HCMP 2770/2017

[2018] HKCFI 819

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 2770 OF 2017

IN THE MATTER of section 45(2) of the Arbitration Ordinance (Cap 609)

and

IN THE MATTER of section 21L of the High Court Ordinance (Cap 4) and Order 29 of the Rules of the High Court (Cap 4A) and inherent jurisdiction of the Court

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BETWEEN

SCC VENTURE VI HOLDCO G, LTD.	Plaintiff
and	
ZHAO CHANGPENG (趙長鵬)	Defendant

Before: Deputy High Court Judge R Ismail SC in Chambers

Date of Hearing: 11 April 2018

Date of Judgment: 24 April 2018

J U D G M E N T

Introduction

1. On 27 December 2017, Mr Justice Li granted an injunction (in aid of intended arbitration proceedings) restraining the defendant ("D") until 1 March 2018 or prior order from entering into any agreement with anyone other than the plaintiff ("P") or its affiliates in connection with a Series A equity financing ("the Injunction").

2. The application was made *ex parte* by P without notice to D.

3. On 5 January 2018, by consent, Mr Justice Ng gave directions for evidence for the purposes of the *inter partes* summons.

4. The *inter partes* summons now comes before me, after 1 March 2018, when the Injunction is spent. However, the parties seek a determination of whether the Injunction was properly obtained.

5. D claims that the Injunction was obtained by an improper use of the *ex parte* procedure amounting to an abuse of process; that P was guilty of material non-disclosure; and that the injunction application is insufficiently meritorious in any event.

6. I consider that P was wrong to pursue the *ex parte* application without notice to D, for the reasons given below. If the Injunction were not already spent, I would have set it aside on that basis alone. For completeness, I will however set out my views in respect of the other arguments raised by D. Essentially, I do not consider the other complaints by D to be well-founded.

Background

7. BitDJ Limited was a company operating a cryptocurrency exchange with an online trading platform ("the Business"). D and a Ms Yi He were the founders of the Business ("the Founders"). P is a subsidiary of an American capital venture firm and is, or was, a potential investor in the Business.

8. Negotiations for an investment by P in the Business began in about August 2017. On 25 August 2017, a term sheet was agreed between P's affiliate, BitDJ Limited, and the Founders ("the Term Sheet"). The Term Sheet was stated to be non–legally-binding, save in respect of certain clauses. The Term Sheet envisaged:

> (a) An investment by P (*inter alia*) of the US dollar equivalent of RMB 60 million in respect of Series A Preferred Stock in a Cayman company which would own the Business;
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> (b) The investment would be on the basis of a pre-money valuation of BitDJ Limited of the US$ equivalent of RMB 500 million on a fully diluted basis;
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> (c) A restructuring of the ownership of the Business (at Clause C);
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> (d) That upon completion of the Series A financing, P and affiliates would own 10.714% of the shares of BitDJ Limited with the remainder of the shares being held by the Founders, the seed investors and the employee stock option pool (at Clause D) (I note that it is implicit from the cap table that P would be the first external investor after seed investors); and
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> (e) P or its affiliates would sign a bridge loan agreement for the US dollar equivalent of RMB 30 million to BitDJ Limited's affiliate Japanese company.

9. On 1 September 2017, P and D entered into a promissory note whereby D agreed to repay US$1 million received from P upon the terms contained therein ("the Promissory Note"). It is to be noted that the Promissory Note evidences a bridging loan between different parties and in a different amount from that envisaged by the Term Sheet, but the parties do not suggest at this stage that this is a material matter.

10. The terms of the Promissory Note:

(a) The preamble to the Promissory Note states:

> " … This Note is issued by [D] to [P] as a bridge loan arrangement in connection with the Series A equity financing transaction ('**Series A Financing**') contemplated under certain term sheet attached hereto as Exhibit A (the '**Term Sheet**'), or under other terms mutually agreed by the Parties after execution of this Note."

