HCCL 5/2023, HCCL 6/2023
(Consolidated)
[2024] HKCFI 1146

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

COMMERCIAL ACTION NO. 5 OF 2023
COMMERCIAL ACTION NO. 6 OF 2023

BETWEEN

TENWOW INTERNATIONAL HOLDINGS LIMITED (IN LIQUIDATION)	1st Plaintiff
NAN PU INTERNATIONAL LIMITED (IN CREDITORS' VOLUNTARY WINDING UP)	2nd Plaintiff

and

PRICEWATERHOUSECOOPERS (A FIRM)	1st Defendant
普华永道中天会计师事务所 (特殊普通合伙) PRICEWATERHOUSECOOPERS ZHONG TIAN LLP	2nd Defendant

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(Consolidated by the Order of the Honourable Mr Justice Anthony Chan dated 8 November 2023)

Before: Hon Anthony Chan J in Chambers

Date of Hearing: 9 April 2024

Date of Decision: 2 May 2024

DECISION

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1. There is before the Court a Notice of Application issued by the 2nd Defendant ("D2") on 1 December 2023 for a Letter of Request ("LOR") to be issued by this Court to the Shanghai High People's Court to enable copies of the documents listed in D2's List of Documents dated 22 November 2023 ("D2 LOD") to be transferred from the Mainland to Hong Kong for production to the Plaintiffs.

2. D2 LOD disclosed that D2 has in its possession in the Mainland over 1,500 audit working papers and items of correspondence relating to the audits of the Tenwow Group to which the Plaintiffs belonged ("D2 Documents"). There is no dispute that these documents are importance to the issues to be determined in this action.

3. The bases advanced for this application are :

(1) D2 is prohibited by laws and regulations in the Mainland ("ML&R") to produce and, by extension, allow inspection of audit working papers which are kept in the Mainland without

having obtained the approval from competent Mainland authorities ("Competent Authorities");

(2) The approval process (which encompasses a screening exercise of the D2 Documents) cannot be initiated except through cross-border cooperation between official bodies. In the context of civil litigation, this requires the issuance of a LOR pursuant to the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the HKSAR signed on 29 December 2016 ("Mutual Arrangement").

Issues

4. Mr Manzoni SC, who appeared with Mr Karas for the Plaintiffs, disagree with this application on a number of grounds :

(1) Whether a LOR may properly be used to assist a party to comply with its discovery obligations;

(2) Whether the Mutual Arrangement can properly be invoked. The Plaintiffs say that it is a tool for gathering evidence (as opposed to disclosure). It is not a tool to relieve a party of its obligation to produce for inspection documents in its own possession;

(3) Even if the Mutual Arrangement can be invoked, the Plaintiffs say that the Court should in the exercise of its discretion refuse to issue a LOR;

(4) The Plaintiffs further say that this application is premised on a flawed interpretation of the ML&R on which D2 relies, such that it is neither necessary nor appropriate for a LOR to be issued. In short, the relevant provisions do not impose any prohibition on the transfer of the D2 Documents to Hong Kong. They restrict only the transfer of documents which contain confidential or sensitive information (including State Secrets) or other information which is prohibited from disclosure under the provisions ("Regulated Information"). The D2 Documents do not contain any Regulated Information.

5. Issues (1), (2) and (4) go to whether the Court's jurisdiction to issue a LOR can properly be invoked.

Background

6. The 1st Plaintiff ("P1") was an investment holding company incorporated in the Cayman Islands. It, together with its subsidiaries (collectively, "Tenwow Group"), were principally engaged in the manufacturing, distribution of beverages, food and snacks in the Mainland. P1 was wound up by the Cayman Court on 11 March 2021.

7. The 2nd Plaintiff ("P2") was an indirect wholly-owned subsidiary of P1 in the Tenwow Group. It was placed into creditors' voluntary liquidation on 4 June 2021.

8. The 1st Defendant ("D1") was (and is) a firm of certified public accountants practising in Hong Kong. It was engaged by P1 as (i)

the reporting accountant for the purpose of P1's listing on the Main Board of the Stock Exchange of Hong Kong Ltd and (ii) the auditor for its consolidated financial statements for the years ended 31 December 2013 to 2017 ("FY2013 to FY2017"). D1 issued unqualified audit opinions on P1's consolidated financial statements for FY2013 to FY2017 ("2013-2017 Audits").

9. D2 was (and is) a firm of certified public accountants practising in the Mainland. It was tasked by D1 with performing audit work on the Tenwow Group's PRC subsidiaries for the 2013-2017 Audits.

