IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHCR 7

Originating Application No 222 of 2023 (Summons No 643 of 2024)

Between

Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership)

… *Claimant*

And

(1) Shandong Ruyi Technology Group Co Ltd
(2) European Topsoho S.àr.l.

… *Respondents*

GROUNDS OF DECISION

[Civil Procedure — Production of documents]
[Civil Procedure — Judgments and orders — Peremptory orders]

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Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership)
v
Shandong Ruyi Technology Group Co Ltd and another

[2024] SGHCR 7

General Division of the High Court — Originating Application No 222 of 2023 (Summons No 643 of 2024)
AR Perry Peh
25 March, 15 July 2024

25 July 2024

AR Perry Peh:

Introduction

1 HC/SUM 643/2024 ("SUM 643") was an application by the second respondent for the unless order ("the Unless Order") granted to compel the claimant's compliance with an order for production of documents ("the Production Order") to take effect, with the consequence that the claimant's application in HC/OA 222/2023 ("OA 222") for the enforcement of a foreign arbitral award under s 29 of the International Arbitration Act 1994 ("the International Arbitration Act") read with O 48 r 6 of the Rules of Court 2021 ("ROC 2021") be dismissed, and HC/ORC 1189/2023 ("ORC 1189"), the order giving permission for enforcement of the award previously granted in OA 222, be set aside. The second respondent had obtained the Production Order for the claimant to produce several categories of documents which I found in an earlier

application for production of documents to be material and relevant to the second respondent's application in HC/SUM 952/2023 ("SUM 952") to set aside ORC 1189 pursuant to O 48 r 6(5) of the ROC 2021.

2 The main issues raised in SUM 643 were: (a) whether the claimant has failed to comply fully with the Production Order and the Unless Order; and (b) whether it is disproportionate for the Unless Order to take effect because setting aside ORC 1189 will disrupt the enforcement of the arbitral award and allow the second respondent to obtain by the backdoor the outcome it sought through the setting-aside application in SUM 952. Having considered the arguments, I decided in the second respondent's favour in respect of both issues and ordered that the Unless Order take effect. The claimant has appealed against my decision in SUM 643.[1] These are my grounds of decision.

Background

3 The background facts leading to these applications are set out in my grounds of decision for the earlier applications brought by the second respondent in which the Production Order and the Unless Order were obtained (HC/SUM 2987/2023 ("SUM 2987") and HC/SUM 346/2024 ("SUM 346") respectively): see *DFD v DFE and another* [2024] SGHCR 4 ("the GD") (at [5]–[18] and [57]–[62]). These grounds were previously redacted as a sealing order had been in place at the time when SUM 2987 and SUM 346 were heard.[2] By the time SUM 643 was brought, the sealing order had been lifted by an order of court made pursuant to the parties' consent.[3] Where appropriate, I adopt the

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1 HC/RA 90/2024.

2 HC/ORC 5234/2023.

3 HC/ORC 1316/2024.

same abbreviations as those used in the GD, save that any redactions previously applied are now omitted.

The Production Order and the Unless Order

4 At the heart of the dispute in these proceedings are shares held by the second respondent, a company incorporated in Luxembourg, in one SMCP SA ("SCMP"). According to the claimant, these shares were pledged as security by the second respondent for a debt owed by the first respondent to the claimant, under an agreement between the claimant, the first respondent and the second respondent ("the Guarantee"). Apparently unbeknownst to the claimant, the second respondent also pledged some 28m of its SCMP shares ("the Pledged Shares") as security under bonds ("the Bonds") which it had issued and later defaulted on. The trustees for the holders of the Bonds, GLAS SAS (London Branch) ("GLAS"), took possession of the Pledged Shares in October 2021. After the claimant came to learn of the Bonds and the Pledged Shares, and out of interest in the second respondent's remaining SCMP shares that were not pledged as security under the Bonds ("the Remaining Shares"), the claimant issued notices for the transfer of the Remaining Shares to its nominee. This transfer was later challenged by GLAS in proceedings before the English courts. The details of the English proceedings are immaterial for present purposes, save that, in October 2022, GLAS obtained in the English courts a summary judgment against the second respondent in respect of the debt owed by the second respondent under the Bonds, and therefore became a creditor of the second respondent.

5 The Remaining Shares later became the subject of the arbitration ("the Arbitration"), which outcome is being challenged in SUM 952. The underlying arbitration agreement is contained in the Guarantee, which provided

for disputes to be resolved by arbitration at the Jining Arbitration Commission ("JAC") in the People's Republic of China. At the time when SUM 2987 was heard, the claimant's case was that the parties had entered into a memorandum signed in or around June 2019 ("the Memorandum") to vary the identified arbitral institution from the JAC to the Beihai Court of International Arbitration ("BCIA"), and it was pursuant to this varied arbitration agreement that the Arbitration was later commenced against the first and second respondents in November 2022. As I point out later, there appears to have a change in the claimant's position on when this component of the arbitration agreement was varied (see [107] below). Be that as it may, through the Arbitration, the claimant obtained an award ("the Award") in January 2023 in which it was adjudged as having rights to the Remaining Shares. The Award recorded, among other things, that in the Arbitration, the second respondent had no objections to the reliefs claimed by the claimant, as well as the evidence submitted by the claimant.

6 In February 2023, a bankruptcy order was made against the second respondent by the Luxembourg courts, the result of which was that an officer with the functions akin to those of a liquidator or trustee-in-bankruptcy was appointed to take over the affairs and administration of the second respondent. It is this officer, which I referred to as "the Liquidator" in the GD, who is effectively the second respondent in these applications; any reference to the second respondent in the period before the making of the bankruptcy order will be a reference to the second respondent *company* itself. The main ground on which the Liquidator appears to rely in SUM 952 to challenge the Award is that the arbitration agreement (as contained in the Guarantee and varied by the Memorandum) is invalid and unenforceable, and further that the Award was procured by fraud because the Arbitration had been orchestrated for the claimant

to steal a march ahead of the second respondent's other creditors in respect of the Remaining Shares. A common thread underlying the Liquidator's allegations is the fact that it had, in its investigation of the second respondent's affairs, not uncovered any documents or evidence of discussions relating to the dispute under the Guarantee, the parties' entry into the Memorandum, as well as the Arbitration itself.

7 The Liquidator successfully obtained the Production Order, under which the claimant was required to produce seven of the eight categories of documents requested in SUM 2987 (see the GD at [18] and [54]). Documents relating to the dispute under the Guarantee and the parties' entry into the Memorandum, the absence of which the Liquidator has relied on in substantiating its allegations in SUM 952, come within the scope of the Production Order.

8 Pursuant to the Production Order, on 11 December 2023, the claimant filed a list of documents ("the LOD"), which the Liquidator attacked as being incomplete. In response, and out of its own accord and without any further direction or order from the court, on 30 January 2024, the claimant filed a supplementary list of documents ("the SLOD"), which the Liquidator maintained was still incomplete. This led to the Liquidator's filing of SUM 346 on 7 February 2024, which sought the claimant's full compliance with the Production Order or otherwise for ORC 1189 to be set aside. When SUM 346 was heard, the claimant was prepared to consent to the reliefs sought in SUM 346, in particular, that it fully complies with the Production Order, save that any order made in SUM 346 should not have peremptory effect (see the GD at [56]–[59]). After hearing parties, on 28 February 2024, I granted the Unless Order. On the circumstances before me then, I was satisfied that the claimant had been in persistent and deliberate non-compliance with the Production Order, which I thought were self-evident from its belated attempt to comply with the

Production Order by filing the SLOD and its subsequent overture to consent to fully comply with the Production Order as sought by the Liquidator in SUM 346 (see the GD at [66]–[67]). Obviously, the claimant would not have done any of those things if it genuinely believed that it had fully complied with the Production Order up to that point in time. I also considered that the Unless Order was necessary to compel the claimant's non-compliance with the Production Order, in particular because the claimant had previously made the decision to refuse compliance in full knowledge that the hearing of SUM 952, for which the documents in the Production Order are sought, was inching close by (see the GD at [68]). There was no appeal by the claimant against both the Production Order and the Unless Order.

The claimant's attempts at compliance with the Unless Order

9 The Unless Order required the claimant to, among other things: (a) fully comply with the Production Order by filing a list of documents responsive to the Production Order and provide copies of these documents to the Liquidator; (b) permit the Liquidator to inspect those documents; and (c) file an affidavit stating (i) the relevant category to which each of the produced documents correspond, (ii) whether the claimant has lost possession or control ("P&C") of any of the documents that are responsive to the Production Order and, (iii) if so, provide an explanation of the circumstances in which such P&C had been lost.

10 Pursuant to the Unless Order, on 4 March 2024, the claimant filed a second supplementary list of documents ("the 2SLOD") as well as an affidavit of Ms Zhang Yu ("Zhang"), who is the Deputy General Manager of the claimant

("the Affidavit").[4] In the Affidavit, Zhang, on the claimant's behalf, explained the following:

(a) The documents hitherto produced in the LOD and the SLOD are responsive to Categories 4, 5, 6 and 7 of the Production Order.[5] There were also other documents produced in the LOD and the SLOD which do not come within any of the categories of the Production Order.[6]

(b) For the 2SLOD, two of the documents produced are responsive to Category 2(c) of the Production Order, while another document is responsive to Category 3 of the Production Order. For the remaining documents in the 2SLOD, they do not come within any of the categories in the Production Order.[7]

11 Zhang then stated:[8]

> 13. Given the documents (i) that have been disclosed and provided to [the Liquidator] in the LOD and [the] SLOD and (ii) to be disclosed and provided to [the Liquidator] in the 2SLOD, *I confirm that the Claimant has complied with the Production Order* by producing all documents in its possession or control that are responsive to the categories of documents covered by the Production Order. *I further provide … the explanations in respect of other documents that are responsive to the production Order which the Claimant has lost possession or control of*, where applicable.
>
> [emphasis added]

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4 1st affidavit of Zhang Yu ("1ZY").

5 1ZY at para 10.

6 1ZY at para 11.

7 1ZY at para 12.

8 1ZY at para 13.

12 In the remaining sections of the Affidavit, Zhang went on to explain how the claimant has lost P&C of documents responsive to Categories 1, 2 and 3 of the Production Order. To recap, these categories of documents pertain to the following (see also the GD at [18]):

(a) Category 1 – Communications between the claimant (which includes the claimant's representatives and lawyers) and the second respondent and/or any of its representatives (including Ms Qiu Chen Ran ("QCR"), who was a director of the second respondent at the material time, and Mr Qiu Yafu ("QYF"), who is QCR's father and also ultimate controller of the group of companies of which the first respondent is part) regarding the need for and negotiation and execution of the Memorandum, including communications relating to the purported deficiency of the JAC and the circumstances which necessitated a variation of the agreed arbitral institution to the BCIA.

(b) Category 2 – Communications from the claimant (which includes the claimants' representatives and lawyers) to the second respondent and/or QCR and QYF and/or He Hanchu ("HHC"), who was the lawyer who acted for the second respondent in the Arbitration, or any other person from HHC's law firm (hereafter collectively referred to as "the second respondent and/or the second respondent's purported representatives), in respect of each of the following time periods and subject matter:

(i) Category 2(a) – prior to the commencement of the Arbitration, alleging a dispute and demanding reliefs from the second respondent and/or the second respondent's purported representatives, whether in the nature of a demand letter or otherwise;

(ii) Category 2(b) – after the commencement of the Arbitration, notifying the second respondent and/or the second respondent's purported representatives of the commencement of the Arbitration; and

(iii) Category 2(c) – after the commencement of the Arbitration, in relation to any matter arising out of or in connection with the Arbitration, including but not limited to matters such as the terms of reference, list of issues, administrative matters and logistics of the hearing(s) for the Arbitration.

(c) Category 3 – Communications in respect of any matter arising out of or in connection with the Arbitration from the claimant to the BCIA.

13 It is not in dispute that, to date, the claimant has not produced *any* documents responsive to Categories 1, 2(a) and 2(b) of the Production Order. As I gather from reading the Affidavit, as well the two reply affidavits filed by the claimant in SUM 643 (a further affidavit of Zhang filed on 21 March 2024 ("the 21 Mar Affidavit")[9] and an affidavit of Mr Wei Shengli ("Wei"), a lawyer who acted for the claimant in the Arbitration, filed on 26 March 2024 ("the 26 Mar Affidavit"),[10] the claimant's position *vis-à-vis* the Production Order may be summarised as follows – it has no P&C of:

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9 2nd affidavit of Zhang Yu ("2ZY").

10 1st affidavit of Wei Shengli ("1W"). For the purposes of the hearing of HC/SUM 643/2024, 1W had been filed under cover of a solicitor's affidavit dated 15 March 2024.

(a) *any documents* responsive to Categories 1, 2(a) and 2(b) of the Production Order; and

(b) *any further documents* responsive to Categories 2(c) and 3 of the Production Order, apart from what has been produced in the LOD, the SLOD and the 2SLOD.

The claimant's explanation for Category 1

14 Category 1 dealt with communications between the claimant and the second respondent regarding the execution of the Memorandum (see the GD at [18(a)] and [39]–[41]). The key point of Zhang's explanation in the Affidavit is that the agreement for the variation of the agreed arbitral institution from the JAC to the BCIA had been reached at an in-person meeting on 9 April 2022 ("the 9 Apr Meeting").[11]

15 The parties said to be present at the 9 Apr Meeting are: (a) QCR; (b) QYF; (c) Ms Wang Yan ("Wang"), the claimant's representative; (d) Ms Su Xiao ("Su"), also the claimant's representative; (e) Mr Ma Wenguang ("Ma"), a lawyer who went on to act for the first respondent in the Arbitration; (f) Wei; (g) Mr Liang Shuang ("Liang"), the claimant's legal advisor; and (h) Zhang herself.[12]

16 According to Zhang, Ma had raised at the 9 Apr Meeting that the JAC may not be able to decide disputes arising under the Guarantee and proposed a change of the agreed arbitral institution to the BCIA, which was more reputable. The attendees agreed, and Wang was responsible for drafting the Memorandum

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11 1ZY at paras 17–21.