(b) Clause 1(c) provides:

> " Either party shall work exclusively with each other to negotiate and enter into binding transaction documents for Series A Financing before the Maturity Date. Without the prior written consent by [P], [D] shall not make any prepayment of the Note before the earlier of the Maturity Date and the closing of Series A Financing. However, the [D] shall has [*sic*] the right to repay the Principal Amount (without interest) if the definitive transactiondocuments for Series A Financing have not been executed beforethe completion of restructure under Section 1(b)(iii) of this Note."

(c) The Maturity Date is defined at clause 1(a) as being the expiry of the 6-month period after the date of the Note, as extended from time to time pursuant to clause 1(c) of the Note. It is common ground that the Maturity Date is 1 March 2018.

11. Negotiations for the investment by P continued until mid-December 2017. These entailed private communications between the principals D and Mr Steve Ji on behalf of P, and also private or group communications involving the respective legal teams and business people, as evidenced by WeChat messages.

12. On 14 December 2017:

(a) D's side informed P's side that there were no difficulties with the draft transaction documents, but that the existing shareholders or angel investors (it is not clear whether D's lawyer was referring to the Founders) felt that the valuation of the company for the purpose of P's investment was too low.

(b) A Mr Zhu Daming was put forward by D as a point of contactfor further discussions with P, on the basis that D was too busy.

(c) IDG Capital ("IDG") approached D with an offer of Series B investment (as stated in D's evidence dated 1 February 2018). IDG's offer was based on a valuation of the Business which assumed that there had already been a Series A financing, but the offer was to invest US$18 million in two tranches Series B1 and B2, with B1 on the basis of a post-money valuation of US$400 million, and B2 on the basis of a post-money valuation of US$1 billion, which valuations were obviously much higher than the sum of P's valuation and P's investmentmoney: P's Term Sheet was for a RMB 60 million investment on the basis of a RMB 500 million valuation). However, it is not clear when P was informed of the IDG offer.

13. It appears that on 17 December 2017, P's side (by Mr Steve Ji)sought to advance a "new proposal" to D. Its exact nature is not clear fromthe evidence but appears (judging from communications on 18 December) to have been an offer to take a lower percentage equity in return for RMB 20 million in addition to the US$1 million already paid.

14. In the early hours of 18 December, Mr Zhu informed P's side that:

(a) the existing shareholders and Founders would not accept the RMB 20 million proposal, and would at most accept an investment of US$1 million on the basis of the Term Sheet valuation as it had already been paid (I e the bridging loan); and

(b) he was informed that IDG would sign the SPA today or tomorrow.

15. On 19 December 2017, Luk & Partners on behalf of P wrote to D c/o Allbright Law Offices in Shanghai, lawyers for D in respect of the proposed investment transaction with P ("the Warning Letter"). This letter referred to clause 1(c) of the Promissory Note (*inter alia*), and stated:

> " 4. It has recently come to our client's attention that you are negotiating the sale of, inter alia, equity interest of the Company and/or its affiliates (together, the '**Group**') with third parties unrelated to [P] and without our client's consent in breach of clause 1(c) of the Promissory Note.
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> 5. Further, despite the fact that our client has accepted all themajor changes proposed by the Group in respect of the transaction documents … on 9 December 2017, to date, the Group and its lawyers have failed to, and have indicated the Group does not haveany plan to continue to, provide any response or confirmation that the Group is in a position to finalize and execute the transaction documents. This also constituted a breach of your obligations to enter into binding transaction documents with our client under, inter alia, clause 1(c) of the Promissory Note.
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> …
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> 8. In the circumstances, unless we receive written confirmation from you by **5.00 p.m. on 20 December 2017** that (i) you will cease all negotiations with other third parties regarding the sale of equity interest of the Group … and (iii) you will continue the Series A Financing based on the terms and conditionsset forth in the Term Sheet, our client will have no alternative but to commence legal action against you without further notice, including but not limited to applying for an injunction restraining you from negotiating or entering into any agreement with other third parties on the sale of the equity interest of the Group …."