10. In this action, the Plaintiffs allege that the Defendants breached their duties by, *inter alia*, failing to detect alleged defalcations by way of prepayments made to three suppliers and illegitimate financial assistance to a related party. The Plaintiffs claim to have suffered loss of about RMB 3.1 billion as a result of the Defendants' alleged negligence.

11. The Defendants deny the alleged breaches of duties. Their case is that :

(1) P1 only engaged D1 (not D2) for the 2013-2017 Audits. D2 therefore did not owe P1 any duty of care, whether in contract or in tort, and P1 does not have any cause of action against it. As for D1, it performed the 2013-2017 Audits with the care and skill of a reasonably competent auditor;

(2) P2, who never engaged either D1 or D2 for any service, was not owed any duty of care by either of them. Accordingly, P2 does not have any cause of action against either D1 or D2.

12. In respect of the discovery of audit working papers, on 29 April 2020, P1's liquidators first wrote to D1 in connection with P1's winding up. D1 was asked to assist by providing its audit working papers in relation to the 2013-2017 Audits. On 15 May 2020, D1 responded by refusing to provide the documents on the basis that they were located in the Mainland and were "subject to China legal impediments which prevent [D1] from disclosing them unless with permission from the Mainland China regulators or through the regulator-to-regulator mechanism".

13. On 16 March 2022, the Plaintiffs served the writ in this action on D1. The Statement of Claim was served on D1 and D2 respectively on 11 April and 1 September 2022.

14. Paragraph 14(3) of the Defence and Counterclaim of the Defendants dated 25 November 2022 averred that "… Chinese laws and regulations applicable to [D2] prevent it from transferring [the D2 Documents] out of Mainland China without approval from relevant authorities in the PRC".

15. On 17 May 2023, the Defendants proposed to the Plaintiffs, for the first time, that a joint application for a LOR be issued by this Court. On 31 May 2023, the Plaintiffs rejected the proposal on the basis that no Mainland authority approval was required.

16. At the first Case Management Conference on 8 November 2023, D2 sought, and this Court made, the following directions (amongst others) :

(1) Parties were to exchange Lists of Documents by 22 November 2023;

(2) Any application by D2 to apply for a LOR pursuant to the Mutual Arrangement was to be made by 1 December 2023;

(3) In the absence of such an application, D2 was to produce its discovery by 22 December 2023.

17. On 22 November 2023, D2 produced the D2 LOD comprising 1,513 documents. On 1 December 2023, this application was taken out.

Applicable principles

18. Mr Shieh SC, who appeared with Ms Au for the Defendants, referred the Court to the following principles, which were not disputed by Mr Manzoni.

19. The power to issue a LOR to judicial authority of another country exists as part of the inherent jurisdiction of the court. In issuing such a letter, the court is doing no more than making a request to a foreign court for assistance; it is not making an order, still less an order addressed to a foreign court or to witnesses: *Kwan Chui Kwok Ying v Tao Wai Chun*, CACV 194/2002, unrep, 13 December 2002, [19]-[21], citing *Panayiotou v Sony Music Ltd* [1994] Ch 142 at 149G.

20. Whether an order for the issuance of a LOR will be granted is a matter for the discretion of the issuing court. It is not necessary for there to be an obligation on the part of the recipient judicial authority to execute the letter. An established practice of executing such letters will be sufficient for the court to exercise its discretion to grant an order for a LOR to the jurisdiction in question: *Kwan Chui Kwok Ying*, *supra*, at [21]-[23].

21. This being a matter of discretion, it is "impossible to lay down any general rule" as to when a LOR will be granted. It must depend on the circumstances of the particular case: *Coch v Allcock & Co* (1888) 21 QBD 178 at 181.

22. In order to justify the issuance of a LOR, it must be demonstrated that the request falls within the scope of one of the articles of the Mutual Arrangement (where it is relied upon in support of the application) such that there is a basis to believe that the LOR, if issued, would likely be executed: *Huang Yu Hui v Zheng Shizhi* [2021] HKCFI 3362 at [28]-[38].