12 1ZY at para 18.

to effect this agreement. On or about 11 April 2022, Wang arranged for the parties' representatives to execute the Memorandum "in person".[13]

17 The remaining parts of Zhang's explanation in the Affidavit goes on to make the following points: (a) the parties' "main mode" of communication was through physical meetings, telephone conversations or WeChat; and (b) "any"[14] WeChat messages concerning the issue of the Memorandum would have been lost because Wang had changed her mobile phone and so WeChat messages on her old phone cannot be retrieved from the new phone. I set out these parts of the Affidavit in full:[15]

> 23. As the offices of the representatives of the Claimant, [the second respondent] and [the first respondent] are all located in Jining, Shandong China at the … address where [the 9 Apr 2022 Meeting] was held, parties' main mode of communication was physical meetings and/or through telephone conversations and WeChat …. I wish to highlight to the Singapore court that it is not the parties' *usual* practice (and therefore not *typically* done) to follow up on what was discussed during meetings or in telephone conversations by email, even with respect to business dealings.
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> 24. However, I am given to understand that any relevant WeChat records of the Claimant's representatives regarding the replacement of the Jining Arbitration Commission and the execution of the Memorandum during this period are no longer available as such WeChat records have been deleted due to a change of mobile phones.
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> 25. More specifically, I am informed that Wang Yan, who was handling this change of arbitration issue as well as the matters concerning the arbitration, has changed her mobile phone and the reinstalled WeChat application on the new mobile phone does not record the said events and discussions.

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13 1ZY at para 22.

14 1ZY at para 24.

15 1ZY at paras 23–27.

> 26. … it is a feature of WeChat … that users of WeChat cannot retrieve messages from their WeChat accounts if the WeChat application has been reinstalled on a new mobile phone or after a user logs out of his/her WeChat account on an old mobile phone and subsequently log into the same account on a new mobile phone.
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> 27. In light of the aforesaid, no documents have been disclosed by the Claimant under category 1 of the Production Order because there are no such documents in the Claimant's possession or control. Particularly, the Claimant and/or its representatives have since lost possession or control of any WeChat chat records between the relevant persons discussion this issue as stated above.
>
> [emphasis added in underline and italics underline]

The claimant's explanation for Categories 2(a), 2(b) and 2(c)

18 Category 2(a) dealt with communications between the claimant and the second respondent relating to the dispute under the Guarantee prior to the commencement of the Arbitration (see the GD at [18(b)(i)] and [42]–[44]). Zhang explained that discussions relating to the claimant's interests in the Remaining Shares had taken place at in-person meetings between the claimant's representatives (Wang and Su) and the second respondent's representative (QCR).[16] In particular, this issue was also discussed at the 9 Apr Meeting.[17] At that meeting, Wang informed the other attendees that one of the claimant's shareholders had given instructions for the claimant to exercise its rights to the Remaining Shares pursuant to the Guarantee. However, the attendees had differing views on how this was to be done. Wang therefore proposed that the Arbitration be instituted for the claimant's rights and interests in the Remaining Shares to be determined.[18]

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16 1ZY at para 29.

17 1ZY at para 30.

18 1ZY at para 32.

19 Similar to the above (at [17]), Zhang explained that it was not the usual practice for parties to follow up by e-mail on what they had discussed at their in-person meetings.[19] Zhang further explained that the claimant has tried to retrieve the WeChat messages for the relevant periods of time but is unable to do so because Wang has changed her mobile phone and so messages sent or received on the old phone can no longer be accessed.[20] Zhang then stated:[21]

> 34. No documents have been disclosed by the Claimant under category 2(a) of the Production Order because [*sic*] are no such documents in the Claimant's possession or control. In particular, the Claimant and/or its representatives have lost possession or control of any WeChat records between the Claimant's representatives and ETS's [second respondent's] representatives.

20 Although the claimant did not expressly state that the parties had exchanged WeChat messages on the subject matter of Category 2(a), given its reliance on the loss of WeChat messages as a reason for asserting the loss of P&C over documents responsive to Category 2(a), it *must* be the claimant's position that the parties had exchanged WeChat messages on the subject matter of Category 2(a), only that they could no longer be located and produced for the purposes of complying with the Production Order, because of the loss of these WeChat messages.

21 Category 2(b) dealt with communications between the claimant and the second respondent after the commencement of the Arbitration, and specifically, those which involve the claimant notifying the second respondent of the commencement of the Arbitration (see the GD at [18(b)(ii)] and [45]). Zhang

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19 1ZY at para 29.

20 1ZY at para 33.

21 1ZY at para 34.

explained that documents relating to the second respondent being notified of the Arbitration "have been disclosed", which she identified to be an e-mail sent by the BCIA to the second respondent contained in the SLOD. Zhang further explained: "As far as I am aware, there was no (and no need for) separate communication between the Claimant and the second respondent on this".[22]

22 Category 2(c) dealt with communications between the claimant and the second respondent after the commencement of the Arbitration, and specifically, in connection with matters arising out of or in connection with the Arbitration (see the GD at [18(b)(iii) and [45]). For communications on the subject matter of Category 2(c), Zhang also repeated what she has said earlier about the parties "main mode" of communication, which encompassed the use of WeChat messaging, and the loss of WeChat messages due to Wang changing her mobile phone:[23]

> 36. … the main mode of communication between the parties was through physical meetings, telephone conversations and/or WeChat. For the same reasons explained above, the Claimant is unable to retrieve the relevant WeChat records or messages during the relevant time period in the Production Order and any such documents are no longer in the possession or control of the Claimant.

23 In SUM 346, the Liquidator pointed to two sets of documents in the SLOD which it said showed that there were other documents responsive to Category 2(c) which the claimant has not produced.[24] The first set comprised an e-mail from the BCIA to the second respondent referring to "your [the second respondent's] application" for a simplified procedure and a subsequent e-mail

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22 1ZY at para 35.

23 1ZY at para 36.

24 Second respondent's written submissions in HC/SUM 346/2024 at para 38.

from the BCIA to the parties referring to the parties' "joint" application for a simplified procedure.[25] The second set was an excerpt from the transcript of the hearing of the Arbitration which referred to the parties' "joint" request" for a sole arbitrator.[26] The Liquidator argued that both sets of documents showed that the claimant and the second respondent must have exchanged correspondence with each other *before* proceeding with these *joint* applications. In particular, it was curious why the application for a simplified procedure initially brought only by the second respondent subsequently morphed into a joint application by the parties. The Liquidator argued that it was inexplicable that the parties, which were large corporations, would have made the joint applications without exchanging any prior written correspondence.[27] Zhang dealt with this issue in the Affidavit and gave the following explanation:

> (a) The reference to "your [the second respondent's] application" for a simplified procedure in the e-mail from the BCIA to the second respondent was in fact a reference to the parties' joint application for a simplified procedure, which the BCIA had referred to in its later e-mails to the second respondent.[28]
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> (b) As a result of the loss of messages due to the change of mobile phones, the claimant has not been able to retrieve the relevant WeChat records or messages regarding the application for a simplified procedure.[29] Nevertheless, in or around January 2024, the claimant

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25 1st affidavit of Max Millet at paras 24–25; Second respondent's written submissions in HC/SUM 346/2024 at paras 39–41.

26 1MM at para 26; Second respondent's written submissions in HC/SUM 346/2024 at para 42.

27 Second respondent's written submissions in HC/SUM 346/2024 at para 41.

28 1ZY at paras 39–40.

29 1ZY at paras 36–37.

reached out to one Jing Lin ("Jing"), who is a secretary of the BCIA and had handled administrative matters in relation to the Arbitration.[30] Jing provided to the claimant his WeChat messages with: (i) HHC (the second respondent's lawyer in the Arbitration: see [12(b)] above) regarding the "summary procedure application form" and (ii) Zhang Tongtong, another secretary from the BCIA who had dealt with matters in the Arbitration. Screenshots of both these messages have been disclosed in the 2SLOD.[31]

(c) There were "some communications" between Liang (the claimant's legal advisor: see [15] above) and HHC on WeChat on matters relating to the Arbitration.[32] However, Liang has since replaced his phone and these messages have been lost.[33] Nonetheless, the claimant has managed to obtain screenshots of two of these messages, both of which have been produced in the 2SLOD – the first was exchanged on 7 December 2022 and provided by Jing to the claimant (as HHC had sent this to Jing); the second was exchanged on 30 December 2022 and provided by HHC to the claimant.[34]

(d) The claimant's position is that the abovementioned messages exchanged between Jing and HHC as well as Zhang Tongtong, as well as the messages exchanged between Liang and HHC (one of which was

30 1ZY at para 37.

31 1ZY at para 38.

32 1ZY at para 42.

33 1ZY at para 42.

34 1ZY at para 43.

provided by Jing) show that the application for a simplified procedure that the BCIA referred to had all along been a joint application.[35]

(e) Also, in or around January 2024, the claimant reached out to Wei, who acted for the claimant in the Arbitration. In respect of Wei's position, Zhang stated the following:[36]

> 41. … [Wei] confirms that he has no other material correspondence with [the second respondent] and/or their representatives on the matters concerning the Arbitration and he did not communicate with Jing Lin on WeChat. The decision by parties for the Arbitration to be dealt with via the simplified procedure and for the matter to be decided by a sole arbitrator was discussed and decided by the parties at physical meetings, telephone discussions and/or WeChat messages.

The claimant's explanation for Category 3

24 Category 3 dealt with communications from the claimant to the BCIA in respect of any matter arising out of or in connection with the Arbitration (see the GD at [18(c)] and [45]). Zhang explained that Wei has advised that there was no written correspondence between the claimant and the BCIA in connection with the Arbitration, and where needed, the claimant's representatives would contact the BCIA through its secretaries via a designated telephone number,[37] in accordance with the ordinary practice of the BCIA.[38] However, due to the passage of time, Wei no longer retains telephone records showing the calls he had made to the BCIA.[39] Wei further advised that, where needed, he had attended in person at the BCIA when dealing with matters in the

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35 1ZY at para 40.

36 1ZY at para 41.

37 1ZY at para 45.

38 1ZY at para 44.

39 1ZY at para 44.

Arbitration, such as when he tendered the evidence required for the Arbitration.[40]

25 In SUM 346, the Liquidator argued that there was incomplete production *vis-à-vis* Category 3 because it sighted a document in the SLOD, which was the BCIA's e-mail to Wang (the claimant's representative in the Arbitration) on 10 January 2023 ("the 10 Jan E-mail") seeking clarification on two questions relating to the Arbitration.[41] According to the Liquidator, based on the documents produced, the next communication in time after the 10 Jan E-mail was an e-mail from the BCIA to the parties informing the parties of the outcome of the Arbitration. The Liquidator argued that "presumably", prior to the latter e-mail from the BCIA, there must have been earlier correspondence from the claimant to the BCIA responding to the BCIA's queries, which the claimant has failed to produce.

26 In connection with this, Zhang explained that Wei has advised that the two questions posed in the 10 Jan E-mail had been addressed at the hearing of the Arbitration, and the 10 Jan E-mail was merely intended to put on record the questions that were asked at the hearing.[42] Wang had forwarded the 10 Jan E-mail to Wei, and Wei spoke with the BCIA over the phone and gave the necessary confirmation to Zhang Tongtong, the BCIA's secretary, on the questions asked.[43] Zhang added that Jing had also separately communicated by WeChat with Liang regarding the issues in the 10 Jan E-mail, and Jing had

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40 1ZY at para 45.

41 Second respondent's written submissions in HC/SUM 346/2024 at paras 51–52.

42 1ZY at para 46.

43 1ZY at para 47.

provided to the claimant a screenshot of this message, which has been disclosed in the 2SLOD.[44] Zhang then went on to state the following:[45]

> 49. Therefore, apart from the screenshot of the WeChat message from Jing Lin referred to above, no other documents have been disclosed under category 3 because there are no such documents in the Claimant's possession or control.

The applicable principles

27 The decision of the High Court in *DNG FZE v PayPal Pte Ltd* [2024] SGHC 65 ("*DNG*"), which was cited by both the Liquidator and the claimant in their submissions, provides guidance as to when the court should exercise its discretion to order a striking out where a party fails to comply with its obligations to produce documents. As the court explained, where the obligation in question has been made the subject of an "unless" order, except where the defaulting party can show that its breach had *not* been intentional and contumelious, the consequence of striking out should follow, but this was subject to the consideration of proportionality (see *DNG* at [96]). The application of the consideration of proportionality depended, not only on the consequences of striking out on the defaulting party, but also on the mental state of the defaulting party, so that where the breach was truly intentional and contumelious, then striking out would in most cases be the proportionate response as it reinforces the serious nature of an "unless" order (see *DNG* at [99]). The court further added that the consideration of proportionality applied on a more limited basis where the obligations breached have been the subject of an "unless" order, because the effect of an "unless" order ought not to be considerably softened by considerations of proportionality where it has been

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44 1ZY at para 48.

45 1ZY at para 49.

legitimately imposed and breached by the defaulting party – otherwise, it risks parties not taking an "unless" order seriously (see *DNG* at [98]). This too, cohered with the notion that an "unless" order is not to be lightly imposed (see *DNG* at [98]).

28 The court further set out the following analytical framework applicable to the question of whether a party's breach of its obligations to produce documents should result in striking out (see *DNG* at [102]):

> (a) First, are the discovery obligations made the subject of an unless order that was legitimately imposed and clearly stated?
>
> …
>
> (b) Second, did the party concerned breach the unless order?
>
> (c) Third, if so, can the defaulting party show that its breach had not been intentional and contumelious?
>
> (i) If so, then consider the matter with an especial consideration of whether striking out the defaulting party's pleadings is a proportionate response.
>
> (ii) If not, then subject to a limited consideration of proportionality, the consequences of the unless order should apply generally.

29 An affidavit verifying a party's list of documents and any subsequent affidavits filed in response to an order for production are generally regarded as conclusive (see *Natixis, Singapore Branch v Lim Oon Kuin and others* [2024] 3 SLR 1502 ("*Natixis*") at [27]; *Lutfi Salim bin Talib and another v British and Malayan Trustees Ltd* [2024] SGHC 85 ("*Lutfi*") at [22]; see also Paul Matthews & hodge M Malek, *Disclosure* (4th Ed, Sweet & Maxwell, 2012) ("*Disclosure*") at para 6.43). However, this is a mere starting point that is subject to exceptions.

30 In the context of the Rules of Court (2014 Rev Ed) ("ROC 2014"), it was held by the High Court in *Natixis* (at [27]) that the court may order *further* disclosure if there is a "reasonable suspicion" that there are further documents to be disclosed, which may arise if the disclosed documents themselves demonstrate that there are other underlying documents within that party's P&C which have not been disclosed, or if the court infers from the circumstances that there are or must be other documents within that party's P&C that have not been disclosed (see *Natixis* at [27]).

31 In the context of the ROC 2021, it was held by the High Court in *Lutfi* (at [32]–[33]) that the affidavits relating to the production of documents are conclusive unless it is "plain and obvious" from the documents that have been produced, the producing party's affidavits or pleadings, or some other objective evidence before the court, that the requested documents: (a) must exist or have existed; (b) must be or have been in the producing party's P&C; or (c) are not protected from production. The court considered that the "plain and obvious" threshold, which is higher than that of a "reasonable suspicion", is more consistent with the ROC 2021 Ideals of expeditious proceedings, cost-effective work and efficient use of court resources, by filtering out the often-unproductive applications for specific discovery which often incur disproportionate costs (see *Lutfi* at [34]). Further, at an interlocutory stage of the proceedings, the court cannot resolve a dispute as to the sufficient of affidavits relating to production of documents based on contentious affidavits alone, and logic and principle require a high threshold to be met before the court can go behind the affidavits relating to production of documents (see *Lutfi* at [33]). The adoption of the "plain and obvious" threshold means that the requesting party cannot argue that the requested documents exist, merely because in the ordinary course of events, such documents *would* exist (see *Lutfi* at [24]).

