construction of an arbitration clause which provides for the arbitration of any dispute arising under the contract including the existence, validity, performance, breach or termination of the contract or non-contractual obligations arising out of the contract, any rational businessman would have intended that to mean that any dispute as to the validity of an award made relating to the contract should also be referred to arbitration by the tribunal. Counsel for both parties referred in the course of their submissions to the

2024 judgment of the English Commercial Court in *Sodzawiczny*, where Foxton J carefully considered issues relating to the grant of AAIs in respect of proceedings brought to challenge arbitral awards, the operation of section 9 of the English Act (corresponding to section 20 of the Ordinance on matters which the court is bound to stay to arbitration) in such circumstances, the respective jurisdiction of the tribunal and of the court and circumstances in which such jurisdiction may overlap. The observations made by the learned judge are highly pertinent to the issues raised in argument by the parties in this case. In *Sodzawiczny*, there was (inter alia):

- (1) an arbitration brought by the claimant against Smith, in which 2 final awards were made against Smith;
- (2) legal proceedings brought by Smith in the Commercial Court whereby Smith sought to set aside the 2 awards and another award which had been made in favor of the claimant in an earlier arbitration (which proceedings were struck out as being non-compliant with the 1996 Act for setting aside awards); and then
- (3) a further arbitration commenced by Smith (the impugned arbitration), in which claims were made that the awards had been obtained by fraud. The claimant applied for an AAI, and Smith applied to stay all enforcement proceedings instigated as a result of the relevant awards. The Court refused Smith's application for a stay under section 9 of the 1996 Act, and granted the AAI against Smith to restrain the conduct of the impugned arbitration. On the question of whether there should be a stay of the enforcement proceedings and of the application for the AAI, Foxton J considered the authorities as to how the court is to identify an arbitral matter to be stayed under section 9, noting that it is necessary to focus upon the substance of the dispute, and held as follows (at paragraph 54 of the judgment): Applying that guidance, it is clear that the enforcement of the TPA and Final Award is not an Arbitral Matter. The enforcement of arbitral awards is not a matter for the arbitral tribunal (which becomes *functus officio* to the extent it has issued a final award) but for each court in which enforcement process is commenced: *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich*

[2003] UKPC 11, para 9; *London Steamship Owners Mutual Insurance Association Ltd v Kingdom of Spain (The Prestige)* (Nos 3 and 4)

[2022] 1 Lloyd's Rep 539, paras 118-119; *Xiamen Xinjinqdi Group Co Ltd v Eton Properties Ltd*

(2020) 23 HKFCA 348, para 120. In addition, the TPA and Final Awards have been the subject of orders under section 66 of the 1996 Act, such that they are enforceable as judgments of this court. The status of these section 66 orders, and whether they should be stayed, is a matter falling within the exclusive jurisdiction of this court, not a matter which the parties to the Settlement Agreement agreed to refer to arbitration. (Emphases added) In relation specifically to the application for an AAI, His Lordship referred to *Sheffield United Football Club*, and observed as follows: Teare J held at para 40 that the parties' arbitration agreement did not extend to a dispute as to whether the court should exercise

its supervisory jurisdiction. Were it otherwise that part of the court's supervisory jurisdiction referred to by Lord Hoffmann would usually be subject to a stay pursuant to section 9 of the Act. Moreover, whilst the parties have agreed that disputes between them should be referred to arbitration they have also agreed, by reason of the seat of the arbitration being England, that the English court is the forum which can exercise a supervisory jurisdiction in support of the arbitration. Foxton J also referred to the decision of Andrew Smith J in *Nomihold*, at paragraph 57 of the judgment: He accepted that the arbitral tribunal would have jurisdiction to hear and determine at least some of the applicant's re-litigation complaints (paras 40 and 44), but held that this was not enough to establish that the legal proceedings brought by *Nomihold* are in respect of matters to be referred to arbitration within the meaning of section 9 of the 1996 Act, (para 45), noting: This expression connotes that the parties agreed that the matters must be referred to arbitration. The objective of section 9 is to ensure that the parties' arbitration agreement is observed and enforced, and a party to an arbitration agreement is entitled to a stay to this end. However, by making the arbitration agreements *Nomihold* and *MTSF* also agreed to the supervisory jurisdiction of the English court. So long as its application seeks relief in accordance with that part of the agreements, *Nomihold* cannot be said to be acting in breach of the arbitration agreements. The point is explained precisely by Raphael in *The Anti-Suit Injunction*

- (2008) in para 7-38, with which I agree although claims that foreign proceedings are in breach of the obligation to arbitrate do generally fall within the scope of arbitration clauses, nevertheless, by contracting for arbitration in England under English law, the parties have impliedly agreed that the usual ancillary proceedings may be brought before the English court to assist and protect the arbitration. These include claims for an anti-suit injunction, which are therefore not a breach of even broadly worded arbitration clauses. This implied agreement operates as an exception to the general scope of the arbitration clause, and permits the court and the arbitrations to exercise a concurrent jurisdiction. With respect, I agree with the analyses expressed in the judgments in *Sodzawiczny*, *Sheffield* and *Nomihold*. The rationale for the Contractual Ground is that the parties had agreed that the supervisory court in the seat of the arbitration should have jurisdiction over challenges to the award, and where a party in breach of such agreement attempts to refer to another forum a claim which in substance seeks to unwind the award and its effects, or to resist enforcement of the award, the veiled claim falls within the jurisdiction of the court, rather than the tribunal. The issue for determination by the supervisory court is whether parties can usurp the function of the Court to supervise and protect the arbitral process, and whether its supervisory jurisdiction should be protected and preserved, particularly when the award has been ordered to be enforced as a judgment of the court. The protection is by the grant of an injunction to restrain the continuation of proceedings brought in breach of the agreement to refer the arbitration to the supervision of the Court at the seat, and to abide by the award made in the arbitration to which they had agreed. As Counsel for the G Parties submitted, it makes little sense for the court to defer to the views of the

tribunal which is constituted in breach of the arbitration agreement. Counsel for CNG has emphasized the point that rescission of the SHA and SPA has not been determined in any of the Awards in the Original Arbitration. No question of re-litigation arises, but even if res judicata or issue estoppel are raised, it was contended that they are questions which should be determined by the tribunal - as these matters go to admissibility of the claims to arbitration, and not to jurisdiction of the tribunal. This issue was also considered by Foxton J in *Sodzawiczny* (see para 75 (ii) of the judgment). The Court's analysis is set out at paras 78-80: 78. there will be cases which fall both within category 1 and category 3, because the attempt to re-litigate the contents of the earlier award is sufficiently fundamental and substantial as to be fairly characterised as an attempt to challenge the earlier award by a Non-Compliant Challenge, bringing the principle discussed at para 67 above into play.

