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IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 128 OF 2021 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF SINA CORPORATION

Before:	The Hon. Raj Parker
Appearances:	Mr David Chivers KC of counsel instructed by Ms Grainne King, Ms Catie Wang and Ms Moesha Ramsay-Howell of Harney Westwood & Riegels for the Company
	Mr Jasbir Dhillon KC of counsel instructed by Mr Rocco Cecere, Ms Charlotte Walker, Mr Ronan O'Doherty and Ms Dawn Major of Collas Crill, Ms Marie Skelly of Ogier and Mr Simon Dickson, Ms Ella van der Schans of Mourant Ozannes (Cayman) LLP together for the Collas Crill, Mourant and Ogier Dissenters
	Thomas Grant KC of counsel instructed by Mr Sam Dawson, Mr Nigel Smith and Mr Tom Stuart of Carey Olsen, Cayman for the Carey Olsen Dissenters
Heard:	6-8 December 2023
Draft Judgment circulated:	16 January 2024
Judgment delivered:	6 February 2024

HEADNOTE

s.238 appraisal proceedings-importance of discovery by the company-PRC law-majority of documents submitted for approval disclosed-remaining documents-breach-real risk of prosecution and serious sanction-expert evidence-US decisions -discretion-balancing exercise-probative value of documents which PRC authority refused to allow to be transferred out of the PRC-necessity for fair trial-independent China expert to review documents and opine on their importance to issues in the case in PRC-delay-conduct of company-prejudice to dissenters-proposals by the company-disclosure of communications with PRC authorities in PRC-letters rogatory.

JUDGMENT

Introduction

1. The Collas Crill, Mourant and Ogier Dissenters ("CCMOD") identified at Appendix 1 to their Summons of 23 August 2023 seek, in essence, orders that:

    (1) the Company shall not be permitted to withhold documents from disclosure and inspection on the grounds of the provisions of the law of the People's Republic of China ("PRC");
    (2) the Company must provide disclosure of all documents withheld on that basis within 30 days; and
    (3) if the Company does not comply with that disclosure obligation, it is debarred from adducing expert valuation evidence or calling an expert valuer at trial.

2. There is also before the Court a separate Summons from the Carey Olsen Dissenters ("COD") which seeks information and documents pertaining to communications to and from the Judicial Assistance Exchange Centre ("JAEC") and other governmental bodies concerning the requirement for regulatory approval and information about the Remaining Documents[1] (see below) which the Company is seeking to withhold on PRC law grounds.

[1] *Numbering 666 documents*

3. Also before the Court, there is an "Amended Extension Summons" from the Company which seeks an order whereby: (a) a PRC Independent Expert, (and not the Dissenters or their counsel) inspects certain relevant documents and files a memorandum as to the potential impact of those documents on the parties' expert reports; and (b) an extension of time for the Company to produce certain further, relevant documents until ten days following the PRC authorities' approval of their transfer to the Dissenters.

4. The Company also filed a "Letters Rogatory Summons" by which the Company proposes that the Court issues a letter of request to the Courts of the PRC requesting the Company's documents.

Background

5. At a hearing on 14-15 December 2021, the Company argued that it could not give disclosure of documents located within the PRC without first obtaining certain approvals. Having heard argument, and in a reserved Judgment[2] (the "2022 Judgment"), the Court decided that it did not consider it necessary to resolve those questions at that time. The background to these proceedings is summarised in paragraphs 1-9 of the 2022 Judgment.

The merger

6. In short, the Company is an exempted limited company incorporated under the laws of the Cayman Islands. Its primary business is to operate a "Twitter-like" social media platform in the PRC called "Weibo". The Company's Board entered into a merger agreement with a buyer group in September 2020, for the purchase of the Company's shares. This was approved at an Extraordinary General Meeting on 23 December 2020.

7. The Dissenters gave notice of dissent, as they are entitled to do, under section 238 of the Cayman Islands Companies Act (as amended) (the "Act"). The Company's fair value offer under section 238(8) of the Act was rejected, and the Company accordingly presented the Petition on 18 May 2021.

The procedural history

The 2022 Judgment

8. The directions hearing in this matter was in December 2021 ("the Directions Hearing"), with judgment given on 25 January 2022 and a Directions Order made on 18 May 2022 (the "Directions Order").

9. In the usual way, the Company was ordered to give discovery of all documents relevant to fair value, including but not limited to those categories of documents specified in Appendix 3 to the Directions Order, by uploading the documents to an electronic data room. This was to be done by 27 July 2022.

10. Before the Directions Hearing, the Company had raised certain impediments under PRC law to giving discovery.[3] The order sought by the Company at that stage would have permitted it to withhold all discovery of documents held in the PRC absent consent of the PRC authorities.

11. At the Directions Hearing the Company modified its position, requesting that it be given the opportunity to seek approval from the relevant PRC authorities for its disclosure so far as documents were located in the PRC. That was against the uncertainty about the new PRC legislation which had come into force on 1 September 2021.

12. Further, Leading counsel for the Company made clear that:

> "*The Company is not seeking to avoid its discovery obligations. It does not contend that it should not be required to give disclosure of relevant documents and information; its position is simply that it must be given an opportunity to seek the requisite regulatory approval first….It recognises that its discovery and the production of material in this case is fundamental because it has the relevant information necessary for an independent evaluation by the Court with the assistance of experts."*[4]

[3] See *the evidence of Professor Han Liu ("Professor Liu") in the first affirmation of Liu Han dated 9 November 2021 ("Lui 1"), which focused on Article 36 of the Data Security Law ("DSL"), which had come into effect on 1 September 2021; In response, the Dissenters served the first affirmation of the PRC law expert, Mr Zhihua Tang ("Mr Tang"), dated 3 December 2021 ("Tang 1"), who disputed the views of Professor Liu. Since then Prof Liu and Mr Tang have served several further affirmations*

[4] *See §§ 54-55 of the 2022 Judgment*

13. In the 2022 Judgment, the Court held that it was "*premature*" and "*not necessary to rule now on the vexed question of whether the undoubted centrality of company discovery in section 238 proceedings and the Court's ability to determine fair value outweigh the concerns expressed by the Company as to PRC law*": 2022 Judgment at [67].

14. The Court said:

> *"It may become necessary to deal with the conflicting opinions of the experts and to apply the relevant law to the facts of this case in due course, but in my view the matter is not yet to be determined. Suffice it to say that there is sufficient and cogent expert evidence adduced on both sides for the Court to say that the matter is validly raised and may well require judicial determination in due course…the need for an exercise in examining the documents, the applicable provisions of PRC law and the risk of prosecution and the nature and extent of the risk, has not yet arisen*" (at [69]-[70] of the 2022 Judgment).

15. The discovery timetable would not run from the date on which any approval was given by the PRC regulatory authorities, as had been suggested by the Company (at [71] of the 2022 Judgment).

16. At [72] of the 2022 Judgment the Court held that the appropriate course was to "*make the usual order for discovery leaving the onus upon the Company to comply or apply to the Court as soon as it perceives that it will not be able to do so".* That would not simply be a notification that it was unable to complete its disclosure of obligations due to the risk of prosecution in the PRC, but could involve an application to be relieved of those obligations for a period of time, conditionally, or absolutely.[5]

17. The Court also stressed the importance of active case management of the discovery process "*at the appropriate stage and to the extent necessary to ensure a fair trial of the one issue in the case; namely the fair value of the Dissenters' shares - which all parties accept requires access to all relevant information".*

18. The Court said that the Dissenters were "*not to be prejudiced by undue delay*" and that the Court would "*not simply 'let the 'can' be kicked down the ro*ad'": The 2022 Judgment at [73].

[5] *See § 9 of the First Affidavit of Charlotte Victoria Walker sworn on 23 August 2023 ("Walker 1")*

19. In the result the Company did not provide discovery by 27 July 2022 but was granted more time until on 17 October 2022 the Company amended its time extension summons to seek a longer extension until 24 February 2023.

20 January 2023 Judgment

20. That further time extension was granted in a ruling dated 20 January 2023 (the "2023 Judgment"). The Court made it clear that the process that had been set down by the Directions Order had to a large extent been complied with and noted that there had obviously been difficulties that the Company had faced in relation to disclosure of certain information concerning its communications with the relevant PRC authorities. The Court was prepared to give the Company the benefit of the doubt in relation to those communications. The Court accepted that it was, in all the circumstances, appropriate for the Company to pursue the route of seeking approval without at that stage arriving at a conclusion on the *Bank Mellat* test.

21. While granting the extension of time, the Court:

(1) Held that "*the dissenters are not to be prejudiced by undue delay":* 2023 Judgment at [3].

(2) Expressed that its intention when making the Directions Order was that "*discovery would be got on with"*, and that this remained the case; the Court would actively case manage discovery in order to ensure a fair trial and "*would not simply let 'the can be kicked down the road"*": 2023 Judgment at [4].

(3) The Court extended the period for the Company to comply with its disclosure obligations to 24 February 2023. The Court made clear, in the 2023 Judgment at [14]-[16], that any further extension of time would require good reasons provided in advance and that non-compliance would be taken seriously:

> "*14. I want the parties to understand that the Court will not look favourably on any application for a further extension of time of any serious duration without good and well evidenced reasons provided to the Court in advance.*
> *15. It goes without saying, but I will reiterate for the parties' benefits in view of the arguments that have been made by the advocates for both parties, that the Company should expect any failure to comply with its obligations with regard to*

> *discovery without good reason to be appropriately dealt with in accordance with the Grand Court Rules, previous authority and if, and I trust this will not be necessary, but if necessary, by way of punitive orders.*
> *16. As to the reasons given by the Company for the extension application, this is not a case where the Company says it should not, as a result of laws in the PRC, be giving disclosure at all. There is no need to decide that matter unless and until that point arises and in the proper context and with all available evidence relating to the point if it arises."*

22. It is to be noted that the existing Directions Order has a Confidentiality Agreement (Appendix 2) to be entered into as regards to access to the Data Room and a redaction protocol (Appendix 5) to provide further safeguards in relation to the discovery provided.

Approval obtained

23. The application materials were submitted to the JAEC on 21 October 2022.[6] The application was referred from the JAEC to the PRC Supreme Court, and required the opinion of the Central Cyberspace Administration of China (the "CAC") before any decision could be issued.[7]

24. On 14 December 2022 an update letter from the Company's attorneys to the Court said:

> ...
>
> *"As mentioned in our previous update letter to the Grand Court on 23 November ..., upon receiving the Company's cross-border data transfer application ... on 21 October ..., the ... (JAEC) ... indicated that further consultation with other relevant government authorities for their opinions on the Company's MOJ Application is anticipated including likely consultation with the Supreme People's Court ... and the Office of the [Central CAC] ...*
> *"On or around 24 November 2022, Central CAC made a follow-up request to the Company via JAEC asking it to supplement its MOJ Application with further explanation on the data proposed to be transferred cross border including ... analyses of any personal information potentially contained therein. Upon receiving the request, the Company promptly instructed its PRC counsel to prepare the explanation materials accordingly.*

6 [redacted]
7 [redacted]

Subsequently ..., the PRC counsel of the Company, on behalf of the Company, submitted the supplemental explanatory statements as requested.

"We understand ... that Central CAC has recently indicated that they are content with the supplemental submissions and will continue to review the materials submitted by the Company."

25. On 4 January 2023. a further update letter from the Company's attorneys to the Court said:

"Following the Company's submission of supplemental explanatory statements on 1 December 2022, in response to the Central CAC's first follow-up request [of 24 November 2022] regarding the data proposed to be transferred cross border, on 29 December 2022, the Central CAC requested that further written explanations be provided to supplement the Company's submissions to date. Hence, on 29 December 2022, the Company, with the assistance of its PRC counsel, submitted a further written explanation as requested by the Central CAC."