32 The High Court's grounds of decision in *Lutfi* was published on 25 March 2024, the same day I heard and decided SUM 643. *Lutfi* was therefore not cited to me by the parties, and I also did not have the benefit of the High Court's guidance in *Lutfi* when arriving at my decision in SUM 643. The parties had cited *Natixis* and the test which the parties accepted as applicable in SUM 643 was that of a "reasonable suspicion" and I also relied on the "reasonable suspicion" test in deciding SUM 643. An issue therefore arises as to whether my decision is now indefensible given the principles set out by the court in *Lutfi* on affidavits relating to the production of documents filed in proceedings under the ROC 2021. I will deal with this issue later. For now, it suffices for me to state that I would have reached the same conclusion in SUM 643 even if I had applied the "plain and obvious" test in *Lutfi* (see [53] and [64] below).

33 For completeness, I highlight that based on case law, in an application for striking out on the ground of a party's breach of its obligations to produce documents under the ROC 2014, the affidavit verifying the documents disclosed by a party is regarded as generally conclusive and the threshold that must be surmounted to displace that proposition comes close, and one may even say, is identical, to the "plain and obvious" test in *Lutfi*. In *Btech Engineering Pte Ltd v Novellers Pte Ltd* [2019] SGHC 171, which was an application for striking out for failure to comply with an order for discovery under O 24 r 16 of the ROC 2014, the court held (at [96]):

> … where the application is interlocutory in nature, affidavits of discovery generally are conclusive as to whether or not the discovery obligation had been breached, and striking out would only be appropriate where the breach is admitted or clear on the face of the documents, affidavits or pleadings put forward by the party in default …

The submissions

34 In SUM 643, the Liquidator relied on the following in support of its case that the claimant has failed to comply with the Unless Order. First, Zhang's explanations in the Affidavit as well as what has been produced in the 2SLOD showed that there are still further documents responsive to the Production Order which are in the claimant's P&C but which the claimant has failed to produce. Secondly, the claimant has not provided a satisfactory explanation as to how the WeChat messages responsive to Categories 1, 2(a) and 2(c) belonging to Wang and Liang have been lost (see [17] and [23(c)] above), which is a clear breach of the Unless Order. Furthermore, there has been no explanation provided in the Affidavit about the WeChat messages of the claimant's other representatives like Wei, Su and Zhang, all of whom had attended the 9 Apr Meeting and who might also have exchanged WeChat messages relating to the subject matter of the Production Order. Thirdly, the claimant has also failed to allow for proper inspection of the documents produced in the 2SLOD pursuant to the Unless Order. The Liquidator explained that its solicitors had been told to inspect printed *copies* of the documents produced in the 2SLOD, which corresponded to the PDF versions of those documents that it had already been provided copies of. The originals of those documents in their native form, such as the source file of the e-mail or the device on which screenshots of the produced WeChat messages had been received by the claimant, were not available for inspection.[46]

35 The consequence of these breaches, the Liquidator argued, is for the Unless Order to come into effect. The Liquidator emphasised that the breaches by the claimant were not minor – for example, documents coming within Category 1 were material to its case that the underlying arbitration agreement

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46 Notes of Arguments, 25 March 2024, p 8 lines 24–30.

was invalid, which it relied on as a ground for setting aside ORC 1189 (see [6] above).[47] This, coupled with the inadequate explanations provided by the claimant in the Affidavit, as well as the claimant's lackadaisical attitude in complying with the Production Order, warrant the Unless Order coming into effect. The Liquidator also cited other factors which it said militates in favour of the Unless Order coming into effect.[48] These include the claimant's failure to pay the costs ordered under the Production Order and the Unless Order despite written requests from the Liquidator to do so. Although such non-payment of costs would ordinarily not constitute an independent ground on which proceedings can be stayed or dismissed (though provided for by O 21 r 2(6) of the ROC 2021), viewed in the circumstances of this case and coupled with the claimant's general attitude, it reinforced the view that the coming into effect of the Unless Order is a proportionate response.

36 On the other hand, the claimant argued that SUM 643 is unwarranted because it has substantively complied with its obligations in the Production Order as well as the Unless Order. The claimant emphasised that it has, through Zhang, provided the necessary confirmation that there are no further documents responsive to the Production Order within its P&C, save for what has already been produced in the LOD, the SLOD and the 2SLOD (see [13] above), and this confirmation ought in the ordinary nature of things be regarded as conclusive. In the same vein, the claimant has also provided a sufficient explanation as to how it lost P&C of the WeChat messages of Wang and Liang, and so the Unless Order has been complied with. In particular, the claimant has even taken the extra step of approaching related parties (such as Jing) to obtain their screenshots of the relevant WeChat messages and produced them.

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47 Notes of Arguments, 25 March 2024, p 6 lines 10–11.

48 Second respondent's written submissions at paras 49–52.

37 In any case, even if the court were of the view that the claimant has breached the Unless Order, it would be a disproportionate response to allow the Unless Order to come into effect. The crucial point is that none of the complaints raised by the Liquidator would affect the conduct of a fair hearing for SUM 952 – the Liquidator has sufficient evidence to support its case, as is evident from the several affidavits it has filed.[49] It was also important to bear in mind that the Liquidator's case in SUM 952 is in large part premised on the *absence* of documentary evidence which the Liquidator says strengthens the view the Award had been orchestrated to steal a march on the second respondent's creditors and thus ought to be set aside. The lack of documents, as a result of any non-compliance with the Production Order by the claimant, will not prevent a fair hearing of SUM 952 from taking place.[50]

38 Finally, if the Unless Order comes into effect, it would result in ORC 1189 being set aside and disrupt the enforcement of the Award, thus allowing the Liquidator to obtain by the backdoor what it had sought through its application in SUM 952. This consequence squarely attracted the principle of minimal curial intervention in the enforcement of arbitral awards and is relevant to the assessment of whether it would be disproportionate for the Unless Order to come into effect. The appropriate and prudent course is to leave issues arising from the absence of documents and any inadequacies in production to the court hearing SUM 952, for that court to deal with these issues by way of adverse inferences drawn or other appropriate orders.[51]

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49 Claimant's written submissions at paras 31, 33 and 34.

50 Notes of Arguments, 25 March 2024, p 15 lines 1-7.

51 Claimant's written submissions at paras 35–36; Notes of Arguments, p 13 lines 29–32 and p 14.

The issues

39 Before turning to set out the issues, I make a preliminary observation. Based on Zhang's explanations in the Affidavit, the claimant accepts that the parties exchanged WeChat messages in connection with the subject matter of Categories 1, 2(a) and 2(c) of the Production Order ("the Messages") (see [17], [20] and [22] above). There is accordingly no dispute that the Messages exist and constitute documents that squarely come within and are responsive to Categories 1, 2(a) and 2(c) of the Production Order and so ought to be produced, but the claimant's position is that it no longer has P&C of the Messages. This is because Wang and Liang have changed their mobile phones (see [17] and [23(c)] above) and so the Messages, sent or received on *their* old mobile phones, can no longer be accessed from their new mobile phones due to the functional feature of the WeChat messaging application. The sufficiency of this explanation has to be scrutinised in considering whether the claimant has complied with: (a) the Production Order *vis-à-vis* Categories 1, 2(a) and 2(c), in so far as the claimant could be *excused* from producing the Messages on the ground that it has lost P&C of them; and (b) the part of the Unless Order requiring the claimant to provide an explanation of the circumstances in which it lost P&C of documents responsive to the Production Order, such as the Messages.

40 With the framework set out by the High Court in *DNG* ([27] above) as well as the above observation in mind, the following issues arose for determination in SUM 643:

(a) Whether the claimant has breached the Unless Order? To this end, there were three questions:

(i) Having regard to the Affidavit (and also the 21 Mar Affidavit and the 26 Mar Affidavit, where applicable) as well as the documents that have been produced, whether the claimant has complied with the Production Order *vis-à-vis* Categories 1, 2 and 3?

(ii) Whether the claimant has provided a sufficient explanation in the Affidavit for its loss of P&C of the Messages?

(iii) Whether the manner in which the documents in the 2SLOD had been made available for inspection by the claimant amounted to a breach of the Unless Order?

(b) If the claimant is found to have breached the Unless Order, two questions followed:

(i) Whether the claimant's breach had been intentional and contumelious?

(ii) What ought to be the consequences attaching to that breach?

Whether the claimant has breached the Unless Order

The affidavits and the documents produced by the claimant

41 The principal issue to be considered here is whether Zhang's explanations in the Affidavit (as well as any relevant explanations in the 21 Mar Affidavit and the 26 Mar Affidavit) and/or the documents produced by the claimant suffice to displace the conclusiveness of Zhang's deposition in the Affidavit that the claimant has fully complied with the Production Order (see [11] above). To do so, the affidavits and/or the documents produced must either

create a "reasonable suspicion" (on the basis of the test in *Natixis* ([29] above)) or make it "plain and obvious" (on the basis of the test in *Lutfi* ([29] above) that there are further documents responsive to Categories 1, 2 and 3 to be produced.

42 At the outset, I should state that in so far as the claimant's compliance with Categories 1, 2(a) and 2(c) of the Production Order is concerned, what remains to be dealt with are the other forms of *written* communications exchanged between the parties apart from WeChat messages ("the Other Written Communications"). This is because the claimant does not dispute that the parties had exchanged WeChat messages on the subject matter of Categories 1, 2(a) and 2(c) and that these messages constitute documents responsive to Categories 1, 2(a) and 2(c) (*ie*, the Messages) but only that it has lost P&C of them and thus is not able to produce them (see [39] above).

43 On the basis of the affidavits and the produced documents, I was satisfied that the claimant has failed to comply with Category 2(c) of the Production Order. As I will explain further below:

(a) In connection with the Other Written Communications – I note the claimant appears to take the position that the Other Written Communications do not exist, though there is no support in the affidavits for that position, and I also found that the explanations offered by the claimant in connection with that position to be somewhat questionable. However, this did not, in my view, surmount the requisite threshold for the conclusive effect of Zhang's depositions in the Affidavit to be displaced and warrant a finding that the Other Written Communications exist, whether on the basis of a "reasonable suspicion" or a "plain and obvious" test (see [53] below).

(b) In connection with Category 2(c) of the Production Order – I was satisfied from one of the documents produced in the 2SLOD identified by the Liquidator that there was a "reasonable suspicion" and/or that it was "plain and obvious" that there exist further documents in the form of the Messages exchanged between HHC and Liang on the subject matter of Category 2(c), which the claimant has not produced (see [64] below).

(c) In connection with Categories 2(b) and 3 of the Production Order – I was satisfied by Zhang's explanations in the Affidavit that the claimant has fully complied with its obligations of production (see [68] below).

The Other Written Communications

44 In the Affidavit, Zhang stated that the claimant has complied with the Production Order by producing in the LOD, the SLOD and the 2SLOD all documents in its P&C that are responsive to the Production Order (see [11] above). It is not in dispute that none of the documents produced are in the form of the Other Written Communications. It therefore follows that the claimant takes the position that the Other Written Communications do not exist. The claimant did not explicitly state so, but it appears to rely on two matters in support of this position: (a) first, Wei's confirmation regarding written communications relating to the Arbitration; and (b) secondly, Zhang's explanation in the Affidavit about the parties' "main mode" of communication being in-person meetings, telephone calls and WeChat messages, and that it was not their "*usual* practice (and therefore not *typically* done)" [emphasis added] to follow up on what had been discussed by e-mail (see [17] above).

(1) Whether the matters relied on by the claimant lend support to its position that the Other Written Communications do not exist

45 As I will explain, the matters which the claimant has relied on do not lend support to the claimant's position that the Other Written Communications do not exist. I begin by considering Wei's confirmation regarding written communications, of which there are two. The first confirmation given by Wei is found in the 26 Mar Affidavit in which Wei stated: "I do not have any other written communications with [the second respondent] and/or its representatives … relating to the Arbitration".[52] The second confirmation is stated through Zhang in the Affidavit, in which it is said that Wei has confirmed to the claimant that the parties' had discussed their decision to pursue the joint applications for a simplified procedure and a sole arbitrator through physical meetings, telephone discussions and/or WeChat messages.[53]

46 The "written communications" referred to in Wei's first confirmation comes within Category 2(c) of the Production Order and as a matter of definition, they would encompass both WeChat messages as well as the Other Written Communications. There is nothing before me to indicate that Wei's first confirmation is to be disbelieved. I therefore accepted, on the basis of Wei's confirmation, that the claimant does not have P&C of the Other Written Communications regarding the subject matter of Category 2(c), but only in so far as they were to be obtained *from Wei*. This is because there were other persons who could communicate on the claimant's behalf with the second respondent's representatives on matters relating to the Arbitration, such as Wang, Su, Liang and Zhang, and Wei's confirmation cannot speak for these

52 1W at para 6.

53 1ZY at para 41.

other persons. Wei's first confirmation therefore does not lend support to the claimant's position that the Other Written Communications do not exist.

47 The applications for a simplified procedure and a sole arbitrator referred to in Wei's second confirmation form *part of the matters* concerning the Arbitration and relate to the subject matter of Category 2(c) of the Production Order. The point made by Wei is that the only written communications that the parties exchanged on these matters were WeChat messages. In other words, in so far as these matters are concerned, the only documents responsive to Category 2(c) of the Production Order take the form of WeChat messages (see [39] above). There is nothing before me to indicate that Wei's second confirmation is to be disbelieved, and so on this basis, I accepted that the claimant does not have P&C of the Other Written Communications regarding the subject matter of Category 2(c), but only in so far as they concern the applications for a simplified procedure and a sole arbitrator. This is because the subject matter of Category 2(c) is not limited to these applications only and encompasses other matters relating to the Arbitration. Wei's second confirmation therefore only supports the claimant's position that the Other Written Communications do not exist to the limited extent that they concerned these applications, but not generally.