79. In these circumstances, and where the English court is the supervisory court for the first arbitral determination, I respectfully agree with Andrew Smith J's insightful decision in *Nomihold Securities Inc v Mobile Telesystems Finance SA*, paras 50 to 51 that this is a case in which the jurisdiction of the supervisory court overlaps with that of the second tribunal in which a plea of legal preclusion might be advanced.
80. The more clearly the claims in the second arbitration can be said to amount, in substance, to a Non-Complaint Challenge to the first award, the stronger the case for AAI relief will be. It is this factor which led Andrew Smith J to distinguish in *Nomihold* between the most blatantly abusive parts of the relief sought in the second arbitration and the other matters raised. He would have granted an AAI in respect of the former, but for undertakings: not to advance in [the new arbitrations] (a) any claim for a declaration (i) that MTSF is not obliged to carry out [the award] and (ii) that so far as the award is concerned MTSF is not bound by LCIA rule 26.9 or (b) a claim for an order that MTSF be released from any obligation to pay the purchase price of US\$179 million to be paid under the option agreement.
81. Whether the arbitration which is to be the subject of the AAI amounts in substance to a Non-Compliant Challenge to an award seated England and Wales will not turn solely on the manner in which it is formulated (which would enable a party to improve its position by framing its challenge in a misleading or obscure way) but on the substance of the position, to be determined in the light of all relevant circumstances. In *Injazat Technology Capital Ltd v Najafi* [2012] EWHC 4171 (Comm), Flaux J was persuaded to grant an AAI *inter alia* because it was clear that the proceedings were a transparent attempt to frustrate enforcement proceedings in relation to the first award (paras 9, 13 and 22), even though the injuncted arbitral claim was not expressly framed as a request to set aside the prior award or nullify its effects. (Emphases added) Applying the applicable legal principles to the facts of the case, Foxton J found in *Sodzawiczny* that the claimant had the right under the 1996 Act for the awards to be challenged only under and in accordance with the Act, and that Smith was seeking to infringe that right by issuing and seeking to pursue the impugned arbitration. He reached such a conclusion because (*inter alia*): the core relief sought in the impugned

arbitration was the setting aside of the relevant awards; and Smith sought orders that the claimant be prevented from enforcing the rights arising under the awards, and to recover the costs of the arbitrations. At paragraph 86 (iv) of the judgment, His Lordship held not only that the relief sought by Smith infringed the claimant's rights under the 1996 Act, but that: any tribunal appointed in the (impugned arbitration) would not have jurisdiction to set aside or restrain enforcement of the Three Awards, which is not an Arbitral Matter. On behalf of CNG, it was contended that the court in *Sodzwiczny* had not considered that an action or claim to set aside judgments for fraud is an independent cause of action. I cannot accept such an argument as a basis to reject the analysis made in *Sodzwiczny*. As Mr Yu rightly pointed out, the action commenced by Smith in the Commercial Court was to set aside the award on the ground of fraud. This could not possibly have escaped the attention of the learned judge, who must have been aware that fraud was relied upon as the cause of action. The court nevertheless concluded that any challenge of an award on the ground of fraud must be made within and under the statutory regime. This was made abundantly clear at paragraph 108 of the judgment, where His Lordship pointed out that to the extent that any of the parties wished to contend that the awards were affected by serious irregularity in the form of the award being obtained by fraud, or that the way in which the award was procured was contrary to public policy, the means of doing so was a challenge under section 68(2)(g) of the 1996 Act, within the time limit provided for by the Act (or extended by the court which it was able to do under the Act). The Court could not have considered anything other than fraud being an independent cause of action to set aside an award. As for the distinction drawn by Mr Wong to the fact that the English court has the discretion to extend the 3 months time limit provided for in Article 34, and that the Hong Kong Court should take a different approach to *Sodzwiczny*, his contention of a Thieves Charter has already been rejected. As demonstrated by the amendments made to the NOA shortly before the hearing of these contested applications, the main contention for CNG was that the Rescission/Damages Claims actually do not attack the Awards, and that the Awards do not in fact bar rescission of the SPA and SHA. PFA 1 is for CNG's transfer of its 65% shareholding in SIL to the G Parties. PFA 3 is an award for specific performance of the Share Transfer following CNG's non-compliance with PFA 1. PFA 2 is an order for CNG to pay damages for breach, and PFA 4 is an award on CNG's liability for breach of developing Phase 2 of the Project under the SPA/SHA. In the NOA, apart from seeking directly to set aside the Awards, and orders to enjoin the G Parties from relying on or enforcing the Awards and to reverse the effects of court orders obtained for the enforcement of the Awards, CNG seeks:

- (1) a declaration that the SPA and the SHA were procured/tainted by fraud and bribery, and that they are liable to be rescinded and set aside; (2) ancillary and consequential relief, including restitution and indemnity in respect of all benefits received and all payments made under the SPA and SHA;
- (3) restitution of the bribes;