....

26. On 17 January 2023, in a further update letter from the Company's attorneys to the Court:

"Today the Company enquired as to the progress of its application to the ... (JAEC) and was informed by the JAEC that it had received the opinion of the PRC Supreme Court, but that it would only issue an approval for the Company's application ... after receiving the opinion of the ... (CCAC). The JAEC also made clear that the Company was not to export data until it received the approval of the JAEC and that the transfer must be in accordance with the instructions set out in such approval."

1 February 2023

27. On 3 February 2023 the Company informed the Court and Dissenters that it had on 1 February 2023 received cross-border transfer approval for the vast majority of material submitted: around 45,199 of the 45,865 documents it had submitted to the JAEC and was continuing to await approval for the remaining documents.[8]

[8] *98.5% approved and only about 1.5% still waiting approval: the split between the 45,199 and the 666.*

Remaining and further documents and further interactions with the PRC authorities

28. 666 discoverable documents (the "Remaining Documents") were not uploaded, because disclosure of those documents had not been approved by the PRC authorities.

29. Since the end of March 2023, the JAEC has refused to accept any new applications for cross border transfer of data. The relevant authorities in the PRC are, according to the Company, discussing a new mechanism for the regulatory approval of data transfer.[9]

The JAEC refusal and warning

30. On 10 May 2023, the Company's attorneys wrote to the Dissenters and the Court stating that a PRC regulatory authority, the JAEC, had denied the application to disclose the Remaining Documents:

> "*on the grounds that the material is highly sensitive and lacks authorisations from the relevant personal information subjects and data subjects*" (the "JAEC Decision").

31. The Company's attorneys' letter of 10 May 2023 also says that on the same date a representative of JAEC:

> *"warned the Company and its PRC counsel by email… that the Company was to strictly comply with the Decision regarding the Remaining Documents, and that any cross-border transfer of these Remaining Documents would subject the Company to penalties under relevant laws including but not limited to Articles 48 and 52 of the Data Security Law of the PRC"* (the "JAEC Email").[10]

32. The Company has not disclosed its correspondence with the JAEC, asserting that the same prohibitive measures apply to these communications as to the underlying discovery documents.

33. On 7 June 2023, PRC counsel, Fangda, provided a written opinion to the Company. The summary of the advice, as explained in Lord 5 at [para 37] was that:

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[9] *See § 71 of the Fifth Affirmation of Victoria Ann Lord affirmed on 14 November 2023 ("Lord 5"), referencing letter of 25 April 2023*
[10] *See § 20 of Lord 5.*

(1) the Company would be in breach of Article 36 of the PRC Data Security Law ("DSL"), the JAEC Decision and Article 1 of the Guidelines for Application of Security Assessment on Cross-border Data Transfer (1st Edition) (the "Guidelines") if it agreed with the Dissenters' proposal for inspection of the Remaining Documents by a representative of the Dissenters within the PRC;

(2) the JAEC Decision made clear that the Company was prohibited from transferring the Remaining Documents cross-border otherwise it would be in breach of Article 36 of the DSL;

(3) the Dissenters could appoint their own PRC Counsel to inspect copies of: (1) the JAEC Decisions of 1 February 2023 and 4 May 2023; and (2) the JAEC email dated 17 January 2023, within the PRC, subject to the PRC Counsel and PRC local law firm entering into a confidentiality undertaking that: (i) they will not photograph, record, take notes of, videotape or use any means to, whatsoever, to record any part of the JAEC Decisions and JAEC Emails or bring any part of them out of the Company's premises in the PRC; and (ii) they will strictly comply with PRC law; and

(4) if the Company agreed to a representative of the Dissenters inspecting the Remaining Documents in the PRC, provided a table of information relating to the Remaining Documents, or provided the Dissenters with the JAEC Correspondence it would violate Article 36 of the DSL and the Decision and be at risk of administrative and/or criminal liabilities.

34. The Company has stated that the JAEC Decision is not appealable, which does not appear to be in dispute.

Further Documents

35. The Company has identified that it has an unspecified volume of further disclosable documents in its possession. These fall into two categories:

(1) Documents which had been withheld for legal advice privilege, which are now disclosable in light of the judgment of Kawaley J in 58.com (unrep., 22 March 2023) (the "Privileged Documents").

(2) Documents that have been identified as a result of an error in the Company's disclosure review process, and documents that the Company may be required to disclose in response to Expert Information Requests pursuant to paragraphs 21-25 of the Directions Order (the "Further Documents").

36. To the extent that such documents are held only within the PRC, the Company maintains that it requires regulatory approval from the PRC authorities before it can disclose them.

37. According to the Company there is currently no available procedure for such approval to be sought: the JAEC has since March 2023 refused to accept any new application for approval of cross-border data transfer and no alternative procedure has thus far been introduced.[11]

Proposals from the Company

38. The Company wrote two letters dated 6 and 14 September 2023 making certain proposals:

First, in the Company's letter dated 6 September 2023 it responded to the COD Summons. It proposed that a so-called "PRC Inspector" be appointed to inspect at the Beijing office of the Company the JAEC Decisions and the JAEC Emails, i.e. certain of the correspondence which had been issued from the JAEC. That PRC Inspector would have to have a set of characteristics and enter into a stringent confidentiality agreement. Attached to that letter were two documents, a memorandum dated 7 June 2023 from the Company's PRC lawyers, Fangda & Partners, and the proposed confidentiality agreement.

Secondly, in the Company's letter dated 14 September 2023, it responded in part to the CCMOD Summons. It suggested that the proposal made in the Dissenters' letter of 26 May 2023 that the Remaining Documents be inspected within the PRC by the agents of foreign organisations would itself be a "cross-border data transfer."

Instead, it proposed that there be appointed by the Company a so-called "China Independent Expert" to consider the Remaining Documents and provide an opinion on their

[11] *Liu 5 paragraphs 20-21 and Lord 5 paragraphs 70-71*

relevance to the value of the Dissenters' shares. A Ms Shirley Wang of Deloitte China was identified as being able to take on that role and put forward to the Dissenters.

39. These proposals were rejected by the Dissenters.

Post hearing proposal

40. More recently on 13 December 2023, following the hearing on 6-8 December 2023, the Company provided a draft order(which was to be subject to a confidentiality and non-disclosure agreement and certain redactions) with the condition that if eventually documents, subject to paragraphs 1 and 2 of the draft order, were brought into evidence, that any evidence which refers to or exhibits that evidence be sealed pending further order of the Court to avoid any access by third parties and that the Dissenters were to agree that the implied undertaking prohibiting collateral use is to be strictly enforced, absent the Company's explicit written consent.

41. The Company's 13 December 2023 draft order provided:

> 1. The Company shall within 14 days of the date of this Order, disclose to all dissenting shareholders copies of the following correspondence with the JAEC:
>
>> 1. Email dated 17 January 2023 ("January Email") from the JAEC informing the Company that it had accepted the Company's application but no government decision in response to the application had been made;
>> 2. The Decision dated 1 February 2023 ("February Decision") granting the Company permission for the cross-border transfer of 45,199 of its relevant documents in these proceedings upon the satisfaction of certain conditions as specified in the February Decision;
>> 3. The Decision dated 4 May 2023 prohibiting the Company from the cross-border transfer of 666 of its relevant documents (the "Remaining Documents" and the "Decision");
>> 4. Email dated 4 May 2023 from the JAEC by which the JAEC cautioned the Company against non- compliance with the Decision; and
>> 5. Copies of any application for approval for cross-border data transfer submitted to the JAEC by the Company redacted as necessary,

whether in accordance with the rules, regulations and laws of the People's Republic of China, or otherwise to protect the security of Sina's systems.

2. The Company shall, within 14 days of the date of this order, provide all dissenting shareholders and the Court with a list containing the following details about each of the Remaining Documents in respect of which the JAEC, by the Decision refused consent for the transfer cross-border for the purpose of these proceedings (the "List of Remaining Documents"):
    1. The type/format of the documents (i.e. word/pdf/excel etc);
    2. Date ranges for each category of document;
    3. A broad description of the document which does not reveal its contents i.e. contract, financial document etc;
    4. The category of documents in the directions order dated 18 May 2022 ("Directions Order") to which the Remaining Documents relate.
3. Disclosure shall be made in the PRC to the documents in paragraphs 1 and 2 above by way of inspection by a PRC lawyer to be appointed by the Dissenters, such access to be subject to the same confidentiality provisions as those provided for in Appendix 2 to the Directions Order.
4. Any evidence which exhibits or refers to any document disclosed pursuant to this Order that is later filed by any party together with the Order herein shall be sealed.
5. Costs in the cause.

42. The Dissenters rejected this proposal for broadly similar reasons on 22 December 2023. It is not necessary to recite them here. Suffice to say that they invite the Court to decide, as they put it, whether the existing order for discovery should be revoked or whether instead the Company should be ordered to comply with its discovery obligations without further delay.

43. Since, regrettably, the parties' have been unable to agree matters, the Court now decides the applications on the basis of the evidence filed and issues which were live as at the close of three days of oral argument on Friday, 8 December 2023.

44. The Court unhappily has to record that this is yet another s.238 hearing which has generated an unnecessarily large amount of evidence,[12] considerable procedural complexity, and lengthy submissions.

Current position

45. The current position is that all parties have access to the 45,199 PRC approved documents. That represents the vast majority of documents which the Company said needed approval from the PRC authorities. The total uploaded to the data room apparently comprises approximately 58,000 documents.

Remaining Documents

46. As to the Remaining Documents, the Company has not disclosed 666 documents which it accepts are material to the issues arising in this proceeding (and so fall within the ambit of paragraph 8 of the Directions Order). Only the Company and its PRC lawyers have reviewed these documents.

47. The probative value of these documents is unknown. The Company refers to a decision by the JAEC which states they cannot be transferred out of the PRC. That decision, the Company says, cannot be appealed. The Company understands that a new approach towards obtaining regulatory approval is under discussion by the Chinese authorities.

48. The Company says they can in principle be considered and reviewed within the PRC by an independent and suitably qualified expert (being a Chinese national), appointed by the Company.[13]

49. The Company has by its recent proposal of 13 December 2023, offered on certain conditions to provide some limited details about these documents in the meantime.

[12] See *the guidance contained in Xingxuan Technology Ltd (26 May 2023), per Doyle J at [21]*
[13] *see Harneys' letter dated 14 September 2023, paras 3-9 and proposal made on 13 December 2023*

Further Documents and Privileged Documents

50. No process to apply for approval is apparently available in relation to the Further Documents and Privileged Documents.[14]

51. The Further Documents are apparently 6,000 mistakenly omitted documents including those related to the Company's significant investment in TuSimple, an American trucking company, based in San Diego, California.[15]

52. The Company has taken steps to ascertain whether any of the requested documents can be located overseas to obviate the need to seek regulatory approval. In particular, the Company has asked TuSimple whether it will provide it with the necessary material located overseas on a voluntary basis.

53. As to circa 1,300 relevant, privileged documents identified in the PRC, there are apparently '31' disclosable documents which have not also been located outside the PRC and uploaded to the data room16. Apparently, these 31 documents will be "reviewed by Fangda, for self-assessment with a view to discovery as soon as regulatory approval is granted". No such mechanism exists at present.

54. A further category of documents has come to light as a result of certain Information Requests made by the valuation experts.17 The Dissenters' expert has made Information Requests in accordance with paragraph 21 of the Directions Order for answers to certain questions, which the Company has confirmed are contained within documents stored in the PRC.[18] It is the Company's position that it cannot provide such documents to the Dissenters (including any documents requested in subsequent information requests) without first obtaining approval from a competent authority in the PRC.[19] No authority is yet in a position to accept the application. This category of documents is unknown in volume but is the subject of Information Requests and so on the face of it, material to the valuation process.