48 The other matter on which the claimant appears to rely in support of its position that the Other Written Communications do not exist is Zhang's explanation in the Affidavit that the parties' "main mode" of communication" is limited to in-person meetings, telephone phone calls and WeChat messaging (see [17] above). However, this explanation does not address what had been the mode of communication utilised on the occasions where the Memorandum, the dispute under the Guarantee, or matters relating to the Arbitration (*ie*, the subject matter of Categories 1, 2(a) and 2(c)) had been discussed. To say that

the parties *usually* do not follow up with their in-person or telephone conversations by e-mail or other forms of written communication apart from WeChat messaging is not to say that there had also been *no* such other forms of written communication on those occasions now specifically under consideration. How is the court to know whether the parties' "main mode" of communication had been adopted on those occasions? If the claimant wishes to persuade the court through the Affidavit that there were no other forms of written communications exchanged on those occasions and so the Other Written Communications do not exist, the claimant should expressly state so. The court cannot *infer*, based on what the claimant has said about the parties' usual mode of communication, that the parties must *also* have adopted that same mode of communication on those occasions where the Memorandum, the dispute under the Guarantee, or matters relating to the Arbitration had been discussed. That would be tantamount to reading into the Affidavit what Zhang has not deposed to in writing. For completeness, I note that other affidavits filed by the claimant in reply in SUM 643 – namely, the 15 Mar Affidavit and the 21 Mar Affidavit – do not address the point further. Zhang's explanation regarding the parties' "main mode" of communication therefore does not lend support to the claimant's position that the Other Written Communications do not exist.

(2) Significance (if any) of the absence of support in the affidavits for the claimant's position that the Other Written Communications do not exist

49 The fact that the claimant's position that the Other Written Communications do not exist is unsupported by the matters which the claimant appears to be relying on (and indeed, more broadly, the absence of any support in the affidavits for that position) is not *per se* fatal to the position taken by the claimant, because the claimant is able to rely on Zhang's deposition in the Affidavit that the claimant has fully complied with the Production Order, which

is regarded as conclusive and the meaning of which is that the Other Written Communications do not exist. The material consideration here is what significance can be made of the absence of any support in the affidavits for the claimant's position, which arises principally from the claimant's omission to state on affidavit what precisely had been the modes of communication utilised on the occasions where the Memorandum, the dispute under the Guarantee, or matters relating to the Arbitration had been discussed. I found the claimant's omission rather curious for three reasons.

50 First, if there were indeed no such other forms of written communications exchanged between the relevant parties apart from the Messages, I struggled to see why the claimant could not expressly state so, especially where Zhang (through whom the claimant's explanations and confirmations in the Affidavit were given) had been one of the attendees at the 9 Apr Meeting where the issue of the Memorandum, the dispute under the Guarantee and the claimant's rights to the Remaining Shares were allegedly discussed. Put another way, the claimant could have easily supported its position that the Other Written Communications do not *exist* by specifying the mode of communication adopted on the relevant occasions, but it did not do so.

51 Secondly, the context in which the Affidavit was filed and the procedural history that led to the filing of the Affidavit would have alerted the claimant to the importance of substantiating its position that the Other Written Communications do not exist. The Unless Order was meant to compel the claimant's full compliance with the Production Order and to satisfy the Liquidator (and ultimately, the court hearing SUM 952), that apart from what has been produced and what the claimant has identified as having lost P&C of, there are no further documents responsive to the Production Order that have not been produced. The claimant is a sophisticated commercial party, and it would

have had the benefit of full legal advice regarding its obligations under the Unless Order and the adverse consequences attaching if the Unless Order was not complied with, namely, that it would lose its right to enforce the Award. Given what was at stake, if it had been the case that the Other Written Communications do not exist, I see no reason why the claimant would stop short of stating the same on affidavit and specifying the mode of communication adopted on the relevant occasions. After all, it can only be in the claimant's interests to provide as complete an explanation as possible and satisfy the court that it has fully complied with the Production Order.

52 Thirdly, it is in my view significant that the claimant's position in the Affidavit that it has no P&C of the Other Written Communications is taken for the first time in these proceedings and it had not been raised in SUM 2987 where the Production Order was sought. As I noted in the GD (at [20]), the claimant had contested SUM 2987 solely on the grounds that the documents requested were unnecessary or not material to the issues in dispute. In the ordinary course of things, upon being served the Liquidator's application for production in SUM 2987, the claimant should have made attempts to search for and locate the documents requested by the Liquidator before deciding how and on what basis it could resist the application. If what Zhang said about the parties' "main mode" of communication indeed applied on the occasions where the Memorandum, the dispute under the Guarantee, or matters relating to the Arbitration had been discussed, it would also be the case that any written communications exchanged regarding the subject matter of Categories 1, 2(a) and 2(c) were limited *only* to WeChat messages (*ie*, the Messages), and it would follow that the Other Written Communications do not exist. Why then did the claimant not take this position *previously* when it resisted SUM 2987? Seen in that light, the claimant's position *now* that the Other Written Communications seems quite inconsistent

and all the more do the circumstances of this case call on the claimant to specify the mode of communication adopted on the occasions where the issue of the Memorandum, the dispute under the Guarantee and the claimant's rights to the Remaining Shares were allegedly discussed.

53 Be that as it may, and despite the questions I have raised above about the claimant's omission, I do not think it is open to me to find that there is a "reasonable suspicion" or that it is "plain and obvious" that the Other Written Communications exist and must be or have been in the claimant's P&C, on the basis of the claimant's omission alone. If I were to rely on the claimant's omission in making any finding that the Other Written Communications exist – whether on the basis of a "reasonable suspicion" or a "plain and obvious" test – I would effectively be drawing an adverse inference against the claimant pursuant to s 116 of the Evidence Act 1893 (2020 Rev Ed) ("the Evidence Act") on the basis of evidence which I am of the view that the claimant has effectively withheld. That is something which I am not permitted to do on the basis of affidavits alone (see s 2(1) of the Evidence Act).

54 As the High Court explained in *Lutfi* ([29] above) (at [41]), in the context of proceedings commenced by way of an Originating Claim, an affidavit relating to production is conclusive only for the purposes of the application for production, and it remains open to the requesting party to cross-examine the relevant witnesses of the producing party at trial on the producing party's assertion that it had no further documents and to submit that the appropriate adverse inferences be drawn if that assertion is eventually found to be untrue. The current proceedings are commenced by way of an Originating Application and unlike proceedings commenced by way of an Originating Claim, there is no subsequent trial process by which issues associated with disputed statements made in the affidavits relating to production could be similarly ventilated. In

this regard, I note that it is open to the Liquidator to apply for permission to cross-examine Zhang in connection with the claimant's position on what had been the precise mode of communications adopted on the occasions where the Memorandum, the dispute under the Guarantee, or matters relating to the Arbitration had been discussed (see O 15 r 7(6) of the ROC 2021; see also *Syed Ibrahim Shaik Mohideen v Wavoo Abdusalam Shaul Hameed and others* [2023] 4 SLR 903 at [12]–[16]). In any such application, it might well be material that the claimant's omissions is taken in connection with the existence of documents responsive to Categories 1 and 2(a) of the Production Order, which in turn are material to two of the three distinct grounds that the Liquidator intends to rely on in SUM 952 to set aside ORC 1189 (see [111] below). To be clear, I am not expressing any view on the merits of any such application that the Liquidator might subsequently take out. The only point I make is that any issues arising from the claimant's omission are not appropriate to be dealt with in the present context where only affidavits relating to production are available to the court, and the fact that the proceedings here are commenced by way of Originating Application where the usual trial process for ventilating disputes arising from affidavits relating to production are absent, cannot justify the court adopting a different approach in this case.

(3) The other arguments made by the Liquidator about Zhang's explanations in the Affidavit

55 For completeness, let me address the other arguments made by the Liquidator as to why the explanations in the Affidavit show that the Production Order has not been complied with.

56 First, the Liquidator placed some emphasis on the part of the Affidavit where Zhang referred to Wei's confirmation that he had "no other *material* correspondence … on the matters concerning the Arbitration" [emphasis added]

(see [23(e)] above).[54] Placing emphasis on the words "material correspondence", the Liquidator argued that Wei had withheld *other* documents which in his subjective view were not *material* to the Arbitration,[55] which is impermissible as this is not a valid basis on which Wei could withhold those documents, and in any event, Wei, as a PRC lawyer, would not be qualified to make any assessment on the materiality of those documents for the purposes of the claimant's obligations of production under the ROC 2021.[56]

57 I disagreed with this submission. While the claimant's use of the words "material correspondence" in the Affidavit raised some questions, it was later explained by Zhang in the 21 Mar Affidavit that what she had meant to convey in the Affidavit was that Wei had confirmed to her that he did not have in his P&C other correspondence concerning the Arbitration under the ambit of the Production Order.[57] In the 26 Mar Affidavit, Wei also confirmed that he had no "any other written communications with [the second respondent] and/or its representatives and [the] BCIA relating to the Arbitration" and he also did not have "any other documents concerning the Arbitration in [his] possession or control".[58] Whatever reasons the claimant might have had for using the words "material correspondence" in the Affidavit, there was nothing before me showing that the subsequent explanations by Zhang and Wei are to be disbelieved. This was also not a case where the Liquidator has pointed to some objective evidence showing that Zhang and/or Wei had intended for the words "material correspondence" in the Affidavit to refer only to documents which in

54 Second respondent's written submissions at para 9.

55 Second respondent's written submissions at para 10.

56 Second respondent's written submissions at paras 11 and 13.

57 Claimant's written submissions at para 23; 2ZY at para 11.

58 1W at paras 6 and 8.

the claimant's view were *material* to the Arbitration. The claimant's use of the words "material correspondence" therefore did not provide a basis for me to conclude that Wei (and in turn the claimant) had withheld other documents responsive to the Production Order.

58 Secondly, the Liquidator argued, although Zhang has stated in the Affidavit that the Memorandum was executed "in person", she did not go so far as to say that the relevant representatives of the claimant and the second respondent had met in person to execute the Memorandum, and presumably a draft of the Memorandum would have been sent across prior to its execution but the claimant did not provide an explanation of how this draft was sent, and whether any communication relating to the sending of this draft of the Memorandum was in the claimant's P&C.[59]

59 I disagreed with this submission. Though the Affidavit appears to be silent on whether the parties had synchronously or asynchronously executed the draft in person, there is nothing in Zhang's explanation in the Affidavit which suggested that drafts of the Memorandum were exchanged in writing prior to the parties executing the draft in person. Whether or not the parties had executed the drafts in person synchronously or asynchronously does not in and of itself have a bearing on whether they would have exchanged drafts of the Memorandum in writing before the meeting – if parties had executed the drafts synchronously, the draft could have prepared there and then and thereafter executed by the parties; if the parties had executed the drafts asynchronously, one side could have executed the draft and then left it somewhere for the other side to subsequently execute it. In my view, it is too much a stretch of the claimant's explanation that the parties had met in person to execute the

[59] Second respondent's written submissions at para 38.

Memorandum to also say that the parties must have exchanged drafts of the Memorandum in writing before doing so. An assertion that further documents exist, apart from what has been already produced, cannot be grounded merely on the basis of an assertion that those further documents *ordinarily* or *presumably* would have existed; the requesting party must *point* to something in the circumstances of the case which specifically grounds its suspicion (see, for example, *Soh Lup Chee and others v Seow Boon Cheng and another* [2002] 1 SLR(R) 604 at [7]). The claimant's explanation that the parties had met in person to execute the Memorandum is therefore not a reason for the court to find that there must have been prior written communications between the parties through which such drafts of the Memorandum were exchanged.

The Messages exchanged between HHC and Liang on the subject matter of Category 2(c)

60 As I have stated earlier (at [39]), the claimant's position is that the Messages constitute documents responsive to Categories 1, 2(a) and 2(c) of the Production Order, but only that it has lost P&C of these documents because Wang and Liang have lost those messages as a result of changing their mobile phones (see [39] above). In spite of that, the claimant has been able to obtain screenshots of some of the Messages. One of them, which was produced in the 2SLOD, is a screenshot of WeChat messages exchanged between HHC and Liang dated 30 December 2022 ("the 30 Dec Message"), which the claimant identified as being responsive to Category 2(c) of the Production Order.[60] The claimant further stated in the 2SLOD that this screenshot was "provided by [HHC]". The Liquidator argued that the claimant could therefore turn to HHC

[60] 1ZY at para 12, s/n 2.

to obtain the *other* WeChat messages that HHC had exchanged with Liang on the subject matter of Category 2(c).[61]

61 In the Affidavit, Zhang stated that "there were some communications … on WeChat on matters relating to the Arbitration" between Liang and HHC but that Liang was unable to retrieve those messages "in the relevant periods of time" as Liang had changed his mobile phone. It is therefore *not* the claimant's position that the WeChat messages exchanged between Liang and HHC are limited only to the 30 Dec Message. The claimant has also produced in the 2SLOD another WeChat message exchanged between Liang and HHC on 7 December 2022 ("the 7 Dec Message"), which was provided to it by Jing (see [23(c)] above) and which it identified as being responsive to Category 2(c) of the Production Order.[62] That being the case, I took as a starting point that, apart from the 30 Dec Message, the Messages exchanged between HHC and Liang on the subject matter of Category 2(c) are *not* limited to the 30 Dec Message.

62 The claimant did not explain in the Affidavit how and why HHC had provided the screenshot of the 30 Dec Message to the claimant. The claimant also did not elaborate in the Affidavit whether the 30 Dec Message was the only message that HHC had been able to provide to the claimant (such as if it was the only message HHC still retained on his mobile phone); neither was this issue addressed in the other affidavits filed by the claimant in SUM 643. It goes without saying that these are all matters within the claimant's knowledge and which it was able and ought to clarify, but the claimant chose to remain silent. Given this and the claimant's ability to procure HHC's assistance to provide some of the Messages exchanged between HHC and Liang on the subject matter

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61 Second respondent's written submissions at para 40.

62 1ZY at para 12, s/n 1.

of Category 2(c) (*ie*, the 30 Dec Message), the only logical inference is that the claimant would similarly have been able to procure HHC's assistance to provide the *remaining* of these messages exchanged between HHC and Liang.

63 On the facts known to the court, there is no solicitor-client relationship or the like between the claimant and HHC. The claimant therefore does not appear to have an enforceable legal right against HHC for HHC to provide to the claimant the Messages exchanged between himself and Liang regarding the subject matter of Category 2(c). However, given what appears to be the claimant's practical ability to obtain from HHC some of these messages exchanged between HHC and Liang, and absent anything to suggest otherwise, it was in my view a fair conclusion to say that the claimant is also in control of the remaining of these messages exchanged between HHC and Liang, which includes but is not limited to the 30 Dec Message (see generally, *Natixis* ([29] above) at [35]; *Dirak Asia Pte Ltd and another v Chew Hua Kok and another* [2013] SGHCR 1 at [35]–[36]). To be clear, I am not saying that the claimant is in control of these other messages because they ought in the ordinary course of things exist or because the claimant presumably would be able to obtain HHC's assistance to provide these other messages. Rather, I was satisfied that these other messages *do exist* (see [61] above) and I was also satisfied that the claimant is able to procure HHC's assistance to provide them (see [62] above).

