Counsel's note
DotAsia Organisation Limited – potential criminal liability – reasoning

Was there any misrepresentation by DotAsia, to the Company Registry and in its Financial Reports?

1. In the course of his opinion, Mr Brewer states the following at paragraphs 16 and 17:

> One particular question concerning AS's office as Director and to which the BGC chair is alive is the fact that although AS was re-elected as Director at the 24 February 2018 AGM on 6 March 2018 DA reported to the Companies Registry that he ceased to hold office on 5 March 2018,[4] whereas in point of fact he did not. Indeed, he has continued to hold office continuously since the 24 February 2018 AGM, being re-elected again in 2020. Moreover, the Board has chosen not to reflect AS as Director in resolutions adopting banking mandates and appointing and changing signatories to bank accounts.[5]
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> I am instructed that these steps reflect a conscious decision of the Board in order to avoid the prospect of DA's bankers withdrawing facilities given that AS is a citizen of Iran and the potential reaction of DA's bankers to the impact of US Treasury Department sanctions.
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> [4] Reflected in the Directors' Report annexed to DA's audited financial statements to 30 September 2018 and dated 19 June 2019; other Directors whose term ceased were reported as having resigned on 24 February 2018.
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> [5] Minute 7.3 of Board minutes of the 28 May 2020 meeting states, *"It was noted, and acknowledged by Alireza, that in accordance with prior Board agreement he is not included in the banking resolution."*
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> [6] The fact that .IPM/IRNIC, the .IR ccTLD registry in Iran was a founder member of DA and remains on the public record as member appears not to concern DA's bankers.

2. From this statement, I infer that DA has made false statements to the Registrar of Companies namely in the Directors' Report annexed to DA's audited financial statements to 30 September 2018 and dated 19 June 2019 by omitting AS when listing the company's directors as it was required to do by s390(1)(a) of the Companies Ordinance.

3. Also of relevance is the following from paragraph 26:

> I am instructed that (a) in September 2017 Citibank notified DA orally that following an overall review which included nationalities of its directors Citibank intended to terminate their banking relationship with DA and foreclose on mortgage facilities granted in respect of DA's premises; (b) DA approached ICBC as potential successor bank but was notified orally that ICBC was not prepared to open an account if DA had a director with

Iranian citizenship; (c) in December 2017 HSBC notified DA orally that compliance checks would not be passed and DA's accounts would have to be closed if "ties with Iran" (being AS's directorship and IRNIC's membership) remained evident and of public record; (d) the Board accordingly agreed the chief executive's suggestion to remove reference to AS from DA's website and from Companies Registry filings until HSBC's compliance checks had been successfully accomplished; and (e) in March 2018 HSBC confirmed a satisfactory outcome of compliance checks and ICBC also confirmed that DA could establish banking and mortgage facilities.

4. As I have noted above, I have not had the benefit of reviewing the underlying documents. However, on the assumption that AS continued to hold office, it appears that either: (1) DA misrepresented the true facts to its bankers by either stating that AS was a director, or omitting to state that he was not a director; or (2) DA's bankers were complicit in the "deception" in that it was agreed that as long as the public record did not reflect that AS was a director, the bankers would (in effect) turn a blind eye to that true fact that he was a director.

5. At this stage, I am not in a position to go beyond the facts set out in the opinion of Mr Brewer. However, assuming that the facts there are accurate, it appears that the Directors' Report annexed to DA's audited financial statements to 30 September 2018 and dated 19 June 2019 misrepresented the true position regarding the directors of the company by omitting that AS was a director at the material time. It also appears from what is set out in those paragraphs that there may have been misrepresentations made to DA's bankers about the true position of who the directors were from time to time. What is not clear to me at this stage is what form the misrepresentations to the bankers may have taken (eg, oral statements recorded in bankers' notes; letters; emails; banking resolutions provided to the bankers; finance documents).

If there was misrepresentation, is it advisable to keep misrepresenting the position to the Companies Office and others?

6. If there have in fact been misrepresentations to the Company Registry, there are at least two provisions of the Companies Ordinance that may be relevant:

    (a) Section 388 requires directors to prepare a financial report for each year.[1] Section 390 states that the report must contain the name of every person who is a director. Breach of s388 is an

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[1] **388. Directors must prepare directors' report**

(1)A company's directors must prepare for each financial year a report that—

(a)complies with sections 390 and 543(2) and Schedule 5;

(b)contains the information prescribed by the Regulation; and

(c)complies with other requirements prescribed by the Regulation.

