MinterEllison LLP
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Welcome to our latest bulletin featuring various legal and market updates

- Forget Me (Not);
- Handling Termination Notices Given by Employees When Emotions Are High;
- A Recent Case on Delisting – Rule 6.01A of the Main Board Listing Rules; and
- Disclosing Identity of Counterparties in Transactions of Listed Issuers.

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.

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Forget Me (Not)

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The right to be forgotten has been subject to much debate over the years. It is not simply a matter of requesting personal data to be erased but involves the balancing of competing fundamental interests such as privacy, data protection, freedom of expression and information, and public interest. Following confirmation from the Court of Justice of the European Union (the "**ECJ**") and the English Court that data subjects have, in certain circumstances, a right to be forgotten against operators of internet search engines under EU law and UK law, Hong Kong has recently clarified in **X v. Privacy Commissioner for Personal Data** (Administrative Appeal No. 15/2019, 7 August 2020) that there is no independent right to be forgotten but such right is not totally irrelevant in the context that personal data should be erased under the Personal Data (Privacy) Ordinance (Cap. 486) (the "**PDPO**").

European Union

In the EU, the right to be forgotten was first recognised by the ECJ in **Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González** [2014] QB 1022 ("**Google Spain**"). In that case, the complainant, a Spanish national, wanted to remove links from Google search results based on his name to an auction notice posted on a Spanish newspaper's website relating to his bankruptcy, which has long been discharged and no longer relevant. The Spanish Court stayed the proceedings of the parties and referred questions for preliminary ruling by the ECJ. On 13 May 2014, the ECJ laid down the following general principles:

- in making available information containing personal data published on the internet by third parties, an operator of an internet search engine (i.e. Google Inc. in that case, currently known as Google LLC, "**Google**") is processing personal data and is a data controller (i.e. a data user) in respect of that processing;

- in appropriate cases, a data subject is entitled to request an operator of an internet search engine to remove from search results displayed, following a search made on the basis of his or her name, links to webpages published by third parties containing information relating to that data subject, notably, where the data is *"inadequate, irrelevant or no longer relevant, or excessive"* in relation to the purposes for which the data was collected or processed and in light of the time that has elapsed, even when the publication in itself on those webpages is lawful;

- the right to be forgotten must be balanced against other fundamental rights, including freedom of information and public interest.

The right to be forgotten is now enshrined in Article 17 of the General Data Protection Regulation (the "**GDPR**") which came into effect on 25 May 2018. Article 17 sets out the specific circumstances under which a data subject has the right to require certain data controllers to erase his or her personal data without undue delay, including where personal data is no longer necessary in relation to the purposes for which it was collected or otherwise processed, or where a data subject withdraws consent. Article 17 also explicitly recognises that the right is not absolute by setting out circumstances where processing a data subject's personal data may override his or her right to be forgotten.

In response to **Google Spain**, Google has launched its official request process on 29 May 2014 for delisting Universal Resource Locators ("**URLs**") from its European search engine results. According to Google's Transparency Report, as at 23 March 2021, requests to delist and URLs requested to be delisted amounted to 1,026,028 and 4,019,688 requests respectively.

United Kingdom

In the UK, the English Court confirmed the right to be forgotten in certain circumstances in its decision handed down on 13 April 2018 in **NT1 & NT2 v. Google LLC** [2018] EWHC 799 (QB) ("**NT1 & NT2**"). The two claimants in the case had been convicted of unrelated conspiracy crimes which were "spent" under UK law. Google's internet search results featured links to third party reports about the claimants' criminal convictions. The claimants sought orders requiring details about their convictions to be removed from the internet search results, on the basis that such information was not just old, but out of date, irrelevant, of no public interest and/or otherwise an illegitimate interference with their rights. They also sought compensation from Google's conduct in continuing to return search results disclosing such details after their complaints.

The English Court dismissed the first claimant's claims on the basis that the information complained of *"retains sufficient relevancy today"*. The first claimant did not accept his guilt or show remorse for his actions. Further, he continued to remain in

business so his conviction information was relevant to the assessment of his honesty by members of the public. As for the second claimant, the English Court compelled Google to delist the links complained of. It was held that the second complainant frankly acknowledged his guilt and expressed genuine remorse. He was no longer involved in business activities in the same field and there was no evidence of any risk of repetition. Accordingly, the crime and punishment information *"has become out of date, irrelevant and of no sufficient legitimate interest to users of Google Search to justify its continued availability, so that an appropriate delisting order should be made"*. In reaching the above conclusions, the English Court applied the 13 common criteria for handling complaints by European data protection authorities set out in the EU *"Guidelines on the Implementation of the Court of Justice of the European Union Judgment on* [Google Spain]*"* which were adopted on 26 November 2014 (the "**EU Guidelines**"). Even though the second claimant succeeded in his delisting claim, the English Court rejected his claim for compensation against Google given that Google was an enterprise committed to compliance with the relevant requirements, it would be harsh to say that it had failed to take such care as in all the circumstances was reasonably required.

Hong Kong

The uncertain position in Hong Kong as to whether the right to be forgotten exists has recently been clarified by the Administrative Appeals Board (the "**AAB**") in **X v. Privacy Commissioner for Personal Data** (Administrative Appeal No. 15/2019, 7 August 2020). The appeal arose from the decision of the Personal Data Privacy Commissioner (the "**Commissioner**") to terminate the investigation of a complaint lodged by the appellant ("**X**") against Google.

X was arrested by the police and his name and posts held in official bodies were published in the news, articles and online forums. When a Google internet search was conducted using the complainant's name, the results showed links to those news, articles and online forums. He requested Google to delist the links from the internet search results but was unsuccessful. X subsequently lodged a complaint with the Commissioner against Google. After investigation, the Commissioner decided to terminate the investigation on grounds including the following:

- Google, which operates the internet search engine, is a US entity with no presence in Hong Kong. Accordingly, Google does not fall within the jurisdiction of the PDPO;

- even though a data user must take all practicable steps to ensure that personal data is not kept longer than is necessary to fulfil the purpose for which it is (or is to be) used, the erasure of personal data is considered unnecessary *"where it is in the public interest (including historical interest) for the data not to be erased"*. In the present case, the incident was widely reported and discussed on online forums. It aroused wide public concern. Therefore, the information about X's arrest published through the internet links was for journalistic purposes and there was no unlawful interest in displaying the internet links. In any event, the PDPO does not explicitly provide an individual with the right to be forgotten. For the sake of discussion, after applying Article 17 of the GDPR and considering **NT1 & NT2**, the Commissioner was of the view that the right to be forgotten would not be applicable and the balance lied in favour of freedom of expression and information which reasonably justified the retention of the data posted through the internet links.

In dismissing X's appeal, the AAB held that the PDPO does not have extra-territorial effect. The PDPO only covers persons being "data users" who have operations controlled in or from Hong Kong (i.e. data users who control all or any part of the collection, holding, processing and use of data in or from Hong Kong). The proper test is solely the "control" requirement. As a matter of fact, Google (the operator of the internet search engine) is not situated in Hong Kong and has no presence or operations in Hong Kong. All of its data centres, equipment and search servers are installed or located outside Hong Kong and all of its operations in relation to the search engine are performed outside Hong Kong. Accordingly, Google is not a "data user" under the PDPO and is not subject to the PDPO.

