

---

**OVERSEAS LAWYERS  
QUALIFICATION EXAMINATION**

---

**HEAD III: COMMERCIAL  
AND COMPANY LAW**

Friday, 29 September 1995



## **HEAD III: COMMERCIAL AND COMPANY LAW**

### **TEST PAPER**

**29 September 1995**

#### **Instructions to Candidates**

- 1. The examination duration is Three (3) hours, plus 30 minutes reading time.**
- 2. There are FIVE questions on this paper. EACH must be answered.**
- 3. This is an Open-Book examination.**
- 4. Each question has the value noted on the question paper. You are urged to apportion your time in accordance with the relative value of each question. No marks can be awarded to a question for which there is no attempted answer.**
- 5. Do not take either this question paper or any answer booklets with you when you leave the examination room.**

**QUESTION 1 (15 marks)**

10 marks      (a)      Worldwide Electronics Ltd, a British company, wishes to enter into the Asian market by manufacturing and distributing its electronic alarm systems in the region. It has approached a Hong Kong company Ling Ding Ltd which has a history of joint ventures with other companies designed to take advantage of its extensive distribution networks in the region.

By reference to Hong Kong company law discuss major factors which you would take into account in structuring a Hong Kong equity joint venture between Worldwide Electronics Ltd and Ling Ding Ltd.

5 marks      (b)      Examine the need for and the limits on the use of a shareholders' agreement in such circumstances in the light of the decision in *Russell v Northern Bank Development Corporation Ltd* (1992).

**QUESTION 2 (30 marks)**

Mr Yip has recently encountered personal financial problems which are directly due to a slow down in the property market which has adversely affected a property development company, Tall Trees Ltd, which is ultimately controlled by Mr Yip through his holding company Ying Sing Ltd.

Mr Leung, a long time friend of Mr Yip, is prepared to make a loan of HK\$40 million to Mr Yip personally on very favourable terms, through one of Mr Leung's companies Ching Kung Holdings Ltd. However, Mr Leung will require Ying Sing Ltd to deposit with Ching Kung Holdings Ltd, by way of security, all of the shares Ying Sing Ltd holds in its wholly owned subsidiary, Sing Ho Housing Ltd. Mr Yip and his two sons are the directors of both Ying Sing Ltd and Sing Ho Housing Ltd.

Both Mr Leung and Mr Yip are clients of your firm and have approached you to carry out the necessary legal work to implement their arrangement.

Ying Sing Ltd's Articles of Association are in Table A form. Its Memorandum of Association does not exclude any clauses or terms which may be implied into the memorandum by the Companies Ordinance.

The Memorandum of Association Ching Kung Holdings is set out below . Its Articles of Association are in Table A form.

**THE COMPANIES ORDINANCE (Chapter 32)**

---

Company Limited by Shares

---

**MEMORANDUM OF ASSOCIATION**

**OF**

**CHING KUNG HOLDINGS LTD**

1. The name of the Company is "Ching Kung Holdings Ltd".
2. The registered office of the Company will be situated in Hong Kong.
3. The objects for which the Company is established are:
  - (1) To carry on all, or any one or more, of the following businesses in all or any of their various aspects:

- (a) general trading, importing, exporting, buying, selling and dealing in goods, materials, substances, articles and merchandise of all kinds in, from and to any part of the world, whether as principal or as agent;
  - (b) manufacturing, processing and/or extracting or taking goods, materials, substances, articles and merchandise of all kinds in any part of the world;
  - (c) investing, developing, dealing in and/or managing real estate or interests therein in any part of the world;
  - (d) owning, operating, chartering and/or managing ships, vehicles and/or aircraft in any part of the world;
  - (e) providing services of any kind, financial or otherwise, in, from and to any part of the world;
  - (f) acting as agents, managers, brokers, advisers and consultants in any part of the world;
  - (g) the business of a holding and/or investment company in any part of the world.
- (2) To carry on any other business of any nature whatsoever which may seem to the Directors to be capable of being conveniently carried on in connection or conjunction with any business of the Company hereinbefore or hereinafter authorised or to be expedient with a view to rendering profitable or more profitable any of the Company's assets or utilising its know-how or expertise.
- (3) To purchase or otherwise acquire and hold for any estate or interest any real or personal property or assets or any concessions, licences, grants, patents, trade marks, copyrights or other exclusive or non-exclusive rights of any kind and to develop, turn to account, licence out and otherwise deal with the same in such manner as may be thought fit and to make experiments and tests and to carry on all kinds of research work.
- (4) To build, construct, pull down, equip, execute, carry out, improve, work, develop, administer, maintain, manage or control buildings, structures or facilities of all kinds, whether for the purpose of the Company or for sale, letting or hire to or in return for any consideration from any company, firm or person, and to contribute to or assist in or carry out any part of any such operation.
- (5) To subscribe, underwrite, purchase, or otherwise acquire, and to hold, dispose of, and deal with, any shares or other securities or commodities or other investments of any nature whatsoever (whether or not income-producing), and any options or rights in respect thereof, and to buy and sell foreign exchange.

