

Statutory mergers, schemes of arrangement and tender offers under Cayman Islands law – A comparison

MATRIX

The Cayman Islands law on statutory mergers, schemes of arrangement and tender offers (also known as voluntary general offers) involving Cayman Islands companies (the **target**) is contained in the Companies Act (as amended) (the **Companies Act**). The Companies Act provides a bidder with mechanisms (through a statutory merger, scheme of arrangement or tender offer (coupled with compulsory acquisition, also known as 'squeeze-out', provisions)) that enable it to acquire all of the shares in the target.

The table below summarises the key characteristics of the Cayman Islands' statutory mergers, schemes of arrangement and tender offers in relation to a bidder proposing to acquire a target. The table assumes the bidder wishes to acquire all of the shares in the target and that a single class of shares is in issue in the target. Further considerations may be applicable if there are more than one class of shares in issue in the target. The table deals only with member (and not creditor) transactions.

The choice of whether to proceed by way of a statutory merger, scheme of arrangement or tender offer will often be driven by a variety of factors unconnected with Cayman Islands law. For example, taxation implications, investor familiarity, listing rules and regulatory approvals all influence the ultimate decision.

This note is only intended to give a summary and general overview, and is subject to any applicable takeover regime or listing rules. It is not intended to be comprehensive as each transaction is fact specific, and does not constitute legal advice.

	Statutory merger/consolidation	Scheme of arrangement	Tender offer (squeeze-out)
Relevant legislation	Part XVI (Sections 232 to 239) of the Companies Act	Section 86 of the Companies Act	Section 88 of the Companies Act
Shareholder/corporate approval	<p>A special resolution of the shareholders of each constituent company (being 66.6 per cent, unless a higher majority is stated in the articles of association) is required, unless the merger is between two Cayman companies (parent and subsidiary), of which one holds a minimum of 90 per cent of the voting rights in the other, and a copy of the plan of merger is given to every member of each subsidiary company to be merged</p> <p>Director resolutions of each constituent company must approve a plan of merger which sets out the terms of the merger</p>	<p>A court convened meeting of shareholders (Court Meeting) is required</p> <p>An EGM is ordinarily also needed to amend the articles and approve ancillary matters regarding the bid</p> <p>In order to obtain control of the target, the bidder requires the approval of 75 per cent in value of shareholders present, in person or by proxy (so shareholder attendance levels are relevant) and voting (the Value Test)¹</p> <p>The bidder can acquire 100 per cent of the target with such approval</p>	<p>No shareholder meeting or resolution is required</p> <p>The bidder requires more than 50 per cent acceptances of its offer by shareholders to obtain a level of control of the target</p> <p>Acceptances by 66.6 per cent of the shareholders will give the bidder the ability to pass special resolutions and therefore greater control</p> <p>The bidder must obtain 90 per cent acceptances of the shares to which the offer relates within four months of making or publishing the offer in order to exercise its right to compulsorily acquire the remaining shares and thereby acquire all shares in the target</p> <p>Untraceable shareholders are ordinarily wrapped into the squeeze-out</p>

¹ The Companies (Amendment) Act 2021 of the Cayman Islands (**Amendment Act**), which came into force on 31 August 2022, abolished the 'headcount test' which required members' scheme of arrangement to be approved by a majority in number, representing at least 75 per cent in value, of shareholders who are present and voting either in person or by proxy at the relevant members' meeting. This change aimed to eliminate the uncertainty that the 'headcount test' had historically brought to schemes of arrangement (particularly where shares of public companies are held by a nominee entity) which are typically used for the privatisations of Cayman Islands companies listed on The Hong Kong Stock Exchange.