…

(6)A director of a company who fails to take all reasonable steps to secure compliance with subsection (1) or (2) commits an offence and is liable to a fine of $150,000.

(7) A director of a company who wilfully fails to take all reasonable steps to secure compliance with subsection (1) or (2) commits an offence and is liable to a fine of $150,000 and to imprisonment for 6 months.

390.Contents of directors' report: general

(1)A directors' report for a financial year must contain—

(a)the name of every person who was a director of the company—

(i)during the financial year; or

(ii)during the period beginning with the end of the financial year and ending on the date of the report; and

(b)the principal activities of the company in the course of the financial year.

offence punishable by fine of up to $150, 000; wilful breach is punishable by a fine of up to $150, 000 and imprisonment for up to 6 months.

(b) Section 895 makes it an offence to knowingly or recklessly make a false statement in any report or financial statement or other document required to be filed under the Companies Ordinance.[2]

7. If there have in fact been misrepresentations to the company's bankers, there are at least 4 provisions of the Theft Ordinance that may be relevant:

   (a) Section 6A (Fraud) makes it a crime to induce anyone (ie the bankers) to do or omit to do anything of which confers a value (ie extend or maintain banking facilities) by deceit where deceit can be by words or conduct .[3] The maximum penalty is imprisonment up to 14 years.
   (b) Section 18 (Obtaining by deception) makes it a crime to obtain a pecuniary advantage (which includes banking facilities) by deception.[4] The maximum penalty is imprisonment up to 14 years.

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[2] **895. Offence for false statement**

(1)A person commits an offence if, in any return, report, financial statements, certificate or other document, required by or for the purposes of any provision of this Ordinance, the person knowingly or recklessly makes a statement that is misleading, false or deceptive in any material particular.

Note—

Please also see section 873 which empowers the Registrar to require the production of records or documents, and the provision of information or explanation in respect of the records or documents, for the purpose of enquiring into whether any act that would constitute an offence under this subsection has been done.

(2) A person who commits an offence under subsection (1) is liable—
(a) on conviction on indictment to a fine of $300,000 and to imprisonment for 2 years; or
(b)on summary conviction to a fine at level 6 and to imprisonment for 6 months.
(3)This section does not affect the operation of—
(a) Part V of the Crimes Ordinance (Cap. 200); or
(b) section 19, 20 or 21 of the Theft Ordinance (Cap. 210).

[3] **6A. Fraud**

(1) If any person by any deceit (whether or not the deceit is the sole or main inducement) and with intent to defraud induces another person to commit an act or make an omission, which results either—
(a) in benefit to any person other than the second-mentioned person; or
(b) in prejudice or a substantial risk of prejudice to any person other than the first-mentioned person,
the first-mentioned person commits the offence of fraud and is liable on conviction upon indictment to imprisonment for 14 years.
(2)For the purposes of subsection (1), a person shall be treated as having an intent to defraud if, at the time when he practises the deceit, he intends that he will by the deceit (whether or not the deceit is the sole or main inducement) induce another person to commit an act or make an omission, which will result in either or both of the consequences referred to in paragraphs (a) and (b) of that subsection.
(3)For the purposes of this section—
act (作為) and ***omission*** (不作為) include respectively a series of acts and a series of omissions;
benefit (利益) means any financial or proprietary gain, whether temporary or permanent;
deceit (欺騙) means any deceit (whether deliberate or reckless) by words or conduct (whether by any act or omission) as to fact or as to law, including a deceit relating to the past, the present or the future and a deceit as to the intentions of the person practising the deceit or of any other person;
gain (獲益) includes a gain by keeping what one has, as well as a gain by getting what one has not;
loss (損失) includes a loss by not getting what one might get, as well as a loss by parting with what one has;
prejudice (不利) means any financial or proprietary loss, whether temporary or permanent.
(4)This section shall not affect or modify the offence at common law of conspiracy to defraud.