- (4) damages/equitable compensation claimed, as directly flowing from the entry into the SPA and the SHA, which include (as particularized in paragraph 47): (i) losses flowing from expenditure and investment in connection with and as a result of the Project; (ii) losses due to the difference between the price paid under the SPA and SHA and the real value of the subject shares; and (iii) loss in profits and business opportunities payable on alternative transactions into which CNG would have entered but for the bribery of A;
- (5) an account of profits; and
- (6) such orders as are necessary to cause the G Parties to take all necessary steps to reverse the effects of the SPA and the SHA. Mr Wong for CNG contended that the rescission sought in the Bribery Arbitration does not require that the award for specific performance should be set aside, but that it works instead on the state of affairs created by that award. The state of affairs is the completion of the performance under the contract, and that performance is then unwound by the later rescission, as if the performance had been made voluntarily. It was claimed that the relief given by way of specific performance is compatible with the rescission sought by CNG, in that specific performance resulted in the return of the SIL shares to the G Parties, just as rescission would. As for damages, what Mr Wong argued was that the objective of the relief for rescission is to restore the parties to their original position, as regards the rights and obligations which have been created by the contract, so that damages for breach of contract must be repaid upon rescission. Damages must be repaid upon rescission, because the damages were paid pursuant to obligations arising under the contract that is being unwound. It was argued that as the damages are paid in fulfillment of the secondary obligation imposed by the contract, the contract is just as much the source of secondary obligations as it is of primary obligations (citing *Photo Productions Ltd v Securicor Transport Ltd* [1980] AC 827 at 849). Submitting that an order or award compelling the performance of the secondary obligation to pay damages is just the mechanism by which the obligor comes to give the performance they should have given voluntarily, it was contended that a later rescission only works on the resulting state of affairs, and that somehow, they are not inconsistent with any of the Awards, as they are all sourced from the contract between the parties. On CNG's case, there is also no inconsistency between a judgment or award for specific performance, and a claim for rescission of the contract and resulting damages on the basis of fraud. They are said to have been made in different circumstances and address different issues, and CNG should be permitted to proceed with the Rescission/Damages Claims, and work out the damages payable. I cannot accept these technical but convoluted arguments. The simple reality is that, a claim to rescind a contract is inconsistent with an award and the extant judgments of the court (in this case the courts of both Hong Kong and BVI) that the contract should be performed, and that in the absence of due performance, damages for breach are payable. Seeking repayment of the damages awarded for breach of contract is seeking to reopen and nullify the Awards in this case, and is obviously attacking the relevant Award, directly or indirectly. Mr Wong referred to the case of *Hughes v Pellicciari* (1982) 2 BPR 9509, to support the proposition that an award for specific performance does not bar the counterparty from

later rescinding the contract upon discovering grounds to do so. The observations made by the court were: The received doctrine appears clearly to be that, notwithstanding that an order for specific performance of an agreement or contract has been sought and made, the agreement or contract does not become merged in the order for specific performance (Austins of East Ham Ltd v Macey [1941] Ch 338, 341 per Lord Greene MR, Johnson v Agnew [1980] AC 367 at 393-4 per Lord Wilberforce; JAG Investments Pty Ltd v Strati [1981] 2 NSWLR 600 at 604 per Hope JA). If this be so, then the contractual rights and obligations of the parties to the agreement or contract remain as they were, albeit that, since the court has taken control of the carrying out of the agreement or contract, such rights as the parties may have under it may be exercised only with the leave of, and only to the extent to which they are not inconsistent with any order made or direction given by, the court (Singh v Nazeer [1979] Ch 474; Johnson v Agnew, supra; JAG Investments Pty Ltd v Strati, supra), and to those contractual rights and obligations are added such rights and obligations as are conferred, or imposed, upon the parties by the order of the court. However, even from the above passage, it can be seen that the court made it clear that the rights of the parties under the contract are to be exercised only with the leave of, and only to the extent to which they are not inconsistent with any order made by the court. As Counsel for the G Parties pointed out, and I agree, there cannot be two inconsistent awards or judgments at the same time. A judgment, or award of an arbitral tribunal, is supposed to be final in the determination of the parties rights and obligations, on which not only the parties to the action but also third parties dealing with property which are the subject matter of the judgment or award can rely, that the rights to the property and the obligations of the parties inter-se have been conclusively considered and determined by the court or tribunal. So unless and until the Awards and the extant judgments for performance of the underlying contracts in this case (which include judgments and orders of the courts of Hong Kong and the BVI) have been set aside on grounds established to the satisfaction of the court, there cannot be a further, inconsistent order for rescission of the underlying contracts. The question remains in this case, as to whether there has been a proper application to the proper court or forum to set aside the binding Awards, before there can be a claim for an order for rescission or damages. In *eof0W W gP* distinguishable. The arbitration was seated in the Mainland, so the Hong Kong court was not the supervisory court of the arbitration. The judgment entered in Hong Kong was on the implied promise to abide by the award, which was separate and distinct from claims under the underlying contract. In any event, Eton was not permitted to raise in the new arbitration issues that were already decided by the Hong Kong courts, as that would be oppressive and an abuse of process. On my analysis of the relevant authorities, the only permissible manner to set aside the Awards in this case is by way of the only recourse permitted under Article 34, to the Court as the competent authority designated under section 13(5) of the Ordinance. That application was made in May 2023, and was dismissed, and it is not open to the tribunal in the Bribery Arbitration to decide either the Set Aside Claim or the Rescission/Damages Claims, when they constitute in substance an impermissible challenge against the Awards, and are within the jurisdiction of the supervisory court to protect not only the arbitral process and the Awards but also the

Court's own judgments and orders, such that the claims are no longer arbitrable matters which can be referred to the tribunal under the Arbitration Agreement. The Abuse Ground I also accept the submissions made by Counsel for the G Parties, that the Bribery Arbitration is an abuse of process. In *eof0W W gP d* an abuse of process. An attempt to relitigate matters already determined by a prior judgment or award can be restrained by the grant of an AAI (SA v KB [2016] 2 HKLRD 1249). Counsel also referred to *Excel Jumbo International Ltd v Cybernaut Greentech Investment Holding (HK) Ltd* [2022] HKCFI 3555, where the court considered that an arbitration which amounted to a conspiracy to strip the assets of a company should be restrained by injunction. In my judgment, and having regard to the history of the Original Arbitration and the subsequent enforcement proceedings which have taken place in Hong Kong and in the BVI, the essence of the claims now raised the Bribery Arbitration are to set aside the SHA, the SPA and the Awards (that the SHA and SPA are to be performed, and that there had been breaches of the agreements), and they are clearly attempts to reopen issues already decided in the Original Arbitration, through raising a claim of alleged bribery/fraud/deception which is said to have tainted the Original Arbitration and the Awards. As highlighted by Counsel for the G Parties, this is in truth and substance an attempt to unwind and undo the entire Original Arbitration which has taken place for 5 years, and is simply part of CNG's plan to retain control of SIL, its assets and the Project, all in defiance of the Awards made against CNG to transfer its shares back to the G Parties. The G Parties referred in their evidence to the steps taken by CNG and the SIL directors/officers CNG controls, after the Awards and Court orders for enforcement thereof, to transfer funds out of SIL, to obstruct and prevent the rectification of the share register of SIL, to defy the orders of the BVI Court for the Share Transfer, and to continue to claim to the Congo authorities that CNG still has interests in SIL and the mines, and that matters relating to the ownership and control of SIL were still not finalized notwithstanding the Awards, the judgments and orders of the Hong Kong Court and the BVI Court with regard to the Share Transfer and the rectification of the share register. CNG relies heavily on the fact that it has a Takhar claim which entitles it to set aside the Awards, that such claim falls outside the scope of Article 34, and that its genuine claim should not be struck out but should be permitted to be arbitrated under the Arbitration Agreements. This is not the substantive hearing for determination of CNG claim of alleged bribery/fraud, and I do not have to go into the merits, but on a brief consideration, I do not accept that there is a strong case as CNG suggests that the Awards can be set aside for A's alleged bribery. In essence, what CNG claims is that A was CNG's lead negotiator of the SHA and SPA at the material time, and that he had been secretly bribed by the G Parties through one Mr B () under a surreptitious consultancy agreement between the G Parties and B's company, in that when entering into the 2013 Consultancy Agreement, B was simply acting as a conduit for channeling illicit funds to A. CNG alleges that all this was unknown to it at the time of the SHA, SPA and the Original Arbitration, and that it only first became aware of the bribery in around April 2024, when it was tipped off by a whistleblower identified as C. A is now under investigation and detention by the NSC. As Counsel for the G Parties pointed out, the threshold of a Takhar claim is stringent, and the requirements are set out in *Mayer Corp*

