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

[2024] SGHC 308

Originating Application No 222 of 2023 (Registrar's Appeal No 90 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*

JUDGMENT

[Arbitration — Enforcement — Foreign award — Breach of "unless order" made in proceedings to enforce foreign award — Whether striking out proceedings to enforce foreign award contrary to Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10th June 1958 — Articles III and V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10th June 1958]
[Arbitration — Enforcement — Foreign award — Breach of "unless order" made in proceedings to enforce foreign award — Whether striking out proceedings to enforce foreign award contrary to pro-enforcement policy or principle of minimal curial intervention]
[Civil Procedure — Production of documents — Breach of "unless orders" — Whether "unless order" for production of documents breached — Whether

"plain and obvious" that party in "possession or control" of further documents responsive to specific production order — Test for "control" — O 11 r 3 of the Rules of Court 2021]
[Civil Procedure — Production of documents — Breach of "unless orders" — Party claiming in affidavit verifying list of documents that no further documents in possession or control — Requirements of explanation in affidavit verifying list of documents — Whether affidavit verifying list of documents deficient]
[Civil Procedure — Striking out — Breach of "unless order" — Whether sanction in "unless order" automatic in effect — Whether striking out proportionate response to breach of "unless order" — Scope of inquiry into proportionality]

TABLE OF CONTENTS

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

[2024] SGHC 308

General Division of the High Court — Originating Application No 222 of 2023 (Registrar's Appeal No 90 of 2024)
S Mohan J
15 October 2024

3 December 2024 Judgment reserved.

S Mohan J:

Introduction

1 This is a case about the consequences of one's actions or, perhaps more accurately, one's failure to act.

2 A peremptory, or "unless", order has been described as one of the most powerful tools in the court's arsenal to ensure compliance with its orders and maintain procedural discipline. Its premise is simple: a party is ordered to do an act, and "unless" the order is complied with and the act done as ordered, a prescribed adverse consequence is to automatically follow. It is no surprise, therefore, that the unless order has been referred to as an "order of last resort" and represents a party's "last chance to put his case in order" (see *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 ("*Hytec*") at 1674).

3 It should seem obvious, as night follows day, that if a party fails to make use of his "last chance", the guillotine should drop and the prescribed consequence(s) ought to follow. For one, the court should not be seen as prone to making idle threats; an ultimatum is hardly an ultimatum if it is not ultimate. But it is contended in this appeal that this intuitive, if not reflexive, flow of events in fact does not flow.

4 Although the imposition and breach of unless orders are not uncommon occurrences *per se* in civil litigation, the present case is situated in the somewhat unusual context of curial proceedings to enforce a foreign arbitral award. A putative award creditor in foreign arbitral proceedings commences proceedings in Singapore to enforce the arbitral award it has obtained in its favour, intending to leverage on the policy of no-frills enforcement embodied by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10th June 1958 (the "New York Convention"), which is given the force of law in Singapore as the Second Schedule of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"). The award creditor obtains permission to enforce the award on an *ex parte* basis. The award debtor, however, claims to know nothing of the arbitration and intends to resist enforcement of the award. To this end, it takes out an application for specific production of documents, seeking various documents relating to the arbitration and the parties' underlying dispute, pursuant to O 11 r 3 of the Rules of Court 2021 ("ROC 2021"). The court below grants the application and makes an order for the award creditor to produce specified categories of documents. After the award creditor fails to comply with its production obligations, an unless order is made against it, specifying, as the consequences of non-compliance, the dismissal of the enforcement proceedings and the rescission of the earlier grant of permission for the enforcement of the award. The award debtor alleges that

the award creditor remains recalcitrant in its non-compliance. The broad issues that arose in the court below and in the appeal before me are twofold:

(a) One, has the award creditor breached the unless order?

(b) Two, should the specified consequences in the unless order be allowed to take effect?

5 The award creditor prays that both questions be answered in the negative. It resists the award debtor's attempt to enforce the unless order on various grounds, ranging from the unless order having (in actuality) been complied with to the court not having the power to enforce the unless order (even if it has been breached) in the face of the New York Convention. Above all, the catchword "proportionality" is the lynchpin of the award creditor's position: it argues that it is *disproportionate* for the unless order to take effect, and for the enforcement proceedings to be stopped in its tracks.

6 In the court below, in his detailed grounds of decision reported at *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co Ltd and another* [2024] SGHCR 7 (the "GD"), the learned assistant registrar Perry Peh ("the AR") – who had also made the order for production of documents and imposed the unless order – found that the unless order had been breached and, more importantly, that it should take effect. The disgruntled award creditor appeals against the AR's decision.

7 This appeal presents a useful opportunity to revisit and consider important aspects of the document production regime and the court's jurisdiction on unless orders, particularly under the ROC 2021. Having considered the parties' submissions carefully, I dismiss the appeal for the

reasons explained in this judgment. My findings, in summary, are as follows:

(a) First, the unless order had been breached as the claimant did fail to comply with its production obligations.

(b) Second, it is not disproportionate for the stated consequences of the dismissal of the enforcement proceedings to kick in.

(c) Third, neither the New York Convention nor the policy of minimal curial intervention in arbitral proceedings deprives the court of the power to enforce the unless order in this case.

Background facts and procedural history

8 I start with the factual background underlying this appeal. The background to the dispute between the parties and the procedural history of this matter are somewhat complicated and warrants being set out in some detail.

Background to the parties' dispute

9 The underlying dispute centres around the parties' rights to shares in a company incorporated in Luxembourg, SMCP SA ("SMCP" and the "SMCP Shares") held by the second respondent, European Topsoho S.àr.l. ("ETS"). The claimant, Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) ("Xinbo"), claims that pursuant to a tripartite agreement (the "Guarantee"), ETS agreed to pledge some 40m shares in SMCP (comprising all of ETS's shares in SMCP) to Xinbo as security for a debt owed by the first respondent, Shandong Ruyi Technology Group Co, Ltd ("Ruyi"), to Xinbo. Xinbo is the ultimate

parent company of ETS.[1] The Guarantee was dated 25 July 2018 and was signed on behalf of ETS by one Ms Qiu Chenran ("QCR"), who was, at that time, one of ETS's managers.[2]

10 The gravamen of Xinbo's complaint is that, unbeknownst to it, ETS had double-pledged some 28m of the SMCP Shares (the "Pledged Shares") by offering it as security to back an issuance of bonds (the "Bonds") by ETS to bondholders. Subsequently, ETS defaulted on the Bonds, and the trustee for the bondholders, GLAS SAS (London Branch) (the "Trustee"), took possession of the Pledged Shares sometime on or around 27 October 2021.[3] After Xinbo learned of the Bonds and the Pledged Shares, it issued notices dated 8 and 9 October 2021 seeking the transfer of ETS's remaining shares in SMCP – some 12m shares (the "Remaining Shares") – to its nominee for the purpose of safeguarding Xinbo's rights to the Remaining Shares.[4] The transfer of the SMCP Shares to Xinbo's nominee was completed on or around 27 October 2021,[5] pursuant to an earlier share sale agreement dated 22 October 2021.[6]

11 The Trustee subsequently commenced proceedings in the English courts against ETS and other persons. It obtained summary judgment on 17 October 2022 in respect of the debt owed by ETS under the Bonds, and thereby became a judgment creditor of ETS.[7] It has also challenged the transfer of the Remaining

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1 1st Affidavit of Valerie Kopera dated 5 April 2023 ("VK-1") at para 43.

2 2nd Affidavit of Wang Yan dated 16 October 2023 ("WY-2") at para 20.

3 WY-2 at paras 22–23.

4 VK-1 at para 46; WY-2 at para 24.

5 WY-2 at para 24.

6 VK-1 at paras 39 and 47.

7 VK-1 at para 42.

Shares[8] on the ground, *inter alia*, that it constitutes a transaction in fraud of ETS's creditors under s 423 of the Insolvency Act 1986 (c 45) (UK). It appears that, at present, the Trustee had applied for and been refused summary judgment, and the matter is to proceed to trial before the English High Court (see *GLAS SAS (London Branch) v European Topsoho SARL and others* [2024] EWHC 83 (Comm)). Nonetheless, the previous and ongoing proceedings before the English courts are not of any particular relevance to the present matter.

12 As part of the Trustee's enforcement action, it filed a bankruptcy petition against ETS in the Luxembourg courts in October 2021. A bankruptcy order was subsequently made against ETS in February 2023, the result of which was the appointment of a curator (the "Curator") to take over control of and conduct investigations into ETS's affairs.[9] I am given to understand that the functions of a Curator are similar to those of a trustee in bankruptcy or a liquidator under Singapore law.[10] In all proceedings before the Singapore courts, ETS has been acting under the control of the Curator.

The Arbitration

13 On 18 November 2022, Xinbo commenced arbitration proceedings that resulted in the award that forms the subject-matter of its present enforcement proceedings in Singapore (the "Arbitration"). According to Xinbo, the Arbitration was commenced for the purpose of addressing its rights to the Remaining Shares under the Guarantee.[11]

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8 VK-1 at para 40.

9 VK-1 at paras 21–22.

10 VK-1 at para 1.

11 WY-2 at paras 26–27.

14 The underlying arbitration agreement in the Guarantee had, initially, provided for the parties' disputes to be resolved by arbitration under the auspices of the "Jining Arbitration Commission" (the "JAC") in the People's Republic of China.[12] Article V of the Guarantee provided as follows:[13]

> V. In case of any dispute between Party A, Party B and Party C arising from the performance and execution of this supplementary agreement, the parties shall settle the dispute through friendly negotiation. If the negotiation fails, the parties shall apply to Jining Arbitration Commission for arbitration, and the current effective Arbitration Rules of the Jining Arbitration Commission shall apply.

15 However, the Arbitration was instead conducted under the auspices of the "Beihai Court of International Arbitration" ("BCIA"). As the AR noted, there is a curious inconsistency in Xinbo's position as to when Art V of the Guarantee was varied to change the arbitral institution from the JAC to the BCIA (see GD at [5] and [107]).

16 Initially, in Xinbo's supporting affidavit for its application for permission to enforce the award in HC/OA 222/2023 ("OA 222"), Xinbo had stated that the parties to the Guarantee – *ie*, Xinbo, Ruyi and ETS – had agreed to change the identified arbitral institution to the BCIA pursuant to a memorandum signed *in or around June 2019* (the "Memorandum"), due to apparent concerns over the JAC's ability to hear an arbitration over the parties' dispute as it was a foreign-related arbitration.[14] Like the Guarantee, the Memorandum was signed on behalf of ETS by QCR. A copy of the

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12 1st Affidavit of Cheng Yu dated 21 March 2023 ("CY-1") at para 8.

13 CY-1 at p 34.

14 CY-1 at para 9.

Memorandum (undated) was exhibited to the supporting affidavit, and cl 1 of the Memorandum stipulated a variation to Art V of the Guarantee as follows:[15]

> 1. Since Jining Arbitration Commission does not have the conditions for hearing foreign-related arbitration cases, now, through negotiation, all parties agree to change Article V of the [Guarantee] signed on July 25, 2018 to:
>
> "In case of any dispute between Party A, Party B and Party C arising from the performance and execution of this Agreement, the parties shall settled [*sic*] the dispute through friendly negotiation. If the negotiation fails, the parties shall apply to Beihai Court of International Arbitration for arbitration, and the current effective arbitration rules of Beihai Court of International Arbitration shall apply."

17 However, in a subsequent affidavit filed by Xinbo's representative, Ms Zhang Yu ("Zhang"), to comply with the Unless Order, Xinbo stated that the parties had agreed to the change of the arbitral institution from the JAC to the BCIA at an in-person meeting held on *9 April 2022* (the "9 April Meeting").[16] According to Zhang, the attendees at the 9 April Meeting included:

(a) QCR;

(b) Mr Qiu Yafu ("QYF"), who is QCR's father and the ultimate controller of the group of companies of which Ruyi is part;

(c) Mr Ma Wenguang ("Ma"), a lawyer who went on to act for Ruyi in the Arbitration;

(d) Ms Wang Yan ("Wang"), Ms Su Xiao ("Su") and Zhang herself, as Xinbo's representatives;

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15 CY-1 at p 38.

16 1st Affidavit of Zhang Yu dated 14 March 2024 ("ZY-1") at paras 17–21.

(e) Mr Wei Shengli ("Wei"), a lawyer who went on to act for Xinbo in the Arbitration; and

(f) Mr Liang Shuang ("Liang"), as Xinbo's legal adviser.

At this juncture, it suffices for me to highlight that the fact that the variation was discussed and agreed on at an in-person meeting is an important part of Xinbo's case that it has complied with the Production Order and the Unless Order.

18 Leaving aside the ambiguity as to the time when the agreement to change the arbitral institution occurred, the Arbitration was conducted at a private hearing on 30 December 2022, and the tribunal handed down its award on 10 January 2023 (the "Award"). It was recorded in the Award that the following persons had appeared before the tribunal at the hearing:[17]

(a) Wei, as the lawyer acting for Xinbo;

(b) Ma, as the lawyer acting for Ruyi; and

(c) Mr He Hanchu ("HHC"), as the lawyer acting for ETS.

19 In the Award, the tribunal affirmed the validity of the debt owed by Ruyi to Xinbo as well as the Guarantee. It adjudged Xinbo to have rights to the Remaining Shares under a pledge of the SMCP Shares by ETS to Xinbo under the Guarantee, and held that Xinbo had a "priority right of compensation" out of the proceeds of sale of the Remaining Shares.[18] Notably, it was recorded at various parts of the Award that (despite being represented by HHC at the

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17 Arbitral Award in BHCIA Case No.3-1280 (2022) dated 10 January 2023 at p 15 (CY-1 at p 11).

18 CY-1 at p 28, para 3.

hearing) ETS had no objection to the evidence submitted by Xinbo, as well as the reliefs claimed by Xinbo.[19]

Xinbo's enforcement proceedings in Singapore

20 In OA 222, Xinbo commenced proceedings in Singapore seeking permission to enforce the Award. The application was heard on an *ex parte* basis and permission was granted in HC/ORC 1189/2023 ("ORC 1189").

ETS's application to refuse enforcement of the Award

21 Subsequently, ETS applied in HC/SUM 952/2023 ("SUM 952") seeking to set aside ORC 1189. In an affidavit filed in support of SUM 952, the Curator alleged various irregularities relating to the Arbitration and the Award that supplied grounds for ORC 1189 to be set aside. Among other things, the Curator stated that:

(a) the arbitration agreement in Art V of the Guarantee was invalid and unenforceable as QCR did not have authority under ETS's articles of association to enter into either the Guarantee or the Memorandum;[20]

(b) the Award was invalid as there was no dispute between the parties that the tribunal had jurisdiction to adjudicate upon;[21]

(c) HHC had no authority to act on ETS's behalf in the Arbitration;[22]

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19 CY-1 at p 15.

20 VK-1 at paras 63–70.

21 VK-1 at paras 71–76.

22 VK-1 at paras 77–79.

(d) the Award was procured by fraud as evidenced *inter alia* by the BCIA being (allegedly) a fictitious and non-existent arbitral institution;[23] and

(e) enforcement of the Award would be contrary to the public policy of Singapore.[24]

22 In a nutshell, ETS's case in SUM 952 was that the Arbitration and the Award had been concocted for the purpose of allowing Xinbo to steal a march ahead of ETS's other creditors in ETS's liquidation by giving Xinbo proprietary rights to the Remaining Shares. A common thread underlying the Curator's assertions was that prior to being notified by Xinbo, the Curator had not had any knowledge of the existence of the Arbitration and the Award, and the Curator had also not been able to, in the course of its investigations into ETS's affairs, uncover any internal documents relating to the parties' alleged dispute under the Guarantee, the parties' entry into the Memorandum, as well as the Arbitration itself (see GD at [6]).[25]

ETS's application for production of documents and the Production Order

23 To fill the gaps in the Curator's knowledge about the Arbitration and the Award, ETS applied in HC/SUM 2987/2023 ("SUM 2987") for Xinbo to produce eight categories of documents which it claimed were material to the determination of SUM 952.

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23 VK-1 at paras 83–116.

24 VK-1 at paras 117–120.

25 VK-1 at paras 24–25.

24 SUM 2987 was heard by the AR and he granted ETS's application in respect of seven of the eight categories of documents requested (see *DFD v DFE and another* [2024] SGHCR 4 at [2]). Xinbo did not appeal against the AR's decision. In the Production Order (*ie*, HC/ORC 5751/2023), Xinbo was ordered *inter alia*:

(a) within 21 days, to file a list of documents corresponding to the seven categories and provide copies of those documents to ETS; and

(b) within 14 days from the time copies of the documents are produced to ETS, to allow ETS to inspect those documents.

25 Generally, the Production Order required Xinbo to produce documents relating to (a) the parties' dispute under the Guarantee; (b) the parties' entry into the Memorandum; and (c) the Arbitration. More specifically, the following categories of documents that Xinbo was ordered to produce *via* the Production Order are relevant for present purposes (see GD at [12]):

(a) *Category 1*: Communications between Xinbo (which includes Xinbo's representatives and lawyers) and ETS and/or any of its representatives (including QCR and QYF) 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 Xinbo (which includes Xinbo's representatives and lawyers) to ETS and/or any of its representatives (including QCR, QYF, HHC or any other person from

HHC's law firm) 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 ETS and/or its representatives, whether in the form of a demand letter or otherwise.

(ii) *Category 2(b)*: after the commencement of the Arbitration, notifying ETS and/or its 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 Xinbo to the BCIA.

Xinbo's non-compliance with the Production Order and the imposition of the Unless Order

26 On 11 December 2023, Xinbo filed a list of documents (the "LOD"), which ETS contended (in correspondence) was incomplete. Subsequently, on 30 January 2024, and without being prompted by any order or direction of the court, Xinbo filed a supplementary list of documents (the "SLOD"), which ETS similarly contended (again, in correspondence) was incomplete.

27 Dissatisfied with Xinbo's attempts at complying with the Production Order, ETS filed HC/SUM 346/2024 ("SUM 346") seeking an unless order to secure Xinbo's full compliance with the Production Order, failing which ORC 1189 – *ie*, the order granting permission for the enforcement of the Award (see [20] above) – be set aside and OA 222 be dismissed.

