

Snapshot: Cayman Grand Court considers section 238 valuation date and impact of PRC laws

Insights - 20/04/2022

In the recent judgment of *In the Matter of Sina Corporation*, [1] the Grand Court of the Cayman Islands determined that the appropriate valuation date for shareholder appraisal actions under section 238 of the Companies Act is the date of the extraordinary general meeting approving the merger. The Court also confirmed that discovery obligations in Cayman Islands proceedings must be complied with in the usual way, notwithstanding any uncertainties as to the impact of recent data protection laws in the People's Republic of China (PRC).

Background

Sina Corporation (**Sina**) 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 Act.

At an initial directions hearing, the Court was required to determine inter alia (i) the date on which the fair value of the dissenters' former shareholdings should be assessed (the **valuation date**); and (ii) whether Sina should be permitted to delay its disclosure whilst it sought certain regulatory approvals under recent PRC data protection laws.

Valuation date

The Act does not specify the date upon which shareholdings in section 238 appraisal proceedings are to be valued.

Sina argued that the valuation date should be the date of the extraordinary general meeting, whereas the dissenters contended that the valuation date should be the date that the merger

completed. The extraordinary general meeting and completion date will normally coincide within a few days of each other. However, there was a three-month intervening period in this case, during which certain events occurred that may have materially impacted upon the fair value of the dissenters' former shareholdings, depending on which valuation date applied.

The Court did not consider itself to be bound by the valuation date that had been agreed between parties in previous section 238 proceedings, but noted that it was desirable for the Court to be consistent in its approach and that the course adopted in previous 238 cases was of considerable assistance. The Court ultimately found that the fair value of the dissenters' shares should be determined as at the date of the extraordinary general meeting, as this was when the merger was considered by all shareholders in light of available information and advice, and then authorised by special resolution. That said, the Court noted that each case will turn on its own facts and the valuation date is not to be rigidly fixed in all cases.

Impact of PRC laws on discovery

The PRC government recently enacted a Data Security Law, Personal Information Protection Law and a Cybersecurity Law (collectively, **Data Protection Laws**), which Sina argued required it to obtain various approvals from regulatory authorities in the PRC before complying with its discovery obligations.

Sina consequently sought to put its disclosure obligations on hold while it sought these regulatory approvals. The dissenters challenged the applicability of the Data Protection Laws to Sina's discovery and also argued that it had not established that there was any real risk of prosecution in the event that its discovery was found to breach the Data Protection Laws. Accordingly, the dissenters sought an order for Sina to provide its discovery within 70 days and objected to this process being delayed pending the approval of any regulatory bodies in the PRC.

The Court acknowledged the dissenters' concerns and reiterated the critical importance of Sina's discovery in section 238 proceedings, which is necessary to ensure a fair and proper trial, and to reach a fair value determination. While the Court encouraged Sina to continue with its attempts to obtain any regulatory approvals that it considered to be necessary, the Court was not prepared to pause the discovery process in the meantime. Sina was accordingly ordered to either comply with its discovery obligations within 70 days or to apply to the Court as soon as it perceived that it was not able to do so.

Should Sina make such an application at a later date, the Court will closely examine the specific documents which Sina may seek to withhold, the applicability of the Data Protection Laws to those particular documents and the nature and extent of risk to Sina of being prosecuted in the PRC should such documents be disclosed without obtaining regulatory approval.

[1] *In the Matter of Sina Corporation* Unreported Judgment, 25 January 2022 (Parker J)

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