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Editorial

This Spring edition of the CU Review features the first of two articles on exclusion clauses, a subject which can affect the pricing of risk and therefore the contract price, and raise temperatures in all seasons. Grateful thanks once again to Campos Cheng for the cartoon.

This edition also includes a second article on the Rewrite of the Companies Ordinance – this one from the administrative and structural viewpoints, and the second important Court of Final Appeal case on contract formation – *The World Food Fair Case*.

You may have been affected and perhaps benefited by the recently enacted Unsolicited Electronic Messages Ordinance and our second article on this Ordinance addresses issues such as the threshold words “in the course of or in the furtherance of any business”.

Last year Counsel in the Commercial Unit attended the 15th Commonwealth Law Conference which was held in Nairobi, Kenya, at a time of relative peace compared with the current state of civil unrest following the announcement of the result of elections that were held in December 2007. Counsel was among the 200 lawyers who attended the Conference with the theme “Governance, Globalisation and Commonwealth”. Although Hong Kong is no longer a Commonwealth country, many of the issues affecting Commonwealth law equally apply to a common law system which Hong Kong still practises. The Conference featured issues which included human rights, law in a globalised economy, governance and the rule of law. “Due Diligence in Capital Markets and other Business Transactions” and “International Financial Markets” were of particular relevance to commercial law. For more information, please visit the Conference website :-

<http://www.commonwealthlaw2007.org/wd90awp/wd90awp.exe/connect/LSK>

CHARLES BARR

Notes:

Can you exclude your own liability? Can you stop the other party from excluding his liability? Can you get value for money?

One matter which will raise temperatures in all seasons is where a contracting party charges fees for providing goods or services on condition he accepts no responsibility for the goods or services provided. Is this legitimate? Can you do it and can you prevent the other party from doing so?

Exemption clauses are frequently used in contracts to exclude or limit liability for negligence or breach of contract. For example, a warehouse contract may provide that the warehouseman “shall not be liable for any loss or damage in respect of goods entrusted to it in the course of its business occasioned by the negligence, wrongful act or default of itself, their servants or agents”¹. Similarly (e.g.) in share underwriting agreements (where the

exclusions are extensive) and software licences.

The use of exemption clauses often leads to abuse² particularly where the parties do not possess equal bargaining strength. The Control of Exemption Clauses Ordinance, Cap. 71 (the Ordinance) was enacted in 1989 to restore some equality of arms by forbidding certain exclusion clauses and permitting others if “reasonable”. This article focuses on the statutory provisions in the Ordinance. The next issue of CU Review will deal with the common law principles and case law.

Does the Ordinance concern the Government?

The Ordinance is concerned with

terms affecting “business liability”, that is liability arising from things done or to be done in the course of a business, or from the occupation of business premises. “Business” includes a profession and the activities of a public body, a public authority, or a board, commission, committee or other body appointed by the Chief Executive or Government³. “Public body” is defined in the Interpretation and General Clauses Ordinance, Cap. 1 to include “any department of the Government”. Government and public bodies may therefore be affected by the Ordinance in cases such as providing drugs for medical purposes and providing access to land (but only where no interest in land is created, transferred or terminated: see Schedule 1 of the Ordinance, paragraph 1(b)).

“The use of exemption clauses often leads to abuse particularly where the parties do not possess equal bargaining strength.”

Liability for negligence

A contract cannot exclude or restrict a person’s liability for death or personal injury resulting from negligence.⁴ In the case of other loss or damage arising from negligence, the exemption clause will be effective only if it satisfies the requirement of reasonableness.⁵

Negligence is defined in the Ordinance to mean the breach –

- (a) of any obligation, arising from the express or implied terms of a contract, to take

reasonable care or exercise reasonable skill in the performance of the contract;

- (b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);
- (c) of the common duty of care imposed by the Occupiers Liability Ordinance, Cap. 314 – the common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the

premises for the purposes for which he is invited or permitted by the occupier to be there.⁶

Liability arising from contract

With regard to consumer contracts (i.e. where a person is “dealing as consumer”) or where the contract is on the other’s “written standard terms of business”, the exemption clauses will be subject to the Ordinance.