28 SUM 346 was also heard by the AR, who granted the application and made the Unless Order (*viz*, HC/ORC 1035/2024). Xinbo *did not* appeal against the imposition of the Unless Order. Given that the present case centres around Xinbo's alleged compliance (or non-compliance) with the Unless Order, it is useful to set out the relevant parts in full:

> 1. The enforcement sought in HC/OA 222/2023 granted on 14 March 2023 pursuant to HC/ORC 1189/2023 be set aside, and HC/OA 222/2023 be dismissed without any further order, unless [Xinbo] complies with paragraphs 2, 3 and 4 of this order.
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> 2. By **4 March 2024**, [Xinbo] is to file a list of, and provide [ETS] 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 5751/2023 ("**the Production Order**"), namely:
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> …
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> 3. [Xinbo] is to permit [ETS] to inspect the documents at paragraph 2 above by **6 March 2024**.
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> 4. By **4 March 2024**, [Xinbo] is to file and serve on [ETS] an affidavit ("**the Affidavit**") explaining: (a) which documents that [Xinbo] has produced and/or will produce fall within the respective categories of documents covered by the Production Order; and (b) whether [Xinbo] has lost P/C of any documents that are responsive to the Production Order and if so, provide an explanation of the circumstances in which it lost P/C of such documents.
>
> …
>
> [emphasis in original]

Xinbo's attempts at complying with the Unless Order

29 In apparent compliance with the Unless Order, Xinbo filed a second supplementary list of documents (the "2SLOD"), as well as an affidavit deposed by Zhang dated 14 March 2024 (the "14 March Affidavit") in which she set out explanations for how Xinbo had complied with the Production Order and the Unless Order.

30 In the 14 March Affidavit, Zhang stated, *inter alia*, that two of the documents produced in the 2SLOD were responsive to Category 2(c) of the Production Order, whereas another document was responsive to Category 3 of the Production Order. The other documents produced in the 2SLOD did not come within any of the categories of the Production Order.[26]

31 Further, Zhang averred that, given the documents disclosed and produced in the LOD, SLOD and 2SLOD, "[Xinbo] 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".[27] In other words, Xinbo took the position that it had *fully complied* with the Unless Order (insofar as it was imposed to secure full compliance with the Production Order).

32 Zhang then went on to elaborate why Xinbo had no further documents in its possession or control responsive to any of the categories in the Production Order. Her explanations have been helpfully set out in detail by the AR in the GD (see GD at [14]–[26]), but for ease of reference, I summarise them here.

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[26] ZY-1 at paras 11–12.

[27] ZY-1 at para 13.

(1) Category 1

33 Category 1 related to communications between Xinbo and ETS regarding the execution of the Memorandum. No documents responsive to Category 1 have been disclosed by Xinbo.[28] Zhang explained that:

> (a) The change of the arbitral institution had been discussed and agreed upon in-person at the 9 April Meeting. At that meeting, Ma (*ie*, Ruyi's lawyer in the Arbitration) had raised the inadequacies of the JAC and suggested a change to the BCIA. The other attendees agreed. Following the meeting, Wang drafted the Memorandum, which was later executed in-person by the parties' representatives on 11 April 2022.[29]
>
> (b) The main mode of communication between the parties was through physical meetings, telephone calls or WeChat messages. Any WeChat messages that might have been responsive to Category 1 were no longer in Xinbo's possession or control as "any relevant WeChat records of [Xinbo's] representatives" – specifically, Wang – had been "deleted due to a change of mobile phones".[30]

(2) Category 2(a)

34 Category 2(a) concerned communications between Xinbo and ETS in respect of the parties' dispute under the Guarantee before the commencement of the Arbitration. Although the AR recorded that Xinbo had not disclosed *any*

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28 ZY-1 at para 27.

29 ZY-1 at paras 17–22.

30 ZY-1 at paras 23–25.

documents responsive to Category 2(a) (see GD at [13]), I note that this may strictly be inaccurate as Zhang explained that the two notices sent by Xinbo to QCR and ETS on 8 and 9 October 2021 for the transfer of the Remaining Shares, which were disclosed in the LOD, were documents responsive to Category 2(a).[31] In fairness to the AR, his impression appears to have been engendered by a subsequent statement by Zhang – admittedly unequivocal on its face – that "[n]o documents have been disclosed by [Xinbo] under category 2(a) of the Production Order".[32]

35 Be that as it may, Xinbo's position seems to be that, those two notices aside, it had not disclosed any other documents responsive to Category 2(a) because no such documents remained in its possession or control. In this regard, Zhang explained that:

> (a) The parties' discussions on Xinbo's interest in the Remaining Shares had taken place at in-person meetings,[33] including at the 9 April Meeting. At the 9 April Meeting, the parties apparently had differing views on the effect of the terms of the Guarantee, specifically, on whether the Guarantee granted Xinbo any priority right to the Remaining Shares and/or their proceeds of sale. It was thus proposed by Wang that the Arbitration be initiated to determine Xinbo's rights to the Remaining Shares under the Guarantee.[34]

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31 ZY-1 at para 28.

32 ZY-1 at para 34.

33 ZY-1 at para 29.

34 ZY-1 at paras 30–32.

(b) Any WeChat messages between Xinbo and ETS responsive to Category 2(a) had been lost, and were thus no longer in Xinbo's possession or control, due to Xinbo's representatives having changed their mobile phones.[35]

(3) Category 2(b)

36 Category 2(b) encompassed communications between Xinbo and ETS after the commencement of the Arbitration, and specifically, those involving Xinbo notifying ETS of the commencement of the Arbitration. Xinbo took the position that it had complied with Category 2(b) by disclosing an e-mail from the BCIA to ETS communicating the commencement of the Arbitration in the SLOD. No further documents responsive to Category 2(b) were disclosed as there was no (and no need for) separate communication between Xinbo and ETS on this matter.[36]

(4) Category 2(c)

37 Category 2(c) involved communications between Xinbo and ETS after the commencement of the Arbitration, and specifically, in connection with matters arising out of or in connection with the Arbitration. Xinbo's position appears to be that it had complied with Category 2(c).

38 Zhang explained that Xinbo itself had no documents responsive to Category 2(c) in its possession or control given the parties' main modes of communication (*ie*, physical meetings, telephone calls and WeChat messages) and the loss of the WeChat messages due to the change of mobile phones of

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35 ZY-1 at paras 25–26 and 33–34.

36 ZY-1 at para 35.

Xinbo's representatives. However, Xinbo had gone the extra mile by reaching out to one Mr Jing Lin ("Jing"), a secretary of the BCIA who handled administrative matters relating to the Arbitration, and who was able to provide some WeChat messages exchanged between (a) Jing and HHC (purportedly ETS's lawyer in the Arbitration) from 7 December 2022 to 9 December 2022; and (b) Jing and one Zhang Tongtong (another secretary of the BCIA who handled the Arbitration). These messages that Xinbo obtained from Jing were disclosed in the 2SLOD.[37]

39 In SUM 346, ETS suggested that Xinbo had failed to comply with the Production Order by pointing to an apparent inconsistency between three documents in the SLOD: (a) an e-mail sent by the BCIA to ETS where the former had referred to *ETS's application* for a simplified procedure; (b) a subsequent e-mail sent by the BCIA to all the parties referring to a *joint application* by the parties for a simplified procedure; and (c) an excerpt from the transcript of the hearing of the Arbitration which also referred to a "joint request" for a sole arbitrator. The Curator argued that the fact that a unilateral application had morphed into a joint application suggested that there had to be underlying communications between the parties preceding the conversion of the application into a joint one (see GD at [23]).

40 In her 14 March Affidavit, Zhang sought to explain away this inconsistency on the basis that the reference in the first e-mail to *ETS's* application was infelicitous, as the application had all along been a joint one. Further, any discussions between the parties on the procedure for the Arbitration had been through their aforementioned main modes of communication, and any

[37] ZY-1 at para 43 and p 9.

WeChat messages that existed had since been lost due to the change of mobile phones of Xinbo's representatives.[38]

(5) Category 3

41 Category 3 concerned communications from Xinbo to the BCIA in respect of any matter arising out of or in connection with the Arbitration. Xinbo's position appears to be that it had complied with Category 3.

42 Zhang averred that, in general, no documents responsive to Category 3 existed because, according to Wei (*ie*, Xinbo's lawyer in the Arbitration), the parties had contacted the BCIA through its designated telephone line as this was the BCIA's common practice. Wei no longer retained telephone records detailing those calls due to the passage of time. Further, Wei had advised that no written correspondence was exchanged between Xinbo and the BCIA because (a) the issues in the Arbitration were not particularly complex; and (b) when necessary, apart from discussions over the telephone, Wei had attended in person at the BCIA to deal with matters concerning the Arbitration, such as when he tendered evidence for the Arbitration.[39]

43 In SUM 346, ETS suggested that Xinbo failed to comply with the Production Order in respect of Category 3 by relying on an e-mail sent by the BCIA to Wang on 10 January 2023 seeking clarification on two questions relating to the Arbitration (the "10 January E-mail"). This e-mail was disclosed in the SLOD. Since the next e-mail in time was the e-mail from the BCIA notifying the parties of the outcome of the Arbitration, ETS argued that there

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38 ZY-1 at paras 39–42.

39 ZY-1 at paras 44–45.

must have been a prior e-mail to this where Xinbo had responded to the 10 January E-mail.

44 In her 14 March Affidavit, Zhang stated that Wei had advised that the 10 January E-mail had simply been intended to put on record matters that had previously been addressed at the hearing of the Arbitration. In any event, Wang had forwarded the e-mail to Wei, who subsequently contacted Zhang *via* the BCIA's telephone line to confirm the same on 10 January 2023. Further, Jing had also liaised with Liang (Xinbo's legal advisor) on WeChat on 10 January 2023 on the same issues in the 10 January E-mail, and Xinbo had disclosed these messages (which it obtained from Jing) in the 2SLOD. Apart from these messages, Xinbo did not have any further documents responsive to Category 3 in its possession or control.[40]

ETS's application to enforce the Unless Order

45 After the time for ETS to comply with the Unless Order had passed, various disagreements arose between the parties as to whether Xinbo had or had not complied with the Unless Order. Among other things, ETS took the position that the 14 March Affidavit – which was initially filed under cover of a solicitors' affidavit – had been filed out of time,[41] which Xinbo disputed.[42] Other

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40 ZY-1 at paras 46–49.

41 2nd Respondent's Letter to Court dated 4 March 2024 at para 4; 2nd Respondent's Letter to Court dated 5 March 2024 at paras 3–5.

42 Claimant's Letter to Court dated 6 March 2024 at para 2(a); Claimant's Letter to Court dated 5 March 2024 at para 3.

objections to the adequacy of Xinbo's purported compliance with the Unless Order were also raised by ETS[43] and refuted by Xinbo.[44]

46 In these circumstances, the AR gave directions for ETS to take up an application if it was of the view that Xinbo had breached the Unless Order. Pursuant to this direction, ETS commenced HC/SUM 643/2024 ("SUM 643") in which it sought *inter alia* an order that the consequences in the Unless Order take effect. The appeal now before me in HC/RA 90/2024 is Xinbo's appeal against the AR's decision in SUM 643.

Decision below

47 The AR held that Xinbo had breached the Unless Order and that it was appropriate for the stated sanctions in the Unless Order to take effect. Although the appeal against the AR's decision is by way of rehearing based on the documents filed before the AR (see O 18 r 25(4) of the ROC 2021), I would record my appreciation for the assistance that I have derived from the AR's detailed and extensive coverage of the issues in the GD.

Xinbo had breached the Unless Order

48 The AR's key findings on the issue of breach can be summarised as follows. First, he noted that it was not entirely clear that Xinbo's position in relation to Categories 1, 2(a) and 2(c) was that the *only* form of communication between the parties had been through WeChat messages, such that *no other forms* of written communications (which the AR referred to collectively as "Other Written Communications") existed (see GD at [43(a)]). However, it

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43 2nd Respondent's Letter to Court dated 5 March 2024 at paras 6–14.

44 Claimant's Letter to Court dated 6 March 2024 at paras 2(b)–2(f) and 3.

appeared that Xinbo's position as gleaned from its affidavits was that the Other Written Communications did not exist given Zhang's statements in her 14 March Affidavit that Xinbo had complied with the Production Order as apart from the documents disclosed in the LOD, SLOD and 2SLOD, no other documents responsive to the Production Order remained in Xinbo's possession or control (see GD at [44]). Although the AR considered Xinbo's failure to expressly state its position on the existence of the Other Written Communications to be odd, and also found some of Xinbo's explanations questionable, he ultimately held that there was insufficient basis to conclude that there was either a reasonable suspicion, or that it was plain or obvious, that the Other Written Communications existed and were in Xinbo's possession or control, such that Xinbo had breached the Production Order (and, in turn, the Unless Order) by failing to disclose them (see GD at [53]).

49 Second, the AR found that Xinbo had breached the Production Order in respect of Category 2(c). Although Xinbo had taken the position that it did not have possession or control of any WeChat messages between its representatives and ETS as its representatives had lost their WeChat messages after a change of mobile phones, the AR noted that Xinbo had been able to produce in the 2SLOD a screenshot of WeChat messages exchanged between HHC (purportedly ETS's lawyer in the Arbitration) and Liang (Xinbo's legal advisor) dated 30 December 2022 (the "30 December Message"), which Xinbo stated it had obtained from HHC and was responsive to Category 2(c) (see GD at [60]). Xinbo's position was not that this 30 December Message was the only document that existed and which was responsive to Category 2(c), but that it was only able to produce the 30 December Message as Liang had changed his phone and thereby lost the other WeChat messages he had exchanged with HHC (see GD at [61]). As Xinbo did not explain how and why HHC had provided the 30 December

Message, and also did not elaborate on whether the 30 December Message was the only message that HHC had been able to provide to it, the AR held that other WeChat messages between HHC and Liang existed and were in Xinbo's control (as Xinbo could procure HHC's assistance to provide them) (see GD at [63]). This either gave rise to a reasonable suspicion or made it plain and obvious that Xinbo had failed to produce these other WeChat messages responsive to Category 2(c), and had therefore failed to comply with the Production Order (see GD at [64]).

50 Third, the AR accepted Xinbo's averment that it had no further documents responsive to Categories 2(b) and 3 on the basis that, respectively, Xinbo had not communicated separately with ETS about the commencement of the Arbitration and Zhang's explanations in the 14 March Affidavit – as confirmed by Wei in a subsequent affidavit of his dated 26 March 2024 (the "26 March Affidavit") – that no written communications were exchanged between Xinbo and the BCIA as Wei had either spoken to the BCIA over the telephone or attended in person when necessary (see GD at [67]–[68]).

51 Fourth, the AR held that Xinbo had breached the Production Order by failing to provide an adequate explanation of how it had lost possession or control of the WeChat messages. By failing to adequately explain its loss of possession or control of the WeChat messages, the court could not accept Xinbo's bald assertions on affidavit that it did not have possession or control of the same, and in turn, Xinbo breached Categories 1, 2(a) and 2(c) insofar as the WeChat messages responsive to these categories were concerned (see GD at [81]). The Production Order required Xinbo to explain the circumstances in which it had lost possession or control as opposed to merely stating that it had

lost possession or control (see GD at [73]). In this regard, Xinbo's explanations were woefully inadequate:

(a) Although Zhang had stated that Xinbo's representatives were unable to access their past WeChat messages after changing their mobile phones, Zhang had *not* stated that the past WeChat messages could no longer be accessed on these representatives' old phones or that these representatives no longer had access to their old phones. Xinbo's explanation was thus incomplete insofar as it only covered its representatives' inability to access the WeChat messages on their *current* (new) phones (see GD at [75]).

(b) There appeared to be other persons from whom Xinbo could obtain the WeChat messages, but Xinbo had failed to account for these other persons and its attempts (if any) to obtain the WeChat messages from them. Instead, Xinbo had simply made a global statement that it had fully complied with the Production Order (see GD at [76]). For example, in respect of the parties' dispute under the Guarantee and their discussion on the Memorandum, persons other than Wang and Liang had been in attendance at the 9 April Meeting from whom Xinbo could have obtained the WeChat messages exchanged between the parties. However, Xinbo had not stated that Wang and Liang were the only persons who had exchanged WeChat messages, and did not address their attempts to obtain the messages from these other persons (see GD at [77]–[79]).

(c) Although Xinbo had stated *how* Wang and Liang had lost possession of the WeChat messages (*ie*, through a change in their mobile phones), it had not stated *when* this had occurred. This was an important

detail that Xinbo had to provide to comply with the Production Order as it corresponded to the time when Xinbo had lost possession or control of the WeChat messages (see GD at [80]).

52 Fifth, the AR held that, separate from the issue of production of documents, Xinbo had breached its obligation to allow ETS to inspect the documents that Xinbo had produced under the LOD, SLOD and 2SLOD. Instead of providing ETS the opportunity to inspect the *originals* of these documents, Xinbo had simply provided printed hardcopies of documents that it had already provided in soft copy to ETS (see GD at [85]).

The consequences in the Unless Order should take effect

53 The AR's reasons for holding that the consequences in the Unless Order should take effect can be summarised thus. First, Xinbo's breach of the Unless Order had clearly been intentional and contumelious. Since it took the position that it had complied with the Production Order and the Unless Order, Xinbo provided no meaningful explanation in SUM 643 as to why it had breached the Production Order and the Unless Order. Further, Xinbo had not made a real attempt at complying with the Production Order and the Unless Order, as evinced by both its woeful attempts at facilitating inspection and the inadequacy of its explanation on the loss of possession or control of the WeChat messages (see GD at [91]–[93]).

54 Second, it was neither contrary to the principle of minimal curial intervention nor the New York Convention to allow enforcement of the Unless Order to disrupt the enforcement of the Award. Minimal curial intervention did not mean that any decision that had the effect of disrupting enforcement of the Award would not be permitted (see GD at [95]). The coming into effect of the

Unless Order and resulting disruption to the enforcement of the Award did not entail a challenge or review of the Award on the merits outside of the prescribed grounds for resisting enforcement of international arbitral awards under the New York Convention and s 31 of the IAA (see GD at [96]). The court, in enforcing the Unless Order, was not resisting enforcement of the Award (so as to be constrained by the exhaustive grounds set out in s 31 of the IAA and the New York Convention), and there was nothing in the ROC 2021 that indicated that the court's case management powers were cut down in a case involving enforcement of an international arbitral award (see GD at [100]–[101]).

55 Third, the fact that enforcement of the Unless Order would give ETS the outcome that it was seeking in SUM 952 did not render the enforcement of the stated sanctions in the Unless Order disproportionate. The Production Order had been made for the purpose of ensuring that the court hearing SUM 952 would be able to properly consider whether enforcement of the Award should be allowed or refused. If it were disproportionate to enforce the Unless Order which was intended to secure compliance with the Production Order, there was a risk that parties seeking the enforcement of foreign arbitral awards would not take the court's orders seriously (see GD at [102]–[104]).

