International Comparative Legal Guides

Mergers & Acquisitions 2021

A practical cross-border insight into mergers and acquisitions

15th Edition

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The primary sources of regulation of M&A in the Cayman Islands are the Companies Act (2020 Revision) (the "**Companies Act**") and common law.

Part XVI of the Companies Act facilitates mergers and consolidations between one or more companies, provided that at least one constituent company is incorporated under the Companies Act. The Limited Liability Companies Act (2020 Revision) (the "**LLC Act**") also provides for a similar framework for Cayman Islands limited liability companies.

In addition:

- mergers, amalgamations and reconstructions by way of a scheme of arrangement approved by the requisite majorities of shareholders and creditors and by an order of the Cayman Islands court under section 86 or 87 of the Companies Act are still available for complex mergers (and are mirrored in the LLC Act); and
- section 88 of the Companies Act provides a limited minority squeeze-out procedure (and, again, is mirrored in the LLC Act).

The Cayman Islands does not have a prescriptive set of legal principles specifically relevant to "going private" and other acquisition transactions (unlike other jurisdictions such as, for example, Delaware). Rather, broad common law and fiduciary principles will apply.

While there are no specific statutes or government regulation concerning the conduct of M&A transactions, where 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**"), which exists principally to ensure fair and equal treatment of all shareholders, may apply.

1.2 Are there different rules for different types of company?

Except to the extent described above with respect to companies listed on the CSX, there are no different rules for different types of company.

1.3 Are there special rules for foreign buyers?

There are no foreign investment restrictions or exchange control legislation in the Cayman Islands. However, any company with an established physical presence in the Cayman Islands must be structured so as to comply with local licensing laws, including with respect to ownership. Any company engaging in business locally requires to be licensed under the Trade and Business Licensing Act (2019 Revision) and the applicant must either be beneficially owned and controlled at least 60% by persons of Caymanian Status, or hold a licence under the Local Companies (Control) Act (2019 Revision). However, foreign investment, if considered beneficial to the Cayman Islands' economy, is generally encouraged.

1.4 Are there any special sector-related rules?

There are change-of-control rules applicable to entities regulated by the Cayman Islands Monetary Authority under the Banks and Trust Companies Act (2020 Revision), the Insurance Act, 2010 or (with respect to licensed mutual fund administrators) the Mutual Funds Act (2020 Revision). In addition, ownership and control restrictions apply to certain entities regulated by the Information and Communications Technology Act (2019 Revision).

1.5 What are the principal sources of liability?

Pursuant to common law rules, the directors of Cayman Islands companies owe fiduciary duties (generally described as being those of loyalty, honesty and good faith) to the company. While it is common for directors of Cayman Islands companies to be indemnified for certain breaches of this duty, as a matter of public policy, it is not possible for directors to be indemnified for conduct amounting to wilful default, wilful neglect, actual fraud or dishonesty.

To the extent that consent to a merger or acquisition is procured via an information memorandum or proxy statement, civil liability in tort may arise for negligent misstatement or fraudulent misrepresentation. In addition, the Contracts Act (1996 Revision) gives certain statutory rights to damages in respect of negligent misstatements. There are certain criminal sanctions under the Penal Code (2019 Revision) for deceptive actions, including for any officer of a company (or person purporting to act as such) with intent to deceive members or creditors of the company about its affairs, who publishes or concurs in publishing a written statement or account that, to their knowledge, is or may be misleading, false or deceptive in a material particular.

Any disposition of property made at an undervalue by or on behalf of a Cayman Islands company and if an intent to defraud its creditors, shall be voidable: (i) under the Companies Act at the instance of the company's official liquidator; or (ii) under the Fraudulent Dispositions Act (1996 Revision) at the instance of a creditor thereby prejudiced.

If the consideration is to be shares in a Cayman Islands company, the Companies Act prohibits an exempted company that is not listed on the CSX from making any invitation to the public in the Cayman Islands to subscribe for any of its securities.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Statutory mergers are by far the most common method of structuring a more complex acquisition or business combination. In certain cases, however, the statutory merger regime may not be suitable, and alternative options, such as contractual equity or asset acquisition, are appropriate. The threshold for a statutory merger (subject to the relevant constitutional documents of the company) requires only a special resolution passed in accordance with the articles of association (typically, a two-thirds majority of those shareholders attending and voting at the relevant meeting). Dissenters in a merger have the right to be paid in cash the fair value of their shares and may compel the company to institute court proceedings to determine that fair value. This can be a factor where the offer involves a share-for-share swap as opposed to a cash buyout, or where the bidder anticipates issues with minority shareholders.

