Cayman Islands

Takeover Guide

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INTRODUCTION

This guide deals in general terms with certain aspects of Cayman Islands law governing the takeover or privatisation of public or listed companies that have been incorporated as *exempted companies* in the Cayman Islands. Exempted companies are companies that conduct international business and state in their memorandum of association that their business activities are carried out mainly outside the Cayman Islands, except for business in the Cayman Islands that is in furtherance of the business carried on outside the Cayman Islands, or unless they have a licence to conduct local business. They may also be registered as special economic zone companies in the Cayman Islands. Ordinary companies or local companies (including non-resident companies) that can carry on business in the Cayman Islands are subject to a different regime that includes the Local Companies (Control) Act (2019 Revision) and other legislation. Limited liability companies (LLCs) can also be formed to conduct business activities outside the Cayman Islands and these companies are governed by the Limited Liability Companies Act, but LLCs, like ordinary or local companies, are not commonly listed on stock exchanges around the world and they too are outside the scope of this guide.

The Cayman Islands also has a stock exchange (the 'CSX') and a Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares, which applies to all companies listed on the CSX apart from open-ended mutual funds. If a company is listed on the CSX and is subject to primary regulations governing takeovers and mergers by a recognised stock exchange (as defined in the CSX listing rules) or other applicable law, those primary regulations generally govern the conduct of the takeover. Early consultation with the Council Executive of the CSX is strongly recommended if a takeover may be subject to the dual jurisdiction of the CSX and an overseas regulator.

REGULATIONS GOVERNING TAKEOVERS OF EXEMPTED COMPANIES

- The Companies Act (2022 Revision);
- Cayman Islands Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares if the target has a primary listing on the CSX;
- Domestic Takeover Codes and Listing Rules where the shares of the target are listed or traded; these often impose additional thresholds that must be met before any takeover or compulsory acquisition can be effected;
- the constitutional documents of the target, including the memorandum and articles of association (which may, in certain cases, incorporate the provisions of a domestic Takeovers Code, which would otherwise not apply), any shareholder rights plan and other material contracts; and
- other legislation may be relevant, including the Banks and Trust Companies Act, Securities Investment Business Act, Mutual Funds Act, Insurance Act or Information and Communications Technology Act/Utility Regulation and Companies Act.

GENERAL OFFERS

Procedure and acceptances

A general offer or tender offer must be made for all the shares of the target or all the shares of a particular class, and the offer must be accepted by the holders of at least 90 per cent of those shares to enable the bidder to acquire the remaining shares compulsorily. Cayman law allows a maximum four-month offer period within which this level of acceptance must be reached.

Compulsory acquisition notice and timetable

A compulsory acquisition notice seeking to acquire shares that are held by shareholders who have not accepted the offer (or who have failed or refused to transfer their shares in accordance with the offer) – so-called dissenting shareholders – may not be served before the expiration of four months from the date the offer was made and must be served within a two-month window commencing on the expiration of this four-month period. This means that it usually takes a minimum of five months from the date of posting or publishing the offer document to complete the acquisition of 100 per cent of the target (assuming no proceedings are instituted by any shareholder who did not accept the offer).

When a compulsory acquisition notice is given, the bidder is entitled and bound to acquire the shares of any dissenting shareholders on the same terms as the offer, unless an application is made by a dissenting shareholder to the Grand Court and the Grand Court thinks fit to order otherwise.

Dissenting shareholders

Within one month of the date on which the compulsory acquisition notice was given, any dissenting shareholder may make an application to the Grand Court to prevent the compulsory acquisition. Applications are rare and are usually made on technical grounds. Dissenting shareholders do not have express appraisal rights whereby they could apply to the Grand Court to have the fair value of their shares appraised or assessed by the Grand Court, although the Grand Court has a broad discretion to make whatever orders it considers appropriate.

If no application has been made to the Grand Court, the bidder must send a copy of the compulsory acquisition notice to the target and pay the consideration to the target on the expiration of one month from when the compulsory acquisition notice was given. If an application has been made to the Grand Court, then this must be done within one month of that application being determined. The target company is then required to register the bidder as the holder of the shares and to hold the consideration on trust for the dissenting shareholder.

SCHEMES OF ARRANGEMENT

Procedure

A takeover by way of a scheme of arrangement involves the target company proposing a scheme to its shareholders to cancel their shares (a cancellation scheme) or to transfer their shares to the bidder (a transfer scheme) in return for cash or securities of the bidder or other consideration. A cancellation scheme usually avoids stamp duty or documentary tax, which would otherwise be payable under a transfer scheme (and on a general offer).

