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ENFORCING PUBLIC TAKEOVER REGULATION

Reconciling Public and Private Interests*

Takeover regulation in the UK, Hong Kong and Singapore relies on takeover codes and takeover panels. However, parties aggrieved by the decisions of the panels may sometimes challenge them in the courts, giving rise to the potential of overlapping jurisdictions. The problem is compounded by two factors: the enforcement of the takeover codes can have substantive implications on the parties' ability to enforce their rights in courts, and takeover panels and courts assess matters differently. This article argues that there needs to be a clearer delineation between the potentially overlapping jurisdictions of the takeover panels and the courts.

WAN Wai Yee
LLB (Hons) (National University of Singapore),
BCL (Oxford); Advocate and Solicitor (Singapore);
Solicitor (England and Wales); Attorney and
Counsellor-at-law (New York);
Professor, School of Law, Singapore Management University.

I. Introduction

1 In the UK, public takeovers are primarily regulated by the City Code on Takeovers and Mergers[1] ("UK Code") and the Panel on Takeovers and Mergers ("UK Panel"). The UK Code represents the collective opinion of those professionally involved in takeovers as to how takeovers should be regulated. The UK Panel, which is a specialist independent body comprising representatives from the financial and investment community, enforces the UK Code. Other common law jurisdictions in the Asia Pacific have closely followed the UK approach to takeover regulation with some minor variations, including Hong Kong[2] and Singapore.[3]

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1 12th Ed, 2016.

2 The Codes on Takeovers and Mergers and Share Buy-backs (July 2018). See generally David Donald, "Evolutionary Development in Hong Kong of

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2 However, while the takeover panel is the main forum for resolving disputes in these takeover code jurisdictions, it is not the only forum. Aggrieved parties may wish to challenge the decision of the panel. Further, takeover disputes often involve substantive legal rights of the market participants, which are ordinarily resolved in the courts. The question that often arises is the role of courts *vis-à-vis* the takeover panels in the jurisdictions that adopt the takeover code. Existing scholarship[4] and established case law[5] have considered two situations of potential conflict: where market participants seek to challenge the takeover panel's rulings in judicial review proceedings, or where the target (or its board) seeks to pre-empt the takeover panel through tactical litigation in an attempt to enjoin a hostile takeover bid.[6] In the case of the former, it is clear that the courts can review decisions of takeover panels, albeit the scope of the review is somewhat limited. In the case of the latter, it is well established that the prohibition on the frustration of *bona fide* bids in the takeover codes can limit the ability of target boards to fulfil their fiduciary duties.

3 Outside of judicial review and tactical litigation, the traditional resolution to the issue of potential overlap in jurisdictions is that the court only adjudicates on the substantive legal rights of the participants. The takeover panel determines whether the participants have complied with the takeover code and, in appropriate cases, makes remedial orders to rectify such non-compliance.[7] However, takeovers occur against the backdrop of legal relationships among the shareholders, directors, the bidder and the target,[8] and the line drawn between adjudication on

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Transplanted UK-Origin Takeover Rules" in *Comparative Takeover Regulation: Global and Asian Perspectives* (Umakanth Varottil & Wai Yee Wan eds) (Cambridge University Press, 2017) ch 12.

3 Singapore Code on Take-overs and Mergers (revised 24 January 2019). See generally Wai Yee Wan, "UK-Style of Takeover Regulation in Singapore" in *Comparative Takeover Regulation: Global and Asian Perspectives* (Umakanth Varottil & Wai Yee Wan eds) (Cambridge University Press, 2017) ch 13.

4 *Eg*, David Kershaw, *Principles of Takeover Regulation* (Oxford University Press, 2016) ch 3. See paras 9–25 below.

5 See paras 9–25 below.

6 John Armour & David Skeel, "Who Writes the Rules for Hostile Takeovers and Why? The Peculiar Diverge of US and UK Takeover Regulation" (2007) 95 Geo LJ 1727; Dan Awrey, Blanaid Clarke & Sean J Griffith, "Resolving the Crisis in US Merger Regulation: A Transatlantic Alternative to the Perpetual Litigation Machine" (2018) 35 Yale J on Reg 1.

7 The distinction between the role of the courts and the takeover panels can be found, for example, in the UK case of *R v Panel on Takeovers and Mergers, ex parte Guinness plc* [1990] 1 QB 146. See para 22 below.

8 See Takis Tridimas, "Self-Regulation and Investor Protection in the United Kingdom: The Takeover Panel and the Market for Corporate Control" (1991) 10 CJQ 24; Peter Cane, "Self-Regulation and Judicial Review" (1987) 6 CJQ 324.

compliance of the takeover code and substantive legal obligations is rarely well defined.

4 Drawing from more recent examples of takeover disputes in the UK, Hong Kong and Singapore, this article argues that that the potential for conflicting outcomes, due to the overlap in jurisdictions, has assumed much more importance. This potential for conflict has intensified, largely in part due to the fact that takeover panels place far more emphasis on market certainty and facilitating orderliness in the markets since the market turmoil after the 2001 terrorist attacks and 2008 global financial crisis. Additionally, given that some of these matters are effectively disposed at proceedings before the takeover panel (and are thus moot issues by the time that they are litigated), they raise the question of whether the takeover panel is intended to be the main (or even only) forum for disputes during the bidding process. In other words, is it desirable to effectively foreclose the right of the market participants to bring an action, *ex post* the takeover?

5 This article argues that there is insufficient basis to foreclose the right of the market participants to bring substantive legal actions in the courts. Yet, at the same time, moving to a system where takeover regulation is largely decided by the courts will undermine most of the advantages of speed and certainty that are currently found in the takeover code jurisdictions. One possible solution to address this problem is to have a clearer delineation of the powers of the courts and the takeover panels. It considers the suitability of importing the partial solution in Australia in the form of s 659B-C of the Corporations Act 2001, which makes the Australian Takeovers Panel ("Australian Panel") the only forum for solving disputes when the bid is under way. While there are important differences between the Australian Panel and the takeover panels in the takeover code jurisdictions,[9] the functions of the Australian Panel parallel that of the panels in the takeover code jurisdictions as they seek to settle disputes in takeovers and make their decisions on similar aims and principles.

9 For example, the Australian Takeovers Panel ("Australian Panel") is not able to act of its own volition but decides applications that are brought before it. Also, in view of the constitutional position in Australia, it is not possible for the Australian Panel to determine the legal rights of the parties. See chapter 3 of the Commonwealth Constitution. See generally Emma Armson, "The Australian Takeovers Panel and Judicial Review of Its Decisions" (2005) 26 *Adelaide Law Review* 327; Rodd Levy, *Takeovers Law and Strategy* (Thomson Reuters, 4th Ed, 2012); *The Takeover Panel and Takeovers Regulation in Australia* (Ian Ramsay ed) (Melbourne University Press, 2010).

6 The article is organised as follows. Part II[10] sets out the respective roles of the courts and the takeover panels in takeover code jurisdictions. Part III[11] deals with the circumstances in which the takeover panels resolve disputes to give effect to certainty and market orderliness, even though the principles-based approach in the takeover codes may conflict or be inconsistent with the conclusion reached under private law. Part III then discusses the following: first, where there is a conflict, will the court give primacy to the decisions of the takeover panel? Second, as a matter of process, is a party precluded from bringing litigation in the courts to seek redress arising from the decision of the takeover panel on the grounds of such inconsistency?

7 Part IV[12] argues that while the takeover panel is not necessarily concerned with the legal position of the participants in the takeover, the remedial order or failure to grant relief in respect of contravention of the takeover code will often affect the participant's remedies at private law.

8 Part V[13] sets out the observations and analyses the implications of the findings on recent developments. In particular, it discusses whether the reluctance of the courts to intervene in decisions made by specialist takeover panels, which are driven by concerns of market certainty and predictability rather than giving effect to substantive legal rights, continues to be justifiable in light of the increasing impact on private law. It also argues for the desirability of a clearer delineation between the takeover panel and the courts and assesses the viability of the Australian example. Part VI[14] concludes.

II. Background and the problem of overlapping jurisdictions

9 There are significant similarities between the takeover regulations in the UK (post-2006) and its former colonies (such as Singapore and Hong Kong), which have transplanted the UK-style of takeover regulation. Prior to the implementation of the European Union ("EU") Takeover Directive ("Takeover Directive") in 2006,[15] the UK Panel was an entirely self-regulatory body and did not have statutory enforcement powers.[16] Post-2006, while the UK Panel now possesses a

10 See paras 9–25 below.
11 See paras 26–45 below.
12 See paras 46–53 below.
13 See paras 54–67 below.
14 See paras 68–69 below.
15 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.
16 Companies Act 2006 (c 46) (UK) ss 942–992. It is noted that even after the implementation of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, the underlying self-regulatory nature of

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statutory function, the essential characteristic of the UK Panel as a regulator of takeovers remains unchanged.[17] Decisions of the UK Panel are made by the Takeover Executive, and rulings can be reviewed by the Hearings Committee[18] with a right to appeal to the Takeover Appeal Board.[19] Panel members are drawn from finance and investment communities.[20] The UK Panel can order compensation for breaches of specified provisions of the UK Code,[21] and its rulings can now be enforced by the courts.[22]

10 Similarly, in Singapore and Hong Kong, takeover regulation is primarily regulated under the Singapore Code on Takeovers and Mergers[23] ("Singapore Code") and the Codes on Takeovers and Mergers and Share Buybacks[24] ("HK Code") respectively, both of which are based on the UK Code. In Singapore, the Singapore Code is administered by the Securities Industry Council of Singapore ("SIC"), established under the Securities and Futures Act.[25] Unlike in the UK, however, SIC members not only are drawn from the private sector but also include government representatives, though the majority are from the private sector.[26] While day-to-day decisions are generally made by the secretariat of the SIC, the SIC may convene hearing committees in certain significant cases.[27] Unlike in the UK and Hong Kong, the Singapore Code does not provide for a right of further appeal against SIC decisions. In Hong Kong, the HK Code is administered by the Takeovers and Mergers Panel ("HK Panel").[28] Rulings at first instance

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the UK Panel on Takeovers and Mergers has not changed. See Jonathan Mukwiri, "The Myth of Tactical Litigation in UK Takeovers" (2008) 8 *Journal of Corporate Law Studies* 373.