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[14] *On 8 June 2023, the Company advised the Dissenters it had completed its review of the Privileged Documents and would submit them for approval as soon as a mechanism for doing so within the PRC became available.*
[15] *The current position as regards these documents is set out by Ms Lord in Lord 5, at paras 40-50; paras 73-75; and para 79, and in the Sixth Affirmation of Victoria Ann Lord dated 29 November 2023 ("Lord 6"), at para 9.*
[16] *Lord 6, para 33; these privileged documents are disclosable to the Dissenters following the Judgment of Kawaley J in 58.com (unrep., 22 March 2023).*
[17] *see Lord 5, para 81*
[18] *Lord 6, para 16*
[19] *Lord 6, para 17*

1782 disclosure

55. The discovery process in the US §1782 proceedings is underway. As explained further by Stuart 1 at paras 37 to 50, that includes documents held by Morgan Stanley, who were the Special Committee's independent financial advisor, advising it on valuation. Documents are also being sought from various third parties by the Dissenters.

56. As those paragraphs of Stuart 1 confirm, and as anticipated by the Directions Order, discovery in the current proceedings will not be concluded until the §1782 proceedings have concluded.

Submissions of the parties

57. Mr Jasbir Dhillon KC appeared for CCMOD. In summary he submitted:

> The Company has come nowhere close to discharging the burden of showing that it would be at a real, actual risk of prosecution if it were to give the discovery that has been ordered. Against that illusory risk must be weighed against the very substantial injustice that would result if the Company, a Caymanian party before its own Courts in proceedings it initiated, was permitted to withhold discovery of documents of central importance to the fair determination of the dispute.

58. The Court is also entitled to have regard to the wider consequences that would follow from the Company's approach. If the Company's argument is accepted in this case, where there is no evidence that anybody has ever been prosecuted for breach of the provisions relied on, then it is difficult to imagine a case in which that argument would not succeed. Caymanian parties with documents held in the PRC would be in a position routinely to delay and, ultimately, to withhold discovery. That cannot be right.

59. The Company has sought multiple extensions of time for its discovery, including extensions sought out of time, which led to a further hearing in January 2023. The Company has, finally, given discovery of some documents, but a substantial number of documents still have not been disclosed. In relation to some of these documents, the Company says that it has sought the approvals that it purportedly requires but that its request has been refused. The Company's position is that it should, therefore, simply be excused from its Court-ordered obligation to disclose those documents.

60. As to the other categories of undisclosed documents, the Company's position is even more remarkable: it says that under PRC law it requires approval to disclose these documents, but that there is currently no procedure in place at all by which such approval may be sought or obtained.

61. Given the time that has elapsed, and the position now adopted by the Company, the time has now come for the Court to deal definitively with this issue. The Company has come nowhere close to proving that it would be unlawful under PRC law for it to disclose these documents now, let alone that there would be a real risk of prosecution or serious sanction if it were to do so. The Court is therefore requested to decide that PRC law provides no excuse for the Company's continued non-compliance with its disclosure obligations, and to order the Company to comply without further delay.

62. Although not stated in terms, the Company's Amended Summons seeks, in substance, the revocation of the Directions Order for discovery. For the reasons set out below, the CCMOD Summons should be granted, and the Amended Extension Summons should be dismissed.

63. The letters rogatory summons is an unnecessary distraction and has been raised far too late. The Company should simply be ordered to disclose its own documents and should do so.

64. Mr Dhillon KC said that the Company's position is that:

(1) it has been refused permission to disclose the Remaining Documents, and it contends that that decision is not appealable; therefore, the Company seeks a variation of the Directions Order which would relieve it of its obligation to disclose the Remaining Documents; and

(2) it cannot disclose the Privileged Documents or Further Documents, or provide any documents from within the PRC in response to Expert Information Requests, unless and until it obtains approval from the PRC authorities to do so; but the Company maintains that there is currently no mechanism in place for it to seek (let alone obtain) such approval. The Company, therefore, seeks an open-ended extension until such time as it can obtain such approvals. There is no guarantee as to when this will happen or indeed that it will ever happen.

65. Based upon the applicable legal principles and the evidence, the Company is not entitled to either of these forms of indulgence. The Company should comply with the Directions Order without further delay.

No real risk of prosecution

66. In order to justify the revocation of the Directions Order for discovery in respect of the documents in issue, the Company would (at a minimum) have to establish that: (1) giving discovery would be a breach of Chinese law; and (2) doing so would put the Company at a real, actual risk of prosecution.

67. The Company's evidence is largely directed at the issue of breach of Chinese law. Professor Liu refers to Article 36 of the DSL and Article 284 (formerly 277) of the PRC Civil Code as well as provisions of the Cybersecurity Law ("CSL") and Personal Information Protection Law ("PIPL").

68. The argument made by the Company's expert Professor Liu, that disclosure of documents absent regulatory approval is a breach of PRC law is wrong: the correct analysis is that giving discovery does not give rise to a breach of PRC law as explained by Mr Tang, the Dissenters' expert, a practising PRC lawyer with over 25 years' experience.

69. But even if the Company was right on this first question, that would not be sufficient because it also needs to satisfy the Court on the second question as well. The Company's evidence comes nowhere close to demonstrating any, let alone any substantial, risk that it would be prosecuted if it were to comply with the Directions Order.

70. All of the same points apply to the Company's responses to Expert Information Requests; and for the same reasons, the Company should not be permitted to withhold written answers or other responsive documents by reference to the supposed risk of prosecution under PRC law.

71. The Company's account of the JAEC Decision and JAEC Email should not be given any, or any real, weight in the Court's determination of the Summonses:

a) Neither the JAEC Decision nor the JAEC Email, nor any of the surrounding correspondence between the Company and the JAEC, are before the Court.

b) The Dissenters have not been provided with the JAEC Decision and the JAEC Email and so have been deprived of the opportunity of challenging the Company's evidence as to what those documents say and mean. The JAEC Email would be a conventional statement only. It should not be regarded as a document evidencing a real risk of prosecution.

c) The Company's account of its undisclosed correspondence with the JAEC is at odds with the experience of Mr Tang, and his partner Mr Ma, who are each practising PRC lawyers of long standing who have considerable experience in dealing with cross-border data transfers out of the PRC.

72. Mr Dhillon KC argued that the Court will be well aware that it is not unknown for government agencies to misapply the law, or to stray beyond the proper scope of their jurisdiction. The likelihood of this can only be exacerbated in a case like the present, where the Company appears to have invited the JAEC to review its proposed discovery.

Breach

73. The Company's primary argument is that giving discovery in these proceedings without regulatory approval would be a breach of Article 36 of the DSL of the PRC, which was formally adopted on 10 June 2021, and came into effect on 1 September 2021.

74. The correct analysis of this provision is given by Mr Tang in Tang 1 paragraphs 33 to 40:

a) Article 36 only applies to a request to the competent authority of the PRC for the taking of evidence abroad by a foreign judicial or law enforcement authority, such as a request made for judicial assistance in civil or commercial matters;

b) In addition, Article 36 DSL applies, on its face, only to an *"organization or individual within the territory of the People's Republic of China"*. The Company in these proceedings is not an organisation or individual within the territory of the PRC. It is a company incorporated in the Cayman Islands and existing under Cayman Islands law; and

c) Mr Tang notes that *inter partes* disclosure by the Company would not involve any transfer of data to any *"foreign judicial body"* or *"law enforcement body"*. The

Company's disclosure is to be given to the Dissenters and to the parties' independent valuation experts, who do not conceivably fit that description and, moreover, the disclosure is to be given subject to the usual undertaking against collateral use.

Risk of prosecution

75. Even if the Company can demonstrate that compliance with the Directions Order in respect of the relevant documents is likely to amount to a breach of PRC law, the Company's case for revoking the Discovery Order fails *in limine* because it has failed to establish any real risk of prosecution for any such breaches. That is because there is no evidence that anybody has ever been prosecuted for a breach of Article 36 of the DSL, let alone subjected to any serious sanction. Nor is there any evidence that any party to foreign litigation has ever been prosecuted in the PRC, under any provision of law, as a result of disclosing documents or information in a foreign proceeding.

76. Mr Dhillon KC submitted that there is no real risk that the Company will be prosecuted at all, and so the issue of what sanction it might be subjected to if prosecuted should not arise. However, to the extent relevant, the evidence indicates that any sanction imposed for a breach of Article 36 of the DSL would, in all likelihood, be modest.

77. The Company has not discharged the burden of demonstrating that sanctions such as revocation of its business licence would even theoretically be applicable as a result of it performing its discovery obligations. As a result, the Court should proceed on the basis that, even if this were to be regarded as a breach of Article 36 of the DSL (which is extremely unlikely for the reasons given above), and even if (contrary to the foregoing submissions) there was a real risk of prosecution, the only sanction that would be available in this case would be the imposition on the Company of a modest fine.

Balancing exercise

78. If the Court accepts that the Company has not met the threshold requirement of establishing a real, actual risk of prosecution, then no balancing exercise need be conducted. To the extent that such an exercise is required, there are numerous considerations strongly militating in favour of ordering the Company to comply with its discovery obligations under the Directions Order and rejecting the Company's application to revoke the Directions Order.

79. The Court should make the following further directions, also sought in the CCMOD' Summons:

(1) That the Company should, within 30 days, give discovery of the Remaining Documents, the Privileged Documents and the Further Documents, together with any other documents that the Company has withheld, by uploading them to the Data Room in accordance with the Directions Order (CCMOD Summons at [2] and[3]). If the Company is not entitled to withhold these documents then it logically follows that it must disclose them. The Company has not suggested in its evidence that it would be unable to do this within 30 days if so ordered.

(2) That the Company should not be permitted to withhold written answers and/or any other responsive documents to experts' information requests on the grounds of any purported or actual obligations under the laws of the PRC, and should respond to such requests in accordance with the Directions Order (CCMOD Summons at [4] and [5]). Again. this relief follows logically from the primary determination that the Court should make, that the Company is not entitled to withhold documents on these grounds.

(3) Paragraph 6 of the CCMOD Summons seeks an "unless order" that will debar the Company from adducing valuation evidence or calling an expert valuer, unless it complies with paragraph 2. If the Court makes the orders at paragraphs 1 to 5 of the Summons, then this is a further order that the Court could appropriately make in the circumstances. The Company has the documents in question and has not suggested that it would be unable to disclose them within 30 days. If it does not do so, that will be a wilful breach of the Court's order.

80. However, if the Court prefers to leave over the question of debarring, Mr Dhillon KC suggested that it could make the orders at paragraphs 1 to 5 whilst adjourning the issue as to whether the relief sought in paragraph 6 should be granted until after the main issue of principle, namely paragraph 2, has been determined. In any event, the Dissenters reserve their right to seek an immediate debarring order in the event of breach of this Court's revised Directions Order in respect of discovery by the Company.

81. Mr Thomas Grant KC appeared for COD. In summary his clients supported the submissions made by Mr Dhillon KC.

82. In particular, the COD adopt the CCMOD submissions that Art 36 has no application to *inter partes* discovery and there is no PRC law inhibition on the Company fulfilling its discovery obligations pursuant to the Directions Order.

83. Even if there is such an inhibition, that should not prevent the Cayman Court insisting that a litigant who chooses to incorporate itself in this jurisdiction and freely chooses to litigate in the Cayman Islands should abide by its discovery regime.