16. By letter dated 20 December 2017 (but sent by email at 2:00 am on 21 December 2017, Allbright replied ("the Allbright Letter").

17. The Allbright Letter in reply asserts:

> (a) Series A Financing means sale of Series A Preferred Stock on the basis of a pre-money valuation of RMB 500 million.
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> (b) The Promissory Note does not prevent D from seeking *subsequent* financing opportunities with third parties on a higher valuation beyond Series A financing.

(c) D and the Group keep receiving requests from third parties for making investment into the Group on much higher valuation, and preliminary responses to these requests shall not be deemed in conflict with the Series A financing of the group.

(d) D and the Company had been working positively with P on the Series A financing, and the current deadlock in negotiation was not because D and the Company did not want to continue the deal but because both parties could not reach agreement on detailed terms and conditions.

(e) The failure of reaching mutual agreement should not be deemed a breach of the Promissory Note by D or the Company.

18. There was no further communication between the parties.

19. On 27 December 2017, P made an *ex parte* application for the Injunction, without giving notice to D. The application was made supported by the 1st affirmation of Mo Charles Chun Ling of Morgan Lewis & Bockius, Hong Kong, dated 26 December 2017 ("Mo 1"). Mo 1 simply exhibited two sworn unnotarized affirmations:

(a) the 1st affirmation of Ao Luo dated 26 December 2017 ("Luo 1"). Mr Luo is a lawyer employed by the Beijing office of Morgan Lewis & Bockius, P's lawyers in the proposed investment transaction with D; and

(b) the affirmation of Lianqing Zhang, general counsel of P's parent company, dated 26 December 2017 ("Zhang 1"); this affirmation agreed with the contents of Luo 1.

20. After a hearing commencing just after 4 pm on 27 December 2017, which lasted approximately half an hour, Li J granted the Injunction. An attendance note of the *ex parte* hearing was made by P's solicitors.

21. On the return day of 5 January 2018, the parties agreed directions for the filing of evidence and an adjournment of the *inter partes* summons.

22. Pursuant to such order, D filed its evidence on 2 February 2018: the affirmation of D dated 1 February 2018, and the affirmation of Liu Yawei, senior partner of Allbright Law Offices, of the same date.

23. Prior to filing its reply evidence, P sought discovery from D pursuant to Order 24, rule 10 of the Rules of the High Court in respect of the IDG offer. On 26 March 2018, DHCJ Keith Yeung SC allowed the discovery summons. The discovery was made. P thereafter filed its reply evidence: Ao 2 dated 30 March 2018 and Zhang 2 dated 30 March 2018.

24. The *inter partes* summons came before me on 11 April 2018 and lasted one day.

Basis for the injunction application

25. P asserts that pursuant to clause 1(c) of the Promissory Note, it was entitled to a period of exclusivity of negotiations with D in respect of Series A Financing.

26. Issues between the parties include:

(a) the extent of the negotiation obligation under clause 1(c);

(b) whether there has been a breach by D of any implied duty of good faith in respect of such obligation; and

(c) whether any such breach would sound in damages referable to the amount of the loan, or referable to the lost opportunity to benefit from an equity share of the Business.

27. These are matters for the arbitration between the parties commenced in the HKIAC.

28. Of particular relevance now is the nature of the exclusive negotiation period under clause 1(c). It is common ground (at least now) that the exclusivity is only in respect of "Series A Financing", not any financing. However, P and D do not agree on the meaning of "Series A Financing" for the purposes of clause 1(c):

(a) P says it means the first round of external financing, and that such meaning is consistent with the definition in the preambleof the Promissory Note and with industry practice and language.