17 See also Geoffrey Morse, "Regulating Takeovers: The Regulators and the Courts: *Quis Custodiet Ipsos Custodes*" (2007) 22 NZULR 622.

18 The City Code on Takeovers and Mergers (12th Ed, 2016) Introduction, "The Panel and its Committees".

19 The City Code on Takeovers and Mergers (12th Ed, 2016) Introduction, "The Panel and its Committees".

20 The City Code on Takeovers and Mergers (12th Ed, 2016) Introduction, "The Panel and its Committees".

21 The City Code on Takeovers and Mergers (12th Ed, 2016) Introduction, "Enforcing the Code".

22 See s 955 of the UK Companies Act 2006 (c 46). For a recent case on s 955, see *The Panel on Takeovers and Mergers v David King* [2017] CSOH 156 at para 15 below.

23 Revised 24 January 2019.

24 July 2018.

25 Cap 289, 2006 Rev Ed.

26 Singapore Code on Take-overs and Mergers (revised 24 January 2019) Introduction.

27 *Eg*, *Re Jade Technologies* Grounds of Decision of the Hearing Committee appointed by the Securities Council, *In the matter of Jade Technologies Holdings Ltd* (14 October 2008). See para 47 below.

28 When the Codes on Takeovers and Mergers and Share Buy-backs (July 2018) was first set up, it was administered by the Committee on Takeovers and Mergers,

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are made by the Executive of the HK Panel, and it is possible to appeal the decisions to the HK Panel and to further appeal to the Takeover Appeal Committee. The HK Panel, established under the Securities and Futures Commission of Hong Kong, comprises members from the financial and investment community.[29]

11 All three takeover code jurisdictions provide for the takeover panel the power to order compensation for breaches of the takeover code, though there are some variations on the scope of compensation. For example, the Singapore Code, unlike the UK and HK codes,[30] does not exhaustively define the types of breaches which compensation may be awarded for.[31]

12 Existing scholarship and jurisprudence deal with two areas of overlap between the takeover panels and the courts where there may be conflicting decisions reached by both bodies. The first relates to judicial review proceedings and the second to litigation by target boards to enjoin *bona fide* bids. There is a third area of potential conflict: pursuant to s 955 of the UK Companies Act 2006,[32] if the UK Panel applies to the court to enforce compliance with the UK Code. However, as this provision is found in neither the Singapore nor HK code, and is unlikely to prove contentious in UK practice in light of *The Panel of Takeovers and Mergers v David King*,[33] it has been excluded from discussion in this article.

A. Judicial review

13 In the UK, before the UK Panel was put on a statutory footing,[34] the English Court of Appeal in *R v Panel on Takeovers and Mergers plc,*

which included three members from the (then) Securities Commission and six members from the financial community.

29 Securities and Futures Ordinance (Cap 571) (Hong Kong) s 8. See the Codes on Takeovers and Mergers and Share Buy-backs (July 2018) Introduction.

30 The Codes on Takeovers and Mergers and Share Buy-backs (July 2018) (Hong Kong) rule 13.13. See Hong Kong, Securities and Futures Commission, "Consultation Conclusions on Proposed Amendments to the Codes on Takeovers and Mergers and Share Buybacks" (13 July 2018).

31 Singapore Code on Take-overs and Mergers (revised 24 January 2019) Introduction, "Enforcement of the Code".

32 c 46.

33 [2017] CSOH 156. See para 15 below.

34 The City Code on Takeovers and Mergers (12th Ed, 2016) and the Panel on Takeovers and Mergers were put on a statutory footing, pursuant to the implementation of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids via the Takeovers Directive (Interim Implementation) Regulations 2006 (SI 2006/1183).

ex parte Datafin plc[35] ("*ex parte Datafin*") held that decisions of the UK Panel were subject to judicial review, on the application of either the "nature" test[36] or the "source" test in administrative law.[37] However, the scope for challenging a UK Panel ruling was very narrow; the courts generally refused to intervene in UK Panel rulings, particularly when they were made in the course of a takeover offer. There was thus very little scope for any party to engage in any kind of tactical litigation to enjoin a hostile takeover bid. Furthermore, unless the UK Panel had breached any rule of natural justice, any ruling by the courts would generally operate prospectively (that is, declaring what the proper decision of the UK Panel should have been for future guidance) and to exonerate individuals disciplined. This was because the courts considered the interests of market certainty, given that the market proceeded and traded on the assumption that the UK Panel's rules and decisions were valid.

14 In a subsequent case, Grand Metropolitan attempted in its bid for Irish Distillers Group to challenge the UK Panel's refusal[38] to relieve the shareholders, who had given irrevocable undertakings, from the obligation to accept Pernod's offer. It ultimately withdrew the application when the court refused its expedited application to ensure that the review took place before the close of the rival bid.[39] Citing *ex parte Datafin*, the court made it clear that such proceedings were not intended to reverse the UK Panel's rulings made in the takeovers.[40]

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35 [1987] 1 QB 815.

36 See *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] 1 QB 815 at 826, *per* Sir John Donaldson MR, which stated of the Panel on Takeovers and Mergers:

> Lacking any authority *de jure*, it exercises immense power *de facto* by devising, promulgating, amending and interpreting the UK Code on Take-overs and Mergers, by waiving or modifying the application of the code in particular circumstances, by investigating and reporting upon alleged breaches of the code and by the application or threat of sanctions. These sanctions are no less effective because they are applied indirectly and lack a legally enforceable base.

37 See *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] 1 QB 815, holding that applying the "nature" test, the Panel on Takeovers and Mergers was subject to judicial review but even if the "source" test was the sole test, the panel was established "under authority of the Government" (at 849) and was thus subject to judicial review.

38 *Irish Distillers Group plc* PS 1988/25 (17 November 1988).

39 "Grand Met Withdraws Review Call" *The Times* (24 November 1988); "Grand Met Beaten by Pernod in IDG Battle" *The Independent* (24 November 1988). See also Tony Shea, "Regulation of Takeovers in the United Kingdom" (1990) 16 Brooklyn J In'tl L 89.

40 See *Irish Distillers Group plc* PS 1988/28 (23 November 1988). See also Mark Warham, "The Takeover Panel" in *A Practitioner's Guide to the UK Code on Takeovers and Mergers 2006/2007* (Maurice Button ed) (City & Financial Publishing, 2006).

15 Further, even in cases where the matter is no longer time-sensitive or the takeover has been completed, the English courts have still been unwilling to intervene in UK Panel decisions.[41] The importance of not undermining the public confidence in the manner in which the UK Panel operates was again underlined in *The Panel on Takeovers and Mergers v David King*,[42] a decision that was decided after the UK Panel was put on a statutory footing.[43] That case was not a judicial review but concerned the interpretation of s 955 of the UK Companies Act 2006,[44] where the UK Panel sought an order from the court to compel K to make a mandatory bid on the grounds that he was a member of a concert party group that had acquired shares in the target, and their combined acquisitions had crossed the mandatory bid threshold. K argued that he was impecunious and the order would have been futile, since the mandatory offer price was at the material time below the trading price. In granting the order, the court emphasised that it would be contrary to public interest if it acted in a way that undermined the UK Panel from policing takeovers.[45] In making its decision, the court reviewed the findings of the UK Panel and the Takeover Appeal Committee and concluded that K had had control over the bidder's resources.

16 In Hong Kong, it is settled law that decisions of the takeover panel are subject to judicial review.[46] The High Court recently held that where the HK Code conflicts with legislation, legislation will always take priority.[47]

17 In Singapore, while the courts have yet to rule definitively on the matter, scholars have argued that the decisions of SIC should be subject to judicial review even though the Singapore Code is not

41 *R v Panel on Takeovers and Mergers, ex parte Guinness plc* [1990] 1 QB 146. *R v Panel on Takeovers and Mergers, ex parte Fayed* [1992] BCLC 938.

42 [2017] CSOH 156.

43 An appeal by David King was dismissed: *Panel on Takeovers and Mergers v David King* [2018] CSIH 30.

44 This provision was not present in *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] 1 QB 815.

45 *The Panel on Takeovers and Mergers v David King* [2017] CSOH 156 at [99]. The court also stressed the two-stage appeal structure in the Panel on Takeovers and Mergers comprising the Hearings Committee and Takeovers Appeal Board, both of which are independent from the Panel Executive.

