

TAKEOVERS AND MERGERS PANEL

Panel Decision

**In relation to an application by
Cobra Technologies Corp. ("Cobra")
for a review of the Executive's ruling of 19 October 1999
that Cobra had triggered a mandatory general offer obligation
under Rule 26 of the Code on Takeovers and Mergers (the "Code")
as a result of Cobra's acquisition of (i) 10.25% of the shares
of Tse Sui Luen Jewellery (International) Limited (the "Company")
and (ii) the rights, title and interest of UBS AG ("UBS")
in certain financing and security documents**

1. At the request of Cobra, the Panel met on 5 November 1999 to review the Executive's ruling that Cobra had incurred mandatory general offer obligations under Rule 26 of the Code as set out in the Executive's letter of 19 October 1999.

Salient Facts

Loan from UBS and the related Share Charges for 49.6% of the Company's shares

2. From 17 July 1997 up to June 1999, Mr. Tse Sui Luen ("Mr. Tse") by himself and through a company owned by him, namely Goldalu Investment Limited ("Goldalu"), charged all his interest in 49.6% of the shares in the Company. This was effected by two share charges (the "Share Charges")¹ to UBS as security for a revolving credit facility of HK\$150 million (the "Facility"). The loans drawn under the Facility had an expiry date in July 1999. In addition, the Labuan branch of UBS and two investment funds of UBS (the "Funds") acquired 10.25% of the shares in the Company in July 1997 from three individuals.

¹ 31.97% of the shares were held through Goldalu, a private company wholly-owned by Mr. Tse. The remaining 17.63% were held by Mr. Tse directly. The shares were charged to UBS under two separate charges (the "Goldalu Charge" and "Tse Charge", respectively) executed by Goldalu and Mr. Tse, respectively. Mr. Tse and Goldalu charged 137,280,400 shares in July 1997 but, due to various subsequent reorganisations and top-ups, and further deliveries of shares to UBS, by June 1999 the total number of shares charged was 194,667,874, constituting 49.6% of the present issued capital of the Company.

3. Since early 1999, Mr. Tse has been in financial difficulties. Apart from the debt owing to UBS, Mr. Tse's unpaid debt obligations are at least HK\$120 million plus interest. It is understood that these debts remain outstanding.
4. In an announcement issued by the Company dated 24 March 1999, it was stated that five writs against Mr. Tse had been issued by Yuanta Securities Asia Financial Services Limited and others claiming specific performance of Mr. Tse's obligations under five put option deeds which had been granted by Mr. Tse.
5. In the announcement dated 24 March 1999, it was also stated that a financial institution, being UBS, had also demanded that Mr. Tse repay monies due under the Facility. UBS first demanded repayment from Mr. Tse in March 1999 by way of a statutory demand, and it threatened to petition for his bankruptcy should Mr. Tse fail to repay the sum within 21 days. On 24 September 1999, UBS filed a petition for bankruptcy against Mr. Tse and the hearing for the petition has been scheduled for 5 January 2000.
6. On 6 September 1999, in the face of a forthcoming Annual General Meeting of the Company on 10 September 1999, UBS wrote a letter to Mr. Tse reminding him that pursuant to the Share Charges, UBS had the exclusive rights to vote at all general meetings of the Company, and that it reserved all such rights and might exercise or refrain from exercising such rights in its absolute discretion.
7. On 24 September 1999, the Executive issued a letter to the legal advisers to UBS stating that:
 - (i) UBS had acquired voting rights with respect to the 49.6% shares that were charged to it; and
 - (ii) in view of the spirit of Note 2 on Dispensations from Rule 26, the Executive did not conclude that a general offer was triggered by UBS.

