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# Corporate M&A 2023

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**Cayman Islands: Law & Practice**

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Maples Group



# CAYMAN ISLANDS



## Law and Practice

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in the areas of corporate commercial, finance, investment funds, litigation and trusts. Maintaining relationships with leading legal counsel, the Group leverages this local expertise to deliver an integrated service offering for global business initiatives.

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## 1. Trends

### 1.1 M&A Market

The global M&A market showed significant growth in 2022 compared to 2021, with deal values reaching all-time highs of USD3.8 trillion in 2022.

The COVID-19 pandemic did not impede the pace of deal activity in 2022. To the contrary, it appeared to have a positive impact on deal activities in certain sectors, such as healthcare, biotech and pharmaceuticals.

The main types of entity incorporated or registered in the Cayman Islands are the exempted company, the exempted limited partnership (ELP) and the limited liability company (LLC). According to the annual statistics issued by the Cayman Islands Registrar of Companies, the Registrar of Exempted Limited Partnerships and the Registrar of Limited Liability Companies, the number of new incorporations and formations increased compared to 2021, as follows:

- 9,059 exempted companies (13,412 in 2021);
- 4,684 exempted limited partnerships (5,778 in 2021); and
- 861 limited liability companies (1,460 in 2021).

### 1.2 Key Trends

Private equity firms continue to lead take-private transactions and companies looking for growth in or through technology and digital transformation.

Some notable deals in 2022 involving Cayman Islands vehicles included the following reverse merger transactions.

- The merger of Condeco (global provider of workspace scheduling software) and iOffice + SpacelQ (global workplace and asset management company) to create Eptura. With the proliferation of hybrid work, the strategic combination creates a global worktech leader that provides software solutions to power the modern workplace.
- The merger of Baring Private Equity Asia Group Holdings Limited (BPEA – a leading Pan-Asian private markets firm) and EQT AB. The combination provides a step-change for EQT's presence in Asia, positioning it ideally to execute on the structural growth opportunity in the Asian private markets. It also increases EQT's global reach, enabling it to continue to scale and expand its range of strategies across the European, North American and Asian core markets.

## 1.3 Key Industries

In the past 12 months, M&A activity in the Cayman Islands was largely concentrated in the legal and financial services industry on a cross-border basis. Financial services, technology, e-commerce, biotech, pharma and healthcare were the primary industries involved in M&A activity with Cayman Islands companies.

The hospitality and tourism industry was the most affected by the COVID-19 pandemic, due to applicable travel and gathering restrictions, among other things.

## 2. Overview of Regulatory Field

### 2.1 Acquiring a Company

The primary legal structures for the acquisition of a Cayman Islands company are set out in the Companies Act (As Revised) (the “Companies Act”), which provides mechanisms for the acquisition of a company by:

- a merger or consolidation under Part XVI of the Companies Act;
- mergers, amalgamations and reconstructions by way of scheme of arrangement under Section 86 or 87 of the Companies Act; and
- a minority squeeze-out procedure under Section 88 of the Companies Act.

The Limited Liability Companies Act (As Revised) (the “LLC Act”) also provides for a similar framework for Cayman Islands LLCs.

At present, there is no statutory mechanism by which a Cayman Islands ELP (which is frequently used as part of offshore holding structures) can merge with and/or into another entity. Where an ELP holds the target assets to be acquired in a statutory merger, a “spin-out” or “spin-off”

will often be implemented, whereby the general partner of the ELP will incorporate a company or LLC and contribute the assets to the subsidiary for the purposes of the merger.

The Cayman Islands does not have a set of prescriptive legal principles that are specifically relevant to acquisition transactions; instead, broad common law and fiduciary principles apply.

### Statutory Merger

The statutory merger under Part XVI of the Companies Act is the most common mechanism for the completion of an acquisition or business combination. Under the statutory merger regime, two or more companies (including at least one Cayman Islands company) may merge. Upon the completion of the merger, the rights, property, liabilities and other obligations of each of the companies immediately vest in the surviving company.

In order to merge or consolidate, the directors of each constituent company must approve a written plan of merger or consolidation. Subject to the relevant constitutional documents of the company, the shareholders of each constituent company must also approve the plan of merger by special resolution (typically, a two-thirds majority of those shareholders attending and voting at the relevant meeting).