(b) D's position has been fluid:

(i) Prior to the hearing (eg from the Allbright Letter at paragraph 1(1), from D's skeleton para 60), I understood D's position to be that "Series A Financing" for the purposes of clause 1(c) means the Series A equity financing transaction on the basis of the pre-money valuation of RMB 500 million contemplated under the Term Sheet (which I will call "D's Version A").

(ii) During Ms Cheung's oral submissions it was clarified that D's position was that the meaning is the Series A equity financing transaction contemplated under the Term Sheet or on other terms agreed by the parties after the execution of the Promissory Note (which I will call "D's Version B").

29. Pausing here, D's position seems to be difficult and double-edged:

(a) On the basis of Version A, then Series A Financing for the purposes of clause 1(c) means that the negotiation exclusivity period is only for Series A financing on the basis of the valuation of RMB 500 million set out in the Term Sheet. On that basis, D could argue that it was not prohibited from negotiating Series A financing with other parties on the basis of a different valuation.

(b) However, D claims it was entitled to negotiate different termswith P for Series A financing including negotiating a different valuation. This is more consistent with Version B (and may be a more helpful definition to D when it comes to the issue whether there has been a breach of any obligation to negotiate in good faith under clause 1(c)).

30. I do not have to finally determine the meaning of clause 1(c), but I do need to identify the extent of the arguments raised in order to examine whether allegations of material non-disclosure are made out (to which I will return below).

31. P's evidence, supported by a number of WeChat messages, shows that until 14 December 2017, P and D seemed to be on the verge of executing transaction documents for the investment as proposed in the Term Sheet, save that (by agreement of the parties) the restructuring of theBusiness had changed shape in light of PRC regulatory change in September 2017 preventing the Business from being conducted on the mainland.

32. As indicated earlier, on 14 December 2017, at 4:15 pm, D informed P that although there was no issue on the documents, the existing shareholders (whether this be the Founders and/or the angel investors) considered the valuation too low. The clear implication is that as at 14 December 2017, there was a desire on D's side to increase the valuation for the deal with P to go ahead.

33. On 17 December 2017, D informed P that D's side no longer agreed to the proposed deal for P to take 10%, leading P to suggest a new proposal. By 18 December 2017, in a message timed at 4:39 am:

(a) D indicated that it would not do a deal with P on the Term Sheet terms nor on the new proposal; and

(b) D would sign a SPA with IDG today or tomorrow (having made reference to IDG as being a subsequent round of financing).

34. Ms Cheung on behalf of D sought to emphasise that D's team were using the language of Series B and/or subsequent or next round of financing in respect of IDG. Accordingly, she submitted, there was no reason for P to be concerned as P's exclusivity was in respect of Series A financing only. However, (as Mr Wong put his case on the *ex parte* application, as may be seen from his skeleton argument para 27(1)), if there was no deal to be executed between P and D, then any deal with IDG would be the first round of external financing, whatever it was called.

35. It seems to me highly arguable that clause 1(c) requires exclusive negotiation period in respect of *any* Series A financing, meaning any first round of external financing, until the Maturity Date. I therefore consider P was justified in being concerned that there was a breach of clause 1(c) by D's negotiations with IDG.

36. P then sent the Warning Letter to D and received the Allbright Letter in reply. I will consider the correspondence issue by issue.

37. The Warning Letter, having set out clause 1(c) (including its specific reference to "Series A Financing") asserts the discovery of D's negotiations with third parties without P's consent in breach of clause 1(c). Implicitly the complaint is in respect of negotiations of Series A Financing with third parties.

38. On this issue, the Allbright Letter in reply makes 3 assertions.

39. First: Series A Financing means sale of Series A Preferred Stock on the basis of a pre-money valuation of RMB 500 million. This is clearly a matter in dispute between the parties.

40. Second: the Promissory Note does not prevent D from seeking *subsequent* financing opportunities with third parties on a higher valuation beyond Series A financing. This is not in dispute.

