公报文章

# Adventures in Wonderland
# 梦游奇境

作者: **林大维 David Lamb,** 资深法律顾问 Consultant

**Once upon a time, long, long ago, the Queen of Hearts would proclaim in a fanciful way: "Off with their heads!" at the slightest sign of difficulty with her subjects in Wonderland.**

**很久很久以前，奇境里的红心王后每逢遇上子民出现丁点问题，都会莫名其妙的大喊"人头落地吧！"。**

Over one-and-a-half centuries after those royal proclamations, the headcount test for shareholder schemes of arrangement has been axed in the Cayman Islands. The Companies (Amendment) Act 2021 (Commencement) Order 2022 sees the Companies (Amendment) Act 2021 in force on 31 August 2022, introducing a new section 86(2A) into the Companies Act (2022 Revision):

一个半世纪之后，开曼群岛将要取消股东协议安排中的"算人头"规定——根据《2021 年公司（修订）法 2022 年（开始）令》规定，《2021 年公司（修订）法》将于 2022 年 8 月 31 日生效，届时《公司法（2022 年修订本）》将会新增第 86(2A) 条如下：

*"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."*

*"亲身或委派代表出席会议并于会上投票之股东或有关类别股东（视情况而定），若按价值计算有百份之七十五同意作出任何妥协或安排，则该等妥协或安排一经法院认许，即对全体股东或有关类别股东（视情况而定）构成约束力，并且对有关公司构成约束力，惟有关公司若处于清盘过程，则对其清盘人及分担人构成约束力。"*

Members' schemes of arrangement for companies incorporated in the Cayman Islands, so oft used in privatisations of listed companies in the wonderland that is the M&A market, no longer need to be approved by a majority in number of the scheme shareholders. The jurisprudence[1] on the seemingly difficult issue of the headcount test or numerosity problem, in which some may find a comparison with the literary nonsense genre of Lewis Carroll's 'Alice's Adventures in Wonderland' (1865), can be put on the ceremonial bonefire (literally a fire of bones). Even the judiciary will surely be as happy as Alice to be freed from this particular rabbit hole and to stoke that bonfire, to use the modern derivation.

并购市场，无奇不有。于开曼群岛注册成立的上市公司，在私有化时经常会用上股东协议安排，此举如今将无须再获得大多数协议股东批准。"算人头"或人数问题的法学理论[1]生涩难解，跟 Lewis Carroll 1865 年所著《爱丽丝梦游奇境》一样天马行空，可幸终究付之一炬、灰飞烟灭。司法机构终可利用现代的衍生办法，摆脱深不见底的兔子洞，想必跟爱丽丝一样满心欢喜，巴不得要在火上加油。

The very term 'scheme of arrangement' is somewhat archaic but, in this context, a scheme is simply an

"股东协议安排"由来已久，当中所谓"协议"，系指目标公司与其 75% 股东之间达成协议，从而将股份强

[1] Cases such as *In the Matter of Little Sheep 2012 (1) CILR 34* (in which the author acted; surely a crowning moment for Lamb to act in Little Sheep) and *In the Matter of Alibaba.Com Limited [2012] (1) CILR 272 and Practice Direction No. 2 of 2010 (GCR O.1,r.12)*.
案例包括：*In the Matter of Little Sheep 2012 (1) CILR 34*（作者本人曾处理此案）及 *In the Matter of Alibaba.Com Limited [2012] (1) CILR 272 and Practice Direction No. 2 of 2010 (GCR O.1,r.12)*。

agreement between the target company and 75% of its shareholders whereby shares are compulsorily transferred to the offeror, or the shares are cancelled, in return for payment of the scheme consideration. The result is that the offeror ends up owning 100% of the target company.

制转让予要约人或予以注销，以换取协议代价。如此一来，目标公司将由要约人全资拥有。

The scheme must be sanctioned by the court but the court process is straightforward and involves a summons for directions, a petition and two hearings. At the first hearing, directions are obtained on the manner in which the meeting of the scheme shareholders is to be convened and held. The composite scheme document is then despatched by the target company to the shareholders. The shareholders meeting is held and the scheme approved. A few days later the second hearing, the petition hearing, is held and the scheme is sanctioned by the court. The scheme is effective when the court order sanctioning the scheme is delivered to the Registrar of Companies for registration, after the satisfaction of any conditions to the scheme.

