CLIFFORD

CHANCE

CONTENTIOUS COMMENTARY: HONG KONG
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Moulin Rouge

Reminder to Non-Executive Directors regarding their Duty to Enquire and Investigate

The judgment of *Moulin Global Eyecare Holdings Limited (in liquidation) (Moulin) v Olivia Lee Sin Mei (Lee)* [2019] HKCFI 1715 was handed down on 23 July 2019. The court found that Lee, a non-executive director (NED), had breached her duty of care and skill and failed to investigate multiple red flags.

By way of background, Moulin's collapse and insolvency due to fraud perpetrated by its senior management is well known. Lee was an experienced solicitor by profession and as well as NED, principal legal adviser and member of the audit committee of Moulin and/or its group companies (Group). The failure to investigate a series of red flags led to fraud and insolvency not being detected. The court ordered damages of HK$450 million against her for cash dividends and share repurchases paid by Moulin when insolvent.

The red flags she failed to investigate were as follows:

- Lee failed to investigate a complaint by a customer involving manipulation of accounts.
- Lee did not question the Group's solvency where on the one hand, it failed to settle the legal fees of Lee's law firm and on the other, the consolidated financial statements of the Group recorded a profit of HK$172 million.
- Lee failed to inquire into the Group's unsecured cash advances of about HK$233 million in circumstances where the Group had no money lender's license and the Group in fact increased its interest bearing bank borrowing.
- Lee should have realised the seriousness of KPMG's resignation as auditor, being an auditor of a listed company.
- Lee failed to enquire and investigate the threats of Ernst & Young (appointed after KPMG) to qualify the accounts including after expressing concerns as to the third party advances.

The key takeaways from this case (as well as from existing English and Australian case law) are:

- NEDs are equal board members and are expected to contribute to the board based on their expertise and knowledge.
- NEDs, particularly those with a professional background, may face serious consequences for not taking action if they become aware of suspicious circumstances that warrant further investigation.
- Those without professional expertise should still be ready to inform appropriate persons and seek advice where required.

Senior Management Focus

Regulation of Intermediaries and Insurers by Independent Insurance Authority

On 23 September 2019, the Insurance Authority (IA) succeeded the three self-regulatory organisations in the regulation of insurance intermediaries. Insurance intermediaries will now be subject to more stringent standards and requirements regulating their day-to-day operations and conduct. There is some alignment now with the regulation of the banking and securities industries to which reference can be made. Review and implementation of improved internal controls and policies, and risk management systems, are clearly a priority.

The IA's regulation of authorised insurers now includes requiring prior approval for appointment or change of key persons responsible for the Intermediary Management Function. The IA must be satisfied that the individual(s) to be appointed are fit and proper. Regulation of the control function including the Intermediary Management Function is comparable to the SFC's manager in charge regime.

As for the licensing of insurance intermediaries, under the new activity-based regime, a person who carries on a "regulated activity" must be licensed. The term "regulated activity" has broad coverage, and includes inviting or inducing a person to make a material decision, or giving regulated advice on various matters such as in relation to a contract of insurance, application or proposal; issuance, continuance or renewal, or change in any term or condition of the same, as well as the making or settlement of an insurance claim. A person who gives his or her personal opinion on these matters, even on a voluntary basis, will be caught.

In terms of the importance of corporate governance controls and procedures, senior management and responsible officers should review section IX of Codes of Conduct for Licensed Insurance Brokers and Licensed Insurance Agents (collectively, the Codes), which set out expected standards.

The Codes define "senior management" to mean the persons performing the functions of managing the regulated activities carried on by a licensed insurance broker company or agency. Such definition will include individuals in a large broker company or agency who are responsible for oversight of a particular business line or function relating to the regulated activities carried on. The title and/or position of the relevant individual is not conclusive. Exposure to potential liability remains high unless clear guidance and education on the statutory requirements are provided to staff members, who may not always appreciate that they are regarded as senior management by regulators.

The Penalty Guideline equally highlights the importance of internal controls. The Penalty Guideline provides that one of the relevant factors in determining the level of penalty in the case of misconduct is whether it reveals serious or systemic weaknesses of a firm's internal control procedures and risk management systems.

