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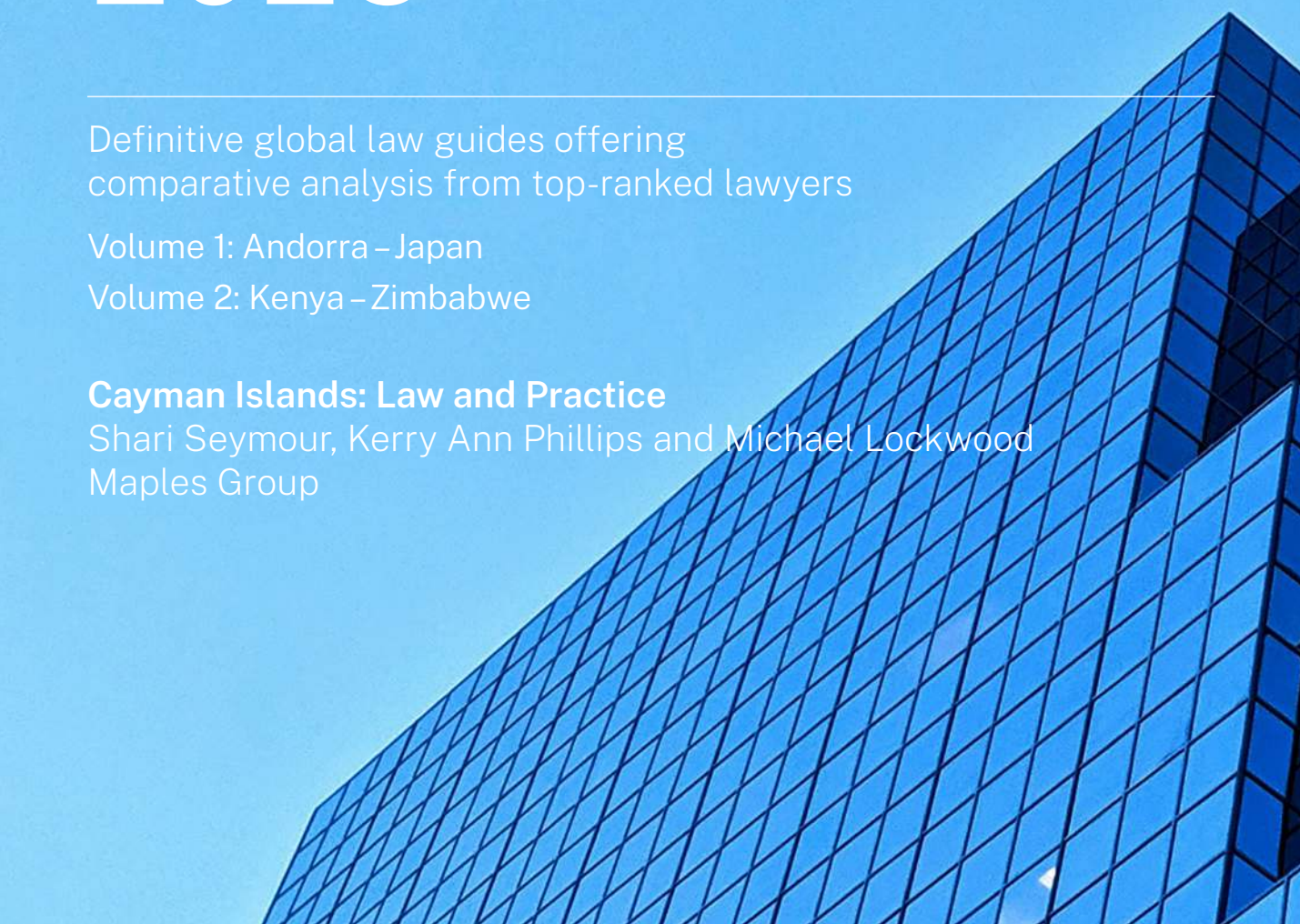
Cayman Islands: Law and Practice

Shari Seymour, Kerry Ann Phillips and Michael Lockwood
Maples Group



CAYMAN ISLANDS

Law and Practice

Contributed by:
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Contents

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1. Trends

1.1 M&A Market

In 2024, the global M&A market saw an 8% increase in deal values compared to 2023, reaching USD3.4 trillion.

This growth stemmed partly from an increase in private equity deals and take-privates, as well as post-US election results and the potential for policy changes in the Trump administration. The sectors that benefitted included energy, technology (including AI), healthcare and private equity.

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 2023, as follows:

- 8,913 exempted companies (7,540 in 2023);
- 3,802 exempted limited partnerships (3,660 in 2023); and
- 859 limited liability companies (690 in 2023).

1.2 Key Trends

With a reduction in interest rates as well as strong equity markets, private equity firms continue to lead take-private transactions and companies looking for growth in or through technology and digital transformation.

Notable deals in 2024 involving Cayman Islands vehicles include the following.