Schemes of arrangement under section 86 or 87 of the Companies Act are appropriate in certain circumstances, such as where a capital reduction is required as part of the acquisition structure. A scheme of arrangement transaction will involve the production of a circular, typically a detailed disclosure document that must provide stakeholders with all information required to make an informed decision on the merits of the proposed scheme. The principal benefit of a scheme is that if all the necessary majorities are obtained and hurdles are cleared, and the court approves the scheme, then the terms of the scheme become binding on all members of the relevant class(es) of shareholders or creditors, whether or not they: (a) received notice of the scheme; (b) voted at the meeting; (c) voted for or against the scheme; and (d) changed their minds afterwards.

In a tender offer, private contractual acquisition, or public takeover, where control of the majority of the voting equity is required, the statutory squeeze-out remains available where the relevant statutory thresholds are met. Where a bidder has acquired 90% or more of the shares in a Cayman Islands company, it can compel the acquisition of the shares of the remaining minority shareholders, and thereby become the sole shareholder. Such a "squeeze-out" requires the acceptance of the offer by holders of no less than 90% in value of the shares to which the offer relates, excluding shares held or contracted to be acquired prior to the date of the offer. Shares held by the bidder or its affiliates are typically not counted for purposes of the 90% requirement. Dissenters have limited rights to object to the acquisition, and in the case of a tender offer that is not on an exclusively cash basis, dissenters have no right to compel a cash alternative.

Contractual asset acquisitions, where the target ceases doing business and is liquidated after the consummation of the sale, are becoming less popular given the flexibility and ease of use of the statutory merger regime, but remain a useful option.

2.2 What advisers do the parties need?

Parties should engage Cayman Islands counsel alongside onshore legal advisers. Generally, auditors, tax and financial advisers are also involved in deal structuring.

2.3 How long does it take?

Depending on the complexity of the transaction, the structure and regulatory status of the target, and the method employed, anywhere from a matter of weeks to a number of months. For example, straightforward mergers of Cayman Islands companies, where the shareholder base is relatively limited, and where there are no secured creditors and no applicable public listing, may be accomplished in a few weeks. Where the target company is listed (either in the Cayman Islands or elsewhere) or the merger is a cross-border transaction, a longer deal time is required.

Schemes of arrangements can, depending on their complexity and given the requirements for court approval, run for many months, as can complex merger transactions.

2.4 What are the main hurdles?

Both a statutory merger and a squeeze-out transaction provide for certain dissenter rights, which, in the merger context, essentially provide for dissenting shareholders to make application to the court for the payment of fair value for their shares. Similar considerations apply for statutory squeeze-outs; however, where there is a tender offer that is not on an exclusively cash basis, dissenters have no right to compel a cash alternative. For schemes of arrangement, the key challenge is achieving the high approval majorities required of each class of shareholders.

2.5 How much flexibility is there over deal terms and price?

Parties are generally free to contract as they wish with regard to terms and price, subject to the directors of a Cayman Islands company discharging their fiduciary duties, including the duty to act *bona fide* in the best interests of the company.

2.6 What differences are there between offering cash and other consideration?

Again, parties are generally free to contract as they wish with regard to terms and price. However, in the context of a statutory merger, where dissenters have the right to be paid in cash the fair value of their shares, a share-for-share deal may add complexity.

2.7 Do the same terms have to be offered to all shareholders?

Where an acquisition is structured by way of a statutory merger or scheme of arrangement, differing consideration can be paid to shareholders. For tender offers utilising a statutory squeeze-out, the same "offer" must be made to all shareholders.

2.8 Are there obligations to purchase other classes of target securities?

There are no statutory or common law obligations to purchase other classes of target securities.

2.9 Are there any limits on agreeing terms with employees?

There are no such limits applicable under Cayman Islands law.

