MinterEllison LLP
Legal update – June 2020

24 June 2020

INSIDE THIS EDITION	Page
Disclosure of inside information during a "takeover" *Desmond Yu & Jun Kwong*	**2-3**
MOUs: Lessons from Da Shing Group Limited v Nicerich Promise Limited *Caroline De Souza*	**4-6**
Email frauds & knowing when to question authority *Pryderi Diebschlag*	**7-8**

Welcome to our latest bulletin featuring various legal and market updates

- Disclosure of inside information during a "takeover"
- MOUs: Lessons from Da Shing Group Limited v Nicerich Promise Limited; and
- Email frauds & knowing when to question authority.

We hope that you find this edition informative and we welcome your comments and suggestions for future topics.

If you have any questions regarding matters in this publication, please refer to the contact details of the contributing authors.

OUR PARTNERS	CONTACT
Capital, Market & Corporate	
Fred Kinmonth	2841 6822
Anne Ko	2841 6826
Barbara Mok	2841 6803
George Tong	2841 6836
Katherine U	2841 6873
Disputes, Competition & Insurance	
William Barber	2841 6934
Nathan Dentice	2841 6881
Jonathan Green	2841 6808
David Harrington	2841 6872
Alex Kaung	2841 6866
Desmond Liaw	2841 6819
David Morrison	2841 6932
Eddy So	2841 6879
Desmond Yu	2841 6878
Infrastructure, Construction & Property	
Malcolm Chin	2841 6870
Steven Yip	2841 6843
Intellectual Property	
Steven Birt	2841 6933

Authors

Desmond Yu
Partner
T 2841 6878

Caroline De Souza
Consultant
T 2841 6910

Pryderi Diebschlag
Senior Associate
T 2841 6931

Jun Kwong
Senior Associate
T 2841 6930

MinterEllison LLP
铭德有限法律责任合伙律师事务所

Disclosure of inside information during a "takeover"

Desmond Yu T: +852 2841 6878 | E: desmond.yu@minterellison.com
Jun Kwong T: +852 2841 6930 | E: jun.kwong@minterellison.com

Latest decision of the Market Misconduct Tribunal

On 18 March 2020, the Market Misconduct Tribunal (the "**MMT**") published its report finding that a formerly Hong Kong listed company, Magic Holdings International Limited ("**Magic**"), and five of its former directors, breached the disclosure requirement under Part XIVA of the Securities and Futures Ordinance (Cap. 571) (the "**SFO**"), by failing to disclose inside information relating to a proposed acquisition of Magic by L'Oréal SA ("**L'Oréal**") as soon as reasonably practicable.

Implications for the market

The decision of the MMT has important implications on compliance with disclosure obligations in "takeover" scenarios. Apart from compliance with The Codes on Takeovers and Mergers and Share Buy-backs, businesses are advised to seek advice on compliance with Part XIVA of the SFO, and to develop internal controls to ensure that an effective system is in place to safeguard confidentiality of inside information and timely disclosure of the same. Businesses are also reminded to keep proper records of the advice obtained, particularly in "takeovers" which may involve a transfer of business records.

Background

Magic was listed on the Hong Kong Stock Exchange in September 2010, and was subsequently acquired by L'Oréal in 2014 by way of a scheme of arrangement. The listing of Magic was withdrawn shortly thereafter.

The acquisition

In March 2013, representatives of L'Oréal approached Magic's founders (who were at the time substantial shareholders and executive directors of Magic) to indicate L'Oréal's interest to acquire Magic. Discussions were held during March and April 2013, and at a meeting on 27 April 2013, representatives of L'Oréal managed to persuade the founders to consider selling their shares to L'Oréal (subject to various follow-up considerations). A preliminary offer price of not less than HK$5.5 per share was mentioned at this meeting. The MMT found that inside information arose at the time of this meeting because the parties' discussions went beyond testing the waters, and there was a commercial reality that the transaction might materialise.

Findings of the Market Misconduct Tribunal

Inside information

Pursuant to Part XIVA of the SFO, inside information would be attributed to Magic if the information came into the knowledge of persons in the course of performing functions as officers of Magic (e.g. directors). Although the MMT agreed that Magic's founders participated in the discussions with representatives of L'Oréal in March and April 2013 (including the meeting on 27 April 2013) in their personal capacities as shareholders of Magic (instead of Magic's officers), the MMT held that inside information was attributed to Magic shortly after 27 April 2013 when one of the founders (being the Chairman of Magic's Board) contacted Magic's institutional investors to inform them, on a confidential basis, that L'Oréal had an interest to acquire Magic. The MMT drew this conclusion mainly because of the language used in the founder's emails to Magic's institutional investors for arranging meetings to inform them of the matter, and that the emails did not state that the founder wished to meet with the institutional investors in his capacity as a shareholder of Magic only.

