MAPLES GROUP

ARTICLE

Chinese take-privates: End of a US affair?

2020 will be a year to remember as covid-19 and the associated economic disruption have put many businesses in liquidation or under immense strain like never before. As a result, a number of Chinese-operated Cayman Islands public companies listed on major securities exchanges such as the New York Stock Exchange (NYSE) and the NASDAQ have experienced volatility in the prices of their publicly traded securities. Couple this volatility with ongoing regulatory developments in the US, such as the US Senate recently putting forward the Holding Foreign Companies Accountable Act in May 2020 and the NASDAQ proposing new "Restricted Market" Listing Rules involving increased audit and reporting requirements, these potential changes could materially and negatively impact Chinese-operated Cayman Islands companies listed on NYSE and NASDAQ.

Presently most relevant companies appear to be closely watching and monitoring developments. Some companies may consider a secondary (dual) listing closer to home on the Hong Kong Stock Exchange such as Alibaba and more recently, JD.com. However, in certain instances, the founders and management of public companies may consider a privatization or "take-private" deal, whereby the company is taken private by becoming a private Cayman Islands company and, as a result, delists from these US securities exchanges. Since 2010, over 50 Chinese public companies have been privatized and delisted from US securities exchanges.

Privatization process

Typically, on these deals, the founders and management may partner with private equity firms and institutional investors, usually with the support of financing institutions such as the investment arms of major Chinese and Western banks, to provide a proposal to the relevant company's shareholders and holders of publicly traded securities such as American Depositary Receipts (ADRs), whereby such shares/ADRs will be cancelled in exchange for cash, with the bidders becoming the owners of the delisted private company. Given the interests of the founders and management, a special committee comprising disinterested members of the company's board is formed to negotiate the deal with the bidder group on an arm's length basis.

Cayman mergers

These transactions are generally structured through a Cayman Islands merger under the statutory merger regime of the Cayman Islands Companies Law, which provides a mechanism whereby the publicly listed Cayman Islands company merges with another Cayman Islands company specially incorporated for this purpose (often referred to as a "merger sub"), to act as a subsidiary of a holding company that is wholly owned by the bidders. Once the merger is completed, the Cayman Islands company and the merger sub become the same legal entity with the former deemed to survive and the latter killed off. The effect is that the bidders' holding company ends up as the sole shareholder of the surviving Cayman Islands company,

which continues to hold all of the assets and liabilities of the once listed public company business. Once the company is private, the founders and management can seek to position the business to generate further value and to implement strategies to potentially monetize their investment with a material uplift at a later date, perhaps via a future listing in China, where the value of the business (and the potential returns) may be significantly greater, or through a potential future M&A buyout or trade sale.

Dissenting shareholders

If the deal is approved by a special resolution (usually 66.66%) of the company's shareholders voting at a shareholder meeting, then the transaction will go ahead and shareholders who disagree with the terms of the deal cannot block the deal from proceeding. However, the Cayman Islands merger regime permits shareholders who dissent from a merger and who wish to challenge the price being offered for their shares to undergo a compulsory negotiation process with the company to agree a fair value for their shares. If the company and the dissenting shareholders are unable to agree on the fair value within a prescribed timeframe, the dissenting shareholders can apply to the Cayman Islands Court seeking a determination of the fair value of their shares. This is a significant area of litigation in the Cayman Islands with the Cayman Islands Court hearing a number of cases relating to fair value with varying valuation methodologies being adopted to determine fair value. These cases include *Re Integra Group* [2016] 1 CILR 192, *in the Matter of Shanda Games Limited* (FSD 14 of 2016, 25 April 2017 unrep), *in the Matter of Qunar Cayman Islands Ltd*, 2019 (1) CILR 611 and *in the Matter of Nord Anglia Education*, 2018 (1) CILR 164. In each of these cases, the Cayman Islands Court determined that the fair value payable to the dissenting shareholders was higher than the price offered in the privatization deal, although the amount of "premium" awarded by the court has varied considerably from case to case.

Schemes of arrangement

An alternative method under the Cayman Islands Companies Law that does not include the dissenting shareholder regime is a scheme of arrangement, which effectively is a court supervised M&A process. The advantage of a scheme over a merger transaction is that the former does not allow dissenting shareholders to litigate about the consideration offered for their shares. This method can provide certainty in that respect, however, the downside is that interested parties, such as the bidder and its affiliates, are not able to vote in favour of the scheme (unlike Cayman Islands mergers), which requires a majority in number and 75% of the shareholders present and voting in favour of the deal to get it over the line, which can potentially be quite difficult to obtain (depending on the shareholder spread of the company involved).

Certainly, at present, it appears that most companies are still willing to proceed with the merger route for take-private deals and we expect to see a trend of more take-private transactions in the short to medium term although the longer term outlook in this post-covid-19 era is still uncertain.

Matt Roberts is a partner and Head of Corporate, Asia at Maples Group. He can be contacted on +852 3690 7405, +852 6013 7108 or by email at matt.roberts@maples.com

中国公司私有化:与美关系将告一段落?