Although the above was sufficient to dismiss the appeal, the AAB provided guidance on the right to be forgotten as requested by the Commissioner for application in future cases as follows:

- there is no independent right to be forgotten in Hong Kong;

- however, the right to be forgotten is not totally irrelevant in the context that personal data should be erased under the PDPO where personal data is inaccurate (Data Protection Principle 2) or no longer required for the purposes for which it was collected (section 26). Hence, the 13 common criteria set out in the EU Guidelines and applied in **NT1 & NT2** may be relevant consideration under the PDPO in appropriate cases.

Although there is no independent right to be forgotten under Hong Kong law, the AAB decision clarifies the basis upon which data users may be compelled to remove contents containing personal data when requested by data subjects under Hong Kong law, that is, where the data is inaccurate or no longer required for the purposes for which it was collected. Guidance as to when personal data should be erased and how personal data may be permanently erased by means of digital deletion and/or physical destruction can be sought from the "Guidance on Personal Data Erasure and Anonymisation" published by the Commissioner in April 2014.

In addition to the above, the AAB decision has helpfully confirmed that unless data is controlled in or from Hong Kong, foreign companies with no operations in Hong Kong are not subject to the PDPO.

Handling Termination Notices Given by Employees When Emotions Are High

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The COVID-19 pandemic created a global health and economic crisis of unprecedented proportions since late 2019 and has led to a transformative impact on all aspects of our daily lives.

Employers have had to cut operation costs through salary reductions, temporary and permanent staff cuts, and in some cases, complete suspension of business activities, while employees are at risk of salary cuts and in fear of being laid off. These changes have inadvertently created pressure and tension amongst employers and employees.

Whilst it is understandable that termination either by way of notice or resignation is inevitable during this period of economic uncertainty, the manner in which employers handle termination is crucial. The recent case of *Lam Sin-Yi Sindy v. Leung King-Wai William t/a William KW Leung & Co* ([2020] 5 HKLRD 170) reminds employers to take time before accepting a termination notice at face value, which may have been given impulsively during acrimonious exchanges when emotions are running high, as these circumstances often give rise to doubt as to whether the parties really mean what they say.

Background

The claimant ("**Employee**") commenced employment with the defendant ("**Employer**"), a firm of solicitors, on 8 August 2019. The employment contract contained a three-month probation period, during which (following the first month) the employment may be terminated by either party by service of 7 days' notice.

In the afternoon of 18 September 2019, the Employee submitted a leave application to the human resources and administrative manager ("**Manager**") to take a half day "no pay leave" from 9 am to 1 pm on 19 September 2019 to accompany her mother to a doctor's appointment ("**Leave Application**"). The Manager approved the Leave Application.

However, when the Leave Application was brought to the attention of the Employer on the morning of 19 September 2019, the Employer messaged the Employee ("**Morning Messages**") via a WhatsApp group of which the Manager and the Employee were members ("**WhatsApp Group**"), stating that he had not approved the Leave Application which was made on one day's notice; and the firm would never approve leave applications short of 7 days' notice unless in emergency situations. The Employer followed up with a WhatsApp message to the Employee, stating that he was considering whether the Employee have been absent from work without cause, and if so, she would have to leave immediately. The Employer also stated to the Manager in the WhatsApp Group that the Employee was still on probation and that a week's notice was required to terminate the Employee during her probation period.

At 1:57 pm on the same day, the Employee responded to the Employer's earlier messages in the WhatsApp Group ("**1:57 Message**"). The Employee stated that she had only taken half day of no pay leave and that leave applications were to be made to the Manager who would then submit it for the Employer's signature. She further questioned whether 7 days' notice requirement was applicable even for no pay leave applications, and finally asked, rhetorically, whether the Employer was treating her as being absent without cause and that she was to leave immediately. She stated that it was up to the Employer to use any alleged fault to dismiss her, that she had been prepared to return to work in the afternoon, but it did not matter if she should return to pack her things, to return her card and to take her pay cheque. She pointed out that the Employer could arrange for other members of staff to monitor her packing.

At around 2 pm, the Employee returned to the office with the intention of seeking clarifications from the Employer, but was prevented from doing so by the Manager and the receptionist of the firm. The Employee was informed that the Employer was not in the office, and she was then asked by the Manager to pack her belongings, return the keys to the office, cancel her computer password and leave. The Employee asked the Manager whether she was being told to leave because she had been absent from work without cause, and the Manager said she would need to consult the Employer on this.

Since then, the Employee did not return to work. On 25 September 2019, the Employee received her final payments but discovered that the Employer had deducted a sum of HK$4,316.67 as payment in lieu of the 7 days' notice, which the Employer claimed he was entitled to do.

Procedural History

The Minor Employment Claims Adjudication Board ("**Board**") dismissed the Employee's claim.

The Board held that before the Employer decided whether the Employee was absent from work without cause, the Employee had already indicated in her 1:57 Message that she would return to the office to pack her things, return office keys, and collect her pay cheque. Although the Employee did not use the word "resign" in any of her messages to the Employer, the contents of her text messages and her conduct demonstrated her termination of employment by resignation. The Board also found that the Employer, through the Morning Messages, intended to give the Employee 7 days' notice and did not summarily dismiss the Employee. On the other hand, the 1:57 Message was a resignation by conduct, and since the Employee did not give 7 days' notice of termination, the Employer was therefore entitled to deduct the payment in lieu of notice.

The Employee appealed the decision of the Board.

The question of law was whether, in determining the facts and construing whether the words and actions of the Employee constituted resignation, the Board should have considered the entire context and circumstances of the dialogue between the Employee and the Employer, and not merely considered the literal meaning of the words used by the Employee.

Judgment

The Court recognized that in circumstances where words or actions regarding termination were not uttered in clear and unambiguous terms, but were uttered in anger or in the heat of the moment, there was a real question as to whether parties really intended to mean what they appeared to say.

The Court held that in deciding whether or not the Employee had resigned on 19 September 2019, the Board should not have only considered the Employee's response to the Employer's WhatsApp messages, but also the entire context in which the WhatsApp messages were heatedly exchanged between them, and whether that evinced a clear intention to resign and terminate the employment.

The Court found that the Employee's words and actions were merely impulsive and made in a moment of anger and could not be properly and reasonably construed by the Employer as resignation. Further, the Employer did not, through either the Manager or the receptionist, correct the Employee's belief that she had been dismissed; nor was the Employee given an opportunity to clarify her intentions.

As such, the Court held that in those circumstances, there was no resignation by the Employee in an unambiguous manner and since she was simply told to pack and leave, she was effectively dismissed by the Employer. The Employer therefore had to reimburse the payment in lieu of notice deducted from the Employee's wage and her respective legal costs.

Takeaway

Disagreements are common in the workplace and employers and employees often say or do things impulsively without genuinely meaning them.

This recent decision of the Court reminds employers to avoid pursuing immediate action and take their time before accepting a purported resignation given in the heat of the moment. Employers should give employees reasonable time to reconsider their decision and obtain confirmation of the employee's intention to resign to prevent allegations of wrongful dismissal. Cool heads are needed!

Should you require any assistance on any aspects of employment law, please do not hesitate to contact our partners Jonathan Green, Desmond Liaw or Lillian Wong.