A person “deals as a consumer” if he does not make (or hold himself out as making) the contract in the

course of a business, and the other party does make the contract in the course of a business. If the contract is for the supply of goods, there is the additional requirement that they must be of a type ordinarily supplied for private use or consumption.

A party who is in breach of the contract cannot by reference to any contract term exclude or restrict his liability in respect of the breach⁷ or render a contractual performance substantially different from that which was reasonably expected of him or to render no performance at all unless such term satisfies the requirement of reasonableness.⁸

Terms implied by law in Sale of Goods

Certain terms are implied into contracts for the sale of goods. The implied undertaking as to title in contracts for the sale or supply of goods cannot be excluded or restricted.⁹ When dealing with a consumer, liability for breach of the seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose cannot be excluded or restricted; whereas when dealing with businesses, such liability may be excluded or restricted if it is reasonable to do so.¹⁰

Guarantee of consumer goods

In the case of consumer goods, where the loss or damage is caused by the negligence of the manufacturer or distributor and arises from the goods proving defective while in consumer use, liability for the loss or damage cannot be excluded or restricted by reference to any "guarantee" that the defects will be made good by complete or partial replacement, or by repair or monetary compensation.¹¹

Unreasonable indemnity

An indemnity clause in a consumer contract which provides that the consumer is to indemnify the other party for any liability of the latter in the performance of the contract is also subject to the requirement of reasonableness.¹² For example, where a person dealing as a consumer hires a car with a driver provided by the owner and the driver causes damage to a third party, any indemnity clause providing for the hirer to indemnify the owner of the car will be subject to the reasonableness test.

Misrepresentation

A misrepresentation is an untrue statement of fact that causes a party to enter into a contract. Any term purporting to exclude or restrict liability for misrepresentation¹³ must be fair and reasonable having regard to the circumstances which were known or ought reasonably to have been known or in the contemplation of the parties when the contract was made. This applies to contracts of all types.

The reasonableness test

The requirement of reasonableness gives rise to a degree of uncertainty as to when an exemption clause will be upheld. To reduce this uncertainty, section 3 of the Ordinance sets out guidelines for determining reasonableness. Reasonableness is to be determined by reference to the time when the contract was made. The onus of proof is on the person seeking to rely on the clause. Where a person seeks to limit his liability to a specified sum of money, regard will be made to his resources and whether he can cover his liability by insurance.¹⁴ Where the contract is for the supply of goods, there are further guidelines for determining reasonableness in Schedule 2 of the

Practical Tips in drafting or avoiding exemption clauses

- Care must be taken to ensure that the exclusion or restriction is drafted in such a way that it is reasonable in the circumstances at the time when the contract is made. For instance, the exclusion or restriction should be expressed in a language which the person adversely affected by it understands¹⁹. Consideration should be given to insurance as an alternative to exclusion of liability. Records of discussions, negotiations and correspondence should be prepared contemporaneously and kept safely.
- To exclude or restrict liability for breach of the obligations under sections 15, 16 or 17 of the Sale of Goods Ordinance in a contract for sale of goods (i.e. obligations as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose) which do not involve a party dealing as consumer, care must be taken to make the clause reasonable having regard to the guidelines in Schedule 2 of the Ordinance – see the above section on "Terms implied by law in Sale of Goods".
- In Government procurements, in order to protect the Government against a contractor / consultant excluding or limiting its liability in contract, tort or otherwise, a no-exclusion clause in the consulting brief or invitation to tender might read:

Ordinance. These are: the relative bargaining positions of the parties; any opportunity of the customer to enter into a similar contract with other persons without having to accept a similar term; the customer's knowledge or means of knowledge of the existence and extent of the term; where the term applies if some condition is not complied with, whether compliance with that condition is practicable; whether the goods were manufactured, processed or adapted to the special order of the customer.

Exclusion from the Ordinance

The provisions regarding liability for negligence and breach of contract, etc in sections 7, 8 and 9 of the Ordinance do not apply to those contracts set out in Schedule 1 of the Ordinance. These include contracts of insurance, contracts relating to the creation, transfer or termination of an interest in land or in intellectual property, or to formation or dissolution of a company, or the creation or transfer of securities. For contracts for international carriage of goods, any exemption of liability for death or personal injury arising from negligence is prohibited. In any other case for such contracts, the Ordinance will generally not apply unless the person is dealing as consumer.

