

Cayman Court extends the timing of factual evidence in section 238 proceedings

Insights - 25/05/2022

In the recent judgment of *In the Matter of Sina Corporation*, [1] the Grand Court of the Cayman Islands directed that factual evidence should follow the completion of all disclosure, including that resulting from third party disclosure applications commenced in the United States under 28 U.S.C. §1782 (1782 applications).

Background

Sina Corporation effected a take-private merger in the Cayman Islands. Certain minority shareholders dissented from this merger and had their shares cancelled in exchange for the right to be paid fair value for their former shareholdings under section 238 of the Companies Act (as revised).

Following a directions hearing in December 2021 (discussed [here](#)) at which a procedural timetable was set, the Court was required to determine whether SINA should be permitted to delay providing its factual evidence until after the 1782 applications filed by the dissenting shareholders had been determined, and any additional third party disclosure that may be ordered had been provided.

Timing of factual evidence

The Court found that even though the possibility of the 1782 applications had been foreshadowed by the dissenting shareholders at the time of the earlier directions hearing, their subsequent filing necessitated an adjustment to the timetable. In particular, the Court considered that it was fair and reasonable to allow SINA to deal with any additional material that might be ordered to be produced by third parties, before preparing its own factual evidence, which may take this additional material into account.

The time for factual evidence was consequently ordered to run from the date that all discovery is provided, including any discovery that is provided by third parties under 28 U.S.C. §1782.

Comment

The Court's decision to extend the Cayman timetable until any third party disclosure is provided underscores the importance of issuing any 1782 applications against third parties as early as possible in section 238 proceedings.

Expert valuation reports in section 238 appraisals are not exchanged until after factual evidence has been provided, so any additional time permitted for factual evidence could materially delay the resolution of the proceedings. It is also conceivable that a company may get a second bite at the evidential cherry if any 1782 applications are filed after the exchange of factual evidence, allowing it to respond to any new matters that might arise out of the later third party disclosure.

Launching 1782 applications at an early stage is, however, easier said than done in practice. Potential third party discovery targets may only be identifiable after considering the company's disclosure - and potentially the content of its factual evidence. In such circumstances, dissenting shareholders will need to carefully assess whether the benefits of seeking additional third party disclosure outweigh the potentially lengthy delays that may be caused to the appraisal timetable.

[1] *In the Matter of Sina Corporation* Unreported Judgment, 18 May 2022 (Parker J)

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