### Merger of Parent and Subsidiary

No special resolution is required for a merger between a parent company and its subsidiary. In order for this to apply, the parent must hold issued shares that together represent at least 90% of the votes at a general meeting of the subsidiary.

## Dissenters' Rights

A dissenting shareholder in a merger is entitled to payment of the fair value of all their shares upon dissenting, if they follow the statutory procedures. The Companies Act also provides that dissenters' rights are not available in certain circumstances, including in respect of the shares of any class of a constituent company for which an open market exists on a recognised stock exchange or recognised inter-dealer quotation system at the expiry of the period allowed for notice of an election to dissent.

## Scheme of Arrangement

A scheme of arrangement is a flexible form of corporate restructuring and is commonly used for more complex mergers. A scheme is approved by the requisite majorities of shareholders and creditors and by a court order. A scheme of arrangement also involves the production of a circular, which must be sufficiently detailed to allow shareholders and creditors to make an informed decision in relation to the merits of the proposed scheme. There are no statutory dissenters' rights under a scheme of arrangement. If such rights are thought desirable, however, then the terms of the scheme itself may make such provision.

## Squeeze-Out

A statutory squeeze-out under Section 88 of the Companies Act is available where the applicable statutory thresholds are met. Where a bidder has acquired or obtained the approval of 90% of the shares in a Cayman Islands company, it may compel the acquisition of the remaining shares in the company and thereby become the sole shareholder of the company.

## 2.2 Primary Regulators

The primary sources of Cayman Islands law relevant to M&A transactions are the Compa-

nies Act, the LLC Act and common law; see **2.1 Acquiring a Company**.

There are no specific statutes or government regulation concerning M&A transactions in the Cayman Islands.

However, if the target company's securities are listed on the Cayman Islands Stock Exchange (CSX), the CSX Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares (the "Code") may apply. Such rules exist principally to ensure the fair and equal treatment of all shareholders.

In addition, there are change-of-control rules applicable to entities that are regulated by:

- the Cayman Islands Monetary Authority (the "Authority") under:
  - (a) the Banks and Trust Companies Act (As Revised);
  - (b) the Insurance Act (As Revised); and
  - (c) the Mutual Funds Act (As Revised), with respect to licensed mutual fund administrators; and
- the Information and Communications Technology Authority under the Information and Communications Technology Act (As Revised).

## 2.3 Restrictions on Foreign Investments

There are no restrictions on foreign investment in the Cayman Islands. However, a company conducting certain business locally in the Cayman Islands must be structured so as to comply with local licensing laws, including with respect to ownership and control.

The main such requirement is to be licensed under the Trade and Business Licensing Act (As Revised), and the company must be beneficially

owned and controlled at least 60% by persons of Caymanian status, or must hold a licence under the Local Companies (Control) Act (As Revised).

## 2.4 Antitrust Regulations

The Cayman Islands does not have any anti-trust legislation applicable to M&A transactions involving Cayman Islands entities.

## 2.5 Labour Law Regulations

The majority of M&A transactions in the Cayman Islands involve entities that do not have employees in the Cayman Islands and are not conducting business in the Islands. Consequently, the legislation applicable to labour law matters is often not relevant to M&A transactions.

Labour laws in the Cayman Islands include:

- the Labour Act (As Revised);
- the Health Insurance Act (As Revised);
- the National Pensions Act (As Revised);
- the Workmen's Compensation Act (As Revised); and
- any ancillary regulations thereto.

These laws establish minimum employment standards, but do not preclude an employer from setting conditions that are above the minimum.

The Companies Act also provides that, subject to any specific arrangements entered into by the parties to a statutory merger, following the merger a surviving Cayman Islands company will be liable for all contracts, obligations, claims, debts and liabilities of each constituent company, which would invariably include all employment/labour-related contracts, obligations, claims, debts and liabilities.

## 2.6 National Security Review

There is no national security review of acquisitions in the Cayman Islands.

## 3. Recent Legal Developments

### 3.1 Significant Court Decisions or Legal Developments

The most significant court decision or legal development in the Cayman Islands in the past three years related to M&A transactions has been the substantial and sustained growth in merger appraisal litigation.

