

Mergers & Acquisitions

Contributing editor
Alan M Klein



2017

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Mergers & Acquisitions 2017

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Cayman Islands

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1 Types of transaction

How may businesses combine?

Businesses, specifically Cayman Islands companies and limited liability companies (LLCs), may combine by any of the following means:

- acquiring a majority of the voting shares in a target company thereby giving control of the target company to the acquiring shareholder or shareholders. Such acquisitions most commonly occur by private agreement, tender offer or public takeover;
- acquiring assets of a target company with the target company ceasing to do business thereafter;
- establishing a joint venture between two businesses, either on a contractual basis or utilising a joint venture entity;
- merger or consolidation of two or more business entities pursuant to either section 233 of the Cayman Islands Companies Law (as amended) (Companies Law), or section 46 of the Cayman Islands Limited Liability Companies Law (as amended) (LLC Law), applicable to LLCs only; or
- utilising a scheme of arrangement under section 86 of the Companies Law or section 42 of the LLC Law in the case of an LLC.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The principal Cayman Islands laws relevant to business combinations are the Companies Law, the LLC Law, the common law and the Cayman Islands Stock Exchange Company Law, 1996.

In respect of the Companies Law and the LLC Law (which contain similar provisions):

- schemes of arrangement are permitted by section 86 of the Companies Law and by section 42 of the LLC Law;
- merger and consolidation provisions are set out in sections 232 to 239 of the Companies Law and in sections 46 to 52 of the LLC Law;
- a minority squeeze-out procedure is permitted pursuant to section 88 of the Companies Law and section 44 of the LLC Law subject to compliance with certain stipulated criteria; and
- an LLC may merge or consolidate with one or more exempted companies subject to compliance with certain stipulated criteria applicable to the exempted company and the LLC, pursuant to section 50 of the LLC Law.

In respect of the common law:

- the Grand Court of the Cayman Islands (the Court) has its own body of case law upon which the common law of the Cayman Islands is based;
- the Cayman Islands is a British overseas territory with the Privy Council in England as its final court of appeal. As a consequence, the authorities of courts in the Commonwealth (and England and Wales in particular), though not technically binding, are persuasive in the Court; and
- on certain points of law, such as the determination of 'fair value' as detailed below at question 14, the law of both Delaware and Canada may be influential on the Court following the decision in the Matter of Integra Group.

In respect of public offers:

- where a target has a listing on the Cayman Islands Stock Exchange (CSX), the Cayman Islands Code on Takeovers and Mergers and Rules Governing the Substantial Acquisitions of Shares (the Code) may apply. The Code is to ensure fair and equal treatment of all shareholders in relation to takeovers by providing an orderly framework within which takeovers are conducted. Those who do not conduct themselves in accordance with the provisions of the Code may be sanctioned and may find that the facilities of the CSX markets are withdrawn; and
- the offering of securities to the public in the Cayman Islands is governed by the Securities Investment Business Law (as amended) and the Companies Law.

Other regulatory statutes that tend to be of application in practice but the extent of their relevance are dependent on the nature of the businesses that are being combined are:

- the Banks and Trust Companies Law (as amended);
- the Mutual Funds Law (as amended);
- the Insurance Law (as amended); and
- the Local Companies (Control) Law (as amended).

3 Governing law

What law typically governs the transaction agreements?

There is no restriction pertaining to the choice of law by contracting parties who are therefore free to choose the governing law of their contracts. In practice, the jurisdiction tends to follow the governing law of the underlying transactions and, accordingly, most commercial agreements are governed by the laws of England and Wales or a law of one of the states of the United States.

A judgment obtained in a foreign court (other than certain judgments of a superior court of any state of the Commonwealth of Australia) will be recognised and enforced in the Court without any re-examination of the merits at common law, by an action commenced on the foreign judgment in the Court, where the judgment:

- is final and conclusive;
- is one in respect of which the foreign court had jurisdiction over the defendant according to Cayman Islands conflict of laws rules;
- is either for a liquidated sum not in respect of penalties or taxes or a fine or similar fiscal or revenue obligations or, in certain circumstances, for in personam non-monetary relief; and
- was neither obtained in a manner, nor is of a kind that enforcement of which is contrary to natural justice or the public policy of the Cayman Islands.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The filings and fees in connection with a business combination will depend largely on the nature of the relevant transaction.

Where a transaction involves the merger or consolidation of entities, then the transactions must be filed with the Registrar of

Companies of the Cayman Islands or the Registrar of Limited Liability Companies of the Cayman Islands, as applicable, and the relevant fee paid.

