

Takeovers Bulletin

Highlights

- Schemes of arrangement and Rule 2.10 of the Takeovers Code
- Application of the Codes to a Grandfathered Greater China Issuer
- New Practice Note 23
- Quarterly update on the activities of the Takeovers Team

We wish all readers a healthy and happy 2022!

- Prohibition view – the offeror and his concert parties are prohibited from voting on the relevant resolution.
- Non-prohibition view – the offeror and his concert parties are not prohibited from voting, but their votes cannot be counted for the purposes of complying with the Takeovers Code.

In His Lordship's view, the Non-prohibition view is the correct position as it is more consistent with the natural and ordinary meaning of Rule 2.10 and section 674(2) of the Companies Ordinance (Cap 622) and the offeror's concert parties who are part of the scheme must be allowed to vote as a matter of scheme law.

(b) *Re Chong Hing Bank Limited* (HCMP 968/2021, [2021] HKCFI 3091) (18 October 2021)

In this decision, The Honourable Madam Justice Linda Chan considered Mr Justice Harris' views in *Re Cosmos Machinery*, which she considered to be *obiter dicta*¹ as the scheme in the case was not approved by the shareholders, and concluded that the Prohibition view is the correct interpretation of Rule 2.10.

Importantly, Her Ladyship set out three types of meetings which may be ordered by the Court for approval of privatisations or takeover schemes involving parties acting in concert with the offeror:

- one Court meeting for all the shareholders to be bound by the scheme, with the concert parties undertaking to the Court not to attend and vote at the meeting;

- two Court meetings, one for the disinterested shareholders and another for the concert parties. The Court, however, may dispense with ordering the second meeting if the concert parties have agreed with the company or given an undertaking to the Court at the time when the company sought an order to convene meetings that they will be bound by the terms of the scheme; and

- if the concert parties have agreed with the company or the offeror to be bound by the terms of the scheme or offer, the scheme may simply be entered into between the company and the disinterested shareholders, in which case there is only one Court meeting for these shareholders.

In the absence of any further clarification from a court of a higher level, and given that Madam Justice Chan's views on the interpretation of Rule 2.10 may be said to form part of the *ratio decidendi*² of the judgment, parties which seek to use a scheme of arrangement to privatise a Hong Kong incorporated company under the Codes should be aware of the interpretation adopted in *Re Chong Hing Bank Limited*.

As the Codes (including Rule 2.10) also apply to Hong Kong listed companies incorporated in other jurisdictions (for example, mainland China, Bermuda, the British Virgin Islands, the Cayman Islands or England and Wales), parties should seek legal advice and, where applicable, guidance from the relevant courts in respect of privatisation schemes of non-Hong Kong incorporated companies. The Executive will take a flexible approach to the application of Rule 2.10 to align with the company law regime of each jurisdiction.

¹ This refers to a judge's comments or observations, in passing, on a matter arising in a case before him which does not require a decision. *Obiter* remarks do not create binding precedent.

² This refers to the "rationale for the decision". Unlike *obiter dicta*, *ratio decidendi* possesses binding authority.

On 17 December 2021, we published a new Practice Note 23 (PN 23) providing guidance to market practitioners on the formal application process for a waiver of the application of Rule 26.1 of the Takeovers Code for De-SPAC (special purpose acquisition companies) transactions.

PN 23 can be found in the “[Regulatory functions – Corporates – Takeovers and mergers – Practice Notes](#)” section of the SFC website. [link to be inserted]

Useful links

- The Codes on Takeovers and Mergers and Share Buy-backs
- Practice notes
- Decisions and statements
- Previous

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