Under Section 238 of the Companies Act (which is broadly similar although not identical to its State of Delaware counterpart), a shareholder that is dissatisfied with a merger may seek to have the fair value of their shares determined by the Cayman Islands Grand Court; they are then entitled to a cash payment in that amount (together with interest and, in some cases, the costs of the proceedings).

Such merger appraisal litigation has been most common (although not exclusive) where listed companies have been the subject of a management buyout. These proceedings have largely been driven by merger arbitrage funds and other similar market participants, which have, in many cases, acquired shares specifically for the purpose of mounting this kind of dissent action.

In recent years, activity in this field has resulted in a number of cases that have run to trial before the Cayman Islands Grand Court (and, in some cases, to appeals); in turn, this has seen a substantial body of authority and knowledge on the subject evolve within a short timeframe. The outcome of these cases has varied significantly, largely depending on the facts of each case.

The following 2022 cases are particularly noteworthy.

- In *Changyou* (16 September 2022, CICA), the Court of Appeal found that dissent rights under Section 238 of the Companies Act also apply to “short-form” mergers under Section 233 between parent companies and subsidiaries, which do not need to be approved by special resolution at an EGM, on the basis that, notwithstanding the wording of Section 238, the expropriation of shares without the ability to petition the court for a fair value determination was unconstitutional.
- In *FGL Holdings* (20 September 2022, CIGC), the Grand Court held for the first time that the price offered to shareholders in the merger transaction was the best and only evidence of fair value, and refused to place any reliance on an income approach. While the Court was satisfied that the market in the company’s stock was efficient, it concluded that the effects of COVID-19 had caused a temporary dislocation, meaning that the market price of the shares at the time the merger completed was not a good indicator of fair value.

### 3.2 Significant Changes to Takeover Law

There have been no significant changes to takeover law in the past 12 months and no takeover legislation is under review that could result in significant changes in the next 12 months.

## 4. Stakebuilding

### 4.1 Principal Stakebuilding Strategies

Stakebuilding is not a common or customary procedure in the context of M&A transactions involving Cayman Islands entities.

### 4.2 Material Shareholding Disclosure Threshold

There are no material shareholding disclosure thresholds under Cayman Islands law, although Cayman Islands entities may be subject to onshore disclosure and reporting obligations (if, for example, their shares are listed on a foreign stock exchange).

Unless a company falls within an exemption, it is required to take reasonable steps to identify its beneficial owners and certain intermediate holding companies prescribed in the Companies Act, and to maintain a beneficial ownership register at its registered office in the Cayman Islands with a licensed and regulated corporate service provider. The information contained in a beneficial ownership register is not publicly available.

### 4.3 Hurdles to Stakebuilding

There are no stakebuilding rules applicable under Cayman Islands law; see **4.1 Principal Stakebuilding Strategies**.

Cayman Islands entities can generally provide for disclosure and reporting thresholds in their constitutional documents.

### 4.4 Dealings in Derivatives

Dealings in derivatives are allowed in the Cayman Islands.

### 4.5 Filing/Reporting Obligations

There are no securities disclosure or competition laws in the Cayman Islands, so there are no filing/reporting obligations in relation to derivatives.

### 4.6 Transparency

Under Cayman Islands law, there is generally no requirement for shareholders to make known the purpose of their acquisition and their intention



regarding control of a company; see **4.2 Material Shareholding Disclosure Threshold**.

That being said, in the case of an entity listed on the CSX, the CSX Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares (which prescribe certain rules relating to disclosure in the offer documents of the intentions of the offeror) may apply; see **2.2 Primary Regulators**.

## 5. Negotiation Phase

### 5.1 Requirement to Disclose a Deal

There is generally no requirement under Cayman Islands law for a target company to publicly disclose a deal.

However, in the case of a target listed on the CSX, an announcement of a firm intention to make an offer must be made in the following circumstances:

- when the board of the target has been notified in writing of a firm intention to make an offer from a serious source, irrespective of the attitude of the board to the offer; or
- immediately upon an acquisition of shares that gives rise to an obligation to make a mandatory offer under the Code; see **6.2 Mandatory Offer Threshold**.

