

TAKEOVERS AND MERGERS PANEL

Panel Decision

**with respect to the procedures to be adopted
in the disciplinary proceedings in relation to
Kong Tai International Holdings Company Limited ("Kong Tai")**

INTRODUCTION

The Panel met on 18 June 1998 to hear procedural matters raised in relation to the disciplinary proceedings instituted by the Executive on 24 February 1998 against a number of parties in relation to Kong Tai. For ease of reference, decisions are set out in the order of items on the agenda which was distributed to all parties prior to the meeting notwithstanding that certain items were taken out of order at the meeting.

All the decisions of the Panel are unanimous and all the decisions of the Chairman are unanimously supported by the other members of the Panel.

AGENDA ITEM 1 - WITHDRAWAL BY THE EXECUTIVE OF CERTAIN PROCEEDINGS IN RESPECT OF CERTAIN PARTIES LISTED BELOW

A submission was made by the firm of solicitors representing Mr E, Mr F and Mr G ("the Other Directors"). The solicitors requested that the Panel issue directions that the Executive should:

1. Not issue the proposed "formal warning letter"; and
2. Issue a letter of apology to the directors.

He further requested that the Panel recommend to the Commission that the SFC should reimburse the costs incurred in defending the disciplinary proceedings against the Other Directors.

Dealing with the submissions in the order set out above, the Panel determines that:

1. The provisions of the Code on Takeovers and Mergers do not permit the Executive to discipline a party unless the party to be disciplined agrees to the disciplinary action proposed to be taken by the Executive (Introduction section 12.1 of the Code). Accordingly, while the Executive may choose to write to the Other Directors, the letter may not be of a disciplinary nature unless that has been previously agreed by the parties. This point was accepted and acknowledged by the Executive at the Panel meeting. Further, in the letter it should be made explicit that it is not an exercise of disciplinary power under the Code.
2. The Panel will not direct the Executive to issue a formal letter of apology. As proceedings against the Other Directors have been withdrawn, the evidence

upon which these proceedings were initiated has not been heard by the Panel. Consequently, the Panel can express no opinion on whether there was a basis or otherwise for the Executive to institute proceedings.

3. Having regard to the decision in paragraph 2 above, there is no basis for the Panel to consider the question of recommending that the Commission order the SFC to pay the other Directors' costs. The Panel also notes that the Code contains no provisions with regard to the Panel making recommendations on parties' costs.

AGENDA ITEM 2

No items for decision arose under this point. It should be noted that the Chairman confirmed that Mr Liang Xiaoting had indicated both that he would not be attending this meeting and, moreover, due to travel commitments, he would now not be able to attend the hearing in October. Mr Liang had, however, confirmed that from his standpoint, he was not aware of any conflict of interest or real danger of bias that would disqualify him from membership of the Panel for the purposes of this hearing. The Chairman confirmed to the solicitors Charles Yeung Clement Lam & Co, representing Mr David Wong, that if Mr Liang was subsequently able to join the Panel for the hearing scheduled in October, then he would most certainly be entitled to raise again the question of whether Mr Liang should remain on the Panel for the purposes of this hearing.

AGENDA ITEM 3 - REQUESTS FOR LEGAL REPRESENTATION IN RESPECT OF THE REMAINING PARTIES

Submissions were made on this point by all parties including the solicitors to Mr E, Mr F and Mr G and by the solicitors Mr Raymond Ho & Koo, representing {X} ("X"), who were not listed on the agenda item. The Executive also presented its views. The question of whether to permit representation other than as prescribed by Introduction Section 16.2 is a matter that falls to the discretion of the Chairman. In exercising this discretion, the Chairman has regard to the submissions made both by the parties and the Executive and also has particular regard to the views of the Panel members. In previous disciplinary cases, the Chairman notes that whilst Solicitors had presented opening and closing submissions, financial advisers or the parties themselves presented the remainder of their case.

Cognisant of the procedure previously adopted by the Panel in this matter, the Chairman grants consent to all of the parties presenting their opening and closing submissions through their Solicitors should they so wish. No general consent is given to the parties' Solicitors to ask questions of the parties or witnesses. In exercising his discretion in this manner, the Chairman has, as stated above, had particular regard to previously established procedures and to the fact that the parties are free to consult their Solicitors during the course of the proceedings.

It should be noted that the Panel would encourage the parties to make their written submissions as full and comprehensive as practicable and to set out in them all the material matters on which they intend to rely.