Instead of the bidder sending an offer document to the shareholders of the target, the target itself must send a composite scheme document to its shareholders. This is important as it is the board of the target that will primarily be in control of the scheme and be responsible for drafting the composite scheme document, making applications to the Grand Court, holding the relevant meetings and making the necessary filings. The bidder will undertake to abide by the scheme and pay the scheme consideration. For these reasons, the bidder and target sometimes enter into a transaction or implementation agreement.

Scheme document

The composite scheme document includes the expected timetable, a letter from the board of the target, a letter from the independent directors or board committee of the target, a letter from the independent financial advisers, an explanatory statement, financial and general information, the scheme of arrangement document itself (which is a formal court document) and notice of the relevant meeting(s).

Approvals

A scheme of arrangement requires approval from the Grand Court, as well as the approval of the directors (in practice) and shareholders of the target.

All schemes must be approved by a majority in number (a head count) representing three-fourths in nominal value (a share count) of the scheme shareholders (or each class of scheme shareholders) voting at the requisite meeting(s) that will have been convened pursuant to an order of the Grand Court obtained at a directions hearing. The Companies (Amendment) Act 2021 has been passed and will come into force by order made by the Cabinet (expected to be in March 2022). This will abolish the headcount test for shareholders schemes of arrangement, leaving only the share count test to apply.

The voting requirements of any applicable Takeovers Code must also be met.

In addition, the shareholders present and voting at the scheme meeting (often confusingly referred to as the 'court meeting') must represent a fair cross-section of the shareholders as a whole and every effort should be made by the target company to secure good attendance by registered shareholders.

The statutory thresholds apply to each class of share. Class composition is determined by a judicial test and not by the ordinary principles of company law. A separate class is created if shareholders have rights against the target company that are so dissimilar as to make it impossible for them to consult together with a view to their common interest. The makeup of any classes will normally be settled by the professional advisers before the directions hearing and will be reflected in the directions order, but this is not necessarily binding on the Grand Court at the subsequent petition hearing.

The statutory majority of shareholders must also act bona fide with no coercion of minority shareholders, and the scheme must be one that an intelligent and honest person acting in respect of his/her interests in the class might reasonably approve.

The thresholds cannot be reduced or waived; if they are not met, the scheme will fail.

Timetable

An indicative timetable setting out the major steps is set out below:

Day 1:	File draft petition/summons for directions/composite scheme document/ affirmation in support.
Day 21:	Directions hearing (depends on court availability).
Day 25:	Despatch composite scheme document.
Day 48:	Scheme meeting to approve the scheme and EGM to approve any reduction in capital (cancellation scheme).
Day 49:	File chairman's report of the scheme meeting.
Day 60:	Petition hearing to sanction the scheme and capital reduction.
Day 63:	Effective Date: file court order with the Registrar of Companies.

Effective date

The scheme will be effective when a copy of the court order is delivered to the Registrar of Companies for registration.

Amalgamations by way of a scheme of arrangement

Amalgamations may be effected through a 'special' scheme of arrangement, although nowadays these are rare. The scheme of arrangement must have been proposed for the purpose of, or in connection with, the 'reconstruction' of the target, or the 'amalgamation' of the target company and the bidder, and the transfer to the bidder of the whole or any part of the undertaking of the target. The Grand Court may then give effect to the reconstruction or amalgamation by making an order providing for:

- the transfer to the bidder of the undertaking, property and liabilities of the target;
- the continuation by or against the bidder of any legal proceedings pending by or against the target;
- provisions to be made for any dissentient shareholders of the target; and
- dissolution, without winding-up, of the target.

MERGERS AND CONSOLIDATIONS

For various reasons, mergers have been the predominant structure used in the takeover or privatisation of companies listed on a stock exchange in the United States or Canada since merger provisions were introduced in 2009. These mergers are typically cash squeeze-out mergers, where the shares held by the public shareholders of the target are compulsorily cancelled in exchange for a cash merger consideration.

Merger

Merger means the merging of two or more constituent companies into a sole remaining constituent company (the 'surviving company') and the vesting of the assets and liabilities of the constituent companies in the surviving company.

Consolidation

Consolidation means the combination of two or more constituent companies into a new consolidated company and the vesting of the assets and liabilities of the constituent companies in the consolidated company.

The cessation of a constituent company that participates in a consolidation or is not the surviving company in a merger does not require winding-up.

Difference between a merger and a consolidation

The essential difference between a merger and a consolidation is that a merger results in one of the constituent companies being the surviving company because the other constituent company is merged into it, whereas a consolidation results in a new consolidated company distinct from either of the constituent companies.