23. On his part, Mr Manzoni referred to *Bank Mellat v Her Majesty's Treasury* [2019] EWCA Civ 449 on the applicable principles where a party has sought to withhold inspection of documents upon an assertion that inspection would give rise to a contravention of foreign law :

(1) The court has jurisdiction to order production and inspection of documents, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law

in the "home" country of the party the subject of the order [63(i)];

(2) Orders for production and inspection are matters of procedural law, governed by the *lex fori*, here Hong Kong law. Foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with Hong Kong procedures and law [63(ii)];

(3) Whether or not to make such an order is a matter for the discretion of the court [63(iii)];

(4) In exercising its discretion, the court will balance, on the one hand, the actual risk of prosecution in the foreign state, and on the other, the importance of the documents of which inspection is to be given. The existence of the former is not determinative but is a factor of which the court would be very mindful [63(iv)];

(5) The court can fashion inspection order to reduce or minimise the concerns under foreign law, eg, by imposing confidentiality restrictions [63(v)];

(6) Where an order for inspection is made by the court, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order. Comity cuts both ways [63(vi)];

(7) The party resisting inspection will need to show that the foreign law contains no exception for legal proceedings, and that the law is not just a text or an empty vessel, but is

regularly enforced so as to give rise to a real threat to the party [62].

Compliance by D2 of its discovery obligations (Issue (1))

24. Mr Manzoni submitted that a litigant is subject to the powers of the Court in respect of his discovery obligations. There is no need to resort to the LOR procedure in connection with a litigant's discovery obligations. LORs are concerned with obtaining evidence from non-parties who are not subject to disclosure obligations.

25. The considerations here are (i) whether LOR are normally issued for obtaining evidence from non-parties and (ii) the application of the principles identified in *Bank Mellat*. The two are inter-related.

26. I start with *Joint and Several Liquidators of Kwong Wah Holdings Ltd v Grande Holdings Ltd* (2006) 9 HKCFAR 766, [38]. It was a case whether the liquidators sought production of documents from companies alleged to have been involved in the management of the companies under liquidation under s.221 of the Companies Ordinance, Cap 32. Lord Millet NPJ observed, *obiter*, at [38] that LOR (amongst others) are "designed to enable a party to litigation … to obtain evidence for use in existing proceedings from a person who is not a party to them".

27. In *Panayiotou*, the defendant belonged to the Sony Group. The plaintiff successfully obtained a LOR for the production of documents

addressed to a company within the Sony group, which was not a party to the proceedings.

28. In *Kwan Chui Kwok Ying*, the LOR was granted against the Director of the Macau Identification Services, a third party, in the dispute between the 6th and 15th Defendants which arose out of a probate action. The grant was upheld on appeal.

29. These well-established authorities support Mr Manzoni's contention.

30. In respect of the authorities relied upon by D2, *Re Mid East Trading Ltd, Lehman Bros Inc v Phillips* [1998] 1 BCLC 240 was concerned with an application by liquidators for a production order against a third party bank pursuant to insolvency legislation (not a LOR).

31. Secondly, *Coch v Allcock & Co* (1888) 21 QBD 178 related to an application for a commission to Norway to examine the plaintiff and his workmate there. It was not about production of documents.

32. Thirdly, in *Huang Yu Hui v Zheng Shizhi* [2021] HKCFI 3362 the defendant, who was imprisoned in the Mainland, applied for a LOR to enable him to give evidence in the Mainland prison. The application was refused on the ground that the LOR would unlikely be executed because it fell outside the scope of Article 6 of the Mutual Arrangement [38].

33. Finally, *China Metal Recycling (Holdings) Ltd (in liq) v Deloitte Touche Tohmatsu (a firm)* [2024] HKCFI 877 was concerned with a LOR against a non-party, referred to as "Deloitte China". Like the present case, the application by the defendant was premised on the contention that the production of audit papers kept in the Mainland was prohibited under ML&R. I shall return to this case below.

34. I agree with Mr Manzoni that the cases relied upon by D2 involved applications which were either against third party or for the taking of evidence of a party (as distinct from the production of documents). In respect of the latter type, *Coch* was decided in 1888 and on a different procedure. In *Huang Yu Hui*, apart from the fact that the application had failed, it was an unusual case where the defendant wanted to have his evidence taken by the Mainland Court whilst he was imprisoned there.

35. It should be noted that the modern practice is to allow the evidence of a party to be given via video link if his inability to attend court here is well-justified.

36. Mr Manzoni also relies on, firstly, *Byers v Samba Financial Group* [2020] EWHC 853 (Ch) at [67] and [68(i)], where it was held that a LOR is for securing evidence (as opposed to disclosure) that is material to an issue at trial. Such an instrument cannot be issued for the purpose of removing an obstacle to a litigant's compliance with an order for disclosure: "attempting to engage the support of a foreign government to remove an obstacle to a foreign litigant's compliance with an order for

disclosure is not a request for assistance from a foreign court to secure material evidence". At [67], the court held :

> "It is therefore clearly established that the court's inherent jurisdiction to issue a letter of request is exercised for the purpose of securing evidence that is material to an issue at trial. The distinction between evidence and disclosure is fundamental, as demonstrated by [*Panayiotou*]. Where a party to a case, over whom the court has jurisdiction, is ordered to give disclosure, the court has all the power it needs to enforce its order."