The proceedings before the Panel are intended to be informal and it is for this reason that the Code encourages parties before the Panel to represent themselves or to be represented by a financial adviser. Most of the representations made to the Panel take the form of written submissions and there is no restriction on the parties in the persons they employ to assist them in the preparation of written submissions. The Code also permits all parties to bring with them any solicitor they wish so that all parties are able to receive legal advice during the course of the proceedings. The Panel considers that these arrangements properly safeguard the interests of the parties appearing before it and will ensure fairness to all parties. Further the Chairman is not persuaded that there are any exceptional circumstances which would cause him to depart from the procedures previously adopted by the Panel.

The Panel is entirely sympathetic to certain of the parties' concerns as to the language of the proceedings and specifically directs that sufficient interpreters should be present during the proceedings so as to ensure that those parties requiring translation of the proceedings are adequately served. In this regard, the Panel is also mindful of the fact that several members of the Panel are fluent in both English and Cantonese.

Two parties (solicitors Charles Yeung Clement Lam & Co, representing Mr David Wong, and the solicitors, representing Mr H) also made applications for their clients to be represented by Counsel at the hearing. Again, this is a matter in which discretion falls to the Chairman. Having regard again to established procedures, the arguments of solicitors representing Mr David Wong and Mr H and to the views of the Panel members, the Chairman considers that there are no exceptional circumstances in the applications before him which would justify a departure from the Panel's usual practice of not permitting representation by Counsel. He further considers that permitting Counsel to be present for the purpose of making oral submissions or asking questions might compromise the informality of the proceedings.

The role of legal counsel to the Panel is for him to be available to advise the Panel and the Chairman on points of procedure or questions of law and on questions of mixed fact and law. Counsel will not participate in the questioning of the parties or witnesses or in deliberating on the matters required to be decided by the Panel.

The Chairman, therefore, declines to exercise his discretion in favour of permitting representation by Counsel for any parties to the proceedings and, in particular, refuses the two specific applications for which approval is sought.

AGENDA ITEM 4 - THE SUBMISSION BY SOLICITORS CHARLES YEUNG CLEMENT LAM & CO., REPRESENTING MR DAVID WONG

The Panel was invited to rule that certain documents had not been shown by the Executive to be of relevance and should be excluded from the purview of the Panel. The Executive confirmed, however, that it considered it was appropriate to place before the Panel and the parties all evidence in their possession that might be relevant, while indicating in the Panel paper particular documents to which the Panel would be referred specifically. The Executive considered that even if only one page of a document was relevant, it was appropriate to include the whole document in order to ensure that not only they but the parties will be able to refer to the entire document should they wish during the course of the hearing. The Panel is of the view that as it is

not known what papers may be called upon during the course of the proceedings, it would be inappropriate to direct that any documents should be excluded.

Application was further made that the Panel should proceed merely on the basis of material properly presented before them and should not take into account any other matter. The Panel has had regard to Section 16.1 of the Introduction to the Code that specifically states that "The Panel directs its own proceedings and may make any enquiries it deems appropriate". Further, the Panel refers to the extract in the list of authorities submitted by solicitors Raymond Ho & Koo, representing {X}. [Halsburys Laws of England, (4th Edition) Volume 37] where it was stated "The content of the rules of natural justice is not stereotyped, and a duty to act judicially does not necessarily connote an application to observe the procedural and evidential rules of a court of law." While recognising, therefore, the need to act fairly and, in accord with the dictates of natural justice, the Panel is not minded to restrict the proceedings in the manner requested. In particular, the Panel will ensure that the parties have a fair opportunity to address the materials upon which the Panel relies in reaching its decision.

Charles Yeung Clement Lam & Co said that Mr. David Wong did not know the case against him. The Panel is of the view that the Panel Paper contains specific allegations against Mr. David Wong that he breached Rule 9 and 26 and General Principles 5, 6, 7, 8 and 10 of the Code. The particulars of the alleged breaches are set out in considerable detail in sections 1 to 4 and 6 to 7 of the Panel paper and the Panel is invited to draw inferences from the facts set out in those sections.

AGENDA ITEM 5 - SUBMISSION BY SOLICITORS REPRESENTING MR I

Solicitors representing Mr I sought the dismissal of the proceedings against Mr I on the basis that the Panel paper provides no basis for disciplinary proceedings and discloses no breach of the Code. The Panel considers that this is not a matter that can be determined at this preliminary hearing but is a matter to be considered and determined at the principal hearing when the submissions and evidence that relate to the Executive's allegations may be properly heard by the Panel. The Panel notes that sections 3, 4 and 7 contain specific allegations of breaches of Rule 9 and General Principles 5,6,7,8 and 10 of the Code by Mr I and that particulars of the breaches are set out in those sections together with facts alleged. Sections 3 and 4 of the Panel paper also record generally the matters alleged from which the Panel is invited to draw inferences.