Preservation of confidentiality

The MMT also found that there was leakage of inside information. There were surges in Magic's share price and trading volume in mid-April 2013 and during late April 2013 to early May 2013. Although it was noted that Magic conducted its first roadshow in the United States in mid-April 2013, the MMT found that the rise of Magic's share price and trading volume during late April 2013 to early May 2013 was unexplained by the evidence. As such, the MMT was satisfied that there was no plausible explanation for the surge in share price and trading volume during late April 2013 to early May 2013, other than that the confidentiality of the inside information had not been preserved. Accordingly, the MMT held that Magic could not rely on the "safe harbour" defence under Part XIVA of the SFO as a defence to the SFC's allegations.

Precautions to preserve confidentiality

On the question of whether Magic had taken all reasonable precautions to preserve the confidentiality of the inside information, and whether the directors had taken all reasonable measures to ensure that proper safeguards exist to prevent Magic's breach, it was found that Magic did not have a written policy concerning identification and disclosure of inside information, and/or the

preservation of confidentiality. The MMT found that there was no evidence to suggest that the inside information had been identified and discussed within Magic, and that any considered, particularised assessment had been made as to whether confidentiality of the inside information had been preserved.

The Market Misconduct Tribunal's conclusion

As a result, the MMT found that Magic was in breach of the disclosure requirement. The MMT also found that Magic's breach was a result of the negligent conduct of Magic's Chairman and company secretary (who were both executive directors of Magic at the time), and as a result of some of Magic's then-directors' failure to take all reasonable measure to ensure that proper safeguards existed to prevent Magic's breach.

Sanctions to be imposed

The MMT has yet to deliver its ruling on the sanctions to be imposed on Magic and those former directors who were found to have breached the disclosure requirement, because the MMT has ordered that expert evidence be prepared to illustrate the notional loss that the investing public had suffered as a result of the breach.

MOUs: Lessons from Da Shing Group Limited v Nicerich Promise Limited

Caroline De Souza T: +852 2841 6910 | E: caroline.desouza@minterellison.com

Background

The Court of First Instance recently handed down a judgment in the case of *Da Shing Group Limited v Nicerich Promise Limited (HCA 1065/2016) [2020] HKCFI 588*. The defendant (**NPL**) was a company incorporated in the British Virgin Islands (**BVI**), was beneficially owned by Dr. Lam Kin Ming and was the controlling shareholder of Hong Kong listed company Crocodile Garments Limited. The plaintiff (**DSG**) was a BVI company controlled by Mr. Zhou Zhenke.

On 13 February 2015, DSG and NPL had signed a memorandum of understanding (**MOU**) for the sale and purchase of NPL's controlling stake in the listed company. Three days later DSG paid a HK$30 million deposit (or "定金" in Chinese) to NPL in accordance with the terms of the MOU. The sale did not go through in the end, but NPL refused to return the deposit to DSG who sued for its return.

The MOU was completely silent on the refundability of the deposit, but it did stipulate that the deposit would be applied as part payment of the purchase price if and when a formal sale and purchase agreement was signed by the parties.

DSG argued that the deposit was refundable because it was in the nature of earnest money and was paid to NPL to show DSG's sincerity in entering into negotiations. NPL contended that the deposit was monetary consideration for the legally binding obligations assumed by it (e.g. the lock-out agreement whereby the defendant undertook not to negotiate with any party other than the plaintiff), with corresponding rights and privileges conferred on DSG.

As a secondary issue (**Secondary Issue**), the Court also had to decide whether the amendments appearing in the drafts of the MOU were admissible for the purpose of construing it. NPL argued that the drafts of the MOU were admissible and, in particular, that the deletion of the words "可退回" (literally translated as "may be refunded") from the relevant clause in the MOU as well as the proviso concerning the mechanism and timing for the repayment of the deposit (collectively the **Deletions**), was proof of the parties' common intention that the deposit was not to be refundable.

The approach of the Court

In reaching its decision, the Court found the guidance in the following cases to be helpful:

- *Arnold v Britton*[1] – When interpreting a written contract, the court is to identify the intention of the parties by reference to *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"*. Essentially this is done by focusing on the meaning of the relevant words in their documentary, factual and commercial context in light of (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the contract was executed; and (v) commercial common sense but (vi) disregarding subjective evidence of any party's intentions.

- *Wood v Capital Insurance Services Ltd*[2] – The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This involves considering the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.

- *Rainy Sky case*[3] – Where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with common business sense. However, to strike a balance between the language and implications of the rival constructions, the court must consider the quality of the drafting of the clause and be alive to the possibility that one side may have agreed to something which, in hindsight, did not serve his interest. The court also needs to be

[1] [2015] AC 1619
[2] [2017] AC 1173
[3] [2011] 1 WLR 2900

mindful that a provision may be a negotiated compromise or that the negotiators of the contract were not able to agree more precise terms.

- *Eminent Investment (Asia Pacific) Limited v Dio Corporation*[4] – This Hong Kong appellate case confirmed that there are "textual" and "contextual" approaches to interpreting a document and that the choice depends on the nature of the document itself. Where the document is professionally prepared, sophisticated and complex, the textual approach can be used without the need to resort to the context or factual matrix of the case. However, where the document is informal, brief or not professionally drafted, a consideration of the context will assist.

The outcome

The Court ordered NPL to return the full HK$30 million deposit to DSG. The quality and credibility of the evidence given by parties' respective witnesses was considered in detail and the Court clearly preferred the evidence of DSG's two witnesses.

