



## Squeeze-outs and Minority Shareholders' Rights



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In the wake of the privatisation and delisting of a number of companies listed on the Singapore Stock Exchange, it is timely to examine the methods available to effect a squeeze-out under the laws of Bermuda, the Cayman Islands and the British Virgin Islands (“BVI”) and the attendant rights of minority shareholders of such companies in the context of squeeze-outs, as some of these privatising companies are established in these jurisdictions. At the time of writing, there are 101 Bermuda companies, 17 Cayman Islands companies and 2 BVI companies listed on the Singapore Stock Exchange.

At the outset, it is worth noting that neither Bermuda, the Cayman Islands nor the BVI has in place any laws or regulations of general application which require takeover offers to be made by persons who acquire significant holdings of shares in Bermuda, Cayman or BVI companies or otherwise regulate takeovers of shares in such companies (with the exception, in Bermuda, of private acts which do not have general application). However, the Singapore Code on Take-overs and Mergers and certain provisions of the Singapore Securities and Futures Act apply to take-over offers of Bermuda, Cayman or BVI companies listed on the Singapore Stock Exchange. This article does not deal with the issues that may arise from the listing requirements of the Singapore Stock Exchange or the Singapore take-overs and mergers laws.

### Bermuda

The main methods under the *Companies Act, 1981* (the “Bermuda Companies Act”) to effect a compulsory acquisition of the shares held by minority shareholders are as follows:

**1. By an offer made by an acquiror followed by a compulsory acquisition (or “squeeze-out”) under Section 102 of the Bermuda Companies Act.**

Under Section 102, if (within 4 months of making the offer) the offer is accepted by the holders of 90% in value of the shares which are the subject of the offer, the acquiror can at any time within 2 months of reaching the 90% threshold compulsorily acquire the shares of dissenting shareholders by giving notice of the compulsory acquisition to such shareholders.

Shares owned by the acquiror or its subsidiaries (or their nominees) at the date of the offer do not, however, count towards the 90%. If the acquiror already owns more than 10% of the subject shares at the date of the offer, the acquiror must offer the same terms to all holders of the shares and, in addition to meeting the 90% acceptance threshold, the shareholders who accept the offer must also represent not less than 75% in number



of the holders of those shares.

Unlike a Section 103 squeeze-out, dissenting shareholders do not have express appraisal rights under Section 102. However, dissenting shareholders have the right to apply for relief from the Supreme Court of Bermuda which has power to make such orders as it thinks fit. Such an application must be made within one month from the date on which notice of the compulsory acquisition was given. If no such application is made, then on the expiry of one month from the date on which the compulsory acquisition notice was given, the acquiror must acquire those shares on the same terms as those offered earlier to the shareholders who accepted the offer.

Dissenting shareholders also have the right under Section 102 to serve a notice on the acquiror requiring it to acquire their shares on the terms of the earlier offer, or on such terms as may be agreed or as the Bermuda court (on the application of either the acquiror or the dissenting shareholder) thinks fit to order. This right must be exercised within 3 months from the giving of notice by the acquiror that the 90% threshold has been reached.

## **2. By an alternative squeeze-out mechanism under Section 103 of the Bermuda Companies Act.**

Under Section 103, shareholders holding not less than 95% of the shares in a company may give notice to the remaining shareholders of the intention to acquire their shares on the terms set out in the notice. The same terms must be offered to all remaining shareholders whose shares are to be acquired.

In a Section 103 squeeze-out, dissenting shareholders have a right to apply to the Bermuda Supreme Court to appraise the value of their shares. This right must be exercised within one month of their receiving the notice of compulsory acquisition.

The acquiror may, within one month of the court's appraisal, acquire all the shares involved at the price fixed by the court or choose to cancel the notice.

It should be noted that if a dissenting shareholder applies to the court and is successful in obtaining a higher value, the acquiror must pay that higher value to all shareholders being squeezed out (unless it chooses to cancel the notice of compulsory acquisition, return any shares already acquired and refund the purchase price paid for such shares).

## **3. By a court-approved scheme of arrangement under Section 99 of the Bermuda Companies Act.**

A Section 99 scheme must be approved by a majority in number representing three-fourths in value of the shareholders present and voting in person or by proxy at the requisite special general meeting convened to approve the scheme. Under Bermuda law, there is no prohibition against the acquiror voting on the scheme.

