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Appealing Appraisal Actions: New Judgments from the Cayman Courts
提出估值诉讼：开曼群岛法院的新判决

A well-known and now widely used part of local legislation, Section 238(8) of the Cayman Islands *Companies Law* (the "Companies Law"), entitles a shareholder who dissents from a merger or consolidation of a Cayman company under the statutory merger provisions contained in Part XVI of the Companies Law to be paid "the fair value of his shares". Disputes about how to determine "fair value", both in terms of procedure and calculation methodology, have been voluminous over the past eighteen months or so, and have resulted in a sharp increase in the number of fair value appraisal actions before the Grand Court of the Cayman Islands (the "Grand Court").

开曼群岛公司法（下称"《公司法》"）第238(8)条是开曼群岛当地著名且广泛应用的法规，其中规定若股东对根据《公司法》第XVI部所载的法定兼并条款兼并或合并一间开曼群岛公司持反对意见，则该股东有权获偿付相当于"其所持股份之公允价值"的款项。在过去18个月左右，有关确定"公允价值"之评估程序和计算方法的争议繁多，令开曼群岛大法院（下称"大法院"）接获的公允价值评估诉讼案大幅增加。

Flowing from that litigation, and adding to the growing jurisprudence on this front, the Cayman Islands Court of Appeal (the "CICA") has recently released a number of highly anticipated decisions concerning various interlocutory issues arising in the course of litigation of this nature. The most important of the judgments released so far and discussed in brief below, analyse the contentious issues of: (1) interim payments to and injunctions by dissenting shareholders (referred to generally below as "Dissenters") pending the outcome of the appraisal litigation; (2) discovery of documents by Dissenters; and (3) the application of a "minority discount" to the value of the Dissenters' share price.

面对这类诉讼，加上日益增多的相关判例，开曼群岛上诉法院（下称"CICA"）最近就此类诉讼过程中的众多非正审事项公布了一系列广受关注的决定。截至目前为止已公布并在下文简要讨论的若干重要判决，就以下争议事项进行了分析：(1) 在估值结果公布前向异议股东（以下合称为"异议股东"）支付临时款项和异议股东申请的禁令；(2) 异议股东的文件披露；及(3) 对异议股东的股票价值实行"少数股权折让"。

Section 238 of the Companies Law

As is now widely accepted, in an appraisal action commenced by petition under Section 238 of the Companies Law, the sole purpose of the action is for the Court to determine the fair value of the shares of the shareholders who have dissented to the merger of two companies, together with a fair rate of interest to be paid by the company to the Dissenters. However, this type of action differs from litigation in the normal

《公司法》第 238 条

现在普遍认为，根据《公司法》第238条以呈请的方式提出估值诉讼的唯一目的是让法院决定反对两间公司进行兼并的股东所持股份的公允价值，及公司须向异议股东支付的适当利率。但这类诉讼不同于一般诉讼，因为这类诉讼不存在原告和被告，且双方均无举证责任，以证明各自的指称。但双方需要就争议的价值进行举证，最终由法院决定公允价值。理论上，整个过程应是简单

course in that there is no plaintiff and no defendant, and there is no burden of proof on one party or the other to prove the allegations they make. Instead each party bears the burden of proving the value for which it contends, and relies on the Court to finally determine the fair value. In theory, the process should be a straightforward and non-contentious valuation exercise with reference to the necessary financial and business information. However, as has been shown in the following judgments, various interlocutory issues inevitably arise as to the various rights and entitlements of the parties involved, and the proceedings can quickly veer into contentious territory.

且无争议的估值程序，会参考必要的财务和商业资料。然而，正如以下判决所示，很难避免出现有关双方各项权利和利益的非正审问题，使诉讼很快陷入争议。

Provisions for Payments to Dissenters

In *In the matter of Trina Solar Limited*[1], the Grand Court had at first instance refused an interlocutory application made by a group of Dissenters for worldwide freezing orders over the assets of the company in question pending the outcome of statutory fair value appraisal proceedings. The Dissenters had applied to the Grand Court because the company had agreed to transfer many of its assets in its subsidiaries to other companies in China, ostensibly to progress the company's post-merger restructuring. While the Dissenters had received an interim payment from the company following a separate application to the Grand Court, the Dissenters argued that the company's actions would have the effect of significantly reducing the assets of the company so that it would ultimately be impossible for the company to satisfy in full any judgment of the Grand Court following the substantive trial. The Grand Court declined to grant the injunction.