协议安排虽然须要获得法院认许，但法院程序简单直接，只须发出传票以索取指示、提出呈请，以及举行两次聆讯。首次聆讯将会指出一众协议股东应如何召开并举行会议。其后，目标公司会将综合协议文件寄发予一众股东，然后召开股东会议，以批核协议。第二次聆讯即“呈请聆讯”，则于数天之后举行，届时将由法院认许有关协议。满足协议条件后，旨在认许协议的法院命令将会交付予公司注册处处长以作注册，同时有关协议即告生效。

The scheme shareholders will normally form one class of shareholders. A class will be created if shareholders have rights, against the target company pursuant to the scheme, which are so dissimilar as to make it impossible for them to consult together with a view to their common interest. The test is a test of the way in which those rights are affected by the scheme and does not depend upon the similarity or dissimilarity of their interests which derive from these rights[2]. Different commercial entitlements between members of the same class do not result in different classes[3]. Applying the test, the real question is whether the scheme is a single arrangement or multiple arrangements. Undertakings by scheme shareholders to vote, even if irrevocable, do not usually mean those particular scheme shareholders constitute a separate class unless those scheme shareholders receive special inducements or benefits pursuant to the scheme.

协议股东一般会构成一个股东类别，但不同股东在协议下针对目标公司而拥有的权利若大相径庭，以致无法协商共同利益，则须另立股东类别。此时须要厘清有关权利将会如何受到有关协议影响，但由该等权利所衍生的利益有何相似或相异之处，则无关痛痒[2]。在同一类别中，股东之间的商业权益纵使未尽相同，亦无须另立类别[3]。所须厘清的真正问题，在于有关协议是否属于单一安排，抑或属于多项安排。除非协议股东在有关协议下能获得特别诱因或利益，否则协议股东即使承诺投票表决（不论是否可以撤回），通常亦不意味会构成另一股东类别。

If the bidder already owns shares in the target company, the bidder's shares are unlikely to form part of the scheme shares, or if they do and the bidder does not undertake not to vote, then the bidder is likely to form a separate class and it will be difficult, but not necessarily impossible, for the bidder to vote in the same class as the rest of the scheme shareholders. In this respect a scheme will be similar to a merger where a majority of the minority requirement has been agreed.[4]

竞投人若早已拥有目标公司股份，则竞投人该等股份通常不会构成协议股份的一部份，但假若果真构成，且竞投人并未承诺放弃表决，则竞投人颇有可能自成股东类别。届时，竞投人与其他协议股东在投票表决时将较难计入同一股东类别，但亦非全无可能。就此而言，有关协议将类似于已协定采取“少数股东多数决”的合并方案[4]。

[2] Bowen LJ in *Sovereign Life Assurance Company v Dodd* (1892) 2 QB 573; *Re Hawk Insurance Company Limited* [2001] EWCA Civ 241; *Re SABMiller plc* [2016] EWHC 2153 (Ch).
法官鲍文勛爵判词：*Sovereign Life Assurance Company v Dodd* (1892) 2 QB 573；*Re Hawk Insurance Company Limited* [2001] EWCA Civ 241；*Re SABMiller plc* [2016] EWHC 2153 (Ch)。
[3] *Re Hawk Insurance Co Ltd* [2001] 2 BCLC; *Eurobank Corporation (In Liquidation)* [2003] CILR 205; Re BTR plc [2000] 1 BCLC 740; Ocean Rig UDW Inc [2017] (2) CILR 495.
[4] The requirements of an applicable Takeovers Code will have a significant bearing on these requirements. For example, rule 2:10 of the Hong Kong Code on Takeovers and Mergers requires (a) the scheme to be approved by at least 75% of the votes attaching to the disinterested shares that are cast either in person or by proxy at the shareholders meeting; and (b) the number of votes cast against the scheme to be not more than 10% of the votes attaching to all disinterested shares. The term “disinterested shares” means shares in the company other than those which are owned by the offeror or persons acting in concert with the offeror. Persons acting in concert are persons who, pursuant to an agreement or

From the buy side perspective, schemes of arrangement have many advantages including the fact that, unlike in most mergers of Cayman Islands companies, dissentient shareholders do not have an appraisal right whereby they can ask the Grand Court to assess the fair value of their shares. Almost any means to avoid the inevitable '238 appraisal litigation' which attends mergers these days must surely be welcome by buyers. Instead, in a scheme the court must merely be satisfied that the scheme is one that an intelligent and honest person, acting in respect of their interests in the relevant class of scheme shares, might reasonably approve. The Grand Court[5] has recognised that the scheme shareholders are the best persons to judge their own commercial interests and the reasonableness of the terms of the scheme such that the commercial details of the scheme are not a matter for the court, provided the scheme as a whole is found to be fair. This is far different from the valuation process the court undertakes if dissentient shareholders validly exercise their appraisal rights in mergerland.

