

TAKEOVERS AND MERGERS PANEL

The Kwong Sang Hong International Limited

Panel decision in relation to the application of Rule 31.1(a)(i) of the Takeovers Code (the "Code")

Introduction

1. The Panel met on 1 March 1997 to consider a referral by the Executive in connection with the application of Rule 31.1(a)(i) of the Code in relation to The Kwong Sang Hong International Limited ("KSH"), a company incorporated in Bermuda and the shares of which are listed on The Stock Exchange of Hong Kong Limited (the "Stock Exchange"). The referral was made by the Executive to the Panel for a ruling pursuant to paragraph 10 of the Introduction to the Code as it considered that a novel point was at issue. The novel point is whether consent should be granted under Rule 31.1(a)(i) of the Code for making an unconditional voluntary general offer, immediately after a privatisation offer has lapsed.

Background

2. Peregrine Investment Holdings Limited ("PIV"), the shares of which are also listed on the Stock Exchange, announced in December 1996 a privatisation proposal for KSH to become its wholly owned subsidiary. At the time of the announcement, PIV held approximately 51.8% interest in KSH and such interest increased to approximately 53.11% at the time of the Panel hearing. The proposal was to be implemented by way of a scheme of arrangement pursuant to Rule 2.10 of the Code. Implementation of the scheme was, therefore, subject to approval by a majority in number representing 90% in value of those shares that were voted either in person or by proxy at a duly convened general meeting by shareholders other than PIV and persons acting in concert with it (the "independent shareholders").
3. The scheme proposed that KSH shares held by persons other than PIV and its subsidiaries be cancelled and in consideration for which, such shareholders be entitled to receive a fixed number of shares in PIV plus a fixed amount of cash for every KSH share held. The scheme document contained advice from the independent director and the independent financial adviser of KSH advising that the terms of the scheme were fair and reasonable, and recommending independent shareholders to vote in favour of the scheme.
4. PIV was concerned that the scheme would not be approved by the necessary number of independent shareholders at the scheme meeting (the "court meeting") pursuant to Bermuda law at a date after the Panel hearing, and therefore applied to the Executive under Rule 31.1(a)(i) for consent to make a voluntary general offer for all the shares of KSH not already owned

that such proposal should be viewed as a revision of the terms of the original proposal by allowing it to "waive" the voting condition of 90% as required in the scheme. This would mean that, in the event that the independent shareholders failed to pass the resolution with the requisite 90% majority at the court meeting, PIV should be allowed to waive the 90% voting condition and proceed with a voluntary offer so that at no stage had the offer formally lapsed. This would, in PIV's view, avoid triggering the application of Rule 31 as the offer would not have lapsed, but would be extended and revised, and take on the form of an usual unconditional voluntary offer.

The Code issues

9. The principal Code issue relates to Rule 31 of the Code. Rule 31.1(a)(i) provides that:

"31.1 (a) Except with the consent of the Executive, where an offer has been announced or posted but has not become unconditional in all respects, and has been withdrawn or has lapsed, neither the offeror or any person who acted in concert with it in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses ...

(i) make an offer for the offeree company,.."
10. The notes to Rule 31, so far as are relevant to this matter, provide as follows:

" Notes to Rule 31 :

1. Recommended and competing offers
The Executive will normally grant consent under this Rule when -

(a) the new offer is recommended by the board of the offeree company and the offeror is not, or is not acting in concert with, a director or substantial shareholder of the offeree company; ..."
11. The circumstances of the case do not fall within Note 1(a) to Rule 31 in that there are a number of common directors between KSH and PIV, and PIV is a substantial shareholder holding more than 50% interest in KSH.
12. The issues for the Panel to decide are:-

(a) whether the Executive has discretion to grant consent under Rule 31 in circumstances which fall outside Note 1 to Rule 31;

(b) if the Executive has discretion to grant consent, whether consent to make the unconditional voluntary offer should be granted to PIV under the present circumstances; and

(c) whether PIV's alternative proposal as set out in its addendum should be allowed.

Panel's decision

13. On the first issue, the Panel is of the view that Note 1 to Rule 31 only provides guidance on the circumstances where the Executive would normally grant consent under Rule 31 and that the Executive does have discretion to

grant consent under Rule 31 in circumstances which fall outside Note 1 to Rule 31.

14.

number representing 90% in value of the independent shareholders voting at the relevant meeting, it is not appropriate to consider this alternative proposal further.

17. The Panel also informed PIV and KSH and their advisers that it intended to review the application of Rule 2.10 of the Code and, in particular, the appropriateness of requiring a 90% majority for privatisation proposals implemented by way of a scheme of arrangement.

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