Following shareholder approval, the scheme must be sanctioned by the court. Although dissenting shareholders do not have express statutory appraisal rights under Section 99, any person affected by the scheme is entitled to appear at the hearing of the petition for the court order sanctioning the scheme and the court will take into account submissions made by such persons in reaching its decision. The court will only sanction a scheme if it is fair, and will be concerned to see that the shareholders approving the scheme are fairly representative of the general body of shareholders.

If sanctioned by the court, a copy of the court order must be lodged with the Bermuda Registrar of Companies ("Bermuda ROC"), after which the scheme will become effective and bind all the shareholders (including those who voted against, or abstained from voting on, the scheme) and will result in 100% of the target company's shares being acquired without further action on the part of the shareholders.



#### **4. By an amalgamation under Sections 104 to 109 of the Bermuda Companies Act.**

Under Bermuda law, two or more companies may amalgamate and continue as one company. The effect of an amalgamation is that by statute the assets and liabilities of the amalgamating companies become the assets and liabilities of the resulting amalgamated company. The advantages of this procedure is that an amalgamation can be completed more quickly than a scheme of arrangement or a general offer, a lower threshold is required to effect a squeeze-out and court approval is not required.

An amalgamation agreement must be entered into between the amalgamating companies and this agreement must be approved by the shareholders of each amalgamating company. The notice of the special general meeting to be convened for this purpose must state the fair value of the shares as determined by each amalgamating company and also that a dissenting shareholder is entitled to be paid the fair value of his shares.

The statutory threshold for approval of an amalgamation is 75% of shareholders voting at the meeting at which a quorum of two persons at least holding or representing by proxy more than one-third of the issued shares is present. After the amalgamation agreement has been approved by shareholders, application is made for the amalgamated company to be registered with the Bermuda ROC and a certificate of amalgamation is issued. The application must be accompanied, inter alia, by an affidavit of solvency including confirmation that no creditors will be prejudiced by the amalgamation or that adequate notice has been given to all known creditors and no creditor objects.

Any shareholder who did not vote in favour of the amalgamation and who is not satisfied that he has been offered fair value for his shares may apply to the court for an appraisal of the fair value of his shares. This right must be exercised within one month of the notice convening the special general meeting to approve the amalgamation and, within one month of the court's appraisal, the company must pay the shareholder the fair value as determined by the court or terminate the amalgamation. The company is also required to pay the dissenting shareholder any difference between the value already paid for his shares and the value as appraised by the court. To date no cases on appraisal rights have been brought before the Bermuda courts.

## **Cayman Islands**

There are three principal methods under the Companies Law of the Cayman Islands (the "Cayman Companies Law") to compulsorily acquire the shares held by minority shareholders in a Cayman Islands company:

#### **1. By a squeeze-out under Section 88 of the Cayman Companies Law.**

Under Section 88, if (within 4 months of making the offer) an offer is accepted by the holders of not less than 90% in value of the shares which are the subject of the offer, the acquiror can (at any time within 2 months after the expiration of the said 4 months) compulsorily acquire the shares of dissenting shareholders by giving notice to such shareholders.

Dissenting shareholders are entitled to apply for relief to the Grand Court of the Cayman Islands within one month from the date on which the notice was given.

However, unlike Section 102 of the Bermuda Companies Act, minority shareholders do not have the right to initiate the squeeze-out process themselves.

Where notice of compulsory acquisition is given, the acquiror must, unless on an application made by a



dissenting shareholder the Grand Court thinks fit to order otherwise, acquire the shares on the terms on which under the offer the shares of the approving shareholders are to be transferred to the acquiror.