37. Secondly, *Secretary of State for Health v Servier Laboratories Ltd*, CA, [2014] 1 WLR 4383. The case turned on one substantive point, namely, whether it was mandatory for the court to make use of an EU regulation akin to a LOR (see [12]) in order to obtain the request information and achieve the desired disclosure ([98]) in circumstances where the French defendants (i) opposed the discovery orders on ground that compliance would expose them to risk of prosecution in France and (ii) contended that the court should invoke the regulation.

38. The question was answered in the negative by the English Court of Appeal which held that the orders in question were of a procedural nature in the pending claims. Their making was governed by English law as the *lex fori*. The fact that such orders might, if complied with, expose the parties subject to them to risk of prosecution under a foreign law provided no defence to their making. The English court still retained a jurisdiction under the *lex fori* to make them, although it had a discretion as to whether to do so in the particular circumstances (*per* Rimer LJ).

39. Further, it was held by Beatson LJ that: "an order for ordinary disclosure should not be equated with the taking of evidence in another state".

40. In response to Mr Manzoni's submission, Mr Shieh argued that whether a LOR is issued against a non-party cannot be a material distinction, and there is no sound reason why a LOR cannot be used in aid of a party.

41. First, Mr Shieh's submission did not address the weight of the above authorities, which demonstrate that, in respect of a party, the LOR procedure may at best be invoked for taking his evidence overseas.

42. Second, as a matter of principle, a party's disclosure obligations are subject to the powers of the Court. It is wrong to subjugate the Court's power to the criminal law of a foreign state. In this case, although Hong Kong is part of the PRC, its legal system is separate to that of the Mainland.

43. As pointed out by Mr Manzoni, if D2 has difficulty in complying with its obligation to produce the D2 Documents, it may apply to the Court to modify its obligations as shown in *Bank Mellat*. This should not be treated as an invitation to D2 to make another interlocutory application. There are thresholds which must be met to justify an application to modify D2's discovery obligations, eg, a real risk of prosecution.

44. In the premises, I agree with Mr Manzoni that the proposed use of a LOR is not appropriate, and this application fails at the first hurdle.

Mutual Arrangement (issue (2))

45. D2 relies on Article 6 of the Mutual Arrangement the relevant part of which provided as follows :

> "The scope of assistance that may be requested by a court of the HKSAR in seeking the taking of evidence by the People's Courts of the Mainland under the Arrangement includes:
>
> (1) obtaining of statements from parties concerned and testimonies from witnesses;
>
> (2) provision of documentary evidence, real evidence, audio-visual information and electronic data;
>
> (3) conduct of site examination and authentication."

46. The provisions referred to the "taking of evidence" by a Mainland Court. I am unable to see how the obtaining of approval in question can fall within any of the categories of evidence which may be taken by a Mainland Court. Further, I refer to the *dicta* of Beatson LJ at [39] above, as well as *Byers* at [36] above.

47. The non-applicability of Article 6 is fatal to this application, see [22] above.

48. Before turning to the next issue, I shall deal with 2 pieces of evidence which bears upon D2's reliance on the Mutual Arrangement, namely, (i) the expert evidence of Professor Huang ("Huang") and

Ms Wang[1] ("Wang") and (ii) a letter from the Mainland Ministry of Finance dated 30 November 2023 ("MOF Letter").

49. Both Huang and Wang asserted that the approval processes by the Competent Authorities to enable transfer of the D2 Documents to Hong Kong would involve screening them. These processes can only be initiated via a LOR under the Mutual Arrangement. I agree with Mr Manzoni that neither Huang nor Wang adequately explained why D2 is prohibited from directly approaching the Competent Authorities to seek the approval.

50. In respect of Huang, he simply asserted what he "consider[ed]" would be involved in the approval procedure[2] without providing any basis for why he so "considered". Such evidence is unhelpful to the Court and does not instil confidence in Huang's opinion. In so far as his (and Wang's) reliance on the approval for transfer of audit papers between regulatory authorities is concerned, it is regulated under a different regime pursuant to memoranda of understanding.

51. As regards Wang, her only relevant experience concerned an action against KPMG in which a LOR was obtained. However, Mr Manzoni, who was involved in that case, informed the Court (without objection by Mr Shieh) that despite the passage of some 3 years no

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1 Mr Shieh submitted that Wang is a factual witness. It is a fine point. Her evidence was not confined to merely her own experience.

2 Bundle A/248, [31]; 249, [33] and 250, [35].

document was produced under the LOR and no reason was given to explain the situation by the Mainland Court.