The Court held that the Deletions from the drafts of the MOU did not necessarily indicate that the parties had agreed that the deposit was not to be refundable. In the absence of any provision in the MOU which permits NPL to retain the deposit, there was no justification for NPL to decline to return the deposit[5].

In relation to the Secondary Issue, the Court ruled that the drafts of the MOU should not be admitted as evidence and, even if the Court was wrong in so ruling, it would not attach any weight to the drafts for the reasons summarised below:

- According to the House of Lords' judgment in *Prenn v Simmonds*[6], where a document appears to have been altered whilst the parties were negotiating, the court cannot look at it as it originally stood compared with the alterations which were made in it, to see whether those alterations will throw any light upon the question of interpretation. As evidence of the parties' intention, the alterations are unhelpful. In most cases, evidence on pre-contractual negotiation only reflects one party's subjective intention, so should not be admissible.
- Even if a court does decide in an exceptional case to admit pre-contractual exchanges as evidence, they cannot be admitted as evidence of what the clause in question means, but as "background known to the parties" which may assist in the interpretation of the clause in question.
- Where the language in the contract is ambiguous or susceptible of more than one meaning, evidence of the surrounding circumstances is admissible to aid interpretation. However, such evidence is not admissible to contradict the language of the contract when it has a plain meaning (*Coldefa Construction Proprietary Limited v State Rail Authority of New South Wales*[7]).

Practical tips

MOUs, letters of intent (LOIs), heads of terms and term sheets are used interchangeably, but essentially mean the same thing. MOUs are commonly signed in the early stages of contractual discussions and before the signing of the definitive transaction documents. An MOU will typically record the key terms of the transaction which have been agreed by the parties. Depending on how the MOU is drafted, it can be non-binding, fully binding or partially binding. In most cases, however, they will be drafted so that they are partially binding. For example, provisions which relate to the protection of confidential information disclosed during negotiations and/or due diligence, exclusivity and governing law will usually be legally binding.

If you are preparing or negotiating an MOU, please keep in mind the following:

- If a deposit is to be paid, you should specify whether it is to be refundable or non-refundable. If it is to be refundable, you should spell out all the circumstances in which it is to be refundable and provide a clear mechanism (with timeline) for the refund.
- The MOU in the *Da Shing* case was not drafted by lawyers, but was prepared by DSG and NPL using a standard precedent. This is not an uncommon practice, but to reduce the risk of costly disputes arising, you should ask an experienced commercial lawyer to approve the final draft.
- There is no such thing as a one-size-fits-all MOU. If using a standard precedent to

[4] [2019] HKCA 606
[5] Chillingworth v Esche [1924] 1 Ch. 97 at 108
[6] [1971] 1 WLR 1381
[7] (1982) 149 CLR 337

prepare your MOU, consider whether it is suitable for your particular transaction.

- Use clear and simple language when drafting your MOU. If the language is vague, inconsistent or open to conflicting interpretations, you are asking for trouble.
- The exercise of interpreting a deficient MOU affords the judge ample opportunity to exercise his subjective judgment. In those circumstances, litigation is highly fact driven, very time consuming, expensive and uncertain in outcome.

Email frauds & knowing when to question authority

Pryderi Diebschlag T: +852 2841 6931 | E: pryderi.diebschlag@minterellison.com

Background

Any CFO will tell you that email frauds are a significant and growing problem worldwide – we have received instructions on 5 new cases just this month involving transfers to bank accounts in Hong Kong, and big cases seem to hit the headlines every few months.

But as we all know this, why are we still being duped?

In our view, it is partially due to a disconnect between the commonly held idea of an email fraud and the modern reality. Gone are the days of poorly drafted email scams claiming to be long-lost uncles leaving us fortunes, or princes from troubled lands needing help moving their cash offshore.

How is it done?

In reality, most frauds begin the same way: with fraudsters hacking into the target company's email systems and patiently observing the parties' business practices, writing style and transaction flow before they jump in.

The fraud then tends to follow one of the following two fact patterns:

- Sales contract account switch: the fraudster emulates the company's supplier and (a) asserts some problem with its existing bank accounts, and (b) requests payment be made to a new account in Hong Kong.

  We have recently seen a more sophisticated version of this scheme, where the fraudster received funds, only to admit to an "error" and refund the money after a week, thereby building trust in the fraudster before asking for much larger sums.

- CEO scam: the fraudster emulates senior management of the company and instructs staff in the finance department to transfer funds to a new business partner, or make a down payment on an exciting new secret project.

You cannot assume that the fraudulent emails will come from obviously wrong email addresses or be written in bad English or Chinese.

We have seen fraudsters use the executive's actual email address, and set up email "rules" to automatically file responses so that they do not come to the attention of the real executive.

More commonly, fraudsters register a domain name designed to appear to be, at first glance, exactly the same as the legitimate domain, for example, the fraudster might use:

- fraudster@hotrnail.com; rather than,
- fraudster@hotmail.com.

We have even seen cases where clients' accounts teams have followed procedure and asked for evidence of the underlying contract, only to be provided with a complete contract spanning 20+ pages, inclusive of signature blocks cut-and-pasted from genuine transactions.

