

# Cayman Islands abolishes the “headcount test” for members’ schemes

With effect from 31 August 2022, a members’ scheme of arrangement involving a Cayman Islands company would no longer be subject to the “headcount test”.

Historically, a members’ scheme of arrangement requires the approval by a majority in number representing 75 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 a general meeting. The “majority in number” requirement, commonly known as the “headcount test”, has given rise to severe debates in the Hong Kong privatisation context over the years, with the two main controversies being as follows:

- **Minority blocking the majority’s intent.** A scheme supported by an overwhelming majority of the votes attached to the issued shares could be blocked by the minority, where the number of shareholders representing such majority is less than 50% of the total number of shareholders present and voting at the relevant general meeting. This has been the prime reason for the failure of various attempted privatisations by way of schemes of arrangement, including that of New World China Land Limited and Glorious Property Holdings Limited.
- **How HKSCC Nominees Limited is counted.** With the bulk of listed shares being held through HKSCC Nominees Limited in the modern days, it is far from clear as to how HKSCC Nominees Limited is to be counted in a scheme of arrangement. Various approaches have been tested and accepted by the court in the Cayman Islands, including the “split-vote approach” (where HKSCC Nominees Limited has one “yes” vote and one “no” vote (ie only counted twice)), the “multi-headed approach” (where HKSCC Nominees Limited has multiple “yes” votes and multiple “no” votes, depending on the instructions given by CCASS participants (ie can be counted more than twice)), and the “single-vote approach” (where HKSCC Nominees Limited has one vote only, depending on whether there are more shares registered in its name voting for or against).

The Companies (Amendment) Act 2021 of the Cayman Islands, which becomes effective on 31 August 2022, abolishes the “headcount test” for members’ schemes of arrangement. Reading this together with Rule 2.10 of the Hong Kong Code on Takeovers and Mergers, going forward a members’ scheme of arrangement would require (i) the approval by at least 75 per cent of the votes attaching to the disinterested shares that are cast either in person or by proxy at a general meeting, (ii) the number of votes cast against the resolution to approve the scheme being no more than 10 per cent of the votes attaching to all disinterested shares and (iii) the sanction of the court of the Cayman Islands.

It should be noted that the “headcount test” will remain applicable to creditors’ schemes of arrangement.

# Our team



**Raymond Ng**

Partner | Banking & Corporate  
Hong Kong  
+852 5806 7883  
raymond.ng@harneys.com



**Calamus Huang**

Partner | Banking & Corporate  
Shanghai  
+86 21 2030 7840  
calamus.huang@harneys.cn

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