52. In my view, there are obvious lacunas in the Plaintiff's expert evidence and the absence of evidence is telling. First, there is no adequate identification of what information in the D2 Documents is prohibited from transfer to Hong Kong and by reason of which ML&R (I shall deal with D2's case of a blanket prohibition below). Second, there is no adequate identification of which Competent Authorities may be involved, save that both Huang and Wang said that the Ministry of Finance ("MOF") would be amongst such Authorities (Wang also mentioned the Archives Bureau). Third, there is no mention of which of the Articles of the Mutual Arrangement can be invoked and the basis for doing so.

53. Further, it is a matter of plain common sense for D2 to try to apply for the requisite approval, especially with Huang's evidence that the key ML&R does not spell out the relevant approval procedures. The absence of such an application is equally telling.

54. Furthermore, the D2 Documents were reviewed by D2's solicitors (which is not disputed) without any approval from Competent Authorities. This flies in the face of D2's case that such inspection is prohibited under ML&R. There is no explanation in the evidence of Huang and Wang on this matter.

55. In respect of the MOF Letter, D2's evidence is that there was a meeting between 4 of its partners and the Supervision and Evaluation

Bureau of the MOF on 29 November 2023 ("MOF Meeting") during which D2 asked for confirmation of its understanding on the prohibition over the transfer of its audit papers outside the Mainland and the requisite approval. D2 says that in the MOF Meeting and by the MOF Letter, its understanding of the relevant provisions under ML&R was "confirmed" to be correct.

56. The MOF Letter stated (translation) as follows :

> "We acknowledge receipt of your 'Request for Instructions Concerning the High Court of Hong Kong's Request for PricewaterhouseCoopers Zhong Tian to Provide Audit Working Papers within the Territory of Mainland China in a Hong Kong High Court Litigation Case'. After studying the matter, we hereby offer our opinion in reply to your request as follows:
>
> The matters concerning the High Court of Hong Kong's request for your firm to provide audit working papers to the Hong Kong liquidators of Tenwow International Holdings Limited fall under the judicial scope. The administrative supervision cooperation agreement between the Mainland and the Hong Kong Special Administrative Region is not applicable. There is no basis for us to approve the production of audit working papers to the High Court of Hong Kong and the Hong Kong liquidators. The High Court of Hong Kong, if necessary during hearing of civil and commercial matters, can request the courts of the Mainland to provide assistance in obtaining the relevant audit working papers through mutual legal assistance between Hong Kong and the Mainland and in accordance with the *Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region.*
>
> You should strictly comply with the relevant requirements of the Mainland laws and regulations in maintaining, using and obtaining the relevant audit working papers, and properly handle litigation related matters in Hong Kong."

57. Expert evidence was adduced by the Plaintiff on the effect of the MOF Letter. According to Professor Yao, the letter is a general, and standard, reply in which the MOF did not express an opinion on whether it is necessary or appropriate for assistance to be sought through the Mutual Arrangement in this case. On the other hand, Wang's opinion is that the MOF Letter is "an administrative instruction given by the relevant competent authority".

58. With respect, the parties have not exercised proper restraint in the production of expert evidence. This is an abuse of the rules which allow the introduction of expert evidence in interlocutory applications without the leave of the court. This Court is able to understand the MOF Letter and come to a view on its meaning. The Court is not assisted by the gulf in the expert evidence.

59. It has not been explained by D2 why it chose to have the MOF Meeting 2 days before the deadline for its LOR application. It had no less than 3 ½ years to do so (see [12] above). There is no evidence of the details on what was discussed at the MOF Meeting. With such circumstances in mind, the Court should maintain a healthy scepticism in the evaluation of the MOF Letter.

60. This Court was referred by Mr Manzoni to *China Medical Technologies, Inc. (in liquidation) v KPMG (a firm)* [2018] HKCFI 655, [11] and [43]. In that case, DHCJ To, after considering a letter from the MOF the material part of which was almost identical to the MOF Letter in this case, held that the letter before the court could not be treated as

evidence that a LOR was necessary to compel the production of audit papers.

61. It appears to me that the MOF Letter was a standard form reply probably in cases involving audit papers. Save for the proposition that D2 should comply with applicable laws, I can see no instruction given by the MOF. There is no evidence of any prior discussions whether Regulated Information is involved or whether there is a blanket prohibition against transfer of audit papers outside the Mainland. Nor is there any evidence of prior discussions on which Article(s) of the Mutual Arrangement may apply and why. In short, I do not find the MOF Letter to be of much evidential value.