46 *Re Television Broadcasts Ltd* HCAL 250/2017 (10 May 2017); *In the matter of judicial review by the applicant A under Order 53 rule 3 of the Rules of the High Court* HCAL 29/2014 (7 November 2014) (application for judicial review succeeded). See also *Amoy Properties v Committee on Takeovers and Mergers and Commissioner for Securities* [1989] 1 HKC 1.

47 *Re Television Broadcasts Ltd* HCAL 250/2017 (10 May 2017).

subsidiary legislation[48] since the decision-making powers of SIC were derived from the Securities and Futures Act.[49] Alternatively, it has been suggested that, on the application of the "nature" test and *ex parte Datafin*, the decisions of SIC are subject to judicial review as SIC exercises an important public duty, being able to sanction wrongdoers and its power neither depending on contract nor being consensual.[50]

B. Target boards enjoining takeover bids through litigation

18 The second area of overlap is where the target boards bring actions to enjoin hostile takeover bids in the absence of independent shareholder approval. In 1980, in charting the history of the UK Code, Sir Andrew Johnston documented the concerns (then) by UK city solicitors that the UK Code might be inconsistent with general obligations under company law.[51] Specifically, the concerns related to differences in how the UK Panel and the court would assess the target board's actions. The UK Panel assessed the board's actions based on their objective effect, while the courts assessed the propriety of the board's actions based on whether the board had in fact exercised the decision for a proper purpose, which included an element of subjectivity. The response to the conflict then was that the UK Code was intended to restrict the actions of the boards of the target and the bidder. Sir Andrew argued that while there were several situations in the 1970s where there were potential conflicts between the UK Code and the rulings of the courts relating to target boards bringing actions to enjoin bids, there was no judicial ruling nullifying the operation of the UK Code.[52]

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48 Securities and Futures Act (Cap 289, 2006 Rev Ed) s 139(3). See also Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (Singapore: LexisNexis, 2nd Ed, 2011) at p 115.

49 See Wai Yee Wan, "UK-Style of Takeover Regulation in Singapore" in *Comparative Takeover Regulation: Global and Asian Perspectives* (Umakanth Varottil & Wai Yee Wan eds) (Cambridge University Press, 2017).

50 Wai Yee Wan, "UK-Style of Takeover Regulation in Singapore" in *Comparative Takeover Regulation: Global and Asian Perspectives* (Umakanth Varottil & Wai Yee Wan eds) (Cambridge University Press, 2017).

51 See Alexander Johnston, *The City Take-over Code* (Oxford University Press, 1980).

52 See Alexander Johnston, *The City Take-over Code* (Oxford University Press, 1980). It was also reported that the ruling of the Panel on Takeovers and Mergers ("UK Panel") is in direct conflict with the legal or equitable rights of third parties not involved in the takeover. See Geoffrey Morse, "Controlling Takeovers – The Self-regulation Option in the United Kingdom" [1998] JBL 58 (referring to the 1995 decision of the UK Panel in respect of British Land Company's ("British Land's") offer for Stanhope Properties, which owned 50% of a deadlocked joint venture company, Broadgate Properties. The other joint venturer of Broadgate Properties, R, argued that British Land should offer for all of the remaining shares of Broadgate Properties on the basis of the chain principle. By ruling that there was no obligation to make an offer for the remaining shares, the UK Panel could

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19 The acquisition of Consolidated Gold Fields plc ("Consgold") demonstrated the UK Panel's position that the no-frustration rule in the UK Code should trump the analysis of directors' duties at general law. In April 1989, Minorco announced that it held or had acceptances in respect of 54.8% of Consgold but was not able to declare the offer unconditional; Consgold, Gold Fields Mining Corporation (Consgold's wholly owned subsidiary), Newmont Mining Corporation ("Newmont") (49% owned by Consgold) and a subsidiary of Newmont had obtained interim injunctions in the District Court in New York which prevented Minorco from acquiring control of Consgold. Consgold argued that the initiation and the continuance of the litigation were in compliance with their directors' duties to protect the interests of their company, and the failure to continue the proceedings would expose them to legal action by minority shareholders. However, the UK Panel held that the litigation could amount to a frustrating action which required the approval of the shareholders and thus ruled that actions taken by directors in fulfilment of their duties could be limited by the UK Code. The UK Panel emphasised that in considering their views of the best interests of the company, directors must have regard to the UK Code and the rulings of the UK Panel.[53]

20 While there is no similar case law or panel decision in Singapore and Hong Kong, a similar position is likely to be adopted given that the no-frustration rule is found in the Singapore Code and HK Code respectively.[54]

C. Other areas of overlap in jurisdictions

21 However, outside of these two areas of judicial review and target boards attempting to enjoin hostile takeover offers in the courts, is it possible for the courts and the takeover panels to reach inconsistent outcomes? Historically, this has not been a problematic issue. In private litigation, the UK courts have generally deferred to the UK Code and the UK Panel; the courts have referred to the UK Code as a guide to good practice in takeovers, even in situations that are not governed by the UK Code.[55] The courts have made pronouncements which support the relevance of the standard of conduct set out in the UK Code, even in

potentially abrogate the rights of R, who may have fiduciary duties owed by Stanhope (which is now controlled by British Land).

53 *Consolidated Gold Fields plc* PS 1989/7 (9 May 1989) at 13.

54 Singapore Code on Take-overs and Mergers (revised 24 January 2019) General Principle 7; the Codes on Takeovers and Mergers and Share Buy-backs (July 2018) rule 4.

55 *Eg*, *Fiske Nominees Ltd v Dwyka Diamonds Ltd* [2002] 2 BCLC 222. See generally Geoffrey Morse, "Regulating Takeovers: The Regulators and the Courts – *Quis Custodiet Ipsos Custodes*" (2007) 22 NZULR 622.

cases where the UK Code does not directly apply.[56] In Hong Kong, in judicial decisions that involve consideration of compliance with the HK Code, the courts have rendered judgments not only on the literal wording of the HK Code but with an emphasis on the principles on which the HK Code was founded.[57]

22 In other situations, the overlap in jurisdictions is resolved by acknowledging that the aims of the panels and courts are different; takeover panels enforce only the takeover codes and not the substantive rights of the parties, which are in the purview of the courts. For example, when takeover panels order compensation, such compensation is confined only to losses arising from breaches of the takeover code and not extended to other claims. In *The Distillers Co plc*,[58] a decision of the UK Panel in connection with Guinness's takeover of Distillers, Guinness was ordered to compensate Distillers' shareholders who should have received, pursuant to rule 11 of the UK Code (as it then applied), an improved cash offer from Guinness but did not. Guinness wanted to make it a precondition to the payment of compensation that the former Distillers shareholders execute a legal release of any claims they might have had against Guinness in respect of the takeover. The UK Panel ruled that while Guinness was entitled to require shareholders to give a release for claims arising out of the absence of a higher cash offer as a result of the breach, shareholders should not be required to forgo any claims in respect of other losses arising out of other breaches of the UK Code or of law.

23 However, in the context of private disputes, while the aims of the takeover panels and the courts are different in theory, the issue of overlapping jurisdictions is now more pronounced for the following reasons. First, in the UK, Kershaw argues that when the UK Panel and the UK Code moved to a statutory footing after 2006, the courts, when interpreting legislation implementing the Takeover Directive, should take a purposive approach to interpretation that complies with the Takeover Directive.[59] For example, while the UK Panel does not determine issues of company law, Kershaw argues that it is nevertheless required to interpret the UK Code in a manner that gives effect to the

56 See Geoffrey Morse, "Regulating Takeovers: The Regulators and the Courts – *Quis Custodiet Ipsos Custodes*" (2007) 22 NZULR 622 (providing examples such as standards of conduct in a private takeover in *Re Chez Nico (Restaurants) Ltd* [1991] BCC 736 and amending the terms of a squeeze-out notice (*Fiske Nominees v Dwyka Diamonds Ltd* [2002] 2 BCLC 222).

57 See *HKSAR v Habibullah Abdul Rahman* cacc 302/2008 at [277].

58 PS 1989/13 (14 July 1989).

59 David Kershaw, *Principles of Takeover Regulation* (Oxford University Press, 2016) at paras 4.63–4.69.

EU Takeover Directive, and company law concepts may ultimately be relevant to the determination of its rulings.[60]

24 Second, and relevant not only to the UK but also to the other takeover code jurisdictions, takeover panels are guided by maintenance of three core principles: that the takeover operates in an orderly takeover market, that shareholders are treated equally and that shareholders are the ultimate decision-makers on the outcome of the bids.[61] In relation to the first core principle, certainty and predictability in the market take precedence. In contrast, the courts determine the substantive legal rights of the parties that appear before them, though they do take into account public interest in ensuring that takeovers rulings are given effect to. As such, the decisions reached by both bodies may provide conflicting results. Drawing examples from takeovers in the UK, Hong Kong and Singapore, this author finds that notwithstanding the fact that takeover panels do not directly adjudicate on the existing rights of the private parties or make pronouncements on private law, the outcomes of their decisions do have an impact, either by affecting the substantive existing rights of the parties or by impeding the parties' enforcement of their legal rights in the courts.