Senior management should also be aware that an offence committed by a body corporate is presumed to have been committed with the consent or connivance of, or to be attributable to neglect or omission on the part of, relevant individuals including responsible officers or key persons in control functions concerned in the management of the body corporate. Therefore, unlike in other general cases where the regulators have the burden of proof in respect of an alleged offence, the person concerned bears the burden of proof and has to provide sufficient evidence to rebut the presumption. In addition, the prosecution must not be able to prove the contrary beyond reasonable doubt in order for the presumption to be rebutted.

Responsible officers and senior management need to take note of the changes taking place given the potential liabilities involved. It is now therefore important to review and consider internal control procedures and risk management systems to ensure compliance with the new requirements.

Raising the Bar

New Insurance Authority Fit and Proper and CPD Guidelines

On 23 September 2019, two new guidelines published by the Insurance Authority (IA), namely, Guideline on Fit and Proper Criteria for Licensed Insurance Intermediaries under the Insurance Ordinance (F&P Guideline) and Guideline on Continuing Professional Development for Licensed Insurance Intermediaries (CPD Guideline) came into effect.

The fit and proper criteria applicable to licensed insurance agencies, broker companies and relevant individuals is provided for in section 64ZZA of the Insurance Ordinance (Cap 41) (the Ordinance) as amended. This affects the grant and renewal of insurance intermediary licenses, as well as license conditions, and the approval of responsible officers. Section 64ZZA sets out a wide range of matters to be considered, including reputation, character, reliability, honesty and integrity; financial status or solvency; corporate governance structure, and internal controls and risk management. The list is non-exhaustive.

Paragraphs 5 and 6 of the F&P Guideline provide more practical guidance on how the wide range of matters in section 64ZZA will be assessed by the IA. However, paragraph 4.7 of the F&P Guideline specifically reserves the IA's discretion to grant approval even if a person fails to meet any of the criteria.

Pursuant to the CPD Guideline, the modified requirements increase the minimum number of CPD hours from 10 to 15 and provide for a compulsory 3 CPD hours on 'Ethics or Regulations' topics. A failure to comply may adversely affect fitness and properness. However, the CPD requirements will only take effect at the start of the CPD assessment period beginning 1 August 2021.

These changes received a positive response from the industry in general, and are expected to enhance the competence of insurance intermediaries.

Sanctions with Chinese Characteristics

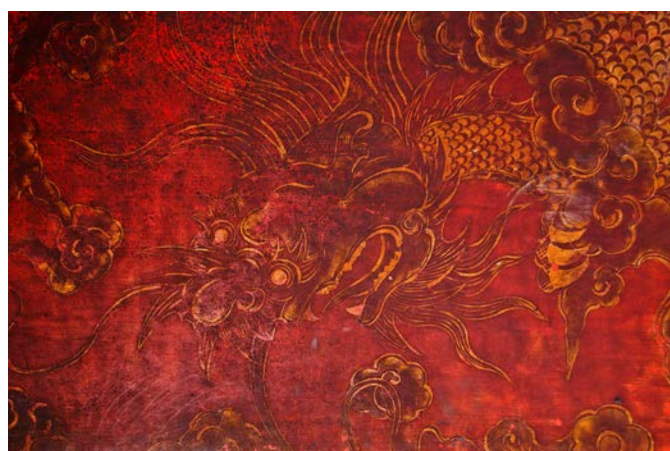
PRC Government Threatens to Brand "Unreliable" Foreign Companies

China's Ministry of Commerce (MOFCOM) announced a new Unreliable Entity List (UEL) on 31 May 2019. The purpose of the UEL is to identify foreign entities that are determined to have failed to abide by market rules in China or discriminated against Chinese companies for non-commercial purposes. Examples of discriminatory measures include boycotts, cutting off supplies, and transactions restricting or blocking trade.

In the words of the Chinese government, the UEL is a response to certain countries (eg the United States) that have abused the concept of national security; applied excessive export control measures, or utilised so-called "long arm" jurisdiction. In particular, references to long arm jurisdiction have been used by the Chinese government to challenge the use of extraterritorial sanctions by the United States against Chinese companies.