84. Mr Grant KC submitted that some of the authorities refer to the degree of relevance of the documents sought to be withheld from production to the issue in the underlying proceedings as having a potential bearing on the Court's discretion. In this case the Company has said nothing at all about the probative value of the Remaining Documents. In those circumstances the Court is bound to proceed on the basis that they are directly material and important to the Court's adjudicative task under section 238 of the Act.

85. The first part of Mr Grant KC's clients' application related to correspondence between the Company and the CAC and subsequently the JAEC. The second part is as to details of the Remaining Documents. The overriding principle was that the Company should be transparent with the Dissenters and with the Court.

86. Mr Grant KC referred the Court to the following additional points: as was submitted by the Dissenters to the Court for the January 2023 hearing, the CAC having apparently declined to review the 1 September 2022 application rendered a number of aspects of the Company's case problematic:

(1) First, the Company had consistently informed the Dissenters and the Court that the body with jurisdiction over the regulatory approvals process was the CAC. That was proven to be incorrect;

(2) Second, since April 2022, the Company had placed particular reliance on the applicability of the (then) Draft Measures on Security Assessment for Cross Border Data Transfer ("Measures"), which were promulgated by the CAC, and identified the CAC as the body to which security assessment should be made: see Arts. 4 and 5 of the Measures. Given the scarcity of the Company's account, it is difficult to know precisely why the CAC found that the application was not in its jurisdiction, but it must at least be a possibility that the CAC considered the basic requirements of the Measures not to be engaged in this case: see the Affirmation of Zhihua Tang affirmed on 21 November 2022 ("Tang 3"), at para [17.3];

(3) Third, the Company's wholesale reliance on CERT's recommendations[20] appears to have been misconceived insofar as: (a) CERT advised the Company that it needed to provide the Requested Information[21] in order to be able to submit a security assessment application (it did not); (b) all Responsive Documents needed to be disclosed to the relevant PRC entity (they apparently were not); and (c) the application needed to be submitted to the CAC (which was incorrect).

87. A few days later, on 21 October 2022, and without consultation with the Dissenters, a fresh submission for cross border data transfer approval was made by the Company to the JAEC, an affiliated unit of the MOJ: see the First Affirmation of Rui Xu affirmed on 19 October 2022 ("Rui Xu 1").

88. Mr Grant KC reminded the Court that the Company's evidence served in October 2022, in support of its amended First Extension Summons was as follows:

(1) Ms Xu apparently first identified the JAEC as the relevant body within the Ministry of Justice, and tried to contact the phone numbers on the JAEC website. In conversations with an unnamed individual in the JAEC, she was informed that: "*the approval process is still at a pilot stage in view of how recent legislative developments have been and the MOJ is considering releasing its official guidelines in the near future*": Xu 1, [8].

(2) The Company's evidence as to its interactions with the JAEC is cryptic: "*The JAEC indicated that it may accept and consider the MOJ Application, conduct the relevant examination and, as appropriate grant approval for the PRC Disclosure Data to be transferred cross-border for the use in foreign litigation*": the First Affirmation of Haiyan Gu ("Gu 1") at, [19].

89. In the Company's calls with the JAEC, no reference was made to: (a) needing to submit all the proposed documents to it; or (b) submitting the Requested Information sought from the Dissenters. Indeed, as to the latter, Ms Xu's evidence expressly accepts that the Requested Information "*was not specifically requested by the JAEC during the call*": Xu 1 at [10]. Tellingly, said Mr Grant KC, there is no indication that the JAEC ever subsequently sought the Requested Information.

[20] *CERT, a quasi-governmental organisation which had advised the Company.*
[21] *As defined in para 10 of Xu 1.*

90. It was only from 30 September 2022 that the Company instructed Fangda Partners to prepare a further security assessment application to the JAEC: Xu 1, at [11]. It then took until 21 October 2022 for the Company to submit its second application to the JAEC: see Harneys' letter dated 23 November 2022. This application apparently related to some 45,865 documents.

91. Apparently, by an email dated 17 January 2023 the JAEC informed the Company that it had accepted the Company's application. The Company declines to disclose that email.

92. Mr David Chivers KC appeared for the Company. In summary he submitted:

93. That the Court should resolve the differences between the parties so that the proceedings can continue in a fair and transparent way, without exposing the Company and its officers to the obvious risk of prosecution. The proposals advanced by the Company are the best way to achieve that.

94. The basis for the Dissenters' scepticism is not understood, particularly considering the time and money already expended by the Company in seeking to comply with the Directions Order.

95. Indeed, the Company's proposal for the PRC Inspector is evidence of the Company's attempt to provide the JAEC correspondence without breaching PRC laws. The proposal enables the JAEC Decision and relevant JAEC correspondence to be inspected on behalf of the Dissenters.

96. The DSL has caused substantial difficulties for litigants in this jurisdiction and in the US. The position in these proceedings is particularly stark because the Chinese authorities have prohibited the transfer of one tranche of the Company's documents and have since refused to accept any further requests for review.

97. The impact of the DSL has led to an inevitable delay and uncertainty in the Company's ability to produce documents collected in the PRC. Moreover, acting on the advice of PRC Counsel, even the Company's legal team (with the exception of its lawyers of PRC nationality, working in China) has not been permitted to review the Remaining Documents and communications with the PRC regulatory authorities under the laws of the PRC.

98. The PRC authorities have reviewed and approved the cross-border release of some 45,199 documents (some 98.5% of the total submitted to those authorities).

99. The debate over the Remaining Documents relates to a small minority of the total, and their probative weight is unknown. Despite the raft of evidence before the Court, none comes from the Dissenters' trial expert. Whether, and if so, to what extent the experts are hindered in the production of their reports also remains unknown.

100. The Dissenters for tactical purposes seek to throw the Company on the horns of a dilemma whereby it (and its officers) must either risk sanctions, including criminal sanctions in China, or forfeit its right to a fair trial in these proceedings.

101. The Company has taken and continues to take every reasonable step to comply with its disclosure obligations in these proceedings while avoiding the risk of serious adverse consequences in China.

102. With regard to categories of Further and Privileged Documents which require the approval of the PRC regulatory authorities, the Court could take a further "wait and see" approach in relation to the mechanism for approval under Article 36 of the DSL, await the outcome of the self-assessment submission to the CAC which is currently being prepared by the Company, and/or sanction the approach of using letters rogatory.[22]

103. There is no prejudice to the Dissenters in the Court adopting such an approach particularly in circumstances when discovery is far from closed, both in these proceedings and in the §1782 proceedings.

104. The Court does not have material before it to suggest that the considerable disclosure already given, together with the likely disclosure from the §1782 proceedings will be insufficient for the purposes of the experts or the Court in determining fair value.

105. The order sought under the Debarring Summons is on any view, disproportionate. It does not provide a constructive and balanced way forward for the resolution of the issues.

106. The Court has sufficient evidence before it to conclude that the Company has in good faith complied with the Directions Order and its disclosure obligations.

[22] See *§ 92 of Lord 5, §§, §§ 76-79 of Stuart 1 Lord 6, § 73*

107. As to the first stage of the *Bank Mellat* test, it is clear there is a substantial risk of prosecution. Permission for disclosure of the Remaining Documents has been positively refused by the Chinese government. There can be little doubt that their disclosure now would trigger criminal sanctions.

108. As to the second stage of the *Bank Mellat* test, it is unclear to what extent the Remaining Documents might go to the fair disposal of the trial. The Company has proposed a solution to determine that issue, which has been rejected by the Dissenters without adequate explanation.

109. The proportionate options available to the Court therefore include (i) simply proceeding on the basis of the Approved Documents; or (ii) crafting an order in the terms of the draft, whereby the PRC Inspector and China Independent Expert will be appointed.

110. Mr Chivers KC submitted that this is admittedly an imperfect solution to an unsatisfactory state of affairs; it is however the 'least worst' option.

111. Article 36 of the DSL envisages a request being made to a PRC authority and the authority that previously used to receive such requests is no longer doing so. If it is accepted that the first limb of Article 36 of the DSL applies (i.e., that there is a general prohibition on cross-border data transfer), then the question turns into how to engage the second limb of Article 36 of the DSL (i.e., the exceptional granting of permission). In the circumstances, the Company considers the Letters Rogatory route is at least worth trying.

The law

112. There is no dispute that disclosure by the Company is essential for a fair trial of this case and central to the analysis of the experts.[23] To arrive at a just resolution of the one issue, fair value, the enquiry *"requires access to all relevant information"*.

113. The Court said at [74] of the 2022 Judgment:

> "*Indeed, the importance of the Company's discovery in section 238 cases is beyond argument. The Court is heavily reliant on the evidence from the parties' valuation experts, and the experts in turn derive their opinions from documents and information in a*

[23] § 73 of the 2022 Judgment

company's possession in order to assist the Court to make a determination of the fair value of the dissenting shareholders' shares. Without the relevant company data, it is difficult to see how the Court could ensure a fair and proper trial in order to reach the fair value determination."[24]

114. Questions of disclosure and inspection are part of the law of procedure and are, therefore, matters of Cayman Islands law as the *lex fori.*[25] Part of the rationale for why English courts have often made orders for disclosure or inspection even where that would be contrary to foreign law is that to do otherwise would be to accord primacy to the foreign law, rather than the domestic legislation. The Court '*should normally lean in favour (probably heavily in favour) of ordering inspection, especially where a substantial number of important documents are involved'*.[26]

115. However, to always accord primacy to the domestic law without reference to the consequences under the foreign law has been described as a "*harsh attitude"* and "*a reproach"* to any legal system.[27] It is essentially a matter of discretion for the Court in light of all the circumstances. The Court has jurisdiction to order that documents be disclosed, even if giving such disclosure would put the disclosing party in breach of foreign criminal law, but whether or not to make such order is always a matter for the discretion of the Court.

116. The Court accepts that the relevant principles to be applied under Cayman Islands law were set out in *Bank Mellat* and the authorities set out below.

Bank Mellat

117. In refusing the plaintiff's application to withhold documents from discovery due to the risk of prosecution by the Iranian authorities for breach of Iranian law, Gross LJ in *Bank Mellat,* at [63] summarised the applicable principles as follows:

"63. Pulling the threads together for present purposes:

vi) *In respect of litigation in this jurisdiction, this Court (i.e., the English Court) has*

[24] See also § 1 January 2023 Judgment
[25] *Bank Mellat, at [2]-[3], [56], [63(ii)]*
[26] *Morris v Banque Arab et Internationale d'Investissement SA [2001] ILPr 37 at § 73*
[27] Per *Lord Nicholls*: Brannigan *v Davison AC [1997] § 251c*

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.

ii) Orders for production and inspection are matters of procedural law, governed by the lex fori, here English law. Local rules apply; foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with English procedures and law.

iii) Whether or not to make such an order is a matter for the discretion of this Court. An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e., foreign) criminal law, not least with considerations of comity in mind (discussed in Dicey, Morris and Collins, op cit, at paras. 1-008 and following). This Court is not, however, in any sense precluded from doing so.

iv) When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful.

v) Should inspection be ordered, this Court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.

vi) Where an order for inspection is made by this Court in such circumstances, 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 of this Court. Comity cuts both ways." (emphasis added).

118. The burden lies on the disclosing party to demonstrate a real and actual risk of prosecution[28]. That includes a burden to demonstrate that the disclosure of the relevant documents gives rise to a breach of foreign law. It was common ground in *Bank Mellat* that production of the Iranian documents would constitute a breach so there was no issue on that point.