25 The author highlights two issues that have arisen in the last two decades in the three takeover code jurisdictions. First, by purportedly enforcing the principles and rules of the takeover codes to ensure an orderly market, the takeover panels may reach decisions that are inconsistent with the bidder board's fiduciary duties and/or restricted the ability of the bidders' contractual ability to terminate offers. Second, the remedial order of the takeover panel or failure to grant relief in respect of contravention of the takeover code thereof will often directly affect the market participants' remedies at private law, even *ex post* the takeover. In both cases, the takeover regulator is influenced by the need to take into account the public interests in ensuring an orderly market.

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60 David Kershaw, *Principles of Takeover Regulation* (Oxford University Press, 2016) at paras 4.63–4.69.

61 Introduction to the City Code on Takeovers and Mergers (12th Ed, 2016) provides that:

> The Code is designed principally to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. The Code also provides an orderly framework within which takeovers are conducted. In addition, it is designed to promote, in conjunction with other regulatory regimes, the integrity of the financial markets.

For similar provisions in Hong Kong, see The Hong Kong Codes on Takeovers and Mergers and Share Buy-backs (July 2018) Introduction at para 1.2 and Singapore Code on Take-overs and Mergers (revised 24 January 2019) General Principles 1, 3 and 12.

Such influence is not present to the same degree if the matters are decided by the courts.

III. Potential conflicts between takeover regulation and substantive rights of parties under private law

26 Takeover panels are concerned with ensuring an orderly market where takeovers operate.[62] In fact, the UK and Singapore codes[63] historically evolved to deal with the problems that may arise in a *laissez-faire* market due to inadequacy and lack of control in supervising takeovers. However, in recent times, there has been greater emphasis by current takeover panels on market certainty and facilitating orderliness in the market due to the fact that the markets have been far less stable after the 2001 terrorist attacks and the 2008 global financial crisis.[64] This policy has translated to the takeover panels having a stronger interest in ensuring that offers which have been announced should be completed, unless defeated only on regulatory grounds or failure to fulfil the acceptance condition.

27 In particular, there are two situations where the takeover regulator has focused primarily on market certainty and predictability, resulting in a potential conflict in respect of fiduciary law obligations of *bidder* directors under company law and the takeover code, and in respect of obligations of the parties under company law and contract law.

A. Conflict between company law and takeover code

28 Where there is a conflict between the target board duties under the takeover codes in respect of the no-frustration rule and the duties at common law (including equitable principles), the target board is obliged to give precedence to the takeover code.[65] However, the position relating to bidder boards is more complex.

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62 Introduction to the City Code on Takeovers and Mergers (12th Ed, 2016) provides that:

> The Code also provides an orderly framework within which takeovers are conducted. In addition, it is designed to promote, in conjunction with other regulatory regimes, the integrity of the financial markets.

63 See Wai Yee Wan, "UK-Style Takeover Regulation in Singapore" in *Comparative Takeover Regulation: Global and Asian Perspectives* (Umakanth Varottil & Wai Yee Wan eds) (Cambridge University Press, 2017) ch 13.

64 See Wai Yee Wan, "Invoking Protective Conditions to Terminate Public Mergers and Acquisitions Transactions" [2011] JBL 64.

65 See *Consolidated Gold Fields plc* PS 1989/7 (9 May 1989) at para 19 above. In Singapore, a director of the Singapore-incorporated company is under a duty to act in the best interests of the company, both at common law and under s 157 of the

(*cont'd on the next page*)

29 In general, the takeover code jurisdictions regard the relationship between the bidder board and its own shareholders as being regulated by company law (which will be the law of incorporation of the bidder), and which the takeover panel does not intervene. For example, in UK, a response paper of the UK Panel post-Kraft/Cadbury[66] takeover states that any regulation of the relationship between the bidder board and its shareholders by the UK Panel would be a "new area of regulation".[67]

30 However, what if the bidder board, in purported compliance of its fiduciary obligations, acts in a manner that may undermine certainty and predictability in the market? For instance, if a bidder board no longer wishes to proceed with an announced offer because it no longer believes that it is in its interests to do so,[68] and the transaction requires the approval of the bidder shareholders,[69] can the bidder lapse the offer by refusing to hold the shareholders' meeting? If the meeting is in fact held, can the bidder board urge its shareholders to vote against the acquisition?

31 Under the takeover codes in the three jurisdictions, the position is unclear as to whether the bidder board can effectively frustrate its own offer by refusing to hold a meeting. In the UK, the Code Committee of the Panel (which has rule-making functions) held that, while the board of the bidder is not obliged to recommend to its shareholders to vote for the transaction in all circumstances,

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Companies Act (Cap 50, 2006 Rev Ed). Section 159 of the Companies Act expressly provides that directors of a Singapore-incorporated company are entitled to have regard to the Singapore Code on Take-overs and Mergers (revised 24 January 2019) and the rulings of the Securities Industry Council of Singapore in exercising their powers.

66 For the Kraft/Cadbury takeover, see generally Blanaid Clarke, "Reviewing Takeover Regulation in the Wake of the Cadbury Acquisition – Regulation in a Twirl" [2011] JBL 298.

67 See United Kingdom, Code Committee of the Takeover Panel, *Response Statement to the Consultation Paper on Review of Certain Aspects of the Regulation of Takeover Bids* (RS 2010/22, 21 October 2010) at para 4.8.

68 For example, in a high-profile case, Prudential plc ("Prudential") announced that it would acquire American International Assurance ("AIA") in 2010. However, after the announcement, it became clear that there was significant shareholder opposition, and Prudential sought a reduced sale price. When the reduction was not forthcoming, Prudential chose to terminate the transaction and paid the break fee. The costs of the termination (including the break fee) were lower than the reduction in the sale price that Prudential was seeking. See Steven Solomon, "The Takeaway from the Failed AIA Deal" *Dealbook, The New York Times* (2 June 2010).

69 The transaction could require the bidder shareholders' approval under a number of circumstances, such as the issuance of shares, or is a significant transaction under the relevant listing rules applicable to the bidder.

a recommendation to shareholders to vote down the transaction is regarded as a serious matter, and the bidder and advisers have to do all that is possible to avoid such a situation arising or risk being found to be in breach of their duty of care.[70] The actions required of the bidder board include, prior to announcing the offer, taking all reasonable steps to satisfy themselves that they can still recommend the offer if the offer is subject to the consent of the bidder shareholders.

32 If the approach of the UK Code Committee is adopted in Hong Kong and Singapore, it is likely that takeover panels will still require the bidder board to call for its own shareholders' meeting and the decision whether to proceed would be made by its shareholders. Since the board owes fiduciary duties to the company, the board must, in discharging these duties, consider whether it is in the interests of the shareholders to vote in favour of the transaction. Thus, while it is unlikely that takeover panels will compel the bidder board to recommend that its shareholders vote in favour of the transaction if the board believes otherwise, the bidder board may still face other consequences: it could potentially still be held by the takeover panel to be in breach of its duty of care under the takeover code.

33 In the earlier work, this author documents the actual case in the Singapore takeover offer by Multi-Fineline Electronix, Inc ("M-Flex") for MFS Technology Ltd ("MFS") where there was a conflict between the duties of the bidder board under company law and under the takeover code. The bidder, M-Flex, a Delaware company,[71] made a preconditional offer to acquire MFS, a Singapore company, and the offer was governed by the Singapore Code. After the announcement, the target announced disappointing results, and the M-Flex board believed that the target was not as profitable as it thought it was; the board thus withdrew its recommendation for the offer. However, the SIC refused to allow M-Flex to terminate the offer, and M-Flex proceeded to sue, among others, MFS in Delaware, arguing that it was inconsistent with its fiduciary duties to proceed with the offer. The matter was eventually settled without firm conclusion on this point, but it is a reminder of the difficulties that the bidder board may face in a conflict between its fiduciary duties and the takeover code.

70 United Kingdom, Code Committee of the Panel on Takeovers and Mergers, *Consultation Paper Issued by the Code Committee of the Panel: Conditions and Pre-conditions* (PCP 2004/4, 10 August 2004) at para 8.4, quoting *Budgens plc* PS 1989/14 (1 August 1989).

71 Section 159 of the Companies Act (Cap 50, 2006 Rev Ed) does not apply to Multi-Fineline Electronix, Inc, which is a foreign corporation.

B. Conflict between the takeover code and contract law

34 Waivable or protective conditions constitute some of the most difficult areas in takeover regulation, as they illustrate the tension between allowing the parties the freedom in setting the commercial terms of the takeover and ensuring market certainty. These are conditions which are capable of being waived and principally comprise negotiated or bespoke conditions (specifying the circumstances under which a party can terminate the offer or agreement), or generally worded material adverse change (MAC) clauses. Negotiated or bespoke conditions are not uncommon in takeover offers of publicly listed companies in the UK, Singapore and Hong Kong.[72]

35 The takeover codes in the UK, Singapore and Hong Kong reach the balance on negotiated or bespoke conditions in the following ways. First, conditions relating to financing are severely limited or prohibited.[73] Second, *bidder* protection conditions (that are waivable) cannot depend on the judgment of the bidder (as it would amount to giving the bidder the ability to refuse to proceed with the offer).[74] In the UK and Hong Kong, additionally, *offeree* protection conditions cannot depend on the judgment of the target.[75] Singapore allows for negotiated

72 See generally Wai Yee Wan, "Invoking Protective Conditions to Terminate Public Mergers and Acquisitions Transactions" [2011] JBL 64 (for UK), Wai Yee Wan, "UK-Style Takeover Regulation in Singapore" in *Comparative Takeover Regulation: Global and Asian Perspectives* (Umakanth Varottil & Wai Yee Wan eds) (Cambridge University Press, 2017) ch 13 (for Singapore) and para 38 below for Hong Kong. For negotiated or bespoke conditions, see generally United Kingdom, The Panel on Takeovers and Mergers, *Conditions and Pre-Conditions: Statement by the Code Committee of the Panel Following External Consultation Process of PCP 2004/4* (RS 2004/4, 25 April 2005) (which rejected the view that bespoke or negotiated conditions should be treated differently from widely standard drafted conditions). For recent examples of bespoke conditions in the UK, see Ricardo Silva and Marco Auletto's offer for Electric Word plc, announced on 27 June 2017, and Hailiang Group's offer for ASA Resource Group plc, announced on 12 July 2017, both cited in Practical Law for Companies, *Public M&A: Trends and Highlights 2017* (2018).