A Recent Case on Delisting – Rule 6.01A of the Main Board Listing Rules

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Under Rule 6.01A of the Main Board Listing Rules, the Exchange may cancel the listing of any securities that have been suspended from trading for a continuous period of 18 months. Recently, there has been an increasing number of applications brought by issuers which have been delisted under Rule 6.01A for leave to judicially review the Exchange's decisions to delist them. A recent example is *Bolina Holding Co. Ltd. (In Liquidation) v The Stock Exchange of Hong Kong Limited* [2021] HKCFI 460, which concerned an issuer that had been suspended from trading for more than 18 months by reason of its insolvency (the "**Decision**"). The Decision illustrates the strictness of the Exchange's delisting regime and highlights the importance for suspended issuers (in particular, issuers in financial distress where a liquidator or provisional liquidator have been appointed) to act promptly towards resumption.

Background to Rule 6.01A

Rule 6.01A was introduced by the Exchange in August 2018 to address the issue of prolonged suspension of trading. Prior to the introduction of Rule 6.01A, there had built up a very large number of issuers whose shares had been suspended for more than a year, with no certainty as to when the suspension would be lifted or the issuer delisted [1]. This prevented the proper functioning of the market, and undermined the quality of the market and its reputation. The Exchange therefore decided to introduce a prescribed period (the "**Prescribed Remedial Period**") for issuers to resolve issues which had led to a suspension and to satisfy any resumption conditions imposed by the Exchange, failing which the issuers would be delisted. The rationale is explained by the Exchange in the "Consultation Conclusions – Delisting and Other Rule Amendments" published on 25 May 2018 as follows:

> "*23. As noted in the Consultation Paper, the fixed period delisting criterion is aimed at delisting issuers which remain unable to resolve the issues requiring their suspensions after a continuous period of suspension. It would give suspended issuers a clear deadline, incentivizing them to look into the issues and to develop a viable action plan to ensure that it will have remedied the relevant issues to the Exchange's satisfaction and resumed trading before the end of the prescribed fixed period.*
>
> *24. With this additional criterion, the Exchange will be able to delist an issuer where it does not have a clear basis to do so under MB Rule 6.01. This will provide certainty for the delisting process and address the issue of prolonged suspension in the interests of market quality and reputation, while reasonable opportunities are given to suspended issuers to take remedial actions with a view to resuming trading.*"

For issuers whose securities are listed on the Main Board, the Prescribed Remedial Period is fixed at 18 months.

Extension of the Prescribed Remedial Period

To ensure the effectiveness and credibility of the delisting framework and prevent undue delay of the delisting process, the Exchange will only extend the Prescribed Remedial Period in exceptional circumstances. As explained in paragraph 19 of Guidance Letter GL95-18 (the "**Guidance Letter**"), the Exchange may do so where:

(a) an issuer has substantially implemented the steps that, it has shown with sufficient certainty, will lead to resumption of trading; but

(b) due to factors outside its control, it becomes unable to meet its planned timeframe and requires a short extension of time to finalize matters. The factors outside the issuer's control are generally expected to be procedural in nature only.

This may happen where, for example, the resumption proposal involves an A1 application which has been approved by the Exchange but,

[1] For example, the issuer's financial position might be uncertain and the Exchange did not have a clear basis for delisting it under Rule 6.01. Under Rule 6.01, the Exchange may delist an issuer where it considers it necessary for the protection of the investor or the maintenance of an orderly market. It may also do so where there are insufficient securities in the hands of the public, the issuer does not carry on a business with a sufficient level of operations and assets, or the issuer or its business is no longer suitable for listing.

due to a delay in the court hearing for approving a scheme of arrangement, the issuer requires additional time to implement the relevant transactions. The Exchange envisages that if an extension of time is given, the Exchange would not normally extend the period for a second time.

Issuers in Financial Distress

During the consultation process, the Exchange specifically considered a proposal that special arrangements should be made for an issuer in financial distress where a liquidator or provisional liquidator had been appointed by the court and was working on a resumption plan for the issuer, having regard to the fact that the liquidator was an officer of the court and could not fully control the time required for a restructuring process which was often complex and would likely involve local and/or foreign court proceedings. The Prescribed Remedial Period, it was argued, might not be sufficient to allow the successful completion of a scheme of arrangement.

That proposal was not adopted by the Exchange. Instead, the Exchange made it clear that the new delisting framework was not intended to promote resumption of trading; rather, it was intended to be an effective delisting framework which enables the Exchange to meet its statutory obligation to maintain a fair, orderly and informed market for the trading of securities, by delisting issuers that no longer meet the continuing listing criteria in a timely manner, incentivizing suspended issuers to act promptly towards resumption and deterring issuers from committing material Listing Rule breaches.

Hence, no exception has been made for issuers in financial distress, and the Prescribed Remedial Period likewise applies.

The Decision

The strictness of the delisting regime is illustrated by the Decision.

The Decision concerned an issuer (the "**Company**") whose shares had been suspended from trading by reason of a winding-up order against the Company on 17 September 2018. Subsequent to its trading suspension, the Exchange set a number of resumption conditions for the Company, including the publication of all outstanding financial results and the withdrawal / dismissal of the winding-up order. The Company could not fulfill any of the resumption conditions (and hence could not resume trading) by the end of the 18-month Prescribed Remedial Period.

The Company applied to the Exchange for an extension of the Prescribed Remedial Period and argued, among other things, that an extension was appropriate in light of the unprecedented impact of the COVID-19 pandemic (which delayed the completion of the audit of the Company's accounts), and the progress which had been made by the liquidators to implement a restructuring by way of a scheme of arrangement.

The Exchange was not satisfied that the Company's situation constituted "exceptional circumstances" under paragraph 19 of the Guidance Letter and cancelled the Company's listing under Rule 6.01A. This decision was upheld by the Listing Review Committee on review. The Company's subsequent attempt to challenge the Listing Review Committee's decision by way of judicial review was also unsuccessful.

Although each case turns on its own facts, a number of observations could be made from the Decision in respect of the Exchange's (and the court's) approach towards applications for an extension of the Prescribed Remedial Period:

(a) The Prescribed Remedial Period is intended to be strict, and the period would only be extended in "exceptional circumstances". Whether the circumstances are "exceptional" for this purpose is primarily a matter for the Exchange, not the court, to decide.

(b) An application for extension should be supported by cogent evidence. For example, it would not be sufficient for an issuer to place general reliance on the COVID-19 pandemic as an "exceptional circumstance" without demonstrating with sufficient particularity as to how the COVID-19 pandemic had actually affected the issuer's resumption progress (for example, by identifying the specific aspects of the audit work that were delayed and the extent of the delay caused by the COVID-19 pandemic), or that the issuer would have been able to fulfil the resumption guidance by the resumption deadline but for the COVID-19 pandemic.

(c) When applying for an extension, an issuer is ordinarily expected to demonstrate to the Exchange that it has substantially implemented the steps that, it has shown with sufficient certainty, will lead to resumption of trading. In the case of an issuer in liquidation, it will not be able to do so if the resumption of trading is dependent upon the successful implementation of a

restructuring by way of scheme of arrangement, and the issuer has not secured the required level of approval from its creditors / shareholders. In any event, even if an issuer could show with sufficient certainty that all the requisite future events and conditions for completing the restructuring would be fulfilled, the Exchange will generally only consider granting an extension if the time required to finalize matters is short.

It is clear from the above that an extension of the Prescribed Remedial Period will not be lightly granted.