A company on the UEL will become subject to legal and administrative measures imposed by MOFCOM. Based on public comments, MOFCOM is expected to advise the public to be cautious of designated foreign entities.

The name of the UEL is similar to the US "Entity List," which is a familiar instrument to export control practitioners. However, it remains uncertain whether the UEL will function like the Entity List, as official regulations on UEL procedures and the actual UEL are not yet public.



Foreign entities are expected to have the opportunity to object to their inclusion on the UEL and the application of the UEL to their and their Chinese counterparts' businesses. It is not clear whether this opportunity will be given prior to listing or as part of a post facto delisting.

As MOFCOM provides more guidance, companies doing business in China may want to consider how compliance with foreign restrictions, such as economic sanctions, may impact their activities in China in light of the potential of a UEL listing in the future.

North Korea Front

Non-US Banks subject to US Jurisdiction are Required to Produce Customer Documents in Sanctions Case

On 18 March 2019, the US District Court for the District of Columbia (the District Court) unsealed a memorandum opinion ordering three Chinese banks (the Chinese Banks) to comply with law enforcement subpoenas issued in part under the USA PATRIOT Act. On 15 May 2019, the District Court unsealed a further memorandum opinion holding the Chinese Banks in contempt and fining them US$50,000 per day for failing to comply with a 28 March 2019 deadline for responding to the subpoenas. The US Court of Appeals for the District of Columbia (the Court of Appeals) has since affirmed the orders, but the final outcome of the case is still pending.

The subpoenas sought records relating to a Hong Kong based customer suspected of acting as a front company for North Korea.

The Court of Appeals held that there was jurisdiction because two of the Chinese Banks had expressly consented to jurisdiction when they opened branches in the US. The third Chinese Bank, through its US-based correspondent account, was subject to jurisdiction under the USA PATRIOT Act.

The Chinese banks had originally resisted the subpoenas to avoid breaking Chinese bank secrecy rules, which prohibit them from disclosing information without the PRC government's permission. The Court of Appeals found that the US Department of Justice (DOJ) was not required to use the US-China Mutual Legal Assistance Agreement (MLAA) for obtaining such permission, after considering the US government's arguments that the MLAA was futile.

The lesson: US law requires banks to cooperate with law enforcement subpoenas concerning US branches or correspondent accounts even when the target of an investigation is a non-US customer. In other words, compliance with US law enforcement subpoenas is not optional. That said, non-US banks are not necessarily compelled to breach their home laws. The US government routinely exchanges information with foreign governments through mutual legal assistance treaties; good faith cooperation often leads to compromise. In this case, it is up to the Chinese Banks or the Chinese government to navigate towards a workable solution with their US counterparts.

Asian Companies on Notice

OFAC Publishes Compliance Framework Guidelines

On 2 May 2019, the US Office of Foreign Assets Control (OFAC) published "A Framework for OFAC Compliance Commitments" (Framework) to give companies guidance on building a sanctions compliance programme.

The Framework is optional in theory but not in practice. Failing to follow the Framework will have a detrimental impact in the event of OFAC enforcement. For example, companies that ignore the Framework, may risk a harsher penalty in settlement negotiations. In particular, OFAC will consider the Framework when evaluating factors under its Enforcement Guidelines, which include management involvement in or knowledge of sanctions violations, as well as whether violations are "egregious" or deserving of mitigating credit.

OFAC makes clear that the Framework is not a checklist, and a sanctions compliance programme should be tailored to the relevant company's risks.

The Framework outlines the five essential components of an effective sanctions compliance programme:

- ***Management commitment***. Management must promote a culture of compliance by providing adequate resources and technology and ensuring compliance staff have regular access to management.
- ***Sanctions risk assessment***. Risks associated with geographies; products and services; supply chains, and customers should be considered periodically.
- ***Internal controls***. These include regularly updated written policies and procedures, record-keeping and other measures to mitigate sanctions risks.
- ***Testing and auditing***. This is to ensure that the internal controls are functioning as designed. Tests should be independent. Results of testing and auditing should lead to improvements in the sanctions compliance programme.
- ***Training***. To be conducted at least annually based on the risk assessment and the results of testing and auditing.