73 The City Code on Takeovers and Mergers (12th Ed, 2016) ("UK Code") rule 13.4; the Codes on Takeovers and Mergers and Share Buy-backs (July 2018) Practice Note 15. Associated prohibitions are also placed on conditions relating to the working capital of the enlarged group: UK Code, Practice Statement 11 of 2005 (Working Capital Requirements in Cash and Securities Exchange Offers); Practice Statement 10 of 2005 (Cash Offers Financed by the Issue of Offeror Securities). There is some relaxation for financing preconditions (as opposed to financing conditions): see rule 13.4 of the UK Code.

74 The City Code on Takeovers and Mergers (12th Ed, 2016) (UK) rule 13.1; the Codes on Takeovers and Mergers and Share Buy-backs (July 2018) rule 30.1.

75 The City Code on Takeovers and Mergers (12th Ed, 2016) (UK) rule 13.1; the Codes on Takeovers and Mergers and Share Buy-backs (July 2018) rule 30.1. See

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or bespoke conditions in a wider range of circumstances so long as they are objective in nature and do not depend on the judgment of the bidder.[76] Third, any decision to waive the condition to lapse the offer or terminate the transaction must require the consent of the takeover panel.[77]

36 However, what if the takeover panel and the court differ on whether the target may invoke the condition to terminate the offer? This may arise if the panel and the court take into account different factors in arriving at the decision. This is illustrated with bespoke or negotiated conditions. As a matter of contract law, the non-fulfilment of a bespoke or negotiated condition (for example, the consolidated net asset value of the company and its subsidiaries not being less than $100m) will ordinarily be a sufficient ground in itself to lapse the offer, unless the reduction in the net asset value is *de minimis*. However, the takeover codes in all of the three jurisdictions require that the circumstances giving rise to the right to lapse the offer must be material in the context of the offer.[78]

37 In a prior work, it has been argued that the risk of inconsistency between the applications of the provisions relating to bespoke conditions by the court (adjudicating on contract law) and by the takeover panel is very real.[79] While the most recent high-profile invocation of the condition in the UK was that in *WPP Group plc – Tempus Group plc*,[80] the situation has also arisen in Singapore,

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UK Panel on Takeovers and Mergers, *Consultation Paper: Offeree Protection Conditions* (PCP 15, 21 July 2003).

76 Singapore Code on Take-overs and Mergers (revised 24 January 2019) rule 15.1.

77 See n 70 above.

78 In the UK, Practice Statement No 5: Rule 13.5(a) – Invocation of Conditions (28 April 2004; amended 19 September 2011) at p 2 provides that:

> … [i]n considering whether a particular matter should give rise to the right to invoke a condition, it is the Executive's practice to take into account all relevant factors, including whether:
>
> - the condition was the subject of negotiation with the offeree company;
> - the condition was expressly drawn to offeree company shareholders' attention in the offer document or announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it; and
> - the condition was included to take account of the particular circumstances of the offeree company.

See rule 15.1, note 2 of Singapore Code on Take-overs and Mergers (revised 24 January 2019) and rule 30.1, note 2 of the Codes on Takeovers and Mergers and Share Buy-backs (July 2018).

79 See Wai Yee Wan, "UK-Style Takeover Regulation in Singapore" in *Comparative Takeover Regulation: Global and Asian Perspectives* (Umakanth Varottil & Wai Yee Wan eds) (Cambridge University Press, 2017) ch 13.

80 PS 2001/15 (6 November 2001). *Cf* Hailiang's offer for ASA Resource Group ("ASA") dated 12 July 2017 (UK), where there is an express insolvency condition

(*cont'd on the next page*)

Hong Kong and Australia, for example, in the Singapore case where Banta attempted to acquire Mentor Media and there was a specific bespoke condition precedent in the agreement that the net tangible asset value of the target should not fall below a specified amount. Banta argued that the condition was not met. However, the SIC ruled that Banta could not withdraw the offer, and Banta proceeded to sue Mentor Media in the High Court for a declaration that the termination of the agreement was valid. The matter was settled without proceeding to judgment.[81]

38 The ruling of the SIC also has a similar parallel to that of the HK Panel in China Gas's offer for Zhongyu Gas in 2010.[82] China Gas, through a wholly owned subsidiary, made an offer for Zhongyu Gas, and the major shareholders, holding approximately 48% of the shares, gave irrevocable undertakings to accept the offer. The offers were conditional upon, among other things, Zhongyu Gas shares remaining listed and traded on the stock exchange, save for any temporary suspension as a result of the offers and no indication being received from the Securities and Futures Commission and/or stock exchange that the listing of the shares was or was likely to be withdrawn.

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relating to the target and companies within its group: London Stock Exchange, "Cash Offer for ASA Resource Group plc" (RNS No 8119K) (12 July 2017) https://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/other/13291794.html (accessed 28 February 2019). After the offer was announced, ASA announced that it was "struggling to meet its ongoing liabilities" (London Stock Exchange, "ASA Resource Group plc: Suspension of Shares and Posting of Offer Document" (RNS No 4376M) (28 July 2017)) and on 16 August 2017, the bidder announced that the Takeover Panel Executive confirmed its ability to lapse the offer on the insolvency condition: London Stock Exchange, "Response to Appointment of Administrators by ASA Board: Extension of Offer" (RNS No 1263O) (16 August 2017). Ultimately, the bidder did not invoke the insolvency condition: London Stock Exchange, "Offer Unconditional in All Aspects" (RNS No 1447X) (21 November 2017). The announcements are found in: https://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/ASA/13311404.html; https://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/other/13331279.html; and https://asaresourcegroup.com/media-centre/regulatory-news/offer-unconditional-in-all-aspects (accessed 28 February 2019).

81 See Wai Yee Wan, "UK-Style Takeover Regulation in Singapore" in *Comparative Takeover Regulation: Global and Asian Perspectives* (Umakanth Varottil & Wai Yee Wan eds) (Cambridge University Press, 2017) ch 13.

82 Hong Kong, Takeovers and Mergers Panel, *Panel Decision: In relation to the review by the Takeovers and Mergers Panel of the Executive's ruling that it was not prepared to confirm that Rich Legend International Limited, a wholly-owned subsidiary of China Gas Holdings Limited ("China Gas") may invoke certain conditions in respect of the conditional voluntary general offers for all the outstanding shares, convertible bonds, and share options of Zhongyu Gas Holdings Limited under Note 2 to Rule 30.1 of the Code on Takeovers and Mergers and accordingly the Offeror should proceed with its Offers* (24 May 2010).

39 Shortly after the announcement of the offers, the senior managers of Zhongyu Gas, particularly those in some of its Chinese subsidiaries, were unhappy with the offers and made demands to improve their position. W, one of the major shareholders who provided the irrevocable undertaking to accept the offer and who was also the chairman of Zhongyu Gas, acceded to the requests by giving them *ex gratia* bonuses and cars. However, the senior managers made further demands which were refused by W. Subsequently, the senior managers retaliated by refusing assistance to Zhongyu Gas's auditors, with the result being the suspension of the audit. When Zhongyu Gas failed to publish its audited financial statements for the year ending 31 December 2009 within the time frame required by the Hong Kong Stock Exchange listing rules, trading in the shares of Zhongyu Gas was suspended.

40 China Gas applied to the HK Panel to withdraw the offer. W consented to the withdrawal. Under the HK Code,[83] which provisions then were similar to those in the UK and Singapore, any announced offer can only be withdrawn in a limited set of circumstances and then only with the consent of the HK Panel.[84] Consent was refused by the Takeover Executive and the HK Panel upheld the decision on 13 May 2010.[85] The HK Panel upheld an underlying principle to create conditions of the "greatest certainty practicable in the context of a takeover offer".[86] In this case, while Zhongyu Gas was in breach of the listing rules because it failed to publish its audited annual financial

83 The relevant provision is note 2 to rule 30.1 of the Codes on Takeovers and Mergers and Share Buy-backs (July 2018), which provides that an offeror should not invoke any condition, other than the acceptance condition, so as to cause the offer to lapse unless the circumstances which give rise to the right to invoke the condition are of material significance to the offeror in the context of the offer.

84 The Codes on Takeovers and Mergers and Share Buy-backs (July 2018) was recently amended in July 2018 to prohibit conditions that are dependent on the judgment by the target company.

