

Takeover Makeover

The need to revamp the Securities (Takeover) Rules 2010

WITH the objective of further strengthening the position of Mauritius as a specialist regional International Financial Centre ("IFC"), the Financial Services Commission (the "FSC") has recently issued a blueprint. One of the areas where opportunities have been identified is in the field of international capital markets.

The Stock Exchange of Mauritius (the "SEM") has played its part by introducing innovative products and services. For instance, the SEM is one of the only exchanges in Africa to possess a multi-currency listing and trading technology platform, which is also open for dual-currency trading and can list, trade and settle equity and debt products in USD, EUR, GBP and ZAR besides the local currency MUR.

Despite all the above advantages and following issues encountered recently on some local and international transactions, we are of the view that in order to be a leading IFC in the region, it is crucial that our Securities (Takeover) Rules 2010 ("STOR 2010") be revised in order to be in line with international best practices while at the same time taking into account the specificities of our local market.

The STOR 2010 apply where there is an offer in respect of the shares of a company who is a reporting issuer and this would include domestic and global business companies listed on the SEM.

The areas where we feel that the STOR 2010 need to be reviewed include the following:

Stake Building – "creeping rules"

Our STOR 2010 do not contain any "creeping rules" which means that if a company holds between 30% and 50% voting shares in a listed company and that it acquires only one (1) additional share, then based on rule 33 of the STOR 2010, a mandatory offer will be triggered. This situation does not seem reasonable and we should introduce "creeping rules" as it is the case in most reputable jurisdictions. For instance, in India a mandatory offer must be made if after reaching 25%, additional acquisition in a financial year exceeds 5%. In Mauritius, the crucial question will be to determine

the maximum creeping percentage per 12 month period taking into account the size and peculiarities of the Mauritian stock market.

Partial Offers

Another way to facilitate corporate restructuring and boost M&A transactions in Mauritius would be to introduce partial offers (which exist in numerous jurisdictions, including the United Kingdom, Singapore and Hong Kong) on target companies. A partial offer can be defined as a voluntary, conditional offer made by an offeror for the acquisition of less than 100% but more than 50% of the voting shares of an offeree. This would allow entities wishing, for example, to acquire only 55% of the voting shares of a target company to avoid making a mandatory offer by receiving irrevocable undertakings from the shareholders of the offeree that they will not sell beyond a certain percentage of their shares which could result in the offeror having to buy more than the said threshold of 55%.

Whitewash Procedure

The STOR 2010 could also be aligned on the United Kingdom and Singapore Takeover Codes and allow whitewash transactions. A whitewash transaction is relevant when an issue of securities as consideration for an acquisition would otherwise result in the of-

feror having to make a mandatory offer under the STOR 2010. In such a case, the FSC may waive the obligation to make a mandatory offer on the condition that a majority of the independent shareholders of the offeree (i.e. shareholders who are not involved in, or interested in the transaction in question) present at a general meeting approve, on a poll, a separate resolution (typically referred to as a "whitewash" resolution) waiving their rights to receive a takeover offer.

Acting in concert

In addition to the above matters, it is crucial that the terms "acting in concert", which is fundamental to the application of the STOR 2010, be subject to guidelines which would once again take into account the size, historical background and structure of our economy.

Conclusion

The requirement for guidelines is also pertinent in respect of the STOR 2010 in general. There are currently no guidelines at all on the STOR 2010 to guide investors and the market in general on questions such as upstream acquisitions, exemptions, scheme of arrangements or lock-up agreements. Other financial centres all have hundreds of pages of guidelines on their takeover rules or codes.

Certainty as to the application of the rules is an essential element for local and international investors. We hope that these deficiencies will be cured when the recently announced takeover panel will at last be established. On that point, when reviewing our takeover rules, it would be sensible to consider whether a permanent takeover panel should be established contrarily to what is currently provided under the STOR 2010 which only caters for an ad-hoc panel.

To conclude, we have on several occasions inspired ourselves from New Zealand laws and in order to position Mauritius as an IFC, it is essential that regulators inspire themselves from the motto of the New Zealand takeover panel which reads as follows: "clarity, certainty and fairness".



NICOLAS RICHARD

(Managing Partner)



BHAVISH SEWRAZ

(Associate-Barrister at Juristconsult Chambers)

**IT IS CRUCIAL
THAT STOR
2010 BE
REVISED IN
ORDER TO BE
IN LINE WITH
INTERNATIONAL
BEST PRACTICES**