Acquisition of Loan and Share Charges and 10.25% of the Company's shares by Cobra

8. On 14 October 1999, pursuant to an assignment entered into between Cobra (a company held as to 60% by Mr. C.K. Lau ("Mr. Lau") and 40% by Mr. Paul Chen) and UBS, and a sale and purchase agreement entered into between Cobra and the

Labuan branch of UBS and the Funds, Cobra acquired:

- (i) the rights, title and interest of UBS under the Facility (the amount of outstanding indebtedness due from Mr. Tse to UBS was in the principal sum of HK\$91,903,430.52 and the interest accrued was HK\$4,451,686.92 (together the "Loan")) and the Share Charges in respect of the 49.6% shares in the Company at the consideration of HK\$62,142,400; and
 - (ii) a 10.25% interest in the Company from the Labuan branch of UBS and the Funds at the consideration of about HK\$12,857,600.
9. Cobra paid a total consideration of HK\$75 million (HK\$12,857,600 for the 10.25% shareholding interest and HK\$62,142,400 for the interest in the Loan and the 49.6% charged shares). This is equivalent to HK\$0.32 per share.
10. Also on 14 October 1999, Cobra and Mr. Tse entered into a supplemental agreement and a letter agreement (together referred to as the "Supplemental Agreements") whereby Cobra agreed to extend the repayment date of the Loan to 15 October 2001 and agreed that voting rights attaching to shares subject to the Share Charges would not be exercisable by Cobra until such Share Charges were enforced.

The Executive's ruling

11. Following an announcement dated 14 October 1999, issued by the Company, advising that UBS had sold its shareholding in the Company to a third party and assigned to such third party the loans owing by Mr. Tse to UBS together with the underlying security, the Executive conducted enquiries into this matter including discussions and written submissions between the Executive and Cobra and its advisers.
12. In a letter dated 19 October 1999, the Executive ruled that a general offer should be made immediately at not less than HK\$0.32 per share on the basis that a mandatory offer had been triggered under Rule 26 of the Takeovers Code as a result of Cobra's acquisitions of shares and voting rights in the Company. The Executive also ruled that Mr. Tse and Cobra are acting in concert in respect of control of the Company.

Panel's decision

13. The Panel considered the written submissions of the Executive and Cobra together with the opening and closing submissions made on behalf of the Executive and Cobra and the evidence given by the witnesses to the proceedings.
14. The Panel decided that the ruling of the Executive should be upheld and that Cobra (or, where appropriate, Cobra and parties acting in concert with it) is under an obligation to make a general offer for all the shares of the Company not already owned by Cobra or parties acting in concert with it. The general offer is to be made at a price of not less than HK\$0.32 per share and comparable offers extended for any convertibles, warrants and options issued by the Company.

Reasons

15. In reaching its decision, the Panel considered carefully the evidence and, in particular, the documentary evidence presented to it. The documentary evidence was not without some measure of ambiguity particularly as regards its precise legal effect and the validity of an alleged defect in the Goldalu Charge. Accordingly, in reaching its decision, the Panel has considered the range of outcomes that might arise were differing interpretations of the effect of the documentation to prevail.
16. Each of the situations contemplated, however, gives rise to a mandatory general offer obligation albeit under different provisions of Rule 26.1.
17. The Panel agrees with the Executive's determination that voting rights in respect of 194,667,874 shares of the Company, constituting approximately 49.6% of the existing issued share capital of the Company, had become exercisable by UBS under the provisions of the Facility and the Share Charges. The ability to exercise these rights was acquired by Cobra under the terms of the documents that assigned to Cobra the entire rights, title and interest of UBS under the Facility and supporting security documentation. Upon acquisition of these rights and interests, together with the acquisition from the Labuan Branch of UBS and the Funds of 40,180,000 shares, Cobra became entitled to exercise 59.85% of the voting rights of the Company. The Panel rules that, at this point in time, Cobra exceeded the 35% threshold and incurred a mandatory general offer obligation under the provisions of Rule 26.1(a) of the Code, which provides that a mandatory offer is required when *"any person acquires, whether by a series of transactions over a period of time or not, 35% or more of the voting rights of a company"*.