64 For the reasons above, the screenshot of the 30 Dec Message produced by the claimant in the 2SLOD gave rise to "a reasonable suspicion" that, apart from the 30 Dec Message, there exist other WeChat messages exchanged between HHC and Liang regarding the subject matter of Category 2(c) which exist and must be or have been in the claimant's control. Given the reasons on which I have found such a "reasonable suspicion", I think I am justified in also saying that it was "plain and obvious" that such other WeChat messages exist

and must be or have been in the claimant's control. Put another way, I was satisfied that the claimant has failed to produce the Messages exchanged between HHC and Liang on the subject matter of Category 2(c), and its failure to do so was a breach of Category 2(c) of the Production Order.

65 I address a further point for completeness. In its written submissions for SUM 346, the Liquidator pointed to three documents produced in the SLOD in arguing that there was incomplete production *vis-à-vis* Category 2(c), which I have already referred to earlier in these grounds (see [23] above): (a) an e-mail from the BCIA to QCR referring to the *second respondent's* application for a simplified procedure in the Arbitration; (b) a subsequent e-mail from the BCIA to the parties informing them that the parties' *joint* application for a simplified procedure had been accepted; and (c) a part of the transcript of the hearing of the Arbitration in which reference was made to the parties' *joint* application for a sole arbitrator. The Liquidator argued in SUM 346 that the claimant and the second respondent, being commercial entities, would have exchanged written communications before they arrived at the decision to make these applications for a simplified procedure and a sole arbitrator, but yet no such written communications have been produced by the claimant.[63] In the parts of the Affidavit that I have set out earlier, the claimant attempted to address this issue by referring to Wei's confirmation that the parties' decision to pursue the applications for a simplified procedure and a sole arbitrator were discussed at physical meetings, over the phone or via WeChat messages.

66 I have already explained that Wei's confirmation lent support to the claimant's position that the Other Written Communications do not exist, to the limited extent that they concerned these matters (see [47] above). As for the

63 Second respondent's written submissions in HC/SUM 346/2024 at paras 39–41.

WeChat messages, they form part of the Messages regarding the subject matter of Category 2(c) of the Production Order, which the claimant did not dispute is responsive to the Production Order (see [39] above). The only question that remains is whether the documents identified by the Liquidator showed incomplete production by the claimant *vis-à-vis* the Other Written Communications on matters concerning the applications for a simplified procedure and a sole arbitrator, notwithstanding the effect of Wei's confirmation. I did not think so. In order for the court to conclude that further documents responsive to an order for production exist on the basis of documents already produced, it must be apparent from the face of the produced documents that such further documents indeed exist. In this case, *none* of the documents identified by the Liquidator refer to or suggest that there were such other written communications exchanged between the parties regarding the applications for a simplified procedure and a sole arbitrator before the communications in those documents came to be sent or exchanged.

Categories 2(b) and 3

67 For Category 2(b), Zhang said in the Affidavit that the second respondent was notified of the commencement of the Arbitration by the BCIA, and the document evidencing that communication had been disclosed, and there was no separate communication between the claimant and the second respondent on the commencement of the Arbitration (see [21] above). For Category 3, Zhang explained that all parties (including the claimant) communicated with the BCIA via a designated telephone line on matters relating to the Arbitration, and further, that Wei has advised the claimant that there was no written correspondence exchanged between the claimant and the BCIA on matters concerning the Arbitration, and any discussions that Wei (in his capacity as the claimant's lawyer in the Arbitration) had with the BCIA on

matters concerning the Arbitration either took place over the phone or in person (see [24] above). Zhang also stated in the Affidavit that Wei had confirmed that he did not communicate on WeChat with Jing, a secretary of the BCIA.[64] In the 26 Mar Affidavit, Wei confirmed that apart from what had already been produced by the claimant, he did not have no any other written communications with the BCIA relating to the Arbitration, and further, he did not communicate with the BCIA on matters concerning the Arbitration via WeChat and he had attended personally at the BCIA when dealing with matters concerning the Arbitration.[65] Also, and as I have referred to earlier (see [25]–[26] above), the claimant clarified that, subsequent to the 10 Jan E-mail that the BCIA sent to the claimant to seek clarification on two questions relating to the Arbitration, it had responded to the BCIA on the clarifications sought through Wei speaking with Zhang Tongtong via the designated BCIA telephone line, and so there were no further written communications by the claimant to the BCIA in response to the 10 Jan E-mail.

68 For Category 2(b), the claimant's explanation that it never *separately* communicated with the second respondent about the commencement of the Arbitration is also a confirmation by the claimant that there exist no written communications regarding the subject matter of Category 2(b). This, in turn, is a confirmation by the claimant that there exist *no* documents responsive to Category 2(b) of the Production Order. For Category 3, the claimant confirmed (through Zhang's explanations in the Affidavit and later Wei's confirmation in the 26 Mar Affidavit) that there were no written communications exchanged between the claimant and the BCIA, which in turn is similarly a confirmation by the claimant that there exist *no* documents responsive to Category 3 of the

64 1ZY at para 41.

65 1W at paras 6–7.

Production Order. The robust nature of the claimant's position and explanations for Categories 2(b) and 3 exclude any suggestion that further documents responsive to those categories exist and which have not been produced.

69 I further observe that the nature of the explanations that the claimant provided for Categories 2(b) and 3 suggests that the claimant knew well the sort of explanations that it had to provide to satisfy the court that it has complied with the Production Order. It makes the claimant's omission to state the precise mode of communications adopted on the occasions where the issue of the Memorandum, the dispute under the Guarantee and the claimant's rights to the Remaining Shares were allegedly discussed, which would lend support to its position that the Other Written Communications do not exist, rather odd (see [49]–[53] above).

70 In arguments, the Liquidator pointed to one of the documents in the 2SLOD as showing incomplete production by the claimant *vis-a-vis* Category 3 – this was a letter from HHC informing the BCIA that the second respondent had "no objection to the nature of Exhibit 3". The Liquidator submitted that, in this context, "Exhibit 3" must have been a reference to an exhibit submitted by the claimant to the tribunal in the Arbitration, but yet none of the documents produced contains correspondence in which this "Exhibit 3" was sent by the claimant to the BCIA.[66] In my view, this complaint of the Liquidator is addressed by the claimant's explanation (both in the Affidavit and later reiterated in the 26 Mar Affidavit) that evidence or supplementary evidence tendered on the claimant's behalf in the Arbitration was done so *in person* by Wei attending personally at the BCIA.[67] Since Exhibit 3 would have been

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66 Second respondent's written submissions at para 35.

67 1ZY at para 45; 1W at para 7.

submitted by Wei physically attending at the BCIA, there would have been no written *communication* from the claimant to the BCIA accompanying its submission. Of course, in the ordinary course of things, the BCIA would likely have required the claimant to fill in some forms or papers identifying the exhibit and accompany its submission of Exhibit 3 with those papers. However, any such papers accompanying the submission would not come within Category 3 of the Production Order as they are not in the nature of written communications sent by the claimant to the BCIA.

The claimant's explanation for the loss of P&C of the Messages

71 The existence of the Messages and the fact that they ought to be produced under the Production Order are not in dispute. The only point raised by the claimant is that it has lost P&C of the Messages (see [39] above). As to why that is the case, the claimant's explanation was as follows: (a) it is a feature of the WeChat messaging application that its users cannot retrieve previous messages from the account if the application is subsequently reinstalled on a new mobile phone, or if a user logs into the same account on a different mobile phone; (b) both Wang and Liang had, at times which the claimant did not specify, changed their mobile phones and the WeChat application installed on their new mobile phone does not contain the WeChat messages which were sent or received on the old mobile phone.

72 The Liquidator argued that this explanation is wholly inadequate for two reasons. First, the claimant omitted to state *when* Wang and Liang had changed their respective mobile phones which led to them losing access to the WeChat messages on their old phones, which is significant because this is *when* the

claimant lost P&C of the Messages.[68] Secondly, the claimant also failed to explain what had happened to the old mobile phones of Wang and Liang, which presumably would still have WeChat messages sent or received using the old phone and so these messages can be accessed and obtained if attempts were made to log into the WeChat applications on the old phones.[69] This showed a complete lack of effort by the claimant to obtain documents which it had been ordered to produce under the Production Order.

73 In my view, where a party is required by an order of court to explain on affidavit the circumstances in which it lost P&C of documents that it had been ordered to produce, to comply with that order, the explanation provided must be sufficient in that it has to be accompanied by essential particulars, such as explanations as to *how* P&C was lost and *when* P&C was lost. This follows for two reasons. First, in order for the court to be able to take what is stated in the affidavit on its face and avoid having to go behind the affidavit, which is the starting point for how the court should treat such explanations in affidavits relating to production (see *Lutfi* ([29]) at [31]), there must be a baseline level of information so that the court can meaningfully scrutinise to determine if the explanation can be accepted. Put another way, if the court is to be able to scrutinise the explanation without having to go behind the affidavit, the explanation must first contain enough information for the court to work with. Secondly, it must be borne in mind that the requirement to provide such an explanation in affidavits relating to production is a means of ensuring that a producing party cannot avoid its obligations of production by making blanket assertions that it has lost or could no longer locate documents. If this requirement could be complied with as a matter of form – such as a mere

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68 Second respondent's written submissions at para 22.

69 Second respondent's written submissions at para 24.

statement by the producing party that it has lost P&C of documents without any further elaboration – it would become quite pointless and render nugatory any order made by the court for such an explanation to be given. After all, what is required of the producing party is to "explain" the circumstances in which it lost P&C and not merely "state" so. I am cognisant that the ROC 2021 has sought to narrow the scope for production of documents as compared to what was previously available under the ROC 2014 (see *Civil Justice Commission Report* (29 December 2017) (Chairperson: Justice Tay Yong Kwang) (at pp 19–20), but in my view, this does not mean that the court now adopts a lesser standard in determining if a producing party has properly complied with orders relating to the production of documents. An order requiring a party to explain the circumstances in which it lost P&C of documents that it has been ordered to produce *is what it means*, and any narrower scope for production of documents applicable under the ROC 2021 does not, in my view, water down the sort of explanation required of the producing party to properly comply with such an order.

74 I now turn to consider the claimant's explanations for its loss of P&C of the Messages. As for ***how*** P&C was lost, Zhang explained in the Affidavit that it is a feature of the WeChat messaging application that messages sent or received on an old mobile phone would no longer be accessible when the application is installed on a new mobile phone or when a user logs in to the application on a new mobile phone (see [17] above). I accepted this part of the explanation as satisfactory and note that it was not challenged by the Liquidator. However, this explanation only supplies half of the story as to ***how*** P&C of the Messages was lost.

75 First, it is *not* the claimant's position that, once the WeChat application is installed on a new mobile phone, messages on the *old* mobile phone will be

lost or inaccessible. That being the case, Zhang's explanation regarding the functionality of the WeChat messaging application means that, despite Wang and Liang changing their mobile phones, WeChat messages sent or received using their old phones can still be accessed from the old phones. In order for the claimant to provide a complete explanation as to how P&C of the Messages was lost, in so far as the Messages were to be obtained from Wang and Liang (see [76]–[79] below), the claimant will have to also explain why the WeChat messages on Wang and Liang's old mobile phones are no longer accessible, but the claimant did not do so in the Affidavit. For the purposes of SUM 643, the claimant has been put on notice, through the contents of the Liquidator's supporting affidavit, that the Liquidator intended to challenge the claimant's explanation for loss of P&C of the Messages on the ground that WeChat messages sent or received using Wang and Liang's old mobile phones could still be accessed from the old phones,[70] but this point was not addressed in any of the affidavits which the claimant filed in response in SUM 643.[71]

76 Secondly, there appears to be other persons from whom the Messages can be obtained but the claimant has not stated on affidavit whether it has made attempts to obtain the Messages from these persons and if so, the outcome of these attempts. The fact that the Messages could be obtained from these other persons means that the claimant must account for them if the claimant is to provide a sufficient explanation for *how* P&C of the Messages was lost. I alluded to this deficiency in my exchange with the claimant's counsel at the hearing of SUM 643, and counsel candidly acknowledged that apart from Wang and Liang, it did appear that there were these other individuals from whom the Messages could be obtained, but he rightly acknowledged that the claimant's

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70 2nd affidavit of Max Millet ("2MM") at p 52.

71 2ZY at paras 13–14.

position was limited only to what had been stated on affidavit and he rested the claimant's case on Zhang's deposition in the Affidavit that the claimant has fully complied with the Production Order.[72] However, that deposition is only conclusive in so far as it withstands scrutiny and as I will explain, it does not.

77 To recap, Zhang has stated in the Affidavit that, apart from Wang and Liang, the following persons were also present at the 9 Apr Meeting where the issue of the Memorandum and the dispute under the Guarantee (respectively the subject matter of Categories 1 and 2(a) of the Production Order) had been discussed: Su (the claimant's representative), Wei (the claimant's lawyer in the Arbitration) and Zhang (see [15] above).[73] It was also the claimant's position that the parties had exchanged WeChat messages on these matters (see [17], [20] and [22] above).[74] In no part of the Affidavit did the claimant state that Wang and Liang were the *only* persons who had exchanged WeChat messages on these matters or that Su, Wei and Zhang did not send and/or receive such messages. For the claimant to provide a sufficient explanation of how P&C of the Messages (specifically those regarding the subject matter of Categories 1 and 2(a) of the Production Order) was lost, the claimant ought also to explain why these messages could not be obtained from Su, Wei and Zhang.

78 The claimant did not provide any explanation as to why these messages could not be obtained from Su and Zhang. As for Wei, I accepted that the claimant did provide a sufficient explanation as to why these messages could not be obtained from him. This is because Wei had confirmed in the 26 Mar Affidavit that he does not "have any other written communications with [the

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72 Notes of Arguments, 25 March 2024, p 18 lines 8–23.

73 1ZY at para 18.

74 1ZY at paras 23 and 33.

second respondent] and/or its representatives … relating to the Arbitration" and he also does not "have any other documents concerning the Arbitration in [his P&C]".[75] This confirmation, which I accepted, means that the Messages regarding the subject matter of Category 2(a) could not be obtained from Wei. As for the Messages regarding the subject matter of Category 1, the Liquidator argued that documents "concerning" or "relating to" the Arbitration would not encompass written communications relating to the Memorandum and so Wei's confirmation has no bearing in so far as these messages are concerned.[76] I did not agree with that because the Memorandum is ultimately related to and concerned the Arbitration since it dealt with the forum at which the Arbitration was to take place. I therefore found that Wei's confirmation in the 26 Mar Affidavit also sufficiently accounted for the Messages regarding the subject matter of Category 1, in so far as they were to be obtained from Wei.