Given the strictness of the delisting regime, it is important for suspended issuers to devise a resumption plan as soon as practicable upon the suspension of trading and act promptly towards resumption. This is particularly the case for issuers which have been placed in liquidation or provisional liquidation, as the approvals of creditors, shareholders, regulators and/or the courts are often required before the issuers could implement their resumption proposals, and the issuers could not fully control the time required to obtain such approvals.

MinterEllison LLP acted for the Exchange in Bolina Holding Co. Ltd. (In Liquidation) v The Stock Exchange of Hong Kong Limited [2021] HKCFI 460.

Disclosing Identity of Counterparties in Transactions of Listed Issuers

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Amendment to Rule 14.58 of the Listing Rules

With a view to enhancing transparency of material transactions undertaken by issuers, The Stock Exchange of Hong Kong Limited (the '**Stock Exchange**') amended Rule 14.58 of the Rules Governing the Listing of Securities of the Stock Exchange (the '**Listing Rules**'), and such amendment came into effect on 1 October 2019 (the '**Amendment**').

Under the amended disclosure requirements, issuers must disclose the identity of the counterparties in notifiable transaction announcements and circulars. This is in addition to the pre-existing requirement to provide a general description of the principal business activities of the counterparties to the transaction. With the enhanced disclosure, the objective is to provide investors with sufficient information (e.g. identity of the parties who can exert influence on the transaction) to better understand the nature of the transaction.

Since the Amendment, the Stock Exchange and the Securities and Futures Commission (the '**SFC**') have published a series of guidance materials to clarify and assist issuers in complying with the amended Rule 14.58 of the Listing Rules, with the latest one released by the Stock Exchange in December 2020 (the '**December 2020 Newsletter**').

In this article, we summarise the December 2020 Newsletter, as well as other guidance materials previously published by the Stock Exchange and the SFC in relation to disclosure of counterparties in transactions.

Listed Issuer Regulation Newsletters issued by the Stock Exchange

The Stock Exchange provided guidance on the disclosure requirement under Rule 14.58 of the Listing Rules in their November 2019 and December 2020 listed issuer regulation newsletters (the '**Newsletters**').

The Stock Exchange highlighted in the Newsletters that, whilst Rule 14.58(2) of the Listing Rules prescribes the minimum requirement to disclose the identity of the counterparties, issuers are highly encouraged to also disclose the identity of the beneficial owners of the counterparties, especially when the counterparties are investment-holding vehicles. In doing so, issuers are to observe the general disclosure principle under Rule 2.13 of the Listing Rules – information contained in issuers' documents must be accurate and complete in all material respects and not be misleading or deceptive. This is to ensure that shareholders and investors are provided with sufficient information to make an informed assessment of the transaction.

The Stock Exchange further indicated that the counterparties that are subject to disclosure are normally the persons who take part in the negotiation process for the transaction, rather than the legal buyers, sellers or subscribers which are often investment-holding companies. The counterparties to a transaction may take various forms, including for example, a company, a trust or an investment fund. The Stock Exchange further elaborated on who may be considered the ultimate beneficial owners of the following types of entities:

- Companies – the natural persons who control, directly or indirectly, one-third (1/3) or more of the counterparty
    - if the counterparty has a diverse shareholder base, as a minimum, the issuer should disclose the ultimate beneficial owner of the single largest shareholder
- Trusts – the trustees and beneficiaries of the trust
- Investment Funds – for a registered investment fund with a wide investor base, the licensed investment manager and/or the general partner (which may be a corporation). For other investment funds, such as one with a single purpose or with a few investors, the identity of the investors should also be disclosed

The Stock Exchange considers that disclosure of the counterparty or its intermediate owner might be sufficient if it is:

- A listed company
- A private company which has a substantive business and is generally known to the public
- A governmental body or state owned enterprise
- A customer or service provider of the issuer, if the issuer receives or provides services in its ordinary and usual course of business

Issuers should also take note that information regarding the ultimate beneficial owners of other

parties related to the transaction may be material information which requires disclosure. This is particularly the case when the issuer has a continuing relationship with these parties (e.g. when the other shareholders of the target company acquired by the issuer can exert influence on the target company).

The Stock Exchange gave certain specific examples in the Newsletters where the identity of the beneficial owners of the counterparties would likely be material information for investors, and thus should be disclosed, for example:

- Where there are continuing relationships with the counterparty e.g. it may continue to hold an equity interest in the acquisition target, or the issuer and the counterparty are joint venture partners
- Where as part of the disposal, the issuer may take back a promissory note from the counterparty
- Where the counterparty was the founder or key management, and played a meaningful role in the historical financial performance of the acquisition targets
- Where the subscriber of securities (including convertible securities) would hold a material interest in the issuer e.g. where the subscription would trigger disclosure of interests requirements under Part XV of the Securities and Futures Ordinance (Chapter 571), or where the subscriber would play a strategic role in the issuer

Statement on the Disclosure of Actual Controllers or Beneficial Owners of Counterparties to a Transaction issued by the SFC (the 'Statement')

Consistent with the Stock Exchange's position set out in the Newsletters, the SFC released the Statement in November 2019 to remind issuers that where the identities of counterparties and their beneficial owners are necessary for the public to make an informed assessment of the issuer, or its activities, assets and liabilities or financial position, appropriate disclosure should be made in the announcements and circulars, otherwise, the non-disclosure of such information may mean the document in question includes materially incomplete information.

To illustrate, the SFC provided certain examples where the identity of the beneficial owners of the counterparties to a transaction may require disclosure. For example, when issuers acquire or dispose of interests in target companies, form joint ventures, inject capital into target businesses, or otherwise enter into a long-term business relationship with the counterparties, the identity of the beneficial owners of the counterparties (as well as their background, experience, resources and strategy) may be important information that would be necessary for investors to make an informed assessment of the issuers' activities.

Practical considerations

Prior to entering into a notifiable transaction, it is advisable for issuers to conduct reasonable due diligence enquiries at an early stage to ascertain the identity of the counterparties to the transaction, and their ultimate beneficial owners. It can be expected that more time is required to identify and verify the ultimate beneficial owners when there are multiple layers of holding structures. Issuers must also ensure that the information disclosed in the announcement and circular is accurate and complete in all material respects and does not omit any material facts. In this regard, issuers should carefully consider whether disclosure of the ultimate beneficial owners of the counterparties would be necessary for the investors to make an informed assessment of the issuers' activities. If so, appropriate disclosure with sufficient details should be included in the notifiable transaction announcement and circular.

Issuers should also be mindful of the disclosure requirement under Rule 14.58(3) of the Listing Rules. A notifiable transaction announcement must contain the directors' confirmation that, to the best of their knowledge, information and belief having made all reasonable enquiries, the counterparties and their ultimate beneficial owners are third parties independent of the issuer and its connected persons. Directors should take steps to identify if there is any significant relationship between the counterparties (and their ultimate beneficial owners) and the connected persons. If there are concerns that the connected person may be in a position to exert significant influence over the issuer in the transaction, the Stock Exchange may deem the counterparties to the transaction as connected persons of the issuer and consequently, the issuer would also need to comply with the applicable connected transaction requirements under Chapter 14A of the Listing Rules.

