



Newsletter Nr. 124 (EN)

How to inherit Shares of a Hong Kong company  
and to enforce certain Shareholder Rights

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## I. Background of the case

In the underlying scenario, we assume that the father of our client (hereinafter “The **CLIENT**”) died several years ago. The deceased set up a Hong Kong COMPANY with another person from Germany (hereinafter “The **DEFENDANT**”), and The **DEFENDANT** is acting as the director of the company. The name of the COMPANY shall be “Hong Kong Co. Ltd.” (hereinafter “The **COMPANY**”), and the deceased is still registered as shareholder of The **COMPANY**.

The **CLIENT** now wants to inherit the shares from the deceased and become shareholder of The **COMPANY**. However, The **DEFENDANT** refuses to disclose any information about The **COMPANY**. The **CLIENT** obtained a judgment from a German court, and the German court ordered The **DEFENDANT** to disclose all relevant information to The **CLIENT**. Yet, The **CLIENT** has not received any information from The **DEFENDANT**.

This memorandum is to provide information about:

- How to enforce the right of the inheritance of shares of The **COMPANY**
- How to register as a shareholder
- Alternatives to acquire the relevant information about The **COMPANY** from The **DEFENDANT**
- The liability of The **DEFENDANT** to The **CLIENT** for not disclosing information

The abovementioned scenario raises several problems:

- a. Can The **CLIENT** inherit the shares of The **COMPANY**?
- b. How to legally inherit shares in Hong Kong, and how to register as a shareholder?

- c. Which documents are required to legally inherit the shares?
- d. What are the alternatives to acquire information from The **DEFENDANT**?
- e. How to enforce the German judgment in Hong Kong?
- f. Under which circumstances would the director of The **COMPANY**, (The **DEFENDANT**), be liable?
- g. What are the legal consequences to The **DEFENDANT** if he intentionally harmed The **COMPANY**?

## II Legal considerations

### 1. How to inherit shares

#### a. Right to inherit shares from the deceased

According to the *Companies Ordinance [cap 32, schedule 1, paragraph 29]*, if the deceased was the sole holder of the shares (the deceased was not one of the joint holders of the shares), the legal personal representative of the deceased will inherit the shares.

Once the estate is distributed and a beneficiary becomes entitled to the share under the last will or under the intestacy rules he may choose to register as a shareholder himself or appoint a nominee.

The **CLIENT**, after the estate is distributed, can register as a shareholder according to the *Companies Ordinance [cap 32, schedule 1 paragraph 30]*. However, the directors retain the same right to decline or suspend registration as they have in cases of transfer before death or at bankruptcy.

Further, anyone who legally inherits the shares from the deceased may have the same right as the deceased; though the rights are excluding rights in company meetings until registration is completed.

It is therefore essential for The CLIENT to complete registration to obtain the full rights of a shareholder.

b. Right of directors to refuse registration/transfer of shares

If one is legally entitled to inherit shares, then he may register as shareholder. However, according to the *Companies Ordinance [cap 32, schedule 1, paragraph 30]*, the director(s) of the COMPANY, as above mentioned, has the right to decline the registration of shares or the transfer of shares. The director(s) has the same right in a case when a member of the COMPANY wants to transfer shares.

If The DEFENDANT, who is the director of The COMPANY, declines the registration or the transfer of shares, he must give a statement of reason upon The CLIENT's (assuming the CLIENT is the beneficiary) request. If the DEFENDANT fails to make a statement of reason within 28 days of the request, The CLIENT may register or transfer the shares, according to the *Companies Ordinance [cap 32, section 69(1A)]*. In the case that the company refuses to register the shares, The Client can apply to court who will subsequently order the transfer to be registered if the application is successful.

2. How to legally inherit shares in Hong Kong

According to the *Non-Contentious Probate Rules (cap 10A, section 4)*, The CLIENT, if he is appointed as an executor under the will or an administrator may apply for a grant of representation either in person or authorize a Hong Kong solicitor to do so.

a. File documents with the Inland Revenue Department

If the deceased died before the 11<sup>th</sup> February 2006, he needs to file an application with the Inland Revenue Department (IRD) of

Hong Kong in order to obtain an estate duty clearance. Any assets less than HK \$7.5 million do not require paying tax, but filing the documents with the Inland Revenue Department (IRD) is necessary. The following documents need to be prepared:

- (1) Death Certificate
- (2) Deceased's identity card/passport/ or other legal documents which can prove his identity
- (3) Applicant's identity card/passport
- (4) The Affidavit for the Commissioner (can be obtained from the IRD).
- (5) Documents related to the assets and liabilities of the estate (i.e. the COMPANY Financial Statements). If such documents cannot be acquired, one can submit any documents that can possibly be obtained, such as the Annual Return. Preferably, the documents should be dated within the 3 years prior to the death of the deceased. In addition, the IRD has the power to ask for more documents from The COMPANY if they think it is necessary).
- (6) Any documents to prove the relationship between the applicant and the deceased, and
- (7) The original Will (if any)

All documents must be legalized in Germany (see below for Authentication of Documents). For example, documents may be sealed by a German Court. Translation of such documents into English may be conducted in Hong Kong.

b. Apply for a probate grant at the Probate Registrar

Secondly, after receiving the estate duty clearance from the IRD, The CLIENT should apply to the Probate Registry to grant a letter of probate in Hong Kong. He

should provide the following documents along with the specific forms:

- (1) Any proof issued by the German Court that The CLIENT has been granted to inherit the deceased's assets.
- (2) Death certificate OR a certified copy legalized with the Certificate of Apostille in Germany.
- (3) Original Will AND a certified copy [Original Will is a must].
- (4) Birth certificate of the deceased (original copy or certified copy), if available.
- (5) Estate duty clearance obtained from the IRD.
- (6) Applicant's identity documents.

Again, all documents must be legalized in Germany (see below on Authentication of Documents).

If all documents are well prepared, it will normally take 2 months (or more) for the Probate Registrar to process such grant.

### c. Authentication of Documents

All documents mentioned above, which are necessary on the application to the IRD and the Probate Registry, must be legalized in Germany.

Since both, Germany and Hong Kong, signed The Hague Convention (*Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*), legalized documents simply mean documents with a Certificate of Apostille. The Certificate of Apostille is a proof of authenticated documents which are issued by courts or administration authorities. This certificate is recognized by all countries which signed the Hague Convention.

Therefore, for the death certificate and the birth certificate, the CLIENT must obtain a

Certificate of Apostille. He can obtain the Certificate of Apostille from the following authorities in Germany:

- the Ministries (or Senate Departments) for the Interior;
- Chief Administrative Officer of the district (President of the administrative district/district authority);
- In Berlin, Registry Office I,
- In Rhineland-Palatinate, the Supervisory and Service Directorate in Trier,
- and in Thuringia, the Land Office of Administration in Weimar.

### d. Transmission of Shares

After the Probate Registrar issued the grant, the estate will be distributed and The CLIENT as the beneficiary under the will or under the intestacy rules will be subsequently entitled to register the shares. The action of registering shares upon death of a shareholder is called transmission of shares.

According to the *Companies Ordinance [Cap 32, section 72]*, the COMPANY and the director of the COMPANY are bound to accept the transmission. Hence, The CLIENT may choose to be registered as a member (shareholder) of The COMPANY, or may transfer the shares to another person.

Further, the transmission of shares should be reported in the next Annual Return to the Companies Registry. In practice, if the grant of probate is in progress, one may also state in the Annual Return that the original shareholder has died and the grant of probate is in progress.

## 3. Claim for information

### a. Criteria to acquire information by court order

Technically, it is not possible to claim for pre-action discovery without any cause of action. However, if it is very likely to have a

proceeding in the Court of First Instance (claim exceeding HK \$ 1 Million), one may apply to the Court of First Instance to acquire information from the potential DEFENDANT of the case under sec 47A District Court Ordinance. The requirements of such application are:

- (1) The proceeding is very likely to happen
- (2) The subsequent claim is to be proceeded in the Court of First Instance, that is, a claim exceeding HK \$1 Million
- (3) The documents are directly relevant to the case and they are in possession of the potential DEFENDANT
- (4) The Court thinks it is appropriate to grant such application

## b. Conclusion

Since The CLIENT has not legally inherited the shares yet and the Probate Registrar has not issued the grant of probate, The CLIENT does not have any claim against The DEFENDANT, based on the fact of being the inheritor of the shares.

## 4. Enforcing German Judgment in Hong Kong

### a. Time limitation

According to *Foreign Judgments (Reciprocal Enforcement) Ordinance [Cap 319, section 4 (1)]*, a Hong Kong court will not recognize or execute any foreign judgments more than 6 years after the date of judgment.