79 As for the Messages regarding the subject matter of Category 2(c), I have already explained earlier that, in so far as the messages exchanged between Liang and HHC are concerned, the claimant appears to have the practical ability to obtain those messages from HHC (see [63] above). Additionally, for reasons only known to the claimant, Jing had provided to the claimant a screenshot of the 7 Dec Message that was exchanged between HHC and Liang, which forms part of the Messages regarding the subject matter of Category 2(c) (see [61] above). This raises the question of whether HHC had provided *other* screenshots of similar messages to Jing, and if so, whether they could be obtained by the claimant for production and if not, why. To be clear, I am not saying that the 7 Dec Message provided by Jing to the claimant in and of itself shows that the claimant will also be in *control* of other screenshots of similar messages

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75 1W at para 8.

76 Second respondent's written submissions at para 31.

exchanged between HHC and Liang. This is because the extent to which screenshots of such messages had been sent by HHC to Jing is entirely unclear on the evidence before me and as a starting point it cannot be assumed that Jing would have these messages as he is by definition not a sender or intended recipient of the Messages regarding the subject matter of Category 2(c). However, since it appears that at least one of these messages (namely, the 7 Dec Message) could be obtained from Jing, in order for the claimant to sufficiently explain how it had lost P&C of the Messages regarding the subject matter of Category 2(c), it also had to account for Jing and explain why the remaining of these messages could not be similarly obtained from him, which might be the case if, for example, the screenshot of the 7 Dec Message was the only screenshot that Jing had received from HHC. On the other hand, given Wei's confirmation in the 26 Mar Affidavit that that he does not have "any other written communications with [the second respondent] and/or its representatives … relating to the Arbitration",[77] which by definition also includes WeChat messages, I accepted that this sufficiently accounted for the Messages regarding the subject matter of Category 2(c), in so far as they were to be obtained from Wei.

80 As for ***when*** P&C of the Messages was lost, the claimant's explanation in the Affidavit was similarly insufficient because it did not state ***when*** Wang and Liang changed their mobile phones, which corresponds also to ***when*** the claimant lost P&C of the Messages, in so far as the Messages were to be obtained from them, and assuming for the moment that the claimant has sufficiently explained why such messages could no longer be accessed from their old mobile phones (see [75] above). As I have stated earlier, the point about *when* P&C was lost forms part of the minimum level of information that the

[77] 1W at paras 6 and 8.

claimant has to provide so that its explanations for loss of P&C can be sufficient. In the present case, the apparent coincidence of Wang and Liang, both of whom are crucial actors who can offer an explanation or account of the events in relation to the Memorandum and the Arbitration, both losing WeChat messages exchanged on those events as a result of changing their mobile phones, all the more calls for the claimant to state *when* those messages were lost so that the claimant's explanations for loss of P&C could withstand scrutiny. There are several possibilities as to when that might have happened – whether it was during the course of the Arbitration, before SUM 2987 came to be heard, after the Production Order was made or after the Liquidator took up SUM 346 which sought the Unless Order. If the messages were lost before SUM 2987 came to be heard, why did the claimant not resist the application for production in SUM 2987 on the ground that it has no P&C of any documents responsive to Categories 1, 2(a) and 2(c) of the Production Order, especially since the claimant now takes the position that the Messages are the only written communications which exist and which constitute documents responsive to the Production Order (see [52] above)? For the avoidance of doubt, I am *not* impugning any impropriety or lack of *bona fides* on the part of claimant or its representatives – the point here is that the circumstances of the case would have alerted the claimant to the necessity of stating when P&C of the Messages had been lost in order for its explanations for loss of P&C be sufficient.

81 For the reasons above, I found the claimant's explanation for the loss of P&C of the Messages insufficient, and the claimant has therefore breached the part of the Unless Order requiring the explanation. The claimant's insufficient explanation also means that I cannot accept the claimant's position that it no longer has P&C of the Messages, and I proceed on the basis that the claimant retains P&C of the Messages. The claimant therefore cannot have any excuse

for not producing the Messages and its failure to have done so means that it has also breached Categories 1, 2(a) and 2(c) of the Production Order.

Inspection

82 On the issue of inspection, the Liquidator's complaint was that the claimant simply provided *printed* versions of the *copies* of documents that were already provided in electronic format to the Liquidator at the time the 2SLOD was filed.[78] The documents in the 2SLOD comprised seven screenshots of WeChat messages and their accompanying attachments, as well as an e-mail and its accompanying attachments. The Liquidator argued that, very clearly, what is contemplated as part of inspection was for the Liquidator to view the originals of these documents in their native format, such as the original file medium of the e-mail or the screenshots of the WeChat messages as displayed on the relevant device by which the claimant had received those screenshots.[79] Despite requests made by the Liquidator's counsel, the claimant did not make available such originals for inspection.[80]

83 It is true that para 3 of the Unless Order that I had previously granted did not expressly state that the documents to be allowed for inspection were to be their originals. For context, let me set out the relevant sections of paras 2 and 3 of the Unless Order:

> 2. By 4 March 2024, the claimant is to file a list of, and provide the 2nd Respondent with *copies* of, all documents in its possession or control ('P/C') that are responsive to the seven categories of documents covered by the order in HC/ORC 575/2023 ('the Production Order'), namely:

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78 Second respondent's written submissions at para 44.

79 Notes of Arguments, p 8, lines 25–30.

80 2MM at pp 100–101.

> …
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> 3. The claimant is to permit the 2nd Respondent to inspect *the document*s at paragraph 2 above by 6 March 2024.
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> [emphasis added]

84 However, reading paras 2 and 3 of the Unless Order together, the reference to "the documents" in para 3 could only be understood as a reference to the originals of those documents. Otherwise, it would have been superfluous for the Unless Order to specify at para 2 that the claimant is to provide "copies" of those documents, which are to be listed in the list of documents that it was required to file and then go on at para 3 to provide for the Liquidator's right to "inspect" the documents *after* the list has been filed and the "copies" have been provided. If all that is required for inspection were mere copies, why would there still be a need for inspection after those copies have already been provided together with the list of documents? In any case, the omission of the word "original" from para 3 could not have suggested that the claimant could comply with its obligations of inspection simply by providing printed versions of the same *copies* of documents previously provided in electronic form. It is trite that a party's obligation to give inspection is to be fulfilled by providing the originals of the documents that are to be inspected, and not their copies (see, for example, *Fermin Aldabe v Standard Chartered Bank* [2009] SGHC 194 at [37]–[39]). Where electronic documents are concerned, careful evaluation of its original source is needed to verify their authenticity (see *Alliance Management SA v Pendleton Lane P and another and another suit* [2008] 4 SLR(R) 1 at [31]–[35]). Order 11 r 12 of the ROC 2021 also makes clear that the right of a party to inspect documents is *vis-à-vis* the "original" of the produced document.

85 Returning to the present case, it is undisputed that the claimant, in complying with its obligations of inspection under the Unless Order, simply provided printed versions of the same *copies* of documents previously sent by

the claimant's counsel to the Liquidator's counsel in electronic format. The claimant did not allow for the inspection of the screenshots of the WeChat messages as well as their accompanying attachments on the relevant device by which the digital files had been received by the claimant, and the claimant also did not allow for the inspection of the e-mail and its accompanying attachments in its native file format. The claimant has therefore *failed* to allow for the inspection of the originals of the documents produced in the 2SLOD in the manner required by the Unless Order, and is therefore in breach of the corresponding part of the Unless Order.

86 In submissions, the claimant's counsel pointed out that the 2SLOD had expressly described the documents produced as being "copies",[81] and for that reason, all that could be allowed for inspection were similarly "copies" of those documents. The claimant therefore could not be faulted for failing to provide originals for inspection.[82] I was not persuaded by this explanation for two reasons. First, the mere act of describing the documents produced as "copies" in the Affidavit cannot go on to relieve the claimant of its obligations of inspection which, as explained, can only be fulfilled by a producing party providing the originals of documents produced for inspection. Secondly, this explanation is, in my view, an afterthought by the claimant. It must be borne in mind that the claimant had in SUM 346 *agreed* to the filing of the list of documents which is now the 2SLOD (see [8] above). The documents in the 2SLOD are therefore those which the claimant had been *prepared* to produce in the first place. If the claimant genuinely faced difficulties in obtaining the originals of those documents to facilitate inspection, it could have raised those difficulties at the time when SUM 346 was heard so that the relevant part of the

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81 1ZY at para 12.

82 Notes of Arguments, p 13, lines 15–25.

Unless Order could be calibrated, but the claimant did not do so. Even if any such difficulties only came about after the Unless Order was granted, the claimant could have stated so in the Affidavit (which accompanied the 2SLOD) and explained why, but the claimant did not do so. At the latest, the claimant could have explained in the affidavits which it filed in response in SUM 643 that it faced difficulties in obtaining originals to facilitate inspection, or that it genuinely believed that it was entitled to *not* provide originals for inspection because it has described the documents produced in the 2SLOD as "copies" in the Affidavit; the claimant did not do so.

Whether the breach had been intentional and contumelious?

87 For the reasons above, I was satisfied that the clamant has breached the Unless Order by:

(a) failing to comply fully of the Production Order, because:

(i) the 30 Dec Message produced in the 2SLOD gave rise to a "reasonable suspicion" and/or made it "plain and obvious" that there exist further documents in the form of the Messages exchanged between HHC and Liang regarding the subject matter of Category 2(c) of the Production Order, which must be or have been in the claimant's control, and which the claimant has not produced;

(ii) the claimant's failure to produce the Messages, which undisputedly exist, constitute documents responsive to Categories 1, 2(a) and 2(c) of the Production Order, and continue to be viewed as being in the claimant's P&C, and which the claimant can have no excuse for its failure to produce;

(b) failing to provide a sufficient explanation as to the circumstances in which it lost P&C of the Messages because the claimant did not explain (i) *how* P&C of the Messages were lost by omitting to explain why the Messages could no longer be retrieved from Wang and Liang's old mobile phones and account for the other persons from whom it appears the Messages could be obtained (see [74]–[79] above) and (ii) *when* P&C of the Messages (in so far as they were to be obtained from Wang and Liang) were lost (see [80] above); and

(c) failing to permit the Liquidator's inspection of originals of documents produced in the 2SLOD as required by the Unless Order (see [85] above).

88 The question which follows is what consequences ought to attach to the claimant's breach. Although the court is guided by considerations of proportionality in assessing breaches of "unless" orders (see *Mitora Pte Ltd v Agritrade International (S) Pte Ltd* [2013] 3 SLR 1179 ("*Mitora*") at [39]), as the High Court explained in *DNG* ([27] above) (at [98]–[99]), this does not mean that the *adverse consequences* of an "unless" order would necessarily militate against it coming into effect. Instead, considerations of proportionality are to be applied on a sliding scale, depending on the mental state of the defaulting party (see *DNG* at [99]). Where the breach was intentional and contumelious, then striking out would be a proportionate response so that it reinforces the seriousness of an "unless" order that had been legitimately imposed. On the other hand, if the breach was due to negligence, then a court must take a more generous consideration of proportionality and avoid striking out.

89 The burden is on the claimant, who seeks to avoid the adverse consequences of the Unless Order, to demonstrate that its breach had not been intentional and contumelious (see *Mitora* at [35]; *DNG* at [96]). The case which the claimant advanced in SUM 643 was that it had substantively complied with the Unless Order and even if it had not, it is disproportionate for the Unless Order to come into effect, bearing in mind that this would result in the setting aside of ORC 1189 and consequent refusal of enforcement of the Award (see [36]–[38] above). It therefore meant that there were no significant arguments before me on whether the claimant's breach had been intentional and contumelious.

90 Be that as it may, in my view, it was clear that claimant's breach of the Unless Order had been intentional and contumelious. I say so for three reasons.

91 First, the claimant cannot come anywhere close to discharging its burden of demonstrating that its breaches had not been intentional and contumelious where it has not provided any meaningful explanation in its affidavits filed in SUM 643 for *why* it has acted in breach of the Production Order and/or the Unless Order. This necessarily follows because the claimant's position in SUM 643 was that it has substantively complied with the Production Order and the Unless Order. In particular, on the issue of whether the claimant's explanation for the loss of P&C of the Messages was sufficient, the Liquidator's supporting affidavit would have informed the claimant that the Liquidator intended to challenge the sufficiency of that explanation because the claimant omitted to state when Wang and Liang changed their mobile phones and what had happened to their old phones. Nowhere in the claimant's affidavits filed in reply in SUM 643 did the claimant make an attempt to say why the explanations for loss of P&C as given in the Affidavit is already sufficient or that it has already given the best explanation it could, which might well be the case if both Wang

and Liang could no longer recall when they had changed their mobile phones, or if for whatever reason WeChat messages sent or received on the old mobile phone could no longer be accessed from that phone. On this point, the claimant simply reiterated in the 21 Mar Affidavit that it had "explained" why the WeChat records of the claimant's key representatives involved in the Arbitration were unavailable.[83]

92 Secondly, the claimant's present instance of non-compliance with the Unless Order has to be viewed in the light of its previous pattern of persistent and deliberate non-compliance with the Production Order that led to the making of the Unless Order (see the GD at [66]–[68]). The claimant's consent to the substance of *what* the Unless Order sought (save for its peremptory effect) was a clear acceptance that it had failed to perform what the Production Order required it to do. It therefore knew full well that the Unless Order was the final opportunity for it to set things right and properly comply with the Production Order and other orders relating thereto. Yet, the claimant chose not to do so. Absent any satisfactory explanation, of which there is none, the irresistible conclusion was that the present instance of non-compliance is unlikely a matter of inadvertence or a consequence of circumstances beyond the claimant's control, and more likely to be a deliberate disregard of court orders by the claimant.

93 Finally, as for the breach associated with the manner in which the claimant allowed for the Liquidator's inspection of the documents produced in the 2SLOD, I found that this too was intentional and contumelious. The claimant would have had experience with document inspection that it previously facilitated in connection with the LOD as required by the Production Order (and

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83 2ZY at para 13.

I presume so in respect of the SLOD). It obviously would have known that this entailed the inspection of the originals of documents produced. As I have stated earlier, it is significant that the documents produced in the 2SLOD were those which the claimant had been prepared to produce and hence any difficulties it might have faced regarding procuring their originals for inspection could have been articulated when the Unless Order was made so that it could be calibrated accordingly, but the claimant did not raise such issues and it also did not explain in the affidavits it filed in reply in SUM 643 why it had been unable to allow for the inspection of originals of the documents produced in the 2SLOD (see also [86] above). These all point to the conclusion that the manner in which the claimant has breached this part of the Unless Order is likewise intentional and contumelious. For the avoidance of doubt, I certainly do not mean to suggest that the claimant's *counsel* had omitted to permit for proper inspection of the documents in the 2SLOD. The claimant's failure to permit for proper inspection of the documents in the 2SLOD is a failure attributed to the *claimant alone*, a point with which the Liquidator's counsel agreed at the hearing before me.[84] From the overall sequence of events, it appears that the claimant's counsel had simply made available for inspection whatever it had been provided by the claimant in accordance with the claimant's instructions.