Where does the money go?

Typically, the recipient of the funds is a small, recently incorporated Hong Kong company (the "**1st Tier Recipient**"), with a PRC national who resides on the mainland acting as its sole shareholder and sole director.

Within a matter of hours or days the funds are usually transferred to other individuals or companies in Hong Kong ("**2nd Tier Recipients**"). Thereafter, the funds flow into the Mainland, Macau or are simply withdrawn in cash.

What should you do?

Upon discovery of a fraud, there are a number of "self-help" steps that you should do immediately:

- inform your bank and ask it to (a) recall the funds, and (b) issue a SWIFT report to the recipient bank, informing it that the funds are the proceeds of crime;
- file an electronic report with the Hong Kong Police here;
- file an electronic "Suspicious Transaction Report" (STR) with the Joint Financial Intelligence Unit (JFIU) here; and
- instruct local legal counsel and ask them to write to the recipient bank as well.

The Organised and Serious Crimes Ordinance (Cap. 455), section 25(1), makes it a criminal offence to deal with any property which in whole or in part directly or indirectly represents the proceeds of an indictable offence. As a result, once the recipient bank is on notice, it may temporarily freeze the 1st Tier Recipient's account, allowing you to take further steps.

What can we do?

In light of the number of electronic reports received by the Hong Kong Police and the JFIU on a daily basis, in our experience, the single most effective step you can take is to report the fraud as soon as possible to the Hong Kong Police face-to-face, at Police headquarters.

The Hong Kong Police may then issue a "letter of no consent" to the recipient bank, which puts the bank on notice that now the Police have reason to suspect that the funds represent the proceeds of crime.

A "letter of no consent" does not operate at law as a freeze of the bank account, or establish any proprietary claim to the funds, but can be a cost effective method to freeze smaller sums of money. However, the funds do technically remain at risk, as it is ultimately for the bank to decide whether to honour the instructions of its customer despite suspecting that the funds may represent the proceeds of crime (*Interush Ltd v Commissioner of Police* [2015] 4 HKLRD 706).

In practical terms, such letters are extremely influential, although in many cases, it will also be necessary and/or prudent to reinforce a "letter of no consent" by means of a *Mareva* type freezing injunction or proprietary injunction. Such injunctions formally secure the funds in the account(s) pending further order of the court and can be obtained on short notice, day or night in Hong Kong.

The Police also discourage victims from relying on "letters of no consent" to prevent dissipation of the funds long term, and will usually encourage victims to apply for a *Mareva* type freezing injunction or proprietary injunction if the case looks unlikely to resolve in judgment and the return of the funds within 3-6 months.

Needless to say, the assistance of experienced local legal counsel is recommended.

Recovery of the funds

If you have successfully frozen the fraudster's account(s) before the funds have been dispersed, it will be necessary to commence litigation in order to recover the funds.

Once the accounts are frozen, very few 1st Tier Recipients will defend the action. If the 1st Tier Recipients do not defend the action, the funds can generally be recovered quickly and efficiently by means of default judgment and a garnishee order.

Where the funds have been transferred to a 2nd Tier Recipient, it may be necessary to obtain a "Bankers Books" disclosure order pursuant to the Evidence Ordinance (Cap. 8), section 21, requiring the recipient bank(s) to disclose account movements, thereby allowing you to trace your funds through multiple accounts.

In these, somewhat more complex cases, the likelihood is that some form of defence will be mounted. While each case will turn on its facts, in our experience these defences rarely stand up to scrutiny and may often be dealt with by means of summary judgment.

At times, we may also encounter a defendant who is a genuinely innocent third party caught in the mix. We have nevertheless had success in the past in recovering against such a party and are currently working on a case against a licensed money service operator.

Learning points

There are numerous steps which may be taken to reduce the likelihood of succumbing to an email fraud. Here we simply set out a few key takeaways:

- Read critically. If in doubt, call the usual number you have for your counterparty.
- Do not rely on the contact details in the sender's email signature. Google them if necessary.
- Check your email account "rules" on at least a monthly basis.
- Every member of the accounts team should have authority to challenge payment instructions, regardless of seniority unless the instructions are given in person. However, such authority must also go hand-in-hand with a culture in which staff feel able and encouraged to act upon their instincts and question senior personnel in order to protect the company.
- If you become the victim of a fraud, you must act quickly, so develop an incident response plan now which includes contact details for your bankers, IT personnel and solicitors: our contact details are on the cover page.

