# Legal Eye: divorcing couples should keep their business affairs in order

Divorcing couples should keep their business affairs in order

**DENIS PETKOVIC**

Hong Kong matrimonial law generally requires an even split of assets between a divorcing couple unless there are particular reasons to depart from this principle, such as the need for one to receive ongoing maintenance payments.
In some cases, such as where the marriage has no children or has created substantial capital value, a clean-break settlement may be possible. This will see one party paying the other lump sum compensation equal to half the value of the assets. Then the couple go their separate ways.
But not all situations are suitable for a clean-break settlement. The nature of some marital assets may require an ongoing relationship between a divorcing couple to enhance the value of those assets.

In an entrepreneurial environment such as Hong Kong, this is frequently an issue. Major matrimonial assets can comprise a substantial family business, or holdings of interests that may have their value reduced (usually because of third-party contractual rights) if one party transfers their shares to the other.

Or the couple may own an interest in a company that is the subject of an imminent flotation on a stock exchange, and the valuation of the company is not yet determined.
In such cases it is sensible for the couple to enter into shareholder arrangements to regulate their affairs concerning the relevant business assets on an arm's-length basis.

Six key considerations apply to an arm's-length agreement between the divorcing couple.
The first consideration is asset identification. A full listing of corporate shareholdings and partnerships, or other interests, should be made and covered by the agreement so both parties are aware of the subject matter of the agreement, and no assets are hidden from either party.
The agreement will typically be preceded by court-related financial disclosures on assets and liabilities of the couple. In addition, it is common to update and reconfirm the position in the agreement with mutual representations made by the couple, which can lead to liability if they are untrue.
The second topic concerns tax and estate planning.

The couple may need to restructure their interests, possibly in a new holding company, and consider using trusts to hold their assets following advice from tax advisers. Related to tax is the question of dividends from the relevant companies, particularly if one of the couple is the "face" of an investment insofar as third-party shareholders are concerned.

There may need to be future tax co-ordination between the couple's tax advisers, which can be regulated in the agreement. Disputes on such co-ordination and presentation of the couple's tax returns may need to be resolved by an independent accountant, if their own tax advisers cannot do so.

The third concern relates to the core commercial considerations of the agreement, and reaching an understanding of how sensitive matters will be dealt with.
These may include the handling of future sales of the business, dealing with changes to the constitutional documents of any relevant company, setting of company budgets and financial plans, the taking of new loans by the company, the writing off of loans to the company, and material changes to the business of any relevant company.
The couple will need to approve such actions, or agree a mechanism to do so via, say, an independent expert.

The fourth concern is treatment of new economic opportunities arising from any relevant company or activity which is the subject of the agreement. These will need to be shared by the divorcing couple, and there should be a mutual prohibition against either of them taking action to reduce the value of their shared investment.

The fifth concern is exit from a shared investment. Sales of shares by one of the couple should not be permitted without the other having the right to acquire such shares before anyone else. Moreover, if an exit opportunity arises such that one of them may sell their shares to, for example, a private equity investor, the couple should agree that the other's shares will or may also be sold.

The last concern is treatment of information. If one of the parties is involved more heavily in company business then provision must be made for reporting of company news and financial information to the other. Disclosure of confidential information associated with the couple's agreement will need to be tightly controlled in the light of necessary disclosures to be made to tax advisers.

These topics are complex and obviously difficult to discuss against the emotional backdrop of a divorce.

But the general position for the couple to adopt is to enhance value and order on the economic front to their mutual advantage, even if this is not possible in their personal lives.