向异议股东付款的规定

在*Trina Solar Limited*[1] 一案中，大法院在初审时拒绝了一组异议股东在法定公允价值评估结果公布前对相关公司资产提出的全球冻结令的非正审申请。异议股东向大法院提出申请，是因为公司已同意将其子公司的诸多资产转让予位于中国的其他公司，表面上是为推进公司兼并后的重组。虽然异议股东在向大法院单另提出一项申请后已经收到了公司支付的临时款项，但异议股东认为，公司的行为将大幅减少公司的资产，从而导致公司最终在实质判决后无法全额支付大法院判决的金额。大法院拒绝发出禁令。

Unhappy with the Grand Court's decision, the Dissenters took their case on to the CICA which, while finding that the Dissenters had crossed the "jurisdictional threshold" so as to be entitled to ask for the grant of an injunction on the terms they had sought, determined that the company's evidence had proved the transactions in question were not undertaken for less than proper consideration or on terms that were prejudicial to the company. Further, the fact that the company had made a provision for payment to the Dissenters, based on a realistic assessment of the company's liability to the Dissenters, was enough to avoid the need for an injunction. The CICA held that the provision made by the company did not need to be for the full amount claimed by the Dissenters with reference to their expert advice, but a "reasonable and prudent provision" made

由于不满大法院的决定，异议股东将案件呈交予CICA。CICA认为，虽然异议股东已超过"管辖权的门槛"，有权申请按其要求授出禁令，但公司提供的证据可证明争议中的交易并未以低于适当代价或者对公司不利的条款进行。此外，公司已根据对欠付股东债务的实际评估就向异议股东的付款进行拨备，这一事实足以使公司避免遭受禁令。CICA认为，公司无需按异议股东参考专家建议后申索的全部金额进行等额拨备，而是应该在听取法律和估值顾问的建议，并在公司"对诉讼风险形成平衡和谨慎的观点"后进行"合理且审慎的拨备"。CICA未授出禁令，但该决定仍然有助于指导面临相似诉讼的公司。

[1] CICA 26 of 2017 (unreported, 9 February 2018)
2017 年 CICA 26（未报道，2018 年 2 月 9 日）

after taking advice from legal and valuation advisers and with the company "forming a balanced and cautious view of the risks of the litigation". No injunction was granted by the CICA, but the decision remains a helpful guide to companies facing similar litigation.

Minority Discount

The separate question of whether a minority discount should be applied to the Dissenters' shares in the course of the valuation exercise was one of the issues considered in the decision of *In the matter of Shanda Games Limited*[2] ("Shanda"). The decision in *Shanda* is particularly interesting because the CICA has moved away from earlier local authority and seemingly altered the landscape against which fair value of the Dissenters shares is to be properly assessed in the future.

At first instance in *Shanda*, it was the view of the company that a minority discount should be applied to the Dissenters' shares, on the basis that the shares to be valued constituted a very small minority of the total shares in the company and such a discount would be applied in any market-based sale of the company's shares. However, the Grand Court had determined that a minority discount should not apply in assessing the fair value of the shares of Dissenters, on the basis that it was the Dissenters' proportionate interest in the company considered as a whole that was being valued. This was a decision consistent with the position taken by the Courts in Delaware and Canada (where the equivalent merger appraisal regimes operate) and indeed with prior local authority such as the decision of Jones J in *In the Matter of Integra Group*.[3]

However, reversing the decision of the trial judge in *Shanda*, the CICA agreed with the company and held that certain English authorities (which permit a minority discount to be applied in other contexts[4]) should be applied in the context of a Section 238 appraisal action. In essence, the CICA held that the legislative intent in enacting Section 238 was that it should be construed alongside and according to the same principles as the provisions already contained in Sections 86, 87 and 88 of the Companies Law (dealing