Consequences of the breach

94 Since the claimant was unable to demonstrate that its breach of the Unless Order had *not* been intentional and contumelious, considerations of proportionality would apply in a limited fashion and the Unless Order should take effect generally (see *DNG* ([27] above) at [99] and [102(c)]). The claimant relied on three main grounds to argue that the Unless Order should not take

[84] Notes of Arguments, 25 March 2024, p 8 lines 28–30.

effect: (a) first, that it is contrary to the principle of minimal curial intervention to disrupt the enforcement of an award of arbitral award under the IAA, which the coming into effect of the Unless Order would result in; (b) secondly, that disrupting the enforcement of the Award is a disproportionate consequence as it would deprive the claimant of its fruits of the Award where none of the statutorily-provided grounds in the IAA for challenging the Award have been demonstrated by the Liquidator; and (c) thirdly, that the hearing of SUM 952 can nevertheless proceed with the Liquidator being able to make submissions on the significance or consequences associated with the absence of those documents that the claimant has allegedly failed to produce, which form a central plank of the claimant's case in SUM 952 anyway. The claimant also took some issue with the fact that the Liquidator's supporting affidavit for SUM 643 is a mere seven paragraphs – which simply adopted the assertions that its solicitors previously made in letters to the court informing the court that the claimant had breached the Unless Order – and did not explain the prejudice that the Liquidator will suffer as a result of the claimant's alleged non-compliance with the Unless Order. None of the claimant's submissions persuaded me that the Unless Order should not take effect. Let me explain.

That the enforcement of the Award stands to be disrupted

(1) The principle of minimal curial intervention and s 31(1) of the International Arbitration Act

95 To the extent the enforcement of the Award is disrupted by the coming into effect of the Unless Order on the basis of the claimant's intentional and contumelious breach of the same, this does not, in my view, contradict the principle of minimal curial intervention in arbitral proceedings. The principle of minimal curial intervention flows from the need to encourage finality in the arbitral process as well as the deemed acceptance by the parties to an arbitration

of the attendant risks of having only a very limited right of recourse to the courts, which is provided for by the International Arbitration Act in specified circumstances (see *BLC and others v BLB and another* [2014] 4 SLR 79 at [51]–[52). Because of the court's limited role in arbitral proceedings, the grounds for curial intervention by the court are limited to the statutorily-prescribed grounds in the International Arbitration Act and do not encompass the merits of the award or the substantive correctness of the tribunal's decision (see *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [37]–[38]). The principle of minimal curial intervention does mean that the court has a natural inclination to let arbitral awards stand but that in fact is a result of the limited grounds of intervention available to the court, rather than an outcome which the principle of minimal curial intervention dictates as an end in its own right. Put another way, what the principle of minimal curial intervention frowns upon is the disruption of the enforcement of arbitral awards on grounds which can undermine the finality of the arbitral process. It does not mean that any decision of the court which stands to disrupt the enforcement of an arbitral award will necessarily contradict the principle of minimal curial intervention. Whether the disruption of enforcement of an arbitral award attracts the principle of minimal curial intervention turns on whether such an outcome has the effect of undermining the finality of the arbitral process.

96 In this case, the Production Order had been granted because I was satisfied that the documents requested by the Liquidator in SUM 2987 are material to the "issues" arising in the Liquidator's application for refusal of enforcement of the Award under s 31(2) of the International Arbitration Act. The Unless Order was in turn granted to compel the claimant's compliance with the Production Order. I proceeded on the basis that the claimant accepts that both the Production Order and the Unless Order had been correctly imposed

because the claimant did not appeal against both orders. The coming into effect of the Unless Order and the consequent disruption of enforcement of the Award, on the basis that the claimant's breach of the same had been intentional and contumelious, is merely a consequence of availing to the Liquidator a remedy under our rules of civil procedure to which any similarly placed litigant is entitled in compelling a defaulting party's compliance with court orders, and it does not in any way entail a *challenge or review of the Award* on the merits or on grounds beyond those statutorily provided for in the International Arbitration Act. This outcome does not undermine the finality of the arbitral process is not inconsistent with the principle of minimal curial intervention. In arriving at this conclusion, I was mindful that there is nothing in the ROC 2021 to suggest that the typical remedies of civil procedure, such as the making of orders for production and peremptory orders, ought to be more limited where the underlying case involves the enforcement of an arbitral award (see also the GD at [24] and [34]).

97 On this point, I note that s 31(1) of the International Arbitration Act provides as follows:

> In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the party against whom the enforcement is sought may request that the enforcement be refused, and the enforcement in any of the cases mentioned in subsections (2) and (4) may be refused, *but not otherwise*.
>
> [emphasis added]

98 Sections 31(2) and 31(4) of the International Arbitration Act in turn provide for the grounds on which the court may refuse enforcement of a foreign award under Part III of the International Arbitration Act, which include some of those grounds that the Liquidator intends to rely on in its application in SUM 952. The High Court in *Aloe Vera of America, Inc v Asianic Food (S) Pte*

Ltd and another [2006] 3 SLR(R) 174 (at [46]) held that the language "but not otherwise" in s 31(1) indicates that the grounds for refusal of enforcement in ss 31(2) and (4) are "meant to be exhaustive and that the court has no residual discretion to refuse enforcement if one of those grounds is not established".

99 In preparing these grounds of decision, I considered whether the *outcome* of my decision in SUM 643 – the disruption of enforcement of the Award as a result of the Unless Order taking effect – might be inconsistent with s 31(1) of the International Arbitration Act. That would be the case if s 31(1) of the International Arbitration Act is interpreted as requiring the court to *never* refuse the enforcement of an arbitral award, except in circumstances set out in ss 31(2) and 31(4) of the International Arbitration Act. I answered this in the negative, for two reasons.

100 First, what s 31(1) of the International Arbitration Act is concerned with is the court's discretion to refuse enforcement of foreign awards in an application brought for refusal of enforcement under s 31(1) of the International Arbitration Act, such as SUM 952. It is in such an application that s 31(1) limits the court's discretion in terms of the grounds on which the court can make an order to refuse the enforcement of an arbitral award, namely, those specified in ss 31(2) and 31(4) of the IAA. The application before me – SUM 643 – is not one such application and the court's discretion to set aside ORC 1189 and thereby refuse the enforcement of the Award flows from the Unless Order, the making of which is within the jurisdiction of the General Division of the High Court. The discretion which I presently exercise is therefore not subject to the constraints in s 31(1) of the IAA. To reiterate, there is nothing in the ROC 2021 which indicate that the civil procedure remedies such as orders for production and "unless" orders to compel a defaulting party's compliance with previous

court orders ought to be limited where the underlying case involves the enforcement of an arbitral award.

101 Secondly, beyond an application for refusal of enforcement of an arbitral award under s 31(1) of the International Arbitration Act, I do not think s 31(1) is intended to limit the court's discretion in terms of the types of orders it could make whenever the order stands to disrupt (and in effect, refuse) the enforcement of an arbitral award. Section 31(1) of the International Arbitration Act can be viewed as an incident of the principle of minimal curial intervention by limiting the circumstances in which an award can be refused enforcement *only* to those where the tribunal has acted in excess of jurisdiction, where there has been a fundamental process failure in the arbitration or where so dictated by public policy of the enforcing state, as set out in Art 36(1) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") and reproduced in ss 31(2) and 31(4) of the International Arbitration Act. What s 31(1) contemplates is where the refusal of enforcement of an arbitral award is sought on the basis of *challenges to the arbitral award* and it in turn limits the grounds on which an award may be refused enforcement to those on which the award may be permissibly challenged under the International Arbitration Act and the Model Law. The limits in s 31(1) of the International Arbitration Act are therefore inapplicable where the refusal of enforcement is not founded on the basis of a challenge to the arbitral award (*ie*, where the case in question does not concern an application under s 31(1) of the International Arbitration Act, such as the present). I therefore did not think that, beyond an application for refusal of enforcement under the International Arbitration Act, s 31(1) goes so far to limit the court from making any order that has the effect of refusing the enforcement of an arbitral award. If this was the intended purpose of s 31(1), then it would contain express language to that effect.

(2) That the enforcement of the Award is refused where the grounds of challenge in SUM 952 have not been demonstrated by the Liquidator

102 Next, the fact that the enforcement of the Award is *refused* where none of the statutorily provided grounds in the IAA for challenging the Award have been demonstrated in SUM 952, is not a reason which renders the coming into effect of the Unless Order disproportionate. In my view, that the enforcement of an arbitral award stands to be disrupted by the coming into effect of an "unless" order can hardly be a relevant consideration in the assessment of proportionality.

103 As a starting point, no State will permit a binding arbitral award to be enforced within its territory without being able to review the award or without allowing the parties an opportunity to address the court if there has been a violation of due process or other irregularities in the arbitral proceedings (see *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [26]). For these safeguards to be upheld, it is necessary that parties seeking enforcement of arbitral awards in the courts (as well as those against whom an award is to be enforced) comply fully with court orders made to allow the court to effectively exercise its jurisdiction and discretion under the International Arbitration Act, such as an order for production of documents material to a challenge under s 31(1) of the International Arbitration Act and a peremptory order granted to compel a party's compliance with the production order.

104 To this end, a legitimately imposed "unless" order would have been granted in the first place because the court considered it necessary to compel the defaulting party's compliance with previous orders of the court that had been granted in aid of the court's jurisdiction and exercise of discretion under the International Arbitration Act. Why should its effect then be mitigated, simply

because the defaulting party stands to lose the right to enforce an arbitral award that it had obtained in its favour? If the disruption of enforcement of an arbitral award is regarded as a relevant consideration in the assessment of whether it is proportionate for the "unless" order to come into effect, this creates a risk that parties seeking the enforcement of arbitral awards will not take seriously the "unless" order (as well as the court's orders generally), on the grounds that they have come to the court to enforce an arbitral award and that such "unless" orders should not come into effect because of what is at stake (see also *DNG* ([27] above) at [98]). The extent to which a party is required to comply with procedural rules and court orders cannot be contingent on the remedy it seeks. It is for this same reason that I think it quite unlikely that s 31(1) of the International Arbitration Court is intended to fetter the court's discretion in terms of the orders it can generally make where this is necessary for, or as a consequence of, securing a defaulting party's compliance with court orders.

That there can nevertheless be a fair hearing of SUM 952 in the absence of the documents that have not been produced

105 I now turn to the claimant's submission that allowing the Unless Order to come into effect will be disproportionate because the Liquidator has been able to make ample arguments in support of SUM 952 despite not having the documents which the claimant had allegedly failed to produce, and so the hearing of SUM 952 can proceed in the absence of these documents. On this point, the claimant emphasised that this is not a situation where the Liquidator has had difficulties making out its case for SUM 952 in the absence of the requested documents, and so even if I were of the view that there remained documents responsive to the Production Order that have not been produced, this could be left to the court hearing SUM 952, which may draw adverse inferences,

as may be needed.[85] To some extent, I agreed with the claimant that the Liquidator appears to have been able to effectively mount its case in SUM 952 since day one, as is evident from its clearly articulated grounds of challenge against ORC 1189 (see the GD at [16]). However, that is not the end-all, and the critical question is whether there can nevertheless be a fair hearing of the matter in the absence of the outstanding documents responsive to the Production Order. I was not satisfied that this is the case.

106 As I previously explained in the GD, the documents in Categories 1, 2(a) and 2(c) are respectively material to the following issues that I considered are likely to arise in SUM 952: (a) whether there had been a genuine agreement between the parties for the variation of the agreed arbitral institution, from the JAC to the BCIA ("the First Issue"; see the GD at [36]); (b) whether there existed any dispute between the parties prior to the commencement of the Arbitration in connection with the claimant's rights to the Remaining Shares ("the Second Issue"; see the GD at [37]); and (c) whether the Arbitration was a sham ("the Third Issue"; see the GD at [38]).

107 In respect of the First Issue, as the Liquidator's counsel highlighted in submissions, the claimant's case appears to have shifted somewhat from the time when SUM 2987 was heard. Then, the claimant's position was that the Memorandum had been signed in or around June 2019 (see the GD at [13]). However, the claimant's position now, according to the explanations in the Affidavit, was that the Memorandum had been executed in person after the 9 Apr Meeting, which took place in 2022, though there is no documentary evidence whatsoever – whether in the form of documents exhibited in the

[85] Claimant's written submissions at paras 33 and 36.

Affidavit or documents hitherto produced – to substantiate this position.[86] I make no comment whatsoever about which account ought to be accepted. The point made here is that, in connection with the First Issue, a court hearing SUM 952 would essentially be left with the claimant's (two) accounts and the Liquidator's opposing account, none of which are substantiated by documentary evidence, *despite there being documents responsive to Category 1 that are material to the First Issue which have not been produced* (namely, the Messages) (see [87(a)] above). The First Issue squarely and directly relates to one ground of the Liquidator's challenge in SUM 952 – that the arbitration agreement is invalid and unenforceable because of the invalidity of the Memorandum (see the GD at [16]).

108 In respect of the Second Issue, the claimant's position now, as stated through Zhang's explanations in the Affidavit, is largely consistent with what it had maintained previously – the claimant stops short of saying that the claimant and the second respondent were in dispute over the claimant's rights to the Remaining Shares before the commencement of the Arbitration and merely says that the claimant wanted its rights to the Remaining Shares adjudicated and that was why the Arbitration had been commenced (see the GD at [37(b)]; see [18] above). The Liquidator's position, on the other hand, is that there had been no genuine dispute, and the Arbitration was commenced for the purpose of allowing the claimant to steal a march ahead of the second respondent's other creditors. Both the claimant's and the Liquidator's respective accounts are unsubstantiated by any documentary evidence. Again, the court hearing SUM 952 will be left with these conflicting accounts *alone*, *despite there being documents responsive to Category 2(a) that are material to the Second Issue which have not been produced* (namely, the Messages) (see [87(a)] above).

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86 Notes of Arguments, 25 March 2024, p 6 lines 13–20.

Similar to the above, the Second Issue directly relates to one ground of the Liquidator's challenge in SUM 952 – that the jurisdiction of the tribunal was not enlivened as there had been no actual dispute between the parties prior to the commencement of the Arbitration (see the GD at [16]).