85 See Takeovers and Mergers Panel, *Panel Decision: In relation to the review by the Takeovers and Mergers Panel of the Executive's ruling that it was not prepared to confirm that Rich Legend International Limited ("Offeror"), a wholly-owned subsidiary of China Gas Holdings Limited, may invoke certain conditions in respect of the conditional voluntary general offers for all of the outstanding shares, convertible bonds and share options of Zhongyu Gas Holdings Limited under note 2 to rule 30.1 of the Code on Takeovers and Mergers and accordingly the Offeror should proceed with its offers* (24 May 2010). The decision was announced on 13 May 2010, and the written grounds were dated 24 May 2010.

86 Takeovers and Mergers Panel, *Panel Decision: In relation to the review by the Takeovers and Mergers Panel of the Executive's ruling that it was not prepared to confirm that Rich Legend International Limited ("Offeror"), a wholly-owned subsidiary of China Gas Holdings Limited, may invoke certain conditions in respect of the conditional voluntary general offers for all of the outstanding shares, convertible bonds and share options of Zhongyu Gas Holdings Limited under note 2 to rule 30.1 of the Code on Takeovers and Mergers and accordingly the Offeror should proceed with its offers* (24 May 2010) at [21].

statements in the prescribed period, the HK Panel found that this was a matter which was capable of being rectified, and there was no indication that the listing was under threat and no action, apart from suspension, had been taken against it. Thus, China Gas failed to demonstrate that the listing was likely to be withdrawn permanently or that the suspension was of material significance in the context of the offer.

41 From a contract law perspective, the result may appear surprising. The offers expressly provide that the offers were conditional upon listing of Zhongyu Gas, save for a temporary suspension. Given that the shares had been suspended since March 2010 and remained suspended by the time of the hearing of the HK Panel in May 2010, and there was no certainty as to whether the senior managers would co-operate with the auditors to provide the requisite information for the audit to be completed and for the suspension lifted, it would appear harsh to compel China Gas to proceed with the offers. Further, it appeared that the board of Zhongyu Gas had ceased to have control of its major subsidiaries. According to the HK Panel, there was no risk of an immediate delisting of Zhongyu Gas because a company would normally delist only after a period of 18 months from the time that the securities exchange indicate that a delisting is likely. The message appeared to be that the existing board of Zhongyu Gas had not done enough and it was for the new board (if the takeover succeeded) to make further efforts to either get the senior managers to co-operate or remove them.[87]

42 In Australia, there are also parallel developments relating to the conflict between the parties' intentions and the takeover regulator's interests. In 2010, in *NGM Resources Ltd*,[88] Paladin Energy ("Paladin") announced a recommended bid for NGM Resources Ltd ("NGM"), where the bid was subject to a *force majeure* condition that no:

> … terrorism … or other event beyond the control of NGM or the relevant subsidiary occurs which affects or is likely to affect the assets, liabilities, financial position, performance, profitability or prospects of NGM or any of its subsidiaries.

In September 2010, seven employees of a French uranium company were abducted by terrorist forces in Niger. The town where the abductions occurred was some 150km from NGM's tenements and 240km from the closest town to NGM's tenements. Paladin sought to

87 Eventually, the board of Zhongyu Gas received the requisite confirmation that the senior managers of Zhongyu Gas would co-operate with the audit on 18 May 2010, and the audited financial statements were announced on 24 June 2010. See Zhongyu Gas Holdings Limited, *Result Announcement for the Year Ended 31 December 2009* (24 June 2010).

88 [2010] ATP 11.

invoke the *force majeure* condition, on the ground that the costs acts of terrorism are likely to affect to the assets, performance or prospects of NGM.

43 The Australian Panel denied that NGM could invoke the *force majeure* condition as NGM could not demonstrate that the events will "materially" affect its assets, performance or prospects. It has been argued by commentators that this effectively rewrote the contract between NGM and Paladin, which did not have a materiality qualification.[89] The Australian Panel explained that it implied the materiality qualification to the condition because of the general policy of certainty found in chapter 6 of the Corporations Act.

44 Thus, the effect of the above cases is that even when parties to the transaction have reached a commercial, negotiated agreement on what they consider to be material, break-away thresholds of the transaction, the agreement may be overridden by the takeover regulator. As argued in a previous work, the reasons are founded on market certainty and orderly conduct, and that takeovers which have been announced should be completed unless they fail for regulatory reasons or fail to garner the requisite acceptances.[90]

45 The problem is compounded by the fact that even if the court gives effect to the express terms of the contract, the bidder may nevertheless not receive any judicial remedy. If the bidder brings an action for a declaration that it is entitled to terminate the offer, the court may take the view that, irrespective of the bidder's legal position, the court still should not generally intervene in an ongoing takeover. Following *ex parte Datafin*, the courts will defer to the regulatory primacy of the takeover codes and the takeover panels, and will not suspend the bidder's obligations to complete the transaction in accordance with the timetable under the takeover codes. In such a case,

89 Tony Damian & Andrew Rich, *Schemes, Takeovers and Himalayan Peaks: The Use of Schemes of Arrangement to Effect Change of Control Transactions* (Sydney: Ross Parsons Centre of Commercial, Corporate and Taxation Law Monograph Series, 3rd Ed, 2013).

90 See Wai Yee Wan, "Invoking Protective Conditions to Terminate Public Mergers and Acquisitions Transactions" [2011] JBL 64. The principles are also affirmed in connection with the appeal of the ruling in respect of whether the offeror, CGNPC-URC, could reduce the offer price of Kalahari shares after it has made an indicative offer; the City Code on Takeovers and Mergers (12th Ed, 2016) allows the reduction only in "wholly exceptional" circumstances, and the UK Panel on Takeovers and Mergers ruled that integrity of the market requires there to be certainty and orderly conduct, which prevail over the apparent advantages in allowing the price reduction, even if the target board consents to such reduction: see *Kalahari Minerals plc (Reasons for the Hearings Committee's decision)* PS 2011/11 (25 May 2011).

while the bidder is not precluded from commencing litigation (as the no-frustration principle applies only to the target board), it is still bound to complete the transaction in accordance with such timetable. Thus, even if the matter is ultimately heard at trial and the court reaches a different substantive decision from the takeover panel, it will be too challenging for the bidder to restrain the acquisition. In such a case, any successful lawsuit by the bidder would be moot, and it would not derive any practical gain from it. The injunctive relief is in fact the real remedy sought by the bidder, such that the judicial failure to intervene would have substantive consequences, thus depriving the bidder of any real relief.

IV. Remedial orders of the takeover panels and the courts

46 Although the takeover panel is not tasked with considering the legal position of the parties to the takeover, the panel's remedial order or failure to grant relief in respect of contravention of the takeover code will often affect the participants' remedies at private law. The following provides illustrative examples.

47 First, in the Singapore *Jade Technologies* case, the bidder made a voluntary cash offer and despatched the offer document. However, the bidder was not able to complete the offer because it did not have sufficient resources to do so; its controlling shareholder deceived the financial adviser to give a cash confirmation. The bidder and its controlling shareholder were in clear breach of the Singapore Code for failing to take reasonable steps to be satisfied that the offer could be implemented in full.[91] The bidder applied to the SIC to withdraw the offer. The SIC allowed the bidder to *withdraw* the offer prior to the expiry of the offer period, and no relief was granted to the accepting shareholders or shareholders who have not yet accepted the offer, though this point was not expressly argued before the hearing committee.

48 As a matter of contract law, shareholders who have accepted the offer prior to the withdrawal should ordinarily be able to bring an action, in the courts, against the bidder on the grounds that they have a binding contract which was breached, and could theoretically demand compensation, being the difference between the offer price and the market value of their shares (when the offer was withdrawn), from the bidder. However, shareholders who have not yet accepted the offer prior

91 Singapore Code on Take-overs and Mergers (revised 24 January 2019) ("Singapore Code") General Principle 6. This should not ordinarily occur because the financial adviser has to confirm the availability of resources under rules 3.5 and 23.8 of the Singapore Code.

to the withdrawal would not have a contractual claim for compensation against the bidder since no contract would have been formed before the bidder withdrew the offer. As a matter of principle, it is by no means self-evident why such shareholders (who thought that they had until the date of expiry of the stated offer period to accept the offer) should not be entitled to any kind of relief from the bidder who breached General Principle 6 or rule 3.5; while the Singapore Code provides for specific cases where compensation is allowed, these are by no means exhaustive, and compensation may be possible in a wider set of circumstances.[92]

49 Second, in *Irish Distillers Group plc*,[93] discussed above, one of the institutional shareholders which gave the irrevocable undertaking to Pernod to accept the offer had commenced litigation in the Irish High Court on the basis that that it (the institutional shareholder) was not bound by the acceptance in question. The Irish High Court ruled that the undertaking (and the acceptance) were binding.[94] Subsequently, the UK Panel determined that Pernod had breached the UK Code in obtaining irrevocable undertakings from the shareholders of Irish Distillers to accept the offer because Pernod failed to provide adequate information. However, notwithstanding the breach, the UK Panel refused to grant relief to the accepting shareholders, including the institutional shareholders, from the obligation to tender the shares in accordance with the irrevocable undertaking. Had the UK Panel granted such relief, these shareholders could have been relieved from their irrevocable undertaking and could have accepted the rival bidder's higher offer afterwards.