18. The Panel does not accept that the execution of the Supplemental Agreements between Cobra and Mr. Tse on 14 October 1999 had the effect of nullifying Cobra's immediate control over these voting rights. The provisions of the Share Charges, in particular Clauses 2.1 and 6.1 (b), (c), (d) and (e), taken together with Clause 17.7, are in no way fettered by the provisions of the Supplemental Agreements and which themselves confirm that the obligations of the borrower under the Facility remain in full force and effect other than as modified by the terms of the Supplemental Agreements (Clauses 4.1 and 4.2). While the Supplemental Agreements (Clause 1.1) extend the repayment date of the Loan, they do not address the other heads under which a power of sale may arise and indeed had already arisen. Further, the Loan remained effectively payable on demand. The second of the Supplemental Agreements does, however, impose a condition precedent to the exercise of voting rights, namely the enforcement of either the Tse Charge or the Goldalu Charge. Having regard to the powers available to the lender under both the Facility and the Share Charges documents, and the fact that satisfaction of this condition precedent is entirely within the powers of Cobra, the Panel holds that control over the relevant voting rights in practice rests with Cobra. In reaching this determination, the Panel has proceeded on the basis that the Goldalu Charge is enforceable.
19. The proposition that the Goldalu Charge is defective is supported only by a letter from K. B. Chau & Co. dated 4 October 1999 addressed to Warburg Dillon Read (a business unit of UBS) and attached as an appendix to Cobra's submission. The letter merely states that no relevant shareholders' resolution has been found approving Goldalu's execution of the Goldalu Charge upon a search by a newly appointed director of Goldalu, Mr. Chan Wing Yu. The letter further requests from Warburg Dillon Read a copy of the relevant shareholders' resolution. The Panel was provided with no evidence as to the records of Goldalu or Warburg Dillon Read's response, if any, to this letter. In the absence of firm evidence as to the alleged defect and evidence that Goldalu would challenge the exercise of voting rights by the registered holder of those shares (now in effect a nominee of Cobra), the Panel has proceeded on the basis that the Goldalu Charge is valid and the rights flowing from that charge unimpeded.
20. If the Panel is wrong and the argument that has been advanced is accepted, namely that the Goldalu Charge is unenforceable and consequently the voting rights on those shares (amounting to approximately 32% of the voting rights of the Company) remain with Goldalu, there is clearly no mandatory general offer obligation under the

provisions of Rule 26.1(a). In these circumstances, Cobra would only have the ability to control voting rights over approximately 28% of the Company's issued share capital.

21. The Panel has, however, upheld the Executive's ruling that Mr. Tse and Cobra are parties in concert in relation to the acquisition or consolidation of control (as defined in the Code) over the Company. The Panel is satisfied that all three elements of acting in concert are present, namely an agreement or understanding between Mr. Tse and Mr. Lau (representing Cobra), active co-operation between them, one of the purposes of which was to acquire control of the Company, and the acquisition voting rights attaching to the shares in the Company by Cobra. Ample evidence has been presented of active co-operation between Mr. Tse and Mr. Lau (representing Cobra) to obtain or consolidate control through the acquisition of voting rights of the Company. The Supplemental Agreements executed between Mr. Tse and Cobra evidenced in part the understanding or agreement that existed between Mr. Tse and Cobra in respect of acquiring control of the voting rights of the Company from UBS. Additional support is given to the determination that an agreement or understanding existed between Cobra and Mr. Tse when account is taken of the similarity in business approach and analysis with respect to the Company's business apparent from the evidence given by Mr. Tse at the hearing and the details provided by Mr. Lau both at the hearing and in the course of an interview with the Executive.
22. It is not denied that Cobra can demonstrate perfectly sound commercial grounds for acquiring UBS's rights and interests under the Facility and the Share Charges. The Code does not, however, require that the obtaining or consolidation of control be the only motive of the agreement or understanding between concert party members. There may be other motives including commercial gain that may be as important or more important than obtaining or consolidating control. While accepting that commercial gain was and is a motive for Cobra, the Panel does not accept that it was the sole motivation of these arrangements which on any reasonable construction also had as their motivation the intention of consolidating both defacto control and control as defined in the Code with Mr. Tse and Cobra.
23. The acquisition of voting rights by Cobra in respect of the Tse Charge (amounting to voting rights in respect of 17.63% of the voting rights of the Company) together with the acquisition of shares carrying 10.25% of the voting rights of the Company from UBS and the Funds gave Cobra control over voting rights in the Company amounting in aggregate to approximately 28%.

