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# HKEx Listing Decisions On Acceptability Of Prior Shareholder Mandates For Notifiable Transactions, The Classification Of A Share Repurchase By A Listed Subsidary Under Chapter 14 And Qualification Requirements For Mainland Property Valuers

## 1. HKEx Publishes Listing Decision on Acceptability of Prior Shareholder Mandates for Notifiable Transactions

### Introduction

HKEx published in March 2011 Listing Decision LD6-2011 as to whether the Stock Exchange of Hong Kong (the **Exchange**) would permit a prior mandate to take the place of a shareholders' approval on the contractual terms of the agreement governing the following transactions:

* A manufacturing company's (**Company A**) proposed acquisition of a plot of land via public tender with a Mainland government body; and
* A property investment company's (**Company B**) proposed disposal of a property in Hong Kong.

The two companies are listed on the Main Board of the Hong Kong Stock Exchange and the transactions had the potential to be major transactions, which must be made subject to shareholder approval under Main Board Listing Rule 14.34. Company A wished to use a mandate in place of seeking shareholder approval as the Mainland government body from which it sought to purchase the land refused to agree to a bid made conditional on shareholder approval. Company B cited the need to move quickly in the property market and the avoidance of the burden of making an agreement to sell subject to shareholder approval as the key reasons for its desire to use the mandate. In the decision, HKEx accepted the reasons advanced by Company A and permitted the use of the prior mandate but did not accept the arguments put forward by Company B and therefore did not allow it to avail of the prior mandate.

### Facts

#### Company A

As noted above, Company A was a manufacturing company which planned to submit a bid to a Mainland government body, using the public tender process, for a plot of land located in the Mainland. The government body would not countenance a bid which was made conditional on shareholder approval so Company A proposed to seek a mandate from its shareholders for the acquisition before submitting a bid. According to the tender notice, Company A would be obliged to purchase the land on the terms detailed therein, which covered all the key elements of the agreement bar the consideration. The proposed mandate set a maximum price for Company A's bid with the price to be calculated by reference to the location of the land, its potential value and a recent professional valuation undertaken on behalf of Company A.

#### Company B

As discussed previously, Company B was a property investment company which wished to sell its full interest in an investment property in Hong Kong. This possibly constituted a major transaction for which shareholder approval was required. In lieu of this approval, Company B sought to obtain a prior mandate, to conduct the sale, from its shareholders. According to the proposed terms of this mandate the property would be sold to an independent party within a defined time period at a price above a stated minimum level. The level of this minimum sale price was to be decided after assessing market conditions and on the basis of a recent professional valuation undertaken on behalf of Company B. The key reasons advanced by Company B for seeking the mandate were that:

* the selling price may be negatively impacted upon by the need to seek shareholder approval as the uncertainty surrounding the transaction would increase and it would take longer to complete; and
* there was a need to move quickly and flexibly in the property market.

### The Regulatory Framework: Chapter 14

Listing Rules 14.34, 14.40 and 14.63 (2) set out the obligations which an issuer must perform when making an acquisition or disposal. These include disclosure and the need to seek shareholder approval, depending on the size of the transaction in question. However in these cases, as HKEx highlight in the decision, no transaction occurred and therefore the requirements of Chapter 14 were not triggered. Nevertheless, HKEx addressed the question of whether it would permit a prior mandate in lieu of a shareholders’ approval on the terms of the agreement governing the proposed transactions.

### HKEx's Decision

#### Company A

HKEx accepted Company A's application for a prior mandate based first on the fact that in this case, due to the nature of the government body's tender process, Company A could only obtain shareholder approval through the mechanism of a prior mandate. Second, the shareholders had enough information to evaluate the merits of the proposed transaction, as Company A had set a maximum level of consideration which it would pay for the land and, additionally, the government body had already set out all the key terms and timings for the tender.

#### Company B

Company B's request for a prior mandate to be accepted by the Exchange in place of a shareholder approval resolution was rejected by HKEx, with the reason given being that it was not "unduly burdensome or impractical for Company B to make the disposal conditional on shareholders’ approval."

## 2. HKEx Publishes Listing Decision On The Classification Of A Share Repurchase By A Listed Subsidiary

### Introduction

HKEx published in March 2011, a decision (HKEx-LD5-2011) concerning a company listed on the Main Board of the Hong Kong Stock Exchange (the **Exchange**), Company A, and its subsidiary company, Subsidiary B, which is listed on an overseas stock exchange. The key issue which HKEx had to address was whether an on-market repurchase (the **Repurchase**) of its own shares by Subsidiary B amounted to a transaction for Company A under Chapter 14 of the Main Board Listing Rules, and if so whether it would be aggregated with Company A's previous acquisition (the **On-Market Acquisition**) of Subsidiary B's shares.

The crucial point for Company A was that if the Repurchase was to be regarded as a transaction for it under Chapter 14, the Repurchase could then be aggregated with the On-Market Acquisition and would therefore amount to a discloseable transaction. Company A argued that as the On-Market Acquisition and the Repurchase were performed separately and were different in nature, they should not be aggregated and thus no discloseable transaction had actually occurred. However this argument was rejected by HKEx, who found that the Repurchase was a transaction from the point of view of Company A and therefore must be aggregated with the On-Market Acquisition and disclosed.