62. In the premises, neither the expert evidence nor the MOF Letter assists D2.

63. In light of the above findings, I shall deal with the remaining issues succinctly. It is logical to deal with issue (4) before considering the discretionary issues.

Necessity (issue (4))

64. The Court has been referred by D2 to a substantial body of ML&R, 8 different sets in total. The Court also has before it a substantial amount of widely conflicting expert evidence, backed up with the analysis of counsel.

65. There is no evidence adduced on what documents are amongst the D2 Documents which may be covered by any of the 8 sets of laws and regulations and why so. It would not have been difficult for D2 to adduce such evidence. The absence of such evidence weighs against any suggestion of risk of prosecution, and has rendered it much of a sterile exercise for D2 to be arguing about infringement of ML&R.

66. The central theme of D2's case is that there is a blanket prohibition over the unapproved transfer of audit papers which was introduced by Article 9 of the Provisions on Strengthening Confidentiality and Archives Administration Overseas Securities Offering and Listing by Domestic Companies (Announcement [2023] No. 44) issued on 24 February 2023[3] ("Regulation 44"), which superseded the Provisions on Confidentiality and Archives Administration for Overseas Securities Offering and Listing (Announcement [2009] No. 29) issued on 20 October 2009 ("Regulation 29"). Article 9 provided as follows :

> "Working papers produced in the Chinese mainland by securities companies and securities service providers in the process of undertaking businesses related to overseas offering and listing by domestic companies shall be retained in the Chinese mainland. Where such documents need to be transferred or transmitted to outside the Chinese mainland, relevant approval procedures stipulated by national regulations shall be followed."
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> [emphasis added]

67. D2 says that Article 9 (and Article 8), unlike Articles 3, 4, 6 and 7 which qualify the obligation in question by reference to the nature of

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[3] It came into effect on 31 March 2023.

the information contained in the relevant document, eg, "state secrets" and "working secrets of government agencies", appears to have presumptively classified "working papers produced in the Chinese mainland by … securities service providers" (there is no dispute that D2 falls within "securities service providers") as a special category of documents which warrants special treatment.

68. I regret to say that I can derive little assistance from the widely diverging views of Huang and Professor Fu ("Fu") (the Plaintiff's expert). I shall use my legal training and form my own view on the meaning of Article 9: *Shenzhen Development Bank Company Ltd v New Century Int'l (Holdings) Ltd*, unrep, HCA 2976/2001, 31 July 2002, [25].

69. The lynchpin of D2's case is the wordings of Article 9. They, D2 contends, imported no qualification over the quality of the working papers, such as containing state secrets. Mr Shieh further submitted that D2's position is fortified by comparing Article 9 of Regulation 44 with its corresponding predecessor article, Article 6 of Regulation 29, which provided :

> "In the process of overseas issuance and listing of securities, working papers or other archives formed within the territory of China by the securities companies and securities service institutions that provide relevant securities service shall be stored in the territory of China.
>
> Where the working papers mentioned in the preceding paragraph involve state secrets, state security or vital interest, such papers shall not be stored, processed or transferred in non-confidential computer information system; the said papers are forbidden from carrying, transporting overseas or transferring to overseas

> institutions or individuals via any means such as information technology without approval of competent authorities."
>
> [emphasis added]

70. By deleting the part "involve state secrets, state security or vital interest" in the new regulation, the drafters of Article 9 of Regulation 44 clearly intended to create a blanket prohibition against the cross-border transfer of audit working papers produced in the Mainland, irrespective of whether such audit working papers are demonstrated to contain state secrets or other specified forms of confidential or sensitive information, said Mr Shieh.

71. First, D2's argument ignores the obligation imposed under Article 9, namely, "relevant approval procedures stipulated by national regulations shall be followed".

72. Second, pursuant to Article 6 of Regulation 44, "… securities service providers that publicly disclose or provide to overseas regulators or other relevant entities or individuals such documents and materials [being documents and materials provided by a domestic company that contain "state secrets or working secrets of government agencies, or other documents and materials that will be detrimental to national security or public interest if leaked"] shall fulfil relevant procedures pursuant to Articles 3 and 4 of this Provisions".

73. Article 3 requires, *inter alia*, a domestic company to first obtain approval from competent authorities according to Mainland law

before making disclosure of or providing documents and materials that contain "state secrets" or "working secrets of government agencies".

74. Article 4 requires, *inter alia*, a domestic company to strictly fulfil relevant procedures stipulated by applicable national regulations before making disclosure of or providing documents and materials that, "if leaked, will be detrimental to national security or public interest".