Solicitors representing Mr I also requested that if disciplinary proceedings against Mr I were not withdrawn, then the proceedings be severed and dealt with separately. Solicitors representing Mr I again requested particulars of the alleged breaches of the Code by Mr I. As indicated above, the Panel is of the view that the Panel paper contains specific allegations against Mr I. The Panel does not agree to sever the proceedings against Mr I as it considers that the allegations are interlinked with the allegations presented against certain of the other parties. The Panel is also of the view that severing these proceedings would be unlikely either to minimise costs or shorten the proceedings overall. Hearing the allegations together with the other allegations with which they are interlinked is necessary to provide all parties the opportunity to hear

and challenge evidence that may be relevant in the context of the allegations against Mr Wong and the other parties.

AGENDA ITEM 6 - TO APPROVE THE PROCEDURAL RULES GOVERNING THE CONDUCT OF DISCIPLINARY PROCEEDINGS

No matters for the Panel's decision were raised under this heading. As mentioned below, the final Procedural Rules Governing the Conduct of Disciplinary Proceedings will be despatched to all parties as soon as practicable after 26 June 1998.

AGENDA ITEM 7 – TIMETABLE

It is the view of the members that the hearing date 12 October 1998 should be maintained if this is at all possible. The Executive has been directed to complete its revision to the Panel paper and provide copies to the Secretary to the Panel by no later than 26 June 1998.

The Panel is, however, mindful of the fact that until the revision to the Panel paper currently contemplated by the Executive has been completed and the paper distributed to the Panel and the parties, it will not be possible to determine whether the dates currently fixed for replies will need to be revised. Such determination will be made, and the final Procedural Rules Governing the Conduct of the Disciplinary Proceedings will be despatched, as soon as practicable after 26 June 1998 when the Chairman has seen the revision of the Panel paper.

ANY OTHER BUSINESS - SUBMISSIONS BY RAYMOND HO & KOO ON BEHALF OF {X}

Solicitors, Raymond Ho & Koo representing {X} requested that particulars of the allegation against {X} be properly framed and identified and served on {X} within fourteen days of the preliminary hearing. The Panel considers that, having regard to paragraphs 2.135 (v) and (vi) of Section 2, it is specifically alleged that {X} was acting in concert with Mr David Wong and that as concert parties, an obligation to make a general offer under Rule 26 of the Code was incurred by them on 18 August 1994 and 2 December 1994. The Panel members consider that, having regard to the content of the Panel paper relating to {X} and the allegations specifically referred to above that the allegations are properly set out, readily identifiable and no further directions are called for.

Raymond Ho & Koo further requested the proceedings against {X} be severed and dealt with separately from those of the other parties. The Panel is of the view that it is in the very nature of the concert party allegations against {X} and Mr David Wong that they should be heard at the same time as the allegations against the other alleged concert parties with Mr David Wong with all parties being able to hear the evidence and given the opportunity to challenge the evidence given by other parties. The Panel is not persuaded by Raymond Ho & Koo's submission that severance is necessary to ensure fairness to {X}. The request for severance is denied.

Raymond Ho & Koo also requested {X} be given full opportunity to respond to any facts or allegations which come to the knowledge of the Panel and that the Panel should be independent as the proceedings are adversarial and not inquisitorial. The Panel agrees

that {X} should be given full opportunity to respond to the allegations made against him and to any facts that are presented to the Panel. The Panel considers that its independence is not affected simply by virtue of the fact (enshrined in the provisions of Section 16.1 of the Code) that its proceedings include an inquisitorial element (in that the Panel may make any enquiries it deems relevant or appropriate and initiates the questioning of the parties and witnesses).

Raymond Ho & Koo were also concerned that certain other respondents in respect of whom proceedings were withdrawn had received preferential treatment and that there was no rational reason for these withdrawals. The Panel accepts the Executive's explanation for the withdrawal of proceedings and in particular that they were not withdrawn solely because they were last in chronological order. The Panel is concerned only with the proceedings now before it, which include the allegations against {X}, and is not required to consider whether proceedings might be maintained against the other respondents.

Raymond Ho & Koo confirmed that they were now withdrawing the two other submissions set out in paragraphs 5 and 6 of their letter of 17 June 1998.

June 1998