119. The burden on the disclosing party to demonstrate both these matters is described in *Matthews and Malek, Disclosure* (5th ed.), §8.26 (approved in *Bank Mellat* at [62]) in the following terms:

[28] *See § 70 (ii)*

> *"It will… need to be shown that the foreign law contains no exception for legal proceedings, and that it is not just a text, or an empty vessel, but is regularly enforced, so that the threat to the party is real. Even so, the court has a discretion and, on the basis that English litigation is to be played according to English and not foreign rules, it will rarely be persuaded not to make a disclosure order on this ground. More often than not where foreign law is raised as an objection, any threat of a sanction abroad against the disclosing party is found to be more illusory than real".*

120. The authors clearly consider that in most cases courts will be more likely to order disclosure than not and that foreign law objections and threats of sanction are more often than not illusory.

121. At first instance in *Bank Mellat*, Cockerill J held that the bank had not discharged the burden of showing that it faced an actual risk of prosecution in Iran, even though there was no expert evidence of Iranian law besides that adduced by the bank. The English Court of Appeal upheld that approach, recognising that Cockerill J *"was entitled to subject [the bank's expert's] assessment of the actual risk of prosecution to critical scrutiny and to differ from it".*[29]

122. *Secretary of State for Health v Servier Laboratories Ltd* [2014] 1 WLR 4383 was an earlier judgment of the English Court of Appeal which was cited in *Bank Mellat*. In that case, the disclosing party sought to rely on a French blocking statute to resist disclosure. The Court found that there had been one previous prosecution under the French blocking statute, on exceptional facts, from which it could be inferred that the risk of prosecution in the unexceptional case before the court was not substantial.[30]

123. In *Byers v SAMBA Financial Group [2020] EWHC 853 (Ch*) a Saudi Arabian bank sought to resist disclosure on the basis that, it asserted, it required the approval of a regulator (the Saudi Arabian Monetary Authority) before disclosing certain documents.

124. Refusing the bank's applications, Fancourt J decided: (i) not to grant the bank a further disclosure extension by reference to developments in Saudi Arabia; (ii) that the order for standard disclosure should not be varied; and (iii) that as a result of its default, the bank should face serious sanctions in the English litigation, debarring it from defending a number of issues.

[29] *See § 70 (iv)*
[30] *See § [117] per Beatson LJ, approving the Judge's exercise of discretion at first instance.*

125. Fancourt J applied *Bank Mellat* and refused to vary the disclosure order. The Judge found that there was a *"residual, real risk"* of prosecution but not a *"strong likelihood"*, and that the bank's witnesses had substantially overstated the severity of any sanction: a financial penalty was a *"real possibility"* but further punishment was *"unlikely"*.[31]

126. At [107] the Judge set out the reasons why he refused to vary the disclosure order, which included the following factors:

(a) The likelihood that the bank's documents would be of the highest importance for a fair trial of the claim and other factual issues; [107(i)];
(b) The bank's application was made very late, i.e., it applied to revoke the discovery order on the day that a previously extended deadline had expired: [107(ii)];
(c) The other party would be seriously disadvantaged in their conduct of a fair trial by not seeing the bank's documents: [107(iii)];
(d) A trial of the case without the bank's disclosure would be contrary to the overriding objective and would not be fair: [107(iv)];
(e) There was a real risk of prosecution in Saudi Arabia if the bank complied with the disclosure order, and the extent of the risk was difficult to assess, but that risk had been overstated by the bank's witnesses; and that risk arose in part from the bank's failure to engage appropriately with its regulator and failure to take steps to explain to the regulator why disclosure was obligatory: [107(v)-(vi)]; and
(f) The lack of severity of any likely sanction: [107(viii)].

127. In *Tugushev v Orlov* [2021] EWHC 1514 (Comm) at [32] Butcher J emphasised that the relevant question is as to the risk of prosecution *"and not merely the question of whether the conduct which is relevant discloses a breach of foreign criminal law"*. At [36] the Judge observed that as a matter of comity, English courts can expect foreign states to take into account the fact that if disclosure is given in contravention of their domestic law it was in compliance with an English court order. This was a factor which Fancourt J considered supported his conclusion that the disclosure order should not be revoked in *Byers* [2020] EWHC 853 (Ch) at [107(xi)]

128. In *Tugushev,* at [39] the Judge noted that, while it could not be said that there was no risk of prosecution, that risk had *"not been shown to be significant or substantial"*. Butcher J went on to order that disclosure should be given for that reason and others, including that:

[31] *See §§ 105-106 of Byers [2020] EWHC 853 (Ch)*

(1) The material in question was necessary for the fair trial of the proceedings given that a party was entitled to see its opponent's documents: *Tugushev,* at [37]-[55];
(2) The disclosing party bore the burden of showing the reality of the risk of prosecution and the absence of evidence of any prosecution counts against the disclosing party and reveals there is no real threat of prosecution: *Tugushev*, at [49], [54];
(3) The disclosing party sought to withhold documents entirely rather than redacting them, which required a stronger justification (at [58]); and
(4) That in order to progress the litigation to trial it was necessary that disclosure take place now, rather than being deferred to allow further attempts to obtain the agreement of Russian prosecuting authorities to the disclosure in question (see [61]-[62].

129. In *Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 (Comm) Henshaw J applied *Bank Mellat* principles to refuse an application by a plaintiff resisting an order for disclosure on the grounds that it would expose them to the real risk of prosecution and sanction under Swiss law.

130. In *Re Xiaodu Life Technology Ltd* (FSD 227 of 2017) (unreported, 14 March 2023) in a section238 appraisal case and in the face of apparently deliberate non-compliance, Kawaley J was persuaded not to take a binary approach and held at [50] that it was not appropriate to make the *"full-blown"* forensic audit that the Dissenters had sought, but instead fashioned an order whereby the parties would jointly instruct a PRC lawyer to provide an opinion:

> "*it seems to me to be clear that the best way to create the greatest likelihood of getting a sensible outcome, which both sides will be bound to accept on this issue, is to have an independent forensic expert do what ordinarily one would expect the Company to do, which is to report to the court on the technical and financial implications of either uploading this raw data to the data room, as would be done with other documents, electronic documents, or alternatively examining them in situ. It is equally clear that the legal terrain in the PRC is sufficiently sensitive to make it prudent to also, at this stage, order that the Company and the Dissenter shall jointly appoint a reputable PRC [lawyer] to provide an opinion setting out a procedure for achieving, as proposed in paragraph 2 of the draft order handed up this morning, achieving the lawful review and disclosure."*

US law

131. The Company and the Dissenters provided an analysis of analogous US cases. The Court sets it out below for completeness but does not find it of great assistance because the facts and circumstances of each of the cases and the approach of US courts to the determination of the expert evidence is different. It is also clear that this is a developing area of jurisprudence in the US and the way in which the Chinese authorities approach the data security laws and enforce them is also recognised by them to be developing.

132. In *Ji v. Jling Inc*., (15-CV-4194 (SIL) (E.D.N.Y. Mar. 31, 2019)), video-link trial testimony was struck out when it was revealed on cross-examination that the witness was physically located in China because the proceeding exposed the defendant to legal sanctions.

133. That case was cited in *Wang v Hull (NO. C18-1220RSL (W.D. Wash. Jun. 22, 2020))* where, the parties agreed that the defendant's counsel was to take a video deposition of the plaintiff at the plaintiff's home in Beijing. However, the defendant's counsel later realised that PRC law forbade foreign counsel from obtaining evidence in China for use in foreign courts without permission from the relevant PRC authority. The parties failed to agree on new arrangements for the deposition. The defendant's counsel subsequently submitted a motion to the US Court seeking *inter alia* a stay of the proceedings until the deposition could be taken without fear of repercussions in the PRC. The Court in *Wang* also considered that the defendant should not bear the risk of non-compliance with the then Article 277 of the PRC Civil Procedure Law (now Article 284):

> *"[w]hile there is certainly a possibility that the Chinese authorities would construe the law narrowly so that it does not apply to foreign individuals who do not set foot within the borders of the [PRC] and who have the cooperation of the Chinese citizen being deposed, the Court will not require defendant to bet on that outcome"*

134. *In Juul Labs, Inc., v Chou (C.D. Cal. 2022),*[32] the Court denied the plaintiffs' request for a forensic examination of various electronic devices which were physically located in China. The DSL was considered by the Court "*in the round"* as part of the Court's approach to proportionality of disclosure: the DSL was *"not dispositive",* but *"along with the other factors cited by Defendants"* demonstrated *"the burden of the proposed discovery"*. The interpretation of the DSL was asserted by the Defendants and was not ultimately decided by the US Court.

[32] *a decision referred to in Liu 5*

135. The Court in *Philips Med. Sys. (Cleveland), Inc. v. Buan, No. 19 CV 2648, 2022 WL 602485, at 6 (N.D. Ill. Mar. 1, 2022)* determined the issue the other way, mainly on the basis of the Guarding State Secrets Law the PIPL and also the DSL. The argument in relation to the DSL was introduced (impermissibly) at the reconsideration stage. Motions for reconsideration to correct manifest errors of law or fact or are brought in order to present newly discovered evidence. Magistrate Judge Young B. Kim concluded that on the facts of that case the defendants did not discharge the burden of providing the Court with *"information of sufficient particularity and specificity to allow the Court to determine whether the discovery sought is indeed prohibited by foreign law".*

136. The Dissenters say that this decision unlike *Juul* included a determination as to the scope of Article 36 of the DSL based on argument and analysis and distinguished between requests made by a court versus *inter partes* disclosure.[33] The court said that even if the defendants had raised their DSL objection in a timely fashion, they had nevertheless failed to demonstrate that the law applied. The DSL's review and approval requirements did not appear to apply to the American Civil discovery process.

137. In relation to *Philips:* It was identified in *Concepts Nrec, LLC v. Xuwen Qiu (D. Vt. Jan. 18, 2023),* that the decision did not directly examine the issue of whether Article 36 of the DSL applies when a litigant calls upon a court to compel a foreign litigant's compliance with a subpoena. The court decided that although there were sound reasons to conclude that the DSL was not an impediment to the production of the information requested in the subpoenas, it had to acknowledge that the DSL is ambiguous in certain critical respects, including that it was unclear whether information produced in response to a U.S. court order constituted data provided to a foreign judicial authority.

138. *Motorola Sols., Inc. v. Hytera Commc'ns Corp. (N.D.Ill. 2023)* shows that *Philips* has been subsumed into the body of US authority on the applicable test (effectively the American analogue of *Bank Mellat),* and that *Philips* does not provide a readymade answer as to how the balance should be struck when American and Chinese legislation come into contact.

139. In *Case No.: 1:20-cv-03375 (ILND) lnventus Power, In., and ICC Electronics (Dongguan) Ltd., v Shenzhen Ace Battery Co., Ltd.,* the parties were ordered by the District Court to appoint a neutral forensic examiner and conduct forensic inspections of Ace's computers and file systems at Ace's site in Shenzhen PRC. The order was made notwithstanding Ace's objections. Ace contacted the

[33] *See Tang 4 § 12*

Ministry of Justice to seek clarification to ensure that it would not be in violation of any laws or regulations in the PRC and a letter sent directly from the PRC Ministry of Justice to the US Department of Justice. The letter stated that the only legal channel to take evidence in China from US is through a request submitted to the Ministry of Justice pursuant to The Hague Evidence Convention and that no foreign agency or individual may without the permission of the Chinese competent authority investigate and take evidence within the territory of China.

