Buying out minority shareholders in Guernsey companies

Service area / Corporate

Legal jurisdictions / Guernsey

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Overview

Part XVIII of The Companies (Guernsey) Law 2008 (as amended) (the "**2008 Law**") provides a simple framework for the compulsory acquisition of minority shareholders by using a squeeze-out procedure, subject to certain conditions as described below.

There is no sell-out right in the 2008 Law for minority shareholders to be bought out. However, the constitutional documents of the target Guernsey Company (the "**Target Company**") may provide additional rights to minority shareholders.

From 1 July 2009, a provision to appoint a body to regulate takeovers and mergers in Guernsey was introduced to the 2008 Law, under the Companies (Panel on Takeovers and Mergers) Ordinance, 2009 (the "**Takeover Panel**"). The Takeover Panel can issue rules and regulations to ensure the fair treatment of shareholders and impose sanctions in Guernsey. More detailed information on the Takeover Panel can be found in our Carey Olsen briefing: The Takeover Code and Guernsey Companies.

Compulsory acquisition by the bidder

The compulsory acquisition procedures are available where a scheme or contract involves the transfer of shares or any class of shares in the Target Company to any person (the "**Bidder**")[1]. Therefore, there must be an offer made by the Bidder under a contract (the "**Offer**") the terms of which can be accepted by the shareholders of the Target Company (the "**Vendors**"). Section 337(1) of the 2008 Law creates a 4-month period (the "**Offer Period**") in which the Offer has to be accepted[2] by Vendors "… comprising 90% in value of the shares affected" (the "**Threshold**"). Section 337(7) states that the following shares are not taken into account when calculating the Threshold: shares held as treasury shares[3], shares held by the transferee or any class or description of person specified in section 337A[4] at the date of the Offer, or shares acquired by the transferee during the Offer Period at a price higher than the Offer price, save where the Offer price is raised to match the higher price.

If, 90% in value of the Vendors (the "**Accepting Vendors**") have accepted the Offer during the Offer Period, the Purchaser can give a notice (a "**Notice to Acquire**")[5] to any shareholder who has not accepted the Offer (the "**Dissenting Shareholders**") within a period of two months immediately after the Threshold is reached.

1. It should be noted that section 336 of the 2008 Law uses the term "transferee".
2. It should be noted that section 337 (1) of the 2008 Law uses the, somewhat confusing, term "approved".
3. There is no definition of "value" set out in the 2008 Law and our view would be that the term "value" means the nominal value where the shares have a par value and the initial paid up amount on the share where the shares are of no par value.
4. This includes a nominee of the transferee; a holding company, subsidiary or fellow subsidiary of the transferee or a nominee of such a holding company, subsidiary or fellow subsidiary; a body corporate in which the transferee is substantially interested; a person who is, or is a nominee of, a party to a share acquisition agreement with the transferee, or; where the transferee is an individual, his spouse and any minor child or step-child of his.
5. There is no statutory notice equivalent to Form 980 (1) under The Companies Act 2006 ("CA 2006").

The Notice to Acquire is then sent to the Dissenting Shareholders and has to explain to the Dissenting Shareholders that the Purchaser wishes (and is making a binding offer) to acquire their shares on the same terms on which the shares of the Accepting Vendors are to be transferred to the Purchaser. If the terms of the Offer provide a choice of consideration, the Notice to Acquire must give particulars of the choice and state the period within which the Dissenting Shareholder must notify the Accepting Vendors of their choice and which consideration applies if no notice is given to the Accepting Vendors.[6]

Under Section 337(3), the Notice to Acquire may be given to any Dissenting Shareholder who is resident outside of Guernsey, irrespective of any laws in force in that jurisdiction that may prohibit the making or acceptance of an Offer or giving of a Notice to Acquire. If the overseas legislation prohibits making an Offer or giving a Notice to Acquire, the Notice to Acquire can be given by publishing it in La Gazette Officielle or in any other manner allowed by the Target Company's articles.

Immediately following the date on which the Notice to Acquire is sent to the Dissenting Shareholders, section 339 of the 2008 Law creates a one-month period during which the Dissenting Shareholders can apply to the Court for the cancellation of the Notice to Acquire (the "**Court Cancellation Period**").[7]

If the Notice to Acquire has not been cancelled by the Court by the end of the Court Cancellation Period, section 338(1) of the 2008 Law provides that the Purchaser "shall": (a) send a copy of the Notice to Acquire to the Target Company; and (b) pay or transfer to the Target Company[8] the consideration required under the Notice to Acquire in respect of the shares he is entitled to acquire from the Dissenting Shareholders (the "**Consideration**").

On receipt of the Notice to Acquire and the Consideration, the Target Company "shall" register the Purchaser as holder of those shares.

Any sums received by the Target Company must be paid into a separate bank account, and any such sums and any other consideration so received shall be held by the Target Company on trust for the Vendors.[9]

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6. See section 337(2) of the 2008 Law.
7. Section 339(2) of the 2008 Law confirms that on such an application the Court can cancel the Notice to Acquire or make such other order as it thinks fit.
8. Section 338(2) of the 2008 Law provides that the Target Company has to receive such sums into a separate bank account and hold them on trust for the Dissenting Shareholders.
9. There is no provision in the 2008 Law regarding the payment of interest which is equivalent to section 982 of the CA 2006.