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铭德有限法律责任合伙律师事务所
法律动态 – 2021 年 3 月

2021 年 3 月 30 日

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- （勿）忘我；
- 处理雇员因一时情绪激动发出的终止雇佣关系的通知；
- 近期有关除牌的案例 – 主板上市规则第 6.01A 条；和
- 披露上市发行人交易对手方的身份。

我们希望本通讯为您提供有用的资料，并欢迎您对日后通讯的内容提出意见和建议。

如果您对本通讯有任何疑问，请参阅作者的联系方式。

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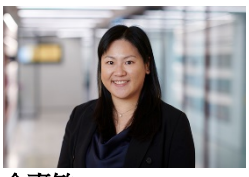

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被遗忘权多年来一直备受争议，它不仅涉及删除个人资料的要求，更涉及调和各种互相矛盾的基本权益，例如私隐权、资料保障权、言论和信息自由，以及公众利益。随着欧洲联盟法院（以下简称「**欧盟法院**」）及英国法院相继确认，根据欧盟法及英国法，资料当事人在某些情况下能对互联网搜索器的营运商行使被遗忘权，香港最近于 **X 与 个人资料私隐专员**（行政上诉委员会上诉案件第 15/2019 号，2020 年 8 月 7 日）一案中澄清，虽然香港法下并没有独立的被遗忘权，但若个人资料应根据《个人资料（私隐）条例》（第 486 章）（以下简称「**《私隐条例》**」）被删除，被遗忘权亦非毫不相关。

欧盟

在欧盟，被遗忘权在欧盟法院的 **Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González** [2014] QB 1022（以下简称「**谷歌西班牙案**」）一案中首次获得承认。在该案中，投诉人为一名西班牙公民，他希望从谷歌搜索结果中删除以其姓名进行搜索的链接。该些链接连接至一个西班牙新闻网站上有关其破产的拍卖公告，而该该破产令早已被解除且不再相关。西班牙法院搁置了各方的诉讼，并将所牵涉的问题移交至欧盟法院，待其作出初步裁决。于 2014 年 5 月 13 日，欧盟法院制定了以下一般性原则：

- 在提供一些第三方于互联网上发布的载有个人资料的资讯时，互联网搜索器的营运商（在该案中，即谷歌公司（Google Inc.），现名为谷歌有限责任公司（Google LLC），以下简称「**谷歌**」）应被视为在处理个人资料，且为处理该项资料的资料控制者（即资料使用者）；

- 在适当的情况下，尤其是就收集或处理资料的目的而言，及考虑到自收集资料以来已过去的时间，个人资料已变得*「不足够、不相关或不再相关，或超乎适度」*时，即使第三方在其网站上发布资料当事人的个人资料为合法行为，资料当事人亦有权要求互联网搜索器的营运商在以其姓名进行搜索所显示的结果中删除第三方所发布且包含与其相关的信息的网页链接；

- 行使被遗忘权时必须与其他的基本权利相权衡，包括信息自由及公众利益。

被遗忘权现已载入于 2018 年 5 月 25 日生效的《通用数据保障条例》（General Data Protection Regulation，以下简称「**《通用数据保障条例》**」）的第 17 条中。第 17 条列明了资料当事人有权要求某些资料控制者在没有不当拖延的前提下删除其个人资料，包括就收集或处理个人资料的目的而言，有关个人资料已不再为必需，或资料当事人撤回同意等。第 17 条亦通过列举各种可推翻资料当事人的被遗忘权而处理其个人资料的情况，表明被遗忘权并非一项绝对的权利。

就**谷歌西班牙案**的裁决，谷歌于 2014 年 5 月 29 日启动其正式要求程序，以从其欧洲搜索器结果中移除网址。根据谷歌的资讯公开报告，截至 2021 年 3 月 23 日，谷歌一共接到 1,026,028 个移除要求，而被要求移除的网址共 4,019,688 个。

英国

在英国，英国法院在 2018 年 4 月 13 日就 **NT1 & NT2 v. Google LLC** [2018] EWHC 799 (QB)（以下简称「**NT1 与 NT2 案**」）一案所颁下的判决中确认了在某些情况下，资料当事人可行使被遗忘权。案中的两名申索人曾被裁定犯下串谋罪行（两者的罪行互不关联），而该项定罪在当时的英国法律下已经「丧失时效」。谷歌的互联网搜索结果显示了一些第三方报道有关两名申索人的刑事定罪的网页链接。两名申索人指当中关于他们定罪的资料不但是旧资料，而且过时、不相关，不涉及公众利益及/或构成对他们的权利的非法干涉，因而向法院申请命令，要求从互联网搜索结果中删除关于他们定罪的详细资料。同时，因谷歌在他们作出投诉后仍然继续显示有关该详细资料的搜索结果，他们亦就此向谷歌追讨赔偿。

英国法院基于第一申索人所投诉的资料*「现时仍有足够的相关性」*而撤销他的申索。第一申索人不接受他的罪行，亦没有对其行为表示悔意。此外，由于他仍然从事商业活动，因此他的定罪资料在公众人士评估其诚信时具有相关性。相反，就第二申索人而言，英国法院强制谷歌移除遭投诉的链接。法庭表示，第二申索人坦诚承认其罪行，并由衷表达悔意。他并不再从事同一领域的商业活动，亦无证据显示他有任何重犯的风险。因此，有关该罪行及惩罚的资料*「已过时，不再相关，而谷歌搜索用户亦没有充分的合法利益以证明其继续可供使用的理由，因此，法庭应颁下适当的命令移除链接」*。在得出上述结论时，英国法院引用了欧盟于 2014 年 11 月 26 日采纳的《关于执行欧盟法院对[谷歌西班牙案]判决的指引》（Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" C-131/12，以下简称「**《指引》**」）中所列的 13 项欧洲资料保障当局处理申诉时采用的共同标准。即使第二申索

人提出的移除申索获胜诉，但英国法庭拒绝其针对谷歌的赔偿申索，原因是谷歌是一家致力遵守相关法规的企业，若要说谷歌没有按合理的要求在一切的情况下审慎从事，实属严苛。

香港

最近，在**X 与 个人资料私隐专员**（行政上诉委员会上诉案件第 15/2019 号，2020 年 8 月 7 日）一案中，行政上诉委员会澄清了香港就被遗忘权是否存在这个议题的模糊立场。该宗上诉案件源自个人资料私隐专员（以下简称「**私隐专员**」）决定终止调查由上诉人（以下简称「**X**」）针对谷歌所提出的投诉。

X 被警方逮捕，他的姓名和在官方机构所担任的工作岗位于新闻、文章及网上讨论区被报道。当在谷歌的互联网搜索器中输入他的姓名时，搜索结果会显示相关新闻报道、文章及网上讨论区的网页链接。X 要求谷歌从搜索结果中移除该等链接，但不被理会。X 遂向私隐专员对谷歌作出投诉。经调查后，私隐专员决定终止调查，其理据包括：

- 谷歌，作为互联网搜索器的营运商，是一家美国的法律实体，于香港并无业务。因此，谷歌并不在《私隐条例》的管辖范围内；

- 即使资料使用者必须采取所有切实可行的步骤以确保个人资料保留时间不超过为达致使用该资料（或将使用该资料）之目的实际所需的时间，但若*「不删除该资料是符合公众利益（包括历史方面的利益）」*，资料使用者则不必删除。在该案中，涉案事件于网上讨论区受到广泛报道及讨论，引起了公众的广泛关注。因此，经该等链接发表有关 X 被拘捕的资料是作传媒报道之用，而显示这些网页链接并无涉及不合法的权益。无论如何，《私隐条例》下并没有明确赋予个人被遗忘权。仅以讨论为目的，私隐专员在应用《通用数据保障条例》第 17 条及考虑 **NT1 与 NT2 案**后，认为被遗忘权并不适用，他亦认为在权衡利益时，应偏重言论及信息自由，这亦为保留经该等互联网链接所发表的资料提供了合理的支持。