56 Fourth, the AR did not agree with Xinbo's argument that its breach of the Production Order did not affect the prospects of a fair hearing of SUM 952 as ETS was nonetheless able to mount its case based on the documents in its possession and those already disclosed. Among other issues in SUM 952, there had been a conspicuous change in Xinbo's position on when the Memorandum had been signed to shift the arbitral institution from the JAC to the BCIA, as well as ETS's contention that there had been no genuine dispute between the parties to found the tribunal's jurisdiction in the Arbitration. In the face of

Xinbo's non-compliance with the Production Order, the court hearing SUM 952 would have no evidence before it other than the parties' competing assertions. The AR was satisfied that the absence of documents due to Xinbo's breach of the Production Order would frustrate a fair hearing and determination of SUM 952 (see GD at [105]–[109]).

57 Finally, the AR decided against giving Xinbo one final chance to comply with the Production Order and the Unless Order. Given Xinbo's unequivocal position that it had fully complied with the Production Order and its failure to provide any explanation for its non-compliance, it appeared rather pointless to ask Xinbo to further comply (see GD at [117]).

Parties' cases on appeal

58 I summarise the parties' positions on appeal in broad strokes, which I shall address in greater detail in the course of my analysis below.

Xinbo's arguments

59 In the appeal before me, Xinbo noticeably placed much more stock in its arguments on why the stated sanctions in the Unless Order ought not take effect (on the premise that the court was satisfied that it had breached the Unless Order), as opposed to vigorously contesting the antecedent question of whether it had breached the Unless Order. Indeed, in oral submissions, counsel for Xinbo Mr Kelvin Poon SC ("Mr Poon"), spent little time addressing the issue of breach and was content to rest on his written submissions.

60 In any event, Xinbo's written submissions contesting the AR's finding of breach were rather sparse. In sum, Xinbo made the broad contention that the AR had misdirected himself in law by conflating the test of "reasonable

suspicion" of Xinbo's statements on affidavit professing compliance with the Production Order being false – "reasonable suspicion" being the applicable test under the former Rules of Court (2014 Rev Ed) ("ROC 2014") – with the correct test (and the higher threshold) of "plain and obvious" applicable to the ROC 2021. It was argued that, had the AR applied the higher threshold correctly, he would have found that Xinbo had complied with the Production Order as it was not "plain and obvious" that Xinbo had failed to disclose documents responsive to the Production Order that remained in its possession or control.[45]

61 Turning to the consequences of breach, Xinbo emphasised that the New York Convention embodied a pro-enforcement regime,[46] and framed the objectionability of enforcing the sanctions in the Unless Order – *ie*, the striking out of OA 222 and discharge of ORC 1189 – in two ways:

(a) First, the effect of the AR's decision was to fashion a new ground for refusing enforcement of a foreign arbitral award beyond the enumerated grounds in the New York Convention and s 31 of the IAA. That, it was argued, was in contravention of the New York Convention.[47] It was not open to the Singapore courts to make orders that had the practical effect of refusing enforcement of an award on a ground outside of these exhaustive bases, and in that respect, the New York Convention and IAA imposed constraints on the court's procedural powers under the ROC 2021.[48]

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45 Claimant's Written Submissions dated 8 August 2024 ("CWS") at para 48.

46 CWS at paras 57–59.

47 CWS at para 68.

48 CWS at paras 61–66.

(b) Second, it was contrary to the Singapore courts' pro-enforcement policy in respect of arbitral awards for the court to strike out an enforcement action. Instead, the court should adopt other means to address a defaulting party's non-compliance with an unless order, as opposed to using striking out as the first port of call. At the hearing of the appeal, in response to my query on what alternative sanctions might be meted out to deal with Xinbo's non-compliance (on the assumption that I were to find that Xinbo had breached the Unless Order), Mr Poon suggested that the court hearing SUM 952 could draw adverse inferences against Xinbo[49] or make appropriate costs orders.[50]

62 Further, Xinbo argued that allowing the sanctions in the Unless Order to take effect would be disproportionate as (a) it was still possible for SUM 952 to be heard and determined fairly; and (b) it granted ETS its desired outcome in SUM 952 through the backdoor.[51]

ETS's arguments

63 ETS submitted, in the first instance, that Xinbo had failed to comply with the Unless Order. Among other things, ETS pointed to the inadequacies in Xinbo's explanation as to how and when the WeChat messages had been lost from its possession or control, as well as the steps that it had taken to obtain and

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49 Transcript (15 October 2024) at p 7:6–10.

50 Transcript (15 October 2024) at pp 13:19–14:7.

51 CWS at paras 72–75.

produce the WeChat messages. ETS also emphasised that Xinbo had completely failed to perform its obligation to permit inspection of the original documents.[52]

64 As for the consequences of Xinbo's breach of the Unless Order, ETS aligned itself with the AR's findings that (a) Xinbo's breach of the Unless Order was intentional and contumelious;[53] (b) there was no legal impediment against enforcing the sanctions stated in the Unless Order posed by the New York Convention, the IAA or the principle of minimal curial intervention;[54] and (c) the enforcement of the sanctions was proportionate to Xinbo's breach.[55]

Issues to be determined

65 The two main issues before me in this appeal are:

(a) first, whether Xinbo had breached the Unless Order; and

(b) second, if Xinbo had indeed breached the Unless Order, what consequences ought to follow as sanctions for the breach.

For Xinbo's benefit, in the main, I shall focus on the findings that the AR made *against* it.

Issue 1: Did Xinbo breach the Unless Order?

66 I start with the question of whether Xinbo breached the Unless Order. In my judgment, the answer is an unequivocal "yes". I begin with a discussion on

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52 2nd Respondent's Written Submissions dated 8 August 2024 ("2RWS") at paras 49–57.

53 2RWS at paras 58–64.

54 2RWS at paras 66–73 and 89.

55 2RWS at paras 76–88.

the applicable legal principles, before turning to elaborate on Xinbo's non-compliance with the Unless Order.

Applicable legal principles

67 The main legal issue in this appeal arises out of Xinbo's contention that the AR had applied the wrong legal test when assessing Xinbo's statements on affidavit that it had complied with the Production Order. To set the groundwork for resolving the issues arising in this case, including the question as to whether the AR had erred in law as Xinbo claims, it is necessary to first consider the applicable law relating to affidavits filed in document production applications and in response to document production orders.

68 It is trite that an affidavit relating to the discovery of documents is generally conclusive as to what documents are or were in a party's possession or control, responsive to a party's discovery obligations, or protected by grounds such as legal professional privilege (see Jeffrey Pinsler SC, *Singapore Civil Practice* (LexisNexis, 2022) ("*Singapore Civil Practice*") at para 30-76; Hodge M Malek & Paul Matthews, *Disclosure* (Sweet & Maxwell, 6th Ed, 2023) ("*Disclosure*") at para 6-79). This principle has typically been articulated in caselaw (some of which I refer to in the following paragraphs) in the specific context of applications for discovery of documents under the ROC 2014 regime (or its English equivalent). Nevertheless, there is, in my view, no reason why the underlying principle as to the conclusiveness of affidavits should be any different under the current regime for production of documents under O 11 of the ROC 2021.

69 The principle as to the general conclusiveness of affidavits has been articulated in several authorities, including *South Staffordshire Tramways*

Company v Ebbsmith (1895) 2 QB 669, where Lord Esher MR made the following reference to it (at 674):

> … It was the rule of the Court of Chancery, where such an inspection of documents was asked for, that the Court granted it subject to this, namely, that, if in answer to the application the defendant pledged his oath to the fact that certain entries were irrelevant to the matters in dispute, the Court accepted that answer, leaving the defendant exposed to the risk of a prosecution for perjury, if it was untrue. …

70 However, it is equally well-established that the court is not *invariably* bound by a statement on affidavit, if it is satisfied that the statement is clearly false or deficient. The leading case for this proposition is the English Court of Appeal decision of *Jones v The Monte Video Gas Company* (1880) 5 QBD 556. All three members of the court were unanimous on this point. First, Brett LJ (as he then was), delivering the lead judgment, explained that (at 558):

> … [W]e are of opinion that the rule to be observed is as follows: either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself; or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit; but except in cases of this description no right to a further affidavit exists in favour of the party seeking production. It cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient. … It may be urged that a party seeking production may be injured by the wrongful withholding of a document, and that an affidavit in contradiction ought to be admitted under supervision. But this mode of proceeding cannot be allowed: the affidavit of documents must be accepted as conclusive. …

In a similar vein, Cotton LJ framed the rule thus (at 559):

> … When an affidavit of discovery was sought, it could not be contradicted, and must have been taken to be sufficient, unless from the documents referred to, or from an admission in the pleadings of the party from whom discovery was sought, or from the affidavit itself, it could be gathered that some documents

> were withheld. The object of this practice was to prevent a conflict of affidavits as to whether the affidavit of documents was sufficient. …

Although the last member of the court, Thesiger LJ, "confess[ed] that [he] felt somewhat apprehensive about drawing a hard and fast rule", he nonetheless agreed that "unless the party seeking production can surmise from his adversary's admissions that some documents are being withheld, he must rest content with the statements in the affidavit of discovery" (at 559).

71 The natural question that arises from this is: *when* can a court look behind the affidavit?

72 Under the ROC 2014, our courts proceeded on the basis of the well-known test of "reasonable suspicion": the court could look behind the deponent's affidavit as to the adequacy of its performance of its discovery obligations if the court entertained a "reasonable suspicion" that there were further documents to be discovered, based on the disclosed documents themselves or the surrounding circumstances (see *Soh Lup Chee and others v Seow Boon Cheng and another* [2002] 1 SLR(R) 604 at [9]; *Natixis, Singapore Branch v Lim Oon Kuin and others* [2024] 3 SLR 1502 ("*Natixis*") at [27]).

73 But the position is different under the current ROC 2021. Earlier this year, in *Lutfi Salim bin Talib and another v British and Malayan Trustees Ltd* [2024] 5 SLR 86 ("*Lutfi*"), Chua Lee Ming J examined the authorities and held that the prevailing "reasonable suspicion" test was inapt having regard to the ethos of the ROC 2021. The learned judge considered a higher threshold of "plain and obvious" to be appropriate (at [32]):

> … in my view, this "reasonable suspicion" test has no place under O 11 r 3 of the ROC 2021. For the purposes of deciding

> an application under O 11 r 3(1), a respondent's opposing affidavit and any subsequent affidavits filed in response to a previous order under O 11 rr 3(1) or 3(2) of the ROC 2021 are conclusive and the court should not go behind the affidavits unless it is *plain and obvious* from the documents that have been produced, the respondent'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 respondent's possession or control; or (c) are not protected from production. [emphasis in original]

While the appeal before me does not strictly concern a specific production application under O 11 r 3 of the ROC 2021, it is not disputed between the parties that *Lutfi* is applicable to the issue of whether Xinbo had complied with the Production Order (and the Unless Order) by virtue of Xinbo making statements on affidavit that it has complied with its document production obligations under the Production Order.

74 Although the view expressed in *Lutfi* is not strictly binding on me, I consider, on principle, that Chua J was correct in raising the bar in the context of the ROC 2021. As the learned judge alluded to, the ROC 2021 was intended to usher in a new approach to the disclosure and production of documents – specifically, a *narrower* regime – than the discovery regime under the former ROC 2014 (see *Lutfi* at [34], citing Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) (Chairperson: Justice Tay Yong Kwang) at p 19). Indeed, apart from the specific issue of the conclusiveness of affidavits filed in fulfilment of a party's disclosure and production obligations, the paradigm shift is apparent from the move away from the previous test of "relevance-necessity" for specific discovery under O 24 of the ROC 2014 (see, for example, *The Management Corporation Strata Title Plan No 689 v DTZ Debenham Tie Leung (SEA) Pte Ltd and Another* [2008] SGHC 98), to the higher and stricter threshold of "materiality" under O 11 of the ROC 2021 (see

Eng's Wantan Noodle Pte Ltd and another v Eng's Char Siew Wantan Mee Pte Ltd [2023] SGHCR 17 at [49(b)]; *Cachet Multi Strategy Fund SPC on behalf of Cachet Special Opportunities SP v Feng Shi and others* [2024] SGHCR 8 ("*Cachet*") at [30]–[31] and [33]).

75 At first blush, the heightened threshold in *Lutfi* may raise concerns of the "plain and obvious" test becoming a charter for parties seeking to suppress or withhold material documents from production (see, for example, Jeffrey Pinsler, "Case Law Developments Concerning Production of Documents" (2024) CLU 5 at paras 7–8). In my view, any such concern is unfounded because the other side of the coin is that a party seeking to avail itself of this stricter standard cannot simply make bald and unsubstantiated assertions that it has complied with its production obligations. The court has the power under O 11 r 3(2) of the ROC 2021 to order a party who claims that certain documents are not in its possession or control to state this, as well as explain whether the documents were previously in its possession or control and if so, what has become of the documents. In the ordinary course, a court making an order for specific production under O 11 r 3 would include this proviso, such that a party either has to produce the requested documents or provide a satisfactory account of them if he does not do so. The effect of this, which is quite material to the present case, is that a party against whom a specific production order is made has *two* distinct and independent obligations: (a) to produce the document or state on affidavit that it is unable to do so for some reason; *and* (b) if it is unable to do so, *explain* why that is so. *Both* must be complied with (in letter *and* substance) before a party can be said to have complied with its obligations under the order for production.

76 It follows that the shift to the "plain and obvious" test does not allow a party to respond to a specific production order by simply making bald assertions on affidavit that it has no documents responsive to the order in its possession or control. It may well be that the court is unable to conclude on the evidence before it that it is "plain and obvious" that the assertion is untrue, but that in no way means that that party has complied with the production order, because it would have failed to discharge its secondary obligation to provide a satisfactory account of its inability to produce the document(s) ordered. In a particularly egregious case, the court may find the account given to be so lacking that it is satisfied that it is "plain and obvious" that the assertion cannot be taken as conclusive as it must be untrue. The point of the matter is that the assertion that one has complied with its production obligations by itself only satisfies one half of the party's obligations. Put a different way, the *separate* obligation to provide a satisfactory account acts as a counterweight against attempts at abusing the conclusiveness of an affidavit filed in response to a document production application or order. In this way, a balance is struck between the interests of the party seeking the order (who either obtains production of the documents or an account of what has become of the documents) and the party subject to the order (who is not put in the invidious position of producing a document that it really does not have and having to prove a negative).

77 None of this is particularly novel or unique to the document production regime under the ROC 2021. The safeguard of requiring the party asserting that it is unable to produce a document that has been requested or ordered of it to adequately explain the circumstances of its inability has always been present within the court's arsenal of powers, even under the ROC 2014 (see O 24 r 5(1) of the ROC 2014), and indeed, before it. The court has always reserved the right to satisfy itself as to the adequacy of a party's explanation(s), *independent* of

making a finding that the party is speaking untruths. An early example can be found in the English Court of Appeal decision of *Gardner and another v Irvin and another* (1878) 4 Ex D 49 ("*Gardner*"). The defendants in that case had resisted discovery of certain documents after a discovery order had been made by asserting privilege over the documents. The defendants' affidavit stated that "one reason for objecting to produce the said documents set forth in the second part of the schedule is that the same are privileged", before setting out a swath of different types of documents in the second part of the schedule. The plaintiffs contended that the affidavit was deficient as it stated merely that the documents were privileged, when it was *prima facie* clear that some of the documents in the second part of the schedule – such as the defendants' cash-book, ledger and accounts – were not privileged. The plaintiffs objected and argued that the defendants had to set out the facts grounding the privilege so that the court could assess the legitimacy of the defendants' claim to privilege (see *Gardner* at 50–51).

78 The court agreed with the plaintiffs that the defendants' affidavit was insufficient. Brett LJ observed that "[t]he defendants ought to verify on oath the facts on which they claim the privilege" (see *Gardner* at 52). Cotton LJ considered that "[the defendants] ought to say not only that the documents are privileged, which is a statement of law, but they ought to set out the facts from which [the court] can see that [their] view of the law is right" (see *Gardner* at 53). His Lordship then went on to explain the reason as follows (see *Gardner* at 53):

> *An affidavit in answer to an application for discovery must be construed strictly, because the other side cannot adduce evidence to contradict it. The person seeking discovery is bound by the affidavit made by his opponent, and therefore it ought to be full.* It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor, the

> letters must be professional communications of a confidential character for the purpose of getting legal advice. … [emphasis added]

79 *Gardner* is thus an example of a case where the court did not make a finding that the documents were *not* covered by privilege as the defendants claimed, but nonetheless found that the statements on affidavit were deficient in particularity. It illustrates that these are distinct obligations of a party who is subject to a production order. Indeed, Cotton LJ draws the perceptive link that it is *precisely because* the court accords a measure of deference to a party's affidavit and generally treats it as conclusive that it is incumbent on that party to supply sufficient particulars.

80 Similar sentiments have been expressed in the local jurisprudence. For example, in *Technigroup Far East Pte Ltd and another v Jaswinderpal Singh s/o Bachint Singh and others* [2018] 3 SLR 1391, Steven Chong J (as he then was) said that it was not the position that (at [56]):

> … all allegations of breach fall away once the defendants file an affidavit asserting such a denial. Whether the defendants have complied with their discovery obligations must still be determined with reference to the *adequacy and completeness* of their responses on affidavit, in the light of all the evidence. … [emphasis added]

In the same vein, I made the observation in *Natixis* that (at [32]):

> The law is clear that a party has a duty to take reasonable steps to search for relevant and material documents and to be satisfied that he has complied with his discovery obligations, *before* the affidavit verifying the list of documents can properly be treated as conclusive. This would include the usual statement in the verifying affidavit that the deponent does not have any other document in his [possession or control]. … [emphasis in original]

81 In my judgment, given the issues that have arisen in this case, it may be useful, without being unduly prescriptive, to lay down some general expectations as to affidavits filed in compliance with a party's document production obligations.

82 First, it should go without saying that the affidavit should address *all* documents that the production order relates to. To use the present case as an illustration, the AR noted that Xinbo's position in relation to the Other Written Communications was ambiguous as the existence and status of the Other Written Communications was not expressly addressed (see [48] above). In my view, it is a basic expectation from the court and the opposing party that no such ambiguities should be left. If a party takes the position that no documents responsive to a particular category that it has been ordered to produce are in its possession or control, it does not suffice to simply focus on one type of document falling within the relevant category while leaving the court and the other party guessing on other types of documents. The affidavit should address the category in its entirety and not merely a subset of it.

