Improved squeeze out provisions under the Companies (Guernsey) Law, 2008

Service area / Corporate

Location / Guernsey

Date / June 2015

Squeeze out provisions were first introduced to Guernsey law in the Companies (Guernsey) Law, 2008 (the "Companies Law"). As a result, it became possible for a bidder to make a takeover offer for a Guernsey company and be confident that they could acquire 100% of the shares of that company, provided that the offer was accepted by the holders of 90% or more of the company's shares.

Following feedback from practitioners and industry, the Companies Law was amended in a number of respects, as set out in the Companies (Guernsey) Law, 2008 Amendment Ordinance, 2015 (the "Ordinance") which came into force on 3rd September 2015. Those changes include significant changes to the squeeze out provisions, as set out in this briefing.

Summary

The amended squeeze out provisions:

- reflect market practice more closely than previously
- expressly address a number of issues which frequently arise in takeover transaction, and thereby creating additional certainty as to how the squeeze out provisions are applied
- are more closely aligned with the provisions which apply in the other jurisdictions which fall within the scope of The City Code on Takeovers and Mergers (the "Takeover Code")

As a result, the amended squeeze out provisions will be more familiar to persons used to undertaking takeovers on the public equity markets of London and elsewhere, and will be easier to apply in practice.

Detailed changes

When the squeeze out right can be exercised

The unamended Companies Law required a bidder to wait four months after the date of the making of the offer before they become entitled to serve a notice on non-accepting shareholders requiring them to transfer their shares. This is the case even if the offer has already been accepted by the holders of 90% or more of the shares affected by the offer.

Under the revised provisions, the bidder can serve the compulsory acquisition notice on non-accepting shareholders as soon as the 90% threshold is reached, provided that this threshold is reached within 4 months of the making of the offer. The notice cannot be served later than 2 months after the close of the offer period.

Consideration payable to non-accepting shareholders

The unamended Companies Law did not expressly address the common situation of shareholders being given an individual choice of the form of consideration (e.g. cash, shares in the bidder, or a combination of both).

The revised provisions state explicitly that the non-accepting shareholder must be given the same choice of consideration as applied under the original offer, and allowing the bidder to set a default option in case no choice is made.

Overseas shareholders

In order for the squeeze out right to apply to a shareholder, an offer must have been made to acquire that shareholder's shares. However, the unamended Companies Law did not expressly deal with how an offer is made. This created uncertainty where a shareholder is located in a jurisdiction (such as the United States) which prohibits or restricts the making of an offer to persons in that jurisdiction.

The revised provisions address this problem by expressly stating that, for the purposes of the Companies Law, an offer can be made to shareholders in such jurisdictions by placing a notice in La Gazette Officielle, or in any other manner allowed by the target company's articles of incorporation.
This allows the offer to be made to such shareholders, and so enables the bidder to compulsorily acquire their shares once the offer has been accepted by the holders of 90% or more of the total shares. However, in practice such shareholders are unlikely to see the notice and so are unlikely to accept the offer. If there are a significant number of such shareholders, it may not be possible to satisfy the 90% threshold without complying with the legal requirements of the relevant jurisdiction and positively making the offer to them direct.

Shares to which the offer relates

The revised provisions state that the squeeze out right will only apply to a non-accepting shareholder if the offer relates to all of the shares of the target company, or to the whole of the class to which the non-accepting shareholder belongs. This prevents a bidder from making a series of partial offers.

The offer is not required to relate to treasury shares (unless the bidder elects that they should be included), nor to shares which are already owned by the bidder or which it already has a right to acquire.

Shares which count towards the 90% threshold

Under the unamended Companies Law, a bidder could acquire shares from closely associated persons pursuant to the offer, and those shares would be counted when determining whether the 90% threshold is reached.

The revised provisions amend this position by excluding from the calculation of the 90% threshold any treasury shares, any shares held by the bidder, any shares which the bidder is already contracted to acquire and any shares held by close associates of the bidder.

Conclusion

The amendments to the squeeze out provisions are a significant improvement and are to be welcomed. The amended provisions are more closely aligned with the equivalent provisions in other jurisdictions which fall within the scope of the Takeover Code, and so will be more familiar to persons who are used to dealing in, or advising on, Takeover Code transactions. The amendments also resolve a number of areas of uncertainty which exist under the current provisions.

FIND US

Carey Olsen (Guernsey) LLP
PO Box 98
Carey House
Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands

T +44 (0)1481 727272
E guernsey@careyolsen.com

FOLLOW US

Visit our corporate team at careyolsen.com