- Global IBO Group Ltd. (GIBO), an integrated AI-generated content animation streaming platform in Asia, entered into a de-SPAC transaction with Bukit Jalil Global Acquisition 1 Ltd. (BUJA). The business combination values GIBO at USD8.3 billion, and the new company is expected to be listed on the Nasdaq.
- Stonepeak, a leading alternative investment firm specialising in infrastructure and real assets, acquired Textainer Group Holdings Limited, one of the world's largest lessors of intermodal containers, in a deal worth USD7.4 billion.
- Sixth Street entered into a take-private transaction of ESR Group Ltd (ESR), as part of a consortium with Starwood Capital Group, SSW Partners, QIA, Warburg Pincus and certain founders of ESR. The transaction will be

implemented by way of a scheme of arrangement in the Cayman Islands and is subject to the Hong Kong Takeovers Code.
- Silver Pegasus Investment completed a take-private transaction by way of a scheme of arrangement of Hong Kong-listed SciClone Pharmaceuticals, valued at USD1.13 billion.
- TDCX Inc., an award-winning digital customer experience (CX) solutions provider for technology and blue-chip companies, completed a statutory merger with Transformative Investments Pte Ltd, with a deal value of USD1 billion.
- Beijing Capital City Development Group Co., Ltd completed a take-private transaction by way of a scheme of arrangement of Beijing Capital Grand Limited, with a deal value of USD82 million.

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.

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), 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, *"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. These dissent rights do not apply to M&A transactions pursuant to a scheme of arrangement.

Scheme of Arrangement

A scheme of arrangement is a flexible form of corporate restructuring, similar to (and based on) statutes in England and elsewhere in the British Commonwealth. A scheme must be approved by the requisite majority shareholders, and by a court order (although the court does not typically evaluate the commercial merits of the scheme). A scheme of arrangement also involves the production of a circular, which must be sufficiently detailed to allow shareholders to make an informed decision in relation to the merits of the proposed scheme. There are no dissenters' rights under a scheme of arrangement, although objecting shareholders are entitled to notice of the proceedings and to be heard by the court. However, the necessary majority vote for a scheme is higher than for a statutory merger, at 75% of those shareholders who attend and vote at the relevant meeting(s), and, unlike with a statutory merger, insiders are typically effectively unable to vote.

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 Companies Act, the LLC Act and common law; see **2.1 Acquiring a Company**. There are no specific statutes or government regulations 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 antitrust 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 M&A-related legal development in the Cayman Islands in recent years 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 (potentially with interest at *"fair"* rate to be deter-

mined and, in some cases, the costs of the proceedings).

Such merger appraisal litigation has been most common (although not exclusively) 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 gone 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 outcomes of these cases have varied significantly, largely depending on the facts of each case.

The following recent 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 extraordinary general meeting, 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. An appeal against this decision was heard by the Privy Council in October 2024, with a final judgment expected in 2025.
- In FGL Holdings (20 September 2022, CIGC), the Cayman Islands 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. The Grand Court awarded the company its costs of the proceeding against the dissenters.
- In Trina Solar (4 May 2023, CICA), the Court of Appeal held that no reliance could be placed on the merger price in circumstances where there were failures and inadequacies in the deal process (including a failure to carry out a robust market check) and the company failed to produce any documentary or witness evidence to explain and justify them. The Court of Appeal also lowered the standard for departing from company management projections in relation to a discounted cash flow analysis, noting that the Court could prefer a forecast put forward by an expert over those of company management even if the latter were not *"obviously wrong, careless or tainted by an improper purpose"*. Rather, once there is *"some evidence"* to question the appropriateness of the management projections, the Court's task is to determine the *"most realistic"* forecast, and it must consider both parties' evidence and reach its own decision on this. This decision is under appeal to the Privy Council, with a hearing expected in 2025.

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, although the application of dissent rights to par-

ent/subsidiary mergers is under appeal to the Privy Council in In Re Changyou.

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. Under existing Cayman Islands laws, 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 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 used in Cayman Islands M&A transactions 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 are in the best interests of the company.

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, and/or for special consent rights that accrue to the bidder or its nominee director(s). 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 that 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 (subject to certain limited exceptions), pass a shareholder resolution authorising a plan of merger (provided that the board had also approved that) 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. Shareholders who wish to object to the offer may apply to the court for relief under Section 88 of the Companies Act, which provides that the transfer will happen unless the court *"thinks fit to order otherwise"*. However, there is a heavy burden of proof on shareholders dissenting under Section 88 to show that the offer is unfair and not merely open to criticism, and a presumption that an offer accepted by 90% of shareholders is fair. Squeeze-outs using this mechanism are very rare in practice, including in light of the availability of parent-subsidiary mergers.

In some circumstances, transactions similar to a merger, reconstruction and/or an amalgamation may be achieved through means other than these statutory provisions, such as a share capital exchange or asset acquisitions.

See also **2.1 Acquiring a Company**.