The prior written consent of the Cayman Islands Monetary Authority (CIMA) is required in connection with a change of control of an entity regulated by it, and, in some instances, upon a change of a shareholder or shareholders holding 10 per cent or more of the voting rights of the regulated entity.

For entities listed on the CSX, depending on the level of acquisition of shares, notifications may be required under the Code.

Cayman Islands stamp duty is payable on documents that are executed in or brought to the Cayman Islands or produced before the Court. The extent of stamp duty payable will depend upon the provisions of the relevant transaction documents.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

No information is required to be made public except where the business combination involves a takeover offer made in respect of an entity listed on the CSX or is effected by a scheme of arrangement pursuant to the Companies Law or the LLC Law.

Where the target company is listed on the CSX, an announcement of a firm intention to make an offer shall be made:

- when the board of the target company 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.

The announcement shall not be delayed while full information is being obtained. Additional information can be the subject of a later supplementary announcement.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

There are no public disclosure requirements for owners of shareholdings in a Cayman Islands company. There are, however, disclosures that are to be made by a company to its service providers (for example, law firms, registered office providers, accountants, etc) as part of the strict 'know your client' and anti-money laundering and anti-terrorism checks. As part of those checks, information must also be provided in respect of shareholders owning 10 per cent or more of the voting capital of such a company.

In the context of a business combination, where the purchaser would, as a consequence of the business combination, hold 10 per cent or more of the target company, then the 'know your client' and anti-money laundering checks and information required would, ideally, need to be provided in advance to the relevant service providers of the target company so as to avoid any delays to the transaction becoming effective.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The general principle, which flows from the common law of England and Wales, is that the directors of a Cayman Islands company owe their duties to the company and not to its shareholders. Directors owe a duty to, at all times, act in the best interests of the company as a whole.

Managing members of an LLC, which are the equivalent of directors in a traditional Cayman Islands company, do not owe any duty, fiduciary or otherwise, to the LLC or any member or other person in respect of the LLC other than a duty to act in good faith, which may be expanded or restricted by the terms of such LLC's limited liability

company agreement (LLC Agreement). The managing members of an LLC may be expressly permitted in the LLC Agreement to act in a manner which they believe to be in the best interests of a particular member or group of members, even though it may not be in the best interests of all of the members or the LLC.

Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by a company at a time when that company was unable to pay its debts within the meaning of the Companies Law, and made or granted in favour of a creditor with a view to giving that creditor a preference over the other creditors of the company, would be invalid if made, incurred, taken or suffered within the six months preceding the commencement of a liquidation of the Cayman Islands company. Such actions will be deemed to have been made with a view to giving such a creditor a preference if it is a 'related party' of the company. A creditor shall be treated as a related party if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions. These provisions in the Companies Law apply in the same way to LLCs.

Any disposition of property made at an undervalue by or on behalf of a Cayman Islands company or an LLC and with an intent to defraud its creditors (which means an intention to wilfully defeat an obligation owed to a creditor), shall be voidable:

- under section 146(2) of the Companies Law at the instance of the company's or LLC's official liquidator; and
- under the Fraudulent Dispositions Law, at the instance of a creditor thereby prejudiced.

That is, provided that in either case, no such action may be commenced more than six years after the date of the relevant disposition.

Shareholders do not have any similar duty towards the company. However, controlling shareholders should take care not to use their dominant position to oppress minority shareholders. The same also applies for members of an LLC.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

As a general rule the requirement for shareholders/members to consent to a business combination would be subject to the terms set out in the articles of association of the target company (the Articles) (where it is a traditional Cayman Islands company), in the LLC Agreement (where it is a Cayman Islands LLC) or as set out in the contractual agreement between the transaction parties (or a combination of the contractual agreement and the Articles or the LLC Agreement, where appropriate).

Depending on the terms of the transaction, shareholder consent may be necessary, for example, where the authorised share capital of the company needs to be increased in order to issue the shares contemplated by the business combination.

A business combination effected by way of a scheme of arrangement under Cayman Islands law would require the consent of a majority in number, representing 75 per cent in value, of the shareholders or members of each class who attend and vote in person or by proxy at meetings of the holders of each class of shares or interests, as well as requiring the sanction of the Court.

In the case of a merger or consolidation involving a Cayman Islands company, the consent of at least 66.6 per cent of the voting share capital of the relevant company present in person or by proxy at a meeting of the shareholders, or 100 per cent in the case of a written resolution of the shareholders, is required.

