



Issue 53/04

## Corporate Loans: Need for a Money Lender Licence

### 企业贷款——何时要放债人牌照

#### A. Introduction (序言)

It is common in Hong Kong for corporations to advance loans in their course of business. Under the Money Lenders Ordinance (放债人条例) (Cap.163) (“**the Ordinance**”), any person (or corporation) who carries on business as a money lender (放债人) is required to obtain a money lender licence (放债人牌照). Failure to obtain the licence will lead to the consequences of not being able to recover the money lent together with interest, or enforce the collateral security.

This article will address: (i) some of the factors considered by the Court in determining whether a corporation is carrying on business as a money lender; and (ii) the major exceptions to the requirement for a money lender licence that are usually necessary for corporate loans.

#### B. Definition of “Money Lender” (放债人的定义)

According to the Ordinance, “money lender” means every person (or corporation) whose business (whether or not he carries on any other business) is that of making loans or who advertises, announces, or holds himself out in any way as carrying on the business.

However, no definition of “*carrying on business as a money lender*” is provided in the Ordinance, and below are some of the factors previously taken into account by the Court in their consideration of whether a person/corporation was “*carrying on business as a money lender*”.

It should be noted that none of the below factors are conclusive, and each case will depend on its own facts.

#### System, Repetition and Continuity (系统性、重复性及连续性)

When considering the meaning of “*carrying on business as a money lender*”, it was ruled by the Court that the word “*business*” imports the notion of system, repetition and continuity<sup>1</sup>.

The Court will take into consideration the number of the loan transactions that were carried out, and if the loans made by a corporation are sufficiently numerous, the Court will be more

<sup>1</sup> *Edgelow v Macelwee* [1918] 1 K.B. 205

ready to infer that an operation system exists and thus a business of “*money-lending*” is being carried on.

#### Comparative Scale of the Money Lending Business (贷款业务与主要业务的比例)

It is not a requirement under the law that money lending has to be a significant part of the business carried out by a corporation.

Instead, case law<sup>2</sup> suggested that a corporation can be a money lender even if only about half a per cent of its business relates to money lending. The judge in that case said “...*in my opinion, a person who makes a business of lending money is not any the less a moneylender because he carries on some other business as well on a much larger scale.*”

#### Class of the Borrowers (借款人的类别)

When determining whether a corporation is carrying on business as a money lender, the Court may also consider to whom the loans were made. As suggested by the Court, “*speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible.*”<sup>3</sup>

As a result, if a corporation does not seek to limit the class of borrowers to whom the loans are extended, the Court may be more ready to find that the lending corporation is a money lender under the Ordinance.

### **C. Major Exceptions (主要例外)**

The following are some of the major exceptions to the need for a money lender licence under the Ordinance which may be applicable to corporate loans:-

1. A loan made by a company or a firm or individual whose ordinary business does not primarily or mainly involve the lending of money in the ordinary course of that business;
2. A loan made to a company that has a paid up share capital (缴足款股本) of not less than HK\$1,000,000 (one million) or an equivalent amount in any other approved currency; and
3. A loan made by a holding company (控权公司) to its subsidiary (附属公司) or by a subsidiary to its holding company or another subsidiary company of the same holding company.

### **D. Conclusion (总结)**

Subject to the said exceptions, the money lent by a money lender without licence is *prima facie* unrecoverable under the Ordinance. Although the Court has discretion to allow the recovery of money lent even if the money lender is not licensed, there is always a risk that the Court may refuse to exercise its discretion.

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<sup>2</sup> *North Central Wagon Finance Co. Ltd. v Brailsford* [1962] 1 W.L.R. 1288

<sup>3</sup> *Litchfield v. Dreyfus* [1906] 1 KB 584

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