Development International Ltd v Alliance Financial Intelligence Ltd [2019] HKCA 777, at para 72:- The two remaining issues are largely factual. There is no dispute as to the legal principles as set out by Aikens LJ in the Highland case at 106, which have been approved by the Supreme Court in Takhar v Gracefield 57 and 67 and are as follows: (1) there must be conscious and deliberate dishonesty in relation to the relevant evidence given; (2) the fresh evidence must be material, in that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did, or that it would have entirely changed the way in which the first court approached and came to its decision; and thus the conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was; and (3) the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence. In Mayer, the Court of Appeal accepted and reiterated that it is an exceptional course to depart from the general rule that judgments are binding and conclusive, so that a departure from the finality principle must be justified (see para 75 of the judgment). At paragraph 79, Kwan VP pointed out that to justify the exceptional course of setting aside a judgment as having been obtained by fraud, the fresh evidence relied upon must satisfy a suitably stringent standard and meet the threshold requirements in the Highland case (ie on materiality). Just as pertinently, the authorities show that the fresh action (to set aside) must be grounded upon fraud which was practiced in the earlier proceedings. In Lu Yongliang v Bank of China Limited, Dongguan Branch [2020] HKCA 1089, at para 22 of the judgment, Lam VP (as His Lordship then was) observed, after referring to the principles set out in Mayer: Thus, the emphasis on the materiality relates to the impact of the new evidence on impugning the honesty of the old evidence and the causative link of the dishonest evidence with the previous judgment. The fresh action was grounded upon fraud practiced in the earlier proceedings, not the fraud in relation to the underlying dispute. (Emphasis added) As Counsel for the G Parties pointed out, a Takhar claim is akin to an action for deceit, the significant distinction being that it was the court or the tribunal in question which had been deceived. Deliberate dishonesty and materiality have to be shown (Fong Ping Kit v Tsang Hin Wai [2024] HKCFI 3585 at para 60, citing Tinklet v Esken Ltd (formerly Stobart Group Ltd) [2023] Ch 451). It is also important to bear in mind that as the Privy Council found in Finzi v Jamaican Redevelopment Foundation Inc [2024] 1 WLR 541, a Takhar claim is still subject to the doctrine of abuse of process. As Lord Leggatt noted in Finzi (at paragraph 76 of his judgment), allegations of fraud are not to be regarded as some kind of open sesame which have only to be uttered to enable a party to engage in a new round of litigation of disputes that have been compromised or decided. In Finzi itself, the Board concluded that the earlier proceedings had been protracted and had extended over many years; Finzi was legally represented in the proceedings and had freely and voluntarily agreed to enter into the settlement in question; no explanation had been offered for why he did not in the earlier proceedings make any of the allegations of fraud and deceit which he later sought to advance; no explanation had been offered for why he had advanced a case which was

inconsistent with his case for setting aside; and there was nothing to suggest that there was in fact any substance in the allegations of fraud being advanced. In such circumstances, the Board was satisfied that there was no real prospect of disturbing the assessment made by the first instance court, that Finzi's action to set aside the judgments and settlements on the ground that they were procured by fraud was an abuse of process. In the judgment of Lord Leggatt, there were pertinent observations made as to the risks of allowing vexatious fraud claims to be launched: When once it has been established, or if it is incontrovertible, that a judgment or settlement agreement was obtained by fraud, it cannot as Lord Sumption pointed out - be a reason to allow the judgment or settlement to stand that the victim of the deceit was negligent in failing to recognise or allege fraud in the earlier proceedings. Clearly fraud is not excused by negligent failure to expose it. Or, as it was put in a pithy statement quoted by Lord Kerr JSC in *Takhar*, at para 50, a knave does not escape liability because he is dealing with a fool (*Gould v Vaggelas* (1985) 157 CLR 215, 252, per Brennan J). Yet what this reasoning leaves out of account is the burden and expense involved in litigating allegations of fraud. If a new action in which fraud is alleged proceeds to trial and the allegation is not made out, the mischief which the power to prevent abuse of the court's process is designed to prevent will have been incurred. As Lord Briggs JSC pointed out in his separate judgment in *Takhar*, at para 75: In particular cases the fraud allegation may be a weak one, just passing the summary judgment test, whereas the invasion of the finality principle in such a case will not merely be a risk but an expensive and time-consuming actuality. The risk of a party being vexed by allegations of fraud which amount to wasteful and potentially oppressive duplicative litigation is as at least as great as the risk as regards other types of new claim. In fact, it may be considered greater, as the jurisdiction to set aside a judgment or settlement agreement for fraud creates the potential for using allegations of fraud as a pretext for relitigating the dispute supposed to have been finally determined. The Board would endorse in this context the observation of Coulson J in *Seele Austria GmbH & Co KG v Tokio Marine Europe Insurance Ltd*