2.10 What role do employees, pension trustees and other stakeholders play?

Aside from a general consideration with respect to the relevant employment contracts, there are no employee or pension-specific provisions applicable to a statutory merger, save that where the surviving company is a Cayman Islands company, it assures all contracts, obligations, claims, debts and liabilities of each of the other constituent companies, including any employment liabilities. Secured creditor consent to a statutory merger is required.

For a scheme of arrangement, again, there are no specific employee or pension-specific provisions applicable, but where the rights of creditors are to be affected, their consent will be required.

Employee, pension or creditor consideration will not be relevant to a tender offer or statutory squeeze-out, or to an asset acquisition.

2.11 What documentation is needed?

While not strictly prescribed by the Companies Act, any complex merger will require some form of disclosure statement, whether or not required by applicable onshore listing rules or regulation. The Companies Act requires each Cayman Islands constituent company to enter into a written plan of merger, setting out certain prescribed information, and for more complex transactions, this is usually accompanied by a long-form merger or framework agreement.

For schemes of arrangement, alongside the applicable court documents, the scheme circular must be provided to the scheme participants, including sufficient information so as to allow them to make an informed decision in relation to the merits of the proposed scheme.

For a tender offer, there is no Cayman Islands prescribed documentation, but again, onshore listing rules or regulation may be applicable. For a statutory squeeze-out, the Companies Act requires that notice be given to dissenting shareholders.

For an asset acquisition, there are no specific documentation requirements, and the parties are free to contract as they see fit.

2.12 Are there any special disclosure requirements?

For schemes of arrangement, the scheme circular must be provided to the scheme participants, and must include sufficient information so as to allow them to make an informed decision in relation to the merits of the proposed scheme. For statutory mergers, the plan of merger must contain certain limited prescribed information and be approved by a special resolution of the members of each Cayman Islands constituent company.

2.13 What are the key costs?

The key costs will be service provider fees; government filing fees will generally be minimal and Cayman Islands stamp duty is only payable on documents that are executed in, or subsequently brought to, the Cayman Islands. Additional costs may also be incurred if the target is obliged to petition the Cayman Islands court in connection with dissenting shareholders. For schemes of arrangement, court fees will also be incurred.

2.14 What consents are needed?

Other than those as set out at question 1.4 above, there are generally no authorisations, consents, approvals, licences, validations or exemptions required by law from any governmental authorities or agencies or other official bodies in the Cayman Islands in connection with M&A transactions.

Absent any contractual consents other than the consents discussed at question 1.4 above, for a statutory merger, the consent of any secured creditor is required. While the merger documents are required to be filed with the Registrar of Companies, upon the satisfaction of the statutory requirements, the plan of merger shall be registered – there is no discretion to refuse registration.

A scheme of arrangement is subject to the sanction of the court, although the court's principal role in the scheme is to ensure procedural fairness and not to assess the commercial benefits of the proposal. Any shareholders or creditors who object to the scheme are entitled to attend the relevant court hearing to object – however, an objection solely on the grounds that it is commercially a "bad deal" is usually unlikely to succeed if the scheme has the support of the requisite majorities.

2.15 What levels of approval or acceptance are needed?

Absent any special thresholds or consent required by the constitutional documents of a Cayman Islands company and the consents discussed at question 1.4 above, for a statutory merger, shareholder approval (generally 66.66% of those who, being entitled to do so, attend and vote at the relevant meeting) is required.

A scheme of arrangement will require the approval of each of the relevant class(es) of members whose rights are to be subject to the scheme, and majorities that must be achieved for approval of each class of members are the same as those applicable to creditors set out above.

2.16 When does cash consideration need to be committed and available?

There are no Cayman Islands legal considerations relevant to determining when cash consideration needs to be committed and available.

3 Friendly or Hostile

3.1 Is there a choice?

Both a statutory merger and a scheme of arrangement can never be "hostile" insofar as they require the consent of the target. The squeeze-out procedure is the only mechanic available in the context of a hostile transaction.

The Cayman Islands does not have any applicable takeover legislation, or competition or antitrust legislation. The constitutional documents of Cayman Islands companies that are publicly listed may contain certain anti-takeover or "poison pill provisions", which may make a hostile takeover more difficult to consummate, or give the target superior bargaining power.

In order to comply with their fiduciary duties, the directors of a Cayman Islands target will need to give due consideration to any *bona fide* offer, even if it is unsolicited, to determine if the acceptance of such an offer is in the best interests of the company.