50 This is not strictly a case of potential inconsistency between the decisions of the UK Panel and the Irish court since the subject matter of contention before the two adjudicating bodies had been different; the former was whether there had been a contravention of the takeover code and the latter was whether the irrevocable undertaking was binding as a matter of contract law. However, the failure by the UK Panel to grant relief meant that the wrongdoer could "escape with the profits of its wrongdoing".[95]

51 Third, in respect of disclosure failures in takeovers (that could not be rectified in time), compensation orders that may be made by a takeover panel to remedy the contravention are generally more attractive than the judicial remedies under general law. Under general

92 See para 11 above.
93 PS 1988/25 (17 November 1988). See para 14 above.
94 *Pernod Ricard Comrie plc v FII (Fyffes) plc* (1988) LEXIS Transcript No 8388p.
95 See Tony Shea, "Regulation of Takeovers in the United Kingdom" (1990) 16 Brooklyn J In'tl L 89 at 106.

law, the claimant has to show that the statements were made to the recipients and the recipients had relied on the statement.

52 The examples from UK illustrate this point. In UK, in *Service Corp International – Great Southern Group – Loewen Group Inc*,[96] the bidder made a no-increase statement but, as a result of an oversight, did not reserve the right to increase the bid should a competitive bid arise. The UK Panel accepted that it was a genuine mistake and allowed the bidder to increase its offer. The UK Panel was influenced by the bidder's decision to compensate shareholders who had sold their shares in the market after being misled by the press release.[97] This was an example of the UK Panel exercising its power to grant dispensation provided that shareholders were not prejudiced, which indirectly led to compensation being paid to the shareholders.

53 If similar matters had arisen in Singapore, breach of disclosure obligations by the bidder could result in compensation to the recipient shareholders in the law of tort (pursuant to misrepresentation) but only where the misrepresentation related to a fact (instead of the bidder's intention), and then only if the recipients had relied on said misrepresentation. There is the possibility of recovering statutory compensation under the Securities and Futures Act, but such compensation would be subject to a specified ceiling unless the claimant proves that he had relied on the misrepresentation.[98]

V. Implications and analysis

54 The author's analysis in the preceding sections raises the following issues. First, if the matters are effectively disposed at proceedings before the takeover panel, while tactical litigation is reduced, it raises the question of whether the takeover framework is intended to make the takeover panel the main (or even only) forum for resolving disputes during the bid. In other words, is it desirable to effectively foreclose the right of the market participants to bring actions *ex post* takeovers? Second, if it is *not* desired to foreclose the right of market participants to bring actions, how can the right of such parties

96 PS 1994/8 (10 August 1994).

97 *Cf CALA plc – Dotterel Ltd – Miller 1999 plc* PS 1999/8 (28 May 1999), where the UK Panel on Takeovers and Mergers refused to allow the bidder to increase the offer, holding that it was bound by the "no-increase statement".

98 See generally ss 234 and 236 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) and discussion in Wai Yee Wan, "Enforcement of the Takeover Code and Market Misconduct in the Course of Takeovers" in Wai Yee Wan & Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (Singapore: LexisNexis, 2013) at paras 16.113–16.115.

be preserved without undermining the objectives of ensuring that disputes are resolved quickly and conclusively without undue disruption to the market? This article considers the suitability of importing the partial solution in Australia in the form of s 659B of the Corporations Act 2001, which makes the Australian Panel the only forum for solving disputes when the bid is under way.

A. Making the takeover panels the de facto forum for resolving takeover disputes?

55 Due to the time-sensitive nature of a takeover, there are several documented advantages in a model of takeover regulation that reaches decisions speedily and conclusively.[99] Further, in certain matters involving determination of concert party relations (such as that in Guinness's takeover of Distillers in late 1980s),[100] a specialist takeover panel is better placed than the court to make such determination. Certainly, tactical litigation, with the intention of frustrating or hampering a *bona fide* unwelcome bid, is usually motivated by management self-interest in entrenchment and is rarely beneficial to the market for corporate control.

56 However, the question that arises is whether all litigation in general, and not merely tactical litigation that hampers or frustrates a bid, is undesirable under takeover conditions. This is a real issue; due to the high financial stakes involved, the real remedy that the bidder board seeks is a declaratory relief in the court so as to avoid the obligation to complete the offer if the events occur such that it is no longer commercially viable to proceed (see, for example, the cases involving Mentor Media and Zhongyu Gas, outlined above). However, takeover panels are also concerned with ensuring certainty and predictability in the markets. The implicit view is that takeover offers, once announced, should always be completed and may only fail for regulatory reasons or failure to receive sufficient acceptances. This is regarded as sufficiently important to override the parties' carefully negotiated bespoke conditions.

57 It could be argued that there are good reasons for takeover panels to be *de facto* forums for resolving disputes. Takeover panels, whose panel members are drawn from the investment and finance

99 See generally John Armour & David Skeel, "Who Writes the Rules for Hostile Takeovers and Why? The Peculiar Diverge of US and UK Takeover Regulation" (2007) 95 Geo LJ 1727; John Coffee, Jr, "Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance" (1984) 84(5) Colum L Rev 1251.

100 *R v Panel on Takeovers and Mergers, ex parte Guinness plc* [1990] 1 QB 146.

communities, will have the necessary expertise and are well placed to make such decisions. The takeover codes are statements of what is regarded as good commercial practice, and the takeover panels generally consult with market players before effecting changes.[101] In contrast, the courts are not able to do so and can only make their decision based on the case brought forward by the parties. In Australia, prior to the amendments to the Corporations Act 2001, scholars have criticised the court in the *Glencore International AG v Takeover Panel*[102] for reaching a decision, on whether a cash-settled equity swap amounts to an interest in the share and are therefore disclosable under the substantial shareholding requirements under company law, based on strict legal principles that are different from the takeover regulator, whose decisions were based more on common sense and in line with commercial reality.[103]

58 However, the policy reasons behind the drastic measure to deny the parties the ability to seek effective relief in the courts are not persuasive. In particular, outside of the narrow situation involving tactical litigation to enjoin hostile bids, this article argues that the policy arguments do not apply with the same force to other areas such as *bidder* directors' duties and enforcing contractual rights. It should be noted that allowing the parties to litigate their rights in the court does not always mean that the matter would proceed to trial for the result as disputes are frequently settled before the final hearing or judgment. However, a party's negotiating position will be considerably weakened (and consequently its private rights diminished) if it is not even able to obtain an effective remedy in the court. Further, the jurisprudence on fiduciary duties will be weakened if the matters are decided solely before takeover panels, which will prioritise market certainty and orderliness.

B. The case for clearer delineation of the powers and jurisdiction of the takeover panel and the courts?

59 Having argued in the preceding section that the policy reasons to enjoin litigation in takeover disputes and to require them to be resolved solely before the takeover panels are not strong, the remaining question is what should be done. This problem is exacerbated by the

101 *Eg*, David Kershaw, *Principles of Takeover Regulation* (Oxford University Press, 2016). For Singapore and Hong Kong, the consultation papers issued by the Securities Industry Council and Hong Kong Takeovers and Mergers Panel are found in http://www.mas.gov.sg/sic and https://www.sfc.hk/web/EN/regulatory-functions/listings-and-takeovers/takeovers-and-mergers/ (accessed November 2018) respectively.

102 (2006) 56 ACSR 753.

103 See Geoffrey Morse, "Regulating Takeovers: The Regulators and the Courts – *Quis Custodiet Ipsos Custodes*?" (2007) 22 NZULR 622.

wide-ranging remedial orders of takeover panels. For example, even the primary securities regulator in Singapore, the Monetary Authority of Singapore ("MAS"), has no jurisdiction to grant compensation orders in the way that the SIC has, nor does it have jurisdiction to apply to the court for orders to compensate people affected by contravention of the market misconduct provisions of the Securities and Futures Act. Instead, persons affected by market misconduct will have to apply to court themselves to seek civil compensation orders against the persons who have contravened the Securities and Futures Act.[104] In practice, there are significant obstacles to the recovery of such civil compensation by investors, which are documented elsewhere, including collective action problems and the statutory caps on recovery in certain cases.[105] In contrast, under the Singapore Code regime, the SIC carries out the investigation and makes remedial orders, which may include ordering the parties to compensate the losses likely incurred by the investors. As such, an investor is treated more favourably under the Singapore Code and is likely to favour this route.

60 In theory, the takeover panel will not deal with questions of private law, such as whether a party is in breach of contract or any other obligation imposed under general law. The takeover panel should also not deal with cases involving minority shareholder oppression, which is a matter of company law. However, there is much potential for overlapping jurisdictions between the takeover regulator and the courts in regulating takeover offers. As set out in above,[106] the takeover panels have expanded their jurisdiction and have intervened in matters which will affect the obligations of the boards of bidders to their companies and/or shareholders, and which are not confined to the no-frustration rule. In the interests of promoting certainty and predictability, they have sought to intervene in matters which may potentially conflict with the parties' contractual obligations and duties under the company law. It is shown above[107] that, while the remedial aims of the takeover regulator and the courts are theoretically different, the availability of relief (or lack thereof) will have substantive implications for the parties in their private law claims.