41. Third: D and the Group keep receiving requests from third parties for making investment into the Group on much higher valuation, and preliminary responses to these requests shall not be deemed in conflictwith the Series A financing of the group. This third assertion is less clear. Insofar as it seeks to make a separate point from the second assertion, it suggests that preliminary negotiations on the basis of higher valuations were permissible for Series A financing. That would of course not be accepted by P.

42. As to the alleged breach of the agreement to enter a binding Series A agreement, the Warning Letter stated that despite P having accepted all major changes proposed in the transaction documents, the Group was not apparently proceeding to execute the same which was a breach of the obligation to enter binding documents contained in clause 1(c).

43. The Allbright Letter replied on this issue that:

> (a) D and the Company had been working positively with P on the Series A financing, and the current deadlock in negotiation was not because D and the Company did not want to continue the deal but because both parties could not reach agreement on detailed terms and conditions.
>
> (b) The failure of reaching mutual agreement should not be deemed a breach of the Promissory Note by D or the Company.

44. It seems to me that the Allbright Letter's version of events is not consistent with the WeChat messages indicating that the transaction documents were not problematic but that D/the Group wished to amend the valuation ie a fundamental term rather than a detail.

45. In addition, the Allbright Letter asserted that under clause 1(c), D had the right to repay the bridging loan if the Series A financing transaction documents were not executed before the proposed restructuring, and in the circumstances, D believed the parties could not reach mutual agreement for Series A Financing, and D would arrange to repay the bridging loan to P to duly terminate the cooperation with P.

46. That again indicated D/the Group's intention not to pursue the Series A financing deal with P.

47. I have every sympathy with P's argument in its *ex parte* skeleton at para 27(1) that it appeared disingenuous for D to be asserting that negotiations with IDG were subsequent negotiations, where D was at the same time making clear, before the Maturity Date, that the prior Series A Financing with P would not happen. Whether it was actually disingenuous or badly worded or mistaken is not clear.

48. In the circumstances of the change of tack by D/the Group in its negotiations with P from 14 December 2017 (following interest received from IDG), it seems to me reasonably arguable that D did not pursue the Series A Financing deal with P in good faith, on the basis that it is at least arguable that such financing was to be on the valuation basis set out in the Term Sheet unless mutually agreed otherwise.

The issues

49. D, represented by Ms Cheung, asserts that the Injunction was improperly obtained on the basis that:

(a) It was an abuse of process for P to apply for the Injunction *ex parte* without notice.

(b) The application was further an abuse of process because the *ex parte* judge was misled as to the nature of the relationship and obligations between P and D.

(c) P is guilty of material non-disclosure by failing to inform the *ex parte* judge of:

(i) the fact that D had at all material times been negotiating with other investors to P's knowledge and without complaint from P;

(ii) the procedural significance of making an *ex parte* application where there had already been *inter partes*correspondence as to the subject matter of the application;

(iii) the fact that "Series A Financing" as used in the critical clause 1(c) of the Promissory Note was a defined term in the parties' documents;

(iv) the fact that general exclusivity terms in favour of P had been proposed by P but rejected by D during the negotiations, and that the reference to "Exclusivity" in the preamble of the Term Sheet was a mistake;

(v) the fact that the parties had failed to reach agreement on key terms of the draft SPA;

(vi) the fact that there had been regulatory changes in the PRC which made impossible the restructuring contemplated by the Promissory Note; and

(vii) the fact that the increase in value of Bitcoin was irrelevant as the Business was the operation of a tradingplatform for some 100 cryptocurrencies not just Bitcoin.

(d) In any event, no injunction should have been granted because there is no serious issue to be tried and/or damages would be an adequate remedy.

(e) There is also a complaint that the principal evidence in supportof the Injunction is that of Mr Ao, P's lawyer rather an officer of P.