83 Second, and following from the first point, addressing a category as a whole does not mean that a party can get by with making a rolled-up or sweeping statement that "no documents responsive to Category *X* exist and/or are in our possession or control". The court would expect some particularity in terms of a party's explanation. If a class of documents comprises different types of documents, it would be prudent to address each type of document specifically (as appropriate) rather than simply referring to the class in its entirety. If necessary, the affidavit could also contain the broad statement as a "sweeping-up" provision to make clear a party's position; but a blanket statement like that

cannot be the *only* information or "explanation" that is presented to the other party and the court. The *Gardner* case illustrates this point.

84 Third, an explanation is hardly an explanation if it throws up as many, or worse, *more*, questions than it answers. Thus, for example, if it is asserted that certain documents do (or did) exist but are no longer in a party's possession or control, it would be expected that the party sets out the steps that it has taken to verify this, and perhaps, even the steps that it has taken to make a good faith attempt at obtaining the documents. As a general litmus test, if there is an obvious follow-on question to what a party has put on affidavit, that is a fair indication that that question should be proactively addressed, so as to complete the explanation, as opposed to leaving the point hanging. To use another aspect of the present case as an illustration, if Xinbo was taking the position that it did not retain certain WeChat messages due to its representatives having changed their mobile phones, it would have been obvious to any bystander that the immediate follow-on questions to this would have been, amongst others, the individual identification of these representatives, the time(s) when the change(s) in mobile phones occurred, and what became of the old mobile phones.

85 Fourth, the affidavit should not be framed in equivocal terms that allow prevarication. If a party does not produce a document on the basis that it is not in the party's possession or control, it should commit to that position and cannot ordinarily state that it is "unsure" or "not certain" if the document is in its possession or control. The case of *Price v Price* (1879) 48 LJ Ch 215 is illustrative of this proposition. After the plaintiff had obtained an order for discovery, the defendant filed an affidavit stating *inter alia* that "I am not able to say exhaustively that there may not be in my office, or may not have been in the possession of Ebenezer Roberts, deceased, my late clerk, documents relating

to the matters in question in this suit, which I have been unable to find" (at 215). Bacon VC held that the affidavit was insufficient on various grounds, including that this clause was "evasive" (at 216). To be clear, the law does not require a party to be omniscient when making statements on affidavit in answer of its production obligations. But what is required is for a party to take all proper means to acquire the documents or information on them (*Mertens v Haigh* (1863) 46 ER 741 at 742), and to then give all the information in its power (*Clinch v Financial Corporation* (1866) LR 2 Eq 271 at 273).

86 These four points that I have identified are not matters that require the expenditure of significant mental bandwidth to conceive. On the contrary, these are matters that would (or should) occur to any party who approaches its document production obligations in good faith and a dose of common sense.

87 Indeed, while I have observed that the safeguard of requiring a proper explanation in the affidavit of a party who does not produce a document it has been ordered to produce is one of considerable vintage (see [77] above), there is a fair argument that the courts ought to apply greater scrutiny to explanations under the ROC 2021, as the "plain and obvious" test is more susceptible to abuse than the "reasonable suspicion" test.

88 With this overview of the applicable principles in mind, I turn to the facts of this case to consider the state of Xinbo's compliance with the Production Order and the Unless Order.

My decision: Xinbo breached the Production Order and the Unless Order

89 As stated at [66] above, it is clear to me that Xinbo has failed to comply with the Production Order and the Unless Order.

90 I can quickly dispose of Xinbo's suggestion that the AR conflated the tests of "reasonable suspicion" and "plain and obvious". I flatly disagree. It is clear beyond peradventure that the AR was keenly aware of the difference between the two tests. Indeed, the AR expressly stated that he had initially made his decision based on the "reasonable suspicion" test as Chua J's decision in *Lutfi* was handed down on the same day that SUM 643 had been heard and decided. The AR recognised explicitly that it was therefore necessary to consider "whether [his] decision [was] now indefensible given the principles set out by the court in *Lutfi*" (see GD at [32]). Xinbo's contention is plainly unsustainable in the face of the AR's awareness that he had to reassess whether his findings based on the "reasonable suspicion" test were maintainable based on the higher "plain and obvious" standard. Indeed, the AR immediately went on to state that "[he] would have reached the same conclusion in SUM 643 even if [he] had applied the 'plain and obvious' test in *Lutfi*" (see GD at [32]).

91 As I focus only on the findings of the AR which are adverse to Xinbo, my analysis will centre around the following three findings of breach of the Production Order and the Unless Order:

(a) Xinbo breached Categories 1, 2(a) and 2(c) of the Production Order by failing to provide an adequate explanation of how it had lost possession or control of the WeChat messages between Xinbo and ETS (see [51] above).

(b) Xinbo breached Category 2(c) of the Production Order by failing to disclose WeChat messages exchanged between Xinbo and ETS after the commencement of the Arbitration in relation to the matters in the Arbitration. The AR considered it to be "plain and obvious" that such documents exist but were not produced by Xinbo (see [49] above).

(c) Xinbo breached the Production Order by failing to allow ETS to inspect the originals of the documents it had produced (see [52] above).

92 I shall take each of these alleged breaches in turn.

Whether Xinbo breached the Unless Order by failing to give an adequate account of the WeChat messages

93 Xinbo has taken the firm position that, apart from the WeChat messages that it has been able to obtain from Jing and HHC, it has no further WeChat messages in its possession or control that are responsive to the Production Order. Leaving aside the issue of whether it is "plain and obvious" that this position is untrue, Xinbo was nonetheless required to provide an adequate explanation of its inability to produce the WeChat messages.

94 I accept, in fairness to Xinbo, that the terms of the Production Order did not expressly state that Xinbo was required to provide an explanation for its inability to produce documents that it had been ordered to produce if it intended to assert such inability. The Production Order had only stated that Xinbo was to (a) "file a list of the documents in Categories 1 to 7 of the Schedule to SUM 2987"; (b) "provide [ETS] with copies of these documents"; and (c) allow ETS "to inspect the documents ordered to be produced … within 14 days from the time copies of those documents are produced to [ETS]" [original emphasis omitted].

95 However, I do not think that this carries Xinbo very far. The fact that Zhang had attempted to provide *some* explanation as to Xinbo's loss of possession or control of the WeChat messages (by repeatedly pointing to its representatives' change of their mobile phones) was not fortuitous. On the

contrary, it indicates that Xinbo was clearly aware of the need for an explanation if it was not producing (or able to produce) the WeChat messages for whatever reason.

96 Mr Poon did not attempt to argue that Xinbo was in fact not required to provide an explanation, or that the explanations offered by Zhang in the 14 March Affidavit had been purely gratuitous. Such an argument would have been contrary to principle and authority. Although the court's power to compel an explanation is acknowledged by O 11 r 3(2) of the ROC 2021, it does not follow that a party only has to provide an explanation when O 11 r 3(2) is expressly invoked. I do not understand Chua J's comments at [19] of *Lutfi*, referencing the general possibility of specific production orders being made without an accompanying order under O 11 r 3(2) – to have been suggesting this – a party, especially a commercial entity acting under legal advice, should not require an express direction to act in accordance with common sense.

97 It is axiomatic that a party should obey both the letter and the spirit of a court order (see *Lee Shieh-Peen Clement and another v Ho Chin Nguang and others* [2010] 4 SLR 801 at [17]). Thus, in the context of contempt proceedings, it is well-established that the court focuses on whether a party has frustrated the order's *purpose*. In *Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246, Sundaresh Menon CJ explained that "the court will not adopt a myopic and blinkered view of the scope of an order", as "[i]t is ultimately the *purpose* for which the order was granted that will be the lodestar in guiding the court's determination as to the true *effect* of the order" [emphasis in original] (at [99]). Drawing on these observations, I noted in *WestBridge Ventures II Investment Holdings v Anupam Mittal* [2024] 3 SLR 332, when dealing with the interpretation of an anti-suit injunction, that the distinction between prohibitory

and mandatory framing of anti-suit injunctions seemed to me rather facile as "one must not lose sight of their essential nature and purpose or be blinkered by form over substance" (at [71]).

98 All this goes to say that I would not have accepted any attempt at gamesmanship on Xinbo's part by pleading (or feigning) ignorance as to the scope of its obligation to provide an adequate explanation in order to meaningfully comply with the Production Order. In any event, the position would have been crystal clear after the Production Order was supplemented with the Unless Order, as para 4 of the Unless Order spelt out that Xinbo was to file an affidavit stating:

> … (a) which documents that [Xinbo] has produced and/or will produce fall within the respective categories of documents covered by the Production Order; and (b) whether [Xinbo] has lost [possession or control] of any documents that are responsive to the Production Order and if so, *provide an explanation of the circumstances in which it lost [possession or control] of such documents*. [emphasis added]

99 It is against this backdrop that I assess the adequacy of Xinbo's explanation. In my judgment, the AR was correct to find that Xinbo's explanation was lacking.

100 Although Zhang made the general assertion at various points of the 14 March Affidavit that Xinbo's representatives had changed their mobile phones, and some individual references were made to certain representatives specifically (*viz*, Wang and Liang), there was a general lack of particularisation in the affidavit as to: (a) the status of the WeChat messages in the possession or control of other representatives of Xinbo; (b) the time when Xinbo's representatives had lost their phones; and (c) how exactly the change of mobile

phones caused Xinbo to lose possession or control of the WeChat messages on the old mobile phones.

101 First, Xinbo did not account for all of its representatives that could reasonably be believed to have documents responsive to the Production Order.[56]

102 I use Xinbo's explanation in response to Category 1 as an illustration. To recap, Category 1 concerned communications between Xinbo and ETS on the change of the arbitral institution from the JAC to the BCIA and the execution of the Memorandum. In the 14 March Affidavit, Zhang stated that the attendees of the 9 April Meeting where this issue had been discussed in-person by the parties' representatives included QYF, QCR, Su, Zhang herself, Ma, Wei and Liang.[57] Zhang also admitted that there were WeChat messages between the parties that corresponded to Category 1, as WeChat messages were one of the parties' "main mode of communication" (the other two forms being physical meetings and telephone calls).[58] The sum of these two facts, in my view, is that if Xinbo did not produce any WeChat messages responsive to Category 1, its explanation had to, at the very least, account for each of the attendees at the 9 April Meeting whom it had control over. Taking a broad view, this would have encompassed Su, Zhang, Ma, Wei, and Liang, all of whom were representatives of Xinbo in some capacity.

103 However, all that Zhang stated in the 14 March Affidavit was the following:[59]

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56 2RWS at para 13.

57 ZY-1 at para 18.

58 ZY-1 at para 23.

59 ZY-1 at paras 24–27.

> 24 However, I am given to understand that any relevant WeChat records of [Xinbo'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.
>
> 25 More specifically, I am informed that Wang Yan, who was handling this change of arbitral institution 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.
>
> 26 I would also like to explain to the court that it is a feature of WeChat application 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.
>
> 27 In light of the aforesaid, no documents have been disclosed by [Xinbo] under category 1 of the Production Order because there are no such documents in [Xinbo's] possession or control. Particularly, [Xinbo] and/or its representatives have since lost possession or control of any WeChat chat records between the relevant persons discussing this issue as stated above.

104 I make two observations. The first is to emphasise the significance of the fact that the attendees at the 9 April Meeting included Zhang herself. Given this, it is curious that Zhang did not expressly address whether *she* ever had possession or control of the WeChat messages responsive to Category 1, and instead only stated what she had been "given to understand" from third parties.[60]

105 The second point is that, despite making the sweeping assertion that "any relevant WeChat records of [Xinbo's] representatives … are no longer available as such WeChat records have been deleted due to a change of mobile phones", Zhang went on to only address Wang's situation specifically. In a

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60 2RWS at para 20.

different part of the 14 March Affidavit, Zhang also states that Liang had changed his mobile phone and thereby no longer has access to his old WeChat messages – presumably, although it is again not entirely clear, this includes any messages responsive to Category 1. Beyond the 14 March Affidavit, the lacuna was subsequently narrowed slightly when Wei stated his position – that he did not have possession or control of any written communications between Xinbo and ETS on the Arbitration – in the 26 March Affidavit. Even so, as ETS points out,[61] there is ambiguity as to whether Wei's reference to the "Arbitration" encompasses the change of the arbitral institution and the Memorandum as opposed to the substantive arbitration, such that arguably even Wei cannot be said to have been accounted for. Although the AR took a rather generous view of the 26 March Affidavit by interpreting "Arbitration" broadly to include these matters, I consider that there is force in ETS's submission that he may have been too generous.[62] But, even leaving that aside, what of the other representatives of Xinbo who are completely not addressed, including Zhang herself?

106 Although Zhang did say that Wang was "handling this change of arbitral institution issue as well as the matters concerning the arbitration", this was equivocal as to whether Wang was the *only* representative of Xinbo who was ever in possession or control of communications responsive to Category 1 (see GD at [77]). The fact that Wang was "handling" or put in charge of addressing the change of arbitral institution and the Arbitration on Xinbo's behalf did not necessarily mean that no other representative of Xinbo had any involvement. Indeed, the fact that four other representatives from Xinbo other than Wang attended the 9 April Meeting presumably means that they had some

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61 2RWS at para 22.

62 Transcript (15 October 2024) at pp 21:6–22:17.

involvement in the change in arbitral institution and execution of the Memorandum. If Xinbo's position was that only Wang and Wang alone had exchanged WeChat messages with ETS on these matters, it did not say so. Indeed, as the AR noted (see GD at [76]), Mr Poon conceded at the hearing before the AR that "there are these other individuals involved",[63] but that he was constrained by what Zhang had set out in the 14 March Affidavit.

107 Second, the details provided by Xinbo as to its loss of possession or control of the WeChat messages were deficient inasmuch as they did not state the time(s) when Xinbo supposedly lost possession or control. At various points of Zhang's 14 March Affidavit, Xinbo simply asserted that its representatives had lost possession or control after changing their mobile phones, but it did not state *when* the change in mobile phones (which corresponded to Xinbo's loss of possession or control) occurred.

108 The time at which a party supposedly lost possession or control of documents that it has been ordered to produce is clearly a material detail. This is acknowledged by O 11 r 3(2) of the ROC 2021, which provides that the court may order a party subject to a specific production order to file an affidavit stating *inter alia* "when that party parted with possession or control and what has become of the requested documents". I wholly agree with the AR's analysis on the need for Xinbo to particularise the time that it had lost possession or control of the WeChat messages, as there were several possibilities: (a) during the Arbitration; (b) before SUM 2987 was heard; (c) after SUM 2987 was heard and the Production Order was made; (d) after ETS commenced SUM 346 to obtain the Unless Order; and (e) after the Unless Order had been made (see GD

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63 Certified Transcript (25 March 2024) at p 18:18–23; 2RWS at para 21.

at [80]). At the risk of repeating myself, an explanation in an affidavit cannot leave the other party and the court guessing.

109 Moreover, in the specific circumstances of this case, the time at which Xinbo lost possession or control was of especial importance for at least two reasons that the AR identified:

(a) First, as Xinbo had not taken the position that the WeChat messages were outside of its possession or control at the time when SUM 2987 was heard and the Production Order made, but only raised it when the time came for it to comply with the Unless Order, there was naturally going to be questions asked as to why the point was only being taken belatedly.

(b) Second, as a matter of common sense, faced with the coincidence in Xinbo's position that, apparently, *all* of its representatives had lost possession or control of their WeChat messages for the *same reason* – *ie*, a change in mobile phones – it was predictable with almost certainty that ETS would raise doubt or even argue that the coincidence was not such but the product of a deliberate ploy on Xinbo's part to suppress the messages. To be clear, I make no finding as to whether Xinbo had or had not suppressed the messages, and do not have to for the purposes of this appeal. The point is that it would have been obvious to any party in Xinbo's position that questions would be asked of it, and it was incumbent on Xinbo to properly and pre-emptively attempt to answer those questions.

110 As I observed at [84] above, if an obvious follow-on question presents itself based on a party's explanation, that would generally be a sign that the

explanation should be firmed up to address the point pre-emptively. In my view, the position is *a fortiori* where, as in this case, the follow-on questions relate to or arise out of suspicions or doubts as to the veracity of a party's explanation. I do not think it is an undue burden to require a party subject to an order for production of documents to anticipate readily foreseeable objections to its position. Document production should be approached with a lens of pragmatism. A party who has convinced the court to make a production order in its favour against another party would inevitably be suspicious if the latter provides a "nil" return; the former would hold the fair and reasonable expectation that documents responsive to the order do exist and are in the other party's possession or control since the court would not have made the order in the first place if it had not been satisfied of those conditions. It is precisely because of this that the law demands an adequate explanation as a substitute when a party professes compliance with a production order without producing the document(s) ordered. It would make a mockery of the production regime, which is grounded in fair play in the conduct of litigation, if a party could simply hide behind the "plain and obvious" test and operate on a belief that the court cannot call its bluff because it holds all the cards.

111 Third, although Xinbo stated the event that had caused its loss of possession or control of the WeChat messages – *ie*, the change of mobile phones – its explanation was incomplete. I agree with the AR that Zhang's explanation in the 14 March Affidavit "only supplies half of the story" as it states that Xinbo's representatives are unable to access their old WeChat messages on their current (new) phones, but nothing is said about whether their old phones remain in their possession or control, as well as whether the WeChat messages can be accessed on their old phones (see GD at [74]–[75]). It could well be that the answers to either one of these questions is "no". But the point is that the court

does not know because Xinbo has not stated so, and it cannot assume a fact that Xinbo is not even required to prove but merely state. As I stated at [85] above, a party subject to a production order has to commit to a position, and it is antithetical to the policy underlying the document production regime to permit a party to hedge its position by making vague, general assertions in an affidavit filed in purported compliance with a production order.

112 In the final analysis, I consider that these inadequacies segue into a more general point. I have referred at [80] above to my observations in *Natixis* that a party has a duty to take reasonable steps to search for documents responsive to a production order made against it before the court will accept the explanation given on affidavit as conclusive of his professed inability to give production as ordered. The need to give a proper explanation that is sufficiently particularised on the material details of a party's inability to give production is a corollary of that duty. A party who has taken the reasonable steps required of it under the law would have little difficulty providing an adequate account of those steps and what came of those steps. A party should have no difficulty committing to a position, backed by an adequate explanation, if it has made a good faith attempt at complying with the production order. Thus, if the court finds a party's explanation lacking, it would likely also be justified in drawing the conclusion that that party has failed to make such an attempt.

