MAYER·BROWN JSM

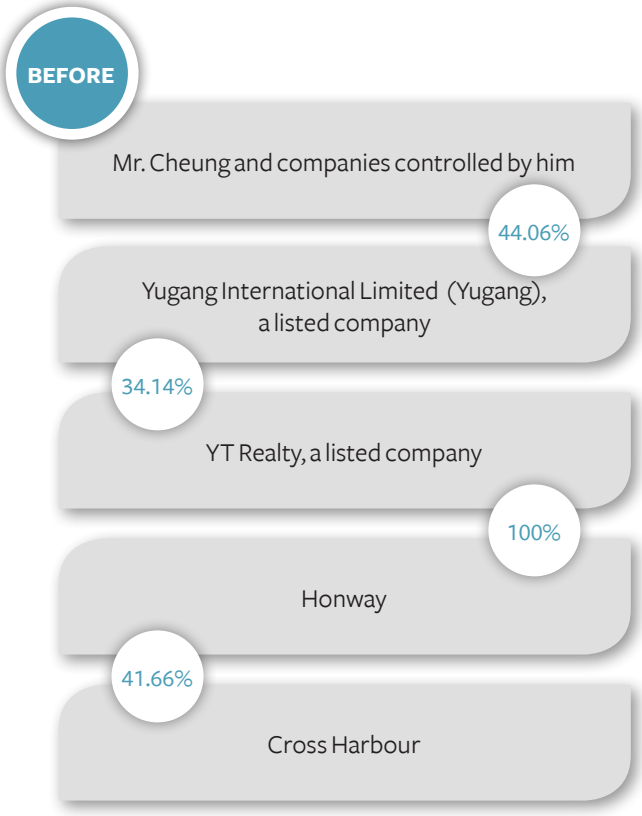
Legal Update
Hong Kong
8 January 2016

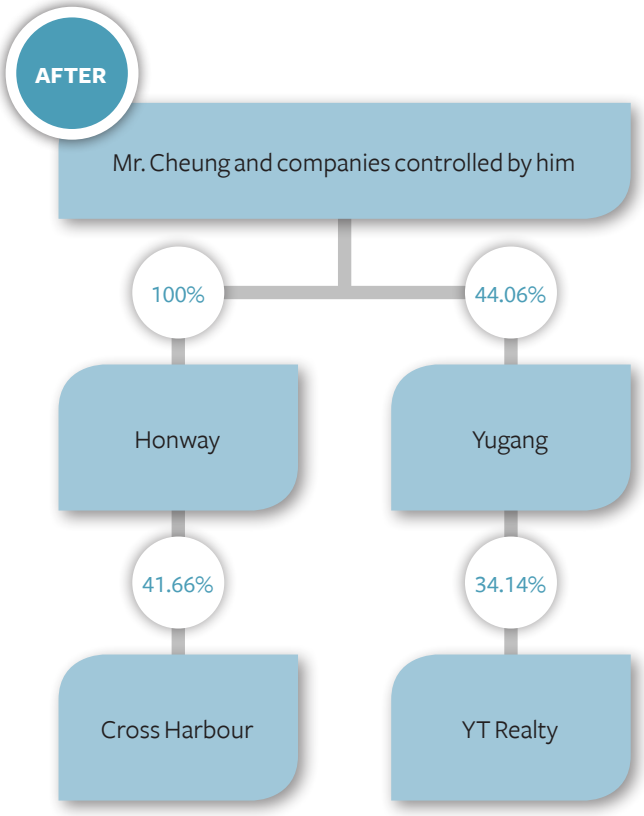
Another MGO Waiver Refusal for Intra-concert Group Transfer

In its recent decision relating to The Cross Harbour (Holdings) Limited (Cross Harbour), the Takeovers and Mergers Panel (the "Panel") ruled that despite there being no change in leadership of a long established concert group, nor payment of premium in the proposed intra-concert group transfer, no waiver from the obligation to make a mandatory general offer (an "MGO") would be granted if the leader acquires a direct holding of a controlling interest in the listed company.

The Cross Harbour Decision

In that case, the proposed transfer (see below) involved the sale of Y.T. Realty Group Limited's (YT Realty) entire issued share capital of Honway Holdings Limited (Honway) (a BVI company) to its controlling shareholder, Mr. Cheung Chung Kiu (Mr. Cheung), with Honway's sole material asset being the controlling interest in Cross Harbour:





In deciding whether an MGO waiver should be granted for the proposed transfer, the Panel adopted a 3-step approach:

1. Will the transfer trigger an MGO?

   Mr. Cheung is acquiring the statutory control of Honway and thereby, "acquiring or consolidating the control" of Cross Harbour. The 'chain principle' set out in Note 8 to the Notes to Rule 26.1 of the Takeovers Code applies and a general offer obligation arises.

2. If the answer to item 1 is affirmative, should waiver be granted under Note 6(a)(i) and (ii) to the Notes to Rule 26.1?

Note 6(a)(i) is not applicable as Yugang is not a subsidiary of the company controlled by Mr. Cheung and YT Realty is not a subsidiary of Yugang. The proposed transfer is not an intra-group reorganisation defined under Note 6(a)(i).