Cayman Islands entities listed on foreign stock exchanges may also be subject to additional disclosure and reporting obligations under the applicable listing rules.

### 5.2 Market Practice on Timing

There is no general market practice regarding the timing of disclosure of M&A deals; see **5.1 Requirement to Disclose a Deal**.

### 5.3 Scope of Due Diligence

There is no standard set of due diligence requirements in the Cayman Islands in a negotiated business combination or other M&A transaction. The due diligence requirements vary from deal to deal, based on the requirements of the relevant parties involved in the transaction.

Generally speaking, the basic due diligence consists of a review of the constitutional documents of the company, the statutory registers (register of directors and officers, register of members, register of mortgages and charges and, if applicable, the beneficial ownership register) and all material contracts and licences. A search of the court registers in the Cayman Islands may also be performed and will disclose any Originating Process pending before the Grand Court of the Cayman Islands in which the target is identified as a defendant or respondent. The scope of due diligence has not been impacted by the COVID-19 pandemic.

The due diligence process is a collaborative effort as most Cayman Islands M&A activity is cross-border.

### 5.4 Standstills or Exclusivity

Standstill agreements and exclusivity agreements are not common for Cayman Islands M&A transactions.

Due to the cross-border nature of Cayman Islands M&A transactions, deal documents (including standstill agreements and exclusivity agreements, if used) are negotiated onshore and governed by onshore laws.

### 5.5 Definitive Agreements

It is permissible for tender offer terms and conditions to be documented in a definitive agreement.

Due to the cross-border nature of Cayman Islands M&A transactions, tender offer documents (if used) are negotiated onshore and governed by onshore laws.

## 6. Structuring

### 6.1 Length of Process for Acquisition/Sale

There is no standard length of time for acquiring/selling a business in the Cayman Islands – the time will vary depending upon common factors/procedures, including available financing, due diligence and (if necessary) regulatory approvals. Governmental measures in the Cayman Islands have not created major practical delays or impediments to the deal-closing process.

### 6.2 Mandatory Offer Threshold

There is no mandatory offer threshold in the Cayman Islands.

In relation to CSX-listed target companies, unless the Council Executive Rules of the CSX provide otherwise, the following persons are obliged to make mandatory offers to holders of any class of equity capital and to holders of any class of voting non-equity capital of which such person or persons acting in concert with them hold shares:

- any person who acquires shares that (taken together with shares held by such person or held or acquired by persons acting in concert with such person) carry 30% or more of the voting rights of a company; or
- any person who, together with persons acting in concert with such person, holds not less than 30% but not more than 50% of the voting rights of a company and such person, or any person acting in concert with such

person, acquires in any period of 12 months additional shares carrying more than 1% of the voting right.

Offers for different classes of equity capital must be fair and appropriate, having regard to current circumstances, and the Council Executive of the CSX must be consulted in advance in such cases.

### 6.3 Consideration

Cash and shares (or equivalent equity securities) are equally common forms of consideration for M&A transactions involving Cayman Islands companies.

There are no specific common tools in Cayman Islands M&A transactions used to bridge value gaps between the parties in a deal environment or industry with high valuation uncertainty. The deal documents are usually governed by onshore law (eg, New York or Delaware law) and, as such, the tools used for onshore M&A transactions would typically apply.

### 6.4 Common Conditions for a Takeover Offer

Cayman Islands laws and regulations do not prescribe any conditions for a takeover offer, nor impose any restrictions on offer conditions.

Any conditions would be a commercial matter to be agreed among the parties. Typical conditions in a tender offer relate to material matters such as regulatory and shareholder approval or consents.

Where a target company is CSX listed, the Code provides that an offer must not be subject to conditions depending solely on subjective judgements by the directors of the offeror,

or the fulfilment of which is in their hands, save with the consent of the CSX Counsel Executive.

## 6.5 Minimum Acceptance Conditions

Tender offers are conditional on a bidder acquiring a sufficient number of target shares to avail themselves of the procedures set out in **2.1 Acquiring a Company** or **6.10 Squeeze-Out Mechanisms**.

## 6.6 Requirement to Obtain Financing

A business combination can be conditional on the bidder obtaining financing.