## **2. By a merger or consolidation under Section 233 of the Cayman Companies Law.**

The Cayman Companies Law was amended in 2009 to introduce a new mechanism for mergers and consolidations between Cayman Islands companies and between Cayman Islands companies and foreign companies. Under these provisions, “merger” is defined as the merging of two or more constituent companies and the vesting of their undertaking, property and liabilities in one of them as the surviving company, and “consolidation” is defined as the combination of two or more constituent companies into a consolidated company and the vesting of the undertaking, property and liabilities of such companies in the consolidated company. The advantages of this new procedure are that no court approval is required (except where the fair value of the shares of a dissenting shareholder cannot be agreed on), the timing for merger or consolidation is generally shorter than for a scheme of arrangement under Section 86, and, whilst dissenting shareholders do have appraisal rights, such rights do not operate to obstruct the merger or consolidation.

A written plan of merger or consolidation must be authorized by each constituent company by (a) a shareholder resolution by majority in number representing 75% in value of the shareholders voting together as one class; and (b) if the shares to be issued to each shareholder in the consolidated or surviving company are to have the same rights and economic value as the shares held in the constituent company, a special resolution of the shareholders voting together as one class. The consent of each holder of a fixed or floating security interest of a constituent company is required unless the court (upon the application of the constituent company that has issued the security) waives the requirement for consent.

Once the requisite approvals have been obtained, the plan is filed with the Cayman Registrar of Companies (“Cayman ROC”) together with the required supporting documents, including various directors’ declarations such as a declaration of solvency of the constituent company and the consolidated or surviving company, that the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent companies, and payment of the applicable fees.

The effective date of a merger or consolidation is the date the plan is registered by the Cayman ROC although the plan may provide for an effective date up to 90 days after the date of registration.

A dissenting shareholder has the right to be paid the fair value of his shares upon dissenting from the merger or consolidation. A dissenting shareholder must give written notice of objection to the constituent company before the vote to approve the merger or consolidation and the procedure in the Cayman Companies Law with respect to the exercise by dissenting shareholders of their rights must be observed. Where the parties cannot agree on the price to be paid to a dissenting shareholder, either party may file a petition to the court to determine fair value of the shares. These rights are not available where an open market exists on a recognised stock exchange for the shares of the class held by the dissenting shareholder. The exercise of appraisal rights by a dissenting shareholder will preclude the exercise of any other rights as a member (such as the right to vote and to receive dividends), save for the right to be paid the fair value of his shares and to institute proceedings to seek relief on the grounds that the merger or consolidation is void or unlawful.

## **3. By a court-approved scheme of arrangement under Section 86 of the Cayman Companies Law.**

Similar to a scheme of arrangement under the Bermuda Companies Act, approval of a scheme under Section 86 of the Cayman Companies Law is a two-step process. The scheme must first be approved at a special meeting of the company convened by the Grand Court of the Cayman Islands, by a majority in number representing 75% in value of the members of the class present and voting either in person or by proxy at the



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meeting, and then sanctioned by the Grand Court.

As with Bermuda schemes of arrangements, dissenting shareholders do not have express statutory appraisal rights but the Cayman court will only sanction a scheme if it is fair and the court has a broad discretion to make whatever orders it feels appropriate. Any shareholder who voted at the members' meeting is entitled to attend and be heard at the court hearing.

If sanctioned by the court, the scheme becomes effective upon filing of the court order with the Cayman ROC. Once effective, it is binding on all members whether they voted against the resolution or did not vote at all.

### **British Virgin Islands**

Under the *BVI Business Companies Act, 2004* (the "BC Act"), shareholders with 90% of the votes of the outstanding shares of a BVI company may squeeze out minority shareholders using the compulsory redemption procedure set out in Section 176 of the BC Act. It is also possible to effect a squeeze-out of minority shareholders by a statutory merger or pursuant to a scheme of arrangement under the BC Act.

Minority shareholders who are squeezed out are generally entitled to payment of the fair value of their shares. The BC Act sets out the procedure for the exercise of dissenting shareholders' rights and the determination of fair value. The exercise of appraisal rights by a dissenting shareholder will preclude the exercise of any other rights as a member save for the right to be paid the fair value of this shares and to institute proceedings to seek relief on the grounds that the action is illegal.

### **Conclusion**

Minority shareholders of Bermuda, Cayman Islands and BVI companies have certain rights and remedies under the law in the context of squeeze-outs and can seek the assistance of the courts in enforcing the same. However, the rights of minority shareholders in any particular case will obviously depend upon the constitutional documents of the company concerned and the factual circumstances of the case.



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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.

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