Ex parte without notice procedure

50. There was no dispute between the parties in respect of the applicable principles as to the use of the *ex parte* procedure. Natural justice requires all parties to be heard save in the most exceptional circumstances, where extreme secrecy or urgency so requires. See *Slik Hong Kong Co Ltd v Gerald Rhoslyn*HCA 1424/2005 (unreported, 25 July 2005, Johnson Lam J (as he then was)).

51. In *Slik*, Johnson Lam J helpfully referred to a number of relevant authorities including the following:

> *(a)* " … ex parte orders are only made 'where the situation is of such extreme urgency that there is literally no time to warn the defendant of what is proposed or where the purpose of the injunction will or may be frustrated if the defendant is informed of what is proposed or where the defendants simply cannot be found' …"
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> *per* Ma J (as he then was) in *Brand, Farrar Buxbaum v Samuel-Rozenbaum Diamond* HCA 5191/1998 (unreported, 8 May 2002), citing the unreported English Court of Appeal decision in *TRP Limited v Thorley*, 13 July 1993.
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> (b) " Even if there is genuine urgency, the proper course is for the claimant to take out an *inter partes* application, if necessary with time abridged, or if that was somehow not possible, to make an *ex parte* application on notice to the plaintiff."
>
> *per* Ma J in *Brand, Farrar Buxbaum*.

> *(c) " For an ex parte application for an injunction to be [justified] on the grounds of urgency it must be so urgent [that] you cannot give even five minutes warning to the other side. Here, solicitors were instructed for the Defendants .... The Plaintiffs' solicitors well knew it. ... There was no justification for not even making a telephone call or sending a fax ...."*
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> *per* Rogers J (as he then was) in *Seapower Resources International Ltd v Lau Pak Shing* HCA 10715/1993 (unreported, 15 December 1993).

52. In this case, on the *ex parte* application on 27 December 2017, P submitted (as may be seen from the *ex parte* skeleton at para 6), that P was driven to make the *ex parte* application on the basis of urgency. That urgency was stated to arise from the indication on 18 December 2017 that a deal would be signed with IDG on 18 or 19 December 2017, and in lightof P's Warning Letter of 19 December 2017, and the Allbright Letter in reply. The date of the Allbright Letter was not given but we know it was dated 20 December and sent in the early hours of 21 December 2017. This correspondence was self-evidently between lawyers for P and D (albeit not based in Hong Kong). The Warning Letter had required a response by 5 pm on 20 December under threat of legal action including an injunction application.

53. The *ex parte* application was not made until 27 December 2017 at about 4 pm.

54. There was no explanation in the *ex parte* skeleton or evidenceas to why there was no *inter partes* application made, nor why no notice hadbeen given to D before the hearing on 27 December 2017 at approximately4 pm. The attendance note of the hearing does not indicate any reference to the above principles or explanation of why the application was being made *ex parte* without notice.

55. At the hearing before me, Mr Wong submitted (without supporting evidence) that no notice was given because of the concern that doing so might cause D to rush to sign a deal with IDG, which P would notbe able to unravel. This is an argument of a need for secrecy, not supported by the evidence. It seems to me that an argument for secrecy must be properly articulated and justified at the appropriate time ie when seeking topursue an *ex parte* application without notice. Without deciding the point,there may be some cases where one can submit that the need for secrecy is obvious from the facts deposed. But that is not this case. Here, P had already expressly told D, through lawyers, that failing a response by 5 pm on 20 December they may seek an injunction. If D were inclined to rush to do a deal to thwart an injunction application, then they had plenty of time to do so after receipt of the Warning Letter on 19 December. There was no justification for keeping the 27 December hearing secret from D.

56. In the circumstances, I agree that the use of the *ex parte* procedure without notice to D was an abuse of process. P should have either used the *inter partes* procedure seeking abridgment of time, or the *ex parte* on notice procedure.