2020 年将是难忘的一年：新冠疫情及其对经济造成的破坏，让许多企业破产清算或承受了前所未有的巨大压力。由此，在纽约证券交易所（“纽交所”）和纳斯达克等主要证券交易所上市的许多中资开曼群岛公众公司公开交易证券的价格出现了剧烈波动。这种剧烈波动再加上美国监管的持续发展，例如美国参议院最近在 2020 年 5 月通过了《外国公司问责法》，纳斯达克则提出了新的“受限市场”上市规则，其中包括增加审计和报告要求，这些潜在变化可能会对在纽交所和纳斯达克上市的中资开曼群岛公司产生重大不利影响。

现时，多数相关公司看起来都在密切关注和监测新动向。有些公司可能会考虑在更靠近中国内地的港交所二次（双重）上市，如阿里巴巴以及最近的京东。不过，在某些情况下，公众公司的创始人和管理层可能会考虑私有化交易，借此让公司成为开曼群岛私人公司，实现私有化，从上述美国证券交易所退市。2010 年以来，已有 50 多家中资公众公司实现私有化，从美国的证券交易所退市。

私有化过程

通常，按照这些交易，创始人和管理层可能会与私募股权公司和机构投资者合作（而且常常得到融资机构如大型中资银行和西方银行的投行部门的支持），向相关公司股东和公开交易证券（如美国存托凭证，即 ADR）的持有者提出方案。根据这些方案，竞购者将向这些股东和持有者支付现金以换取注销后者的股份/ADR，同时成为退市后的私人公司的所有者。考虑到创始人和管理层的利益，将由公司董事会中无利害关系的成员组成特别委员会与竞购者集团开展公平合理的谈判。

开曼群岛合并

这些交易通常根据开曼群岛《公司法》的法定合并制度，以开曼群岛合并的形式来组织安排。这种法定合并制度提供了一种机制，公开上市公司可凭借此机制与专门为此目的设立的另一家开曼群岛公司（常称为“合并子公司”，充当竞购者全资所有的控股公司的子公司）合并。一旦完成合并，开曼群岛公司和合并子公司成为同一法人实体，其中前者视为存续，而后者则不复存在。这种做法的后果是，竞购者的控股公司最终成为存续的开曼群岛公司的唯一股东，并将继续持有曾经上市的公众公司的全部资产和负债。公司一旦完成私有化，创始人和管理层可寻求调整业务定位，以产生进一步的价值并实行可能将其投资变现的策略，这些策略可能包括另行在中国上市，或未来并购、买断或向第三方出售股权等，其中另行在中国上市所带来的业务价值（以及潜在回报）可能会高得多。

异议股东

交易如果获得在股东大会上表决的公司股东的特别决议批准（赞成票通常应达到 66.66%），则将继续下去，同时不同意交易条款的股东不得阻止交易。不过，开曼群岛合并制度允许不赞同合并以及希望对其股份的要约价格提出异议的股东与公司进行强制谈判，以约定其股份的公允价值。如果公司和异议股东无法在规定期限内约定公允价值，异议股东可向开曼群岛法院申请对其股份的公允价值做出判决。这是开曼群岛诉讼的一个重要领域。开曼群岛法院审理了一些涉及公允价值的案件，同时为了确定公允价值采用了不

同的估值方法，这些方法分别用于"*Re Integra Group [2016] 1 CILR 192*"、"*In the Matter of Shanda Games Limited (FSD 14 of 2016, 25 April 2017 unrep)*" 、" *In the Matter of Qunar Cayman Islands Ltd, 2019 (1) CILR 611*"和 "*In the Matter of Nord Anglia Education, 2018 (1) CILR 164*"等案件。在这些案件中，开曼群岛法院裁定，应向异议股东支付的公允价值高于私有化交易中的要约价格，尽管法院裁决的"溢价"金额因案件而存在相当大的差异。

协议安排

开曼群岛《公司法》项下的另一种方法为协议安排，其中不包括异议股东制度。它实际上是在法院监督下的并购过程。相较于合并交易，协议安排的好处是不允许异议股东对向其股份开出的对价提起诉讼。这种方法可以在这方面提供确定性，然而其不利之处在于，竞购方和其关联方等有利害关系的当事人无法对协议安排投赞成票（这一点不同于开曼群岛合并），同时协议安排需要由出席并会上投票的过半数股东赞成，且其持有股份占所有出席并会上投票的股东所持有股份75%或以上，协议方可生效，而要满足上述两项要求难度相当高（取决于所涉及公司的股东分布情况）。

当然，目前看起来多数公司仍然愿意对私有化交易采用合并法，我们预计中短期内私有化交易将出现增加趋势，但是在现在这个后新冠疫情时代，其长远前景仍不确定。

Matt Roberts 是 Maples 集团合伙人兼亚洲公司事务负责人。他的联系方式为电话+852 3690 7405, +852 6013 7108 或者电邮 matt.roberts@maples.com