[2009] BLR 261, para 107, that: the court should be astute to prevent a claiming party from putting its case one way, thereby causing the other side to incur considerable expense, only for the claiming party to lose and then come up with a different way of putting the same case, so as to begin the process all over again. The same applies with equal, if not greater force, in the familiar situation where a party who has entered into a compromise agreement afterwards regrets having done so and attempts to re-open the litigation. 69 It is by no means unknown for disappointed litigants, looking back at proceedings which resulted in an adverse judgment or a settlement that with hindsight seems to them disadvantageous, to come to believe that, to achieve such an outcome, their opponent must have engaged in deceit. Conduct and intentions not originally seen as fraudulent may now be perceived in a malign light. Such a change of perception cannot, in the Board's opinion, provide an adequate basis for allowing a party to bring fresh proceedings relying on material it already had when the earlier proceedings were taking place but which is now rebranded as evidence of fraud. (Emphases added) The above is a practical

and realistic description of the majority of the cases where a losing party comes before the court, seeking the case to be reopened. It needs no mention that it is difficult for the court to gauge the real motives or intentions behind steps taken by litigants. Their credibility, and motives, can only be assessed in the light of all the circumstances and facts of the case, and judged from the conduct of the party as historically chronicled throughout the proceedings. CNG's case is that it had no knowledge, and could not have discovered the bribery and fraud before, or during the Original Arbitration. It was only after the issue of the Awards, that it received a tip-off in April 2024 from the former director and executive vice president of a company in the G Parties group. The bribery was reported to CNG's internal compliance department in May 2024, and later to the NSC in December 2024. CNG was not able to disclose the fact that the matter was being investigated, as by law, it had to obtain permission from the NSC before it could reveal matters relating to NCS's investigations. According to CNG, it was only on 18 May 2025 that such permission was obtained by CNG. The application for stay made in May 2025 was the first time in which the bribery allegations were raised. The NOA in the Bribery Arbitration was filed on 23 July 2025. On the G Parties case, there had been delay by CNG in making the claims based on the Bribery Allegation. Even on the evidence relied upon by CNG, the tipoff was received in April 2024, and in November 2024, CNG had discovered and retrieved what CNG now relies on as suspicious correspondence between A and B which CNG claims establishes its case of bribery. By 15 May 2025, CNG received information that A had been detained by the NSC. According to the G Parties, there was no justification for CNG to withhold making its claims of fraud and bribery until the stay applications on 20 May 2025, and until 23 July 2025 for the Bribery Arbitration to be commenced. Counsel for the G Parties firstly contend that CNG's delay is inconsistent with any genuine belief on its part that the substance of the tipoff and materials it allegedly uncovered only recently show any serious criminality, or was in any way material to the Original Arbitration and the Awards. As rightly contended for the G Parties, although CNG was allegedly tipped off in May 2024, it waited until October 2024 before taking the most basic investigative step of gaining access to the emails of the alleged culprit, A, which led to the discovery then (allegedly) of the Consultancy Agreement. The matter was not reported to the NSC until December 2024, despite the claim now made that the 2013 Consultancy Agreement was clear evidence of the G Parties bribery of A. The excuse was that A only retired around August 2024. If the matter was indeed as serious, criminal and as obvious as is now claimed, I cannot accept the reason given. It should not have been impossible or even difficult for CNG to gain access to A's emails if there had been genuine suspicions and any serious investigations made. The cumbersome operations within CNG do not make the excuse any more convincing. According to the G Parties, the Bribery Allegation was only raised to derail and delay the hearing of the initial application to stay enforcement of the Awards in Hong Kong, which was initially for the interim pending only the resolution of the resistance made by CNG in the BVI to the rectification of the register of SIL. That was not successful in view of the outcome of the BVI Rectification Application. Only then did CNG apply to amend the initial stay application to include the Bribery Allegation. In the

meantime, the active steps taken by CNG between the tipoff in April 2024 and the amendment in June 2025 to include the bribery investigation as a ground for seeking the stay of execution/enforcement, demonstrate conduct which is clearly inconsistent with its stance, that the SPA/SHA and the Awards were procured by and/or tainted by the dishonest and fraudulent conduct alleged, and that the SHA/SPA/the Original Arbitration should be or had been rescinded/invalidated by the bribery/fraud. These steps include the following.

- (1) In June 2024, CNG attended and participated in a hearing in the Original Arbitration relating to relief sought by the G Parties in connection with CNG's Dividend/UE Claim, and the Interim Payment Application made by the G Parties. The Dividend/UE Claim is one seeking the payment of dividends from SIL to CNG as a holder of the disputed shares in SIL. This is inconsistent with a claim for rescission of the underlying contracts under which CNG acquired shares in SIL.
- (2) In July 2024, CNG sought to remove the Presiding Arbitrator from the Original Arbitration, on the ground that there was apparent bias, but not on the ground that there is no valid arbitration agreement/arbitration.
- (3) On 4 October 2024, CNG filed a Notice of Arbitration in the Misrepresentation Arbitration, relying on misrepresentations made by the G Parties as to the amount of mineral resources at the Project, but not on any other misrepresentation or bribery inducing the SPA and SHA.
- (4) On 8 March 2025, CNG filed a Statement of Claim in the Dividends/UE Arbitration. By this time, it had retrieved the allegedly suspicious emails from A's inbox which allegedly establish the bribery, but the claims of bribery were not made.
- (5) On 8 April 2025, CNG issued the original application for stay of enforcement/execution, with no mention of the Bribery Allegation. The explanation given is simply that after the tipoff in April 2024, the bribery was reported to NSC on 5 December 2024, and under the law of the Mainland, CNG could not disclose the investigation to anyone. I cannot accept that this can excuse all the active and positive steps taken after April 2024, or December 2024. If there is a serious case of fraud or illegality, I see no good reason why CNG cannot even disclose to the Tribunal, or to the Court if necessary, that there had been developments which affected the validity of the SPA/SHA/the Original Arbitration/the Awards, but which they were not able to disclose under Mainland law constraints, and in the meantime, to refrain from taking any active steps in either the Original Arbitration, or in any court proceedings. On behalf of the G Parties, Counsel also pointed out that matters of procedural law are governed by the *lex fori*. The authorities are clear that in the context of discovery, foreign law cannot override the Court's ability to conduct proceedings in accordance with Hong Kong procedures and Hong Kong law, even if compliance with these procedural requirements might entail a breach of foreign criminal law (*Bank Mellat v Her Majesty's Treasury* [2019] EWCA Civ 449, para 63). Irrespective of any confidentiality obligations which may exist under Mainland law relating to a state investigation, CNG should inform and cannot be prevented from