- (6) To undertake and execute any trusts the undertaking whereof may seem desirable and, whether in relation to any such trust or otherwise, to undertake the office of or act as executor, administrator, director, treasurer, accountant, secretary, registrar, custodian, depository or nominee or in such other capacity as the Directors may from time to time think fit.
- (7) To amalgamate or enter into partnership or any joint venture or profit-sharing arrangement or other association with any company, firm or person.
- (8) To purchase or otherwise acquire and undertake all or any part of the business, property and liabilities of any company, firm or person carrying on, or immediately prior to its liquidation or the appointment of any receiver or administrator carrying on, any business which the Company is authorised to carry on or possessed of any property suitable for the purposes of the Company.
- (9) To promote, or join in the promotion of, any company, whether or not having objects similar to those of the Company.
- (10) To borrow and raise money and to secure or discharge any debt or obligation of or binding on the Company in such manner as may be thought fit and in particular by mortgages and charges upon all or any part of the undertaking, property and assets (present and future) and the uncalled capital of the Company, or by the creation and issue of debentures, debenture stock or other securities of any description.
- (11) To advance, lend or give credit to or deposit money with any company, firm or person on such terms as may be thought fit and with or without security.
- (12) To guarantee or give indemnities or give or procure the giving of bonds or provide security, whether by personal covenant or by mortgage or charge upon all or any part of the undertaking, property and assets (present and future) and the uncalled capital of the Company, or by all or any such methods, and whether with or without consideration for the performance of any contracts or obligations, and the payment of capital or principal (together with any premium) and dividends or interest on any shares, debentures or other securities or obligations, of, and otherwise to support and assist, any person, firm or company including (without limiting the generality of the foregoing) any company which is for the time being a subsidiary or holding company of the Company or another subsidiary of any such holding company or is otherwise allied to or associated with the Company or any such subsidiary or holding company in business or otherwise, but so that nothing in this paragraph shall authorise the carrying on of the Company of an insurance business and so that (without prejudice to the construction of any other paragraph hereof) this paragraph shall be construed both as a separate and independent object of the Company and as a power ancillary to the other objects of the Company.

- (13) To issue any securities which the Company has power to issue for any other purpose by way of security or indemnity or in satisfaction of any liability undertaken or agreed to be undertaken by the Company, but so that nothing in this paragraph shall authorise the carrying on by the Company of an insurance business.
- (14) To draw, make, accept, endorse, discount, negotiate, execute, and issue, and to buy, sell and deal with bills of exchange, promissory notes, and other negotiable or transferable instruments or securities.
- (15) To enter into, carry on and participate in financial transactions and operations of all kinds, and in particular, without affecting the generality of the foregoing, to trade in foreign currencies, to enter into interest rate and currency swaps, to buy and sell and trade futures, options, warrants and financial instruments and derivatives of financial instruments of any kind.
- (16) To sell, lease, grant licences, easements and other rights over, and in any other manner deal with or dispose of, the undertaking, property, assets, rights and effects of the Company or any part thereof for such consideration as may be thought fit or for no consideration, and in particular for shares or other securities, whether fully or partly paid up.
- (17) To procure the registration or incorporation of the Company in or under the laws of any territory outside Hong Kong.
- (18) To subscribe or guarantee money for any charitable, benevolent, public, general or useful object or for any purpose which may be considered likely directly or indirectly to further the interests of the Company or of its members.
- (19) To establish and maintain or contribute to any pension or superannuation funds for the benefit of, and to give or procure the giving of donations, gratuities, pensions, allowances or emoluments to, any individuals who are or were at any time in the employment or service of the Company or of any company which is or was at any relevant time a subsidiary or holding company of the Company or another subsidiary of any such holding company or is otherwise allied to or associated with the Company or any such subsidiary or holding company, or who are or were at any time directors or officers of the Company or of any such other company, and the wives, husbands, widows, widowers, families and dependants of any such individuals; to establish and subsidise or subscribe to any institutions, associations, clubs or funds which may be considered likely to benefit any such persons or to further the interests of the Company or of any such other company; and to make payments for or towards the insurance of any such persons.
- (20) To establish and maintain, and to contribute to, any scheme for encouraging or facilitating the holding of shares or debentures in the Company by or for the benefit of its employees or former employees, or those of its subsidiary

or holding company or of any other subsidiary of its holding company, or by or for the benefit of such other persons as may for the time being be permitted by law, or any scheme for sharing profits with its employees of those of its subsidiary and/or associated companies, and (so far as for the time being permitted by law) to lend money to any of the Company's subsidiaries and/or associated companies or to trustees for the beneficiaries of any such scheme for the purposes of such scheme.