The Framework comes at a time when OFAC is focused on investigation and enforcement in Asia, for example, in relation to violations of Iran and North Korea sanctions programmes. The Framework puts companies on notice that OFAC expects them to adopt compliance programmes, especially in high risk industries.

Not a Redevelopment Business

HKCFA Definitively Rules in Favour of Taxpayer on Profits Tax

In *Perfekta Enterprises Limited v Commissioner of Inland Revenue* [2019] HKCFA 25, which was handed down on 12 July 2019, the Court of Final Appeal considered whether the appellant taxpayer was engaged in a trade or business and if so, liable to profits tax. The taxpayer had signed a redevelopment agreement with a developer and received an initial payment of HK$165,104,100 as consideration for the right to redevelop land.

The land was originally owned by the taxpayer, which used it for manufacturing purposes. The manufacturing later moved to China. To enhance the value of the land, the taxpayer obtained planning permission to develop a composite industrial and office building, government consent for variation of the lease and approval of building plans. The taxpayer then entered into the redevelopment agreement so that its subsidiary could enter into a joint venture for redevelopment of the land. The land was later transferred to the taxpayer's subsidiary. The subsidiary then entered into another agreement with the developer for the carrying out of the redevelopment joint venture, whereby the profits were to be shared equally.

It was common ground that the land had originally been held by the taxpayer as a long term capital asset. In order for the initial payment to be taxable, it was necessary for the court to find a change of intention such that the intention of the taxpayer became to dispose of the land as part of a trade or business. This was a question of fact.

The CFA unanimously held the taxpayer had disposed of the land as a capital asset. The fact that its subsidiary, a separate legal entity, was to redevelop the land in a trading joint venture on its own account was significant. The subsidiary became the owner of the land and entered into a separate agreement with the developer to which the taxpayer was not a party. The CFA further held that the steps taken by the taxpayer to enhance the value of the land such as obtaining planning permission were consistent with disposal of the land as a capital asset at the best price and did not necessarily evidence an intention to trade.

The taxpayer's intentions were also apparent from the documentation including the minutes evidencing the taxpayer's decision to dispose of the land and the terms of the redevelopment agreement itself. The decision shows the importance of a taxpayer carefully structuring the transaction and wording the contractual documentation to evidence its intentions.

Squatting Target

PRC Trademark Law Amended to Address Registrations Filed in Bad Faith

China has amended its Trademark Law with the amendments to come into effect on 1 November 2019. The amendments concern trademarks filed in bad faith, targeting the squatting problem at the legislative level. The amendments also enhance penalties to deter infringement.

Specific provision has now been added to the Trademark Law (Article 4) that bad faith applications without intent to use shall be rejected. Other measures to tackle or curb the squatting problem include:

- While China remains a "first to file" jurisdiction such that showing use or intent is generally not required, the amendment to Article 4 allows examiners to reject bad faith applications at the examination stage.
- Bad faith applications with no intent to use is a ground for opposition or cancellation (Articles 33 and 44).
- Trademark agencies may not represent applicants where they know or should have known that the application is in bad faith with no intent to use with breach subjecting them to administrative penalties (Article 68).

In terms of amendments relating to damages for infringement, the upper limit of statutory damages for trade mark infringement has been increased from RMB 3 million to 5 million. Statutory damages are awarded where actual damages cannot be established. Since China has no discovery regime, statutory damages are sought and awarded in many cases.

For wilful trademark infringement, the multiplier has increased from three to five times damages.

Whilst the amendments show a clear intent on the part of the Chinese legislature to deal with the issue of bad faith applications without intent to use, the problem of imitation or copycat brands remains. Further, it remains unclear how the amendments will affect the strategy of legitimate trade mark owners filing defensive registrations. Filing and enforcement strategies should be revisited in light of the amendments.