113 The adequacy of a party's explanations must also be viewed in context. I have already made the point above that it would have been patently clear to Xinbo that ETS would be suspicious of the position that Xinbo was taking in response to the Production Order, and the court should consider Xinbo's omissions in that light. The failure to address a glaringly obvious objection is, self-evidently, far more indefensible than a failure to address an objection that

is more subtle or, for want of a better word, of the nitpicking sort. If a party fails to address an obvious point, that will often be another indication to the court that the party has not undertaken reasonable endeavours to perform its production obligations in both letter and spirit.

114 There is a further piece of context. As Mr Tan pointed out in oral submissions,[64] by the time Xinbo filed its affidavits to resist SUM 643, it was already known to Xinbo that ETS was taking issue with *inter alia* the adequacy of its explanations. ETS had raised these concerns in a letter to the court dated 5 March 2024 after Zhang's 14 March Affidavit had initially been filed under cover of a solicitors' affidavit on 4 March 2024. Even if I accept that Zhang's 14 March Affidavit could not deviate from the draft earlier filed in court, Xinbo had every opportunity to respond meaningfully to ETS's objections in its subsequent affidavits, namely, the affidavit deposed by Zhang on 21 March 2024[65] (the "21 March Affidavit") as well as Wei's 26 March Affidavit. However, neither of these affidavits shed further light or added details to Zhang's 14 March Affidavit. In the 21 March Affidavit, Zhang largely offered bare denials of ETS's allegations, and in relation to the WeChat messages specifically, she took the position that the 14 March Affidavit had been adequately comprehensive:[66]

> 13. The Claimant has now complied with the Peremptory Order by explaining the circumstances as to why they are not in possession or control of the WeChat messages. *The Claimant's key representatives who were involved in the Arbitration were identified and it was explained why their WeChat records are not available.* Where the Claimant was able to obtain from ETS and [BCIA] any WeChat or other documents

64 Transcript (15 October 2024) at p 19:22–28.

65 2nd Affidavit of Zhang Yu dated 21 March 2024 ("ZY-2").

66 ZY-2 at paras 13–14.

> concerning the Arbitration, which came into the Claimant's possession and control, these were disclosed.
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> 14. In any event, the Clamant had confirmed that all documents within its possession or control that are responsive to the categories of documents under the Production Order have been disclosed as required under the Peremptory Order.
>
> [emphasis added]

115 Zhang's position should be read against ETS's objections in its letter dated 5 March 2024, which had *explicitly* referenced the lack of particulars as to the identities of Xinbo's representatives and the time when they lost possession or control:

> 10. … the Claimant accepted that the documents sought to be produced exist and are in its possession and control. The Claimant has now done a *volte face* and is claiming that somehow its officers including Ms Wang Yan and Mr Liang Shuang (***and it is not clear from the affidavit who else***) have loss [*sic*] access to their WeChat records. Crucially, despite being ordered in paragraph 4 of the Peremptory Order to provide an explanation of "*whether the claimant has lost [possession or control] of any documents that are responsive to the Production Order and if so, provide an explanation of the circumstances in which it lost [possession or control] of such documents*", ***it is not clear who, other than Ms Wang Yan and Mr Liang Shuang, had lost access to their WeChat records***.
>
> 11. Crucially, even as regards Ms Wang and Mr Liang, ***there is a complete lack of particulars including the date or at least month in which they had replaced their phones and what has become of their previous phones*** (whether they have been discarded or are actually still in their possession …). For example, it is said at paragraph 42 [of the 14 March Affidavit] that "*However, Liang Shuang has since replaced his phone and is unable to retrieve the WeChat records between him and He Han Chu in the relevant periods of time.*" ***This sort of unparticularised, incomplete and cryptic explanations are cynical and inadequate***. This too is a breach of paragraph 4 of the Peremptory Order and is, regrettably, symptomatic of the Claimant's "*deliberate and persistent breach*".
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> [original emphasis in italics; emphasis added in bold italics]

116 Thus, Xinbo's defaults were *directly and explicitly* highlighted by ETS. Despite knowing that SUM 643 was an application that put the issue of its compliance with the Unless Order at the forefront, Xinbo chose to evade answering ETS's questions, in both the 21 March Affidavit and the 26 March Affidavit. Indeed, even before me in this appeal, Xinbo has offered no justification or explanation as to *why* the details sought by ETS are unreasonable or unnecessary. It should therefore come as no surprise that I find Xinbo's explanations woefully inadequate and that it has accordingly breached the Unless Order.

117 For the avoidance of doubt, my finding on the inadequacy of Xinbo's explanation is an entirely separate matter from any finding that its unsubstantiated position that it has produced all the documents it can is false. As I have taken pains to emphasise, these are *separate* obligations imposed by the Production Order and the Unless Order. The court's ability to look behind Xinbo's asserted position is governed by the "plain and obvious" test, but the scrutiny over the adequacy of Xinbo's explanation is not.

118 For this reason, I would respectfully not go as far as the AR to say that because Xinbo's explanation is inadequate, the court cannot accept Xinbo's position that it does not have possession or control over the WeChat messages as true, and that Xinbo has therefore breached Categories 1, 2(a) and 2(c) of the Production Order by failing to produce the WeChat messages (see GD at [81]). It appears that the AR's reasoning was that the inadequacy of Xinbo's explanation meant that it was "plain and obvious" that Xinbo had failed to produce the WeChat messages despite them being in its possession or control. In my view, although I accept that it is possible that an explanation may be so abjectly deficient that the court can see that it is "plain and obvious" that a

party's professed inability to produce the documents ordered is false, this chain of reasoning risks conflating the independence of the obligations imposed by a production order. As I explained at [76] above, a finding that it is not "plain and obvious" that a party has lied is not mutually exclusive with a finding that it is "plain and obvious" that a party's explanation has been deficient. In this case, I am not entirely convinced that the deficiencies in Xinbo's explanation provide a sufficient basis to meet the "plain and obvious" test so as to make a global finding that Xinbo has breached its obligation to produce documents (*viz*, the WeChat messages) responsive to *all three* of Categories 1, 2(a) and 2(c).

Whether Xinbo breached Category 2(c) of the Production Order by failing to disclose the WeChat messages

119 That said, it would be recalled that the AR held that Xinbo had breached Category 2(c) of the Production Order by failing to disclose certain WeChat messages, independently of the inadequacies in Xinbo's account on its loss of possession or control of the WeChat messages. The AR's analysis centred around the 30 December Message exchanged between HHC and Liang which, according to Zhang, Xinbo had been able to obtain from HHC despite Liang having lost his WeChat messages after changing his mobile phone (see [49] above).

120 I agree with the AR's assessment that it is "plain and obvious" that there exist communications between HHC and Liang other than the 30 December Message. In the 14 March Affidavit, Zhang stated that there were "*some* communications" on WeChat between Liang and HHC "on matters relating to the Arbitration", but Liang was unable to "retrieve the WeChat records … in

the relevant *periods* of time" [emphasis added].[67] However, Xinbo had been able to obtain the 30 December Message from HHC which it disclosed in the 2SLOD.[68] Although I am cognisant that words in an affidavit should not be analysed as if they are words in legislation, it is clear to my mind that plural references to "some" and "periods" at the very least suggest that there were more than a single chain of messages – *ie*, the 30 December Message – exchanged between Liang and HHC.

121 If that were the *only* basis for finding that WeChat messages other than the 30 December Message existed and were in Xinbo's possession or control, I probably would not have been convinced that the high threshold of "plain and obvious" had been met. But that is not so. Zhang also stated in the 14 March Affidavit that Xinbo had been able to obtain *another* set of messages between Liang and HHC on 7 December 2022 from Jing. Curiously, Zhang did not say that this message was *also* obtained from HHC, which begs the question – why did HHC not produce this message, such that it had to be obtained from Jing? It is also not said by Zhang that this message and the 30 December Message are the *only* WeChat messages ever exchanged between Liang and HHC. In my judgment, this 7 December 2022 message is compelling proof that the 30 December Message was not the *only* message exchanged between Liang and HHC, and I am prepared to find based on this that it is "plain and obvious" that there remain WeChat messages other than the 30 December Message to be discovered from HHC.

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67 ZY-1 at para 42.

68 ZY-1 at para 43.

122 The question that then arises is whether the WeChat messages in *HHC's* possession can be said to be in *Xinbo's* possession or control.

123 The phrase "possession or control" that is used in O 11 of the ROC 2021 is new; it replaces the former terminology of "possession, custody or power" in O 24 rr 1 and 5 of the ROC 2014. The change in nomenclature notwithstanding, it has been suggested in commentary that "[t]here is no substantive difference between the former and current wording as 'custody' or 'power' imply an element of control over the documents" (see *Singapore Civil Practice* at para 30-27) and "[t]he change in wording is not intended to narrow the scope of the provision" (see *Singapore Civil Procedure 2024* vol 1 (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2023) at para 11/2/3). Prior authorities addressing the definitional scope of "possession, custody or power" in the context of O 24 of the ROC 2014 are thus instructive in construing the scope of "possession or control" under O 11 of the ROC 2021.

124 Given that "possession" (a common concept across both O 24 of the ROC 2014 and O 11 of the ROC 2021) entails "a physical holding of the document coupled with a possessory right" (see Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) ("*Principles of Civil Procedure*") at para 17.005), it is clear that messages in HHC's possession are not in the (physical) possession of Xinbo. It is not contended by ETS that there is any solicitor-client or other agency relationship between HHC (who acted for ETS, rather than Xinbo, in the Arbitration) and Xinbo that could, in principle, result in the attribution of HHC's possession to Xinbo (see *Disclosure* at para 5-89).

125 So I am focused on the question of "control". If the language or terminology in O 24 of the ROC 2014 is mapped onto O 11 of the ROC,

"control" would correspond to "custody or power". In this respect, "custody" can also be dismissed given that it entails physical possession *simpliciter* (see *Principles of Civil Procedure* at para 17.005; *Disclosure* at para 5-91). But "power" is much less straightforward. In the House of Lords decision of *Lonrho Ltd and another v Shell Petroleum Co Ltd and another* [1980] 1 WLR 627, Lord Diplock defined "power" as "a presently enforceable *legal right* to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else" (at 635) [emphasis added].

126 If Lord Diplock's definition of "power" is exhaustive of the scope of "control", it would seem on the facts of this case that Xinbo cannot be said to have "power" over the WeChat messages in HHC's possession as Xinbo does not have any strict *in personam* right against HHC to compel him to produce the messages to Xinbo or an *in rem* (or proprietary) right to the WeChat messages in HHC's possession. However, subsequent cases have not read the requirement so narrowly. In *Dirak Asia Pte Ltd and another v Chew Hua Kok and another* [2013] SGHCR 1, the court observed that "a rigid adherence to Lord Diplock's perceived definition of 'power' as an 'enforceable legal right to obtain documents' should give way to a more flexible contextual analysis" (at [24]), and that this "contextual approach" encompassed "not only the legal right to obtain documents, but also *the practical ability to do so*" [emphasis added] (at [28]). The court summarised the position thus (at [35]):

> The conception of "power" under Order 24 of the [ROC 2014] cannot be understood in a vacuum, and must necessarily be considered in light of the facts at hand. As expounded in *Lonrho*, a party can be found to have power over the documents in the hands of a third party if it has an enforceable legal right to obtain possession of those documents. … However, in so far as the inquiry is *essentially a factual one*, that would not be the ***only way*** in which Order 24 contemplates that a party may be shown to have power over documents in the possession of third

> parties. *A party found to have no presently enforceable legal right to obtain possession of the documents held by a third party would not necessarily conclude the question of whether that party has power over those documents. Where an examination of the relationship between the producing party and the third party reveals that the former has the* ***practical ability*** *to access or obtain documents held in the possession of the third party, and* ***having regard to the context*** *in which that practical ability is found, the producing party may indeed be found to have the* ***sufficient degree of control*** *that falls within the conception of "power" as contemplated under Order 24 of the [ROC 2014].* [emphasis added in italics; original emphasis in bold italics]

Subsequently, Kannan Ramesh J (as he then was) affirmed this approach in the Singapore International Commercial Court decision of *Hai Jiao 1306 Ltd and others v Yaw Chee Siew* [2020] 3 SLR 142 (at [46]–[47]), as did I in *Natixis* (at [35]). It can thus be seen that, even before the advent of the ROC 2021, our courts had in substance *already* been applying a test of "control".

127 Some further insights into the concept of "control" may be gleaned from the English courts. English law shares a common experience with Singapore law as r 31.8(2) of the English Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) (the "CPR") also refers to "control". In *Various Airfinance Leasing Companies and another v Saudi Arabian Airlines Corpn* [2022] 1 WLR 1027, Peter MacDonald Eggers QC, sitting as a Deputy High Court Judge of the English High Court, said this (at [21]):

> Insofar as a document is in the physical possession of a third party, meaning a person who is not a party to the action, that document is in the control of a party to the action not only where the party has a legally enforceable right to obtain access to such a document, but also *where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document*, even if the party has no legally enforceable right of such access … However, in order to establish that there is such a standing or continuing arrangement or even a specific, time-limited arrangement, whereby a third party allows a party to the action access to the document which the third party has

> in its possession, it is not generally sufficient to demonstrate that there is a close legal or commercial relationship between the party and third party, such as parent and subsidiary companies or employer and employee relationships; something more is required; *there must be more specific and compelling evidence of such an arrangement* … [emphasis added]

128 The qualification at the end of this extract (which I have placed in emphasis) about the need for "specific and compelling evidence" going specifically to the issue of a party's ability to access documents in another's possession, as opposed to merely circumstantial evidence about the parties' relationship generally, is significant. As Cockerill J subsequently opined in *Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd and others* [2023] EWHC 548 (Comm), "there is a degree of stringency required" (at [12]). In this connection, her Ladyship referred to the oft-cited decision of *Ardila Investments NV v ECRC NV* [2015] EWHC 3761 (Comm), where Males J (as he then was) cautioned that "practical control" in the sense that a third party could be expected to comply with the request of a party to the litigation did not suffice (at [11]). His Lordship preferred to state the test as one of "unfettered access" or "there [being] material from which the court can conclude that there is some understanding or arrangement" for the party to achieve such access (at [14]).

129 I agree with both Males J and Cockerill J that some circumspection is needed. An overbroad approach to "control" could place an undue burden on a party subject to a production order. But I would not go as far as to pitch the threshold at the level of "unfettered access" or to say that an expectation of compliance is invariably insufficient. In *Natixis*, I said that "[w]here the documents may lie with a *third party*, the duty extends to making reasonable efforts to request for the relevant documents" [emphasis in original] (at [32]). In my view, if there is clear evidence before the court that a party's request for

documents from a third party would be complied with, there is no reason why such documents should not be said to be in the former's control. Indeed, this is illustrated by *Phones 4U (in administration) v EE Ltd and others* [2021] 1 WLR 3270, which I referred to in *Natixis*. In that case, the English Court of Appeal affirmed the making of an order against an employer that the employer should request that its present and former employees or agents make available their personal electronic devices for inspection.

130 Finally, in *Berkeley Square Holdings Ltd and others v Lancer Property Asset Management Ltd and others* [2021] EWHC 849 (Ch), Deputy High Court Judge Robin Vos identified the following general principles (at [46]):

> i) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship;
>
> ii) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;
>
> iii) The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;
>
> iv) The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;
>
> v) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;
>
> vi) the arrangement or understanding must not be limited to a specific request but should be more general in nature.

Save for adopting the qualification to the first principle inserted by Jacobs J in the recent case of *The Public Institution for Social Security v Al-Rajaan Al-Wazzan (in her capacity as representative of the estate of Mr Fahad Maziad Rajaan Al Rajaan (deceased)) and others* [2024] EWHC 480 (Comm) that it goes too far to say that the relationship between the parties is "irrelevant", and it is more accurate to say that the nature of the relationship is "not determinative" (at [28]), I generally accept these principles, subject of course to the caveat that they are signposts and should not be approached as if they were words of a statute or as entailing a box-ticking exercise.

131 In my judgment, applying the above principles, I am satisfied that it is "plain and obvious" based on the facts known to the court that Xinbo does have control over the WeChat messages in HHC's possession. The fact that HHC has already voluntarily produced at least the 30 December Message to Xinbo on Xinbo's request itself indicates that Xinbo can obtain possession of the WeChat messages from HHC. As I mentioned earlier at [121], it is ambiguous if the 30 December Message was the only message that Xinbo obtained from HHC or if HHC had in fact disclosed other messages to Xinbo as well. Moreover, I am buttressed in my conclusion by the peculiarity, highlighted by ETS, of HHC having cooperated with Xinbo's requests whilst apparently rebuffing ETS's own attempts at establishing contact with him – this is despite HHC having acted *for ETS* in the Arbitration. The unusual circumstances lead to the inference that Xinbo does have the practical ability to access, and thus has control of, the WeChat messages in HHC's possession, if it does not already have them.

132 As I am satisfied that it is "plain and obvious" that WeChat messages between Liang and Shuang other than the 30 December Message (and the 7 December 2022 message obtained from Jing) *exist* and are in Xinbo's *control*,

I affirm the AR's holding that Xinbo breached Category 2(c) by failing to produce these messages.

Whether Xinbo breached the Unless Order by failing to produce the originals for inspection

133 Lastly, I come to ETS's complaint that Xinbo has breached the Production Order and the Unless Order by failing to produce the originals of the documents that it had disclosed in the LOD, SLOD and 2SLOD for ETS to inspect. According to ETS, when its solicitors attended at the offices of Xinbo's solicitors on 6 March 2024 to inspect the documents, Xinbo had merely printed out documents that had already been sent in soft copy to ETS for ETS's solicitors to inspect.[69]

134 I consider this to be straightforward. Although Xinbo contested this issue before the AR, Xinbo appears to have conceded (or at the least abandoned) the point before me, as there was complete silence in both its written and oral submission regarding this alleged breach of the Production Order and the Unless Order.

135 In any event, I agree with ETS and the AR that Xinbo's non-compliance is clear. Before the AR, Xinbo argued that all it had were copies of the documents, it had prefaced its disclosure in the 2SLOD with the overarching description that the documents referred to therein were "copies and in Chinese unless otherwise stated", and therefore, all that Xinbo could and had to give inspection of were *copies* of the documents and not originals.[70] ETS's

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69 2nd Affidavit of Max Mailliet dated 18 March 2024 at para 6.