## 6.7 Types of Deal Security Measures

Bidders may negotiate with the target for the provision of break fees, non-solicitation undertakings, exclusivity periods and match rights on competing bids, among other deal security measures.

When agreeing to any such protection measures, the board of directors of a Cayman Islands target company should take into account their fiduciary and other duties owed to the company and be comfortable that such arrangements are permissible under the company's articles of association and in the best interests of the company.

There have not been any new contractual considerations or tools for managing "pandemic risk" in the interim period (ie, between the signing of the M&A agreement and the closing of the M&A transaction).

There have not been any changes to the regulatory environment in the Cayman Islands that have impacted the length of time between the signing and closing/completion of deals.

## 6.8 Additional Governance Rights

If a bidder does not seek 100% ownership of a target, examples of additional governance rights that the bidder can seek outside of its shareholdings include negotiating with the target for the right to nominate a person for appointment as a director of the target, assuming that such right is not already contemplated pursuant to the memorandum and articles of association of the target. Unless the memorandum and articles of association provide otherwise, the business and affairs of a company are managed by its board of directors.

In the context of an LLC, which may be managed by its members or by a board of managers, and if the LLC is managed by a board of managers, the bidder could similarly seek rights to appoint the managers if this is not already provided for in the operating agreement of the LLC.

To the extent that a bidder acquires such number of a Cayman Islands company's shares to pass a special resolution under Cayman Islands law (typically, a two-thirds majority of those shareholders attending and voting at the relevant meeting), it would be able to amend the company's memorandum and articles of association, authorise a plan of merger and place the company into voluntary liquidation, among other matters.

If a bidder acquires a sufficient interest in an LLC, it may be able to cause equivalent actions in respect of such LLC, subject to the terms of the LLC agreement constituting the LLC.

## 6.9 Voting by Proxy

Subject to the memorandum and articles of association of a Cayman Islands company, shareholders may vote by proxy at general meetings of the company.

## 6.10 Squeeze-Out Mechanisms

When a takeover offer is made and accepted by holders of 90% of the shares to which the offer relates within four months, the offeror may, within a two-month period, require the holders of the remaining shares to transfer such shares on the terms of the offer. An objection can be made to the Grand Court of the Cayman Islands, but this is unlikely to succeed unless there is evidence of fraud, bad faith, collusion or inequitable treatment of the shareholders.

Furthermore, transactions similar to a merger, reconstruction and/or an amalgamation may, in some circumstances, be achieved through means other than these statutory provisions, such as a share capital exchange, asset acquisition or control, or through contractual arrangements of an operating business.

See **2.1 Acquiring a Company** (Merger of Parent and Subsidiary).

## 6.11 Irrevocable Commitments

It is common for bidders to obtain irrevocable commitments to tender or vote by principal shareholders of a Cayman Islands target company prior to the launch of bids or the announcement of the relevant transaction.

Regarding statutory mergers and tender offers in respect of a Cayman Islands company, the shares subject to an irrevocable commitment will generally count towards the requisite voting thresholds to complete the transaction. In the context of a scheme of arrangement, additional consideration should be given to such irrevocable undertakings, which may, in certain instances, be construed as creating a separate class of shares and requiring a separate vote in respect of the relevant shareholders.

## 7. Disclosure

### 7.1 Making a Bid Public

There is generally no legal requirement to make a bid public.

For companies listed on a foreign stock exchange, the applicable listing rules may prescribe requirements for public disclosure and/or the observance of secrecy in respect of bids.

In the case of a target listed on the CSX, an announcement of a firm intention to make an offer must be made in the following circumstances:

- when the board of the target has been notified in writing of a firm intention to make an offer from a serious source, irrespective of the attitude of the board to the offer; or
- immediately upon an acquisition of shares that gives rise to an obligation to make a mandatory offer under the Code; see **6.2 Mandatory Offer Threshold**.

### 7.2 Type of Disclosure Required

No specific disclosure is required for the issuance of shares in a business combination, except for a deal structured as a scheme of arrangement, in which case a circular is required (see **2.1 Acquiring a Company**), or for a tender offer involving a CSX listed target, in which case an announcement would apply (see **7.1 Making a Bid Public**).