109 It has to be borne in mind that in a proceeding like SUM 952, there is to be no taking of oral evidence and cross-examination of witnesses unless otherwise permitted by the court (see O 15 r 7(5) of the ROC 2021) and in the absence of examination of witnesses in court, it will not be open to the Liquidator to argue in SUM 952 on the basis of affidavits alone that adverse inferences be drawn by the court against the claimant pursuant to s 116 of the Evidence Act in respect of the absence of documents responsive to Categories 1 and 2(a) which the claimant has failed to produce (see s 2(1) of the Evidence Act). The Liquidator can of course apply for the cross-examination the relevant witnesses on matters to which the documents in Categories 1 and 2(a) relate but as *things presently stand*, the outcome of any such putative application is uncertain and it is also unclear whether the Liquidator would indeed be able to secure the oral evidence of any of these witnesses and what such evidence would show. I add that in determining if the Unless Order should take effect, I am limited to what is presently *known* to the court; it will not be correct for me to factor in hypotheticals or possibilities in that exercise, such as the *possibility* of witnesses being cross-examined by the Liquidator and that their evidence might mitigate any gap arising from the absence of documents responsive to Categories 1 and 2(a) in connection with the issues to be determined in SUM 952. Furthermore, why should the burden to secure a fair hearing be imposed on the Liquidator, where it has been the claimant's breaches that have in the first place frustrated a fair hearing from taking place? For these reasons and coupled with the fact that the documents in Categories 1 and 2(a) respectively

relate to two of the three distinct grounds of the Liquidator's challenge in SUM 952, I was satisfied that the absence of documents responsive to Categories 1 and 2(a), occasioned by the claimant's breaches of the Production Order and the Unless Order, will frustrate a fair hearing and determination of SUM 952.

110 Documents responsive to Category 2(c), as well as those responsive to Categories 4 to 7, are all material to the Third Issue, *ie*, whether the Arbitration had been a sham. This is because, as explained in the GD (at [45]), the documents from Categories 2(b) to 7 are those which one would ordinarily expect to exist in a routine arbitration. Unlike the case for the First Issue and the Second Issue, for the Third Issue, apart from the documents coming within Category 2(c) (parties' written communications on matters relating to the conduct of the Arbitration), the court may resort to *other* sources of documentary evidence to determine that issue, since the question of whether the Arbitration is a sham can be demonstrated *other* than by reference to whether the parties had engaged in written communications between themselves relating to the conduct of the Arbitration. In this situation, where the court appears to already have some other documentary evidence by which the Third Issue can be determined, such as the documents produced for Categories 4 to 7 (which the Liquidator did not take issue with) and the documents produced for Category 3 (which I accept the claimant has produced in full), I hesitated to go so far to say that the absence of documents responsive to Category 2(c) will impede a fair hearing of SUM 952, in the same manner as the absence of documents responsive to Categories 1 and 2(a) would.

111 However, what I have said about Category 2(c) is not a reason for the Unless Order to not take effect, given the conclusions I have drawn with respect to the absence of documents responsive to Categories 1 and 2(a), which respectively relate to *two* of the three issues likely to arise in SUM 952 as well

as *two* of the three distinct grounds that the Liquidator relies on for its challenge against ORC 1189. In these circumstances, I was satisfied that it is a proportionate consequence for the Unless Order to come into effect.

Other considerations relating to proportionality

112 Let me now turn to the other arguments which the parties have made on the point of whether it is proportionate for the Unless Order to come into effect. First, in its arguments that the Unless Order should take effect, the Liquidator placed emphasis on the fact that the claimant has to date not paid the outstanding costs ordered in SUM 2987 and SUM 346, and also pointed to the unsatisfactory explanations in the Affidavit as to why the claimant had failed to comply with the Production Order in the first place, which it said were revealing of the claimant's dilatory conduct as a whole. With respect to the non-payment of costs ordered by the court, there are procedural avenues by which the Liquidator can seek recourse from the claimant. Similarly, as for Zhang's explanations in the Affidavit as to why the claimant had failed to comply with the Production Order in the first place, because they did not come within the scope of the claimant's obligations under Unless Order (see the GD at [69]), I do not think any insufficiency associated with them can be relied upon to justify the Unless Order taking effect. I therefore disagreed with the Liquidator that the outstanding costs and the claimant's unsatisfactory explanation for its earlier non-compliance were reasons that justified the Unless Order coming into effect.

113 In any case, I agreed with the Liquidator that Zhang's explanations for the claimant's failure to comply with the Production Order were unsatisfactory. Zhang explained that at the time when the Production Order was made, Wang had fallen seriously ill and so the claimant had faced delay in obtaining the documents required for the LOD and the SLOD, and this delay was exacerbated

by the year-end holidays.[87] While I accepted that the claimant would have faced delays due to Wang being ill, the claimant could have well informed the court of the genuine difficulties it faced and asked for more time to comply with its obligations under the Production Order. The claimant never did so and simply filed the LOD which it well knew was incomplete and later sought to remedy by the SLOD which too was incomplete (see the GD at [66]).

114 Secondly, the claimant took some issue with the fact that the Liquidator's supporting affidavit for SUM 643 is scant and that it simply adopted assertions that the Liquidator's counsel had made in letters to court about the claimant's alleged breaches of the Unless Order and also failed to articulate the prejudice suffered by the Liquidator. I did not see the relevance of this submission on the issue of whether the Unless Order should take effect. The assertions made by the Liquidator's counsel in its letters to court would have been drafted pursuant to the Liquidator's instructions and I did not see anything objectionable with the Liquidator adopting them in its supporting affidavit for SUM 643. That being said, I would have expected the Liquidator to flesh out these assertions in the body of its supporting affidavit more fully, though I appreciate that the Liquidator faced some time pressure as compressed timelines were given for the filing of SUM 643 in order to not scupper the hearing date of SUM 952 that had been fixed for 28 March 2024. In any case, the question of whether an "unless" order should come into effect is not contingent on the non-defaulting party demonstrating prejudice caused by the breach; the question is whether the defaulting party can demonstrate any reason why the "unless" order should not be given effect to, and from the reasons I have set out above, the claimant has not persuaded me so.

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87 1ZY at para 50; Claimant's written submissions at para 29.

115 In *Mitora* ([88] above) (at [45]), the Court of Appeal held that "unless" orders should be granted scrupulously and where appropriate the court should consider alternative means of penalising contumelious or persistent breaches. This similarly applies where the question is whether an "unless" order should be given effect to (see, for example, *DNG* ([27] above) at [156]). One consideration which therefore came to mind when I decided SUM 643 was whether, as an alternative to ordering that the Unless Order take effect, I should afford the claimant a final chance at compliance with the Unless Order by ordering that it file an affidavit and provide its position on the deficiencies I have identified above, and depending on the explanations given, I could then decide if the Unless Order should take effect. These deficiencies are, namely, the following:

(a) why, apart from the 30 Dec Message, it has not produced the remaining of the Cat 2(c) Messages exchanged between Liang and HHC, which the claimant appeared to be able to obtain from HHC;

(b) why the Messages (in so far as they were sent and/or received by Wang and Liang) could not be obtained from the old mobile phones of Wang and Liang;

(c) whether the Messages regarding the subject matter of Categories 1 and 2(a) of the Production Order (in so far as they were sent and/or received by Su and Zhang) could be obtained from Su and Zhang, and if not, why;

(d) whether any further screenshots of the Messages regarding the subject matter of Category 2(c) of the Production Order exchanged between Liang and HHC could be obtained from Jing, and if not, why; and

(e) why it had not provided the originals of the documents produced in the 2SLOD for inspection by the Liquidator.

116 I eventually decided against this approach, for two reasons.

117 First, in view of the rather unequivocal positions taken by the claimant *vis-à-vis* the issue of whether it has complied with the Unless Order, as gleaned from the Affidavit and the other affidavits it filed in SUM 643, I thought that such an exercise would be quite pointless. Given the claimant's overarching position in the Affidavit that it has already produced all documents responsive to the Production Order of which it has P&C (see [11] above), it would be an exercise in futility to ask the claimant to again provide its position on the deficiencies relating to the individual categories of documents because chances are that the claimant would simply reiterate the same point. The same goes for the issue of the Messages because the claimant has already stated (through Zhang) in the 21 Mar Affidavit, which it filed in SUM 643 responding to the Liquidator's allegations of the claimant's breaches of the Unless Order, that the claimant already "explained" in the Affidavit why the relevant WeChat messages were unavailable. Again, chances are that the claimant would simply reiterate the same point in any further affidavit it might be asked to file. Secondly, and more critically, the claimant already had an opportunity to remedy any deficient explanation in the Affidavit through the affidavits that it filed in response in SUM 643. To give the claimant a further opportunity is to extend to the claimant a second bite at the cherry, which is unjustifiable in any event, and especially so given the rather unequivocal positions the claimant had already taken *vis-à-vis* the issue of whether it has complied with the Unless Order.

Conclusion

118 For the reasons above, I found that the Unless Order has been breached by the claimant and that its breach had been intentional and contumelious. I was also satisfied that there were no reasons against the Unless Order coming into effect. I therefore allowed SUM 643 and ordered that ORC 1189 be set aside and OA 222 be dismissed. At the conclusion of the hearing where I delivered my decision on SUM 643 to the parties, I also recorded that no order was made in respect of SUM 952, since the outcome of SUM 643 has rendered the Liquidator's challenge in that application nugatory.

Costs

119 For costs, the parties put forward their respective positions in two letters sent to the Registry.[88] As I gathered from these letters, there were three sets of costs and disbursements in respect of which orders had to be made, following my decision in SUM 643: (a) the costs and disbursements of SUM 643 itself; (b) the wasted costs and disbursements arising from my decision in SUM 643 ("the Wasted Costs"); and (c) the costs of OA 222, which has been dismissed following my decision in SUM 643.

120 In respect of SUM 643:

(a) I ordered that the claimant pay the Liquidator $12,000 for costs excluding disbursements. I drew reference from the costs range provided for "striking out" of whole suit/defence under Section II(B) of the Guidelines for Party-and-Party Costs Awards in the Supreme Court of

[88] Breakpoint LLC's letter dated 26 March 2023 and Genesis Law Corporation's letter dated 1 April 2023 ("GLC's Letter") in Other Hearing Related Requests filed by the second respondent dated 1 April 2024.

Singapore in Appendix G of the Supreme Court Practice Directions 2021 ("Appendix G"), which is between $6,000 and $20,000. The parties were largely in agreement on the use of this range for the costs of SUM 643, only that the Liquidator proposed a sum of $16,000 while the claimant proposed a sum of $10,000. On the whole, having regard to the length of the affidavits filed and the length of the submissions made, and in particular the fact that *part* of the Liquidator's submissions in SUM 643 dealt with the issues of the claimant's non-compliance that had been *previously* raised in SUM 346, I considered a sum of $12,000 excluding disbursements appropriate.

(b) As for disbursements, the claimant stated that it did not dispute the disbursements claimed by the Liquidator in respect of SUM 643 ($3,307.89).[89] I therefore ordered the claimant to pay the Liquidator $3,307.89 in disbursements for SUM 643.

121 In respect of the Wasted Costs, this comprises (a) the costs and disbursements of SUM 952, which has been rendered nugatory following my decision in SUM 643, as well as (b) the costs and disbursements of an earlier application to adduce further evidence in HC/SUM 2671/2023 ("SUM 2671"), which the Liquidator had prevailed in, and which had been ordered by the court hearing SUM 2671 to be in the cause of SUM 952.

(a) I ordered that the claimant pay the Liquidator $40,000 (being the costs of SUM 952) and $9,000 (being the costs of SUM 2671), both of which exclude disbursements.

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89 GLC's Letter at para 17.

(b) For the costs of SUM 952, the parties were largely in agreement that the daily tariff for "Arbitration" Originating Applications under Section IV(B) of Appendix G was the appropriate costs range, save that the Liquidator proposed a sum of $60,000 while the claimant proposed a sum of $36,000. The Liquidator argued that the sum of $60,000 was justified in view of the exceptional nature of SUM 952, because the substantive grounds raised for the challenge were complex and novel, and also because SUM 952 had necessitated the claimant taking out several related applications, such as SUM 2987, SUM 346 and SUM 643. Having regard to the grounds of the Liquidator's challenge in SUM 952 and having briefly perused the rounds of affidavits that the parties have filed in connection with SUM 952, and also having regard to the fact that the work on SUM 952 was terminated right on the doorstep before it came up for hearing (SUM 952 was due to be heard on 28 March 2024, three days after I heard SUM 643), I considered that a sum of $40,000, being the uppermost limit of the daily tariff in Appendix G, was appropriate for the costs of SUM 952. I did not agree with the Liquidator that the various related applications it had taken out against the claimant relating to and arising from the Production Order can warrant a higher quantum of costs because the Liquidator would have been paid the costs of those applications separately through costs orders made in each of those applications.

(c) For the costs of SUM 2671, I drew guidance from Section II(A) of Appendix G which provided for a costs range of $9,000 to $22,000 for contested applications fixed for special hearing. SUM 2671 had been fixed for a special half-day hearing before a Judge in the General Division of the High Court. The parties also filed full written submissions for SUM 2671, though it appears from the record of the

hearing that the claimant appears to have conceded at the hearing itself that it had no meaningful ground for challenging SUM 2671. On this note and having regard to the length of the written submissions and the affidavits filed, I considered that a sum of $9,000 was appropriate for the costs of SUM 2671.

(d) As for disbursements, the claimant stated that it does not dispute the disbursements claimed by the Liquidator in respect of SUM 952 as well as SUM 2671.[90] I therefore ordered the claimant to pay the Liquidator $7,545.99 and €8,480.00 (being the disbursements of SUM 952) and $1,165.60 (being the disbursements of SUM 2671).

122 Finally, in respect of the costs of OA 222, I make no order as to costs. I should highlight that ORC 1189, which previously provided for the second respondent/the Liquidator to pay costs to the claimant alongside with the enforcement of the Award, has since been set aside. The only question therefore is whether the Liquidator should be further entitled to costs arising from the dismissal of OA 222, and I did not see why that should be so. OA 222 is an application for permission to enforce an arbitral award, which O 48 r 6(1) of the ROC 2021 provides may be made "without notice". OA 222 was therefore brought on a "without notice" basis and did not involve the Liquidator until the latter filed applications seeking to challenge ORC 1189. I do not see why the Liquidator should be entitled to recover any costs and/or disbursements for OA 222, an application which was not meant to, and which in the event did not, involve parties other than the claimant. As for the costs incurred in work done for applications taken out to challenge ORC 1189, the Liquidator would have

[90] GLC's Letter at para 17.

been compensated for its costs through the costs orders separately made in those applications (see [120(a)] and [121(b)] above).

Perry Peh
Assistant Registrar

Kelvin Poon SC and Devathas Satianathan (Rajah & Tann Singapore LLP) (instructed) and Terence Tan and Lena Tan (Genesis Law Corporation) for the claimant;
Jordan Tan and Damien Chng (Audent Chambers LLC) (instructed) and Nicholas Poon and Michael Chan (Breakpoint LLC) for second respondent.