70 Certified Transcript (25 March 2024) at p 13:12–25.

frustration carries through in its written submissions where it animatedly refutes this argument as follows:[71]

> 52 Xinbo had turned the inspection of originals into a farce. Obviously, Breakpoint LLC has printing facilities and is perfectly capable of printing softcopies sent to it by Genesis Law Corporation. There was no need for Breakpoint LLC to attend at Genesis Law Corporation to inspect print-outs of the same softcopies by Genesis Law Corporation.
>
> …
>
> 57 Against this, Xinbo came up with a cute argument. Xinbo says that because it had used the word "copies" in its 2SLOD, it did not need to give inspection of the originals. This is a fascinating argument which, if accepted, would change the discovery regime in Singapore because litigants could simply add the word "copies" to their list of documents and magically avoid any obligation to allow inspection of originals. The AR correctly rejected this nonsensical argument.

136 Although I would not go to the same lengths as ETS in its criticism, I accept the general thrust of its submission. In fairness to Mr Poon, his position before the AR was not *only* based on Xinbo having referred to "copies" in the 2SLOD, but also that Xinbo did not have the originals of at least some of the documents referred to therein such that it could only produce "copies". But, in my view, Xinbo's contention that its obligation to give inspection of "copies" entailed printing out hard copies of the soft copy documents that it had already sent to ETS was thoroughly misconceived.

137 It was already established under the ROC 2014 that a party's obligation to give inspection relates to the *originals* of the documents in question (see *Alliance Management SA v Pendleton Lane P and another and another suit* [2008] 4 SLR(R) 1 at [35]; *Fermin Aldabe v Standard Chartered Bank* [2009]

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[71] 2RWS at para 52 and 57.

SGHC 194 ("*Fermin Aldabe*") at [39]; *Deutsche Bank AG v Chang Tse Wen and others* [2010] SGHC 125 ("*Deutsche Bank*") at [28]). Thus, in *Fermin Aldabe*, where the documents in question were 14 e-mail messages stored electronically on the defendant's e-mail services, the court held that the defendant's obligation to give inspection was not fulfilled by merely providing electronic copies of the discoverable e-mail messages; the defendant had to provide the technical means necessary for the plaintiff to inspect the e-mail messages which, at the minimum, entailed "provid[ing] a computer system from which the relevant e-mail mailboxes may be accessed and the 14 e-mail messages displayed on screen for the Plaintiff to view" (at [42]). Likewise, the court in *Deutsche Bank* held that the plaintiff's assumption that providing printed copies of electronic documents for inspection discharged its obligations to give inspection of the electronic documents was wrong, as "where electronic documents are available, inspection should be given of the original and not merely a printed copy" (at [28]). Although the court noted that inspection of originals could be done for e-mails located outside of the jurisdiction by providing remote access to foreign e-mail services from the plaintiff's offices in Singapore or having the devices containing such e-mails brought into Singapore, it considered that a reasonable alternative to these steps, in light of concerns as to costs and inconvenience, was to have the plaintiff provide electronic copies of the e-mails in their native format (at [29]).

138 The courts have arrived at the position above notwithstanding that O 24 of the ROC 2014 did not make any explicit reference to the "original" of a disclosed document (see Charles Hollander, *Documentary Evidence* (Sweet & Maxwell, 15th Ed, 2024) ("*Documentary Evidence*") at para 9-25). But the point is put beyond doubt in the ROC 2021, as O 11 r 12 admits no such

ambiguity because it expressly defines a party's right to inspection as relating to the "original of any document produced":

> **Inspection of original of document produced (O. 11, r. 12)**
>
> **12.**—(1) If a party requests to inspect the original of any document produced, the party who produced the document must arrange a mutually convenient time and place for the inspection to take place.
>
> (2) Such inspection must take place within 14 days after the request unless the parties otherwise agree.
>
> (3) If the party who produced the document fails to comply with paragraph (1) or (2), the requesting party may apply to the Court to compel that party to do so.

139 In the present case, even if all that Xinbo had were copies of the documents, its obligation to provide inspection of the copies of the documents related to the *original or primary copy* in its possession or control (see *Documentary Evidence* at para 9-25). In *Rohan St George v 4Fingers Pte Ltd and another* [2024] SGHCR 9, also a decision of the AR but in respect of a different case, the AR said that (at [75]):

> … if the document is a *print* document, then the "original" simply refers to a *hardcopy* of that same document which had been used for production. If the document produced is an *electronically generated* document, then the "original" must refer to its native format. Specifically, what constitutes the "native format" is dependent on the type of the document in question. In a case where the produced document consists of e-mails, that would typically refer to e-mails in their original digital file format (such as the .pst file format). In a case where the produced documents consist of a record of phone messages, that would typically refer to the messages as displayed on the relevant device from which the record had been generated. … [emphasis in original]

140 I agree. A printed copy of an electronic document is not the "original". Instead, the "original" of the electronic document would be the document as it exists on the device from which it was received or accessed by Xinbo. For

example, if Xinbo received screenshots of text messages from a third party, its obligation to give inspection of the original screenshots required Xinbo to allow ETS to view the original screenshots on the phone or computer on which Xinbo had received the screenshot. Indeed, this mirrors what the court in *Fermin Aldabe* said in respect of e-mail messages (see [137] above). I therefore accept ETS's submission, based on the authorities I have referenced above, that:[72]

> … Xinbo ought to have at least provided ETS' solicitor with the opportunity to inspect either: (i) the disclosed WeChat messages and emails in their native form; or (ii) the communications in which the screenshot of these WeChat messages and emails were sent to Xinbo i.e. for example the phone of Xinbo's representative which had received the screenshots from the other parties. This would allow ETS to meaningfully verify that the copies of the documents sent to it were authentic and consider their provenance. How was ETS to verify if the softcopies sent were authentic if it was simply given print-outs of the very same copies?

141 The AR rightly observed that the illogicality in Xinbo's position was apparent from the fact that the inspection of printed copies of the documents by ETS served no purpose (see GD at [84]); it added no value since ETS could have simply printed the copies it had received, and not have troubled itself with attending at the offices of Xinbo's solicitors. I therefore have no hesitation in affirming the AR's finding that Xinbo had breached the Production Order and the Unless Order insofar as the giving of inspection was concerned.

Conclusion

142 For the reasons I have explained in detail above, I hold that Xinbo did breach the Unless Order in a number of different aspects. It is thus necessary

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72 2RWS at para 55.

for me to go on to consider the consequences that should follow from Xinbo's breach.

Issue 2: What consequences ought to flow from the breach of the Unless Order?

Was SUM 643 necessary for the Unless Order to take effect?

143 As a preliminary point, I consider it useful to make some observations about the nature and effect of unless orders. Specifically, I emphasise that, as a matter of law, an application like SUM 643 is not a necessary step for the prescribed consequence in an unless order to take effect. In this case, while ETS had commenced SUM 643 on the AR's directions to *confirm* that the Unless Order had been breached and that the stated consequences therein had resultingly come into effect, it would be wrong to think of SUM 643 as the *cause* that triggered the consequences in the Unless Order. This is because an unless order is, by nature, "self-executing" as the consequence of non-compliance is embedded within the order as an *automatic* consequence upon breach (see *DNG FZE v Paypal Pte Ltd* [2024] SGHC 65 ("*DNG*") at [100]). Indeed, this was especially clear in the present case as it had been specified in para 1 of the Unless Order that, if Xinbo failed to comply within the requisite time, ORC 1189 would be discharged and OA 222 would be dismissed "without any further order" (see [28] above). Any lingering misconception that an unless order does not automatically take effect should be dispelled.

144 I make two points that follow from this. The first is that it appears to have sometimes been overlooked that the breach of an unless order is a freestanding basis for the striking out of an action or defence. It is distinct from the court's power to strike out an action or defence on the ground of a party's

breach of its production obligations under O 11 r 7(*a*) of the ROC 2021, which is a separate and independent regime that exists in parallel with unless orders (see *DNG* at [92]). Put differently, the court's power under O 11 r 7(*a*) is exercisable based on a party's non-compliance with its production obligations *simpliciter*, and the prior imposition or breach of an unless order is neither a necessary nor a sufficient condition for a party to bring an application and/or for the court to strike out a claim or defence under O 11 r 7(*a*).

145 The second point is that it is necessary to distinguish between: (a) the effect of the breach of an unless order, which is that the stated sanction in the order *automatically* takes effect; and (b) the court's power to waive non-compliance either on request by the party in default or, more exceptionally, on its own motion (see *Marcan Shipping (London) Ltd v Kefalas and another* [2007] 1 WLR 1864 ("*Marcan Shipping*") at [13]–[14]). The fact that the court has the power to forgive a breach of an unless order *does not* mean that the stated sanction in the unless order does not take effect until the court confirms that it has been breached and/or declines to grant relief to the party in default.

146 Earlier authorities had once taken so strict a view of the automatic effect of an unless order that it was thought that the court did not have jurisdiction to grant relief to a party in default after a stated sanction of termination or dismissal of a claim had been triggered, on the basis that the court could not resuscitate something that had ceased to exist (see *Whistler v Hancock* (1878) 3 QBD 83; *Wallis v Hepburn* (1878) 3 QBD 84; *King v Davenport* (1879) 4 QBD 402). This exceeding strictness was relaxed in *Samuels v Linzi Dresses Ltd* [1981] QB 115 ("*Samuels*") on the basis that the court *did* have jurisdiction to extend the time for compliance with an unless order and thereby grant relief from the sanction(s) in the unless order. It was however recognised that "it is a power

which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored" (at 126H). After *Samuels*, a practice developed, probably as a matter of caution, for a party seeking to take advantage of a breach of an unless order to apply to the court for a confirmation that the sanction had taken effect upon the other party's breach. Nonetheless, and crucially, the development of this practice did not change the inherent nature of an unless order, *viz*, that the sanction imposed came into effect automatically upon breach (see *Marcan Shipping* at [13]–[14]). The position established by *Samuels* was subsequently endorsed by the Court of Appeal in *Syed Mohamed Abdul Muthaliff and another v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 ("*Syed Mohamed*") and, to my knowledge, is still the position today.

147 In *Marcan Shipping*, Moore-Bick LJ made the following observations on three consequences of the self-executing nature of an unless order, which are worth reproducing (see [34]–[36]):

> 34 In my view it should now be clearly recognised that *the sanction embodied in an "unless" order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect.* This has a number of consequences, to three of which I think it is worth drawing particular attention. The first is that ***it is unnecessary, and indeed inappropriate, for a party who seeks to rely on non-compliance with an order of that kind to make an application to the court for the sanction to be imposed or, as the judge put it, "activated". The sanction prescribed by the order takes effect automatically as a result of the failure to comply with its terms.*** If an application to enter judgment is made under rule 3.5(5), the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect. ***Unless the party in default has applied for relief, or the court itself decides for some exceptional reason that it should act of its own initiative, the question whether the sanction ought to apply does not arise***. It must be assumed that at the time of making the order the court

> considered all the relevant factors and reached the decision that the sanction should take effect in the event of default. If it is thought that the court should not have made an order in those terms in the first place, the right course is to challenge it on appeal, but it may often be better to make all reasonable efforts to comply and to seek relief in the event of default.
>
> 35 The second consequence, which follows from the first, is that *the party in default must apply for relief from the sanction under rule 3.8 if he wishes to escape its consequences.* Although the court can act of its own motion, it is under no duty to do so and the party in default cannot complain if he fails to take appropriate steps to protect his own interests. Any application of this kind must deal with the matters which the court is required by rule 3.9 to consider.
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> 36 The third consequence is that before making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for … "good housekeeping purposes".
>
> [emphasis added in italics and bold italics]

148 Although the third consequence is also of much importance, and I will return to it in greater detail below, I focus for the present purposes on the first and second consequences which relate to the mechanics of an unless order. The first consequence affirms that the starting position upon the breach of an unless order is that the stated sanction(s) in the order automatically take effect. This is so regardless of whether the issue of breach or non-compliance is contested or not. If the issue is disputed, that may require an application to the court by the party seeking to rely on the unless order to confirm the other's breach of the unless order, but the court's decision would not be the trigger for the sanction,

since the court would merely be declaring the *status quo*. The second consequence suggests that the sanction, once automatically triggered, would continue to operate unless the court grants the party in default relief from it (either on its application or, exceptionally, on the court's own motion). In this regard, the court's power to grant relief from the sanctions in an unless order can be located in O 3 rr 2(4) and 4(1) of the ROC 2021 which, respectively, refer to the power to (a) waive non-compliance with court orders; and (b) extend time for compliance with court orders.

149 In the present case, based on the second consequence identified by Moore-Bick LJ in *Marcan Shipping*, there appeared to me to be some substance in the argument that the court should only consider the issue of whether the Unless Order had been breached and thereby confirm if the sanctions did indeed automatically take effect. There was no application by Xinbo for relief from non-compliance (if the court did find such non-compliance) as SUM 643 was *ETS's* application. In this regard, the leading scholar on English civil procedure law, Prof Adrian Zuckerman, expressed the following opinion in a case comment on *Marcan Shipping* (see Adrian Zuckerman, "How Seriously Should Unless Orders be Taken?" (2008) 27 CJQ 1 at 4):

> … it is important to keep in mind the difference between the operation of the sanction and the exercise of the court's discretion to grant relief. On an application for judgment under CPR 3.5 following non-compliance with an unless order, he held, *the court should not entertain arguments that would be relevant to an application for relief from sanction under CPR 3.8. A judge hearing an application under CPR 3.5 must therefore confine himself to deciding whether there had been a breach of the unless order. If no application for relief has been made … the court must not embark on an examination of whether relief may be granted under CPR 3.9.* [emphasis added]

150 Speaking for myself, I did see force in the view that the distinction between the operation of the sanction and the court's power to grant relief means that the court should (unless it decides to act on its own motion to grant relief) confine itself in an application like SUM 643 to the issue of whether the unless order was breached or not. The court can act on its own motion, but it is not clear why this should be the general rule rather than the exception. If the defaulting party does not itself put in an application for relief, why should the court proactively act to protect a litigant that has repeatedly flouted its authority through disobedience of its orders from the consequences of its own actions? However, I am conscious that existing authority appears to have resulted in a general practice by the Singapore courts of considering, on its own motion, the appropriateness of the sanctions taking effect. I shall therefore also do so. In any event, ETS did not take the point that SUM 643 was not the proper forum to consider whether Xinbo should be granted relief from the consequences in the Unless Order.

Should the consequences in the Unless Order come to pass?

(1) Applicable legal principles

151 The guideline judgment on the enforcement of unless orders is the Court of Appeal decision of *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 ("*Mitora*"). The following propositions can be distilled from this case:

(a) The starting position is that the breach of an unless order will automatically trigger its specified adverse consequences, and the onus is on the defaulting party to demonstrate that its breach had not been intentional and contumelious so as to avoid those consequences (see

Mitora at [35], citing *In re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196 at 1203B).

(b) A party may escape the characterisation of its breach being "intentional and contumelious" by demonstrating that it had made positive efforts to comply but was prevented from doing so by extraneous circumstances (see *Mitora* at [36], citing *Syed Mohamed* at [14]).

(c) But, even if a party's conduct can be said to have been intentional and contumelious, that is not the end of the matter, as the court must nevertheless determine what sanction should be imposed as a result (see *Mitora* at [37]). In this respect, the court will be guided by considerations of proportionality (see *Mitora* at [39], citing *Teeni Enterprise Pte Ltd v Singco Pte Ltd* [2008] SGHC 115 at [64]).

152 Although it was decided just over a decade ago, *Mitora* is not a straightforward case insofar as it lies in the centre of an uneasy tension between the propositions that (a) a breach of an unless order would automatically trigger the stated sanctions; and (b) the court should nonetheless assess the sanction imposed having regard to proportionality. This difficulty was recently fleshed out with characteristic acuity by Goh Yihan J in *DNG*, who sought to rationalise the appropriate balance between these competing considerations in the following exposition that merits setting out *in extenso* (see *DNG* at [97]–[99]):

> 97 In my respectful view, while the Court of Appeal stated that it is always necessary to consider proportionality in deciding whether striking out is the appropriate sanction for breach of an unless order, this must necessarily be on a more *limited* basis as compared to a situation where there had not been an unless order. Otherwise, there would be no practical consequence to the imposition of an unless order. Also, if

proportionality were to overwhelm all practical consequences of the unless order, then it would reduce the potency of the various judicial statements that an unless order is a defaulting party's "last chance to put his case in order" and that "a failure to comply will ordinarily result in the sanction being imposed" (see *Hytec* at 1674–1675, accepted by the Court of Appeal in *Syed Mohamed* at [15], and also in *Mitora* at [42]). In my respectful view, the Court of Appeal could not have intended for such an outcome, which is what the plaintiff effectively argued for in the present case.

98 In saying this, I am aware that the Court of Appeal in *Mitora* held (at [44]) that because unless orders are such potent tools, they must therefore be used with due care. However, that simply underscores the point that the consideration of proportionality cannot overwhelm the practical consequences of an unless order. Accordingly, the court pertinently pointed out (at [45]) that "[s]ince it is axiomatic that 'unless orders' must mean what they say, it is imperative that such orders are drafted with due care and consideration". Further, the court cited a learned academic text to the effect that parties will only take unless orders seriously if they believe that they will be enforced (at [45], citing *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 2nd Ed, 2003) at para 10.143). It appears to me that the court's concern in *Mitora* was that unless orders should not be imposed indiscriminately. But once an unless order is legitimately imposed, then I fail to see why its effect should be considerably softened. This risks parties not taking them seriously.

99 Seen in this manner, and mindful of the authority that is binding on me, I respectfully suggest that the mandated consideration of proportionality can be applied on a sliding scale. The application of proportionality should thus depend, not only on the consequences of striking out on the defaulting party, but also on the mental state of the defaulting party. Thus, if the breach was truly intentional and contumelious, then striking out would in most cases be *the* proportionate response because it reinforces the serious nature of an unless order. An alternative analysis is that, a court might take a *much more* limited consideration of the consequences of striking out on the defaulting party in light of its deliberate non-compliance. In my view, both analyses lead to the same result. In contrast, where the breach of the unless order was due to negligence, then a court must take a more generous consideration of proportionality and avoid striking out. This calibrated application of proportionality would, in my respectful view, better explain the apparent tension between what has often been cited as two important but seemingly inconsistent

> principles: (a) that the consequences of an unless order (*ie*, striking out) would automatically apply, but that (b) proportionality should apply to temper those consequences.
>
> [emphasis in original]

153 I respectfully agree with these observations. As Goh J points out, if the court were required to engage in a *full* reconsideration of the proportionality of the sanction in the unless order after the unless order has been breached, it would quite simply defeat the purpose of making the unless order in the first place. The court would essentially be conflating the distinct regimes of the enforcement of an unless order and its power to strike out a claim or defence based on a party's non-compliance with its production obligations under O 11 r 7(1) of the ROC 2021, the exercise of which, as explained at [144] above, is *not* subject to a condition precedent of there having been a prior unless order in place. It *must* be, therefore, that if there is to be any consideration of the issue of proportionality at the stage of enforcement of an unless order, such an assessment must be on a light-touch basis so as not to render the earlier making of the unless order nugatory.

