# A CLOSER LOOK AT THE APPROACH OF HONG KONG COURTS IN DETERMINING LEGAL CHALLENGES AGAINST DELISTING DECISIONS

In the past year, we have seen a number of failed attempts to challenge the decisions made by The Stock Exchange of Hong Kong Limited (the **Exchange**) to cancel the listing of certain issuers by way of judicial review. The latest attempt was made by Up Energy Development Group Limited (the **Company**).

The High Court recently delivered its decision on the Company's application for leave to apply for judicial review of the decision made by the Listing Appeals Committee (**LAC**) of the Exchange to cancel the listing status of the Company.

This briefing discusses the factors which the Hong Kong courts have considered when determining previous applications for leave to challenge the legality of the Exchange's decision to delist a company under the Listing Rules.[1]

## Up Energy Development

The Company is a Bermuda-incorporated company, conducting the business of mining, production and sales of coking coal. Its securities had been listed on the Main Board of the Exchange since 2 December 1992.

When the Company's financial situation deteriorated in early 2016, winding up petitions were presented against the Company in Hong Kong and Bermuda. On 30 June 2016, trading in the Company's shares was suspended due to its failure to release its annual results. On 18 October 2016, pursuant to the Practice Note 17 (**PN17**),[2] the Exchange informed the Company that it had been placed into the first delisting stage with the following resumption conditions:

(1) To demonstrate that it had a sufficient level of operations or assets of sufficient value as required under Listing Rule 13.24 (**LR 13.24**);[3]

(2) To publish all outstanding financial results and address audit qualifications (if any); and

(3) To have the winding up petitions either withdrawn or dismissed and the provisional liquidators discharged.

Around the same time, the Company went into provisional liquidation and joint provisional liquidators (**JPLs**) were appointed. The JPLs were given full powers over the affairs of the Company and the directors' powers ceased.

The Listing Division subsequently placed the Company in the second stage of delisting and required it to submit a viable resumption proposal within six months. In an attempt to comply with the requirement, the Company submitted a draft resumption proposal and a further modification which unfortunately could not meet the Listing Division's expectations. The matter then proceeded to the third stage of delisting. Whilst the Company had attempted to apply for a review of the Listing Division's decision (and the subsequent decision of the Listing Committee), those attempts were unsuccessful.

Notwithstanding that the Company submitted another resumption proposal, the Listing Committee decided to cancel the listing of the Company's shares in March 2020. Upon the Company's application, the Listing Review Committee (**LRC**) reviewed the Listing Committee's decision. When the LRC decided against the Company, the Company applied to the Listing Appeals Committee

[1] Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited.

[2] The delisting framework was amended on 1 August 2018 to give the Exchange the power to cancel the listing of any securities that have been suspended for trading for a continuous period of 18 months. However, PN17 continued to apply to a suspended issuer placed in a delisting stage prior to 1 August 2018.

[3] The resumption condition was determined by the Exchange before the amendment to LR 13.24 became effective on 1 October 2019. In its current form, LR 13.24 requires a listed issuer to carry out a sufficient level of operations and have assets of sufficient value to warrant continued listing.

(**LAC**) for a review of the LRC's decision. By the time the matter came before the LAC, the Company had almost five years to put forward a viable resumption proposal, and had no less than eight separate opportunities to demonstrate compliance with the resumption conditions imposed. It however sought a time extension of six months to submit ta viable resumption proposal.

The LAC met on 21 April 2021. Having considered the parties' written submissions and oral submissions, the LAC decided against the Company. The Company then sought leave from the High Court to apply for judicial review of the LAC Decision.

## Grounds of Review

The Company claimed that the LAC Decision was tainted with procedural impropriety in three aspects (Ground 1). Alternatively, the decision constituted a disproportionate interference with the right to property of the Company (Ground 2). Both grounds were dismissed.

**Ground 1 - (a) Failure to afford a fair remedial period**

As mentioned above, the Company was required to demonstrate compliance with LR 13.24. Prior to 1 October 2019, LR 13.24 required listed issuers to demonstrate a sufficient level of operations or assets of sufficient value to warrant continued listing. The rule was amended to its current form on 1 October 2019 whereby listed issuers are required to demonstrate a sufficient level of operations and the existence of assets of sufficient value. When the amended LR 13.24 came into force, listed issuers were granted a grace period of 12 months to comply with the new requirements.