[4] 18. **Obtaining pecuniary advantage by deception**

(c) Section 18 (False accounting) makes it a crime to falsify, or makes use of such a document or concurs in the making or using of such a document (ie knowingly acquiesces).[5] The maximum penalty is imprisonment up to 10 years.
(d) Section 21 (False statement by director) makes it a crime for a director to make a false statement to a creditor (which includes a banker who has entered into a security for the benefit of the company).[6] The maximum penalty is imprisonment up to 10 years.

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(1)Any person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains for himself or another any pecuniary advantage shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years.
(2)The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where—
(a) he is granted by a bank or deposit-taking company, or any subsidiary thereof the principal business of which is the provision of credit—
(i) a credit facility or credit arrangement;
(ii) an improvement to, or extension of, the terms of a credit facility or credit arrangement; or
(iii) a credit to, or a set off against, an account, whether any such credit facility, credit arrangement or account—
(A) is in his name or the name of another person; or
(B) is legally enforceable or not;
(b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement on the terms on which he is allowed to do so, whether any such overdraft, policy of insurance or annuity contract—
(i) is in his name or the name of another person; or
(ii) is legally enforceable or not; or
(c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.
(3) For the purposes of this section—
bank (銀行) means—(a) a bank within the meaning of section 2(1) of the Banking Ordinance (Cap. 155); and
(b)a bank—
(i)incorporated by or under the law or other authority in any place outside Hong Kong, and in this respect
incorporated (成立為法團) includes established; and
(ii)which is not a bank within the meaning of section 2(1) of the Banking Ordinance (Cap. 155);
deception (欺騙手段) has the same meaning as in section 17;
deposit-taking company (接受存款公司) means a deposit-taking company or restricted licence bank within the meaning of section 2(1) of the Banking Ordinance (Cap. 155);
subsidiary (附屬公司) has the same meaning as in the Companies Ordinance (Cap. 622).

[5] **19. False accounting**
(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another—
(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or
(b)in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular,
he shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years.
(2)For the purposes of this section a person who makes or concurs in making in an account, record or document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account, record or document, is to be treated as falsifying the account, record or document.
(3)For the purposes of this section,
record (紀錄) includes a record kept by means of a computer.

[6] **21. False statements by company directors, etc.**
(1)Where an officer of a body corporate or unincorporated association (or person purporting to act as such) with intent to deceive members or creditors of the body corporate or association about its affairs, publishes or concurs in publishing a written statement or account which to his knowledge is or may be misleading, false or deceptive in a material particular, he shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years.

8. Also of note is s20 of the Theft Ordinance which provides that where an offence under s17, 18 or 19 is done with the "consent or connivance of any director", then that director is liable of the offence.[7] That is, it is not just the officer of the company who commits the offence by (for example making a false statement) that is liable, but also any director who agrees with/authorises that course of action, or knows about it and allows it to happen.

9. There is also a common law offence of conspiracy to defraud which is specifically preserved under s6A of the Theft Act. I note the statement at paragraphs 16 and 17 in the opinion of Mr Brewer that: " Moreover, the Board has chosen not to reflect AS as Director in resolutions adopting banking mandates and appointing and changing signatories to bank accounts.[5] I am instructed that these steps reflect a conscious decision of the Board in order to avoid the prospect of DA's bankers withdrawing facilities given that AS is a citizen of Iran and the potential reaction of DA's bankers to the impact of US Treasury Department sanctions." If true, this may well give rise to liability under s20 and/or constitute a conspiracy to defraud.

10. I ought to be clear, I am not in this opinion expressing any view on whether there has in fact been an offence under any of these provisions. I am however of the view that if the statements set out in the opinion of Mr Brewer are correct, it may well be the case that an offence has been committed by executives of the company, and, to the extent that there was knowledge/acquiescence by a particular board member, it may be the case that an offence has been committed by a director.

11. Furthermore, I am also of the view that if the facts when fully investigated do tend to show that misrepresentations have been made to the Registrar of Companies, and/or the company's bankers (and/or other stakeholders) the board will need to consider carefully what steps ought to be taken to remedy the situation as a failure to act to correct a known misrepresentation might give rise to criminal liability if the false representations are conceived of as ongoing representations, or if there is otherwise a duty to correct.

What is the liability facing the directors of DotAsia (a) now, and (b) if we continue misrepresenting the position?