154 I would go further. In my judgment, the latitude for a defaulting party to make arguments on the (dis)proportionality of enforcing the stated sanctions in the unless order has to be *considerably* narrower than the *status quo* where no unless order has been made. I say this for the following reasons.

155 First, it is necessary to bear in mind the context in which unless orders are made. In the English Court of Appeal decision of *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] 1 WLR 4530, Jackson LJ observed that (at [38]–[39] and [41]):

> 38 An "unless" order, however, does not stand on its own. *The court usually only makes an "unless" order against a party*

> *which is already in breach*. The "unless" order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an "unless" order in isolation. *A party who fails to comply with an "unless" order is normally in breach of an original order or rule as well as the "unless" order.*
>
> 39 In order to assess the seriousness and significance of a breach of an "unless" order, it is necessary also to look at the underlying breach. The court must look at what X failed to do in the first place, when assessing X's failure to take advantage of the second chance which he was given.
>
> …
>
> 41 The very fact that X has failed to comply with an "unless" order (as opposed to an "ordinary" order) is undoubtedly a pointer towards seriousness and significance. This is for two reasons. First, *X is in breach of two successive obligations to do the same thing*. Secondly, *the court has underlined the importance of doing that thing by specifying an automatic sanction in default (in this case the draconian sanction of strike out).*
>
> [emphasis added]

Since an unless order is only made on the premise of an antecedent breach of a court order (indeed, it is more likely than not that there has been *more than one* antecedent breach before an unless order is made), it is wrong to assume that a party who has breached an unless order is being called to account *only* for the breach of the unless order. Rather, the court should bear in mind that the defaulting party has breached (at least) "two successive obligations to do the same thing". In the circumstances, there should be a strong *prima facie* assumption that enforcing the unless order – as well as the underlying breaches – would *not* be disproportionate.

156 Second, the court considering the enforcement of an unless order must bear in mind that the issue of the proportionality of the stated sanction in the unless order has already been considered by the court that granted the unless order in the first place. Thus, at least in a loose sense, the issue of the

proportionality of the stated sanction is *res judicata*. In *DNG*, Goh J saw much force in the view that "if a court were to consider the proportionality of striking out following the intentional and contumelious breach of an unless order, that would amount to an attack on the earlier decision to impose the unless order" (at [100]).

157 I respectfully align myself with the learned judge's view. Indeed, it also derives support from the UK Supreme Court decision of *Thevarajah v Riordan and others* [2016] 1 WLR 76 ("*Thevarajah*"). In that case, the defendants had failed to comply with an unless order and were resultingly debarred from defending the claim. In refusing the defendants' (second) application for relief from sanctions under r 3.9 of the CPR (the first having been earlier refused), Lord Neuberger of Abbotsbury PSC observed that (at [18]):

> … as a matter of ordinary principle, when a court has made an interlocutory order, it is not normally open to a party subsequently to ask for relief which effectively requires that order to be varied or rescinded, save if there has been a material change in circumstances since the order was made. …

158 This dovetails with Goh J's observation in *DNG*: when it is established that a defaulting party has indeed breached the unless order, in asking the court *not* to enforce the *automatic* sanctions in the unless order, what the defaulting party is essentially seeking to do is for the unless order to be varied or rescinded. It is thus entirely logical that the court should generally refuse to do so, unless eminently good reasons are given. For the most part, any consideration that would have entered into the court's mind when the unless order was *made* should not move the needle: *ex hypothesi* the earlier court would have considered the factor in question and assessed the sanctions stated in the unless order to nevertheless be proportionate. This is why, as Lord Neuberger noted, the court's focus should be trained on a "material change in circumstances *since*

the order was made" [emphasis added]: if such new factors exist at the time when the order is sought to be enforced, the enforcement court would not be undermining the earlier decision to grant the unless order since the judge making the order would not have factored in those factors into the calculus.

159 While the facts of *Thevarajah* were admittedly somewhat different insofar as they concerned a second (and not first) application for relief from sanctions, Lord Neuberger went on to say that (at [21]:

> … where a party is subject to a debarring order for failing to comply with an "unless" order to do something within a specified period and relief from sanctions is refused at a time when he is still in default, the mere fact that he then complies with the "unless" order (albeit late) cannot amount to a material change of circumstances entitling him to make a second application for relief from sanctions. *By refusing the party's first application for relief from sanctions, the court would have effectively been saying that it was now too late for that party to comply with the "unless" order and obtain relief from sanctions.* ***So, if the court on a second application for relief from sanctions granted the relief sought simply because the "unless" order had been complied with late, its reasoning would ex hypothesi be inconsistent with the reasoning of the court which heard and determined the first application for relief****.* [emphasis added in italics and bold italics]

I do not think that these observations are confined solely to the specific context of *Thevarajah*. *Thevarajah* was an *a fortiori* case insofar as there had already been an earlier unsuccessful application for relief from sanctions. But the basic principle and thinking is the same: even in a first application for relief from the sanctions in the unless order, a decision granting such relief and refusing enforcement of the unless order's *automatic* consequences would *ex hypothesi* be inconsistent with the reasoning of the court that made the unless order. It is doubtless that the court should not be seen as being too ready to contradict itself. As Prof Zuckerman cautions, "an automatic sanction set up by a rule or order

might only be considered to be disproportionate ex post facto where circumstances have changed, or with the benefit of hindsight" and the court should not "lose sight of the difference between ex ante considerations of reasonableness and proportionality of process arrangements, and of ex post facto excuses for non-compliance" (see Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 4th Ed, 2021) ("*Zuckerman on Civil Procedure*") at para 11.157).

160 This segues into my third point. In my view, if a party considers the sanction in the unless order to be disproportionate, the proper forum for such complaints to be ventilated is *not* when the unless order has been breached and is sought to be enforced, but when the unless order is being *sought*. In other words, considerations of proportionality should be frontloaded to the time when the court is deciding (a) whether to impose an unless order; and (b) the terms of the unless order if one is to be made. If a party is disgruntled with the making of the unless order or the stated consequence(s) in the order, it is free to appeal against the making of the order and/or its terms. But once the unless order is made, and no appeal is filed (or, at any rate, successful), the ship to dispute proportionality further down the river ought to have sailed. I again refer to Prof Zuckerman's observations in this regard (see *Zuckerman on Civil Procedure* at para 11.159):

> … If the consequence of non-compliance stipulated by the original order was proportionate, then no issue of proportionality of this kind could arise in an application for relief from that same sanction. … a refusal of relief would only be 'disproportionate' in the sense alluded to here if there was a reasonable excuse for the failure to comply, or if the default was insignificant.

It is, with respect, a distortion of the natural order of things for the court to be asked to consider the proportionality of an *automatic* consequence *after* the

consequence has come to pass in law. The right balance, to my mind, is that closer scrutiny and circumspection may be warranted when deciding if an unless order is to be made (and on what terms), but if the court does make an unless order, the party in default should generally be accorded "no mercy" (see *Hytec* at 1675A). This would go some way towards mitigating the fundamental tension between the automatic nature of the unless order and the need to ensure proportionality and avoid overkill. This is referable to the third consequence identified by Moore-Bick LJ at [36] of *Marcan Shipping* in the extract I have earlier set out at [147] above – the draconian nature of the unless order may legitimately affect the court's readiness to *issue* such an order, but it should not bear on the court's resolve to *enforce* it once it is issued.

161 I return to *Mitora* for the fourth point. In my view, although the Court of Appeal's observations on the importance of considering proportionality are no doubt of general application, they should be understood in the specific context in that case. In particular, the court expressly found that the appellant "did substantively comply with all its discovery obligations" (see *Mitora* at [21]). Any breach of the unless order by the appellant was so insignificant that the court considered that there had been a "false-positive diagnosis of evidential deficiency", and even said that the courts below had erred by allowing the appellant's statement of claim to be "struck out on a technicality" (see *Mitora* at [25]–[26]). The court's comments on the importance of proportionality should be read in this context. It is therefore wrong, in my view, to cite *Mitora* as an authority for any wide-ranging proposition that, regardless of the nature and extent of the breach of an unless order, a prayer to proportionality may nonetheless save the day for the defaulting party. The Court of Appeal's point in *Mitora* was really that striking out a claim for an arid or technical breach would be disproportionate where the court is satisfied that the unless order has

been complied with as a matter of substance. And that must be unassailably correct. But in a case where the court does *not* find that the unless order has been substantively complied with, *Mitora* is, in my view, of little assistance to the party in default.

162 Indeed, the need to read *Mitora* in its context was subsequently emphasised by the Court of Appeal itself in *Energy & Commodity Pte Ltd and others v BTS Tankers Pte Ltd* [2021] 2 SLR 877. In that case, the appellants had failed to make a number of disclosures, resulting in an unless order being made against them which provided for their defences to be struck out and for judgment to be entered against them. After the unless order was breached, the aforesaid consequences followed. The Court of Appeal was unimpressed by the appellants' reliance on *Mitora* in support of their argument that the unless order should not have been made. The following comments by Andrew Phang Boon Leong JCA (as he then was) on the factual setting of *Mitora* are apposite (at [21]–[22]):

> 21 Contrary to the appellants' suggestion, we were of the view that the Judge's grant of the Unless Order was proportionate. As the Judge rightly pointed out, the "guiding principle was that of proportionality" (see the GD ([1] *supra*) at [84]). The purpose of the Unless Order was to give the appellants a final opportunity to produce all relevant documents. Rather than to comply in full, the appellants chose to appeal. Given the appellants' intentional breaches of court orders, the prejudicial effect these breaches had on the respondent, the appellants' constant lying, as well as the lack of any genuine attempt to comply, the Judge had in truth exhausted all other measures and there is every reason to think that the Unless Order was proportionate.
>
> 22 We note that in *Mitora*, this court held that it was not proportionate for the statement of claim there to be struck out owing to the appellant's earlier breaches of "unless orders" (see *Mitora* at [41]). ***However, we think that the facts of Mitora are distinguishable. In that case, the appellant there was hamstrung by extraneous circumstances which resulted in***

> ***the delay. Those extraneous circumstances having been resolved by the time of the appeal, the appellant was able to subsequently comply. This being the case, there had been, in truth, no irremediable prejudice suffered by the respondent in Mitora***. That is quite different in the present case, where Suit 844 had dragged on since 2017 and there was no credible explanation for the delays in disclosure. In the present context, the proportionality principle operated against the appellants.
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> [emphasis added in bold italics]

163 Fifth, I would suggest that the principles in *Mitora* should be properly situated in the prevailing context of the ROC 2021, which is a different civil procedure regime that is underpinned by different values than that which persisted at the time when *Mitora* was decided. Put simply, what might have previously been considered disproportionate could be considered proportionate in the current legislative context. Amongst other things, the Ideals set out in O 3 r 1(2) of the ROC 2021 are of paramount importance, as the court is enjoined to "seek to achieve the Ideals in all its orders or directions" (see O 3 r 1(3) of the ROC 2021).

164 There have been practical consequences resulting from this change in philosophy. For example, Mr Poon suggested that one way to redress Xinbo's breach of the Unless Order could be through a suitable costs order.[73] This line of thinking appears to be influenced by the traditional assumption that, if prejudice occasioned by a procedural default was compensable by costs, the court would generally be content to grant its indulgence. In *Affert Resources Pte Ltd (in compulsory winding up) v Industries Chimiques du Senegal and another* [2024] 4 SLR 258 ("*Affert Resources*"), even in the context of a case governed by the ROC 2014, Goh J deprecated this assumption (at [3]):

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[73] Transcript (15 October 2024) at p 13:19–21.

> … In my respectful view, the expression "prejudice that cannot be compensated by costs" should not be bandied around by litigants, as the appellant did in this appeal, because a meaningful analysis must still be undertaken as to whether an extension of time should be granted. Indeed, almost anything, save for those most valuable to us as human beings, *can* be compensated by money and, by extension, an appropriate costs order. There is therefore limited utility in framing the appropriate test primarily in terms of whether the other party has suffered a prejudice that cannot be compensated by costs. Instead, as a long line of cases has established, the focus of the appropriate test should be to strike a balance between the parties' interests, bearing in mind: (a) a party's interest to have its case determined on the substantive merits; (b) the counterparty's interest to have the matter resolved as expeditiously as possible; and (c) the court's interest in maintaining the due administration of civil justice. [emphasis in original]

165 If this assumption was already being sidelined in respect of the ROC 2014 regime, the position is now put beyond doubt in the ROC 2021. Order 3 r 2(4)(*d*) of the ROC 2021 expressly spells out that where there has been non-compliance with a court order, the court may "dismiss, stay or set aside any proceedings and give the appropriate judgment or order *even though the non-compliance could be compensated by costs, if the non-compliance is inconsistent with any of the Ideals in a material way*" [emphasis added]. In my view, this rule weakens the force of Mr Poon's appeal to costs as an appropriate sanction as there is a clear intention in the ROC 2021 that the courts should move away from framing the question of prejudice from the perspective of costs being an adequate alternative recompense.

166 Moreover, as I intimated to Mr Poon at the hearing, I have some difficulty with the view that a costs order is a proportionate sanction for a breach of an unless order relating to a party's breach of its document production

obligations.[74] A breach of production obligations bears on the *substantive fairness* of the proceedings as it can affect the other party's ability to present its case. As Mr Tan rightly pointed out, there is a gradation of types of procedural defaults, and breaches of document production obligations are self-evidently among the most severe kind.[75] To put the point somewhat bluntly, it seems to me perverse to suggest that a party can essentially "buy" the right to suppress or withhold material evidence from the other party or the court, by a payment of costs.

167 I would make a further point. Similar to how the court would have weighed the proportionality of the sanction in the unless order before making the order, the court dealing with a case under the ROC 2021 would have assessed the appropriateness of the unless order (and its embedded sanctions) against the Ideals. Thus, if the court refuses to enforce the unless order on a ground that was already factored into by the court (as opposed to an extraneous or unforeseen circumstance), the court would be refusing the enforcement of an order that it had already held to be upholding the Ideals of the ROC 2021. I am doubtful that such an approach or outcome can be correct.

(2) My decision: The sanctions in the Unless Order should be enforced

168 Having regard to the above principles and, in particular, my observations on the limited role of proportionality, I consider that the present case is one where it is entirely appropriate for the sanctions in the Unless Order to be enforced. The onus is on Xinbo to demonstrate that the Unless Order should not be enforced, and I do not find that it has come close to discharging that burden.

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74 Transcript (15 October 2024) at p 13:22–23.

75 Transcript (15 October 2024) at pp 27:25–28:7.

169 For a start, I find that Xinbo's breach of the Unless Order is intentional and contumelious. Indeed, I heard no argument to the contrary from Xinbo on this. Both its written submissions and Mr Poon's oral submissions centred around the subsequent question of proportionality which, logically, means that Xinbo accepts (at the very least implicitly) that its breach was intentional and contumelious. Xinbo has chosen instead to hang its hat on the court's discretion that is grounded on proportionality.

170 In any event, the point is straightforward. A breach of an unless order is by default intentional and contumelious, unless the party in default can show that it was prevented by outside circumstances from obeying the order (see *DNG* at [86]; *Kraze Entertainment (S) Pte Ltd v Marina Bay Sands Pte Ltd* [2014] 1 SLR 78 at [36]). There can be no suggestion here that Xinbo's breaches which I have canvassed in detail above have been caused by anything but its own failings. As the AR observed, by taking the position that it had complied with the Unless Order, Xinbo logically disabled itself from providing any meaningful explanation for its non-compliance with the Unless Order (see GD at [91]).

171 Turning to proportionality, I am unconvinced by Xinbo's arguments. As I have explained above, the starting point is that Xinbo did not appeal the making of the Unless Order or its terms. Therefore, the AR's assessment on the proportionality of the sanctions in the Unless Order (and its consistency with the Ideals of the ROC 2021) should be given due respect. It should generally only be where the breach could either be properly characterised as trivial, or the result of circumstances that are extraneous (*ie*, outside of the defaulting party's control) or unforeseen, that it would be disproportionate.

172 No such argument was advanced by Xinbo. Instead, the main point that Xinbo emphasised is that the impact of its breaches of the Unless Order on ETS's ability to run its case in SUM 952 is not significant. Xinbo claims that since the AR agreed with it on this point, he was wrong to hold that enforcing the sanctions in the Unless Order was a proportionate response.[76]

173 Although I accept that this is, in principle, a relevant and important consideration, I disagree that it is of any assistance to Xinbo. In the first place, Xinbo has mischaracterised the AR's decision. The AR did not express an unqualified agreement with Xinbo's submission. In his words, he only agreed "[t]o *some extent* … with [Xinbo] that [ETS] appears to have been able to effectively mount its case in SUM 952 since day one" [emphasis added]. In fact, the AR then immediately went on to say that, in respect of the "critical question" of "whether there can nevertheless be a fair hearing", he was "not satisfied that this [was] the case" (see GD at [105]).

174 Even if the AR did make a finding that ETS' ability to run its case in SUM 952 was not affected by Xinbo's breaches (which, to be clear, he did *not*), I would have disagreed with it. The link between Xinbo's breaches of its production obligations under the Production Order and the Unless Order is manifest from the criteria that underpins the court's jurisdiction to make specific production orders under O 11 r 3 of the ROC 2021. In particular, the touchstone of materiality means that the documents that the court has ordered to be produced are *material* to the *adjudicative outcome*; thus, the court in making a specific production order thereby decides that the documents have a real bearing on the way that the court would determine a pleaded issue in the parties' dispute

[76] CWS at para 72.

(see *Cachet* at [33]). In principle, therefore, there would be a clear enough nexus between a party's breach of an unless order made to secure performance of a specific production order and the other party's ability to present its case.

175 Further, Xinbo appears to conceive of the question of whether there can be a fair hearing between ETS and it in SUM 952 as a purely bilateral matter between the parties *inter se*.[77] I question that premise. In my view, the *court* has a direct interest to ensure a measure of fair play in the conduct of litigation; so, even if it is not impossible *per se* for a party to present its case, the court should be entitled to take the view that the other party's conduct has rendered the proceedings unfair. Put another way, it is wrong to assume that all there is to a "fair hearing" is the other party's ability to present its case at a baseline level, such that one is then entitled to inflict disadvantage on the other so long as it does not go *too far* – that sets the standard too low, and the court should not countenance or permit any such manoeuvring that incentivises tactical non-compliance with court orders. I alluded to this concern in the course of Mr Poon's oral arguments.[78] In fairness to Mr Poon, he did candidly accept this point which, to my mind, was incontrovertible. Indeed, Mr Poon acknowledged that he could not run away from the point because it was on that basis that the Production Order was made.[79]

176 I have already expressed my reservations against substituting striking out for an adverse costs order at [166] above, and turn now to address Mr Poon's

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77 CWS at para 75.

