Article

Heads Will Roll: Cayman's Proposed Amendment to the Companies Act (2021 Revision) Would Abolish Headcount Test

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M&A lawyers can let out two cheers for the Companies (Amendment) Bill 2021 ("Bill") which was recently gazetted in the Cayman Islands.

If enacted in its current form Bill will, amongst other things[1], abolish the headcount test in members' schemes of arrangement, typically used to privatise companies and thereupon end the decades-long struggle of the courts to apply the test to schemes of arrangement by listed companies. Members' schemes of arrangement will then only require the approval of 75% in nominal value of the members, or class of members, present and voting either in person or by proxy at the requisite scheme meeting[2].

The headcount test requires a majority in *number of members*, i.e. registered shareholders, holding 75% in nominal value of the scheme shares to approve the scheme. The test originally applied only to *creditors* schemes[3] but was extended to members' schemes in England in 1908[4] when stock exchanges did not operate through central depositaries. The shares of listed public companies today are often held and traded on a stock exchange through a *single member* as a central depositary, such as HKSCC Nominees Limited (HKEx) in Hong Kong or The Central Depositary (Pte) Limited (SGX) in Singapore and the application of the test gave rise to the numerosity problem. Bill will eliminate this problem and the central nominee will no longer have to be counted as the one and only bicephalic shareholder which votes both for and against the scheme. As I have written before, this particular Two-Headed Monster can happily return to the Muppet Show; cases such as *In the Matter of Little Sheep 2012 (1) CILR 34* and *In the Matter of Alibaba.Com Limited [2012] (1) CILR 272* can be confined to the bin; escapades such as share splitting[5] will be confined to history; and composite scheme documents can be simplified. That moment cannot come too soon for M&A lawyers.

Bill will segregate the approvals required for creditor schemes, where the headcount test is retained, and shareholder schemes, where the headcount test is abolished. A new section 86(2A) of the Companies Act (2021 Revision) will apply to members' schemes and will provide:

> *"If seventy-five per cent in value of the members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the members or class of members, as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company."*

Bill was gazetted on 21 October 2021 and will go through a 21 day consultation period before the first reading in Parliament. It will then go through a second reading, a committee stage, a report stage and a third reading and may be amended in the process. If Bill is then passed by Parliament, Bill will be presented to the Governor for assent and upon assent, Bill will be gazetted. Bill will become law on a date to be appointed by Order of the Cabinet. Although the legislative timetable has not yet been set, optimistic M&A lawyers can ready their third cheer: hip, hip hip, hooray!

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[1] Bill also provides for a company which is, or is likely to become, unable to pay its debts to present a petition to the Grand Court for the appointment of a qualified insolvency practitioner as a restructuring officer to promote a creditors scheme of arrangement.
[2] The requirements of any applicable Takeovers Code will also need to be met.
[3] Companies Act 1862.
[4] Companies (Consolidation) Act 1908.
[5] Re PCCW Ltd [2009] 3 HKC 292; see also Re Dee Valley Group plc [2017] EWHC 184 (Ch).