在驳回 X 的上诉时，行政上诉委员会裁定《私隐条例》并无域外效力。《私隐条例》只规管能在香港或从香港控制其作业的「资料使用者」（即该资料使用者能够在香港控制个人资料的收集、持有、处理及使用的全部或任何部分，或能够从香港行使该项控制）。适用的测试仅为「控制」规定。事实上，谷歌（作为互联网搜索器的营运商）并非位于香港，在香港亦无业务或营运工作。谷歌的所有资料中心、设备及搜索伺服器全都安装或设置在香港境外，而且有关其搜索伺服器的所有操作亦是在香港境外进行。因此，谷歌并不属于《私隐条例》下定义的「资料使用者」，亦不受《私隐条例》规管。

虽然上述已经足以驳回 X 的上诉，但行政上诉委员会应私隐专员要求就被遗忘权提供指引，以应用于将来的案件，其指引如下：

- 在香港，被遗忘权不是独立权利；

- 可是，在《私隐条例》中，如个人资料不准确（保障资料第 2 原则）或不再为收集该资料时的目的而所需（《私隐条例》第 26 条），此等资料应当删除。在此情况下，被遗忘权并非毫不相关。因此，在适当的案件中，《指引》中所列、并在 **NT1 与 NT2 案**应用到的 13 项共同标准可能会成为《私隐条例》下的相关考虑因素。

虽然香港的法律上并没有独立的被遗忘权，但行政上诉委员会的裁决澄清了在什么基础上，资料使用者在收到资料当事人要求删除资料后，可能会被香港法律强制要求删除该载有个人资料的内容，而这些基础就是当个人资料不准确或不再为收集的目的而所需。有关何时应删除个人资料及如何用电子删除及/或销毁实体方式永久地删除个人资料，请参阅私隐专员于 2014 年 4 月所发布的《个人资料的删除与匿名化指引》。

除此以外，行政上诉委员会的裁决亦确定，如外国公司于香港并无经营业务，除非该公司能在香港或从香港控制个人资料，否则不受《私隐条例》规管。

处理雇员因一时情绪激动发出的终止雇佣关系的通知

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自 2019 年末以来，2019 冠状病毒病大流行造成前所未有的全球健康与经济危机，并对我们日常生活的各个方面产生变革性影响。

雇主不得不通过减薪、临时和永久性裁员，以及在某些情况下完全停止商业活动来削减运营成本，而雇员则面临着减薪的风险和被解雇的恐惧。这些变化无意中使雇主和雇员之间关系变得紧张。

在这段经济不稳定时期，采用通知或辞职方式终止雇佣关系无可避免，也是可以理解的，但雇主对终止雇佣的处理方式至关重要。近期的林倩颐诉梁景威经营梁景威律师事务所（[2020] 5 HKLRD 170）一案提醒雇主，在激烈争执下，雇员可能会因一时情绪激动冲动地提交辞职通知，而雇主在接受该通知前应仔细考虑是否接受该通知表面上表达的意思，因为在这种情况下，双方的所作所为都会被质疑是否真的反应其本意。

案情背景

2019 年 8 月 8 日，申索人（“**雇员**”）与作为被告的一家律师事务所（“**雇主**”）开始雇佣关系。雇佣合约包含三个月试用期，在此期间（第一个月之后），任何一方均可在提前 7 日向另一方送达通知，终止雇佣关系。

2019 年 9 月 18 日下午，雇员向人力资源及行政部经理（“**经理**”）提交其于 2019 年 9 月 19 日早上 9 时至下午 1 时放取半天「无薪假期」的假期申请，以陪同其母亲约见医生（“**假期申请**”）。经理批准了该假期申请。

然而，当雇主在 2019 年 9 月 19 日早上留意到该假期申请时，雇主透过包括经经理和雇员在内的 WhatsApp 群组（“**WhatsApp 群组**”)向雇员发出讯息（“**早上讯息**”），表示他并未批准提前一天通知的假期申请；以及除紧急情况外，律师事务所不会批准少于 7 天通知的假期申请。雇主随后向雇员发出下一项 WhatsApp 讯息，声称他正在考虑雇员是否无故旷工，如果是的话，她便须立即离开。雇主亦向同在 WhatsApp 群组的经理表示，雇员仍处在试用期，并且若要在其试用期内终止雇佣关系，需要提前一星期给出通知。

在同日下午 1 时 57 分，雇员在 WhatsApp 群组内回复雇主先前发出的讯息（“**1 时 57 分讯息**”）。雇员声称，她只放取半天的无薪假期，而且经理会将其收到的雇员的假期申请提交雇主签署。她进一步质疑 7 天通知的要求是否同样适用于无薪假期的申请，并最后反问雇主是否把她视作无故旷工处理，并要求她立即离开。她表示雇主完全可以通过任何据称的过失来解雇她，她本来已经准备下午回去工作，但如果雇主需要她回去收拾私人物品、归还办公室钥匙和领取发薪支票也没有关系。她指出，雇主可以安排其他同事监督她收拾私人物品。

约下午 2 时，雇员返回办公室，希望寻求雇主作出澄清，但遭到经理和律师事务所的接待员的阻止。雇员获告知雇主不在办公室，随后经理要求她收拾私人物品、返还办公室钥匙、取消电脑密码及离开。雇员询问经理，是否因为她无故旷工而被要求离开，经理表示，她需要询问雇主以作了解。

此后，雇员并无回去工作。2019 年 9 月 25 日，雇员收到最终薪酬，但发现雇主扣除了共计 4316.67 港元，作为 7 天通知的代通知金，雇主声称其有权扣除该笔款项。

程序经过

小额薪酬索偿仲裁处（“**仲裁处**”）驳回雇员的申索。

仲裁处裁定，在雇主决定雇员是否无故旷工前，雇员已在 1 时 57 分讯息中表示她会返回办公室收拾私人物品、归还办公室钥匙及领取其发薪支票。虽然雇员在其向雇主发出的任何讯息中都没有使用「辞职」一词，但其文字讯息内容和行为表明她已采用辞职的方式终止其受雇工作。仲裁处同时裁定，雇主透过早上讯息已有意给雇员 7 日提前通知，而且并无即时解雇雇员。另一方面，1 时 57 分讯息属于雇员通过行为提出辞职，并且由于雇员并未就终止雇佣关系给予提前 7 天的通知，雇主有权扣除代通知金。

雇员对仲裁处的裁定提出上诉。

该案涉及的法律问题是，在判断事实和解读雇员的言行是否构成辞职时，仲裁处应否考虑当时雇主和雇员之间的对话的整体背景和情形，而不是只考虑雇员的言语在字面上的意思。

判决

法庭承认，在某些情况下，案涉的终止雇佣关系的言词或行动未必清晰明确且毫不含糊，而是在盛怒或一时激动之下作出的。在该等情况下，真正的问题在于当事人是否真的有意表达在表面上所指的意思。