informing the Tribunal, the supervisory court in Hong Kong, and the BVI court in a timely and appropriate manner, that it had received a whistleblower allegation which directly implicated the integrity of the Original Arbitration. In any event, CNG has not given any satisfactory explanation for the lapse of time between April 2024, and May 2025 when the bribery was first disclosed to the Court. There is no explanation or evidence as to why the report was only made to CNG in December 2024, why no disclosure at all could not be made before the bribery was reported to CNG, and after December 2024, why no permission was sought from CNG for disclosure, until May 2025. The G Parties further submit that it was public knowledge by December 2024 that there were investigations made by the NSC into CNG, for other serious alleged criminality in respect of dealings which were unconnected to the Project/SIL, and that there was a broader investigation by the Mainland authorities into the systemic fraud and corruption within the CNG Group. In all the circumstances, I accept that CNG's inaction before May 2025 to process the Bribery Allegation against the G Parties shows that it was not a genuine claim, and not a claim which CNG had reason to believe would affect or had affected the Original Arbitration, or the validity and legality of the Awards made therein. In all probability, the tipoff did not come as any surprise to CNG, as it was aware of the matters to which C had referred, and CNG knew that whatever criminality A had engaged in, the matters had no effect at all on the SPA, the SHA, the conduct of the Original Arbitration, or the Awards made. In any event, according to Counsel for the G Parties, the steps taken by CNG since April 2024, to seek relief under the SPA/SHA, and to consciously pursue fresh claims for enforcement of those contracts, amounted to unequivocal affirmation of the SHA, SPA, the Original Arbitration and the Awards. To any objective bystander, these steps taken by CNG would mean that CNG considered that the SHA, the SPA and the Awards were all valid. I agree. CNG cannot affirm the SPA/SHA when it was convenient and suited its interests to do so, and at the same time seek to disavow and unravel them for another purpose. In *Re Minloy Ltd* [2020] HKCFI 2215, the court held that in addition to inconsistent factual allegations, taking inconsistent legal positions or assumptions adopted in previous (or the same) proceedings are likewise abuse. Mr Yu contended that this alone is sufficient for the Court to find that the Bribery Arbitration amounts to abuse. Whether the Mayer requirements and the threshold of a Takhar claim are made out According to Counsel for the G Parties, even taking CNG's asserted claim of bribery to be genuine, its evidence cannot satisfy the high threshold of a Takhar claim. To set aside a judgment, it is not sufficient to allege simply that there is some evidence to support an allegation of fraud. In *Lu Yongliang v BOC Ltd, Dongguan Branch*, the Court emphasized that it has to be shown that the evidence of the alleged fraud must have been relied upon in the court below. Particularly in the context of an arbitral award, the alleged fraud must have been a fraud in the adjudication process, as opposed to a fraud inducing or relating to the underlying transaction. Counsel for CNG submitted that the Parties witness, Mr D, had deliberately given false evidence to conceal the bribery, citing his witness statement in which D claimed that the G Parties were able to resume negotiations with CNG concerning the potential investment in mid-2013, with the assistance of (C) and E who had remained in contact with key individuals at CNG and had maintained a relationship with

them . All that CNG has claimed is that, by suggesting that there were legitimate negotiations, the G Parties had withheld material evidence, by remaining silent and not disclosing the Consultancy Agreements between B/A and the G Parties, and had failed to reveal the bribery it had made to A. As Mr Yu pointed out, this is not an application for setting aside an order or an award for breach of a duty to make full and frank disclosure of all possible defences open to a counterparty. Even a duty of good faith in the conduct of an arbitration cannot mean that a party must disclose a defence which may be open to the other side. I agree that the onus is on CNG to put forward convincing evidence of how there was conscious and deliberate dishonesty on the part of the G Parties in the Original Arbitration, which dishonesty was causative of the Awards being obtained on their terms. In this case, there is no evidence that A had received bribes during and in the course of the arbitral process, as distinct from the facts and evidence in *Federal Republic of Nigeria v PIDL* [2023] EWHC 2638 (Comm). As the G Parties were keen to point out in their evidence, A had in the course of the Original Arbitration and in the course of the dispute and events leading to the Original Arbitration consistently acted in a manner which was adverse to the interests of the G Parties. According to the G Parties, A was the protagonist in CNG's campaign to deprive the G Parties of their performance payment under the underlying contracts, and A was the Chairman of SIL at the relevant time (between 2022 and 2024) when US\$109 million of SIL's assets were placed beyond SIL's reach and dissipated to China. This dissipation has been the subject matter of proceedings before the courts. A's evidence on the negotiations, given in the Original Arbitration, had no bearing on the findings in the Awards on the Share Transfer. The Tribunal's findings in PFA 1 and PFA 3 were made on the basis of the Tribunal's evaluation of the written communications between Mr D of the G Parties and Mr F of CNG, and the credibility of their testimony. The conclusions made by the Tribunal were reached because it rejected F's testimony which was contradicted by the written records. The Awards were based almost entirely on the contemporaneous documents and the evidence of the expert witnesses, independently of any evidence from A. Even if A's evidence were to be rejected in the Original Arbitration, as unreliable, CNG has not shown how the findings in the Awards could have been entirely changed. I cannot agree that by reason of any bribery of A which had induced the SPA and SHA, CNG was unable to advance its defence on an informed basis to the claims made in the Original Arbitration of CNG's breach of the SPA and SHA. The alleged bribery of A before the SPA/SHA could not have influenced or affected the essential issue in the Original Arbitration, of whether CNG was in breach of contract, by reason of its performance or non-performance during the course of the SPA/SHA. Despite the assertions made, I cannot see how by reason of any different strategy that may have been adopted by CNG, the Awards could have been materially different. As for CNG's reliance on the introductory letter dated 17 July 2013 (Letter), and its claim that A had lied in cross-examination when he denied having drafted the Letter for the G Parties, I am not persuaded that the Letter has any bearing at all on the issues which had to be decided by the Tribunal. In fact, both Mr D and Mr G of the G Parties gave evidence in the Original Arbitration, that the Letter was drafted by A or at his direction. This is acknowledged also by Mr H, the affirmant supporting CNG's case. The fact that the