Note 6(a)(ii) is not applicable as the proposed transfer is not an arrangement for the transfer of voting rights between Mr. Cheung and members of his family, whether held directly or through related family trusts or family-controlled companies.

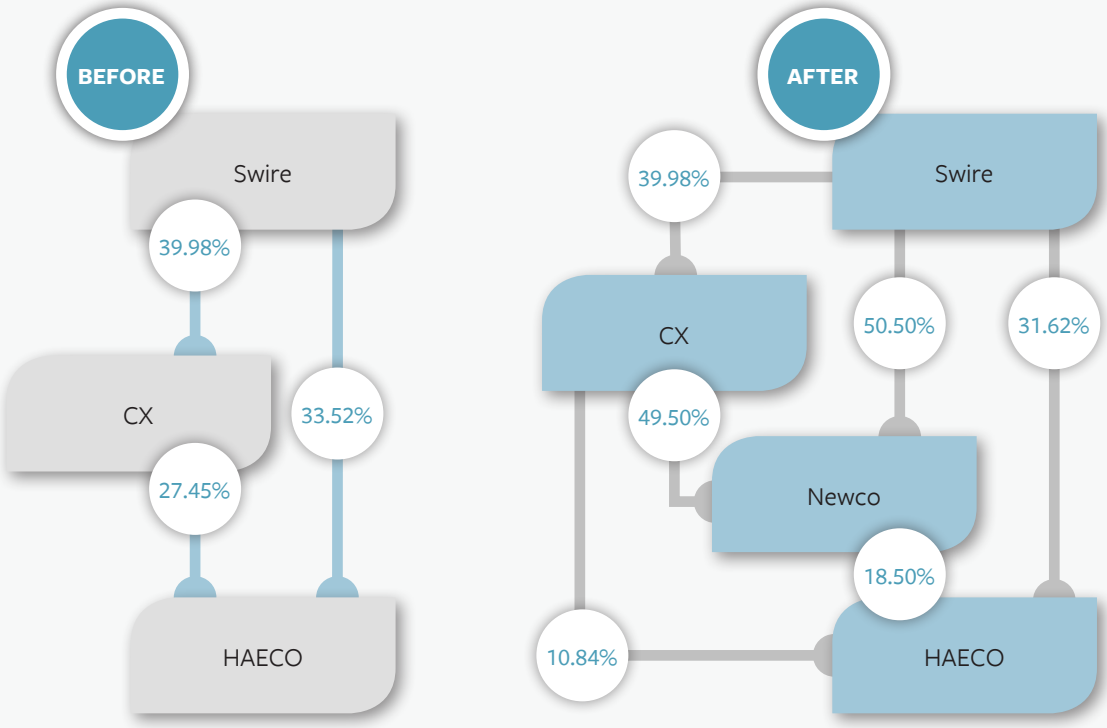
3. If the answer to item 2 is negative, do circumstances of the case warrant a waiver being granted?

The Panel emphasised that 'waivers from the obligation are the exception'. It is interesting to note that the Panel acknowledged that no premium has been paid for the transfer (as distinguished from the decision relating to Hong Kong Aircraft Engineering Company Limited (HAECO) mentioned below). It, however, ruled that this is not determinative. The Panel placed great emphasis in distinguishing a direct holding of a controlling interest and a holding through a chain of companies, each of which is controlled through a controlling interest and the qualitative difference between them. Such a change is regarded as changing the balance of the shareholders and therefore, circumstances do not warrant a grant of an MGO waiver.

The Cross Harbour decision echoed the Panel's HAECO decision in 2008 which was cited to illustrate the point that Rule 26.1 would be strictly regulated and waivers are really for exceptional cases. It is, therefore, worth reviewing briefly the facts and ruling in that case.

The HAECO Decision of 2008

No MGO waiver was granted despite there being no change in leadership of a long established concert group. In that case, the Panel considered that Swire Pacific Limited (Swire) and Newco (the proposed joint venture company with Cathay Pacific Airways Limited (CX) where Swire would hold 50.5%, see below) should be taken together and counted as one. As such, Swire would increase its interest in HAECO through Newco from 33.52% to 50.12%, thereby acquiring the statutory control of HAECO and crossing over the MGO trigger point. An MGO obligation arose. Given there was a significant change in the balance of concert group holding and payment of a significant premium, the circumstances of the case did not warrant a grant of an MGO waiver.



Conclusion

It is clear from both the Cross Harbour and HAECO decisions that for any intra-concert group transfer resulting in one member consolidating control through a change of a relative control into an absolute control of a controlling interest in the listed company, no MGO waiver would normally be granted, except possibly in a family arrangement, which is yet to be tested.

Contact Us

For enquiries related to this Legal Update, please contact the following persons or your usual contact at our firm.

Jacqueline Chiu
Partner
T: +852 2843 2447
E: jacqueline.chiu@mayerbrownjsm.com

Tammie Tam
Professional Support Lawyer (Corporate)
T: +852 2843 2482
E: tammie.tam@mayerbrownjsm.com