57. Ms Cheung also submitted that P had been aware of the IDG interest since 2 December 2017 but had done nothing about it, so there was no need for P to make an urgent application. From the WeChat correspondence shown to me dated 2 December 2017 and thereafter, it appears that P's deal was being pursued and that the IDG interest was for subsequent, non-Series A financing, and therefore not of concern to P. Concern about P's deal did not apparently materialize before 14 December,and more convincingly on 18 December. I accept that urgency arose from 18 December, or possibly 21 December when the Allbright Letter was received.

58. I have had regard to *Yifung Developments Ltd v Liu Chi Keung Ricky*[2014] 4 HKLRD 483 at 491 where an order improperly obtained *ex parte* was set aside on that ground alone, following the guidance in *Luck Continent Ltd v Leonora Yung*CACV 42/2010 (unreported, 22 October 2010). Mr Wong did not seek to argue that it would be inappropriate to setaside the order if the *ex parte* procedure used was inappropriate as claimed.

59. Insofar as it is necessary, I do find that it is self-evident that obtaining the Injunction would give P some kind of victory and a possible means to bring D back to the negotiating table.

60. Had the Injunction not already been spent, I would have set aside the Injunction.

MND allegations (listed at §49(c) above)

61. Where P only claims exclusivity in respect of Series A Financing negotiations, it seems to me to be irrelevant to consider negotiations in respect of later Series B financing. Accordingly, I do not consider the 2 December 2017 WeChat message in respect of negotiations for subsequent financing (or other similar messages) to be a relevant fact which ought to have been brought to the *ex parte* judge's attention.

62. I have already addressed the procedural significance of making an *ex parte* application where there has been *inter partes* correspondence in respect of a potential injunction application.

63. The attention of the *ex parte* judge was drawn to the Promissory Note by Luo 1 paras 11 to 14, which not only explained the general industry meaning of Series A financing but also referred to the definition in the Promissory Note. I note that the affirmation does not set out the full sentence in which the definition is contained, which D says is relevant to the definition. However, I have no doubt that where the apprehended breach was of clause 1(c) which contained the capitalized phrase "Series A Financing", and para 14 of Luo 2 referred to the definition in an extract from the preamble, the Court's attention was adequately drawn to the definition in the Promissory Note.

64. D complains that P did not inform the *ex parte* judge of the fact of deletion of draft general exclusivity provisions from both the Term Sheet and the draft SPA. This is said to be part of the general matrix of fact which would inform the Court as to the proper interpretation of clause 1(c) of the Promissory Note.

(a) I accept P's submission that the draft provision in the draft SPA post-dated the Promissory Note and could not be relevant.

(b) As a matter of common sense, without reference to the authorities, the refusal to agree to a general exclusivity provision might be relevant to the ambit of a limited exclusivity provision, depending on the extent of disagreement as to the meaning of the limited exclusivity provision. If P's proposed interpretation was as wide as the deleted draft provision, then of course the deletion would be relevant. But here, the dispute on interpretation is limited to whether P was entitled to an exclusive negotiation period for any Series A financing, or whether that exclusivity was limited to Series A financing on the terms of the Term Sheet or on terms otherwise mutually agreed between P and D. The draft clause M suggested, but rejected, for the Term Sheet provided for P to have exclusivity in respect of any financing negotiations (not limited to Series A). Accordingly, the fact that that was not agreed has no bearing on the interpretation issue in clause 1(c).

(c) I do not therefore need to consider the authorities on admissibility of drafts and deleted provisions when construing a contract, addressed in supplemental submissions of D and P after the hearing.

(d) I do not consider that the fact that the Term Sheet preamble retained a reference to an "Exclusivity" provision after the deletion of such provision was a matter which had to be brought to the *ex parte* Judge's attention. It was readily apparent that in the absence of an Exclusivity provision, the wording in the preamble was of no effect.