24. As the Panel has upheld the Executive's ruling that Cobra and Mr. Tse were acting in concert, it is the Panel's ruling that the acquisition of control over voting rights representing approximately 28% of the Company's voting rights by Cobra, taken together with Goldalu's holding of shares in the Company amounting to approximately 32% , gave rise to a mandatory general offer obligation under the provisions of Rule 26.1(b) on the part of Cobra and parties acting in concert with it. Rule 26.1(b) provides that a mandatory general offer is required when *"two or more persons are acting in concert, and they collectively hold less than 35% of the voting rights of a company, and any one or more of them acquires voting rights and such acquisition has the effect of increasing their collective holding of voting rights to 35% or more of the voting rights of the company"*.
25. Finally, the Panel has considered the position that would result if it was wrong and it were held that Cobra did not acquire control of any voting rights by virtue of the assignment of rights, title and interest under the Facility and Share Charges because the Supplemental Agreements were effective in removing Cobra's ability to take immediate steps to exercise the voting rights attaching to the shares subject to one or both of the Share Charges.
26. As stated above, the Panel has upheld the ruling of the Executive that Mr. Tse and Cobra are acting in concert. The Panel has had regard to the public announcement issued by the Company, of which Mr. Tse is a director and for which he took formal responsibility, dated 31 May 1999. This announcement states, inter alia, that *"the total number of shares held by Mr. Tse and parties acting in concert with him is 194,667,874 (of which 189,713,724 shares have been pledged to a financial institution as set out in the announcement of the Company made on 24 March 1999). This represents 49.6% of the total issued share capital of the Company of 391,889,263 ordinary shares as at the date of this announcement."* The acquisition on 14 October 1999 by Cobra, acting in concert with Mr. Tse, of 10.25% of the issued share capital of the Company from UBS and the Funds gives rise to a mandatory general offer obligation under the provisions of Rule 26.1(d), which provides that a mandatory offer is required when *"two or more persons are acting in concert and they collectively own not less than 35% but not more than 50% of the voting rights of a company and any one or more of them acquires additional voting rights and such acquisition has the effect of increasing their collective holding of voting rights of the company by more than 5% from the lowest collective percentage holding of such persons in the 12 month period ending on and inclusive of the date"*

of the relevant acquisition". Accordingly, the Panel has ruled that the purchase by Cobra of a 10.25% shareholding in the Company results in a mandatory general offer obligation arising under Rule 26.1(d) on the part of Cobra and parties acting in concert with it.

27. The Panel wishes to make it clear that it was impressed by the frankness of the evidence presented during the hearing. The Panel does, however, wish to point out that those involved in transactions which have or may have Code implications should have particular regard to any obligations they may have to consult with the Executive. The Panel cannot over emphasise the importance of early consultation with the Executive particularly where doubt exists as to the Code implications of a transaction, the requirement for which is set out in paragraph 8.1 of the Introduction to the Code.

9 November 1999

Provisions of agreements referred to in the Panel's decision

(1) Relevant provisions of the Facility are as follows:

Security/Support: Legal pledge of listed shares of Tse Sui Luen Jewellery (International) Ltd (the "Pledged Shares"), and/or together with other security pledged in favour of UBS from time to time, the (sic) ("the First Security") in favour of UBS. The initial market value of the Pledged Shares shall not be less (sic) 213% of the Facility Amount. The Pledged Shares are to be registered in the name of UBS's nominee and deposited in UBS' custody.

Top-up Requirement: Should the market value of the Pledged Shares fall below 182% of the outstanding Facility Amount, the Borrower shall be required within 10 days, to top-up by:

- 1) pledging additional Tse Sui Luen Jewellery (International) Ltd or other listed shares acceptable to UBS; and/or*
- 2) pledging cash deposits with UBS as additional security; and/or*
- 3) making partial prepayment of the outstanding Facility Amount to UBS*

in order to reinstate the aggregate market value of the Pledged Shares and/or the First Security to a minimum of 213% of the then outstanding Facility Amount.