法院判定，在决定雇员是否已于 2019 年 9 月 19 日辞职时，仲裁处不应只考虑雇员对雇主 WhatsApp 讯息的回复，还应考虑当时雇主和雇员在情绪激动下互传 WhatsApp 讯息的整体情形，以及有关讯息是否表明具有辞职及终止受雇工作的明确意愿。

法院认为，雇员的言行均是出于冲动而在盛怒之时作出的，雇主不能恰当合理地将其解释为辞职。此外，雇主没有通过经理或接待员更正雇员认为她已被解雇的想法；亦没有给予雇员机会以澄清其意愿。

因此，法院判定，在此种情况下，雇员并未明确辞职，并且由于她只是获告知收拾个人物品及离开，这实际上意味着她被解雇。因此，雇主必须向雇员偿还其从雇员工资中扣除的代通知金以及她所承担的法律费用。

重点总结

在工作场合出现争执和分歧是常见的现象，雇主和雇员经常在一时激动之下表达或行事，却其实并无其言行表面上所表达的意思。

法院最近的这一项判决提醒雇主，当收到雇员在盛怒下所发出的终止雇佣关系的通知时，应避免马上采取行动，并且应花点时间确定雇员是否真的有意终止雇佣关系。雇主应给予雇员合理的时间重新考虑他们的决定并确认雇员的辞职意向，以避免不当解雇的指控。雇主需保持冷静！

如果您在劳动法方面需要任何帮助，请随时与 Jonathan Green、廖泰业与黄丽菱律师联系。

近期有关除牌的案例 – 主板上市规则第 6.01A 条

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根据《主板上市规则》第 6.01A 条，联交所可将已连续停牌 18 个月的证券除牌。最近，越来越多根据第 6.01A 条被除牌的发行人就联交所的除牌决定提呈司法复核许可申请。近期的一个案例为 *Bolina Holding Co. Ltd. (In Liquidation) v The Stock Exchange of Hong Kong Limited* [2021] HKCFI 460 ，该案涉及一家因无力偿债而连续停牌超过 18 个月的发行人（「**该决定**」）。该决定显示了联交所除牌机制的严厉程度，并突显了已停牌的发行人（特别是陷入财务困境并已获委任清盘人或临时清盘人的发行人）迅速采取行动争取复牌的重要性。

第 6.01A 条的背景

联交所于 2018 年 8 月推出第 6.01A 条，以针对解决发行人长时间暂停买卖的问题。在第 6.01A 条实施前，大量发行人的股份已停牌超过一年，而且无法预料发行人何时会复牌或除牌[1]，导致市场无法正常运作，令市场的质素和信誉受损。因此，联交所决定引入一段规定时间（「**规定补救期**」），让发行人补救导致其停牌的问题并满足任何联交所施加的复牌条件，否则发行人将被除牌。联交所在其于 2018 年 5 月 25 日刊发的《谘询总结 – 除牌及《上市规则》其他修订》中阐述了以下理据：

> "23. *正如谘询文件所提及，定时除牌准则旨在针对那些持续停牌满一段时间后仍然未能解决停牌问题的发行人。这能给予停牌中的发行人一个明确期限，促使他们认真研究有关问题并制定可行的行动计划，确保可在期限结束前补救相关问题从而令联交所信纳而恢复买卖。*
>
> 24. *有了此新增的准则，联交所即使根据《主板规则》第 6.01 条没有下令除牌的明确依据的情况下，亦将能够把发行人除牌。这可使市场了解除牌程序、并解决长期停牌的问题，有助维持市场质素及信誉；同时让停牌发行人有合理机会采取补救行动争取复牌。*"

对证券于主板上市的发行人而言，规定补救期的期限为 18 个月。

延长规定补救期

为了确保除牌机制的效用及认受性，并防止除牌程序有不必要的延误，联交所只会在特殊情况下延长规定补救期。如指引信 GL95-18（「**指引信**」）第 19 段所述，联交所可在以下情况延长规定时限：

(i) 发行人已切实采取措施并颇肯定公司能复牌；<u>但是</u>

(ii) 基于一些不受其控制的原因而未能符合计划中的时间表，以致发行人需要稍多时间敲定有关事宜。不受控制的原因一般预期仅为程序性问题。

譬如，复牌计划涉及一项 A1 申请而该项 A1 申请已获联交所批准，但由于批准重组安排计划的法庭聆讯延期，故发行人需要更多时间落实相关交易。联交所预料，若期限已获延长一次，联交所通常不会批准再度延期。

陷入财务困境的发行人

在引入第6.01A条的谘询过程中，联交所特别考虑了一项与陷入财务困境的发行人有关的提议。该项提议指出，若法院已为陷入财务困境的发行人委任清盘人或临时清盘人，而该清盘人正为发行人着手进行复牌计划，联交所应另设特别安排。这是由于重组程序大多非常复杂，并可能涉及本地及/或外地法院程序，而清盘人是法院人员，亦不能完全控制重组程序所需的时间。因此，有意见认为，规定补救期可能不足以让有关的重组安排计划顺利完成。

该提议没有获联交所接纳。反之，联交所明确指出新除牌机制的主要作用并不是促进复牌，而是透过有效的除牌架构，及时将不再符合持续上市准则的发行人除牌、鼓励已停牌的发行人迅速采取行动争取复牌及遏止发行人进行严重违反《上市规则》的行为。这使得联交所履行其法定职责，确保证券买卖在公平、有秩序和信息灵通的市场中进行。

因此，规定补救期亦同样适用于陷入财务困境的发行人，并无例外。

[1] 例如，发行人的财务状况存在不确定性，而联交所在第 6.01 条下没有将其除牌的明确依据。根据第 6.01 条，如果联交所认为有必要保障投资者或维持一个有秩序的市场，联交所可将发行人除牌。如果联交所认为公众人士所持有的证券数量不足、发行人没有足够的业务运作或相当价值的资产、或发行人或其业务不再适合上市，联交所亦可以将发行人除牌。

该决定

该决定显示了除牌机制的严厉性。

该决定涉及一名发行人（以下简称「**该公司**」），其股份因一份于 2018 年 9 月 17 日对该公司下达的清盘令被暂停交易。在该公司停牌后，联交所对该公司提出了多项复牌条件，包括发布所有未完成的财务业绩及撤回或撤销清盘令。该公司无法在规定补救期的 18 个月期限前达成任何复牌条件而因此无法复牌。

该公司向联交所申请延长规定补救期，并称 2019 冠状病毒病疫情造成了前所未有的影响，推迟了该公司账目审计的完成时间。鉴于此，并考虑到清盘人通过债务偿还安排计划实施重组所取得的进展，延长期限是适当的。

联交所并不认为该公司的情况构成指引信第 19 段所指的「特殊情况」，并根据第 6.10A 条将该公司予以除牌。上市复核委员会在复核后维持该决定。该公司随后试图以司法复核的方式对上市复核委员会的决定提出异议，亦未能成功。

尽管每宗案件的具体案情都有所不同，但我们可以通过该决定，就联交所及法院就规定补救期的延长申请的取向归纳出一些观察所得：

(i) 联交所旨在严厉执行规定补救期，并只会在「特殊情况」下延长期限。就情况是否「特殊」而言，应由联交所而非法院决定。

(ii) 延长规定补救期的申请应以有力的证据支持。例如，发行人不能概括地依赖 2019 冠状病毒病疫情作为「特殊情况」的依据，而是要提供足够细节以证明 2019 冠状病毒病疫情实际上影响了发行人的复牌进程（例如，通过指出审计工作具体受延误的方面及因 2019 冠状病毒病疫情造成延误的程度），或证明若没有 2019 冠状病毒病疫情，发行人本可以在复牌截止日期前履行复牌指引。