testimony of the G Parties witnesses in this regard is true and correct, cannot support any contention that the G Parties had somehow misled the Tribunal. The Letter, and any false testimony of A on the Letter (presumably as a result of the bribe he had allegedly received) simply had no material effect on either the Original Arbitration or the Awards. The substance of the Fraud/Bribery Allegation The G Parties contend that in any event, and even though it is not necessary at this stage to deal with the merits of the Bribery Allegation, highlighting the fact that they did not have the opportunity to present evidence in answer to the matters raised in the reply evidence of CNG, there are material matters which show that the Bribery Allegation is unsubstantiated and unfounded. I will only refer briefly to the more significant matters. First, the Bribery Allegation is based on the evidence of C (the whistleblower). H who made the affirmations in support of CNG stay application has no personal knowledge of any of the matters which took place in 2010 and 2013. C filed two affirmations in these proceedings, but they contain inconsistent allegations on important aspects of the alleged bribery. In his first affirmation, C referred to the 2013 Consultancy Agreement with the G Parties, under which the G Parties were to pay a fee. He went on to claim as follows (at paragraph 8): My understanding, now and at that time, is that Mr A leveraged his personal influence to facilitate the completion of the SIL Project and would receive corresponding remuneration from this Consultancy Agreement after the project was completed. Given Mr A alleged that he had veto power (referred to above) in relation to CNG Group Co s new investment of this nature, we would have been unable to have CNG Group Co agree to consider the transaction without Mr A s approval. Therefore, G Parties agreed to sign the Consultancy Agreement . Mr Yu submitted fact that the matters relating to A leveraging his influence and receiving remuneration from the Consultancy Agreement, was only C s understanding. He did not have actual knowledge nor did he profess to have materials or knowledge of facts to justify his own understanding or belief. Mr Yu further pointed out that C changed his evidence when he claimed in his second affirmation, at paragraph 7, that: As explained in my first affirmation, A was a beneficiary of the 2013 Consultancy Agreement where B was an agent for him too. At that time, I certainly understood the relationship between these three individuals and why it was essential to have B as the intermediary. It was highlighted by Counsel that C had in fact never mentioned in his first affirmation that A was a beneficiary of the 2013 Consultancy Agreement. On behalf of the G Parties, it was submitted that the evidence of CNG s star witness is doubtful and contradictory as to what was C s alleged understanding, and knowledge, at the relevant time. As Mr Yu aptly pointed out, C was in fact the signatory of the G Parties when the 2013 Consultancy Agreement was executed. If C knew as he claimed that A was the beneficiary of the 2013 Consultancy Agreement at the time, to be receiving the fee as a bribe, he never explained why he agreed to sign the illicit agreement. C also stated in his second affirmation that it was in fact Bureau Chief I (Bureau Chief I) who was the consultant to the G Parties, with B acting as the intermediary or agent. In his second affirmation, C claimed that it was Bureau Chief I s friend, B, who took charge of the subsequent negotiations in relation to the consultancy arrangement, as it was not appropriate for Bureau Chief I to show up frequently, as he was the Bureau Chief of a Chinese State ministry at the time. This was not

mentioned in his first affirmation, when C had in fact described A as playing the leading role for CNG in the negotiations, that B was acting as a consultant to the G Parties, and that B was A's close friend. According to CNG's latest evidence, Bureau Chief I is also the subject of investigations by the NSC. It was submitted that even on the face of the evidence from C, the whistleblower who had given the tipoff to CNG, there is no clear explanation as to the role played by the different individuals at the relevant time, whether B was acting as the white glove to conceal the role of A, or of Bureau Chief I, and that C was unable to give a complete and full picture of the individuals who are claimed to be influencing CNG's negotiations and decisions, and said to be benefiting from the alleged bribery. From this, it can be said that C's evidence is highly unreliable. According to the G Parties, C is in fact a disgruntled former employee who had his own reasons to portray the G Parties in a bad light. An essential part of CNG's claim that the SPA/SHA had been procured by the G Parties bribery of A is that there was no reason for the G Parties to enter into the 2013 Consultancy Agreement with B to pay any fee to B, as: (1) CNG had already been introduced to the G Parties in 2010, and there was no reason to pay B for any introduction or facilitation in 2013; (2) B had no real role to play in the negotiations and in the conclusion of the SPA/SHA for the Project; and (3) B lacked the requisite skills or expertise to advise on the Project or the Investment. CNG's claim is that B was only named as a party to the 2013 Consultancy Agreement as a conduit for payment and as a white-glove for A who was allegedly the key decision maker on CNG's side, and that the 2013 Consultancy Agreement with B was a sham serving no real purpose. According to CNG, it had no knowledge at all of the 2013 Consultancy Agreement (paragraph 27.10 of the 2nd affirmation of H), of B's role, nor of A being the actual beneficiary of the fee paid - until the discovery of the suspicious emails between A and B, which disclosed the role played by A in the preparation of the 2013 Consultancy Agreement. On the evidence adduced for the hearing, which includes the emails produced and relied upon by CNG, it can be seen that B had been involved in the negotiations between the G Parties and CNG from inception of the negotiations for the Project in 2010. The contemporaneous emails and documents show B's presence at the meetings held, and his communications with CNG and the G Parties. There was nothing surreptitious about B's role in the negotiations and meetings held between CNG and the G Parties, which was accurately described by the G Parties as being open and transparent. As the G Parties rightly pointed out, B was paid the fee not because of any technical expertise on his part, but because he was the facilitator/broker, and the person who had brought the parties together through his connections and introductions. According to the G Parties, B was knowledgeable about projects in Africa and mining projects in general, and was able to open doors for the G Parties and make the necessary introductions to the right people in China. The work B carried out during the negotiations in 2010 and 2013 was outlined and explained in detail in the evidence of the G Parties, supported by the contemporaneous emails and documents produced. Significantly, there was already a Consultancy Agreement made in 2010 between the G Parties and B's company, whereby B was engaged to facilitate negotiations to be made between the G Parties with potential investors, CNG being only one of the targets. The fee to be paid by the G Parties to B under the 2010 Consultancy Agreement was a commission of 3% of the actual