Cancellation: The Borrower and UBS will have the right to cancel the Facility at any time by giving not less than 30 days written notice.

(2) Clauses 2.1, 6.1 and 17.7 of the Share Charges provide as follows:

2. Covenant to pay, assignment, charge and pledge

2.1 *In consideration of the Bank making or continuing to make the Facilities*

available to the Borrower, the Chargor irrevocably and unconditionally covenants to pay on demand the Secured Indebtedness and as sole beneficial owner hereby charges and agrees to charge in favour of the Bank, with the intent that it shall take effect by way of first fixed charge, and assigns and agrees to assign absolutely to the Bank all its present and future rights, title and interest in and to and pledges the Charged Assets, including without limitation, all Securities which are at any time and from time to time kept or maintained by the Chargor in the Designated Account maintained by the Chargor with the Depository Agent and/or in any of the sub-accounts maintained by the Bank with the Depository Agent or held by the Depository Agent to the order of the Chargor, whether as nominee or otherwise, as a continuing security for the due and punctual payment and discharge of the Secured Indebtedness.

6. Enforcement and power of sale

6.1 If:-

- (a) the Borrower fails to pay the Secured Indebtedness (or any part thereof) when due or upon demand (as the case may be) or is in breach of any obligation of the Borrower to the Bank;*
- (b) the Chargor is in breach of any of the terms of this Charge;*
- (c) the Borrower or the Chargor is unable or admits inability to pay its debts as they become due;*
- (d) the Borrower or the Chargor is subject to any insolvency proceedings, or if legal process is commenced against any asset of the Borrower or the Chargor; or*
- (e) an event of default (howsoever described) occurs in respect of any of the Facilities made available to the Borrower,*

the Bank shall be entitled to enforce this Charge and may, without prior notice to the Chargor retain, apply, realise, sell or otherwise dispose of all or any part of the Charged Assets and apply the proceeds thereof in or towards the discharge of the costs thereby incurred and of the Secured Indebtedness in such manner as it in its absolute discretion thinks fit. Such power of sale or other disposal shall operate as a variation and extension of

the power of sale conferred by any relevant applicable statutory or other law, but any restrictions on such powers imposed by such statutory or other law shall not apply to the fullest extent permissible under such statutory or other law.

17. Miscellaneous

17.7 *The Bank or any of its nominees, agents, representatives, correspondents or attorneys, may at the discretion of the Bank or, as the case may be, such person, exercise (in the name of the Chargor or otherwise at any time and without any further consent or authority on the part of the Chargor) in respect of any Charged Assets (a) all the powers given to trustees under any relevant applicable statutory or other law, in respect of securities or property subject to a trust and any other powers or rights which may be exercised under the terms thereof or otherwise by the bearer of any such Charged Assets or by the person or persons in whose name or names any of such Charged Assets are registered and (b) subject to the power of sale of the Bank having arisen, all related voting rights. Neither the Bank nor any of its nominees, agents, representatives, correspondents or attorneys shall be under any duty to take any action in connection with the Charged Assets other than to use reasonable care in the custody and preservation of the Charged Assets which are in the actual possession of the Bank or, as the case may be, such person.*

(3) Clauses 1 and 4 of the Supplemental Agreements provide as follows:

1. Repayment Date

1.1 *The Lender agrees, at the request of the Borrower, to extend the date to 15th October, 2001 for the repayment of the Loan and accrued interest outstanding under the Facility Letter.*

4. Obligation of the Borrower

4.1 *Subject to the terms and provisions of this Agreement, the obligations of the Borrower under the Facility Letter shall remain in full force and effect.*

4.2 *Save as referred to above, all other terms of the Loan as set out in the*

Facility Letter shall remain in full force and effect.

- 4.3 *For the avoidance of doubt, unless and until the Lender enforces for (sic) Tse Charge or the Goldalu Charge pursuant to the terms thereto, the Lender shall not be entitled to exercise the voting rights over the number of shares of TSLJ charged under the Tse Charge and the Goldalu Charge as set out in the Schedule hereto.*