140. The transmission of data triggered a formal investigation by the PRC authorities, which included the CEO of Ace being interrogated for over three hours.[34]

141. The Letter of Warning, which followed investigation from a number of Chinese government agencies, demanded that Ace (i) immediately terminate any unauthorised transmission of data stored within the PRC to foreign judicial or law enforcement agencies; (ii) submit all data requested by foreign judicial or law enforcement agencies to competent authorities for security review before its transmission; and (iii) provide a written detailed account of transmitted data to the foreign judicial or law enforcement agencies without approval. The Letter of Warning set out the penalties for noncompliance, which the Company says are consistent with the penalties described by Professor Liu in his evidence.[35]

142. The Dissenters say that *Shenzhen Ace* sheds no light on whether there is a risk of prosecution because the facts of this case are different. First the case did not concern *inter partes* discovery but was concerned with international judicial assistance. Second the Letter of Warning is dated 18 May 2022, which is before the JAEC recognised that it lacked authority to approve transfers under Article 36 of the DSL and even if it represented its position in May 2022, it does not represent its position since March 2023. Third, the case was settled without any evidence being taken by the forensic examiner and so the occasion for any possible prosecution and sanction did not arise.

[34] *See § 12 of the Affirmation of He Cheng affirmed on 3 November 2023 ("Cheng 1")*
[35] See *Cheng 1 who acted for Schenzen Ace 1 §§ 8-9,12-14*

Determination

The PRC law issue

143. An inordinate amount of expert evidence[36] has been submitted on the question of PRC data security laws. The Court has carefully reviewed this evidence in order to determine whether or not there is a breach of the relevant PRC law and a real risk of prosecution.

144. There is a stark division of opinion concerning the meaning and reach of Article 36 of the DSL between Professor Liu, the expert relied upon by the Company, and Mr Tang, the expert relied upon by the Dissenters; and further, even if Article 36 of the DSL is applicable, the risk of any prosecution for breach of it.

145. The Court has already had cause to read earlier affirmations by both experts and to hear lengthy submissions on the question, both at the hearings in December 2021 and in January 2023.

146. Both experts have impressive CVs. They are qualified to express opinions on the subject matter. They both confirm in their evidence that their attention has been drawn to the duties of expert witnesses under the Grand Court Rules and the general requirements in the FSD guide and they confirm that they understand and comply with their overriding duty to the Court. The Court has not had the benefit of having heard or seen either expert being cross examined and, notwithstanding the submissions of Counsel, does not take the view that either expert lacks objectivity and impartiality or is in any other way attempting to give false or misleading evidence.

147. Professor Liu is primarily an academic and Mr Tang is in practice, albeit not litigation practice. Professor Liu takes a more cautious approach to the applicability and enforcement of the relevant provisions of PRC law than Mr Tang.

148. On issues of foreign law, the following propositions are well-established and emerge from the judgment of Scott LJ, in *A/S Tallina Laevauhisus v Estonian State S.S. Line* (1947) 80 Ll. L. Rep. 99, at pp. 107-108, together with *Dicey, Morris and Collins On The Conflict of Laws* (16th ed.), at 3-002 to 3-015:

[36] *Professor Liu: First Affirmation affirmed on 9 November 2021; Second Affirmation affirmed on 6 December 2021; Third Affirmation affirmed on 18 October 2022; Fourth Affirmation affirmed on 23 December 2022; Fifth Affirmation affirmed on 7 November 2023 and Sixth Affirmation affirmed on 29 November 2023.*

"(i) In English private international law, foreign law is a question of fact, to be proved by a duly qualified expert in the law of that foreign country. The function of such an expert extends to both the interpretation and application of the foreign law.
(ii) The burden of proof rests on the party seeking to establish the proposition of foreign law in question.
(iii) Although the English Court will scrutinise the evidence adduced, it will not undertake its own researches into questions of foreign law, any more than it will into other questions of evidence.
(iv) When scrutinising evidence of foreign law, as on any other question of evidence, the Court is not inhibited from using its own intelligence and common sense.
(v) Where expert evidence on foreign law is uncontradicted, the Court "should be reluctant" to reject it and is not entitled to do so on the basis of its own research; however, as explained in Dicey, Morris and Collins (at para. 3-015):
"….while the court will normally accept such evidence it will not do so if it is 'obviously false', 'obscure', 'extravagant', lacking in obvious 'objectivity and impartiality' or 'patently absurd' or if 'he never applied his mind to the real point of law' or if 'the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning'… Or, in other words, 'using its own intelligence as on any other question of evidence'*…. "(emphasis added)*

The Court applies these propositions to the expert evidence of foreign law in this case.

Breach of PRC law, prosecution and sanction

149. Article 36 of the DSL which was promulgated on 10 June 2021 and effective from 1 September 2021, provides (in English translation) as follows:

"The competent authority of the People's Republic of China shall process a request for data from a foreign judicial or law enforcement authority in accordance with relevant laws and international treaties and agreements entered into or acceded to by the People's Republic of China, or under the principle of equality and reciprocity. Without the approval of the competent authority of the People's Republic of China, a domestic organization or

individual[37] *shall not provide data stored in the territory of the People's Republic of China to any foreign judicial or law enforcement authority."*

150. There is (see second sentence) a mechanism by which approval can be sought for the cross-border transfer of data from within the PRC to a foreign judicial or law enforcement authority. That mechanism has not been available since March 2023.

151. In summary, Professor Liu's views are that:

(1) the Company and its subsidiaries are within the jurisdiction of the DSL, having operations in the PRC, and must comply with the DSL's provisions. To that end, the Company and its subsidiaries must obtain approval from PRC authorities before the Company can transfer data collected in the PRC out of the jurisdiction.

(2) Article 36 of the DSL is applicable to *inter partes* disclosure in litigation as long as there is a data transfer cross-border out of the PRC. Article 36 of the DSL also stipulates that a domestic organisation or individual must not provide data stored in the territory of the PRC to any foreign judicial or law enforcement authority without prior approval of the competent authority of the PRC.

(3) The *"domestic organisation or individual"* referred to in Article 36 of the DSL should be interpreted consistently with the regulatory objectives of the DSL, and accordingly includes organisations and individuals who have operations, conduct data processing activities and store data in (mainland) China. This includes the Company and its subsidiaries: see paragraphs 8 to 17 of Liu 2.

(4) The Company is especially likely to be targeted, because of its relative size, importance, and the nature of its business (Weibo Corporation, a subsidiary, is a major social media platform).[38]

(5) The fact that no prosecution has yet been publicised is neither here nor there, because prosecutions are not routinely publicised in the PRC, and the law has only been introduced relatively recently. It is clear that the Chinese authorities have intervened a

[37] *Professor Liu at Liu 2 § 11 gives a different translation: "organisation or individual within the territory of China"*
[38] *Liu 2, paras 20, 27; Gu 1, paras 23-25 and November 2023 § 5,9 and 10,14-16*

number of times in the past under similar laws,[39] and the Company has itself been fined for inadvertent breaches by the same relevant authority.

(6) Punishments are likely to be imposed if the approval procedure described in Article 36 of the DSL is not followed.

(7) There is currently no mechanism in place whereby approval can be sought (nor any right of appeal).

152. In summary, Mr Tang's views are that:

(1) The Company was not required to seek regulatory approval, because (i) this was not a request for international judicial assistance (but rather relates to *inter partes* discovery); and (ii) the Company was not a resident of China.[40]

(2) The documents were unlikely to include *"important data"*, and any offending data could be appropriately redacted.

(3) The risk of sanction is exceedingly low if the Company gives discovery without completing the regulatory approval process. In support of that point, he notes that he is not aware of sanctions having been imposed on a party to foreign litigation under Article 36 of the DSL.

Analysis of experts' views

153. The Court is not persuaded that because Professor Liu is an academic and may not have the practical expertise of Mr Tang, he does not have subject matter expertise and the requisite judgment concerning the law in question and its enforcement by the relevant Chinese authorities.

154. His credentials make clear that is not the case. He has been involved, albeit on the periphery, of the PRC legislative process and changes. His expert view is that the various PRC enactments were intended to tighten up control of data and in the context of the DSL, transfers abroad.[41] He says that Article 36 of the DSL is a defensive response to the long arm jurisdiction of foreign countries

[39] *Liu 3, paras 54 to 55*
[40] *Supported by Mr. Yang a member of the Legislative Affairs Commission of the Standing Committee of the National People's Congress who also says that Article 284 of the CPL and Article 41 of PIPL are concerned with requests made by foreign authorities for international judicial assistance-see Tang 4 para 12*
[41] *Lui 2 para 9*

which he says is perceived as highly threatening to Chinese judicial sovereignty and national security.[42]

155. The Court has decided to give weight to this and his view that the Company is a relevant company for the purposes of the legislation, that the documents caught by a disclosure order constitute data for the purposes of the DSL and as to his interpretation that "*foreign judicial or law enforcement authority"* includes court ordered *inter partes* disclosure.

Breach

156. Mr Tang opines that the language of Article 36 of the DSL accords with international judicial assistance from a foreign Court not an *inter partes* Order. The Court agrees that would appear on its face to be a plausible interpretation from the language used.

157. However, it is the case that this is a relatively early stage of the application of the DSL by the relevant authorities, and so there is a degree of uncertainty as to reach, or what international regulators sometimes call the "perimeter".

158. There is also an inconsistency in Mr Tang's opinion that a discovery order in this case would not amount to "judicial assistance" and the evidence that he gives that his own clients have *"voluntarily chosen to seek approval for their foreign court disclosures"* and that the JAEC *"often accepted those applications"*. It would follow that if Mr Tang was right about the JAEC's approach to its jurisdiction it would not have been necessary for his clients to do so and one might have expected the JAEC to have rejected the applications.[43] Instead it accepted and processed them in respect of *inter partes* disclosure. In this case the CAC sent the Company's application for self-assessment to the JAEC.

159. His Partner, Mr Ma, supports his view that documents are submitted to the JAEC for approval by *"cautious clients"*[44].No doubt each case is different both as to perceived risk, facts and strategy. Mr Ma also says that he received an e-mail from the JAEC (a redacted copy which he exhibits) on 27 March 2023 in which it stated in terms that it did not have authority under the DSL and PIPL to assess applications for cross-border evidence transfers[45].

[42] *Lui 2 para 11 and Lui 4 para 19*
[43] *Tang 3 § 18.2*
[44] *First Affirmation of Chen Ma ("Ma 1") 1 § 8*
[45] *Ma 1 § 13*

160. Mr Tang also exhibits a file note of a telephone conversation dated 1 December 2023 between one of his associates and a JAEC representative.[46] The Court does not find this evidence persuasive. There is no information about the seniority of the person giving the information nor that they knew it would be relied on and there have been no other official statements from the Chinese regulators that approvals are not required.

161. It seems to the Court unlikely that the clients of their law firm, Han Kun, would have applied to the JAEC with the costs consequences, the risk of refusal, and delay unless there was a need to.

162. Professor Liu says that Mr Tang's interpretation is very narrow and is unlikely to be shared by the PRC judicial and regulatory authorities.[47] By contrast, Mr Tang says Professor Liu's view is overly broad.

163. The Court has concluded that there is no reason to doubt Professor Liu's view on the approach taken by the Chinese authorities to their own jurisdiction and breach summarised at [148] 1-3 above.

164. The Court accepts Mr Tang's view on a literal reading of Article 36 of the DSL is plausible at [149] (1) above. Article 36 of the DSL may not seem on its face to apply to the provision of data that is stored within China by a party to foreign litigation to another party to that litigation as part of *inter partes* discovery, but that is not the way the Chinese authorities have approached this matter.

165. They reviewed these documents and determined that there were documents which were of a category (important data) which should not be disclosed. The others, they authorised for disclosure.

166. The JAEC seems to have operated as a clearing house consulting with the Supreme Court and the CAC (which then came back twice with further requests and questions), and accepted the vast majority of the Company's application for approval and refused the Remaining Documents. Since the end of March 2023, it has stopped accepting such applications.