少数股权折让

另一个问题是关于是否应当在估值过程中对异议股东的股份进行少数股权折让，*Shanda Games Limited*[2]（下称"Shanda"）一案的判决就涉及这个问题。*Shanda*一案的有趣之处在于，CICA的判决和早前的地方判例出现了分歧，这似乎改变了未来妥善评估异议股东股份之公允价值的依据。

在*Shanda*案的一审中，公司认为应当对异议股东的股份价值进行少数股权折让，因为待评估的股份在公司股份总数中的占比很小，且在任何市场出售公司股份时都会进行折价。然而，大法院认为，在评估异议股东股票的公允价值时不应进行少数股权折让，因为异议股东在公司中按比例持有的权益是作为一个整体进行评估的。这与特拉华州和加拿大（这些地方采用同等的企业兼并估值制度）法院的立场一致，也符合当地以往的判例，例如Jones法官在*Integra Group* 一案中的决定。[3]

然而，CICA推翻了*Shanda*一案的初审判决，CICA认同公司的观点，并且认为在根据公司法第238条提出的估值诉讼中可沿用某些英国判例的做法（这些判例允许在一些情况下应用少数股权折让[4]）。CICA认为，根据第238条法规的立法目的，该条法规应连同并根据《公司法》第86、87和88条（有关收购和挤出式合并的条款）所适用的相同原则进行解读，因为它们是实现同一商业目标的三种方法。另外，由于有英国判例判定在收购协议安排和法定挤出式合并中应用少数股权折让，因此立

[2] CICA 13 of 2017 (unreported, 9 March 2018)
2017 年 CICA 13（未报道，2018 年 3 月 9 日）

[3] [2016] 1 CILR 192
[2016] 1 CILR 192

[4] See for example *Re Grierson, Oldham & Adams Ltd* [1968] Ch 17, *Irvine -v- Irvine (No 2)* [2007] 1 BCLC 445, *Golar LNG Ltd -v- World Nordic SE* [2011] Bda L R 9, and *Olive Group Capital Limited -v- Mayhew* [2016] ECSCJ No 167, as cited by the Honourable Judges.
例如法官援引的 *Re Grierson*、*Oldham & Adams Ltd* [1968] Ch 17、*Irvine-v-Irvine (No 2)* [2007] 1 BCLC 445、*Golar LNG Lt-v-World Nordic SE* [2011] Bda L R 9 以及 *Olive Group Capital Limited-v-Mayhew* [2016] ECSCJ No 167 等案例。

with takeovers and squeeze-outs), because they are simply three ways of achieving the same commercial objective. And, as there are English authorities which hold that a minority discount could be applied in a takeover scheme of arrangement and in a statutory squeeze-out, it follows that when enacting Section 238 the legislature cannot have intended that the situation should be different from that which already existed. The Judgment therefore confirms that a minority discount should now be applied to Dissenters' shares in appraisal actions before the courts of the Cayman Islands.

法机关在颁布第238条法规时无法完全忽略先前的判例。因此，判决确认在向开曼群岛法院提出的估值诉讼中应对异议股东持有的股票进行少数股权折让。

Dissenter Discovery

Finally, in *In the matter of Qunar Cayman Islands Ltd*[5]the Court was required to determine, among other things, the scope of discovery in a Section 238 action and in particular whether the Dissenters ought to give discovery. In that case, the company had also been the subject of a 'take private' transaction resulting in a merger but four groups of Dissenters had dissented and commenced the statutory appraisal process. In the course of the proceedings, the company made an application for discovery by the Dissenters, notwithstanding that the Grand Court had already ruled on this question in *In the matter of Homeinns Hotel Group* where the same application had been dismissed.[6] In advancing its case, the company relied upon a Delaware decision known as *In Re Appraisal of Dole Foods Company,Inc.* ("Dole")[7] in which the Dissenters had been ordered to give discovery. At first instance, the Grand Court noted that while it would take into account and pay close attention to the decision of the courts in Delaware, given the similarity of the jurisprudence and statutory merger provisions, the *Dole* decision was of '*little assistance in relation to procedural matters such as discovery where the Delaware jurisdiction is so different*'. The Grand Court ultimately decided in favour of the Dissenters, who had resisted discovery on the basis that the Dissenters' internal analyses of share price were not relevant and it was therefore not appropriate for Dissenters to provide discovery of their documents.