The Company argued that when the amended LR 13.24 became effective on 1 October 2019, it should as a matter of fairness have been given a fresh 18-month remedial period (i.e. until 1 April 2021) to comply with the new requirement. As such, it was unfair that the LAC dismissed the review and refused to grant a further time extension for the submission of a resumption proposal.

The CFI rejected the Company's argument. It accepted the Exchange's argument that the Company, same as other suspended issuers, was not exempt from the compliance with all of the Listing Rules. All suspended issuers were informed that they would have 12 months to comply with the amended LR 13.24. There was no basis to extend the 12-month remedial period by another 6 months. Furthermore, as a matter of fact, the Company had already enjoyed an extension of 18 months by the date of the LAC Hearing but was still unable to comply with the new LR 13.24.

**Ground 1 - (b) Apparent bias**

According to the transcripts of the LAC Hearing, the Chairman and Deputy Chairman raised questions and comments about the absence of representatives from the management of the Company at the hearing (the **first question**). The LAC also expressed concern about a "latent potential conflict of interest" in that, unlike the Exchange, the JPLs had an "interest in earning fees on the Company" and they were running the Company. The LAC asked the Company for more information concerning the appointment of the JPLs and their fee arrangements (the **second question**).

The Company sought to argue that the questions and concerns raised by the LAC demonstrated an apparent bias. It was submitted that since the JPLs were properly appointed and were officers of the court, there was simply no (reasonable) basis for those queries. The LAC was in fact attacking the integrity of the JPLs.

As confirmed by the Court, the well-established test for apparent bias is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that the decision-maker has not brought or will not bring an impartial mind (i.e. a mind open to persuasion by the evidence and submissions raised by the parties) to bear on the adjudication of the matter. The issue was not whether the LAC was fair and impartial in the LAC Decision, but whether a fair minded and informed observer would conclude that there was a reasonable apprehension of bias. It is to be presumed that the fair-minded observer would have observed the entirety of the LAC Hearing, including all the questions and answers, submissions and exchanges at the hearing.

Having considered the transcripts in context, the Court was of the view that LAC's first question was relevant to the determination of whether the Company had a viable and sustainable business, including by reference to the identity and expertise of the persons in charge of the business. The second question on the JPLs' fee arrangements were put to ease the regulatory concern that the parties associated with suspended listed issuers might try to take advantage of the economic value of the listed shell by engaging in a reverse takeover or backdoor listing. The Court accepted the Exchange's submission that the fact that the LAC raised questions suggested that they wished to give the Company an opportunity to clarify and explain the position. Indeed, the Company's representative responded to those questions and the LAC had no further questions. The LAC Decision was not based on any concern about reverse takeover or backdoor listing.

**Ground 1 – (c) lack of a fair and adequate opportunity to present one's case**

At the LAC Hearing, the Company wanted to make a more comprehensive submission to facilitate the Committee members' decision, starting with the basic background of the Company and its developments over the past few years. However, the Company's representative was reminded to keep his oral submissions succinct and limited as far as possible to matters not adequately covered in the written submissions and materials filed before the hearing. The Company contended that as such, it was not afforded a fair and adequate opportunity to present its case.

The CFI acknowledged that it is trite that a person who is entitled to be heard orally must be allowed an adequate opportunity of putting his own case and the decision maker is obliged fairly to listen to the contentions of all persons entitled to be represented at the hearing. However, standards of procedural fairness are not immutable and depend on the facts and circumstances of each case. Where the parties had had an opportunity to file full written submissions in advance of an oral hearing (which was the case here), it is justifiable to require every oral submission made to the tribunal to be succinct and limited as far as possible to matters not adequately covered in the written submissions. Indeed, the Court found it a typically fair approach to ask parties to restrict their oral submissions to anything which is not covered by the written submissions.

**Ground 2 - Constitutional Challenge**

The Company argued that the LAC Decision constituted a disproportionate interference with the right to property of the Company under Articles 6 and 105 of the Basic Law.[4] Relying on the Court of Appeal's decision in *Internsh Ltd v Commissioner of Police*,[5] the Company submitted that "property" should be interpreted generously and should include not only tangible assets but also any right which has an economic value, such as a chose in action.

