



Chambers Global Practice Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Corporate M&A 2022

Cayman Islands: Law & Practice
Shari Seymour, Kerry Ann Phillips
and Michael Lockwood
Maples Group

practiceguides.chambers.com

CAYMAN ISLANDS

Law and Practice

Contributed by:

Shari Seymour, Kerry Ann Phillips

and Michael Lockwood

Maples Group see p.16



CONTENTS

1. Trends	p.4	6. Structuring	p.9
1.1 M&A Market	p.4	6.1 Length of Process for Acquisition/Sale	p.9
1.2 Key Trends	p.4	6.2 Mandatory Offer Threshold	p.9
1.3 Key Industries	p.4	6.3 Consideration	p.9
2. Overview of Regulatory Field	p.4	6.4 Common Conditions for a Takeover Offer	p.10
2.1 Acquiring a Company	p.4	6.5 Minimum Acceptance Conditions	p.10
2.2 Primary Regulators	p.6	6.6 Requirement to Obtain Financing	p.10
2.3 Restrictions on Foreign Investments	p.6	6.7 Types of Deal Security Measures	p.10
2.4 Antitrust Regulations	p.6	6.8 Additional Governance Rights	p.10
2.5 Labour Law Regulations	p.6	6.9 Voting by Proxy	p.11
2.6 National Security Review	p.7	6.10 Squeeze-Out Mechanisms	p.11
3. Recent Legal Developments	p.7	6.11 Irrevocable Commitments	p.11
3.1 Significant Court Decisions or Legal Developments	p.7	7. Disclosure	p.11
3.2 Significant Changes to Takeover Law	p.7	7.1 Making a Bid Public	p.11
4. Stakebuilding	p.7	7.2 Type of Disclosure Required	p.11
4.1 Principal Stakebuilding Strategies	p.7	7.3 Producing Financial Statements	p.12
4.2 Material Shareholding Disclosure Threshold	p.7	7.4 Transaction Documents	p.12
4.3 Hurdles to Stakebuilding	p.8	8. Duties of Directors	p.12
4.4 Dealings in Derivatives	p.8	8.1 Principal Directors' Duties	p.12
4.5 Filing/Reporting Obligations	p.8	8.2 Special or Ad Hoc Committees	p.13
4.6 Transparency	p.8	8.3 Business Judgement Rule	p.13
5. Negotiation Phase	p.8	8.4 Independent Outside Advice	p.13
5.1 Requirement to Disclose a Deal	p.8	8.5 Conflicts of Interest	p.13
5.2 Market Practice on Timing	p.8	9. Defensive Measures	p.14
5.3 Scope of Due Diligence	p.8	9.1 Hostile Tender Offers	p.14
5.4 Standstills or Exclusivity	p.9	9.2 Directors' Use of Defensive Measures	p.14
5.5 Definitive Agreements	p.9	9.3 Common Defensive Measures	p.14
		9.4 Directors' Duties	p.14
		9.5 Directors' Ability to "Just Say No"	p.14

10. Litigation	p.15
10.1 Frequency of Litigation	p.15
10.2 Stage of Deal	p.15
10.3 "Broken-Deal" Disputes	p.15
11. Activism	p.15
11.1 Shareholder Activism	p.15
11.2 Aims of Activists	p.15
11.3 Interference with Completion	p.15

1. TRENDS

1.1 M&A Market

The global M&A market showed significant growth in 2021 compared to 2020, with deal values reaching all-time highs of USD5.9 trillion in 2021.

As a preferred offshore jurisdiction for cross-border M&A transactions, unsurprisingly, the Cayman Islands also saw aggregate M&A deal values increase from approximately USD71 billion in 2020 to approximately USD223 billion in 2021.

The COVID-19 pandemic did not impede the pace of deal activity in 2021. 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 as compared to 2020:

- 13,412 exempted companies (9,360 in 2020);
- 5,778 exempted limited partnerships (4,510 in 2020); and
- 1,460 limited liability companies (918 in 2020).

1.2 Key Trends

One of the key trends evident in the Cayman Islands in 2021 was the proliferation of formation of special purpose acquisition companies (SPACs), with over 450 Cayman Islands SPACs established during the course of 2021. This ulti-

mately led to an increase in M&A activity in connection with business combination deals.

