

## CAYMAN ISLANDS GRAND COURT

***In the Matter of Sections 15 and 86 of the Companies Law (2011) Revision and In the Matter of Alibaba.com Cause No. FSD 38 of 2012, per Creswell, J. (20 April 2012)***

COMPANIES - SCHEME OF ARRANGEMENT -  
MAJORITY IN NUMBER

On an application for sanction of a scheme of arrangement under Section 86, the Court again considered the proper manner in which the “headcount” aspect of the approval requirement should be calculated where a custodian holds a number of shares for investors.

The traditional approach of the Courts as to the position of a custodian, assuming it is instructed to vote some of its shares in favour of and some against the scheme, has been to treat the custodian for the headcount test as one vote “for” and one vote “against.”

In the Little Sheep case (see digest above) the petitioner argued that for the purposes of the headcount test a custodian should be counted as one person having voted either “for” or “against” the scheme depending on its net voting position.

This argument was rejected, with the Court instead finding that it was appropriate to count the parties from whom the custodian receives instructions. The Court expressed an inclination to apply the principle of judicial comity and follow the decision of Jones J in Little Sheep, he being a judge of co-ordinate jurisdiction. The Court directed that, to the extent that the shares to which the proposed scheme relates, that a registered in the name of custodians (a) such custodian may cast votes both for and against the proposed scheme in accordance with the instructions of its clients, and (b) such custodian shall specify the number of votes cast in favour of the scheme and the number of clients on whose instructions they are cast and the number of votes cast against the proposed scheme and the number of clients on whose instructions they are cast.

Compliance with this direction will then enable the Court at the hearing of the petition to consider the question of whether a majority in number has been achieved, having regard to all of the facts.

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