75. Reading Article 6 in conjunction with Articles 3 and 4, it is reasonably clear that a securities service provider who has obtained any Regulated Information from it client is not free to transfer such information overseas without compliance with ML&R.

76. In other words, reading Regulation 44 as a whole, there appears to be little material change over Regulation 29 insofar as restriction on the transfer of audit papers (which contained Regulated Information) abroad is concerned.

77. Third, the above proposition is supported by the explanatory Revision Notes on Regulation 44, which acknowledged that "[f]or more than a decade, [Regulation 29] has played a positive role in ensuring the secure administration of information related to overseas offering and listing by domestic companies, particularly providing audit working papers in the cross-border context". The Revision Notes went on to identify 3 areas where Regulation 29 had fallen out of step amid evolving market circumstances, namely, (i) limited coverage; (ii) not kept up with

regulatory reform in overseas offering and listing by domestic companies; and (iii) falls short of the need for cross-border regulatory cooperation.

78. Under "Section II. Main Contents of Revision", the Revision Notes provided that "[t]he revised Provisions contains 13 articles by striking out two articles and adding three new ones from the original document". Five areas of major contents of the revision were then set out. These 5 areas of did not mention any "blanket prohibition" or audit working papers warranting special treatment, or any change from Regulation 29 in the approach to audit working papers. I agree with Mr Manzoni that it would be remarkable if Regulation 44 was intended to make such a fundamental change, but the Revision Notes omitted to make any mention of it.

79. Fourth, I also agree with Mr Manzoni that the provisions of Regulation 44 were the products of redrafting and not produced by amending those of Regulation 29. Therefore, making a comparison between Article 9 of Regulation 44 and Article 6 of Regulation 29 is of limited assistance.

80. Fifth, taking a step back, the proposition that every set of audit papers will have to be vetted by Competent Authorities prior to transfer abroad is not one which sits with common sense. The Authorities would be inundated (even with the help of outside lawyers as suggested by Wang), and it is difficult to see how the Mainland economy can properly function. The proposition is not to be accepted without sound foundation. I can find none.

81. For these reasons, I disagree with the blanket prohibition argument. In my view, there is no material change under Regulation 44. If the D2 Documents contain Regulated Information, then the necessary approval will have to be obtained. However, as mentioned above, there is no evidence of Regulated Information being involved.

82. Finally, I should refer to 3 Hong Kong cases. The first two, *Securities and Futures Commission v Ernst & Young (a firm)* [2015] 5 HKLRD 293 and *The Joint and several Liquidators of China Medical Technologies, Inc. v KPMG (a firm)*, unrep, HCCW 435/2012, 24 February 2016, were decided in the context of Regulation 29. In these cases, Ng J and Harris J respectively accepted that Mainland law did not impose a blanket prohibition on the transfer of audit working papers.

83. In respect of D2's expert evidence that a private entity cannot pre-judge whether a document contains Regulated Information, and that only the Competent Authorities may make such a determination, this would mean that every document has to be screened and approved by the Authorities before they can be considered for transfer out of the Mainland. The contention was rejected by Harris J in *China Medical* ([72]-[78] and [88]) and is plainly unworkable. As observed by the learned Judge, commercial activity would grind to a halt if such a position were correct [72]. I agree.

84. It should be added that Fu made the point that the Plaintiffs' business concerned the manufacturing and distribution of snacks and beverages, such that the D2 Documents are inherently unlikely to contain

Regulated Information. The point is consonant with common sense and has not been properly answered by D2's evidence.

85. The third case is *China Metal*, *supra* at para 33 above, in which Cheng J considered both *China Medical* and *SFC v KPMG*, and accepted the expert evidence before the Court that pursuant to Regulation 44, approval was required for the transmission of audit working papers and related documents to Hong Kong. With great respect, the application before the learned Judge was unopposed and the decision was reached without the benefit of opposing evidence and submissions.

Discretionary considerations (issue (3))

86. Mr Manzoni relies on 2 additional factors which are said to weigh heavily against the Court exercising its discretion to issue a LOR in any event, namely, futility and delay.

87. In respect of the first factor, it was submitted that even if a LOR is to be issued pursuant to the Mutual Arrangement, there is a high likelihood of inaction by the Mainland Court. Unless there is reason to believe that the Mainland Court would be receptive to the LOR, this Court should not embark on an exercise in futility: see *Byers*, [68(i)].

88. The Mutual Arrangement outlines the process for the taking of evidence between the Mainland and Hong Kong. However, there are no implementing provisions or rules, and no published Mainland judgment

on how the Mutual Arrangement is to be applied to the taking of evidence in the Mainland.