61 Further, there are residual provisions in the takeover codes that relate to the conduct of boards and the shareholders as a whole. For example, the Singapore and HK codes each contains a general

104 Securities and Futures Act (Cap 289, 2006 Rev Ed) ss 234 and 236.

105 See discussion in Wai Yee Wan, "Enforcement of the Takeover Code and Market Misconduct in the Course of Takeovers" in Wai Yee Wan & Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (Singapore: LexisNexis, 2013) ch 16.

106 See paras 26–45 above.

107 See paras 46–53 above.

principle, which is no longer found in the UK Code, that "rights of control must be exercised in good faith and oppression of minority is wholly unacceptable".[108] The question is therefore whether the SIC or the HK Panel may, in the future, purport to assert jurisdiction over shareholder protection issues and thereby pre-empt the courts' determination. Currently, this does not appear likely since none of the detailed rules in the Singapore Code or HK Code have been tied to this principle of unacceptable minority oppression. However, this lack of certainty in the jurisdictional framework is undesirable.

62 It is submitted that there needs to be careful consideration as to which body should resolve substantive disputes in takeovers in the case of overlapping jurisdictions. While it is desirable to proceed in a manner that continues to allow, for the most part, speedy and conclusive decisions without undermining market certainty, this article argues that the outcome has to be one that will not effectively foreclose a market participant's right to seek legal recourse. It acknowledges that some disputes are better left exclusively to the purview of takeover panels. For example, for disputes concerning the procedural aspects of takeovers, such as the provision of adequate and non-misleading disclosures by boards of targets and bidders, the starting point is that they are much better dealt with by the takeover panels. The remedy for inadequate disclosures is typically compelling the offending party to correct the takeover disclosures and/or to extend time to allow the shareholders to consider the new information.[109] In the UK, breach of disclosure obligations under the UK Code is explicitly stated not to be a basis for applying for private law action.[110]

63 Where the dispute resolution relates to substantive terms of agreements entered into by the parties to the bid or shareholders, the author turns to a jurisdiction which has explicitly considered this point. In Australia, the solution is found in ss 659B(1) and 659C of the Australian Corporations Act 2001. Section 659B(1) prohibits the commencement of proceedings in "relation to a takeover bid or proposed takeover bid, before the end of the bid period", unless the proceedings are brought by the Australian Securities and Investment

108 Singapore Code on Take-overs and Mergers (revised 24 January 2019) General Principle 4; The Codes on Takeovers and Mergers and Share Buy-backs (July 2018) (Hong Kong) General Principle 7.

109 For a discussion on disputes relating to disclosures of information in the Australian context, see Ian Ramsay, "Takeover Dispute Resolution in Australia and the United States – Takeovers Panel or Courts" (2015) 33 C&SLJ 341.

110 Companies Act 2006 (c 46) (UK) s 956. See also David Kershaw, "The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition (2007) 56 ICLQ 267.

Commission, a minister or government authority.[111] When the application is made to the court after the bid period is over, even where the panel declines to make a finding of unacceptable circumstances (and the court subsequently finds that the behaviour of the participant contravenes the Corporations Act), there are limited powers of the court to impose remedies.[112] When the court is hearing the dispute, the panel generally will not intervene.[113] Thus, primacy is given to takeover regulators by prohibiting the market participants' bringing of court proceedings while the bid is in force and limiting the powers of the court post-bid. In contrast, due to Australian constitutional law, judicial review proceedings challenging the Australian Panel decision can be brought at any time during the bid (and not only after the bid).[114]

64 The practical operation of the provisions, however, is not so straightforward. The Australian courts have construed s 659B narrowly; in *Lionsgate Australia v Macquarie Private Portfolio Management*,[115] where the court considered the issue of whether a bidder may seek specific performance of a substantial shareholder's contractual promise to sell into the bid prior to the expiry of the bid period, Austin J took a very restrictive reading of the provision, holding that the provision does not prevent enforcement of a contractual right as opposed to an action taken as part of, or for the purposes of, the bid.[116]

65 The converse of non-interference by takeover panels of court orders is also true in Australia; Australian takeover jurisprudence establishes that a remedial order made by the takeover panel for breach of the takeover code is not intended to affect the existing legal rights of the parties. In *Rinker Group Ltd*,[117] it was held that:[118]

111 Corporations Act 2001 (Cth) s 659B. In the case of the scheme of arrangement, while the Australian Takeover Panel ("Australian Panel") has powers to declare unacceptable circumstances under s 657A(2)(a) of the Australian Corporations Act 2001, the Australian Panel will generally not intervene: see Australian Government, Takeovers Panel, Guidance Note 1 – Unacceptable Circumstances at para 18. See Robert P Austin, "The Courts and the Panel" in *The Takeovers Panel after 10 Years* (Jennifer Hill & Robert P Austin eds) Session 5. See also Ian Ramsay, "Takeover Dispute Resolution in Australia and the United States – Takeovers Panel or Courts" (2015) 33 C&SLJ 341.

112 Corporations Act 2001 (Cth) s 659C.

113 *Re Taipan Resources NL (No 2)* (2000) 36 ACSR 704 at 709–710. I am indebted to Dr Emma Armson for drawing the decision to my attention.

114 Australian Constitution s 75(v). See Ian Ramsay, "Takeover Dispute Resolution in Australia and the United States – Takeovers Panel or Courts" (2015) 33 C&SLJ 341.

115 [2007] NSWSC 318.

116 See Rodd Levy, *Takeovers Law and Strategy* (Thomson Reuters, 4th Ed, 2012) ch 21.

117 [2007] ATP 17; [2007] ATP 19.

118 *Rinker Group Ltd* [2007] ATP 19 at [123]–[124].

> The Panel's orders are not intended to 'compensate' as a court might do at law. Rather, in this case, they are appropriate to protect the rights or interests of affected persons, noting that it is not feasible to 'restore any disadvantaged parties to the position they would have been in had the unacceptable circumstances not occurred': Guidance Note 4 at [4.13]. Possible orders available on, say, 8 May, included a payment order to sellers, holding CEMEX to its best and final statement, or returning to sellers an equivalent number of shares (each possibility assuming there would be no unfair prejudice) …
>
> The review Panel disagrees with CEMEX that the concept of new rights is no different in form or substance to rights enforced by a court. The Panel is directed by section 657A(3) to have regard to (among other things) the policy of the takeovers chapter as set out in section 602 when exercising its powers, including its order powers. This goes beyond what a court would consider. Also, any order can only be made if the Panel makes a declaration as the foundation. A declaration takes into account policy and other considerations. The review Panel therefore considers that its orders create new rights. Moreover, orders the Panel may make in appropriate circumstances can extend to orders so that a takeover proceeds as it would have if the unacceptable circumstances had not occurred. Although not ordered in this case, such an order does not necessarily align with enforcing or adjudicating pre-existing rights either. Lastly, the Panel notes that orders can protect rights or interests of persons not parties to the application.

66 Thus, while Australian position purports to delineate the jurisdictions of the panel and the courts by the timing in which the actions are brought (whether during or post-bid), there remains some areas of ambiguities: for example, during the life of a bid, a party may still bring enforcement actions in the court for orders that do not relate to the bid. The difficulty is that the line between the two is not clear; the effect of a court order to take certain actions or to forestall certain actions may impact the outcome of the bid, even if it is not the action that directly advances or frustrates the bid. Likewise, this article has demonstrated that orders made by takeover panels can have substantive impact on the legal rights of the parties. This problem is compounded by the fact that panels and courts may have different views on the resolution of the disputes as they are motivated by different factors.

67 In view of these difficulties, it is argued that the delineation of the jurisdictions cannot be solely determined on whether the actions are brought during or after the bid. Instead, in an action brought by the party to the bid or a market participant, the decision by either the panel or court to make an order (or not to make an order) should centre on whether the effect of making an order will effectively foreclose the party's remedies pursuant to the other dispute resolution body. Undertakings may be required by the party making the application to

ensure that the parties' rights are preserved. It is important to appreciate the challenges that the order made by the court or panel can affect the outcome of the remedy sought by the party in the other dispute resolution body.

VI. Conclusion

68 Takeover bids take place against the background of substantive private law obligations that the participants of the takeover bid (including the shareholders, boards, bidder and target) are subject to. Takeover regulators are specifically entrusted with the regulation of public takeovers, and there are many documented advantages in having specialist bodies which have the commercial and securities market expertise to determine disputes speedily and with certainty. This is beneficial not only for the parties but also for the investors. The traditional role of the courts has been to defer to the decisions of the takeover regulator and to intervene only in exceptional cases.

69 However, the more recent developments show that the takeover regulators have prioritised certainty and predictability in the market and in so doing, taken a more expansive view of their roles and jurisdictions, apart from regulating the processes and the enforcement of the no-frustration rule. In so doing, there will be an increase in conflicts that arise between the takeover codes and the substantive private law governing the relationships among the participants. The remedies that are ordered by the takeover panel will also have an impact on the substantive obligations of the parties. This article has sought to demonstrate that there needs to be more robust debate on the correct balance as to the proper role of the regulator and the courts in this area. Australia has tried to reach the balance by disallowing private market participants to mount court challenges during the life of the bid. As shown in this article, this approach is not without difficulties. The better approach is for the panel or the court to appreciate that the orders that they make will affect the parties' ability to seek remedies in the other takeover dispute resolution body.