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 2021 involving Cayman Islands vehicles included the following reverse merger transactions:

- the USD48.6 billion acquisition by Grab Holdings Inc. of Altimeter Growth Corp from Altimeter Capital Management, LP and others;
- the USD12.2 billion acquisition by Owl Rock Capital Group LLC and Dyal Capital Partners of Altimar Acquisition Corporation; and
- the USD10.8 billion acquisition by Aurora Innovation, Inc of Reinvent Technology.

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, among other things, applicable travel and gathering restrictions.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

The primary legal structures for acquisition 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 specifically relevant to acquisition transactions and 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 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, 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 a commonly used option 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, however, such rights are

thought desirable 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 Companies 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 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 the Banks and Trust Companies Act (as revised), the Insurance Act (as revised);
- with respect to licensed mutual fund administrators, the Mutual Funds Act (as revised); 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 either be beneficially owned and controlled at least 60% by persons of Caymanian status, or 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 are 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 which is dissatisfied with a merger may seek to have the fair value of their shares determined by the Cayman Islands Grand Court – and 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 exclusively) where listed companies have been the subject of a management buy-out. These proceedings have been largely 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.

Activity in this field has in recent years resulted in a number of cases which have run to trial before the Cayman Islands Grand Court (and in some cases, appeals), which has, in turn, 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.

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 and competition laws in the Cayman Islands and, therefore, 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:

- 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 which 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 as to 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 licenses. 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 him hold shares:

- any person who acquires shares which (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 the 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 (for example, 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 judgments by the directors of the offeror or the fulfillment 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 signing of the M&A agreement and 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 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 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 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 in the event that 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.

As it relates to LLCs, 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 limited liability company 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

Squeeze-Out Provisions

When a takeover offer is made and accepted by holders of 90% of the shares to whom 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.

Further, 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 com-

pany prior to the launch of bids or announcement of the relevant transaction.

With respect to 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:

- 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 which 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

There is no specific disclosure required for the issuance of shares in a business combination except in the case of a deals structured as a

scheme of arrangement in which case a circular is required, see **2.1 Acquiring a Company**, or 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) and 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.

That said, 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:

- 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;
- 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;
- duty to exercise powers fairly as between different sections of shareholders;
- 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
- duty to exercise independent judgment.

In addition to the above, directors also owe a duty of care to the company which is not fiduciary in nature. This duty has been defined as a requirement to act as a reasonably diligent person having both 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 and 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, or 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 that 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). Once, however, 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 to mitigate risks which 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 duties of directors (for example, 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, tax and financial advisors 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 or 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 bona fide 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.

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' given that 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 give the target superior bargaining power.

Examples of such defensive measures include the ability to issue blank cheque preference shares, staggered boards, 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 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 2020.

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**.

Maples Group advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg, through its leading international law firm, Maples and Calder. With offices in key jurisdictions around the world, the Maples Group has specific strengths

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.

AUTHORS



Shari Seymour is a partner in the Cayman Islands corporate team at Maples and Calder, the Maples Group's law firm. She has a wide range of experience in corporate and commercial

law, including joint venture arrangements, IPOs, restructurings, banking and financing transactions. Her practice also includes the formation and maintenance of all types of investment funds, including hedge funds and private equity funds.



Michael Lockwood is an associate in the Cayman Islands Corporate team at Maples and Calder, the Maples Group's law firm. His areas of practice include the formation and

restructuring of all types of investment funds, including hedge funds, private equity funds and other corporate, commercial and finance transactions, such as restructurings and reorganisations. He also advises on general regulatory aspects.



Kerry Ann Phillips is an associate in the Cayman Islands Corporate team at Maples and Calder, the Maples Group's law firm. Her practice areas include a range of corporate and

commercial transactions, such as restructurings and reorganisations, and investment funds, with experience in note issues and other structured finance and capital market transactions. She also advises on general regulatory law.

*Contributed by: Shari Seymour, Kerry Ann Phillips and Michael Lockwood, **Maples Group***

Maples Group

Ugland House
South Church Street
PO Box 309
Grand Cayman KY1-1104
Cayman Islands

Tel: +1 345 949 8066
Fax: +1 345 949 8080
Web: www.maples.com





Chambers Guides to the Legal Profession

Chambers Directories are research-based, assessing law firms and individuals through thousands of interviews with clients and lawyers. The guides are objective and independent.