78 Transcript (15 October 2024) at pp 5:22–6:22.

79 Transcript (15 October 2024) at pp 5:22–6:22.

alternative submission that the right (and proportionate) way forward is for the court hearing SUM 952 to draw adverse inferences against Xinbo.[80]

177 As a preliminary point, I note that the AR appears to have doubted the permissibility of adverse inferences being drawn against Xinbo if SUM 952 were to proceed without an application for the taking of oral evidence and cross-examination from ETS, on the basis that s 2(1) of the Evidence Act 1893 (2020 Rev Ed) (the "EA") disapplies s 116 of the EA to proceedings decided solely based on affidavit evidence (see GD at [109]). If the AR was correct in proceeding on this premise, Xinbo's reliance on adverse inferences as an alternative censure would be misconceived as its posited alternative would be no alternative at all.

178 In fairness to Xinbo, however, I respectfully doubt the correctness of that premise. In *The Online Citizen Pte Ltd v Attorney-General* [2023] 3 SLR 761, Aidan Xu J expressed the view that s 2(1) of the EA did not have the effect of preventing the court from drawing an adverse inference from affidavit evidence, whether on the basis that s 2(1) did not completely exclude the operation of s 116 of the EA or that an adverse inference was a general inference available in the common law that the EA did not displace (at [57]–[58]). Similarly, Prof Jeffrey Pinsler SC has opined, in relation to s 2(1) of the EA, that "[t]he non-application of the EA to interlocutory proceedings or other process involving affidavits does not prevent a court from applying basic evidential considerations in order to reach a just result" (see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) at para 1.046). I am minded to agree with this perspective, and so I proceed on the basis – in

[80] Transcript (15 October 2024) at p 7:6–10.

Xinbo's favour – that the court hearing SUM 952 could draw an adverse inference against Xinbo if it considers it fit, even if SUM 952 is a proceeding to be decided solely on affidavit evidence.

179 Nevertheless, the theoretical availability of an adverse inference does not advance Xinbo's position. While the Court of Appeal in *Mitora* did list the drawing of adverse inferences against the defaulting party as one of various tools in the court's arsenal other than the draconian sanction of striking out (at [45]), it is, in my view, insufficient for the defaulting party to point generally to the theoretical availability of a particular option, as the court has to assess the viability of any given option in the specific context of each case and its factual landscape.

180 In the present case, it is not at all clear to me how an adverse inference could satisfactorily address the prejudice occasioned by Xinbo's deliberate breach of the Unless Order. Mr Tan referred me to Goh J's decision in *DNG*,[81] where the learned judge had dismissed the viability of adverse inferences as "the extent of such inferences was difficult to measure because of the broad nature of the plaintiff's breaches" and that "such inferences would overwhelm the plaintiff's case almost entirely" (at [157]). I agree that the same can be said of this case. Xinbo's breaches of the Unless Order are wide-ranging and affect a substantial, if not the entirety, of the issues raised in SUM 952. This is not a situation where there is a specific, discrete omission which the court could set right on a targeted basis; instead, the omissions infect the entirety of SUM 952. If Xinbo's position is that the court in SUM 952 should draw adverse inference after adverse inference and adverse inference *upon* adverse inference, it is

[81] Transcript (15 October 2024) at p 31:4–8.

effectively suggesting that SUM 952 be decided entirely on a conjectural basis. I decline to proceed on such an unsatisfactory basis.

181 For all these reasons, I hold that the enforcement of the sanctions set out in the Unless Order is a proportionate response to the gravity and extent of Xinbo's breaches of the Unless Order.

Does the New York Convention or the principle of minimal curial intervention fetter the court's power to enforce unless orders?

182 I come to the final arrow in Xinbo's quiver. The argument is a legal one: it is said that the enforcement of a striking out sanction against an award creditor in proceedings to enforce a New York Convention award is either contrary to the New York Convention and/or the Singapore courts' pro-arbitration policy undergirded by the principle of minimal curial intervention.

183 The argument is a creative one but there is no doubt in my mind that it cannot withstand scrutiny.

184 I start with the New York Convention. The gravamen of Xinbo's complaint is that the striking out of an enforcement order for breach of an unless order is tantamount to fashioning a *new* ground for refusing enforcement of a foreign arbitral award by judicial fiat. It is argued by Xinbo that this contravenes Art V of the New York Convention and s 31(1) of the IAA which *exhaustively* prescribe the grounds on which a Contracting State to the New York Convention can resist enforcement of an award made in another Contracting State (which I shall refer to shorthand as a "Convention Award").

185 In my judgment, there is no merit in this submission, for the following reasons.

186 First, it is normatively objectionable to say that any party that invokes the jurisdiction of the Singapore courts can claim to stand outside of our procedural rules or enjoy immunity from any part thereof.

187 Second, Art III of the New York Convention expressly puts paid to any such suggestion, as it expressly subjects the enforcement of a Convention Award to the procedural rules of each Contracting State:

> Each Contracting State shall recognise arbitral awards as binding and enforce them ***in accordance with the rules of procedure of the territory where the award is relied upon***, under the conditions laid down in the following Articles. *There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.* [emphasis added in italics and bold italics]

188 It is thus explicitly clear that an award creditor must comply with the rules of a Contracting State if it chooses to invoke the jurisdiction of that Contracting State to enforce a Convention Award. The only constraint that is imposed on a Contracting State is the last sentence of Art III which sets out the principle of non-discrimination against Convention Awards: a Contracting State is not permitted to discriminate against a Convention Award by imposing more onerous procedural rules than those which apply to domestic arbitral awards. There is no suggestion from Xinbo that the striking out of an application to enforce an award is a sanction that somehow only applies to Convention Awards and not, for example, to domestic awards governed by the Arbitration Act 2001 (2020 Rev Ed).

189 The English High Court decision in *Diag Human SE v Czech Republic* [2014] 1 All ER (Comm) 605 ("*Diag Human*") is particularly apposite. The court considered *inter alia* whether the New York Convention prevented the

court from making an order for security for costs against an award creditor seeking to enforce a Convention Award. The award creditor made essentially the same argument as Xinbo in the present case that (see *Diag Human* at [12]):

> … there can be no condition imposed upon a party seeking to enforce a convention award, because if he fails to comply with such a condition then a sanction will follow by way of dismissal of his enforcement proceedings, which is not permissible within the terms of art V, which sets out the *only* ground upon which recognition and enforcement of an award may be refused … [emphasis in original]

Interestingly, the award debtor in fact appeared to concede this, as its counsel is recorded as having argued that the court had the option of imposing a stay of the enforcement proceedings rather than dismissal, which would not amount to a refusal of enforcement under Art V of the New York Convention (see *Diag Human* at [12]).

190 Burton J did not accept the award creditor's argument. Indeed, his Lordship went *even further* than the position taken by the award debtor as he did not accept that dismissal of the enforcement proceedings for non-compliance with a security for costs order was impermissible under the New York Convention. After citing commentary that focussed on Art III's prohibition on discriminatory treatment of Convention Awards, his Lordship said thus (see *Diag Human* at [15]–[16]):

> 15 ***It is quite clear that the local court is free to impose its own procedural conditions, such as orders for disclosure, indeed time limits for evidence, and, in respect of compliance with those conditions, to make final or unless orders, and, in the event of failure to comply with such final or unless orders, to impose sanctions including dismissal***. It is plain to me that this must also include security for costs, if otherwise appropriate, and so long as non-discriminatory; and the fact that there is an express remedy given by art VI, whereby a *defendant* may be liable for security in respect of the award and/or for costs, does not in my

> judgment take away the effect of the second sentence of art III, which permits the imposition of conditions, and hence inevitably of sanctions for non-compliance with them, including a dismissal, which would thus not be offensive to art V. I am satisfied that there is no need to take the cautious approach suggested by [the award debtor] of the imposition of a stay.
>
> 16 Non-discriminatory conditions can be imposed, as a result of the second sentence of art III, and the sanctions for non-compliance must include dismissal. …
>
> [original emphasis in italics; emphasis added in bold italics]

Diag Human is thus authority that directly supports my conclusion that the Singapore courts can, in enforcement proceedings in respect of Convention Awards: (a) impose unless orders that prescribe the sanction of striking out of those enforcement proceedings; and (b) enforce that sanction in the event of non-compliance with the unless order.

191 Xinbo cites the English Court of Appeal decision of *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2008] Bus LR 388 ("*Gater Assets*") as authority for the proposition that "English courts have declined to make certain orders if they would have the practical effect of refusing enforcement of an award".[82] The court in *Gater Assets* considered the same issue in *Diag Human* as to whether it could make an order for security for costs against an award creditor seeking to enforce a Convention Award. Xinbo places particular reliance on the following comments in the judgment of Rix LJ, where his Lordship cast doubt on the permissibility of making such orders (see *Gater Assets* at [81]):

> … Under the Convention, an award creditor is entitled as of right to the enforcement of his award and each state party is obliged to provide such enforcement, subject only to the narrow exceptions allowed. This is part of an international agreement to make international arbitration attractive and efficient. In such circumstances, to say that an award creditor cannot

82 CWS at para 61.

> enforce his award unless he provides security for the costs which will be incurred because his award debtor wishes to try to prove that he can bring himself within those narrow exceptions would seem to me to run counter to the essential basis of the Convention. It is not simply a matter of a "more onerous condition" in the sense in which that expression is used in article III, viz rule of procedure: see *Van Der Berg, The New York Arbitration Convention of 1958* (1994), pp 239–240. It is refusing to effect enforcement unless security is provided and derogates from article III's requirement that enforcement be accorded "under the conditions laid down in the following articles" (viz articles IV to VI). Field J, however, was prepared to refuse enforcement, on the ground of failure to provide the security for costs ordered. That was the order that Field J made, setting aside the enforcement order if the security was not provided, and doing so on a ground not expressly within the Convention. There is no express basis in the New York Convention for that condition. Enforcement may be refused "only if" one of the exceptions within article V is made good. …

192 Although *Gater Assets* is a decision of a superior court in the English judicial hierarchy relative to *Diag Human*, I am not moved by Xinbo's reliance on it. As neither decision is binding on me, I am free to prefer the reasoning in *Diag Human* if I am persuaded of its merits. In addition, the comments of Rix LJ in *Gater Assets* were strictly *obiter* and his Lordship himself made clear that he "[did] not make this a separate ground of decision" but was merely stating his opinion based on his understanding of the New York Convention's structure (see *Gater Assets* at [82]).

193 In any event, I am persuaded by the merits of the approach taken in *Diag Human*. In *Gater Assets*, Rix LJ considered that the jurisdiction to make an order for security for costs went beyond merely Art III of the New York Convention because his focus was trained on the consequence of a Convention Award not being enforced if the order was not complied with. But, with respect, such an analysis seems to me to place the cart before the horse. This is because, as I explained at [188] above, Art III itself expressly subjects the enforcement of a

Convention Award to the "rules of procedure of the territory where the award is relied upon". Thus, a Convention Award would be enforced *only if* such enforcement would be in accordance with a Contracting State's domestic rules of procedure. Put a different way, the pro-enforcement policy of the New York Convention bends to the domestic procedural rules of an individual Contracting State rather than the other way around. Indeed, the difficulty with Rix LJ's approach was noted – correctly, in my view – in the separate judgment of Buxton LJ in *Gater Assets* who, in disagreeing with Rix LJ on this point, observed as follows (see *Gater Assets* at [116]):

> Rix LJ, in para 81 above, expresses a more general concern (not, I think, advanced as part of Gater's case) and Moses LJ in his para 95 agrees, that Field J's order, refusing enforcement unless security is given, infringes this country's obligations under the New York Convention to provide enforcement subject only to the exceptions recognised by the New York Convention itself. *But article III recognises in terms that enforcement has to be in accordance with the national rules of procedure. It is inherent in that provision that a refusal by an award creditor to respect those national rules of procedure will debar him from enforcement.* [emphasis added]

I respectfully prefer Buxton LJ's interpretation of the structure of the New York Convention, which was subsequently followed by Burton J in *Diag Human*.

194 Locally, there are other examples, albeit in different contexts or at a higher degree of abstraction, that demonstrate that there is no impediment to applying well-established domestic procedural rules to the context of enforcement of arbitral awards, even if the application of such rules would, as a practical matter, result in disruption to the enforcement of a Convention Award. For one, in *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56, it was held that the doctrine of transnational issue estoppel from Singapore's conflict of laws rules could be applied in the context of award enforcement

proceedings. The Court of Appeal observed that "when dealing with the question of the enforcement of a foreign arbitral award, the New York Convention does not operate in isolation *because the domestic law of the enforcement court also comes into play*" [emphasis added] (at [97]). Like an unless order, the doctrine of transnational issue estoppel is a procedural tool that can result in the non-enforcement of an award.

195 In a similar vein is the duty to make full and frank disclosure of all material facts at the *ex parte* stage of an application to enforce an arbitral award under s 31 of the IAA. If Xinbo is right, it would mean that, even if Xinbo is found to have failed to make full and frank disclosure in its *ex parte* application for permission to enforce the Award, the court would be powerless to set aside ORC 1189 since discharging ORC 1189 would, in a sense, disrupt the enforcement of the Award on a ground not found in the New York Convention and s 31 of the IAA. But, as ETS rightly points out,[83] there is local authority establishing to the contrary that the court can discharge its earlier grant of permission if the enforcement applicant is found to have breached its duty of full and frank disclosure, even if the court retains an overriding discretion not to do so in the circumstances of each case (see *CZD v CZE* [2023] 5 SLR 806 at [49], citing *AUF v AUG and other matters* [2016] 1 SLR 859 at [163]; *National Oilwell Varco Norway AS (formerly known as Hydralift AS) v Keppel FELS Ltd (formerly known as Far East Levingston Shipbuilding Ltd)* [2021] SGHC 124 at [176]–[184]). It is thus certainly not the case that permission to enforce a Convention Award, once given, can never be taken back or halted for non-compliance with domestic law or procedural rules.

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[83] 2RWS at paras 68–69.

196 Further, I note that the *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (United Nations, 2016) ("*Guide on New York Convention*") also expressly recognises that the procedural rules of a Contracting State may result in the denial of the recognition and enforcement of a Convention Award (at p 86):

> The flexibility afforded under article III to Contracting States to apply their national rules of procedure gives rise to the possibility that an award could be granted recognition and enforcement in one Contracting State and denied recognition and enforcement in another based on a rule of procedure that exists in the former but not the latter. However, reported case law provides very few examples of such situations.

197 Third, the various examples I have raised to make the second point (at [194]–[195]) illustrate that Xinbo's reliance on the exhaustive nature of Art V of the New York Convention and s 31 of the IAA rests on the false premise that *anything* that results in the practical consequence of a Convention Award not being enforced amounts to refusing enforcement of the Award in a way that falls foul of Art V and s 31.

198 Turning to Xinbo's invocation of the well-established pro-enforcement policy of the Singapore courts and the principle of minimal curial intervention, I am also unconvinced that either of these support Xinbo's attempt to fetter the Singapore courts' jurisdiction to enforce unless orders made in proceedings to enforce a Convention Award.

199 An abstracted invocation of the Singapore courts' pro-enforcement policy rings hollow. It cannot seriously be contended that a policy of pro-enforcement requires the court to ignore intentional and contumelious disregard for its authority in the form of breaches of its orders, still less an unless order. An arbitral award obtained by an award creditor in a Convention country is not

a golden ticket to immunity from being visited with the natural consequences of the creditor disregarding orders made by this court in the course of enforcement proceedings that are before it. Xinbo's argument attempts to set up a fence between the Singapore court's pro-enforcement inclination and its protection of its authority and the due administration of justice as mutual exclusives, where the twain shall never meet. In my judgment, that is an ill-constructed fence. The court is entitled – and indeed, *required* – to strike the balance between these two imperatives as it sees fit.

200 Nor can Xinbo derive any assistance from the principle of minimal curial intervention. The principle of minimal curial intervention is premised on a proper ordering of roles between the court and the arbitral tribunal in the arbitration ecosystem (see *Swire Shipping Pte Ltd v Ace Exim Pte Ltd* [2024] 5 SLR 706 at [1]). In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, V K Rajah JA explained that (at [65(c)]):

> … minimal curial intervention is underpinned by two principal considerations. First, there is a need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts. …

It is plain that compliance with the court's orders has nothing to do with the allocation of roles between the courts and the arbitral tribunal. It is exclusively a matter within the province of the courts. The court in meting out sanction for non-compliance with its orders in no way infringes or undermines the adjudicative jurisdiction of the tribunal or the tribunal's mastery over its own procedure. I struggle to see how the principle of minimal curial intervention is of any relevance to this appeal or affords any way out for Xinbo.

Conclusion

201 For all of the foregoing reasons, I dismiss Xinbo's appeal. In my judgment, Xinbo has undoubtedly breached the Unless Order, and the appropriate consequence flowing from the breach is for the specified consequences in the Unless Order to take effect. There is no impediment, whether in terms of legality or proportionality, that militates against Xinbo being visited with the natural consequences of its conduct.

202 Taking a step back and looking at things in the round, Xinbo has fear-mongered that enforcement of the Unless Order would set a "dangerous precedent". I disagree. In my judgment, accepting Xinbo's position would set a comparatively more dangerous precedent: it would give award creditors and enforcement applicants the impression that, with the award in hand, they have an open road to disobey the court's orders with impunity. Anyone who invokes the Singapore court's jurisdiction and powers for their own purpose – here, to enforce an award – necessarily subjects itself to the court's authority and any orders made by it.

203 I will hear the parties on costs.

S Mohan
Judge of the High Court

Poon Kin Mun Kelvin SC and Devathas Satianathan (Rajah & Tann Singapore LLP) (instructed), Tan Ky Won Terence and Tan Lena (Genesis Law Corporation LLP) for the claimant;
The first respondent absent and unrepresented;
Tan Zhengxian Jordan, Leong Hoi Seng Victor and Lim Jun Heng (Audent Chambers LLC) (instructed), Poon Guokun Nicholas and Chan Michael Karfai (Breakpoint LLC) for the second respondent.