International supply contracts (as defined in the Ordinance) are exempted from the requirements prohibiting unreasonable exclusion or indemnity clauses¹⁵.

The main provisions in the Ordinance do not apply where the proper law of the contract is Hong Kong only by reason of the choice of the parties (and apart from that choice would be the law of the jurisdiction other than Hong

Kong)¹⁶. On the other hand, the Ordinance applies, notwithstanding any choice of foreign law clause, where that choice of law clause appears to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Ordinance¹⁷.

How about unconscionable bargains?

In addition to the control over exemption clauses by the Ordinance, the Unconscionable Contracts Ordinance, Cap. 458 further protects a party dealing as consumer. Where the court finds the consumer contract or any part of it to have been unconscionable in the circumstances relating to the contract at the time it was made, the court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable part, or limit the application of, or revise or alter, any unconscionable part.¹⁸

¹ *Spurling v Bradshaw* [1956] 1 WLR 461

² Para 4.10 of the Report on the Control of Exemption Clauses by the Law Reform Commission of Hong Kong (1986)

³ Section 2(1) of the Ordinance

⁴ Section 7(1) of the Ordinance

⁵ Section 7(2) of the Ordinance

⁶ Section 3(2) of the Occupiers Liability Ordinance, Cap. 314

⁷ Section 8(2)(a) of the Ordinance

⁸ Section 8(2)(b) of the Ordinance

⁹ Section 11(1) of the Ordinance

¹⁰ Section 11 of the Ordinance

¹¹ Section 10 of the Ordinance

¹² Section 9 of the Ordinance

¹³ Section 4 of the Misrepresentation Ordinance, Cap. 284 and section 3(1) of the Ordinance

¹⁴ Section 3 of the Ordinance

¹⁵ Section 16 of the Ordinance

¹⁶ Section 17(1) of the Ordinance

¹⁷ Section 17(2)(a) of the Ordinance

¹⁸ Section 5 of the Unconscionable Contracts Ordinance, Cap. 458

¹⁹ Section 3(4) of the Ordinance

(1) "Restrictions or limitations proposed by a contractor/consultant which seek to limit or avoid the responsibility of the contractor/consultant in contract, tort or otherwise for failing to exercise the skill and care required by the contract or reasonably expected of the contractor / consultant may render its proposal non-compliant in the absolute discretion of the Government."

(2) "The Government will not provide any indemnity to the contractor/consultant in any circumstances."

AGATHA DING

The Companies Ordinance Rewrite (COR) – Part II : From decision to lift-off

In Part I of The Companies Ordinance Rewrite¹, the history of the Companies Ordinance (Cap. 32) (CO) has been traced from the time it was first enacted back in 1865 up to the current rewrite process which began in 2006. What may appear to have been a seamless transition from the decision to rewrite to the commencement of the rewrite itself required many hours of preparatory work to make lift-off possible. In this article, the CU from its own perspective (not necessarily an

identical perspective to other bureaux and departments) would like to share some of its experience with those who may have a similarly huge task in rewriting a major piece of legislation in the future. Although no precedent for other major projects, the instructing Bureau first contacted the Department of Justice about resource implications in July 2003, and the first Steering Committee was held three years later in June 2006.

Planning

With any major project, planning plays an important role. It is important perhaps critical that the planning is done in a spirit of collaboration – the knowledge required at this stage is often reposed in different bureaux (including CSB) and departments and extends to technical, professional and administrative matters. The main logistical issues that required attention can be categorised into two types, namely, (a) administrative; and (b) structural.

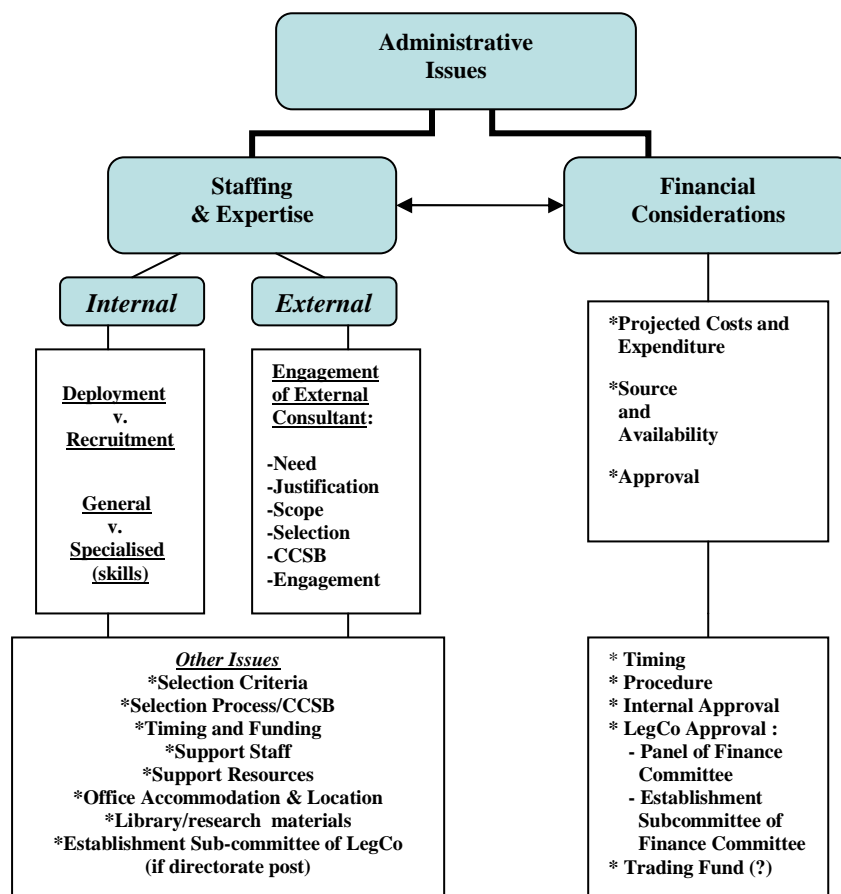


Diagram 1: Administrative Issues

Administrative Issues

The two main areas of concern in this category are staffing and finance. They are inter-dependent and closely interlinked. Ensuring that sufficient suitable staffing and funding will be available for the whole duration of the review process is an important task. Internal deployment is a possibility but possible strain and negative impact on the workforce should be carefully assessed. Recruitment may be necessary. In which case, recruitment criteria, the selection process and funding would have to be systematically addressed.

Note the trilogy: Posts, Money, and Persons (to fund and fill the Posts).

All three are required and therefore consideration must be given at the beginning, so as to minimise delay and frustration later, to CSB’s requirements, the recruitment and status of non-permanent residents in any selection exercise and whether dispensation from the Chinese language requirement may be justified (as was the case in COR). The Establishment Subcommittee of Finance Committee of the Legislative Council will need to approve directorate posts – this requires detailed justification and in some cases the deletion of a corresponding directorate post; non-directorate posts are easier to create. The engagement of external experts may also be appropriate where specialised areas

such as law and economics are to be reviewed. In engaging external consultants, issues to be addressed would include the need to follow the Central Consultants Selection Board (CCSB) procedures (in most cases, but the Department of Justice is not required to do so and CCSB procedures are not engaged if the consultancy fee is expected to be less than (currently) HK\$1.3 million), the determination of the scope of the consultancy, the selection criteria and process, and the proposed fees and funding. Diagram 1 sets out a summary of the main administrative issues in this regard. Legal advice was given that COR fell within the scope of the trading fund

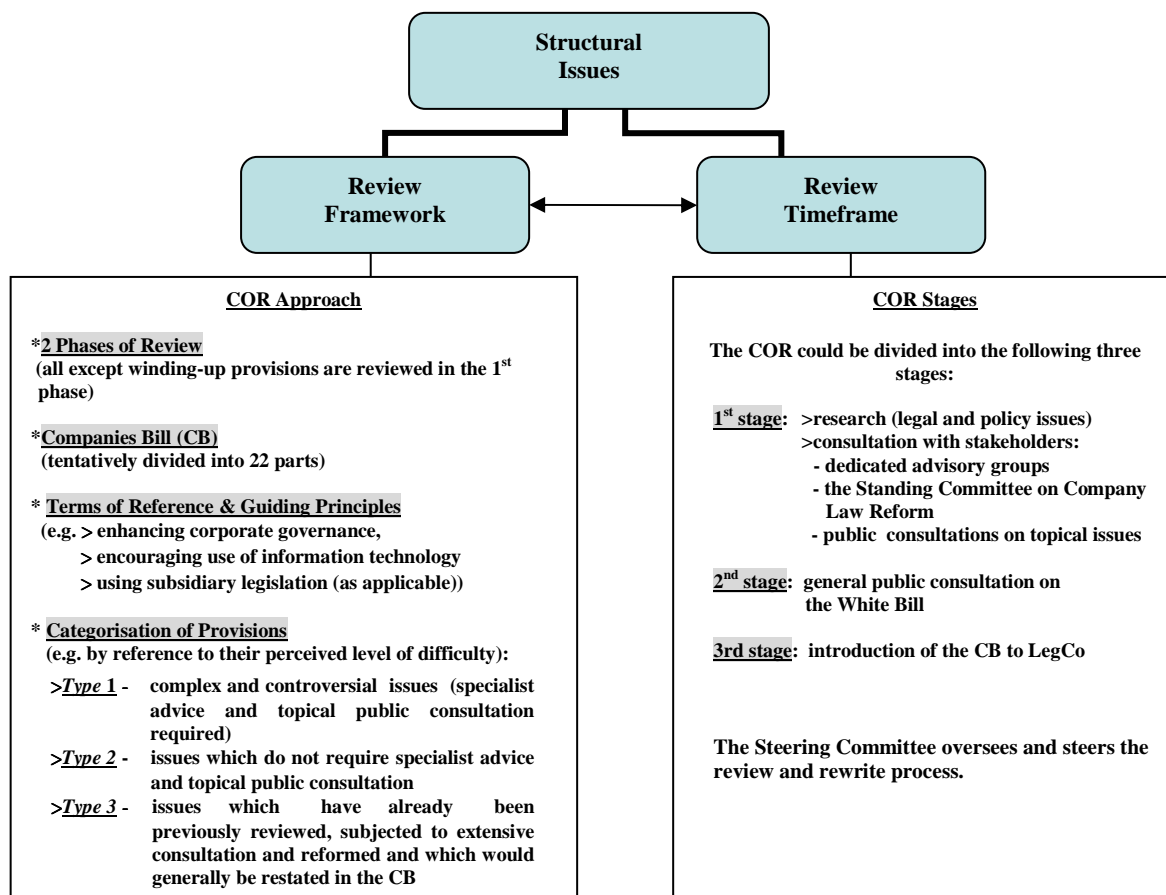


Diagram 2: Structural Issues

provisions applicable to the Companies Registry with the result that the expenses of COR could be defrayed from that fund with a corresponding reduction in any payment to general revenue account.

Structural Issues

The CO is one of the longest pieces of legislation in Hong Kong. The legislation is divided into fourteen parts and twenty-six schedules covering a variety of subjects relating to companies. As such, it was important to formulate clearly the review process from the beginning. The structure of the review process could be divided into (a) the review framework and

(b) the review timeframe. Again, these two issues are closely interlinked.

In the formulation of the review framework, the issues which would need to be addressed include the establishment of terms of reference and guiding principles, identifying levels of perceived difficulties and setting out a tentative structure of the proposed legislation. The review timeframe is another very important aspect of planning the review structure. Thorough research into and consideration of all relevant legal and policy issues as well as sufficient allocation of time for detailed discussion and public consultations on and the drafting of the proposed

legislation need to be carefully considered and planned. Diagram 2 provides examples of how these issues have been addressed in the COR.

The logistics of administrative and structural issues should be meticulously planned from the outset. A well defined structural framework will provide the essential foundation upon which a solid review process and rewrite can be built. However time will tell: “It is easier to begin well than to finish well” (Plautus).

CHARLES BARR

¹ CU Review Summer 2007

Highlights of the Unsolicited Electronic Messages Ordinance – Part II

A glossary of some of technical terms in the Unsolicited Electronic Messages Ordinance, Cap. 593 (UEMO)

“Address-harvesting software” means software that is specifically designed or marketed for use for (a) searching the Internet or a public telecommunications network for electronic addresses; and (b) collecting, compiling, capturing or otherwise obtaining those electronic addresses.

“Domain Name” means a string (any sequence or combination of letters, characters, numbers or symbols of any language) registered with or allocated or assigned by a domain name authority as part of an electronic address on the Internet.

“Electronic address” means any sequence or combination of letters, characters, numbers or symbols of any language used to specify a source or destination of an electronic message including an electronic mail address, Internet protocol address, instant messaging account name, telephone number and facsimile number.

“Electronic message” is a message sent over a public telecommunications service to an electronic address including (a) a text, voice, sound, image or video message; and (b) a message combining text, voice, sound, images or video.

“Harvested-address list” means (a) a list of electronic addresses; (b) a collection of electronic addresses; or (c) a compilation of electronic addresses, where the production of the list, collection or compilation is, to any extent, directly or indirectly attributable to the use of address-harvesting software.

Operation of UEMO

“In the course of or in the furtherance of any business”

UEMO only regulates a person who sends a “commercial electronic message” (CEM) that has a Hong Kong link.

An electronic message is a CEM if (1) it is an electronic message for any of the purposes set out in paragraphs (a) to (f) in the

definition in section 2(1) of UEMO; and (2) it is an electronic message “in the course of or in the furtherance of any business”.

The definition in section 2(1)(a)-(f) of UEMO covers situations where the purpose or one of the purposes is to offer to supply goods, services, facilities or land, or to provide business or investment opportunities, or to advertise or promote goods, services, facilities, land or business or investment opportunities. This is the commercial purpose which if done “in the course of or in the furtherance of any business” will make the electronic message a commercial electronic message or CEM.

“Business” in section 2 is defined non-exclusively to include “a trade or profession”.

Generally, the word “business” has a very wide meaning. In *Rolls v Miller* [1884] 27 Ch.D. 71 at 88, Lindely L.J. said that the word “business” means “almost anything which is an occupation as distinguished from pleasure – anything which is an occupation or duty which requires attention to business”.

However, the word “business” must be read in context namely the commercial purpose referred to above. The commercial purpose sets the scene and places a limitation on what might otherwise be the wider or unrestricted meaning to the word “business”.

For example, the term “business” is

defined in section 94(1) of the UK Value Added Tax Act 1994 (VAT Act) to include “any trade, profession or vocation”. In *Customs and Excise Commissioners v Morrison’s Academy Boarding Houses Association* [1978] STC 1 at 5, Lord Emslie said that the word “include” in the definition shows that “business” could comprehend activities which do not fall within the common understanding of the words “trade, profession or vocation”. The word “business” in this context is to be given its natural meaning and does not require that what is done must be done commercially in the

*“The commercial purpose
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on the meaning to the word “business””*

popular sense or with the object of profit. Lord Cameron, at page 8, said that the use of the words “in the course of” suggests that the activity must not be in sporadic or isolated transactions but continued over an appreciable tract of time and with such frequency as to amount to a recognizable and identifiable activity of the particular person on whom the liability is to fall.

It was held in *RWK Stirling v The Commissioners* [1985] VATTR 232 that adding the words “or furtherance” in the

VAT Act was to ensure that all business activities were caught by the section, for example fringe activities carried on separately from the main business or transactions related in some way to the main business but which are different in character from the general run of the business.

In *Town Investments v Department of Environment* (H.L.(E.)) [1978] A.C. 359, Lord Diplock said that “the word ‘business’ is an etymological chameleon: it suits its meaning to the context in which it is found” and “in exercising the

functions of government the civil servants of the Crown are all engaged in carrying on a single business on behalf of the Crown, i.e. Her Majesty’s Government in the United Kingdom.”