funding in purchasing the project acquired. The G Parties highlighted the fact that the 3% payable under the 2010 Consultancy Agreement is even greater in terms of the amount of the fee that was later provided for in the 2013 Consultancy Agreement. The G Parties explained that the initial negotiations with CNG had come to a halt some time in 2010 when the parties were unable to agree on the price, but negotiations resumed in 2013 when there was a change of personnel on the G Parties team. According to the evidence of the G Parties, B had not been paid for the services he had carried out under the 2010 Consultancy Agreement, as the transaction with CNG was not successfully completed then, but when the deal was resurrected in 2013, the G Parties agreed that B should be compensated, since he had done the initial work under the 2010 Consultancy Agreement, and his assistance to progress and negotiate the deal was still necessary in 2013. The negotiations for the 2013 Consultancy Agreement were made in those circumstances. Materially, and as evidenced by the contemporaneous email correspondence and an earlier draft of the 2013 Consultancy Agreement, the initial discussions and negotiations were on the basis that CNG would be a party to that agreement, together with the G Parties and B. On 3 June 2013, what was referred to as a Triparty Agreement was circulated amongst one XXXXXXXX of CNG (who is on the G Parties evidence the Project Manager of CNG's Resource Development), A (on his work email) and B. That draft refers to the target company enjoying 100% interest in the gold mine in Congo, and the G Parties intention to transfer 60% of its interest in the target company to CNG, named as Party C to the agreement. The draft refers to the G Parties appointment of B's company (named as Party B) to look for a suitable transferee in China, and that after 3 years of extensive preliminary work's company had selected CNG and introduced the G parties and its target company to CNG. The draft agreement refers to the G Parties agreement to pay B's company a service fee of the portion of the compensation paid by CNG to the G Parties for the transfer of the equity interest in the target company as a Service Fee, with the G Parties agreeing to bear the entire Service Fee. The G Parties explained in their evidence that they had initially wanted CNG to share the cost of the fee payable to B, but that at CNG's insistence, it was ultimately agreed that CNG would be replaced by SIL instead as a party, with the G Parties bearing the cost of the fees. According to the G Parties, it was normal practice for brokers/investment bankers to get paid out of the proceeds of the party raising the equity for funding, but that the G Parties finally agreed to bear the cost of B's fee. In any event, the 2013 Consultancy Agreement and the fee arrangement with B was not a surreptitious arrangement, but had been disclosed to and was known to CNG. CNG's own witness, H, accepts that it is not unusual in the trade or business for commission to be paid in deals of this nature. It is only H's case that CNG had no knowledge of the Consultancy Agreement and the payment arrangement. As Counsel for the G Parties pointed out, if the 2013 Consultancy Agreement was a sham, and B was a mere white glove to receive money for A, it was inexplicable for CNG to be made a party to the agreement, and for the draft Consultancy Agreement and the payment to be made thereunder to be circulated to other personnel within CNG. On the G Parties evidence, CNG's portrayal that the transaction with the G Parties was driven by A is deceptive, since A was hardly the decisive or unilateral authority to approve the contracts between CNG and the G

Parties. According to the G Parties, approval of the transaction required and involved scrutiny from numerous individuals and entities at multi-levels including state authorities. Counsel for the G Parties submit that CNG assertion, that A was the only individual with veto power is in fact contradicted by the contemporaneous documents which show that Mr XXXXXXXX, CNG Group Chief Engineer, was the chief decision maker in all mining asset acquisitions and who had the sole veto power. Considering the entire matter on the evidence available at this stage, the assertions made as to the foundation of the Bribery Allegation: that there was no real reason to pay a substantial fee to B in 2013, that B was only a conduit and white glove for A, and that the 2013 Consultancy Agreement was unknown to CNG, and a mere sham to hide the payment of benefits to A as the real beneficiary; appear to be open to real doubts, when a case of fraud/serious wrongdoing calls for cogent and compelling evidence in support. Counsel for the G Parties submit that the stay application made by CNG can be seen to be simply another attempt to delay and avoid enforcement of the Awards, under the guise of a fraud/bribery claim, which can easily raise concerns as to whether any court should recognize an award if it is tainted by such a serious wrongdoing. However, as forewarned in the authorities, the courts must be vigilant and not permit parties to challenge and attack binding awards and judgments by dubious claims. In this case, I am not satisfied that CNG should be granted the stay of enforcement which it seeks, on the basis of the evidence which it has adduced, in circumstances of the unsatisfactory delay on its part in taking action upon its alleged discovery of the suspicious acts, and the inconsistent acts it has taken since such discovery which amounted to affirmation of the underlying contracts, as well as the Awards. Conclusion and disposition Bearing in mind the important public policy of upholding the finality of court judgments and arbitral awards, it requires sound evidence before the Court can accede to any direct, or collateral, attack against a judgment or arbitral award, or agree to stay enforcement of a final award on any mere suggestion of fraud or illegality. The claim must be scrutinized in the exercise of the Court's supervisory jurisdiction over the arbitral process and arbitrations held at its seat. I am not satisfied that the evidence of the alleged bribery in this case is sufficient to show either that it is genuine or if genuine, that it had any material impact on the Awards. On the evidence in this case, it is clear that the claims made in the Bribery Arbitration are inconsistent with the substance of the Awards and the judgments of this Court, to constitute collateral attacks against the Awards in a manner which is not compliant with Article 34 and section 81 of the Ordinance. The pursuit of the Set Aside Claim and the Rescission/Damages Claims by arbitration is in breach of the Arbitration Agreement and the right of the G Parties thereunder, to have any challenge to the Awards made in accordance with and pursuant to section 81 of the Ordinance, and not be vexed by other claims. The Set Aside Claim and the Rescission/Damages Claims are not arbitral matters anymore and fall within the exclusive jurisdiction of the Hong Kong supervisory court. In all, the claims sought to be pursued are vexatious and oppressive, and an abuse of process. It is just to grant the injunctions sought to restrain the Bribery Arbitration. In view of the reasons given above, that the Bribery Arbitration is non-compliant with section 81 and an abuse of the process of the court, the applications for stay of execution and enforcement of the Awards are dismissed. For

[illegible]

INSTANCE NSTRUCTION AND ARBITRATION PROCEEDINGS

THE MATTER of the enforcement of a partial award dated 8 February 2023 in an arbitration administered by the Hong Kong International Arbitration Centre IN THE MATTER of section 84 of the Arbitration Ordinance (Cap 609) IN THE MATTER of Order 73 rule the Rules of High Court (Cap 4A)

BETWEEN Applicant Applicant Respondent Respondent

"Arial Judiciary Hong Kong HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE Title Headings <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{7396D9A8-1E88-4E27-84FD-12D1738AC343}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

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