- (21) So far as for the time being permitted by law, to purchase, and grant financial assistance for the purpose of or in connection with the acquisition by any person of, shares in the Company.
- (22) To distribute among members of the Company in specie or otherwise, by way of dividend or bonus or by way of reduction of capital, all or any of the property or assets of the Company, or any proceeds of sale or other disposal of any property or assets of the Company, with and subject to any incident authorised and consent required by law.
- (23) To apply for, promote and obtain any statute, order, regulation or other authorisation or enactment which may seem calculated directly or indirectly to benefit the Company, and to oppose any bills, proceedings or applications which may seem calculated or likely directly or indirectly to prejudice the Company's interests.
- (24) To do all or any of the things and matters aforesaid in any part of the world, and either as principals, agents, contractors, trustees or otherwise, and by or through trustees, agents, subsidiary companies or otherwise, and either alone or in conjunction with others.
- (25) To do all such other things as may be considered to be incidental or conducive to the attainment of any of the objects and the exercise of any of the powers of the Company.

And it is hereby declared that:

- (a) the objects of the Company as specified in each of the foregoing paragraphs of this Clause (except only if and so far as otherwise expressly provided in any paragraph) shall be separate and distinct objects of the Company and shall not be in any way limited by reference to any other paragraph or the order in which the same occur or the name of the Company; and
- (b) the Company shall in addition have the powers set forth in the Seventh Schedule to the Companies Ordinance (Chapter 32 of the Laws of Hong Kong) except to the extent, if at all, that they are inconsistent with any of the foregoing paragraphs of this Clause.



4. The liability of the members is limited.
  5. The share capital of the Company is HK\$5 million divided into 50 million shares of HK\$10 each.
- 

You are asked:

- 3 marks (a) Is it appropriate to act for both sides in such circumstances? Explain the appropriate steps which you must take in this regard.
- 2 marks (b) What board meetings may be necessary to implement the loan?
- 4 marks (c) Are there any requirements under the Articles and/or the Companies Ordinance which must be complied with at the board meetings in the circumstances of this case? Draft the appropriate minutes of the board meeting of Ying Sing Ltd.
- 4 marks (d) By reference to relevant case law explain the possible effect of failure in compliance under (b) above on the enforceability of the loan and security.
- 4 marks (e) When the shares in Sing Ho Housing Ltd are deposited with Ching Kung Holdings is there any document which ought to be executed to enhance Ching Kung Holding's security? Identify the document.
- 3 marks (f) Examine whether it is possible to register a charge in favour of Ching Kung Holdings Ltd over the shares in Sing Ho Housing Ltd against Ying Sing Ltd under s.80 of the Companies Ordinance.
- 5 marks (g) In the event of a failure to repay the loan by Mr Yip and in the light of Table A Part II, article 3, examine how Ching Kung Holdings may enforce its security in relation to Sing Ho Housing Ltd. Make reference to relevant statutory provisions and Hong Kong case law.
- 5 marks (h) In the light of the foregoing advise Mr Leung and Mr Yip on how the transaction may be restructured to avoid some or all of the difficulties considered above.

**QUESTION 3 (20 marks)**

A longstanding client of your firm, Mr Mega, intends to purchase a Hong Kong private company, Spiv Ltd. Spiv Ltd. is in the business of developing property but you have learned that it also runs a number of Karaoke Bars around Hong Kong. Spiv Ltd. was incorporated back in 1955 as a family company but has grown significantly over the intervening years and now has a large workforce. Mr Mega instructs you that he has had long discussions with Mr Slick, the managing director of Spiv Ltd. and is convinced that Spiv Ltd. is a well run and profitable company. At present, this is all the information you have about Spiv Ltd.

Your supervising partner has asked you to conduct a "due diligence review" of Spiv Ltd. on behalf of Mr. Mega. Please draft a detailed plan for yourself outlining the areas you are going to review, how you intend to conduct the review and why you are reviewing these areas.