铭德有限法律责任合伙律师事务所
法律动态 –2020 年 6 月

2020 年 6 月 24 日

本版内容	页
在“收购”期间披露内幕消息 *余卓伦和邝永骏*	**2**
谅解备忘录: 从大晟金融集团有限公司诉 Nicerich Promise Limited 一案中得到的启示 *Caroline De Souza*	**3-4**
电子邮件诈骗及如何辨别电子邮件的真伪 *Pryderi Diebschlag*	**5-6**

在欢迎阅读我们有着各样法律和市场最新情况的新一期通讯

- 在“收购”期间披露内幕消息;
- 谅解备忘录: 从大晟金融集团有限公司诉 Nicerich Promise Limited 一案中得到的启示; 和
- 电子邮件诈骗及如何辨别电子邮件的真伪。

我们希望本通讯为您提供有用的资料，并欢迎您对日后的题目提出意见和建议。

如果您对本通讯有任何疑问，请参阅作者的联系方式。

合伙人	联系方式
资本市场及公司业务	
Fred Kinmonth 高文天	2841 6822
高惠妮	2841 6826
莫玮坤	2841 6803
唐宇平	2841 6836
胡川明	2841 6873
争议解决、竞争及保险	
William Barber 巴伟林	2841 6934
Nathan Dentice	2841 6881
Jonathan Green	2841 6808
David Harrington 夏狄伟	2841 6872
江惠明	2841 6866
廖泰业	2841 6819
David Morrison	2841 6932
苏振国	2841 6879
余卓伦	2841 6878
基建、工程及物业	
秦再昌	2841 6870
叶永耀	2841 6843
知识产权	
Steven Birt 毕兆丰	2841 6933

作者

余卓伦
合伙人
T 2841 6878

Caroline De Souza
顾问
T 2841 6910

Pryderi Diebschlag
高级律师
T 2841 6931

邝永骏
高级律师
T 2841 6930

MinterEllison LLP
铭德有限法律责任合伙律师事务所

在“收购”期间披露内幕消息

余卓伦 T: +852 2841 6878 | E: desmond.yu@minterellison.com
邝永骏 T: +852 2841 6930 | E: jun.kwong@minterellison.com

市场失当行为审裁处最新的裁决

市场失当行为审裁处（**「审裁处」**）在 2020 年 3 月 18 日发表报告，裁定前香港上市公司美即控股国际有限公司（**「美即」**）及其五名前董事违反了香港《证券及期货条例》（第 571 章)（**「证券及期货条例」**）第 XIVA 部项下的披露规定，因其等没有在合理可行的时间内尽快披露与 L'Oréal SA（**「欧莱雅」**）拟收购美即有关的内幕消息。

对市场的影响

审裁处的决定对在收购的情形下履行披露义务有深远的影响。除了遵守香港的《收购及合并守则》与《股份回购守则》外，我们建议企业就遵守证券及期货条例第 XIVA 部征求意见，并建立起内部控制，确保有一套有效的制度去确保内幕消息的保密性和及时披露内幕消息。我们也谨此提醒企业应该妥善保存其获取的建议的记录，尤其是在可能涉及到转移业务记录的收购中。

背景

美即于 2010 年 9 月在香港联交所上市。美即在 2014 年通过一项安排计划被欧莱雅收购。此后不久，美即的上市资格被撤销。

欧莱雅收购美即

欧莱雅的代表在 2013 年 3 月与美即的创办人（也即美即当时的大股东和执行董事）接洽，表示有意收购美即。商谈在 2013 年 3 月至 4 月期间进行。在 2013 年 4 月 27 日的一次会议上，欧莱雅的代表说服创办人考虑将其所持美即股份出售给欧莱雅（受制于各种日后的进一步的考虑）。在该会议中，双方曾提及收购价为每股不低于 5.5 港元。审裁处认定在这次会议上产生了内幕消息，因为双方的讨论超出了试探的范围，而且存在实际发生交易的可能性。

审裁处的裁决

内幕消息

根据证券及期货条例第 XIVA 部的规定，如果内幕消息是在美即的高级管理人员（如董事）履行职责的过程中得悉的，则该内幕消息就归于美即，并进而需承担相应的披露义务。审裁处虽然同意美即的创办人以个人和作为美即股东的身份（而非美即的高级管理人员的身份）在 2013 年 3 月和 4 月（包括 2013 年 4 月 27 日的会议）参加了与欧莱雅代表的讨论，但是审裁处裁定 2013 年 4 月 27 日之后不久，当美即的创办人之一（即美即的董事会主席）在保密的基础上联络了美即的机构投资者，告知其欧莱雅有意收购美即时，内幕消息即归美即所有。审裁处得出这一结论的主要原因是创办人为安排会议而发给美即机构投资者的电子邮件中的措辞，以及这些电子邮件并没有说明创办人只是打算以美即股东的身份与机构投资者会面。

消息保密

审裁处也发现存在内幕消息泄露的情况。美即的股价和成交量在 2013 年 4 月中旬和 4 月下旬至 5 月上旬大幅上涨。虽然美即在 2013 年 4 月中旬在美国进行了第一次路演，但审裁处认为，根据证据，2013 年 4 月底至 2013 年 5 月初期间美即股价及成交量的上升是无法解释的。因此，除了内幕消息被泄露之外，并无可对 2013 年 4 月底至 5 月初期间股价及成交量上升之可信的解释，审裁处认为没有其他合理的解释。故此，审裁处认为，美即不能以证券及期货条例第 XIVA 部项下的“安全港”条文对香港证监会的指控进行抗辩。