异议股东的信息披露

最后，在*Qunar Cayman Islands Ltd*[5] 一案中，法院需决定（其中包括）根据公司法第238条提出之诉讼的披露范围，特别是异议股东是否应当进行信息披露。在该案中，公司也是一起"私有化"交易的对象，其中涉及公司兼并，但四组异议股东反对交易，并且启动了法定估值程序。在诉讼过程中，公司申请让异议股东进行信息披露，尽管大法院已在 *Homeinns Hotel Group* 一案中对同一问题做出裁定，驳回了有关申请。[6]在案件进展过程中，公司依据的是特拉华州对*Re Appraisal of Dole Foods Company,Inc.*（下称"Dole"）一案[7]的判决，判决要求异议股东进行信息披露。一审过程中，大法院提到，尽管会考虑和特别关注特拉华州法院的判决（因为两个案件的法律体系和法定兼并条款十分相似），但Dole一案的判决"*在信息披露等程序性问题上的参考作用不大，因为特拉华州与开曼群岛的管辖权差异很大*"。大法院最终做出了有利于异议股东的判决，异议股东反对信息披露的依据是彼等对股票价格的内部分析与案件无关，因此不应要求其披露相关文件。

However, the CICA disagreed. Noting that the question of fair value is closely related to the question of what a

但是，CICA并不认同。CICA指出，公允价值的问题与公司股份的潜在买卖双方如何进行交易密切相关，因此

[5] CICA 24 of 2017 (unreported, 10 April 2018)
2017 年 CICA 24（未报道，2018 年 4 月 10 日）

[6] [2017] 1 CILR 206
[2017] 1 CILR 206

[7] CA No 9079 (December 9, 2014)
CA 第 9079 号（2014 年 12 月 9 日）

willing buyer and a willing seller would exchange for the shares of the company, the CICA found that valuations conducted within the market generally are relevant. It followed that the analyses and valuations conducted by the Dissenters were also considered by the CICA to be of importance to the valuation exercise: the Dissenters were held to be not merely potential investors, but actual investors and therefore "*active members of the market who are willing to put their money where their analysis is*". The CICA expressed the view that discovery is a mutual obligation, requiring equality and fairness, and Section 238 litigation is not a "*unique field in which one-sided disclosure*" ought to be practised. Discovery by the Dissenters was therefore ordered, and will be expected in future proceedings of this nature.

认为在市场上进行的估值通常都是相关的。所以，CICA认为异议股东进行的分析和估值对估值程序亦非常重要：异议股东不仅被视为潜在投资者，也是实际投资者，因此，他们属于*"愿意把资金投入他们所分析领域的活跃市场参与者"*。CICA认为，信息披露是一种共同义务，要平等和公平，且根据第238条提出的诉讼并非需要实行*"单方面披露的特殊领域"*。因此，法院命令异议股东进行信息披露，且预计未来此类诉讼也会这样判决。

Further Judgments

Further judgments are anticipated, both from the Grand Court and the CICA, in the coming months. These will likely bring even greater clarity and further specific guidance not only as to the roles and responsibilities of the different parties to statutory appraisal litigation in the Cayman Islands, but also as to the expectations of the local Courts regarding the proper conduct of the parties as they work their way through the valuation process. Results may differ, but the local statutory appraisal procedure is becoming increasingly well-defined and mature.

更多判决

预计在未来数月，大法院和CICA都将作出更多判决。这将对开曼群岛法定估值诉讼各方的角色和责任，以及地方法院对各方在估值过程中的适当行为的预期加以阐明并提供进一步的具体指引。判决结果虽然可能不同，但当地法定估值程序将日渐清晰和完善。

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

本文并非法律意见，其内容亦非详尽无遗，只可作为概览及一般参考资料。感谢您的垂阅!

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