12. In general terms, this issue has been dealt with above. What I cannot do at this stage is to advise any particular director whether they may have liability for past representations. As above, this would depend on their knowledge at the time. However, based on the statements from Mr Brewer at paragraph 13 above, there may well be the possibility that some or all of the directors are already in a position where there could be liabilities for past misrepresentations. If so, the situation moving forward needs to be carefully managed to minimise the risk that the authorities might look to lay charges.

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(2)For the purposes of this section a person who has entered into a security for the benefit of a body corporate or association is to be treated as a creditor of it.

[7] **20. Liability of company officers for certain offences by company**
(1)Where an offence committed by a body corporate under section 17, 18, 18A, 18B, 18D, 19 or 22(2) is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.
(2)Where the affairs of a body corporate are managed by its members, this section shall apply in relation to the acts and defaults of a member in connexion with his functions of management as if he were a director of the body corporate.

13. Furthermore, whatever the position is in relation to any particular director's knowledge at the time that the representations were made, as a result of the opinion of Mr Brewer of 13 May 2021, which I understand to have been provided to the board around that date, all directors are now aware that there may have been representations made to the Registrar of Companies, and to the company's bankers that are false. The board will need to consider carefully what do to regularise the situation moving forward. In particular, it may be that the directors' knowledge triggers provisions under the banking facilities that require the bankers to be advised. (At this stage I have not seen the facility documents). Furthermore, as above, it may be that the representations that have been made, could be construed as ongoing representations and that it could be said that the board is now acquiescing in an ongoing deceit on (say) DA's bankers.

14. At paragraph 33 of his opinion, Mr Brewer notes: "It is of course a matter for the Board as a whole but the risks of affording any additional public exposure of AS's position and of exposing DA and Board members to the risk of prosecution for causing misleading statements to be made to the Registrar of Companies are real." That is true. However, in my view the board must also consider the risk of prosecution arising from the failure to correct what may now be known misrepresentations of fact. Put differently, whatever the case may have been earlier, no individual board member can now say that they are unaware that DA's bankers are (or at least may be) labouring under a misapprehension. Nor could any individual board member now say that they were unaware that the false representation might have been material to DA's bankers given what Mr Brewer has set out in his opinion at paragraph 26.

15. This being the case, in my view the board needs to consider carefully how best to move forward.

As the Company's officer that implemented the misrepresentations, is there a conflict of interest between the CEO and DotAsia?

16. On the fact known to me, (ie limited to the facts set out in the opinion of Mr Brewer) it is not possible to say whether there is *in fact* a conflict of interest between the CEO. However, I note the following which may be of assistance to the board:
    (a) Generally speaking, when a board is confronted with the kinds of issues that DA is facing, the issue of whether there is a conflict of interest between an employee and the company itself, often comes down to the issue of whether the employee was sufficiently senior in the organisation that their actions are, in effect, the actions of the company.
    (b) Assuming that the employee is a senior person within the organisation (such that it would be assumed that their actions were the actions of the company) the issue further comes down to whether the actions of the employee were adopted by the company, (for example, authorised by the CEO or authorised by the board). If they were, there may be no significant difference between the position of senior employee and the position of the company, unless it could be said that the actions of the employee (or CEO) were such that they should not be attributed to the company itself (eg fraud by a senior employee).
    (c) There is a further question whether there is any conflict between the employee (or, as I understand the facts in this case, the CEO) and the board of the company. If the CEO's actions were (at least arguably) not known to the board and not authorised to the board, then it may be that there is a conflict between the CEO and the board.

17. Given the matters set out above, there must be a real risk of *an actual* conflict between the CEO and the company and/or between the CEO and the board (or some individual directors) – for example, the CEO may claim that his actions were knowingly authorised by the board, whereas it may be the case that either the board does not agree that was the case, or that particular board members do not agree that is the case. Alternatively, it may be that the facts, when properly investigated, reveal that the board relied solely on assurances given by the CEO that what they were being authorised was normal practice, commercially legitimate and otherwise lawful. If that occurred, for the reasons set out above, those assurances are likely to have misled the board, giving rise to an actual conflict between the CEO and the company and the CEO and the board.