### 7.3 Producing Financial Statements

Bidders are not legally required to produce financial statements (pro forma or otherwise) in their disclosure documents. Formal financial statements are not legally required to be prepared in any required form, although they are usually

prepared in accordance with GAAP, IFRS or any other applicable accounting standards.

A constituent company in a statutory merger must confirm to the Registrar of Companies that it is able to pay its debts as they fall due in the ordinary course of business (ie, solvent). This is demonstrated by preparing a statement of assets and liabilities up to the latest practicable date (typically no more than 30 days) prior to the merger.

## 7.4 Transaction Documents

There is no legal requirement to disclose any transaction documents in full.

However, Cayman Islands entities may be subject to onshore disclosure and reporting obligations (if, for example, their shares are listed on a foreign stock exchange).

Disclosure may also be required in a scheme of arrangement or a tender offer involving a CSX listed target; see **7.2 Type of Disclosure Required**.

## 8. Duties of Directors

### 8.1 Principal Directors' Duties

Under Cayman Islands law, directors owe the following fiduciary duties to the company as a whole:

- a duty to act in good faith in what the director or officer believes to be in the best interests of the company as a whole;
- a duty to exercise powers for the purposes for which those powers were conferred and not for a collateral purpose;
- directors should not improperly fetter the exercise of future discretion;

- a duty to exercise powers fairly between different sections of shareholders;
- a duty not to put themselves in a position in which there is a conflict between their duty to the company and their personal interests; and
- a duty to exercise independent judgement.

Directors also owe a duty of care to the company that is not fiduciary in nature. This duty has been defined as a requirement to act as a reasonably diligent person having the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, as well as the general knowledge skill and experience of that director.

As set out above, directors have a duty not to put themselves in a position of conflict, and this includes a duty not to engage in self-dealing, nor to otherwise benefit as a result of their position. However, in some instances what would otherwise be a breach of this duty can be forgiven and/or authorised in advance by the shareholders, provided there is full disclosure by the directors. This can be done by way of permission granted in the constitutional documents or alternatively by shareholder approval at general meetings.

The duties of a director are generally owed to the company but can, very occasionally, be owed directly to creditors or shareholders if there are special factual circumstances. In the ordinary course, the “interests of the company” may be equated to the interests of the company’s shareholders (ie, the persons whose money is at stake). However, once a company is insolvent or is “doubtfully solvent”, the directors must consider the creditors’ interests when discharging their duties.

## 8.2 Special or Ad Hoc Committees

The constitutional documents of a Cayman Islands company may provide that a director may vote in respect of any transaction or contract in which such director is interested, provided the nature of such director's interest is disclosed prior to any vote thereon. However, this does not modify the duty of conflicted directors to act in the best interests of the company as a whole.

If any directors are conflicted, it may be advisable (depending upon the nature of the conflict) for the board to establish a special committee consisting of non-conflicted directors to take forward all matters relating to the business combination. This assists in mitigating risks that may arise from a particular director's conflict of interest and their overriding core duty to always act in the best interests of the company as a whole.

## 8.3 Business Judgement Rule

As a matter of Cayman Islands law, while the constitutional documents can modify the duties of directors (eg, so that a director can still vote even if they have a conflicting interest), there is an irreducible core of duties that cannot be contracted out of, most easily described as the duty to act in the best interests of the company as a whole.

This is a subjective test and a Cayman Islands court would only interfere if it determines that no reasonable director could have concluded that a particular course of action was in the best interests of the company as a whole. The court is not, however, concerned with the merits of the business decision from a commercial point of view.

## 8.4 Independent Outside Advice

It is common, but not required, for the board of directors (or special committee thereof) to obtain

an opinion from an independent investment banking firm or another valuation or appraisal firm that regularly renders fairness opinions on the type of target business that is being acquired, in order to confirm that the acquisition is fair from a financial point of view.

The board of directors of a Cayman Islands company is able to obtain, and rely upon, advice received from the company's legal counsel, auditors and tax and financial advisers in determining whether or not the acquisition is in the best interests of the company as a whole.

## 8.5 Conflicts of Interest

See **8.1 Principal Directors' Duties**, **8.2 Special or Ad Hoc Committees** and **8.3 Business Judgement Rule**.