6.11 Irrevocable Commitments

It is common for bidders to obtain irrevocable commitments to tender or vote from 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. Irrevocable commitments to vote may also be utilised in the context of a scheme of arrangement, provid-

ed they are clearly disclosed and (subject to certain exceptions) do not confer additional rights on those giving the commitment. However, in a scheme context, careful consideration should be given to whether insiders and/or bidder affiliates can or should vote in any event (including in light of any relevant listing rules), as that may create issues when it comes to having the scheme approved by the court.

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, it is 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;
- a duty not to 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 ratified 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 and absent any solvency concerns, the *"interests of the company"* may be equated to the interests of the company's shareholders as a whole (ie, the persons whose money is at stake).

In an M&A context, directors also have a duty to ensure that shareholders are fully informed on any matter being put to a shareholder vote. In certain circumstances, that may include putting (or disclosing the existence of) competing offers to the shareholders, so that they may decide for themselves which offer, if any, to accept.

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 transaction. In a statutory merger context, this may also assist when it comes to defending the fairness of the merger price in the event of dissent proceedings.

8.3 Business Judgement Rule

Generally, the courts of the Cayman Islands will not interfere with the bona fide business judgement of a company's directors.

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, or the decision was otherwise made in breach of duty. Otherwise, the court is not generally concerned with the merits of business decisions from a commercial point of view.

8.4 Independent Outside Advice

Boards of Cayman Islands companies may obtain and rely upon advice from experts (including, for example, legal counsel and tax and financial advisers) in determining whether or not a proposed transaction is in the best interests of the company as a whole. However, they may not do so unthinkingly or uncritically.

It is common, but not strictly required, for the board of directors (or a 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. Robust external financial advice (potentially going beyond a typical *"fairness opinion"*) can also play an important role in the context of merger dissent actions when defending the merger price as fair.

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. On appeal (4 May 2023, CICA), the Court of Appeal was critical of the adequacy of the evidence presented by the company on how the special committee had managed the deal process, including in relation to the preparation of management projections, controlling engagement between company management and the buyers, and failing to engage in a market check exercise. On appeal, the Court of Appeal noted that a special committee composed of independent, experienced directors is an important indicator of reliability for the deal process, and that the existence of a conflict of interest relating to the transaction will militate against reliance on merger price.

In FGL Holdings (20 September 2022, CIGC), 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 or 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. However, this is very rare in practice, including because where a proposed acquiror holds that level of shareholding, it would likely be able to control the board in any event (in which case, a parent-subsidiary merger process would also be available, and is likely to be more attractive).

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.

However, particular care must be exercised when using the issuance of new shares to defend against a hostile potential takeover. The Privy Council held in Tianrui [2024] UKPC 36 that, since the power to allot and issue shares is a fiduciary power, it must only be exercised for a proper purpose (ie, the purpose for which that power is conferred), and that shareholders have a personal right of action against the company where shares have been allotted for an improper purpose and this has negatively affected them. It is well established that issuing shares for the purpose of thwarting a takeover or otherwise affecting the outcome of shareholder meetings is not exercising that board power for a proper purpose. That general rule may, however, be modified by the company's articles of association (see **9.3 Common Defensive Measures**).

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"* that may make a hostile takeover more difficult to consummate, or that 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.

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"

While always fact sensitive, directors of a Cayman Islands company typically cannot *"just say no"* to a proposed takeover or merger. 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. However, directors may be justified in rejecting even a legitimate offer and/or not putting that offer to the shareholders if, for example, they were aware that shareholders with a blocking stake will oppose the transaction, such that a

vote would be futile, or if the offer in question was below what the directors had been advised was the fair value of the Company.

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 that 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 significant number of dissenters' petitions under the statutory merger regime have been (or are in the process of being) heard in the Cayman Islands courts. M&A transactions implemented through schemes of arrangement inherently involve the Cayman Islands court. However, these are rarely opposed.

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

10.2 Stage of Deal

In the case of transactions implemented through statutory mergers, litigation typically occurs post-closing, as opposed to in a manner which frustrates or delaying closing. This is because dissent rights, which guarantee dissenters the payment of fair value, are conditional on the merger completing. For transactions implemented through a scheme of arrangement, the scheme may be challenged before the court, although the grounds for such a challenge are limited, and this is rare in practice.

10.3 "Broken-Deal" Disputes

Disputes did arise from broken M&A deals involving Cayman Islands companies in 2024, but these disputes are not being litigated in the Cayman Islands because (as is common) the relevant merger agreements were not Cayman Islands law governed and/or contained dispute resolution provisions in favour of other courts or arbitration. However, issues of Cayman Islands law often still feature in such disputes.

11. Activism

11.1 Shareholder Activism

Shareholder activism is not an important force in M&A transactions involving Cayman Islands entities outside of merger dissent litigation, which is typically driven by activist arbitrage investors, who often acquire their shares for the purpose of pursuing such dissent actions.

11.2 Aims of Activists

See **11.1 Shareholder Activism**.

11.3 Interference With Completion

See **11.1 Shareholder Activism**.

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