	Statutory merger/consolidation	Scheme of arrangement	Tender offer (squeeze-out)
			Bid conditions ordinarily set the unconditionality levels at 90 per cent of the shares to which the offer relates
Ability to use irrevocable commitments	Yes. Commonly used to secure founder or management commitments in take-privates prior to announcing the merger	Yes. Commonly used to secure founder or management commitments in take-privates prior to announcing the scheme although consideration will need to be given to whether such irrevocable undertaking effectively creates a separate class of shareholders for the purposes of approving the scheme where the irrevocable undertaking sufficiently differentiates the interests of such shareholders from others	Yes. Frequently used to lock up commitments before launch of the bid
Excluded shareholders	No excluded shares Shares held by the bidder may be voted by the bidder	No excluded shares Shares held by the bidder may be voted by the bidder Separate class meetings may be required for those with divergent interests	Certain shares are excluded from calculating whether the 90 per cent threshold has been met, including shares which the bidder or its associates acquired or contracted to acquire before the offer
Minority shareholder right to block process	A minority shareholder has no specific right to block the process, other than the rights under the Companies Act generally Shareholders with sufficient voting power could prevent a special resolution from being passed Shareholders are entitled, pursuant to section 238 of the Companies Act, to dissent from the merger and in certain circumstances to request payment of 'fair value' for their shares	A minority shareholder has no specific right to block the process, other than the rights under the Companies Act generally Shareholders with sufficient voting power could prevent the statutory approval threshold being met	Shareholders with sufficient voting power could prevent the 90 per cent threshold being met Once acceptances have been received for 90 per cent of the shares to which the offer relates, a squeeze-out notice must be served on dissenting shareholders (Squeeze-Out Notice) within two months after expiration of the four months offer-period A dissenting shareholder may then, within one month of the date of the Squeeze-Out Notice, apply to the court for an order blocking the compulsory acquisition of such dissenting shareholder's shares or varying the terms of acquisition of such shares
Court involvement	No court approval/sanction is required. However, shareholders who dissent have a right to exercise appraisal rights under section 238 of the Companies Act	Court sanction is required A minimum of two court hearings are required The first court hearing is for the court to convene the relevant shareholder meeting(s) The second court hearing is for the court to sanction the scheme (once approved by target shareholders)	No court approval/sanction is required. Dissentient shareholders do not have express appraisal rights (ie cannot apply to the court to have fair value of shares appraised or assessed by the court, unlike in a statutory merger) – burden of proof is on the applicant to show that the terms of the offer were unfair, not compliant with statutory administrative provisions, a substantial breach of the applicable takeovers code or differential terms

	Statutory merger/consolidation	Scheme of arrangement	Tender offer (squeeze-out)
Target involvement in the process	The process involves both the bidder and the target This process could not be pursued for a hostile bid	The scheme process is ultimately driven by the target and the Scheme Circular is despatched by the target to its shareholders (for the purposes of the court meeting and (if required) the EGM) A scheme transaction is very difficult to use for hostile bid scenarios	The offer document is sent by the bidder and the process is ordinarily controlled and managed by the bidder Ancillary matters regarding completion of the squeeze-out need target assistance Limited engagement with the target if the bid is hostile
Rights of creditors of the target	The consent of each holder of fixed or floating security interests of a constituent company must be obtained	The Companies Act does not require that account be taken of the target's creditors in the process, though the court has discretion to hear the views of creditors at the sanction hearing	The Companies Act does not require that account be taken of the target's creditors in the process
Key document	Plan of Merger	Scheme Circular	Offer Document
Indicative timing	One to two months (excluding the fair value appraisal process, if applicable)	Three to six months but dependent on the number of classes of shares, court availability, and the timing under any applicable listing rules	At least four to six months following the tender offer being made
Advantages	<ul style="list-style-type: none"> Relatively short timetable when compared with the other forms of merger or acquisition processes (including document preparation) assuming no dissenting shareholders Bidder can vote on the shares it holds in the target Certainty of no minority remaining after the process (if required) No court sanction required Potentially greater flexibility around merger terms, including consideration payable and post-acquisition shareholdings 	<ul style="list-style-type: none"> No fair value appraisal rights for dissenting shareholders who will be bound by any scheme sanctioned by the court Potentially has the shortest timetable where the offer is not 100 per cent agreed Certainty of 100 per cent and no minority interests remaining after the process The court can potentially (under certain circumstances) treat holders of shares of different classes as being of the same class for the purposes of approval of the scheme 	<ul style="list-style-type: none"> Relatively short timetable for recommended offer No court sanction required (although the court may be involved if a shareholder dissents) Flexibility to amend terms after sending documents Ability to use in hostile situations No statutory fair value appraisal rights for dissenting shareholders
Disadvantages	<ul style="list-style-type: none"> Appraisal rights are available for dissenting shareholders, which can lead to economic uncertainty and affect the commercials of the deal Fair value appraisal process can require court involvement, which is costly and time consuming 	<ul style="list-style-type: none"> Higher approval threshold than a statutory merger The Headcount Test can present difficulties in calculating votes² Court sanction required Timetable can, in circumstances, be drawn out depending on court availability and deal specifics 	<ul style="list-style-type: none"> Highest shareholder approval threshold for a 100 per cent acquisition Possibility of a minority remaining after the process if the 90 per cent threshold is not met (subject to requisite bid conditions) Process can take a long time to implement

² See note above.

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		<ul style="list-style-type: none"> Potential requirement for multiple shareholder class meetings if there are different classes of shares 	

This matrix is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this matrix, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](https://www.mourant.com). © 2022 MOURANT OZANNES ALL RIGHTS RESERVED