18. Aside from these general points, there is a further fact which indicates that the interests of the company and/or the board are not alleged with the interests of the CEO. In particular, from paragraph 26 of the opinion of Mr Brewer, it seems that the CEO has a personal interest in the financing arrangements between DA and its bankers in that there is a guarantee executed by DA's chief executive officer for an unlimited amount. That being the case, and given any misrepresentation in the past may trigger banking covenants, it may be that the CEO has a personal interest that is beyond the interests of the company itself.

19. Finally, I understand from Mr Brewer's opinion at paragraph 16 that "The current circumstances in which DA finds itself include allegations of misappropriation on the part of the CEO and litigation in which the CEO is named as defendant." I understand this to be a reference to litigation in which both DA and the CEO are named as defendants. I understand that Joel Disini (a director of DA) is also a director of the two plaintiffs. I assume that DA and the CEO are separately represented in the litigation given that their interests there are unlikely to be completely aligned.

20. In the circumstances set out above, there appear to be a number of reasons for concluding that there either is already, or there may well emerge a conflict of interest as between the CEO and the board (or any particular board member).

Is it advisable the board seek independent lawyers?

21. It is not possible for me to advise the board as to whether it should seek "independent" lawyers. That is a matter for the board and its current advisers to determine.

22. What I can do is to make the following points:
    (a) In the normal course of events, I would expect that DotAsia's board engage the company's usual lawyers to investigate thoroughly the underlying facts and advise the board what steps should be taken to protect the position of the company; individual board members; and company executives.
    (b) During that process, it is likely that differences of interest would emerge, (if not conflicts of interest) and that individual directors or executives may need to be separately represented (bearing in mind that the company's lawyers would be responsible for the interests of the company, and not individual board members or executives who may themselves have criminal exposure).
    (c) In cases which concern the actions of a CEO who may deal regularly with the company's usual lawyers, and where there is potential for differences in views between the CEO, the board, and individual board members, boards will sometimes consider it prudent to engage lawyers (and counsel) who have had no prior dealings with the company, any individual board

members or executives to advise the board in a way that it is both completely objective and seen by all parties to be completely objective. This is particularly so if the usual lawyers have given any advice earlier in the process – in this case, when the issue of potential difficulties arising out of the directorship of AS arising.

(d) Nor is it unusual for a company to have its usual lawyers, but retaining different lawyers (and counsel) to advise on a particular issue which is outside of the expertise of the company's usual lawyers. In the present case, the skill set that the company requires is a forensic fraud investigation and advice on how to minimise the risk arising out of the past misrepresentations to the company; individual board members; and executives, and advice on how to regularise the company's affairs moving forward.

(e) Furthermore, as noted in the previous section, it appears that in the particular circumstances set out above, there are a number of reasons for concluding that there may already be a conflict of interest as between the CEO and the board (or any particular board member), or at least that such a conflict may well emerge during the course of investigation and advice to the board.

(f) Finally, based on the opinion of Mr Brewer, I understand that there may be a difference in views amongst individual directors as to the best way to proceed with some in favour of AS stepping down as director; some in favour of maintaining the current position as represented to the Companies Office and DA's bankers, namely that AS is not a director; and some in favour of trying to regularise the position and minimise any risk to the company and to individual board members from past misrepresentations.

23. Given the matters set out above, it appears to me that there are a number of reasons why the board may well consider it prudent to engage alternate lawyers.

Conclusion

24. My opinions set out above are necessarily preliminary in that they are based solely on my understanding of the facts as set out in the opinion of Mr Brewer. I have not had the benefit of reviewing the underlying documents. However, based on what Mr Brewer has said, there is a real risk that the CEO, DA, and possibly individual board members have significant criminal exposure. Mr Brewer notes at paragraph 32 that: "While the prospect of DA's bankers and auditors making routine enquiry of DA's webpages and discovering the fact of AS holding office may be somewhat remote, it is not improbable." I agree. I am however of the view that however remote the risk, the board does need to properly investigation what has happened; why it has happened; and to reach an informed decision about how to move forward. Simply ignoring the possibility that serious criminal offending may have occurred would be most unwise.

25. Finally, I should note that I did not know Mr Dinishi prior to being approached on this issue. I have had no prior engagements that would preclude me being engaged by the board to assist it with the issues that I have set out above.

4 August 2021

MA Corlett QC
Barrister