While the duty of directors of a Cayman Islands company to avoid a conflict of interest is a strict one, almost invariably that duty will be extensively modified in the company's constitutional documents. The validity of such a modification has generally been upheld in Cayman Islands case law. Moreover, absent unusual circumstances, shareholders do not owe duties to each other nor to the company itself under Cayman Islands law.

However, modification of the duty to avoid a conflict typically does not modify a director's core fiduciary duty to act in the best interests of the company. So, while the mere existence of a conflict may not of itself be actionable, it has proved to be a relevant factor in claims against directors, insofar as it may provide a director with a motive to breach this core duty.

The importance of properly managing conflicts of interests has also been a feature in merger appraisal litigation in the Cayman Islands, under

Section 238 of the Companies Act. For example, in *Trina Solar Limited* (23 September 2020, CIGC), the court discussed at length the significance of the role of the special committee in dealing with mergers where some members of the board are conflicted, emphasising the importance of the special committee having robust (and properly documented) processes and procedures in assessing the deal.

In *FGL Holdings* (20 September, CICA), alleged conflicts and inter-relationships between members of the Special Committee and the buyer and contractual counterparties were explored in great detail and the Grand Court ultimately concluded, based on the facts and evidence, that the merger process was robust, fair and not affected by conflicts.

## 9. Defensive Measures

### 9.1 Hostile Tender Offers

Hostile tender offers are generally not supported by the Cayman Islands M&A regime. A statutory merger and a scheme of arrangement could never be truly “hostile”, as they require the consent of the target.

For public companies where the constitutional documents do not require director consent to transfers of shares, it is foreseeable that a tender offer could be successful without the support of the target.

The squeeze-out procedure is the only mechanism available in the context of a hostile transaction where the bidder could proceed by tender offer.

### 9.2 Directors’ Use of Defensive Measures

Cayman Islands law does not prohibit the use of defensive measures by directors, subject to the directors complying with their fiduciary duties.

### 9.3 Common Defensive Measures

The memorandum and articles of association of a company that is publicly listed may contain certain anti-takeover or “poison pill provisions”, which may make a hostile takeover more difficult to consummate, or may give the target superior bargaining power.

Examples of such defensive measures include the ability to issue blank cheque preference shares, staggered boards, the removal of directors only for cause or by a supermajority vote, and restrictions on the ability of shareholders to requisition general meetings.

The prevalence of various defensive measures has not changed as a result of the COVID-19 pandemic.

### 9.4 Directors’ Duties

When enacting defensive measures, directors of a target company owe certain fiduciary duties and a duty of care, diligence and skill to the company; see **8.1 Principal Directors’ Duties**.

### 9.5 Directors’ Ability to “Just Say No”

Directors of a Cayman Islands company cannot “just say no” and take action that prevents a business combination. In order to comply with their fiduciary and other duties, the directors of a Cayman Islands target will need to give due consideration to any legitimate offer, even if unsolicited, to determine if the acceptance of such proposal would be in the best interests of the company as a whole.

Where a target company is listed on the CSX, the Code provides that, after a bona fide offer has been communicated to the board of an offeree company or after the board has reason to believe that such an offer might be imminent, the board may not take any action without the approval of the shareholders in a general meeting, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.

## 10. Litigation

### 10.1 Frequency of Litigation

Litigation in the Cayman Islands is not common in connection with M&A transactions, although a number of dissenters' petitions under the statutory merger regime have been heard in the Cayman Islands courts.

Given that a large proportion of Cayman Islands M&A activity involves cross-border deals, it is not uncommon for M&A transactions involving Cayman Islands entities to be subject to onshore litigation.

### 10.2 Stage of Deal

If any litigation is brought, it would be done post-closing.

### 10.3 "Broken-Deal" Disputes

There have been no disputes of note between parties with pending transactions in early 2023.

## 11. Activism

### 11.1 Shareholder Activism

Shareholder activism is not an important force in M&A transactions involving Cayman Islands entities.

### 11.2 Aims of Activists

See 11.1 Shareholder Activism.

### 11.3 Interference With Completion

See 11.1 Shareholder Activism.



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