3.2 Are there rules about an approach to the target?

There are no applicable rules in the Cayman Islands.

3.3 How relevant is the target board?

The directors of a Cayman Islands company will be integral in consummating a merger or acquisition, whether by statutory merger, scheme of arrangement, equity acquisition or asset acquisition.

In the context of a statutory merger or an asset acquisition, the directors will be required to approve the terms of the transaction on behalf of the company, and for a scheme of arrangement, the company must consent to the scheme, which, by necessity, will involve the consent of the directors. The usual position for a Cayman Islands company (other than a listed company) is that the transfer of shares is subject to the consent of the directors, meaning that the directors will also generally be able to control an equity acquisition.

However, the directors of a Cayman Islands company will, in making decisions on a proposed takeover, need to act consistently with their fiduciary duties, including (i) by acting *bona fide* in the best interests of the company as whole, and (ii) by not allowing their personal interests to conflict with their duties to the company.

Directors of a Cayman Islands company have a strict duty to avoid a conflict of interest. However, the constitutional documents of a Cayman Islands company will almost invariably contain provisions that relax this duty, usually allowing directors to vote in connection with transactions in which they are interested, provided they make appropriate disclosures (albeit, such provisions do not modify the directors' overriding duty to act *bona fide* in the best interests of the company).

It is common for the directors of a listed company to elect to establish an independent committee of uninterested directors to consider takeover offers. While this may assist from a risk-management perspective, it does not provide the same "safe harbour" or "roadmap" protection that it may offer in other jurisdictions.

3.4 Does the choice affect process?

There is no statutory mechanism to consummate an unsolicited, "hostile" acquisition. The cooperation of the target company is required for a statutory merger, scheme of arrangement or asset acquisition but there may be circumstances where the bidder could proceed by tender offer.

4 Information

4.1 What information is available to a buyer?

There is very limited publicly available information in the Cayman Islands, essentially limited to the company name and the location of its registered office. If the target company is listed, additional information may be available (for example, any SEC filings). A search of the court registers in the Cayman Islands will disclose any Originating Process pending before the Grand Court of the Cayman Islands, in which the company is identified as a defendant or respondent.

4.2 Is negotiation confidential and is access restricted?

Yes, negotiation is confidential and access is restricted.

4.3 When is an announcement required and what will become public?

There is no Cayman Islands regulation relating to the making or content of any announcement.

4.4 What if the information is wrong or changes?

See question 4.3.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Yes, subject to the general caveat that, where they are not listed on a recognised stock exchange, transfers of shares in a Cayman Islands company are usually subject to the consent of the directors of the company.

5.2 Can derivatives be bought outside the offer process?

There are no Cayman Islands restrictions in this regard.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

There are no stakebuilding rules applicable under Cayman Islands law.

5.4 What are the limitations and consequences?

There are no limitations or consequences.

6 Deal Protection

6.1 Are break fees available?

There is no specific restriction on break fees under Cayman Islands law, although directors of a Cayman Islands will need to give careful consideration to the break fee provisions in approving any contract on behalf of the company, to ensure that they comply with their fiduciary and other duties, including the duty to act *bona fide* in the best interests of the company.

6.2 Can the target agree not to shop the company or its assets?

Yes, subject to the directors of the company complying with their fiduciary and other duties.

6.3 Can the target agree to issue shares or sell assets?

Yes, again subject to the directors of the company complying with their fiduciary and other duties, including exercising their powers and discretions (for example, to issue shares) for a proper purpose, and not to frustrate, or protect, a particular deal.

6.4 What commitments are available to tie up a deal?

"No-shop" and lock-up agreements are, in principle, acceptable under Cayman Islands law, as are voting agreements whereby key shareholders agree to vote in favour of a transaction.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

The deal conditions described at section 6 above are generally permitted, subject to the compliance by the directors of the relevant company with their fiduciary and other duties.

7.2 What control does the bidder have over the target during the process?

The bidder will not generally gain "control" of the target until closing of the relevant transaction, but it is not uncommon for deal documentation to include restrictions on the conduct of the target's business; for example, limiting it to the "ordinary course of business". Alternatively, the transaction documentation may provide for restrictions or termination in the event of material changes in circumstances.