167. The Court is prepared to accept that the Company's request was made in the context of overseas litigation and was not a judicial assistance request. The JAEC consulted the Supreme Court in terms of the cross-border litigation aspects and, it would seem from the evidence, looked to the CAC in terms of the technical data protection issues. It was the CAC that regarded the data in the Remaining

[46] *Tang 5 §16*
[47] *Lui 2 § 8*

Documents as sufficiently "important" not to allow for the transfer. No doubt these matters will be made clear by the further disclosure the Company has proposed it should give by its letter of 13 December 2023 (see below).

168. Professor Liu has experience of and a broad understanding concerning the context in which the data protection laws were brought into effect. He is able to and does give a view on what the provisions were intended to do and says, where a party is compelled as a matter of disclosure in litigation to disclose data, that falls within the PRC law. The Court accepts his view.

169. It follows, that taking into account the competing experts' views and the evidential material as to the application process, the Court has concluded that Article 36 of the DSL applies to *inter partes* disclosure, approval should be sought, and if the data is transferred without approval, there is a breach of PRC Law.

Risk of prosecution

170. The "*... mundane, essentially factual question"*, identified by Gross LJ in *Bank Mellat* is the actual risk of prosecution.

171. Mr Tang and Mr Ma do not say that if an application by their clients had been denied they would have advised their clients to disregard the denial and any warning and to have proceeded, nevertheless.

172. It does not seem to the Court that much weight should be given to the lack of reported decisions that Article 36 of the DSL had been breached and sanctions imposed. First the law has not been in place for very long and second there is evidence that the Chinese authorities have been willing to enforce the law.[48] For reasons specific to this Company and its business, it seems to the Court that it could be a likely target were it to disregard the denial and warning already given.

173. The Court does not in the circumstances believe that a lack of available evidence of "*regular enforcement"* is of any real significance. It is reasonable to infer that there may be cases which are not in the public domain[49].

[48] *Cheng 1 §§ 7,11,13)*
[49] *Liu 5 § 25*

174. As to the communications with the PRC regulators, the legal memorandum,[50] for all the criticisms made of it by Mr Grant KC in particular, corroborates Professor Liu's views and says:

a) the application for inspection would itself be a violation of Article 36 of the DSL because Article 1(2) of the Guidelines for Application of Security Assessment on Cross-border.
b) Data Transfer (1st Edition) provides that examination and retrieval of documents fall within the definition of and are consequently deemed to be a "*cross-border data transfer*": paragraph 12.
c) Examination by any agent of the Dissenters (as "overseas persons"), especially not by a Chinese citizen, would be deemed to be a violation of Article 36: paras 14-15.
d) The JAEC correspondence itself falls within Article 36 of the DSL (para 16). There is an identifiable (although appreciably lower) risk involved in the provision of the JAEC Decisions and Emails (para 17), and that risk could be mitigated by the Dissenters' own appointed PRC Counsel reviewing the documents under strict conditions (para 18). The proposal made by the Company on 13 December 2023 follows this advice.

Bank Mellat

Is there a real risk of prosecution?

175. It seems to the Court that a reasonable interpretation of the Chinese authorities' approach to the transmission of certain documents outside the PRC in this case is more consistent with Professor Liu's than Mr Tang's. If their policy was as Mr Tang opined, to encourage the free flow of information for the purposes of the fair disposals of trials in foreign courts, this would not seem to apply to the documents which have been submitted for their approval. They have refused permission and warned the Company not to proceed albeit in respect of a small proportion.

176. The Dissenters say that the Court should place no weight on the JAEC decision and the warning because there is no correspondence between the Company and the JAEC before the Court. All that is before the Court is the Company's summary of what is said to be the contents of those documents.[51] They argue that they have been deprived of the opportunity to challenge the Company's evidence as to what those documents say and mean and what the Company had told

50 [redacted]
51 [redacted]

the JAEC, and as a consequence their fundamental right to have a fair hearing has been compromised.[52]

177. The Court is prepared to accept the Company's summary at face value for the purposes of this application considering its inability to produce the relevant material to date.

178. If it is not accurate, that will be revealed on inspection of the correspondence upon the conditions offered by the Company and the Dissenters will then be able to see the entire picture and decide upon their course of action (if any).

179. The Court does not accept that the Dissenters have been prevented from fairly challenging the Company's account for the purposes of this application. The Company's case has been well understood and challenged.

180. It seems to the Court that the Company, having had a small proportion of its application for approval denied, is now (even if it was not before) likely to be on the PRC authorities' "radar" and the Company is also likely, (given the nature and extent of Weibo's business and profile) to be an important business for the Chinese authorities to pay particular attention to.

181. As to comity, the Court accepts that the refusal and warning was given by the JAEC having been advised that the purpose was to provide the material for overseas litigation. It is therefore not in the Court's estimation a significant factor in the circumstances of this case. The Court is not persuaded that the Chinese authorities would choose not to prosecute the Company for non-compliance of its decision and warning because the Company complies with a disclosure order against its express prohibition in respect of certain documents.

182. The General Counsel of the Company Haiyan Gu, refers to the fact that the Company has widespread name recognition and is one of the top social networking platforms in China with over 500 million monthly active users and so is highly likely to attract regulatory scrutiny.

183. Considering the direction from the Chinese authority where there is no appeal, it seems to the Court that there is a real risk that enforcement action would be taken against the Company and its officers were it to nevertheless disclose the Remaining Documents.

[52] *Al Rawi [2012] AC 53 at §93*

184. The Company and its General Counsel say they have a real concern that they will be prosecuted and punished if they disobey the decision.[53]

> *"In my professional opinion, taking account of my over 10 years working as GC in this industry, together with the Company's size and profile and the regulator's stance on the technology industry, the Company must be exemplary in its compliance with all relevant laws. Otherwise, the real and present risk is that the Company will be severely penalised in the event of violation, in order to set an example to others."*[54]

185. The Court is persuaded in all the circumstances that this rings true and there is, as a matter of fact, a real risk that disclosure in these circumstances would trigger a prosecution and serious sanction.

186. This is not a case where the PRC law is being assessed in the abstract but where an application has been made, the vast majority of documents have been approved for transfer, and a limited number have been refused on the basis that they contain important data. That being the case it seems to the Court that the Chinese authorities have proactively asserted their jurisdiction and to proceed with disclosure regardless would be a deliberate breach of a decision already taken.

Sanction

187. The Company has persuaded the Court that serious sanctions, such as revocation of its business licence, would be applicable as a result of it performing its discovery obligations in breach of the PRC authorities approach to their jurisdiction and warning.[55] The Court is not of the view on the evidence that the only sanction that would be available in this case would be the imposition on the Company of a modest fine in circumstances where the Company would be disobeying a specific instruction and warning. The Court accepts Professor Liu's evidence that given the importance of the Company's place in the internet information sector in China and the nature of its data involved in the case it is at least likely that its violation of Article 36 of the DSL will have serious consequences.

[53] *See § 22 of Lord 5*
[54] *See § 25 of Gu 1and see also §§ 15- 16 of Gu 2.*
[55] *See Article 48 DSL and Liu 5 at § 26, Gu 2 at §§ 17-18*

Discretion

188. Having reviewed the relevant authorities which preceded *Bank Mellat* and the Court of Appeal decision itself, it is clear that the Court has a discretion to take relevant factors into account in considering whether and on what terms to order disclosure by conducting a balancing exercise.

189. One of the factors is the conduct of the party giving disclosure. In s.238 cases it has been a constant refrain from dissenting shareholders that companies have not taken their disclosure obligations seriously and in many cases have brazenly sought to evade them.

190. The Court has made previous interim decisions and reviewed the voluminous evidence in this case and is of the view that this is not a company which is deliberately obstructing or impeding the discovery process. The Court accepts the Company's case that a substantial amount of time and money has been spent in trying to resolve the issues arising out of the Company's obligations under PRC Data Security Law and notes that the Company has funded and will fund the costs of its proposals to mitigate its position and provide information to work around the current situation.[56]

191. Other factors are delay and prejudice. The Court acknowledges that the original discovery deadline was 27 July 2022, which was then extended to 24 March 2023. On that date the Company issued a summons to extend time for compliance with disclosure. That was when the JAEC had not reached a decision on the Remaining Documents, but had given permission that 45,000 odd documents could be disclosed.

192. The Court also acknowledges that in its January 2023 judgment it said that the "*can"* could not simply be "*kicked down the road*" echoing Mr Levy KC's phrase when he appeared for all the Dissenters in this case. The JAEC decision was in May 2023. There was then a further delay until the Dissenters themselves raised the issue in August 2023. The Dissenters were then apparently not prepared to agree that the matter could be determined on the papers, and it took time to list it for hearing by which time the Dissenters had issued their own summonses.

193. There has certainly been a delay as a result of the process of obtaining approvals which is regrettable. However, any concern as to delay is overtaken, in the Court's view, by the fact that tens of thousands of documents have been uploaded to the data room and the §1782 discovery

[56] *Lord 5 § 24*

process is yielding yet further documents.[57] There is a substantial amount of disclosure to be reviewed and utilised. There is no good reason why substantive trial preparation should not have been, and should now be, pursued.

194. As the Court observed at the hearing, a CMC ought to be listed as soon as practicable in order that directions to move this case on to trial can be agreed or ordered. The Court does not accept that to allow the Company's proposals to come to fruition (or not) causes prejudice to the Dissenters. The matter can be case managed as appropriate to ensure a trial within the next 12-18 months. That in the context of hard fought s.238 cases is not out of the norm.

195. The Court's previous rulings were underpinned by an acknowledgement that permission should first be sought from the Chinese authorities and then any further directions could be given.[58]

196. This appeared to the Court at the time to be likely to be the most constructive and fair way to proceed. In the result this has yielded, most of the documents that are accepted to be material to the issue in this case, the Chinese authorities having approved 97% of the volume submitted.

197. As to the Remaining Documents and the documents awaiting approval it is true that the Company is a Cayman Islands company which has chosen the jurisdiction as both safe and reputable for incorporation and as the platform for its listing in the US. However that does not mean it is to be disadvantaged when it comes to applying the Court's discretion and the Grand Court Rules. The Court will ensure that it will indeed play by the rules it has chosen to be subject to, as will the Dissenters.

198. The proposals the Company has put forward should now be engaged with to work around the difficulties and prohibition that the Company has experienced in obtaining the necessary approvals to the documents which have not yet been produced.

199. This is in keeping with the Overriding Objective of the Grand Court Rules to ensure that the proceedings are dealt with in a just, expeditious and economical way, which of course is an obligation which all the attorneys instructed need to have in mind when approaching contentious procedural issues.

[57] *10,000 further documents from Morgan Stanley have apparently been uploaded*
[58] *See 2022 Judgment at § 72 and Walker 1 at § 9*

200. Pragmatic compromise wherever reasonable and an approach that gives time for matters to progress before hardened binary positions are taken is to be encouraged in support of the Overriding Objective. The Court is alive to tactical positions taken in s.238 cases to further litigation advantages. Justice Kawaley in *Xiaodou* also referred to this feature which unfortunately frequently occurs.

201. This case can be progressed to trial with work streams following the Company's proposals without further being diverted into deciding issues which take up resources and time and which do not need to hold up progress to trial.

202. What the Court needs to ensure is that, as far as is possible, all material relevant to the issue of determining the fair value of the Dissenters shares is available to the experts and to the Court. The stated requirement that companies in section 238 proceedings must disclose *all* relevant documentary material was not dealing with the position where there was a legal restriction to disclosure.[59] It is not to be treated as an absolute requirement.

203. The Court does not intend to detract in any way from the obligation of a company in section 238 proceedings to provide the material data so that the experts who assist the Court, and ultimately the Court itself, can decide the fair value of the dissenting shareholders' shares.