65. I do not accept D's submission that P failed to inform the *ex parte* judge that the parties had failed to reach agreement on key terms of the SPA. It seems indisputable on the evidence that the parties were agreed by 14 December 2017 that there was no particular problem with the transaction documents, but that from that date, D wished to revisit the fundamental term of valuation for P's investment. That was made plain to the *ex parte* judge. It was indeed the basis for the injunction application that this led to a position where it seemed a deal with P was now being resisted by D, who were looking to do a deal with IDG.

66. I do not accept that the regulatory changes in the PRC relatingto the Business were a material fact which ought to have been disclosed tothe *ex parte* judge. These regulatory changes meant that the restructuringenvisaged in the Term Sheet and/or Promissory Note had to be altered, butthe parties proceeded to do so in the draft documentation without this being a point of contention. This simply has no bearing on the issues between the parties in respect of the interpretation of or compliance with clause 1(c).

67. I do not accept that P ought to have told the *ex parte* judge that the increase in value of Bitcoin was not at all relevant to the Business. Indeed, I do not accept that to be true. The Business involves trading cryptocurrencies which include Bitcoin. The income of the Business is referable to the value of the product being traded. The fact that Bitcoin isonly one of the traded products does not make it irrelevant. I do not regard P's reference to Bitcoin rather than cryptocurrencies generally as material.

Serious issue to be tried

68. It will be apparent from what I have said above that I have nodoubt there is a serious issue to be tried as to P's entitlement to an exclusive negotiation period for Series A financing, and as to the potential deal with IDG being in breach thereof. Insofar as necessary, I am satisfied of that to a higher level of assurance.

69. I also have no doubt there is a serious issue to be tried as to whether D was under an obligation to negotiate the Series A financing with P in good faith, and that there may have been an absence of good faith in the negotiations from 14 December 2017 when D sought to revisit the valuation with P and/or make an alternative deal with IDG. I am not however satisfied of the merits of P's claim in this respect to a high level of assurance.

Whether damages are an adequate remedy

70. Insofar as P claims that the breach of clause 1(c) should resultnot only in repayment of the bridging loan but also damages for the loss of a chance to invest in the Business, then I agree that the damages would be difficult to quantify, so that damages may not be an adequate remedy. I am certainly unable to conclude at this stage, as D submits, that D was able to walk away from the negotiations at any time subject only to repayment of the bridging loan.

Identity of the deponent

71. So far as I can tell from the evidence, the best factual witness for P would be Mr Steve Ji. However, Luo 1 para 23 states that Mr Ji was travelling abroad and unable to swear an affirmation. Mr Luo was apparently the lead lawyer on the negotiations with D. Whilst not personally involved in private conversations between D and Mr Ji, he was able to give substantial firsthand evidence in respect of the negotiations. This is not a case of a factual witness hiding behind his lawyer when it comes to giving evidence. Mr Luo is indeed a proper factual witness for P. D's complaint in this regard is unjustified.

Costs

72. I consider that P's use of the *ex parte* without notice procedurewas an abuse of process. D was entitled to seek to set aside the Injunctionon that ground alone. However, the bulk of D's evidence and the hearing was concerned with complaints which I have found to be unjustified.

73. I will make an order *nisi* as follows:

(a) no order as to the costs of and incidental to the *ex parte* application or the application for service out;

(b) the costs of the first *inter partes* hearing before Ng J on 5 January 2018 be to D;

(c) 25% of the costs of preparation of D's evidence, and 25% of D's costs of and incidental to the substantive *inter partes* hearing on 11 April 2018 be paid by P to D.

(d) If not agreed, costs to be taxed on an indemnity basis.

74. If any variation to this costs order is sought, written submissions should be made within 7 days, otherwise the order *nisi* will become final.

75. If variation of the order *nisi* is sought, any submissions in answer are to be served and filed within 7 days thereafter.

(Roxanne Ismail SC)
Deputy High Court Judge

Mr Jonathan Wong, instructed by Luk & Partners, for the plaintiff

Ms Elizabeth Cheung, instructed by Herbert Smith Freehills, for the defendant