89. The evidence adduced by the Plaintiffs before the Court is that up to 31 December 2023, 9 LORs were issued to the Mainland Courts under the Mutual Arrangement since it came into force on 1 March 2017. None of them has been completed in that no requested evidence has ever been obtained. According to the information which originated from the Government, the reasons for the state of affairs included "unavailability of the requested information, discontinuance of the proceedings concerned or non-compliance of the requested assistance with the relevant law in the Mainland, etc".

90. I accept that in the KPMG case in which Mr Manzoni was involved the LOR had produced no result for some 3 years with no reason given. On the other hand, it was pointed out by Mr Shieh that the Mutual Arrangement gives rise to an "obligation" on the part of the Mainland Court to "as far as practicable complete the requested matter within six months from the date of the receipt of the letter of request" or, if the requested matter cannot be complete, provide written reasons (see Article 10).

91. It is apparent that the Mutual Arrangement is not working in the way intended, at least in the KPMG case. However, I am not prepared to say that this Court should exercise its discretion to decline the issuance a LOR on this ground alone.

92. As regards delay, D1 was, on its case, aware of the need to obtain approval since at least May 2020 (see para 12 above). There is no reason to believe that D2, being Mainland professionals, did not share such knowledge. The delay in making this application is both lengthy and unexplained.

93. The Court must also factor into the equation, firstly, the likely delay in obtaining the requisite approvals (how many Competent Authorities will be involved is unclear) and the eventual transfer of the D2 Documents to Hong Kong. The above considerations under futility are also relevant here. Secondly, the 31-day trial of this action is to take place in February 2026.

94. Under such light, delay will have a serious impact on the readiness for trial. The preparations for expert evidence and witness statements are yet to be completed in this case. Further delay in obtaining the production of the D2 Documents would likely have an adverse impact on these preparations.

95. In these circumstances, I would have inclined to exercise my discretion against granting this application even if it were otherwise properly made out.

96. Finally, it should be noted that Mr Manzoni had suggested that this Court may order that the production of the D2 Documents be carried out in the Mainland if it has reservation about production in Hong Kong.

However, Mr Shieh was unreceptive to the proposition and relied on the evidence of Huang that inspection in the Mainland is prohibited.

Disposition

97. For these reasons, the Notice of Application is dismissed. D2 must comply with its obligation to produce the D2 Documents pursuant to para 5 of this Court's directions dated 8 November 2023.

98. The parties are in agreement that costs should follow the event. I order that the costs of and occasioned by the Notice of Application be paid by D2 with a certificate for 1 counsel and 1 solicitor advocate. Such costs are to be taxed if not agreed.

99. Last but not least, I am grateful for the assistance rendered to the Court.

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

Mr Charles Manzoni SC instructed by and Mr Jason Karas (solicitor advocate) of Karas So LLP, for the Plaintiffs

Mr Paul Shieh SC and Ms Astina Au, instructed by Reynolds Porter Chamberlain, for the 2nd Defendant

HCCL 5/2023, HCCL 6/2023
(Consolidated)
[2024] HKCFI 1146

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

COMMERCIAL ACTION NO. 5 OF 2023
COMMERCIAL ACTION NO. 6 OF 2023

BETWEEN

TENWOW INTERNATIONAL HOLDINGS LIMITED (IN LIQUIDATION)	1st Plaintiff
NAN PU INTERNATIONAL LIMITED (IN CREDITORS' VOLUNTARY WINDING UP)	2nd Plaintiff

and

PRICEWATERHOUSECOOPERS (A FIRM)	1st Defendant
普华永道中天会计师事务所 (特殊普通合伙) PRICEWATERHOUSECOOPERS ZHONG TIAN LLP	2nd Defendant

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(Consolidated by the Order of the Honourable Mr Justice Anthony Chan dated 8 November 2023)

Before: Hon Anthony Chan J in Chambers

Date of Hearing: 9 April 2024

Date of Decision: 2 May 2024

CORRIGENDA

Please note the following corrections in the Judgment handed down on 2 May 2024:

(1) Page 10, paragraph 26, 1st line, "*Joint and Several Liquidators of Kwong Wah Holdings Ltd*" should read "*Joint and Several Liquidators of Kong Wah Holdings Ltd*"

(2) Page 17, paragraph 52, 1st line, "in the Plaintiff's expert evidence" should read "in the D2's expert evidence";

(3) Page 29, paragraph 93, 5th line, "the 31-day trial of this action is to take place in February 2026" should read "the 30-day trial of this action is to take place in March 2026".

Dated this 7th day of May 2024

(Ada LAM)
Clerk to Hon Anthony Chan J