7.3 When does control pass to the bidder?

There is no statutory definition of "control" in the Cayman Islands, but the usual position is that shareholders of a Cayman Islands company can appoint and remove directors by ordinary resolution (50% + 1 vote). The constitutional documents of a Cayman Islands company may depart from the usual position, providing for staggered boards, removal for cause only or a higher voting threshold, which will result in effective control of the target being difficult to achieve.

7.4 How can the bidder get 100% control?

100% control can be achieved contractually under a statutory merger, equity acquisition, or asset acquisition, or upon the terms of a stakeholder and court-approved scheme of arrangement, each as described in section 2 above. 100% control may be able to be compelled under a statutory merger by paying any dissenters fair value of their shares, as required under the Companies Act, or the bidder availing themselves of the statutory squeeze-out provisions, again as described in section 2 above.

8 Target Defences

8.1 What can the target do to resist change of control?

To the extent that the target's constitutional documents do not include anti-takeover provisions or "poison pill"-type provisions, such as staggered boards or limited director removal rights, the directors of the target will be limited in their ability to resist a change of control by their fiduciary duties to the company – the directors will be obliged to consider the terms of the acquisition in good faith and act *bona fide* in the best interests of the company as a whole in relation to any acquisition proposal. In addition, if the target is listed on the CSX, the Code provides that at no time after a *bona fide* offer has been communicated to the board of the offeree company, or after the board of the offeree company has reason to believe that such an offer might be imminent, may any action be taken by the board of the offeree company, without the approval of the shareholders in the 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.

8.2 Is it a fair fight?

The balance of the Cayman Islands M&A regime is arguably weighted slightly in favour of the target, particularly given the usual discretion given to the directors of a target to approve the commercial terms of a particular transaction or a transfer of shares (noting, however, that the director must exercise such discretion for a proper purpose). The statutory and common law principles applying to acquisitions are focused on fairness and reasonableness, and the duties of the directors of any Cayman Islands target will be to ensure the best outcome for the shareholders of the company as a whole. In agreeing to any deal mechanics that seek to "rebalance the playing field", directors of a Cayman Islands target will need to keep their fiduciary duties front of mind.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Deals offering a premium to market value and with market standard terms and conditions will have a greater prospect of success. The cooperation of the target's board and strategic shareholders will also be factors in achieving success.

9.2 What happens if it fails?

There is no restriction on a bidder making a new offer upon a failure to consummate an initial bid.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

Dissenting Rights: From 2016 through to 2020, further dissenters' petitions under the statutory merger regime have been heard in the Cayman Islands. These decisions provide additional guidance as to how the "fair value" of a dissenter's shares will be determined.

In *Shanda Games Limited*, the Privy Council confirmed that, as a matter of principle, where a dissenting shareholder holds a minority interest, a minority discount may be applied. However, whether a minority discount will be applied is fact-specific. For example, in *Qunar Cayman Islands Limited*, the Grand Court determined that the applicable majority discount was nil.

Separately, while *Qunar* had confirmed the Court's jurisdiction to grant dissenters an immediate payment of the merger consideration as an interim payment, the decision in *eHi Car Services Limited* departed from the position that the full amount of the merger consideration is generally the appropriate interim payment amount. Rather, the Court confirmed that the correct test to be applied is the irreducible minimum amount that could safely be assumed the dissenters would receive in any event without venturing into disputed issues of fact or valuation.

SPACs: Cayman Islands M&A activity related to business combinations for special purpose acquisition vehicles ("**SPACs**") was particularly notable in 2020, following the trends developing over the last few years in that sector.

Economic Substance: The Cayman Islands introduced the International Tax Co-operation (Economic Substance) Act (2020 Revision) in response to global OECD Base Erosion and Profit Shifting ("**BEPS**") standards regarding geographically mobile activities, reflecting both the Cayman Islands' ongoing adherence to global standards as one of the member countries committed to the OECD's BEPS Inclusive Framework, and commitments made by the Cayman Islands to the EU as part of the EU's listing process. While Cayman Islands structures, and the use of Cayman Islands structures in cross-border M&A transactions, generally do not give rise to BEPS concerns, an early analysis of the position of such vehicles under the economic substance regime is recommended.

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