However, Judge Coleman, reaffirming his Lordship's decisions in *Longrun Tea Group Co Ltd v The Stock Exchange of Hong Kong Limited*[6] and *Kwok Hiu Kwan v Convoy Global Holdings Limited*,[7] held that the listing status of the Company would not fall within the concept of "property" so as to trigger the provisions in the Basic Law. Even if the listing status constituted "property", it is not property belonging to the Company. In a reverse takeover scenario, the real value of a company's listing status would belong to its creditors and contributors since the value would essentially be taken as a means of removing or resolving the relevant debts upon the restructuring arising out of its insolvency.

In the *Convoy* case, his Lordship acknowledged that there were cases where the courts recognised a company's listing status as a valuable asset. However, those cases were all concerned with insolvent companies. The same position would not apply to companies which are not insolvent. Further, those earlier cases were decided prior to 2019 and at a time when reverse takeover was not as strictly regulated as it is today and therefore the listing status of a company might carry some value in a reverse takeover. However, nowadays, it would be extremely unlikely that the listing status of most companies would remain a real valuable asset.

Whilst the listing status would have an impact on the prospect of the scheme of arrangement which had been approved by the requisite statutory majority of the creditors of the Company, as the Court ruled, it does not alter the conclusion that it is not a right to property of the Company.

In any event, the CFI was satisfied that the LAC Decision made pursuant to the delisting procedure under the Listing Rules was rationally connected to the legitimate aims of preventing the build-up of issuers whose shares have been suspended for long periods, with no certainty as to when trading would resume or when the issuer would be delisted, which would in turn hinder the proper functioning of the securities market and undermine its quality and reputation. A decision to delist an issuer after the remedial period has lapsed and all review procedures have been exhausted would be deemed proportionate.

In light of the above, the CFI refused the Company's application for leave to apply for judicial review.

[4] Article 6 provides for the protection of the right of private ownership of property while Article 105 provides for the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

[5] [2019] 1 HKLRD 892 at §6.18.

[6] [2021] HKCFI 1883 at §108-113.

[7] [2021] HKCFI 814 at §112-113.

## Lessons from previous attempts to challenge a delisting decision

Having studied the case of Up Energy and the other recent cases,[8] we set out below the takeaway points which one should bear in mind when considering whether to mount a legal challenge against the Exchange's decision to delist a listed issuer.

1. A decision made by an administrative body could be challenged on the ground that it is tainted by procedural impropriety, or that it is irrational or unreasonable in the Wednesbury sense.

2. The Courts, however, are reluctant to interfere with decisions by the Exchange's committees as they are deemed independent in their role due to their appointment mechanism and the composition of the members who represent the various interests of investors, representatives of listed companies and market practitioners. These people are well-placed with their relevant knowledge and experience to determine currently acceptable standards in the market.

3. An applicant must first exhaust all alternative remedies before seeking the Court's intervention by way of a judicial review. Unless there are exceptional circumstances, it would be abusive for the applicant to make a challenge and seek a stay or adjournment of the application for leave to review the Exchange's decision pending the outcome of an alternative remedy pursuant to the Listing Rules, hoping to further delay a delisting decision already made.

4. Whilst there is a presumption that an administrative power will be exercised in a manner which is fair in all the circumstances, provided that the decision-making body achieves the degree of fairness appropriate to its task, it is for the body to decide how it will proceed. The Court would hardly exercise its judicial review jurisdiction to review decisions that go only to procedure rather than to the end result.

5. It is difficult to successfully challenge the Exchange's assessment of an issuer's compliance with LR 13.24 in court. The Exchange is entitled to look at the level of operations and the level of assets in conjunction with the issuer' actual business. In particular, relevant considerations include the way in which the assets have actually been deployed in the past and the likely use of those assets in the future. The court in determining whether to grant leave to apply for judicial review will focus on whether the decision made is proper under the usual test and not on the underlying merits of the case already considered by the Exchange.

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[8] *Brightoil Petroleum (Holdings) Ltd v Stock Exchange of Hong Kong Ltd* [2020] HKCFI 1601; *Cai Zhenrong v Stock Exchange of Hong Kong* Ltd [2021] HKCFI 1899; *China Trends Holdings Ltd v Stock Exchange of Hong Kong Ltd* [2020] HKCFI 3045; *Longrun Tea Group Co Ltd v The Stock Exchange of Hong Kong Ltd* [2021] HKCFI 1883.