Procedure

The directors of each constituent company must approve a written plan of merger or consolidation (the 'Plan'). The Plan must contain certain prescribed information including:

- the basis of either the conversion of the shares in each constituent company into shares of the consolidated company or surviving company, and the rights attached to the shares; or the cancellation of those shares in exchange for the applicable consideration;
- any proposed amendments to the memorandum and articles of the surviving company in a merger or the proposed new memorandum and articles of association of the consolidated company in a consolidation;
- details of any secured creditors of the constituent companies; and
- the effective date of the merger/consolidation.

Approvals

The Plan must be approved by a special resolution of the shareholders of each constituent company. Any other authorisation required by the articles of association of a constituent company must also be obtained.

Shareholders do not need to approve a merger between a Cayman incorporated parent company and a Cayman incorporated subsidiary. For this purpose, a parent company is a company that holds shares carrying at least 90 per cent of the votes exercisable at a general meeting of the subsidiary.

The consent of any secured creditors of a constituent company is required, unless this requirement is waived by the Grand Court.

Other consents (and filings) may be required, for example, under the Banks and Trust Companies Act or the Insurance Act.

Filings

The Plan must be filed with the Registrar of Companies, together with fees and supporting documents including:

- a declaration:
  - of solvency (debts as they fall due);
  - that the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent companies;
  - of the assets and liabilities of each constituent company;
  - that no petition or similar proceeding is outstanding and that no order has been made or resolution passed to wind up a constituent company or to appoint a receiver, trustee or administrator in any jurisdiction;
  - that no scheme, order, compromise or arrangement has been made in any jurisdiction whereby the rights of creditors have been suspended or restricted; and

(a) an undertaking that a copy of the certificate of merger or consolidation will be given to members and creditors of a constituent company and published in the Cayman Islands Gazette.

Dissentient shareholders and appraisal rights

Dissentient shareholders who are entered in the register of members of the target company are entitled to apply to the Grand Court to have the court assess the fair value of their shares unless: (1) an open market exists for the shares on a recognised stock exchange or interdealer quotation system at the end of the dissent period (see below); and (2) the merger or consolidation consideration consists of shares or depository receipts of the surviving or consolidated company, or shares or depository receipts of any other Cayman company that are listed on a national securities exchange or designated as a national market system security on a recognised interdealer quotation system or held of record by more than 2,000 holders, on the effective date of the merger or consolidation.

The exercise of appraisal rights preclude the exercise of any other rights by a dissentient shareholder, save for the right to seek relief on the grounds that the merger or consolidation is void or unlawful.

The following procedure must be followed:

1. The dissentient shareholder (who must be entered in the register of members of the target company) must give written notice of an objection (notice of objection) to the target company before the vote to approve the merger or consolidation.

2. Within 20 days of the vote approving the merger or consolidation, the target company must give written notice of the approval of the merger (approval notice) to all registered shareholders who served a notice of objection.

3. Within 20 days (dissent period) of the approval notice, a registered shareholder who gave a notice of objection must give written notice of dissent to the target company/surviving company/consolidated company demanding payment of the fair value of his/her shares.

4. Within seven days of the expiry of the dissent period or within seven days of the date on which the Plan is filed with the Registrar of Companies (whichever is later), the constituent company, surviving company or consolidated company must make a written offer (fair value offer) to each registered shareholder who served a valid notice of dissent to purchase their shares at a price determined by the company to be their fair value.

5. If the company and the dissentient shareholders fail to agree the price within 30 days of the fair value offer being made (negotiation period) then, within 20 days of the expiry of the negotiation period, the company must apply to the Grand Court to determine the fair value of the shares held by all dissentient shareholders who have served a notice of dissent and who have not agreed the fair value with the company.

Effective date

The effective date of a merger or consolidation is the date the Plan is registered by the Registrar of Companies, although the Plan will usually specify the effective date and may provide for an effective date not exceeding 90 days after the date of the registration of the Plan.

Effect of a merger or consolidation

The rights, property, business, undertaking, goodwill, benefits, immunities and privileges of each of the constituent companies vest in the surviving or consolidated company that will be liable for all mortgages, charges, security interests and all contracts, obligations, claims, debts and liabilities of each constituent company. Existing claims, proceedings, judgments, orders or rulings applicable to each constituent company automatically apply to the surviving company or consolidated company.

Certificate of merger or consolidation

A certificate of merger or consolidation is issued by the Registrar of Companies, which is prima facie evidence of compliance with all statutory requirements in respect of the merger or consolidation.