204. However, that does not mean every single piece of data or every document must be disclosed in order for a fair trial to take place. The Court has drawn on its own experience in trying these cases and has also found Justice Kawaley's approach in another section 238 case helpful.[60]

205. The approach taken by the trial experts in relation to valuation will inform the sufficiency or otherwise of the available material to their task. The Court also notes that there is further material becoming available from the §1782 proceedings[61] and the Independent China Expert (see below) will give an opinion on the importance of the Remaining Documents.

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[59] *Trina CICA unreported 4 May 2023 at §§ 145,146 (iv) (f) 256,258,260-261 and 269.*

[60] As Kawaley J said in *Xiadou* '*… what the Court will regard as 'complete and full ' will never require completeness in an absolute sense. Were this to be required the discovery stage of litigation in most appraisal cases would never end. As I observed in the course of hearing, there will usually be some way of taking into account at trial material deficiencies in available information." §57*

[61] *In addition, if this issue cannot be agreed, as per Birt JA's comments, the dissenters will need to apply to vary the terms of the directions order as envisaged by the Cayman Islands Court of Appeal (CICA Judgment § 87) in relation to the increase in the value of Weibo's shares not long after the valuation date.*

206. The Court has not yet had any expert assistance in relation to the "missing" material and whether there has been any gap analysis undertaken in relation to the substantial amount of information already in the data room and what further information the experts say they need or might need. The Court understands that the experts[62] have been making requests and detailed answers have been given so that the process of Information Requests is underway. There is no evidence concerning the adequacy or otherwise of the substantial disclosure already given and in the data room.

207. The question of disclosure under the *lex fori* is always a matter for the discretion of the Court in all the circumstances of the case and may not always produce an outcome which accords a binary primacy to foreign law over domestic litigation or *vice versa*. By analogy, where the self incrimination privilege does not apply, because the feared prosecution is under foreign law, the domestic Court under its inherent power to conduct its process in a fair and reasonable manner has a discretion to excuse a witness from giving self- incriminating evidence.[63]

208. Lord Nicholls said:

> *"If the unqualified application of the privilege to foreign law is unsatisfactory, so also is the opposite extreme. The opposite extreme is that the prospect of prosecution under a foreign law is neither here nor there….. This would be a harsh attitude. It would be a reproach to any legal system. One would expect that a trial judge would have a measure of discretion."*

209. The Company's approach as advised by PRC counsel and in accordance with the evidence of Professor Liu has been very largely successful. The vast amount of documents submitted for approval have been approved for cross-border transfer.

210. The Court was persuaded to endorse this approach, that PRC regulatory approval should be sought, and extensions of time for disclosure were given to allow for that to take place.

211. On the question of "need", the probative value of the Remaining Documents (which in the Court's view is a key element on this application), is that the Court is not in a position to assess or to reasonably infer, at this stage, how important the Remaining Documents and Further Documents are to the process of valuation required in these proceedings.

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[62] *Professor Yilmaz made a first information request on 4 October 2023*
[63] *Brannigan v Davison AC [1997] §251c*

212. The Court is not prepared to assume, as contended for by Mr Dhillon KC, that the Company and its lawyers know that these "*are highly probative documents that the Company is keeping up their sleeves in China*". That does not accord, on the available evidence, with the Company's conduct in this case. The Company has not been shown to have been withholding documents. It would be a very serious matter if it were.

213. The Company and its PRC lawyers say that they are prevented from saying anything much about the Remaining Documents and have proposed a solution to avoid the risk of prosecution by instructing a China expert.

214. The Court cannot say at present that these documents, whilst relevant, are 'necessary'[64] and without them a fair trial and assessment of the fair value of the Dissenters' shares could not take place. In *Bank Mellat*, the court had the relevant documents (save for the redactions) and so could conclude that there was a real prospect that the material would not just be relevant, but may have a probative influence on the issues at stake; yet this is not the position here in relation to the Remaining Documents. The Court simply does not know. It is not speculating in favour of one party or another.

215. The Court accepts Mr Chivers KC's submission that the Court does not have material to suggest that the considerable disclosure already given will be insufficient.

216. The importance of the Remaining Documents is likely to depend on the approaches, methods of valuation and lines of inquiry that the respective experts engaged by the parties to assist the Court take. The Court does not have the benefit of their views, as yet.

217. If Professor Liu is correct in his opinion that certain categories of documents are very likely to contain "important data", for example the items he lists,[65] those documents are also likely to be highly material to the valuation issue.

Conclusions

218. The Court finds that the Company has discharged the burden of showing that there would be a breach of PRC law and a real risk of prosecution with serious sanctions if it were to disregard the JAEC refusal and warning and that it needs the awaited approvals to comply with PRC law.

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[64] *See Bank Mellat § 73*
[65] *See* § 27 of *Liu 2*

219. The Court has also assessed, based on the available evidence, that there is indeed a *lacuna* in the PRC approval procedure at this time in relation to which PRC authority will decide the matter in relation to the awaited approvals.

220. The Court has decided that the fairest and most appropriate course in these circumstances is to approve the orders contained in the proposals made by the Company on December 13 (as further directed by the Court - see below) and also to proceed with the letters rogatory process[66] in order that the best possible chance of finding out more about the outstanding categories of material and obtaining it is facilitated.

221. It is important to record that the Company has not said that it will not give disclosure of the Remaining Documents. There is no pressing requirement that they be disclosed to the Dissenters in 30 or even 60 days. The better course in the interests of justice is to make that decision with more information about them, and a sensible process for that to happen should now be agreed and implemented.

222. The Court wishes to make it plain that is not deciding that the Company is excused from complying with the Directions Order with regard to the Remaining Documents. The trial of this action is still some way off. The Court is deciding that the Company has persuaded it, having regard to *Bank Mellat* principles, not to take steps to maintain and enforce the Directions Order in its present form for the time being, in order that further information can be established as to the evidential importance of the documents to the fair value determination in this case.

223. The Court does not accept that the proposals made by the Company are inimical to any common law rights of the Dissenters "*that the court decides the issues based on the documents rather than someone else*". There is no subcontracting of any duty on the part of the Court to try this case.

224. The Court has provided some amendments that it requires to the 13 December proposals below to better protect the Dissenters' interests.

225. As to letters rogatory it accepts Mr Chivers KC's submission that in circumstances where Article 36 of the DSL envisages a request being made to a PRC authority and that the authority that previously used to receive such requests is no longer doing so, the granting of permission needs to be engaged in some way. The Letter of Request route is one potential way of doing that. A Hague

66 [redacted]

Convention or Letters Rogatory request can occur at the same time as the other measures proposed by the Company. Professor Liu[67] accepts that there are uncertainties in the letters rogatory route, and it is seldom used. However, he says as a matter of PRC law there is no impediment for the Company to seek an approval from the CAC in tandem.

China expert and further details of the Remaining Documents

226. The Company should provide more detail as regards § 2 of the draft order of 13 December so that the Dissenters and the Court have the best possible understanding (allowing for PRC law issues) of the documents withheld in the PRC, which include: the title of each document; the date of each document; the sender and recipient of each document; what type of document it is; from where the document originates and where it is currently located. If it is possible to provide redacted copies for inspection in the PRC, that should be done.

227. The concept of an independent suitably qualified expert in China expressing a view as to the importance of the Remaining Documents seems to the Court to be a sensible proposal. It is not ideal but provides a way forward as to the 'need' question.

228. The Court would be prepared to make the following directions. There should be complete transparency in the letter of engagement and communications and between the China Independent Expert and the Company, to be made available the Dissenters and to the Court. The parties are to agree a timetable for instruction and delivery of an opinion from the China expert and the format of such an opinion (accepting that the contents of documents themselves will not be revealed). The parties should also agree a mechanism whereby the China expert can be asked for more information and for her to answer questions. For example, at meetings which could be arranged by the expert valuers instructed by the parties with the China expert (in the PRC if necessary) to better understand the opinion.

229. The objective is for the Court to be provided with further and better information about the probative value of the Remaining Documents. The parties should not assume that the report/memorandum will be simply accepted at face value and unchallenged if there is good reason for such a challenge.

230. The parties and the experts should make sure the China Independent Expert has an agreed list of the issues in play before she embarks on the assignment. The Court is not convinced that the parties' respective experts on valuation need to be far advanced in their expert reports before the China

[67] *Liu 7*

Independent Expert is appointed, as long as the issues are identified to her. In that regard the specific impact on the issues which the experts have decided are at play will need to be set out in detail in the memorandum the China expert produces, even though it is recognised by the Court that the specific contents of the Remaining Documents cannot for the time being be disclosed.

231. The timetable for the production of her report/memorandum should be as short as is reasonably practicable. The Court does not agree that the memorandum should be filed some two months following the exchange of supplemental reports as suggested in the draft amended summons from the Company.

232. Once the China Independent Expert has opined on the Remaining Documents the 'need' question in relation to the importance of the documents to the issues in the case will become clearer and if necessary, the Court can make further decisions in relation to the Remaining Documents.

233. The Court expressed the view at the hearing that the documents may or may not all be accounting or commercial documents. Some may go to factual questions as to whether the deal process was reliable and fair, which could also be explored once the expert has expressed a view as to the documents' importance to the issues in play. Their importance or otherwise from an independent expert's point of view to these Cayman proceedings may also affect the further presentations to /communications with the Chinese authorities.

The JAEC communications

234. The Court accepts that the mechanism proposed by the Company would not give the Dissenters the same information as if they were to have that information disclosed directly to them on terms of confidentiality.

235. The Court directs that the materials be provided on the terms proposed by the Company on 13 December save that there should be no limit to the disclosure of the Company's communications to only the identified documents, and there should be full disclosure of all communications with the JAEC including notes of any calls as well as letters and emails, so that the Dissenters and the Court are able to understand the decisions made in their proper context. That way a much fuller view of the communications will be revealed.

236. As to the Privileged Documents and Further Documents there is at present no mechanism in place to obtain the approvals required. Professor Liu is of the view that such a mechanism might be

introduced in the first quarter of this year.[68]. Mr Tang disagrees and says there will be no new cross-border data transfer mechanism established for the *inter partes* disclosure currently at issue in these proceedings.[69] Again the Court is prepared to accept Professor Liu's view that such an obvious gap will need to be filled in a reasonable time.

237. In all the circumstances, the Court accepts that time should be extended for a reasonable further period for the Company to produce the further, relevant documents, until ten days following the PRC authorities' approval of their transfer to the Dissenters.

238. The Company should be allowed to complete a self assessment application to the CAC in respect of the Further Documents in the meantime.

239. The Court should continue to be updated monthly on all material developments, with the Dissenters in copy.

240. It is obviously in the Company's interests to carry on giving disclosure (a continuing obligation) and to do the best it can in all the circumstances as expeditiously as it can, otherwise the Court will be left with the position of having to make decisions in the litigation to ensure there is no real prejudice the Dissenters and to ensure a fair trial.

241. The existing directions order should be varied to accommodate the Company's proposals of 13 December as further directed by the Court (above) and the Company should follow the relevant processes to complete its disclosure, and/or return to the Court for further directions.

242. In the meantime, further case management directions to prepare the case for trial can be canvassed and ordered at a CMC which the Court understands is set for 19 February 2024.

243. None of the matters relating to PRC law issues will be allowed to delay the trial date which will be fixed at the CMC.

244. The costs of these applications, if they cannot be agreed, should be the subject of short written submissions of no more than five pages in length.

[68] *See § 21 of Liu*
[69] *See § 19 of Tang 4*

245. The Company' sealing order application was granted until the handing down of this Judgment, and if it cannot be agreed will be extended until further order. In the event it is resisted the Court will determine it on the basis of written submissions, again of no more than five pages in length.

246. The Court is grateful to the teams of attorneys and to Leading Counsel who were of considerable assistance.

THE HON. MR. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT