CU Review Winter 2014

The Commercial Unit, Civil Division
The Department of Justice

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Editorial

We feature three articles in this edition. The first article talks about the important changes to the law introduced by the new Companies Ordinance (Cap. 622) on corporate constitutions for both new companies incorporated under the new Companies Ordinance and existing companies incorporated under any of the predecessor Companies Ordinances. The second article discusses the traditional principles concerning the implication of terms in a contract and the latest development in this area of the law. The third article talks about the inaugural issue of Islamic bonds by the Government under the Government Bond Programme in September 2014.

We also feature three case reports in this edition. The first case is about the equitable doctrine of undue influence exercised on the wife by the husband. The second case is about the provisions in the former Companies Ordinance (Cap. 32) regarding the name of a company – whether such provisions should be amended to give more power to the Registrar of Companies to police passing off. The third case is about the common law principle of mistake in contract.

YUNG Lap-yan

Constitution of Companies under the new Companies Ordinance

Introduction

The new Companies Ordinance (Cap. 622) ("new CO") commenced operation on 3 March 2014. The new legislation introduces some important changes to the law on corporate constitutions for both new companies incorporated under the new CO and existing companies incorporated under any of the predecessor Companies Ordinances. This article briefly discusses the changes.

Abolition of Memorandum of Association

Under the predecessor Companies Ordinances, the constitution of a company consisted of the memorandum of association and articles of association. The concept of a memorandum of association is abolished under the new CO. For companies incorporated under the new CO, there is no longer a need for a memorandum to be prepared and lodged for registration of the company. For existing companies, the provisions of the memorandum are deemed to be provisions in the articles of association of the company[1]. From the strict legal perspective, neither existing nor new companies have a memorandum of association. The constitution of companies now consists solely of the articles.

Constitutions of Existing Companies

As noted above, the provisions in the memorandum of existing companies are deemed to be part of the articles from 3 March 2014. However, for companies limited by shares, the share capital clause in the memorandum (which states the amount of authorized capital and the division of the capital into shares of a fixed nominal amount) is excluded from the deeming[2]. In other words, that clause in the former memorandum no longer has any legal effect. This change is due to the abolition of the concept of nominal or par value of shares[3] and the abolition of the concept of authorized share capital.

The articles of an existing company (modified to include the provisions in the memorandum) continue to apply to the company unless and until the company alters its articles pursuant to the usual procedures for alteration. If a company previously relied on the Table A articles as contained in the First Schedule to the former Companies Ordinance (Cap. 32) ("former CO"), the version of Table A applicable to the company continues to apply[4]. However, any provisions in the articles which are inconsistent with the new CO would no longer have legal effect, since the Ordinance would override inconsistent provisions in the articles. Existing companies may also amend their existing constitutions, for example, to replace references to obsolete provisions of the former CO, to provide for a re-numbering in light of the inclusion of the provisions in the memorandum in the articles, or to take advantage of some of the new initiatives under the new CO.

Constitutions of New Companies

To form a new company under the new CO, a copy of the company's articles of association must be lodged for registration[5]. There are 5 mandatory articles set out in ss.81 to 85 of the new CO. They include the company name and statements as to the liabilities of members, such as whether the members have limited liability. If the company's objects are to be specified in the constitution, they should now be set out in the articles.

As for the regulations of the company, the persons forming the company have a choice whether to include their own regulations in the registered articles (similar to the process under the former CO), or they may rely on the default articles, which are now referred to as the model articles.

Model Articles

Companies (Model Articles) Notice[6] (Cap. 622H)

The new CO empowers the Financial Secretary ("FS") to prescribe model articles for companies[7]. The

[1] New CO s.98
[2] New CO s.98(4)
[3] New CO s.135

[4] New CO Sch.11 s.9
[5] New CO s.67
[6] L.N. 77 of 2013

Companies (Model Articles) Notice (the "Notice") made by FS prescribes the model articles for public companies limited by shares (Sch. 1), private companies limited by shares (Sch. 2) and companies limited by guarantee (Sch. 3). There are no model articles for unlimited companies.

Application of the Model Articles

The model articles replace the standard articles provided in Table A (for public and private companies limited by shares) and Table C (for companies limited by guarantee) of the First Schedule to the former CO and apply to companies incorporated under the new CO.

A company may adopt any or all of the provisions in the model articles prescribed for the type of company to which it belongs[8]. On the incorporation of a limited company, the model articles form part of the company's articles of association if the company's registered articles do not prescribe any regulations for the company or in so far as the company's registered articles do not exclude or modify the model articles[9]. The model articles are in addition to the mandatory articles that a company is required to have.

The model articles do not apply by default to existing companies formed before the commencement of the new CO[10], including those companies which have adopted the standard articles provided in the First Schedule to the former CO. However, existing companies may amend their articles to follow the model articles of their own volition.

Major Changes Introduced by the Model Articles

When compared with the former standard articles, the model articles are substantially re-organised to enhance clarity, coherence and ease of reference. For example, articles concerning similar matters are grouped together under different broad headings with the following topics covered –

(a) directors and company secretary, and in particular how directors are to make decisions;

(b) members' rights and the proceedings at general meetings;

(c) shares and distributions; and

(d) miscellaneous matters, including communications to and by the company.

In terms of the substantive content, many of the provisions in the model articles are derived from the former standard articles. However, there are some changes introduced, for example, to provide for more detailed procedures for the administration of the company and to align with new requirements under the new CO. For instance, in respect of decision-making by directors, new articles have been added to provide for the detailed procedures for written resolutions[11] and for the appointment and removal of alternate directors[12]; and in respect of the proceedings at general meetings, an article is added on the rights of directors and other persons who are not members of the company to attend and speak at general meetings[13].

Stefan Lo and Ida Chan

[7] New CO s.78
[8] New CO s.79
[9] New CO s.80
[10] The model articles also do not apply to any company formed after the commencement of the new CO where the company was formed under the former CO pursuant to transitional provisions: new CO Sch.11 s.3

[11] The Notice: Sch.1 Arts.17-19
[12] The Notice: Sch.1 Art.30; Sch.2 Art.28; and Sch.3 Art.26
[13] The Notice: Sch.1 Art.45; Sch.2 Art.41; and Sch.3 Art.41

Implication of Terms in a Contract

Where a contract is entered into by the parties, usually the important terms are written down as express terms. In some cases, the parties might have common assumptions not expressly spelt out in the contract or some details are not expressly written out. Under the law of contract, the court has the power to imply terms into a contract in certain circumstances.

In this article, we will deal with some of the instances in which the court implies an "unwritten" term into a contract.

Business Efficacy

The general principle is that a term will be implied to give business efficacy to the contract [14]. Such implication must be strictly necessary, not just being or might seem reasonable. The court is cautious in not re-writing the contract. The Privy Council in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*[15] set out the following conditions (which may overlap) that must be satisfied:

(1) it must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that "it goes without saying";

(4) it must be capable of clear expression; and

(5) it must not contradict any express term of the contract.

In that case, BP (Westernport) Pty Limited ("BP") entered into a rating agreement with the Premier of Victoria of Australia under which the latter agreed to charge only preferential rates on BP for 40 years in respect of its refinery site. BP later went into voluntary liquidation and the liquidator transferred the refinery to BP's associate company. The local government in Victoria claimed that the rating agreement was terminated because of the transfer and charged BP's associate company at the general rate which was higher. The Supreme Court of Victoria implied a condition into the rating agreement that the rating agreement should continue in operation only so long as BP should be the occupier of the refinery site. This was rejected by the Privy Council on appeal which found such an implied term unreasonable and inequitable. Instead, the Privy Council implied the term that if the rights of BP (which was defined as "the Company" in the rating agreement) were assigned or otherwise disposed of to an associate company of BP, the term "Company" should mean that assignee company. This was because apart from the rating agreement, there was a refinery agreement providing for BP to construct a refinery on the site. The refinery agreement was also given statutory sanction by the Westernport (Oil Refinery) Act 1963. There was an express provision in the refinery agreement that the refinery agreement might be assigned to an associate of BP. The court considered the rating agreement together with the refinery agreement. The Local Government (Decentralized Industries) Act 1963 under which the rating agreement was entered into was enacted the same day as the Westernport (Oil Refinery) Act 1963. The court considered the two Acts as "twin implementations of a policy of securing decentralization of industry by offering preferential rating".

Co-operation/Prevention Principle

It is also well established that there is an implied term that the parties shall co-operate to ensure the performance of their bargain.

Similarly, where a contractor's performance of a condition of contract is rendered impossible by the act of the other contracting party, he is exonerated from the performance of it. This "prevention principle" was applied in a conveyancing case in the Hong Kong Court of Final Appeal ("CFA") – *Kensland Realty Ltd v Whale View Investment Ltd* [16]. In the completion of purchase of property, the CFA held that there was an implied term that reasonable time should be given by the vendor's solicitors to the purchaser's solicitors to

[14] *The Moorcock* (1889)14 P.D. 64

[15] (1977) 16 ALR 363

[16] (2001) 4 HKCFAR 381

prepare split cheques for completion **("Implied Term")**. The split payment information was given only 1 hour 47 minutes before 1 p.m., the scheduled time of completion. As a result, after the purchaser's solicitors went through the procedures of checking documents, credit authorisations, obtaining cashier orders from banks, delivering the completion documents by hand to the vendor's solicitors' office, it was 1:06 pm, 6 minutes late of the scheduled time of completion. It was held that the vendor's solicitors failed to give sufficient time to the purchaser's solicitors to draw down the loan and prepare the split cheques. The purchaser was thus prevented to perform his part of the contractual obligation to tender purchase price on time. The CFA apart from ruling that there was the Implied Term, also held that on the facts of the case the vendor had breached the Implied Term. The purchaser's inability to tender completion was due plainly to the vendor's breach. The vendor who forfeited the deposits and alleged the purchaser in breach was instead held to be the one in breach and was liable to repay the purchaser its deposits of HK$ 8.25m and also had to pay the purchaser damages amounting to HK$ 8m for the purchaser's loss of bargain.

However, CFA disagreed with the Court of Appeal below that there was also an implied term that the vendor should grant an extension of time for completion as this term if implied would be contrary to the express term of the contract that time was of the essence.

Recent Development

Recently, there appears to be a development of the law on implied terms in the UK. The authors of Chitty on Contracts (31st Ed.) described it as a broader approach[17].

Lord Hoffmann stated in *Att-Gen of Belize v Belize Telecom Ltd* [18] at the Judicial Committee of the Privy Council:

"in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such provision would spell out in express words what the instrument read against the relevant background, would reasonably be understood to mean"[19].

Earlier in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co. Ltd* [20], Lord Hoffmann stated that the process "is one of construction of the agreement as a whole in its commercial setting."

The authors were also of the view that the principles that traditionally govern the implication (or non-implication) of terms in the body of case law should now no longer be regarded as "tests" but rather as guidelines to assist the court. However, "it is clear that Lord Hoffmann did not intend in his broader approach to herald any fundamental change of attitude so as to enable terms to be more easily implied."[21] This broader approach was also considered in a Hong Kong CFA case[22] but the court still regarded that for a term to be implied, it must be of strict necessity.

Agatha Ding

HKSAR Government's Inaugural Issue of Islamic Bonds

On 11 September 2014, the Hong Kong Government launched its inaugural issue of Islamic bonds in the form of Ijarah Sukuk under the Government Bond Programme ("2014 Sukuk"). The 2014 Sukuk, with an issuance size of US$ 1 billion and a tenor of 5 years, marks the world's first USD-denominated sukuk originated by an AAA-rated government. It recorded an oversubscription of 4.7 times, and was allocated to over 120 global institutional investors, with 36% distributed to the Middle East, 47% to Asia, 6% to Europe and 11% to the United States.

The Philosophy of Islamic Finance

The term "Islamic finance" refers to financial activities conducted in compliance with the relevant principles of the Shariah, which represents the guidance given by the Holy Quran and the Sunnah (the custom, habit or way of life) of the Prophet Muhammad. Financial contracts must not, amongst other things, contain the elements of *Riba* (interest),

17 Chitty on Contracts, 31st Ed. at para. 13-005
18 [2009] UKPC 10, [2009]1W.L.R. 1988
19 [2009] UKPC 10 at para. 21

20 [1997] AC 191 at 212
21 Chitty on Contracts, 31st Ed. at para. 13-005
22 By Sir Ivor Richardson NPJ at para. 241 in *Ying Ho Co Ltd and Others v The Secretary for Justice* [2004] HKCFA 51, [2005] 1 HKLRD 135

Gharar (uncertainty or risk relating to the major elements of a contract) and *Qimar* (games of chance, gambling).

Riba covers all forms of "interest" on commercial or personal loans. The Shariah prohibits it as it causes wealth to be accumulated in a few hands. Lending in Islam is not a business but a virtuous activity, from which one cannot take any benefit. If the value of the loan decreases due to inflation, the lender will be considered as having done a greater virtue.

Gharar refers to entering into a contract in absolute risk or uncertainty about the ultimate result of the contract, the nature and specifications of the subject matter or the rights and obligations of the parties. The prohibition of *Gharar* and *Qimar* requires Islamic banks to avoid for instance speculative trade in shares, short-selling, discounting of bills and securities as well as futures and options contracts.

What is Ijarah Sukuk?

The Shariah permits Ijarah, which involves leasing an asset and receiving rentals. Lending money with interest is prohibited, but Islamic banks are allowed to provide financing to their customers by purchasing assets and leasing them to their customers.

Likewise, corporate bodies and Governments are permitted to issue Ijarah Sukuk as an alternative tool to interest-based borrowing. Durable assets are selected and used to back the issue of Ijarah Sukuk, which are certificates representing the holder's proportionate beneficial ownership in the underlying asset. An Ijarah Sukuk can be negotiated and traded freely in the market.

In a typical government issue of Ijarah Sukuk, a special purpose vehicle ("SPV") is created to purchase the asset from the originator, i.e. the government. The SPV raises money by issuing Sukuk to the investors, enabling it to pay for the purchase of the asset. The SPV then leases the asset back to the government for a period corresponding to the tenor of the Sukuk. During the tenor of an Ijarah Sukuk, the Sukuk holders assume the rights and obligations of the owner and receive periodic payments. The periodic rental payments from the government to the SPV match the periodic payments from the SPV to the Sukuk holders. Upon maturity of the Sukuk or in the event of default, the government will purchase the asset back from the SPV at a pre-determined price. The SPV will use the sale proceeds received from the sale of the asset to redeem the Sukuk.

Legislative Changes

The existing legal or regulatory framework in Hong Kong does not prohibit Islamic financing. However, the nature and structure of Islamic financial products normally involves transfer of assets which may attract more tax (e.g. stamp duty) than their conventional counterparts. This has been considered an impediment to the development of an Islamic bond market in Hong Kong.

The Inland Revenue and Stamp Duty Legislation (Alternative Bond Schemes) (Amendment) Ordinance 2013

With a view to providing a comparable taxation framework for Sukuk vis-à-vis conventional bonds, the Legislative Council passed the Inland Revenue and Stamp Duty Legislation (Alternative Bond Schemes)(Amendment) Ordinance in July 2013. The 4 most common types of "Islamic" financial arrangements are given the same profits tax treatment as conventional debt arrangements. These financial arrangements, referred to as "specified alternative bond schemes" under the Amendment Ordinance, must consist of a bond arrangement (between the bond issuer and the bond holders) and a specified investment arrangement (between the bond issuer and the originator) which must take any of the following forms:

- lease arrangement
- profits sharing arrangement
- purchase and sale arrangement
- agency arrangement

Further, a number of conditions have to be satisfied before the bond arrangement and the specified investment arrangement in a specified alternative bond scheme can be regarded as a debt arrangement for profits tax purpose.

The amendments to the Stamp Duty Ordinance now provide for relief from stamp duty on certain instruments executed solely for compliance with Shariah principles and not otherwise required in the case of conventional bonds.

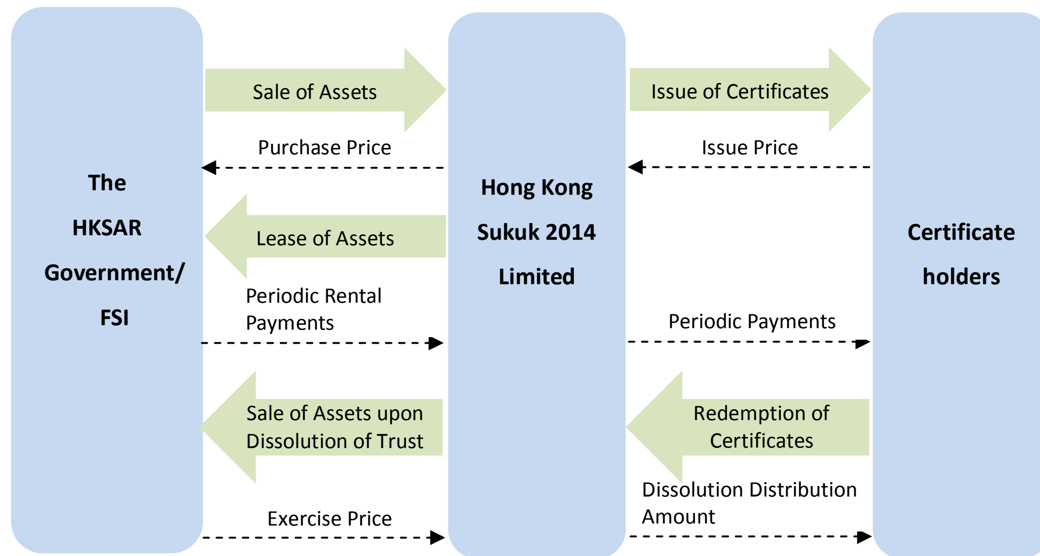
Loans (Amendment) Ordinance 2014

The Loans (Amendment) Ordinance, passed in March 2014, allows periodic payments and disposal gains

derived from the redemption of any alternative bonds issued in connection with the Government Bond Programme to enjoy the same profits tax exemption as that currently applicable to the interest payments and disposal gains in relation to conventional Government Bonds.

The 2014 Sukuk

The following diagram illustrates the structure and cash flows of the 2014 Sukuk.



The Hong Kong Government, being the originator, first established an SPV under the name of Hong Kong Sukuk 2014 Limited ("Issuer"). Certain Government properties in Wu Chung House and Fairmont House ("Trust Assets"), which were then owned by the Financial Secretary Incorporated ("FSI"), were selected to back the Sukuk issuance. On 18 September 2014, the closing date, the Sukuk holders paid the issue price of the Sukuk to the Issuer, which then paid such amount to the FSI as the purchase price for the Trust Assets. Immediately upon purchase of the Trust Assets, the Issuer leased the Trust Assets to the Hong Kong Government and issued the certificates to the Sukuk holders, declaring that it would hold the Trust Assets on trust for the Sukuk holders as owners and beneficiaries pro rata according to the face amount of the Sukuk they held. An amount representing the rentals will be paid every 6 months commencing from 18 March 2015 for a period of 5 years. On the same dates, the Sukuk holders will receive an amount representing a defined share of the rentals paid by the Hong Kong Government. On 18 September 2019, the FSI would purchase the Trust Assets back from the Issuer, which would use the purchase monies to redeem the Sukuk.

The 2014 Sukuk 2014 Limited was listed on the Hong Kong Stock Exchange and Bursa Malaysia on 19 September 2014 and admitted to trading on NASDAQ Dubai on 21 September 2014.

Beverly Yan

Bank of China (Hong Kong) Ltd v Wong Kam Ho
[2014] 1 HKLRD 41

The issue in this case is whether a legal charge on a family home (the "Property") executed by a husband (the "Husband") and wife (the "Wife") was vitiated by undue influence exercised on the Wife by the Husband. Undue influence is a doctrine of equity that enables the court to strike down a transaction where the intention to enter into it had been procured unconscionably. Whether or not a transaction was brought about by the exercise of undue influence is a question of fact.

Facts

The Husband, a businessman, and Wife, a housewife, both came to Hong Kong from Swatow and were married for over 30 years. The Husband and the 1st Defendant ("D1") became the only two shareholders and directors of a business in paper products (the "Business"). To secure credit facilities from the plaintiff bank (the "Bank") granted to the Business, the Husband and Wife executed a legal charge on the Property (the "Legal Charge") which was owned by them as joint tenants in favour of the Bank at the Bank's solicitors' offices.

The Business subsequently defaulted in repaying its debts to the Bank. The Bank commenced the present action for, inter alia, possession of the Property. The Wife counterclaimed that the Legal Charge should be rescinded on the ground of undue influence by the Husband. She claimed that she trusted the Husband and signed the Legal Charge because he told her to do so, without knowing the nature and purpose of it.

Decision

The Court analysed the case according to the three questions posed in *Royal Bank of Scotland plc v Etridge (No 2)*[23]:

"(1) Has the wife proved what is necessary for the court to be satisfied that the transaction was affected by the undue influence of the husband? (2) Was the lender put on inquiry? (3) If so, did the lender take reasonable steps to satisfy itself that there was no undue influence? It will be appreciated that unless the first question is answered in favour of the wife neither of the later questions arise. The wife has no defence and is liable…"

Considering *Royal Bank of Scotland plc*, the Court held that in a case where a man is said to have unduly influenced his wife, the fact that the wife has reposed trust and confidence in the husband in relation to the management of her financial affairs, coupled with the fact that the transaction is one that calls for explanation, are normally sufficient basis, absent evidence to the contrary, to infer that the transaction was brought about by the husband's undue influence over the wife. However, in the ordinary course and failing proof to the contrary, a transaction involving a wife guaranteeing payment of her husband's business debts was not explicable only on the basis that it was procured by the exercise of undue influence by the husband.

The Wife's defence and counterclaim gave particulars of how she was influenced by the Husband. Reference was made to the marriage of 30 years and how throughout the marriage she was a housewife and reposed full trust and confidence in the Husband in handling all matters including all financial matters relating to the Property. The Wife claimed she completely trusted the Husband, and that she signed the document because the Husband told her to do so, without knowing what it was that she signed. The Court found that even if one accepted the Wife's evidence at face value, it did not demonstrate any undue influence exercised by the Husband. There was a relationship of trust and confidence, but such trust was not unusual between husband and wife and a part of every healthy marriage. The transaction was not one that called for explanation. What the Husband earned from the business would be income of the family, the Wife had a real interest in seeing that business prosper, and therefore in providing her security over the Property required for the borrowing necessary for the Business. The Property had been charged before more than once for bank financing to support the Husband's business. The Court found no

[23] [2002] 2 AC 773 at para. 101

suggestion there was any coercion, pressure or bullying on the part of the Husband to make the Wife sign the Legal Charge, nor was there any allegation of misrepresentation by the Husband to the Wife about the nature of the transaction or documents. On question (1) the Court found that the Wife had failed to discharge the burden of proof that the Husband exercised undue influence on her. Considering the evidence, the Court was not satisfied that the Husband had in any way unconscionably abused the trust and confidence the Wife placed in him. The Wife's counterclaim was dismissed.

As question (1) was not answered in favour of the Wife, the other two questions did not arise. However, the Court commented on the other questions in *obiter*. As regards question (2), the Court followed the approach in *Royal Bank of Scotland plc* that a bank was put on inquiry "whenever a wife offers to stand surety for her husband's debts". The Court considered that it would have found that the Bank was put on inquiry as it knew the Property was jointly owned by the Husband and Wife, and it would have been apparent to the Bank's solicitors who handled the Legal Charge that the Wife was neither a shareholder nor director of the Business. As regards question (3), the Court would have held that the Bank had not shown it had taken reasonable steps to bring home to the Wife, in a meaningful way, the implications of the Legal Charge. A separate meeting (in the absence of the Husband) with the Bank or a solicitor would give some assurance that the Wife was told of her potential liability and risk of standing as surety and urged to take independent legal advice. Yet there was no satisfactory explanation why the Bank had not followed such practice.

Josephine Ho

Power Dekor (Hong Kong) Ltd v Power Dekor Group Co Ltd [2014] 1 HKLRD 845

Facts

The plaintiff company was an established company in Hong Kong trading in building and decoration materials. Its major shareholder (the "Holding Company") was a company incorporated in the PRC under the name Power Dekor Group Co Ltd and was the registered proprietor of various trade marks in the PRC and elsewhere used by the plaintiff company in its business. The defendant company was incorporated in Hong Kong in 2010 with the same name as that of the Holding Company.

The relevant legislation at the time of its incorporation was (1) s.20(1)(a) of the former Companies Ordinance (Cap. 32), which provided that a company shall not be registered by a name which is the same as a name appearing in the Registrar of Companies' index of company names, and (2) s.22(2), which provided that where a company had been registered by a name which (a) is the same as, or, in the opinion of the Registrar, too like a name appearing at the time of the registration in the Registrar's index of names…, the Registrar may within 12 months of that time, in writing, direct the company to change its name within such period as he may specify.

In permitting the incorporation of the defendant company under its name, the Registrar of Companies had obviously taken the view that the defendant company's name was not the same as or too like the name of the plaintiff company. That was a legitimate view according to the practice of the Companies Registry. That practice is set out in the Companies Registry publication 'Guideline on Registration of Company Names for Hong Kong Companies'.

The scenario in the Power Dekor case is an example of what is called a 'shadow company', that is a company incorporated in Hong Kong with a name very similar to a well-known brand name or trade mark and using its incorporation to pass off as the real company in conducting business in mainland China. An amendment had been made to s.22 of Cap. 32 (the change of name provision) by the Companies (Amendment) Ordinance 2010 adding a new sub-section (3B) to s.22 empowering the Registrar to direct a company to change its name where an order has been made by a court restraining the company from using the name. This change was intended to deal with the shadow company problem.

The application before the Court in the Power Dekor case was for judgment in default of notice of intention to defend and of defence. The plaintiff company's claim against the defendant was for trade mark infringement and passing off. Zervos J was satisfied that the relevant papers had been properly served and entered judgment for the plaintiff company. Accordingly, s.22(3B) would apply and the Registrar could make a direction to change its name to the defendant company, and if it failed to do so the Registrar could substitute the company's registration number for its name and the penalty of a fine and daily default fine could be imposed.

Judge's criticism of existing process

Zervos J indicated that he did not think that the current provisions went far enough. He said that "serious consideration should be given to enacting provisions that give the Registrar far more effective measures... . It seems that greater scrutiny needs to be employed in the approval process to ensure that a company name will not be accepted for registration if it is the same or very similar as a name appearing in the Registrar's index of company names".

The difficulty is with regard to "too like". Appendix B to the Guideline referred to above sets out some criteria which the Registrar will apply in forming an opinion on whether the names are "too alike". Based on the criteria in the Guideline, the Holding Company's name was not "too alike". The Registrar would have had no knowledge of the Holding Company's existence. A similar name to companies in a group plus 'Group' is common enough in the group situation and acceptable. Should the Registrar have sought the plaintiff company's views on the defendant company's application? Should the Registrar have asked "Is this your group company?" The Registrar is not required to do so under the current law.

The issue is clear enough. Should we change the current system in Hong Kong as to company names which, in effect, provides for almost immediate incorporation (subject only to checking against the index for same names), which may allow incorporation of, say even 50, shadow companies a year, or revert to the pre-1990 situation when company incorporation took weeks and sometimes months, while professional officers had to make decisions on subtle differences in wording. It is submitted that the current system is preferable, notwithstanding that a small (in relation to the total number of new companies registered) number of shadow companies may slip in. Prior to the 1990 amendments, the Companies Registry was policing the passing off law. The amendments were intended to change that.

Ted Tyler

Kowloon Development Finance Ltd v Pendex Industries Ltd & Ors [2013] 6 HKC 443

Mistakes can sometimes be made when expressing the intention of the parties in agreements. The common law recognises two types of mistakes, one common and one unilateral. The Court of Final Appeal ("**CFA**") in *Kowloon Development Finance* held that there was a common mistake in the wording of an agreement embodied in a consent order obtained by the parties from the court and ordered that the order be rectified.

Facts

The plaintiff moneylender ("L") advanced certain loan facilities to the defendant borrower ("B") in the aggregate amount of some HK$20 million. In 2003, B defaulted payment and after negotiation, the parties reached an agreement containing a rescheduling of the debt repayments. The agreement was embodied in a Tomlin order made by consent by the court in 2004 ("2004 Order"). The agreement only concerned the instalments payable in 2004 and it was expressly stated in the 2004 Order that if B had duly repaid such instalments, L would review the amount of repayment annually thereafter. Indeed another agreement was reached and was embodied in another Tomlin order made by consent in 2005 ("2005 Order"). Just as in the case of the 2004 Order, the 2005 Order focused on the amount of instalments repayable in one year, viz. 2005. Unlike the 2004 Order, the 2005 Order was silent about how the remaining indebtedness would be discharged if B had duly paid up the instalments in 2005. Like the 2004 Order, the 2005 Order did not say if any of the instalments was not paid, L would be at liberty to recommence the action. B failed to pay up some instalments due in 2005 and L decided to recommence proceedings to recover the entire indebtedness. B protested by arguing that payment of the annual instalments specified in the 2005 Order would discharge the whole debt.

B failed and L succeeded before the High Court and the Court of Appeal, which held that there was a common mistake in the 2005 Order. B then appealed to CFA.

Decision

CFA dismissed the appeal and held that there was ample evidence for the conclusion that there was a common mistake in the 2005 Order. CFA went

further to conclude that there was also a unilateral mistake. Both mistakes justified rectification of the 2005 Order and the appeal of B was dismissed.

CFA explained the difference between a common mistake and a unilateral mistake, and the requirements to be fulfilled in order for the court to find that there has been a mistake before allowing rectification of an agreement. In the case of common mistake, the question is "whether a written document correctly reflects what the parties had, on an objective assessment, agreed it should contain [24]". "The concept for rectification for common mistake involves carrying into effect what the parties **appear to have actually** agreed [25]" (emphasis added). Thus, rectification is concerned with contracts and documents, not with intentions[26].

For unilateral mistake, the court has to look into the "subjective states of mind of the parties. If the contract contains a provision which one party knows that the other party thinks is not there, or knows that the other party is mistaken about its meaning, the court may, as a matter of discretion, either refuse to allow him to enforce the contract as it would ordinarily be construed or go further and rectify the written agreement to give effect to what the mistaken party thought had been agreed [27]". The court attributed this rectification remedy as a remedy against specific forms of bad faith, namely bad faith in the sense that the court would not allow a party who knew that a mistake had been made by the counter-party to benefit from such mistake by enforcing a wrongly worded agreement against such counter-party.

Relevance to Government Tenders

The principles endorsed by CFA in *Kowloon Development Finance* concerning mistakes should also be applicable in the case of contracts concluded through tendering. It is quite common for tenderers to make mistakes in their tenders (for example, a price quotation with a missing digit rendering the quotation to be abnormally low that the tenderer could not have intended it). Under this example, it should not be good faith for the procuring department to insist that the abnormally low quotation should be binding on the tenderer. If the procurement department were to do so, the tenderer might seek rectification by the court to prevent the procurement department from enforcing the wrongly submitted quotation. Further, in the case of inconsistency in the quotations submitted (for example, between the unit prices for individual goods or services and the total), there should be clear provisions in the tender documents entitling the Government to seek clarification from the tenderer. Simply relying on the lower or higher amount (or just the total) which may be incorrect should not be the preferred approach.

Denise Lam

24 [2013] 6 HKC 450 at para. 19I
25 [2013] 6 HKC 451 at para. 19D
26 Per Denning LJ in Frederick E Rose (London) Ltd. v William H Pim Jnr & Co Ltd. [1953]2 QB 450, 461
27 [2013] 6 HKC 451 at para. 20E-G

Editors : **Yung Lap Yan**
Beverly Yan
Ada Chen

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