**QUESTION 4 (15 marks)**

Answer either questions (a)(i) and (ii) OR questions (b)(i) and (ii).

- ✓(a) Wong is an investment correspondent for the Oriental Daily Bugle. Over lunch Sarah, a merchant banker, told Wong that Orbit Ltd, a public company listed on the Hong Kong Stock Exchange and client of the bank, was the subject of a take-over bid and that she was handling the finance for the deal. Wong's other enquiries had led him to believe that a bid may be taking place, and this information confirmed it. He purchased 100,000 shares in Orbit Ltd in his wife's name.

Sarah and her husband Jim are also the directors of, and majority shareholders in, Minerals Ltd, a mining company registered in Hong Kong, in which Wong was the only other shareholder. The company had just uncovered large quantities of uranium ore in its mining field, but only Sarah and Jim were aware of this. In order to pay for his wife's shares in Orbit Ltd, Wong asked Sarah if she would buy all but three of his shares in Minerals Ltd. Sarah does buy his shares. After the take-over bid is announced the shares in Orbit Ltd rise in value by \$10. After the uranium find is made known, it is estimated that the shares in Uranium Ltd are worth an extra \$20,000 each.

Advise Wong:

- 8 marks (i) Whether insider dealing under the Securities (Insider Dealing) Ordinance has taken place and the possible consequences for Wong.
- 7 marks (ii) Whether Wong may have an action against Sarah for her failure to disclose the uranium find when purchasing his shares in Minerals Ltd.

**OR**

- (b)
- 8 marks (i) Assume that Mineral Ltd in question (a) above is a public company listed on the Hong Kong Stock Exchange and that when Yip asked Sarah to buy most of his shares in the company Sarah replied in writing that since Mineral Ltd's prospects were poor she could only offer the current market price, which was below par, even though as a director she was aware of the uranium ore discovery.

Advise whether Sarah has committed any offence under the Securities Ordinance and whether Yip has any possible action against Sarah under the same Ordinance.

7 marks

- (ii) Golden Oaks Ltd. is an international property development company. It wishes to advertise houses and apartments which it has for sale in various locations in Europe, North America and China. These advertisements will be given a high profile in local Hong Kong newspapers and magazines. They will emphasise the properties' investment potential and as an additional selling ploy a guaranteed buy back by Golden Oaks Ltd. within 5 years of purchase should the purchaser wish to resell in this period.

Advise Golden Oaks on whether they can go ahead with such an advertisement in Hong Kong.

**QUESTION 5 (20 marks)**

Answer either questions (a) and (b) OR questions (c) and (d)

In 1991, Big Bank lent \$20 million to Dodgy Ltd. Mr Weave, the Managing Director and principal shareholder of Dodgy Ltd., guaranteed repayment of the \$20 million and charged his yacht worth \$5 million as collateral.

Dodgy Ltd. is now in liquidation and Big Bank is unlikely to recover more than 50 cents in the dollar through the winding up.

- (a) (i) Can Big Bank claim \$20 million from Mr Weave?
- (ii) If Big Bank recovers from Mr Weave, can it still prove in the winding up of Dodgy Ltd.?
- (iii) If Mr Weave is unable to pay \$20 million, what can Big Bank do?
- (iv) If Big Bank recovers only \$5 million from Mr Weave, can it still prove in the winding up of Dodgy Ltd. and if so, for how much?
- v) Please draft a suspense account clause for Big Bank.

- (b) In 1992, Small Bank lent \$500,000 to Dodgy Ltd. This loan was unsecured. In April 1995, Small Bank lent a further \$500,000 to Dodgy Ltd. On this occasion, Small Bank took a fixed and floating charge over the assets and undertaking of Dodgy Ltd. as security for the \$1 million it had lent to Dodgy Ltd. over the years. At the time Small Bank's charge was created, there were other creditors of Dodgy Ltd. both secured and unsecured.

Advise Small Bank whether their charge is effective now that Dodgy Ltd. is in liquidation.

**OR**

- (c) It was a term of the loan agreement between Big Bank and Dodgy Ltd. that upon default in repayment, Big Bank could appoint a receiver. Big Bank has just appointed a receiver. Mr Weave of Dodgy Ltd. is extremely upset about the appointment and has come to you for advice as to the validity of the appointment. What things would you check in relation to the appointment of the receiver?
- (d) Mr Weave is concerned that the receiver will sell assets of Dodgy Ltd. at undervalue. Mr Weave wants to know whether Dodgy Ltd. has any recourse against the receiver in these circumstances. Please advise Mr Weave in some detail about the powers and duties of a receiver in relation to the sale of assets.