(iii) 当发行人申请延长规定补救期时，发行人需要向联交所证明发行人已在相当程度上完成所需步骤并颇肯定该等步骤会令该公司复牌。对正在清盘的发行人而言，如果能否复牌是取决于发行人能否通过债务偿还安排计划成功实施重组，而发行人未从债权人/股东获得所需的批准，发行人将无法证明发行人已在相当程度上完成所需步骤并颇肯定该等步骤会令该公司复牌。无论如何，即使发行人能够确实地证明完成重组所需的未来事件及条件都将达成，联交所一般也只会在待完成事项所需时间较短的情况下考虑给予延期。

由此可见，联交所不会轻易延长规定补救期。

鉴于除牌机制的严厉性，停牌发行人必须在停牌后尽快制定复牌计划，并迅速采取行动争取复牌。对于已被清盘或临时清盘的发行人来说尤其如此，因为发行人在实施复牌计划之前，一般都需要获得债权人、股东、监管机构及/或法院的批准，而发行人无法完全控制获得该等批准所需的时间。

铭德有限法律责任合伙律师事务所于 Bolina Holding Co. Ltd. (In Liquidation) v The Stock Exchange of Hong Kong Limited [2021] HKCFI 460 一案中代表联交所。

披露上市发行人交易对手方的身份

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对《上市规则》第 14.58 条的修订

为提升发行人进行之重大交易的透明度，香港联合交易所有限公司（以下简称「**联交所**」）修订了《联交所证券上市规则》（以下简称「**《上市规则》**」）第 14.58 条，该修订已于 2019 年 10 月 1 日生效（「**该修订**」）。

按照修订后的披露规定，发行人除须根据现有规定于须予公布的交易的公告及通函中披露交易对手方主要业务的概况外，还须披露交易对手方的身份。加强资料披露的目的在于为投资者提供足够的资料（例如可对交易施加影响的人士之身份），以使其更好地了解交易的性质。

自该修订以来，联交所及证券及期货事务监察委员会（以下简称「**证监会**」）刊发了一系列指引文件以阐明及协助发行人遵守经修订的《上市规则》第 14.58 条，最新一则指引由联交所于 2020 年 12 月发布（以下简称「**2020 年 12 月通讯**」）。

我们将在本文总结 2020 年 12 月通讯，及由联交所与证监会于早前发布的有关披露交易对手方的其他指引文件。

联交所发布的《上市发行人监管通讯》

联交所在其于 2019 年 11 月及 2020 年 12 月发布的上市发行人监管通讯（以下简称「**该等通讯**」）中就《上市规则》第 14.58 条规定的披露要求提供了指引。

联交所在该等通讯中强调，尽管《上市规则》第 14.58(2)条规定了披露对手方身份为最低限度的要求，联交所非常鼓励发行人同时披露对手方实益拥有人的身份，尤其是若对手方为投资控股实体。在此情况下，发行人须遵守《上市规则》第 2.13 条规定的一般披露原则—发行人文件所载的资料在各重要方面须准确、完备及不具误导性或欺骗性。这是为了确保股东及投资者能获得足够资料以对交易作出有根据的评估。

联交所进一步指出，须予披露的对手方一般为参与交易磋商过程的人士，而并非法定买方、卖方或认购方（通常为投资控股公司）。交易对手方的实体形式有多种，包括例如公司、信托或投资基金。对于以下几类实体的最终实益拥有人的身份，联交所进一步阐释如下：

- 公司—直接或间接控制对手方三分之一（1/3）或以上的自然人
    - 若对手方的股东基础甚为广泛，发行人应至少披露对手方单一最大股东的最终实益拥有人
- 信托—该信托的受托人及受益人
- 投资基金—若为投资者基础甚为广泛的注册投资基金，应披露其持牌投资经理及/或普通合伙人（可能为一家公司）。若为其他投资基金（例如单一目的基金或仅有数名投资者的基金），亦应披露投资者的身份

联交所认为对于以下对手方，仅披露对手方或其中介持有人的资料就可能足够：

- 上市公司
- 业务规模庞大且为公众所熟悉的私人公司
- 政府机构或国有企业
- 如发行人在其日常业务过程中接受或提供服务，则发行人的客户或服务供应商

发行人亦应注意，与交易相关的其他方的最终实益拥有人的相关资料可能属于须作披露的重要资料，尤其是发行人与这些人士有持续关系时（例如发行人收购的目标公司的其他股东可对该目标公司施加影响）。

联交所在该等通讯中列举了一些具体情形，说明对手方的实益拥有人的身份对投资者而言可能属重大资料，因而须作披露，例如：

- 与对手方存在持续关系，例如该对手方可能继续持有收购目标的股权，或发行人与对手方为合营企业的伙伴
- 作为出售的一部分，发行人可从对手方取得承付票
- 对手方为收购目标的创办人或主要管理人员并对收购目标的过往财务业绩有重大贡献
- 证券（包括可换股证券）认购人将于发行人持有重大权益，例如有关认购将触发《证券及期货条例》（第 571 章）第 XV 部中有关权益披露的规定，或认购人将于发行人担任策略性角色

证监会发布的《有关披露交易对手方的实际控制人或实益拥有人的声明》（以下简称「该声明」）

与联交所在该等通讯中表明的立场一致，证监会于 2019 年 11 月发布了该声明，以提醒发行人，当对手方及其实益拥有人的身份对于让公众就发行人或其活动、资产及负债或财务状况作出有根据的评估是有必要的，发行人则应于相关公告及通函中作出适当披露，否则，不披露该等资料可能意味着有关文件载有在要项上不完整的资料。

证监会列举了几种可能需要披露交易对手方实益拥有人身份的情形。例如，当发行人收购或出售目标公司的权益、组成合资公司、向目标企业注资或与对手方以其他方式订立长期业务关系时，对手方实益拥有人的身份（及其背景、经验、资源及策略）可能属重要资料，且对于让投资者能够对发行人的活动作出有根据的评估是必要的。

实际考虑

在订立须予公布的交易前，建议发行人在初期阶段就展开合理的尽职调查以确定交易对手方及其最终实益拥有人的身份。可以预期，若存在多层控股结构的情况，发行人须花费更多时间确定及核查最终实益拥有人的身份。发行人还须确保公告及通函中披露的资料在各重要方面均属准确完备且未有遗漏任何重大事实。在这一方面，发行人应慎重考虑披露交易对手方的最终实益拥有人对于让投资者就发行人的活动作出有根据的评估是否为必要的。如有必要，发行人应在须予公布的交易的公告及通函中适当地披露详尽的资料。

发行人应谨慎遵守《上市规则》第 14.58(3)条规定的披露要求。须予公布的交易的公告须包含董事的确认— 以各董事所知所信，并经过所有合理查询，对手方及其最终实益拥有人均是发行人及发行人的关连人士以外的独立第三者。董事应采取措施确认对手方（及其最终实益拥有人）与关连人士之间是否有任何重大关系。如存在关连人士可在交易中对发行人施加重大影响的疑虑，联交所可能会视交易对手方为发行人的关连人士，发行人因此亦须遵守《上市规则》第 14A 章有关关连交易的要求。