

UPDATE

Cerberus at the gates: 'multi-headed' voting on schemes of arrangement

Update prepared by Jonathon Milne (Counsel, Cayman Islands)

At first blush, voting procedures in relation to Cayman schemes of arrangements do not appear to be particularly complex or controversial. To reach the necessary threshold, a scheme proposal requires votes from a majority in number representing 75 per cent of a particular creditor class or member class, as the case may be. However, voting does not always involve a simple head-count of those present at the meeting. For example, proxies, nominees and custodians may often wear many different hats on behalf of multiple investors at a single meeting.

The recent decision of the Grand Court of the Cayman Islands by Mr Justice Segal in *In re Uni-Asia Holdings Limited* affirms the 'look-through' voting rules espoused by Mr Justice Jones QC in *In The Matter of Little Sheep Group Limited*. Based on this line of authority, it is clear that depositories should be entitled to have votes counted separately in circumstances where they act for several underlying investors. As in *Uni-Asia*, the Court may intervene and insist on amendments to scheme documents and orders expressly protecting an individual's right to be counted.

Uni-Asia, as the petitioner, applied to convene a meeting of its ordinary shareholders pursuant to section 86 of the Companies Law (2016 Revision) for the purposes of voting on a proposed scheme of arrangement. Essentially, Uni-Asia sought approval to change the domicile of its holding company from the Cayman Islands to Singapore. If approved, Uni-Asia would become wholly owned by a new subsidiary incorporated under the laws of Singapore and shareholders would receive shares in the new subsidiary, to be traded on the Singapore Stock Exchange.

Almost all of Uni-Asia's issued shares were registered in the name of a central depository (CDP). As is often the case, the CDP acted as a nominee holding securities on behalf of various depositors who hold shares in Uni-Asia which are entered against their names in the share register maintained by the CDP.

Uni-Asia applied to the Grand Court of the Cayman Islands for permission to allow the CDP to be treated as a 'multi-headed shareholder' for voting purposes. The CDP would gather proxies and cast votes consistent with the wishes of each depositor. This practice is known colloquially as 'looking through the register' and is provided for in Practice Direction No. 2 of 2010. Mr Justice Segal, like his contemporaries before him, approved this approach at the directions hearing.

However, the judge was not satisfied that the scheme documents, including proxy forms and circulars, were sufficiently clear. In particular, Mr Justice Segal formed the view that the explanation regarding the purpose of the scheme was incomplete. The judge emphasised that it is important to explain the nature of the benefits sought to be achieved by the relevant scheme. The judge invited Uni-Asia to revise the documents in light of his suggestions and this led to a far more detailed note in respect of the risk profile and advantages of the proposed new structure.

Furthermore, Mr Justice Segal noted that the three voting options described in the scheme documents were unclear and would benefit from some clarification. This clarification ultimately extended to a provision in the Order expressly permitting CDP to split its vote in accordance with the 'multi-headed shareholder' principle.

This is a prime example of the Cayman judiciary's willingness to provide substantive guidance on critical procedural points and clearer drafting of scheme documents with the principal aim of ensuring there are no disenfranchised members or creditors. Transparent and consistent voting procedures are at the heart of the scheme of arrangement regime in Cayman and other common law jurisdictions. The decision in Uni-Asia highlights the fact that the Court will go to great lengths to safeguard the credibility of the process.

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