Where the merger or consolidation involves two or more Cayman Islands LLCs, the plan of merger or consolidation must be authorised by each LLC by the approval of at least a two-thirds majority in number of the members of each LLC. The LLC Agreement may specify a higher or lower threshold for approval or another type or method of authorisation.

Dissenting shareholders to a merger may avail themselves of appraisal rights in certain circumstances where the relevant provisions of the Companies Law or the LLC Law are complied with.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Under Cayman Islands law there are no legal restrictions on the making of a hostile bid. It should be noted, however, that since a scheme of arrangement under Cayman Islands law requires the consent of the target board of directors, utilising a Cayman Islands scheme of arrangement would not be available in a hostile bid scenario.

The Code applies to all companies, including LLCs, listed on the CSX other than open-ended mutual funds, and sets down certain provisions that should be adhered to by a bidder of a company listed on the CSX:

- an offer must be put to the board of the offeree company or to its authorised advisers;
- information about companies involved in an offer shall be made equally available to all shareholders as near as possible at the same time and in the same manner;
- favourable deals with some shareholders requires consent of the council executive of the CSX; and
- special provisions apply to share purchases made before or during an offer period.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There is no specific legislation in the Cayman Islands that prohibits or regulates the use of break-fees in transactions.

At common law, the directors of a Cayman Islands company are required to exercise their power and authority in an informed and independent fashion in what they consider to be in good faith in the interests of the company. Any agreement that conflicts with such duties of the directors may be unenforceable; however, whether or not this is the case would depend on the extent of the break-fee and the circumstances of the particular transaction. As the LLC is a very new form of Cayman company, no similar cases have yet been heard which determine the duty of managing members of an LLC in respect of the use of break-fees; however, it is likely to depend on the specific wording of the LLC Agreement.

If a break-fee is to be used, an agreement to pay a break-fee must not be outside the scope of the target company's memorandum and articles of association or the LLC's LLC Agreement. While it is usual for a Cayman Islands company to have objects set out in its memorandum of association that are unrestricted and that would permit the payment of a break-fee, the position is not always free from doubt.

There is no prohibition on Cayman Islands companies giving financial assistance to companies in order to acquire them.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The consent of CIMA is required for change of control (and in some cases a change in ownership of 10 per cent or more of the voting share capital) in respect of entities that are licensed under the Banks and Trust Companies Law (as amended), the Mutual Funds Law (as amended) or Insurance Law (as amended). In respect of companies that provide services to the public in the Cayman Islands, there are some further ownership control measures contained in the Local Companies (Control) Law (as amended), which may be relevant, but are beyond the scope of this summary.

Update and trends

The number of Cayman Islands companies incorporated on an annual basis continued to increase over the past 12 months. The increase reflects sustained economic growth internationally which has resulted in a steady flow of international M&A transactions. The use of Cayman Islands LLCs for joint ventures has been prominent since the enactment of the LLC Law and we expect this growth trend to continue over the next year. No major legislative changes or reviews are currently scheduled for the Companies Law over the next 12 months.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

As a general principle, parties are free to determine the conditions that are to apply to the bilateral purchase arrangement between them. Where the target business is regulated with CIMA, it would be expected and usual for any offer to be conditional upon the consent of CIMA to the proposed transaction.

A tender offer is an offer for the entire issued share capital of the target business, which can be made conditional on offerees holding, at least, a certain percentage of shares in the target business having accepted the offer.

A scheme of arrangement requires the approval of a majority in number, representing 75 per cent in value of a target company's shareholders of each relevant class who attend and vote in person or by proxy at a meeting of the target company, and additionally needs to be sanctioned by the Court. This threshold applies equally to members of an LLC.

Where the target company or LLC is listed on the CSX and unless a dispensation is granted, an offer should not be subject to conditions that depend solely on the subjective judgement of the offeror or the fulfilment of which is for the offeror.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

This is usually a contractual matter for the parties to determine and set out within the transaction documents. If buyer-financing is needed, then it is usual for this to be a condition precedent to the completion of the transaction.