保密的预防措施

关于美即是否采取了所有合理的预防措施来确保内幕消息的保密，以及董事们是否采取了所有合理的措施来确保有适当的保障措施来防止美即违规，审裁处裁定美即没有关于识别和披露内幕消息和/或保密的书面政策。审裁处认为，没有证据可以证明美即发现了内幕消息及就此作内部讨论，也没有证据可以证明美即对内幕消息的保密作过深思熟虑和针对性的评估。

审裁处的结论

审裁处裁定美即违反了披露要求。审裁处并裁定，美即之所以违规是因为美即的董事长和公司秘书（他们当时都是美即的执行董事）存在疏忽，以及美即当时的一些董事没有采取一切合理的措施来确保有恰当的保护措施防止美即违规。

待作出的制裁

审裁处尚未就美即和那些被裁定违反披露规定的前董事的制裁措施作出裁决，因为审裁处已下令准备专家证据来证明有关违规行为给投资公众造成的理论上的损失。

谅解备忘录: 从大晟金融集团有限公司诉 Nicerich Promise Limited 案件中得到的启示

Caroline De Souza T: +852 2841 6910 | E: caroline.desouza@minterellison.com

背景

香港原讼法庭近日就大晟金融集团有限公司诉 Nicerich Promise Limited 案件 (*(HCA 1065/2016) [2020] HKCFI 588)* 作出判决。被告人 (下称:「**NPL**」) 是一家于英属维尔京群岛成立并由林建名博士实益拥有的公司。该公司同时也是香港上市公司鳄鱼恤有限公司 (下称:「**上市公司**」) 的控股股东。原告 (下称:「**大晟**」) 是一家由 Zhou Zhenke 先生控制，于英属维尔京群岛成立的公司。

大晟与 NPL 在二零一五年二月十三日签订了一份关于出售及收购 NPL 在上市公司的控股权的谅解备忘录 (下称:「**备忘录**」)。三天后，大晟依照备忘录的条款向 NPL 支付 了 3000 万港元作为定金 (下称「**定金**」)。该次交易最终没有完成，但 NPL 拒绝退回定金，故大晟提出诉讼要求 NPL 返还定金。

备忘录并未对退还定金作出规定，但却规定如果双方签订正式的出售及收购协议，该笔定金将被用作部分的收购价款。

大晟主张定金是可以退回的，因其本质上为诚意金。支付定金意在显示大晟有诚意与 NPL 协商该次交易。NPL 辩称定金是其承担备忘录项下具有法律约束力的义务 (例如：在锁定协议中，被告承诺除原告外，不会与其他人士进行协商)，并将该义务对应的权利和特权赋予大晟的金钱对价。

作为次要事项 (下称:「**次要事项**」)，为解释备忘录之目的，法庭也需要决定在备忘录草拟稿中所呈现的修订可否接纳为证据。NPL 认为备忘录草拟稿可获接纳，特别是删除的备忘录相关条款中的「可退回」字样以及涉及偿还定金的方法及时间的条款 (统称:「**删去条款**」) 均可被视为“定金为不可退还的”是双方的共同意图之证据。

法庭采取的做法

法庭认为以下案件有助于本案的裁决：

- *Arnold v Britton*[1] – 在对一份书面合同进行解释时，法庭应参考「一个拥有各方可得的相关背景知识的理性自然人通过合同的语言所能理解的签订合同的意图」以确定各方意图。本质上，这是指根据文件、事实及商业环境下相关字词的含义，并根据: (i) 条款的自然及普通意思; (ii) 合同的其他相关条款; (iii) 条款和合同的总体目的; (iv)合同签署时各方知晓或假定的事实及环境; 及 (v) 商业常识来理解合同，但 (vi) 不包括关于任何一方意图的主观证据。

- *Wood v Capital Insurance Services Ltd*[2] - 法庭的工作在于确定各方选择表述其协议的语言的客观含义。这就包括将合同作为一个整体进行考虑，以及在决定语言的客观含义时，根据合同的性质，形式和起草的质量，对更广泛的上下文给予或多或少的考虑。

- *Rainy Sky case*[3] - 当合同语言出现互相抵触的意思时，法庭可以从“哪种意思更符合商业常识”的角度来考虑互相抵触的意思的影响。但是，要在语言以及互相抵触的意思之间取得平衡，法庭须考虑条款起草的质量及一方可能已同意某些事后看来不符合其利益的事情的可能性。法庭亦需注意，某条款可能是通过谈判达成的折衷方案，或者协商合同的谈判方无法同意更精确的条款。

- *Eminent Investment (Asia Pacific) Limited v Dio Corporation*[4] - 这个于香港上诉的案件确认了解释一份文件有「内容分析法」和「环境分析法」两种方法，而这两种方法的选择则取决于文件本身的性质。若文件是由专业人士准备的、比较精密且复杂，则可以使用「内容分析法」，而无需重塑上下文或事实环境。然而，若文件为非正式的、简短的或未经专业人士草拟，参考上下文相关内容则会有所帮助。

案件结果

法庭判决 NPL 应向大晟退还 3,000 万港元定金。法庭已仔细考虑双方各自的证人所提供的证据的质量及可信度，并明显倾向于大晟的两位证人所提供的证据。

法庭认为备忘录草拟稿中的删去条款不能必然表明双方已同意定金为不可返还的。备忘录中没有任何条款允许 NPL 可以保留定金，故 NPL 并无正当理由拒绝返还定金[5]。