In view however of the need for commercial purpose referred to above, if an electronic message (e.g. a fax message) is sent for the purposes of supplying information (e.g. health information, information about the Basic Law, citizen’s advice or announcements in the public interest), it will not be a CEM.

In such case sending the electronic message would not fall within UEMO.

An electronic message with a commercial purpose should be distinguished from one which only has a commercial consequence – this is not a CEM. For example an electronic message may promote a hobby or an activity for nominal financial value or a charitable benefit or good governance on the part of the HKSARG or private sector, and not be a CEM.

To implement UEMO and the Unsolicited Electronic Messages Regulation, Cap. 593A, the Telecommunications Authority (TA) issued a code of practice to provide guidance to the public and established three do-not-call registers (DNC registers). They are Fax Register, Short message Register and Pre-recorded telephone message Register. No commercial electronic message (CEM) shall be sent to electronic addresses registered in a DNC register. Senders of CEMs may pay

a yearly fee to TA to download the DNC register to screen-out those registered electronic addresses before delivering CEM.

Enforcement and appeal against unsolicited CEM

A registered user of an electronic address may lodge a complaint to TA for investigation if they unsubscribe or register but still receive CEM or experience any infringement of UEMO.

“A person who suffers loss or damage by reason of contravention of any provision in UEMO may lodge a civil claim.”

After investigation, TA may serve an enforcement notice on any person who is contravening or has contravened any provisions of Part 2 of the UEMO (which prescribes rules about sending CEMs) requiring the person to take remedial action as specified. A person who fails to comply with an enforcement notice commits a criminal offence. The person on whom an enforcement notice is served can appeal to the Unsolicited Electronic Messages (Enforcement Notices) Appeal Board (“Appeal Board”) within 14 days after the enforcement notice is served but the person should still comply with an enforcement notice until the Appeal Board has decided his appeal.

A person who suffers loss or damage by reason of contravention of any provision in UEMO may lodge a civil claim in the District Court for remedies, orders, injunctions or other relief appropriate or in the Small Claims Tribunal for small claims.

Criminal Offences in respect of CEM and electronic mail address

Under Part 3 of UEMO, the following activities in respect of CEM and electronic mail address are criminal offences:

- (i) supply, acquisition and use of address-harvesting software or a harvested-address list in connection with or to facilitate the sending of a CEM,

- (ii) use of scripts or other automated means to register five or more electronic mail addresses, and
- (iii) using a telecommunications device, service or network to relay or retransmit multiple CEMs.

Under Part 4 of UEMO, fraud and other illicit activities related to transmission of CEMs are criminal offences including:

- (i) accessing a telecommunications device, service or network without authority to initiate transmission of multiple CEMs,
- (ii) initiating transmission of multiple CEMs with intent to deceive or mislead

- recipients as to source of messages,
- (iii) falsifying header information in multiple CEMs,
 - (iv) registering for electronic addresses or domain names using information that falsifies the identity of actual registrant to send multiple CEMs and
 - (v) falsely representing registrants of five or more electronic addresses or domain names to send multiple CEMs.

The position of telecommunications service providers (TSPs)

A TSP who merely provides a service that enables a CEM to be sent is presumed not to have sent the message and not to have authorized the message to be sent. Pursuant to section 19(4) of UEMO, the prohibition of the use of scripts or other automated

means to register five or more electronic mail addresses set out in section 19(1) of UEMO is not applicable to a TSP acting in connection with a public telecommunications service.

However, TA may for example direct TSPs to disclose information to assist her in an investigation.

The reaction of the industry and consumers to UEMO

Hong Kong Association of Interactive Marketing (HKAIM) welcomes guidance under UEMO and believes it will support healthy growth of the marketing industry. HKAIM also endorses the requirement for senders to identify themselves and to provide accurate contact information in a CEM but is worried that the volume of unsolicited CEM sent from overseas may cause difficulty in

enforcement and effectiveness of UEMO.

TSPs appear (so far at least) to welcome the code of practice and DNC registers and believe UEMO strikes the balance between the development of the e-marketing industry and the rights of recipients. Hong Kong Internet Service Providers Association believes the public will become more conscious of the problem of unsolicited electronic messages and UEMO provides accurate information and resources to handle this problem.