There is no obligation under Cayman Islands law for a seller to assist in the buyer's financing, but neither is there any prohibition. Specifically in this regard, there is no prohibition on a target company providing financial assistance for the acquisition of its shares.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Where a tender offer to acquire all of the shares of the target company or LLC not held by the offeror has, within four months of the making of the offer, been approved by the holders of not less than 90 per cent in value of the shares or LLC interests affected, then:

- the offeror may, at any time within two months of the expiration of the said four-month period, give notice to any dissenting shareholder or member that it shall be entitled and bound to acquire those shares or LLC interests on the same terms;
- a dissenting shareholder or member may, within one month from the date on which such notice is given, apply to the Court for an order excluding it from the compulsory acquisition procedure;
- within one month of the notice being given to the dissenting shareholder or member (if no application has been made to the Court for an order referred to above, or if an application has been made and an order is pending, following such order being disposed of) the offeror shall provide a copy of the notice to the target company

or LLC and pay the target company or LLC the consideration for the dissenting shares or interests upon which the register of members is updated to reflect the offeror as the owner of the dissenting shares or interests; and

- the target company or LLC holds the consideration in a separate bank account on trust for the dissenting shareholders or members.

It is also important to note that dissenting shareholders have the ability during the squeeze-out process under a takeover offer to seek fair value for their shares. The Court recently considered and handed down some much-anticipated guidance on the determination of 'fair value' in the context of a claim brought by dissenting shareholders in the Matter of Integra Group. The Court noted the significant influence of the law of both Delaware and Canada on the drafting of the Cayman Islands merger provisions and accepted the proposition that the meaning of fair value should be determined with reference to those jurisdictions.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

There are no statutory provisions specifically regulating cross-border transactions, other than the provisions of the Companies Law and the LLC Law that address the legal requirements for cross-border mergers and consolidations involving a Cayman Islands company or Cayman Islands LLC.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In order to invoke the minority shareholder or shareholders squeeze-out mechanism described above, the tender offer must be open for at least four months. The same applies to LLCs.

The Code prescribes that the offer period should be open for at least 28 days in respect of an offer for a company listed on the CSX.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

The consent of CIMA is required for change of control (and in some cases a change in ownership of 10 per cent or more of the voting share capital) in respect of entities that are licensed under the Banks and Trust Companies Law (as amended), the Mutual Funds Law (as amended) or Insurance Law (as amended). In respect of companies that provide services to the public in the Cayman Islands, there are some further ownership control measures contained in the Local Companies (Control) Law (as amended), which may be relevant.

18 Tax issues

What are the basic tax issues involved in business combinations?

There are currently no Cayman Islands income taxes, capital gains tax, withholdings, levies, registration taxes or other similar taxes imposed on business combinations in the Cayman Islands.

Stamp duty of varying levels is payable if the original of a document is executed in the Cayman Islands or brought into the Cayman Islands or brought before the Court.

No stamp duty is ordinarily payable in respect of the issuance or the transfer of shares or LLC interests.

Stamp duty at varying levels is payable in respect of the purchase of property in the Cayman Islands.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The change of control of a company is unlikely to affect the contractual terms of an employee's contract as the target company will continue to be the employer post-transaction.

There are no provisions under Cayman Islands law requiring that employees are notified of, or consulted with in respect of, any acquisition of a Cayman Islands company.

Where a target company has employees who are based in the Cayman Islands, the following laws are applicable:

- the Labour Law (2011 Revision) (as amended);
- the Immigration Law (2013 Revision);
- the Health Insurance Law (2013 Revision);
- the National Pensions (Amendment) Law 2016; and
- the Workmen's Compensation Law (1996 Revision).

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

In buying assets from a liquidator or receiver, the first question is to determine whether the appointment is valid and whether the appointee has the power to enter into the transaction.

Where a receiver or liquidator has been appointed, a purchaser is unlikely to receive substantive representations and warranties and, as a result, a high level of due diligence should be undertaken in respect of the target company. The position is a little easier in the case of an asset purchase as the due diligence can be limited to the assets under consideration. It may also be appropriate for a purchaser to consider whether the receiver or liquidator should obtain sanction from the Court (if appropriate) to complete the transaction.



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Schemes of arrangement are often used in restructurings to deal with the acquisition of assets (and they are often used in conjunction with a liquidation).

Buyers of assets from a company or an LLC in the twilight of insolvency should be aware that any subsequently appointed liquidator has the power to seek to set aside antecedent transactions where, for example, there has been a preference or a transaction at an undervalue.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The Anti-Corruption Law (2016 Revision) (the ACL) was originally brought into force in January 2010 and gives effect to the United Nations Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The ACL creates a number of offences including, but not limited to, offences such as bribery of public officers and members of the legislative assembly, bribing a foreign public officer, failure to report, secret commissions and fraud on the government.

The ACL allows for varying penalties if convicted of an offence. The penalties range from US\$1,000 and three months' imprisonment to 14 years' imprisonment.

Companies from the United States and the United Kingdom should ensure that they comply with the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act (2010).

Getting the Deal Through

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