关于次要事项，法庭裁定备忘录草拟稿不可被接纳为证据。此外，即使法庭的裁定是错误的，法

[1] [2015] AC 1619
[2] [2017] AC 1173
[3] [2011] 1 WLR 2900
[4] [2019] HKCA 606
[5] Chillingworth v Esche [1924] 1 Ch.97 at 108

庭也不会对备忘录草拟稿进行任何考虑，原因如下:

- 根据英国上议院对于 *Prenn v Simmonds*[6]一案的裁决，当一份文件显示已被修订，而各方仍在协商，法庭不能通过比较其最初的版本与修订的版本来分析修订的部分是否对解释问题产生任何启示。就证明各方意图而言，修订部分是没有帮助的。在大多数情况下，合同签订前的协商作为证据仅反映了一方的主观意图，因此不应被采纳。
- 即使法庭在一个例外情况下将合同签订前的交流采纳为证据，该交流也不能被采纳为证明待商榷的条款的含义之证据，而是作为「各方已知的背景」，对存疑条款的解释可能会有帮助。
- 如果合同中的语言含糊不清或能被理解成多种含义，则周围情况的证明可被采纳为证据以协助解释。但当合同有直白的字面含义时，该证据不可被采纳为证据以否定合同的语言。(*Coldefa Construction Proprietary Limited v State Rail Authority of New South Wales*[7])

实务提示

谅解备忘录、意向书、条款大纲及条款清单这类词语是可交替互换的，但本质上具有相同意思。谅解备忘录通常在合同商讨初期签订，但在签订正式交易文件之前。一份谅解备忘录通常记录了各方已达成一致的交易中的重要条款。根据谅解备忘录起草的方式，其可以为不具约束力、完全具约束力及部分具约束力。然而在大多数情况下，谅解备忘录是部分具有约束力的。例如，有关保障协商期间以及/或尽职调查所披露保密信息的条款、排他性条款以及适用法律条款通常均具有法律约束力。

如果你在准备或正在协商一份谅解备忘录，请留意下列几点:

- 如果有定金要支付，则应指明该定金是否为可返还的。若为可返还的，则应详细说明及列出可返还定金的所有情况，并提供明确的返还机制 (含时间表)。
- 在上述大晟诉 NPL 的案件中，该谅解备忘录不是由律师起草的，而是大晟及 NPL 采用的一个模板文件。此为常见做法，但为了减少代价高昂的争议的风险，请先咨询一位有经验的商业律师对最终的草拟稿进行审阅。
- 没有一份可适用于所有情况的谅解备忘录。在采用一个模板文件准备谅解备忘录时，请先考虑该版本是否适用于你的交易。
- 在草拟谅解备忘录时，请使用清晰及简单的语言。如果采用的语言含糊不清、前后不符或是含义的解释是可以开放讨论的，这等同于自招麻烦。
- 解释一份有瑕疵的谅解备忘录为法官提供了充分的机会来行使其主观判断。在该种情况下，诉讼高度取决于事实，非常耗时，昂贵且结果是不能确定的。

[6] [1971] 1 WLR 1381

[7] (1982) 149 CLR 337

电子邮件诈骗及如何辨别电子邮件的真伪

Pryderi Diebschlag T: +852 2841 6931 | E: pryderi.diebschlag@minterellison.com

背景

任何一位财务总监都会告诉你，电子邮件诈骗在世界各地都是一个顯著的及日趋严重的问题 - 仅仅在这个月，我们已收到 5 宗有关转账至香港银行之账户的新诈骗个案的延聘。此外，大型电子邮件诈骗案件似乎每隔几个月就成为头条新闻。

但就在这些事情已是众所周知的情况下，为什么我们仍然被骗呢？

我们认为部分原因是一般人对电子邮件诈骗的了解与现今的实况脱节。起草拙劣的电子邮件骗局，如声称是失散多年的亲友给我们留下了财富，或者声称来自陷入困境的国家的王子需要帮助将现金转移到国外，这些骗局现在已经不复存在。