Race for New Technology

Liberalisation of China's Technology Transfer Rules

In March 2019, amendments to the Chinese Administrative Regulation on Technology Import and Export (TIER) came into effect. The amendments remove various requirements applying to inbound technology arrangements. In the past, the requirements lacked guidance from the authorities and the courts, and caused confusion. They were also criticised by the US for forcing technology transfer.

The requirements in TIER that have now been removed include:

- A foreign technology owner is no longer required to indemnify a Chinese counterparty for infringement of third party IP in use of the owner's technology (Article 24(3)).
- A Chinese licensee of foreign owned technology no longer has automatic ownership of improvements made by it and parties are free to contract in this regard including to provide for grant back to the licensor (Article 27), but note further discussion below.
- The restrictions that a foreign licensor in a technology import contract with a Chinese licensee may not impose have been removed (Article 29), but note further discussion below.

The deletion of Article 29, TIER is somewhat superfluous, as certain provisions of the Chinese Contract Law still apply. Under Article 329 of the same, contracts that illegally monopolise technology and impede technological progress are void. Article 329 has been interpreted by Article 10 of the Judicial Interpretation concerning the Adjudication of Technology Contract Disputes (Technology Contract Judicial Interpretation). Article 10 lists restrictions that a foreign licensor may not impose, which in large part mirror those in the deleted Article 29, TIER, including:

- On the licensee's rights to improve the technology or use improved technology;
- On procurement of similar or competing technology;
- On exploitation of the technology in terms of its quantity, product type, price, sales channel or export market if unreasonable;
- Purchase or acceptance of unnecessary technology, raw materials, products, equipment, services or personnel;
- On the source of raw materials, parts, products or equipment used by the licensee if unreasonable.

Further, in relation to deletion of Article 27, TIER and allowing for grant back, whilst the Contract Law and Article 10 of the Technology Contract Judicial Interpretation do not categorically prohibit the same, Article 10 provides that grant backs that impose unfair conditions are not permissible including where no compensation is provided or non-reciprocal transfer of technology is involved.

The TIER amendments are welcome in the context of the race to control new or emerging technologies. However, caution should still be exercised when entering into a technology contract with a Chinese party in terms of ensuring compliance with mandatory provisions of Chinese law including Article 329, Contract Law. To justify a grant back clause, it is crucial to enhance reciprocity and allow access to improvements by the licensee.

Hong Kong Dawn

Competition Tribunal's First Decisions: Six Key Takeaways

On 17 May 2019, the Competition Tribunal handed down judgment in Hong Kong's first two competition cases, *Competition Commission v Nutanix Hong Kong Ltd* [2019] HKCT 2 and *Competition Commission v W Hing Construction Co Ltd* [2019] HKCT 3. They involved bid rigging, market sharing and price fixing. The Tribunal laid down important principles for the interpretation and application of the Competition Ordinance. The two cases are significant to Hong Kong now building its own body of precedents in competition law.

Some key takeaways from the decisions are:

- ***Standard of proof***. The standard of proof on the part of the Competition Commission is the criminal standard, namely, beyond reasonable doubt, at least where the Commission seeks a pecuniary penalty.
- In relation to any defence to justify conduct on the basis of efficiency, the standard of proof on the part of a respondent is on the balance of probabilities.
- ***Liability for others' conduct***. For an employer to be answerable for an employee's conduct, there must be a sufficient connection between the acts of the employee and the employer such that the employer put the employee in a position to do the kind of acts in question. An employer cannot hide behind lack of authorisation or knowledge.
- It is a question of fact whether a contractor and its subcontractors are considered a single undertaking such that all are liable for contraventions of the Competition Ordinance.

- ***Warning notice***. A warning notice (which is a unique feature of the Hong Kong competition law regime) is only required where the Competition Commission has reasonable cause to believe that serious anti-competitive conduct is *not* involved. This requires the Commission to consider each element of the relevant conduct such as bid rigging and whether its has reasonable cause to believe it is involved. (Bid rigging constitutes serious anti-competitive conduct and if involved, a warning notice would not be required.)
- ***Object test***. The First Conduct Rule prohibits conduct where the object or effect is to harm competition in Hong Kong. In respect of the First Conduct Rule, the "by object" test involves examining whether an agreement entails a sufficient degree of harm to competition such that no further examination is required as to anti-competitive effects. An agreement need not contain "typical" features such as of bid-rigging for anti-competitive objects to be established.