### b. Requirements of the German judgment:

According to *Conflict of Law in Hong Kong (Graeme Johnson)*, there are 6 requirements to enforce a foreign judgment (in the underlying case a German Judgment) in Hong Kong:

- (1) First, the German judgment must not be against natural justice. That is, in obtaining the German judgment, the DEFEN-

DANT must have had an opportunity to present his case in court during the proceedings in Germany. Also, the judgment must not be obtained by fraud.

- (2) Second, the DEFENDANT must be present/reside in German at the time of the commencement of the original proceeding (to exclude forum shopping). If the DEFENDANT is a COMPANY, Germany should be the fixed place of business of the COMPANY or the COMPANY had carried its business in Germany for a period of time.

- (3) Third, the German judgment must be final, means there must not be a pending proceeding in Germany.

- (4) Forth, the case must not be tried in Hong Kong or other countries by the same parties.

- (5) Fifth, the German judgment must not conflict with any Hong Kong case law.

- (6) Sixth, the German judgment must not be contrary to the public policy in Hong Kong (“ordre public”).

### c. Conclusion

Assuming that The DEFENDANT was living in Germany or having a residence in Germany at the beginning of the original proceeding, the German judgment meets all the abovementioned criteria. Therefore, it is likely that a Hong Kong court will recognize and enforce the German judgment.

In order to do so, The CLIENT should apply for a Certificate of Apostille for the judgment.

## 5. Legal consequences for a director who may be liable to shareholders

- a. Director fails to conduct annual general meeting

According to the *Companies Ordinance* [cap 32, section 111 (5)], if a director fails to conduct an annual general meeting, a shareholder may report to the court. The court may order to schedule the meeting. If the director still fails to conduct the meeting, the court may order the director to pay a fine.

b. Director fails to convene extraordinary general meetings

According to the *Companies Ordinance* [cap 32, section 113 (1)], a COMPANY must convene an extraordinary general meeting upon request of the shareholder who has more than one-twentieth paid-up capital of the COMPANY. If the director fails to do so, the director (s) has to repay and reimburse the COMPANY for any reasonable expenses for not being able to conduct the meeting. Reasonable expenses include, for example, the fees of facilities or remuneration of services which has been wasted as the result of failing to conduct the meeting.

**6. Liability of the Director if he intentionally imposes harm to the COMPANY**

a. Disqualification of the directors

A director may be disqualified under a court order if:

(1) The director convicted a criminal offence in connection with the COMPANY to which he has acted fraudulently or dishonestly [*Companies Ordinance* (cap 32), section 168 E (1)]

(2) The director is in persistent default in relation to the *Companies Ordinance*. That is, the director fails to return, file, or deliver any documents required by the *Companies Ordinance* for more than 3 times in 5 years [*Companies Ordinance* (cap 32), section 168F (2)(3)]

A court order to disqualify a director may be applied by (a) the Companies Registry, or (b) any past or present member of the

COMPANY [*Companies Ordinance* (cap 32), section 168 P]

In the case *Re GP Nanotechnology Group* [2009] HKEC 1677, two directors from the COMPANY were disqualified by the court, and they were restrained to be directors of any other corporation for a period of six years. The reason they were disqualified is, that they were responsible for five extraordinary transactions which continuously drained fund out of the COMPANY without any proper purposes. Those transactions were plainly not in the interest of the COMPANY.

b. Obtain compensation from the directors

A director has fiduciary duties to act for the benefit of the COMPANY and to exercise his powers for proper purposes.

Assuming the director (The DEFENDANT) had intentionally withdrawn money from The COMPANY, or had caused financial harm to The COMPANY or any shareholder (The CLIENT) may claim for any financial damage or loss which was caused by the director's act (The DEFENDANT).

In addition, if The DEFENDANT used the COMPANY to make personal profit without paying any fees or making account to the COMPANY, The CLIENT may claim for the profit which the DEFENDANT had gained.

In the case *Industrial Development Consultants v Cooley* (1972) 1 WLR 433, the director of Industrial Development Consultants obtained some information and knowledge about an industrial project due to his position of being a director. Then he resigned from Industrial Development Consultants and made large profits with this information. As a result, Industrial Development Consultants sued him and successfully claimed him for the profit he made out of the information.

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