

## 公报文章

# Heads Will Roll: Cayman's Proposed Amendment to the Companies Act (2021 Revision) Would Abolish Headcount Test “人头数”之变：开曼拟修订《公司法》（2021年修订），废除“数人头”测试

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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<sup>1</sup>, 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<sup>2</sup>.

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*<sup>3</sup> but was extended to members' schemes in England in 1908<sup>4</sup> 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 Depository (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*

并购律师们已经可以为开曼群岛最近刊宪的《2021年公司法（修订）草案》（下称“草案”）欣喜一阵了。

如果以目前的形式颁布，草案将（除其他事项外）<sup>1</sup>废除通常用于公司私有化的股东协议安排须通过的“数人头”测试，从而结束法院数十年来在对上市公司协议安排适用“数人头”测试时面临的困难。届时，股东协议安排只需在必要的协议会议上获得持有股份面值不少于 75% 的亲自（或委派代表）出席并投票的股东或类别股东批准。<sup>2</sup>

“数人头”测试要求持有协议股份面值不少于 75% 的大多数股东（即登记股东）批准协议。该测试最初仅适用于债权人协议<sup>3</sup>，但于 1908 年扩大至英格兰的股东协议，当时的证券交易所不是透过中央存托机构进行运作<sup>4</sup>。而如今，上市公司的股份通常是由中央存托机构（例如香港的香港中央结算（代理人）有限公司（港交所）或新加坡的中央托收私人有限公司（新交所））作为唯一股东在证券交易所持有和买卖的，这种情况下，适用“数人头”测试就会产生人数方面的问题。而草案将可解决这个问题，中央代理人将不再被算作唯一对协议既投赞成票又投反对票的“双投”股东。正如我之前的文章所写，这个奇特的“双头怪”终于可以回归它的布偶秀台了！以后诸如 *Little Sheep 2012 (1) CILR 34* 和 *Alibaba.Com Limited [2012] (1) CILR 272* 等案例将不复存在；股份拆分<sup>5</sup>等规避行为也将成为历史；综合计划文件将被简化。对并购律师而言，这个时刻期待已久。

<sup>1</sup> 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.

草案亦规定，已经或可能资不抵债的公司可向大法院提出呈请，要求委任一名合格的清盘从业员作为重组负责人，以促进债权人协议安排。

<sup>2</sup> The requirements of any applicable Takeovers Code will also need to be met.

亦须符合任何适用的收购守则规定。

<sup>3</sup> Companies Act 1862.

1862年《公司法》。

<sup>4</sup> Companies (Consolidation) Act 1908.

1908年《公司（合并）法》。

*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<sup>5</sup> 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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草案将债权人协议和股东协议所需的批准加以区分，前者将保留“数人头”测试，而后者会将该测试废除。《公司法》（2021 年修订）新增的第 86(2A) 条将适用于股东协议，其规定：

*“若持有股份面值不少于 75% 的股东或类别股东（视情况而定）亲自（或委派代表）出席会议并投票赞成任何和解或安排，则该和解或安排一经法院批准，即对所有股东或类别股东（视情况而定）具有约束力，且亦对公司（倘公司正在进行清盘，则对清盘人和出资人）具有约束力。”*

草案于 2021 年 10 月 21 日刊宪，在议会进行一读前有 21 天的咨询期，之后将经历二读、委员会审议阶段、报告阶段和三读，在此过程中可能仍有修订。草案获议会通过后，将呈交予总督批准，获批准后将会刊宪，并将于内阁以命令方式指定的日期成为法律。尽管目前立法时间表尚未确定，但乐观的并购律师们已经可以准备好喝彩欢呼了！

若需提供进一步资料，请发送电邮至：[media@conyers.com](mailto:media@conyers.com)

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<sup>5</sup> Re PCCW Ltd [2009] 3 HKC 292; see also Re Dee Valley Group plc [2017] EWHC 184 (Ch).  
参阅 PCCW Ltd [2009] 3 HKC 292 一案；另见 Re Dee Valley Group plc [2017] EWHC 184 (Ch) 一案。