### Facts

Company A acquired a number of shares in Subsidiary B by purchasing them on the overseas stock exchange on which Subsidiary B was listed. A number of months subsequent to this acquisition, Subsidiary B proposed an on-market share repurchase of its shares. As noted above, an issue arose as to whether an on-market repurchase of its own shares by Subsidiary B amounted to a transaction for Company A under Chapter 14 of the Rules, and, if so, whether it would be aggregated with Company A's prior acquisition of Subsidiary B's shares. Company A denied that the Repurchase amounted to a transaction for it and therefore that no aggregation, and thus no disclosure, need take place.

### The Regulatory Framework: Chapter 14

Chapter 14 regulates transactions conducted by an issuer and its subsidiaries, including the purchase and sale of securities and other assets.

Rule 14.22 addresses the matter of aggregation of such transactions and empowers the Exchange to oblige an issuer to aggregate a sequence of transactions if they occur in a 12 months period or are related in some other fashion. Rule 14.23 then sets out a non-exhaustive list of factors which the Exchange may consider when assessing whether or not to demand aggregation. HKEx notes at this point in the decision that it will take into account all relevant circumstances in the case at hand when making this evaluation.

### HKEx's Decision

HKEx concluded that the Repurchase amounted to a transaction for Company A and that it should be aggregated with the On-Market Acquisition and disclosed. The grounds on which HKEx found that the Repurchase constituted a transaction for Company A were that it was performed by a subsidiary of Company A, namely Subsidiary B, and had as a consequence an increase in Company A's equity interest in Subsidiary B. The rationale for finding that the Repurchase should be aggregated under Rule 14.22 with the On-Market Acquisition was that although different means were used, the two deals served to enlarge Company A’s interest in Subsidiary B, and also that they were performed within a short period of time.

## 3. HKEx Publishes Updated Listing Decision On Qualification Requirements For Mainland Valuers

### Introduction

HKEx published in March 2011, an updated listing decision, HKEx-LD102-1, on the qualification requirements for persons seeking to act as valuers of property located in the mainland of the People's Democratic Republic of China (the **Mainland**). The case concerned the application of Main Board Rule 5.08(2)(b) and paragraph 4.1 of Practice Note 12, which create the regulatory framework for the recognition of property valuers in Hong Kong. HKEx concluded that in light of the experience of the persons concerned as property valuers, and their responsibility to comply with the professional requirements of the China Institute of Real Estate Appraisers and Agents (**CIREA**), the persons in question were eligible to prepare a valuation report of a public company (**Company B**) with a dual listing on the Main Board of the Hong Kong Stock Exchange (the **Exchange**) and the Mainland Stock Exchange.

### Facts of the case- Part 1

The decision relates to Company B's desire to sell a commercial property to its parent company. This is a connected transaction under the Listing Rules, meaning independent shareholder approval of the decision to sell is required. A valuation report by a Mainland real estate appraising company (the **Appraiser**) formed part of the circular to the general meeting at which the decision to sell was to be approved by the shareholders. This report was the work of Mr T and Mr U, neither of whom are members of the Hong Kong Institute of Surveyors (**HKIS**) or the Royal Institution of Chartered Surveyors (**RICE**).

#### Regulatory Framework

Under Main Board Listing Rule 5.05 all valuation reports must be made in accordance with the "Hong Kong Guidance Notes on the Valuation of Property Assets", issued by HKIS and RICE. Furthermore, Rule 5.08 demands that all valuations must be the work of an independent "qualified" valuer, with qualified in the context of a valuation of a property situated outside Hong Kong meaning "the valuer has the appropriate professional qualifications and experience of valuing properties in the same location and category to carry out the valuation."

In addition Practice Note 12, paragraph 4.1, states that any person seeking to carry out valuations of properties located in developing jurisdictions should be subject to the disciplinary code of the RICS or the HKIS, or to that of a professional body of similar standing. Additionally such a person should have at least 2 years' of professional experience valuing properties in the jurisdiction in question, or have such other relevant experience which the Exchange is willing to accept.

### Facts of the Case - The Qualifications of Mr T and Mr U

The Appraiser, which employed Mr T and Mr U, was a member of CIREA and consequently subject to its disciplinary procedures. In support of its contention that CIREA was a professional body of similar standing to HKIS, the Appraiser pointed to the existence of a reciprocity agreement between the two entities, concerning the recognition of qualifications of Mainland real estate appraisers and Hong Kong surveyors.

Furthermore, the Appraiser noted that although Mr T and Mr U were not individual members of CIREA, the Appraiser's internal code of conduct obliged them to adhere to CIREA's standards of professional discipline when putting together a valuation report. Additionally, Mr T and Mr U were registered with the Ministry of Construction (**MOC**) as certified real estate appraisers and were thus qualified to prepare property valuation reports in the Mainland. Part of their responsibilities on registering with the MOC was an obligation to conform to the professional discipline and ethics regulations of the real estate appraisal industry in the Mainland (including those issued by CIREA). For example, Mr T and Mr U were bound to act in accordance with the Code for Real Estate Appraisal issued by MOC which is the key professional discipline of CIREA. The Appraiser stated that the code is of a particularly elevated standard and comparable with the HKIS property valuation criteria discussed in Rule 5.05.

Lastly Mr T and Mr U had over ten years' experience in the area of valuing commercial property as certified real estate appraisers and had also undertaken ongoing training on the CIREA standards.

### HKEx's Decision

HKEx concluded that Mr T and Mr U were suitably qualified to prepare the property valuation in Company B’s circular. HKEx accepted that CIREA is a professional body of similar standing to the HKIS and that Mr T and Mr U were, by virtue of their registration with the MOC and obligation to comply with the internal regulations of the Appraiser, subject to the standards of professional discipline imposed by CIREA. They also possessed the experience required by paragraph 4.1 of PN 12.

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