电子邮件诈骗案是怎样形成的？

现实中，大多数的诈骗都是以相同的方式开始：骗徒入侵目标公司的电子邮件系统，并耐心观察各人的做事习惯，写作风格和交易的过程，然后动手。

诈骗通常以下述的两种模式之一进行：

- 转换销售合同账户：骗徒假扮成公司的供应商，并且（a）声称其现有的银行账户出现一些问题，及（b）要求向新的香港账户付款。

  最近，我们发现这布局有一个更周密的版本，就是当骗徒收到了款项后，承认出现了一些「错误」并在一周后退还款项，从而建立目标对骗徒的信任，其后才要求更大的金额。

- 行政总裁骗局：骗徒假扮成公司的高级管理层，并指示财务部门的员工将款项转移给新的业务合作伙伴，或为一项新的让人兴奋的秘密项目支付首期。

您不能假设欺诈性电子邮件会来自明显错误的电邮地址，或以差劲的英文或中文写成。

我们见过骗徒使用行政人员的真实电邮地址，并设立了电子邮件自动归档回复，使电子邮件不会引起真正的行政人员的注意。

更常见的是骗徒会注册一个看来似乎与标准域名完全相同的域名，例如骗徒可能使用：

- 骗徒@hotrnail.com；而非，
- 骗徒@hotmail.com。

我们甚至见过当客户的会计小组遵循程序要求对方提供相关合同的证据时，对方提供了一份超过 20 页的完整合同扫描本，包括贴上从真实交易文件中复制的签名。

钱往哪里去？

收款人通常是一家在香港新成立的小型公司（「**第一层收款人**」），其唯一的股东和董事是一名居住在中国内地的中国公民。

款项通常会在几个小时或几天之内转移到其他在香港的人或公司（「**第二层收款人**」）。款项在其后会流入内地，澳门或以现金被提取。

您该怎么做？

一旦发现诈骗，您应立即采取一些自救措施：

- 通知您的银行，并要求它（a）收回款项，并（b）向收款银行发出一份 SWIFT 报告，知会它该款项是犯罪收益；
- 在这网页上向香港警察提交一份电子报告；
- 在这网页上向联合财富情报组（Joint Financial Intelligence Unit）提交电子「可疑交易报告」（Suspicious Transaction Report）；及
- 聘请当地律师，并要求他们致函收款银行。

香港《有组织及严重罪行条例》（第 455 章）第 25（1）条列明，如财产全部或部分、直接或间接的是从可公诉罪行中获得的得益，处理该财产则为刑事罪行。因此，一旦收款银行收到通知，它可能会暂时冻结第一层收款人的账户，使您可以采取进一步的行动。

我们可以做什么？

鉴于香港警察和联合财富情报组每天收到的电子报告的数量，根据我们的经验，您可以采取之最有效的一步是亲往警察总部，尽快当面将诈骗行为向香港警察报告。

香港警方可能会在其后向收款银行发出「不同意处理书」，通知该银行警方现在有理由怀疑该笔款项是犯罪收益。

在法律上，「不同意处理书」不能冻结银行账户或确立任何对款项所有权的申索，但其是一种能

够冻结少量款项又合符成本效益的方法。然而，严格来说，这些款项仍面临风险，因为即使银行怀疑这笔款项可能为犯罪收益，银行最终还是可以决定是否遵守客户的指示（*Interush Ltd 诉警务处处长 [2015] 4 HKLRD 706*）。

实际上，「不同意处理书」有极大的影响力。尽管在许多情况下，辅以“*Mareva*”类型的冻结禁制令或所有权禁制令是必要的及/或是慎重的做法。这类禁制令能在法院颁布其他命令之前正式地将款项留在账户中，而且在香港可以在短时间内取得，不分昼夜。

警方亦不鼓励受害人长期依赖「不同意处理书」来防止款项丢失。如果案件看来不大可能在 3 到 6 个月内取得判决书并取回款项，警方通常会鼓励受害人申请“*Mareva*”类型的冻结禁制令或所有权禁制令。

无需多说，我们亦建议向经验丰富的当地律师求助。

取回款项

如果您在款项丢失之前冻结了骗徒的账户，下一步便要提起诉讼程序以讨回款项。

账户被冻结后，第一层收款人很少会作抗辩。如果第一层收款人不作抗辩，通常可以通过“辩方欠缺行动”而获得判决和第三债务人的命令快速而有效地取回资金。

如果款项已转移到第二层收款人，则可能有必要根据香港《证据条例》（第 8 章）第 21 条获取银行账簿披露命令，要求收款银行披露账户内的变化，让您可以透过多个账户追查您的款项。

在这些比较复杂的情况下，对方可能会作出一些抗辩。虽然每一个案件的情节各有不同，但根据我们的经验，这些抗辩很少能经得起考验，而且一般都可以通过简易判决来处理。

有时侯，我们亦可能会遇到一些无辜被卷入事件中的第三方。尽管如此，我们过去亦曾经从这些无辜的第三方处追回款项。目前亦正在处理一宗针对持牌金融服务经营者的个案。

要注意之处

要减少我们遭到电子邮件诈骗的机会，我们有很多事情可以做，谨此摘要列举如下：

- 严谨的阅读。如有疑问，就打对方的常用电话号码。
- 不要相信发件人在电子邮件签名中的联系资料。如有必要，使用网络搜索。
- 至少每个月检查您的电子邮件帐户规则一次。
- 不论职级高低，每一个会计小组的成员都应该有权力去质疑付款指示，除非是面对面亲自下达的指示。但是，这种权力还必须与一种文化相辅相成，该文化是指让员工感到有能力并得到鼓励根据自己的直觉行事，可以为了保护公司而质疑高层人士。
- 如果您成为诈骗行为的受害者，必须迅速采取行动，所以现在就请制定事故应变计划，其中应包括银行，IT 人员和律师的联系方式: 我们的详细联系方式在首页。

铭德及有关办事处：

阿德莱德 奥克兰 北京 布里斯班 堪培拉 达尔文 黄金海岸 香港 伦敦 墨尔本 珀斯 上海 悉尼 乌兰巴托 惠灵顿