Fast Forward from Longlide

State Council Permits Foreign Arbitral Institutions to Administer Arbitrations in Mainland China

On 6 August 2019, the State Council of China expanded the China (Shanghai) Pilot Free Trade Zone (Shanghai FTZ) to include the Lingang New Area and also announced a plan for the area (Plan). One significant element of the Plan is to allow, for the first time, reputable foreign arbitral institutions (likely to include ICC, HKIAC and SIAC) to establish operating offices in the Lingang New Area and administer civil and commercial arbitrations in China.

The permission for foreign arbitral institutions to establish operating offices in the Lingang New Area could be a cornerstone in the integration of international arbitration into the existing legal framework under the PRC Arbitration Law. In the landmark decision of *Anhui Longlide Packing and Printing Co.,*

Ltd v BP Agnati S.R.L. ([2013] Min Si Ta Zi No.13), the Supreme People's Court of China affirmed the validity of an arbitration agreement under PRC law which provided for arbitration administered by the ICC (a foreign arbitral institution) in Shanghai. However, that case left uncertain the supervisory jurisdiction of any court over such an arbitration and the enforceability of any award rendered pursuant to such an arbitration agreement.

Pursuant to the Plan, upon foreign arbitral institutions registering with the local judicial administrative authority in a manner similar to that for Mainland Chinese arbitral institutions under the PRC Arbitration Law, the relevant Mainland Chinese courts could potentially exercise judicial oversight and provide support for arbitrations administered by those registered foreign arbitral institutions.

It remains to be seen which reputable foreign arbitral institutions will be permitted to establish operations in the Lingang New Area pursuant to the Plan, and what the role and approach of the supervisory courts will be. In any event, the Plan represents a significant and positive step in the development of international commercial arbitration in Mainland China. It will present new opportunities to foreign arbitral institutions and more options for parties engaged in China-related commercial transactions.

Hong Kong world first

Interim Measures to become Available from PRC Courts in Aid of Hong Kong Arbitrations pursuant to Mutual Assistance Arrangement

On 1 October 2019, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the Arrangement) came into effect after being signed on 2 April 2019.

Under existing Hong Kong law, Hong Kong courts may grant interim relief in support of arbitrations seated outside Hong Kong including in Mainland China. The Arrangement does not change this. As such, the significance of the Arrangement mainly lies in parties of certain arbitrations seated in Hong Kong having the ability to access the PRC courts for interim measures in aid thereof. Hong Kong is the first seat of arbitration outside Mainland China with such access.

The Arrangement applies to both arbitrations commenced after the effective date and those commenced prior, but still pending after the effective date. It applies to arbitrations seated in Hong Kong administered by institutions mutually acknowledged by the Supreme People's Court of the PRC (SPC) and the Department of Justice of Hong Kong (HKDoJ). These currently include:

- Hong Kong International Arbitration Centre (HKIAC);
- International Court of Arbitration of the International Chamber of Commerce – Asia Office (ICC); and
- China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center (CIETAC HK).
- South China International Arbitration Center (HK);
- Hong Kong Maritime Arbitration Group; and
- eBRAM International Online Dispute Resolution Centre (eBRAM stands for Electronic Business Related Arbitration and Mediation).

The interim relief that the PRC court may grant follows existing relief available including property preservation, evidence preservation and conduct preservation (similar to prohibitory and mandatory injunctions). Application for interim measures may be made either in advance of the commencement of arbitration or in the course of arbitration. It is to be made to the competent PRC court, namely, where the party subject to the application is domiciled or where the asset or evidence subject to preservation is located.

Parties valuing recourse to the PRC courts for interim relief such as those contracting with Mainland Chinese entities or dealing with assets or projects in Mainland China were previously constrained to choose onshore arbitration or litigation. Under the Arrangement (and subject to applicable requirements), these parties may now have the option of administered arbitration in Hong Kong.

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C H A N C E

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