在买方角度，协议安排备有多种好处：举例而言，与大部份开曼群岛公司合并交易不同，反对有关协议的股东并无评核权，故不能要求大法院评估其股份的公允价值。今时今日，合并交易难免涉及“238 评核诉讼”，故若有任何途径可避免此事，基本上肯定会受到买方青睐。反之，在协议安排下，法院单单须要信纳，就相关协议股份类别的自身利益而言，聪敏诚实的人若有合理可能会批核有关协议，即已足够。大法院[5]已认定，协议股东自身商业利益及协议条款是否合理此二问题，应交由协议股东自行判断，故此只要协议整体尚属公允，法院即不会过问其商业细节。反观合并交易中，反对合并的股东若能有效行使评核权，法院即会采取估值过程，与上述做法大不相同。

In the U.S. market, where take-private mergers have been prevalent since Tongjitang Chinese Medicines Company first took advantage of the newly minted merger provisions in the Companies (Amendment) Law 2009, the risk of appraisal proceedings is often high and a scheme of arrangement may once again become a popular alternative for those companies traded on a U.S. exchange which are thinking about a take-private transaction for a variety of reasons, notwithstanding the recent agreement between the PCAOB and the CSRC. An added bonus for share exchange schemes is the availability of a '3(a) (10) exemption' from the registration requirements of the Securities Act of 1933.

美国市场方面，自同济堂药房有限公司当初善用《2009 年公司（修订）法》新订合并条文以来，私有化合并交易屡见不鲜。鉴于美国市场的评核程序风险通常颇高，故此正在考虑进行私有化交易的美国上市公司，均有可能会因种种原因而再次转投协议安排怀抱——尽管美国公众公司会计监督委员会与中国证监会近日达成协议。此外，股份交换协议尚有一项额外好处，即可获得“第 3(a)(10) 条豁免权”，故此无须符合《1933 年证券法》的注册要求。

Although the Cayman Islands has stolen a march on her competing jurisdictions, perhaps Bermuda and the British Virgin Islands will follow suit.

开曼群岛虽已先拔头筹，但其两个竞争对手即百慕达及英属处女群岛大概亦会不甘后人，加以效法。

“Full scheme ahead!”, said Alice in Wonderland.

“决定权在你自己手里。”奇境里的爱丽丝如是说。

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

**本文不能取代任何法律建议或法律意见，而仅旨在就题旨大意，提供综观概览及一般资讯。**

**For further information please contact: media@conyers.com**

**如需更多资讯，请联络：media@conyers.com**

understanding (whether formal or informal), actively cooperate to obtain or consolidate “control”, defined to mean the acquisition of 30% or more of the voting rights of the company.
此类要求将大大取决于《收购守则》有何适用规定。举例而言，根据香港《公司收购及合并守则》规则 2.10 的规定，(a) 有关协议必须在股东会议上获得亲身或委派代表出席的股东附于该等无利害关系股份的投票权至少 75% 的票数批准；及 (b) 投票反对有关协议的票数不得超过附于所有无利害关系股份投票权的 10%。所谓“无利害关系股份”，系指有关公司并非由要约人或其一致行动人士所拥有的股份。所谓“一致行动人士”，则指在（正式或非正式）协议或谅解下积极合作以获得或巩固“控制权”的各个人士，当中“控制权”即指获得有关公司 30% 或以上的表决权。

[5] Bestway Global Holdings Inc. (FSD 208 of 2021 (unreported)) citing Barclays Bank PLC [2019] EWHC 129 (Ch).
*Bestway Global Holdings Inc.* (FSD 208 of 2021 (unreported)) ，当中引用 *Barclays Bank PLC* [2019] EWHC 129 (Ch)。

## 作者 Author：

**林大维 David Lamb**
**Consultant**
**资深法律顾问**
david.lamb@conyers.com
+852 2842 9511