Professor Leo Sin Yat-ming of Chinese University expects UEMO to affect the electronic marketing industry only in the short term and anticipates that e-marketers will shift their mindsets to adapt to the new trend in electronic marketing of consumer choice as to what they receive.

RAYMOND FONG

World Food Fair Ltd v Hong Kong Island Development Ltd (2006) 9 HKCFAR 735 (World Food Fair Case)

Readers may recall that in the CU Review Autumn/Winter 2007 at page 6 we reported on a recent case – *New World Development Co. Ltd & Others v Sun Hung Kai Securities Ltd & Another (the New World Development Case)* where Hong Kong’s top court, the Court of Final Appeal (CFA), decided (amongst other things) that for there to be good contract there must be a concluded bargain and a concluded contract was one which settled everything that was necessary to be settled and left nothing to be settled by

agreement. But an agreement was not incomplete merely because it left something which still had to be determined. It was often possible for the court to discern in the parties’ agreement the intended principles, criteria or machinery, express or implied, for determining specific contractual rights and liabilities without requiring the parties to arrive at further agreement. However in the *World Food Fair Case* the CFA was unable to discern the parties’ agreement.

In the *World Food Fair Case* the

CFA decided that:

- (1) where a contract for a lease (see Practical Tips) was being asserted (as in the *New World Development Case*) there had to be unconditional agreement on **all** the terms that the parties intended to include in their particular lease including the parties, the premises the commencement and duration of the terms and rent;
- (2) whether the parties intended to contract was to be looked at objectively and in this

case there was no concluded contract because final agreement had not been reached on the commencement date, on what should be the period of the rent free period, and on an option to renew, all being matters which the parties had plainly intended to be regulated by their contract;

- (3) the payment of a deposit and the giving of access for fitting out works were generally equivocal acts. Such acts were consistent with :
- (a) the existence of a concluded agreement, but did not prove its existence; and
 - (b) also being acts done in anticipation of a legally binding agreement.

It was not uncommon for parties in the course of negotiations which were still incomplete or subject to contract to pay deposits or to allow builders access to the premises. Here, the “initial deposit” and the giving of possession for fitting out works, did not establish the existence of a concluded contract (see Practical Tips). Indeed, the request for the “initial deposit” might suggest that the parties had not yet reached final agreement, as there would have been no need to seek such comfort if the parties were already legally bound (*AG & another v Humphreys Estate (Queen’s Gardens) Ltd* [1987] HKLR 427 applied; *Chillingworth v Esche* [1924] 1 Ch 97 considered); and

- (4) the Defendant was ordered to repay the initial deposit since there was no concluded agreement.

Practical Tips

- The CFA did not refer to any legal distinction between a contract for the granting of a lease and a contract for other kinds of transaction, nor did it indicate that different legal principles should apply.
- Care needs to be taken that unintentionally no legally binding interim agreement has been entered into in the course of a lengthy negotiation. A failure of the further negotiations will not affect the legally binding status of any interim agreement.
- The *World Food Fair Case* also highlights the importance of reaching a binding agreement on all the terms the parties intended to be included **before one party such as Government incurs expenditure, makes payments or gives or obtains access to another.**
- Difficulties with the application of the law to the facts of cases such as *World Food Fair Case* are highlighted by the costs, delay and uncertainty reflected in the history of the litigation : the Court of

Appeal (which found that the absence of formality was met by part performance) reversed the Court at First Instance and the Court of Appeal was in turn reversed by the CFA. More than 10 years elapsed between the commencement of negotiations to lease the units and the decision in the CFA.

- As mentioned in the CU Review Autumn / Winter 2007 at page 7, always minimise the risk of uncertainty and incomplete agreements (and therefore litigation) by expressly stating all rights and liabilities in the agreement. Minimise what you leave to chance. Pre-contractual consideration and negotiation are still critical. Do not always rely on the Court finding in the agreement a formula or mechanism for making terms certain and complete. The Court did not do so in the *World Food Fair Case*.

CHARLES BARR

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Advice should be sought from CU before applying the information in the CU Review to particular circumstances.