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# THE MERGERS & ACQUISITIONS REVIEW

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SEVENTH EDITION

EDITORS

SIMON ROBINSON AND MARK ZERDIN

LAW BUSINESS RESEARCH

# THE MERGERS & ACQUISITIONS REVIEW

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Editors

SIMON ROBINSON AND MARK ZERDIN

LAW BUSINESS RESEARCH LTD

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## PUBLISHER'S NOTE

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In presenting this seventh annual edition of *The Mergers & Acquisitions Review*, the publisher would like to extend warm and heartfelt thanks to editor Simon Robinson, who has recently retired from Slaughter and May. Simon has held the position of editor of *The Mergers & Acquisitions Review* since its inauguration seven years ago, and Simon and his partners at Slaughter and May have been instrumental in the success of The Law Reviews series. Thank you Simon.

The publisher would like to welcome Mark Zerdin, also a partner at Slaughter and May, as current and future editor of *The Mergers & Acquisitions Review*. We are delighted to have Mark on board, and we look forward to future editions in Mark's very capable editorial hands.

Gideon Robertson  
Publisher, The Law Reviews  
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# EDITOR'S PREFACE

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This past year has seen some surprising twists and turns, not only in the mergers and acquisitions markets but also in the economic and political environments. November saw the re-election of Barack Obama, although this had less of an impact on the markets than an announcement by Ben Bernanke in May that the US Federal Reserve would consider a slowdown in its programme of quantitative easing. On the other side of the Pacific, Xi Jinping has outlined a new communist doctrine – the ‘Chinese dream’. The doctrine reflects the changing economic outlook in China where growth will be increasingly consumer rather than investment-led. A new political rhetoric has also emerged in Japan as Shinzo Abe, elected in a landslide December victory, seeks to reinvigorate the Japanese economy. Both rebrandings flirt with nationalist sentiment and the attitude of these two countries towards one another will continue to bear on the region’s business environment.

In Europe, despite an awkward Cypriot bailout, the sovereign debt crisis showed signs of stability and government bond yields are falling. Europe also improved its attractiveness in the eyes of investors and remains the largest destination for foreign direct investment. However, there has yet to be a return to growth. Investors seem split fairly evenly between those who believe Europe will emerge from the crisis in the next three years, and those who believe it will take five years or more. In any event, a return to the boom years is unlikely in the near future, particularly as the emerging markets see a relative slowdown. The IMF data for 2012 shows that the combined growth rate of India and China is at its lowest in over 20 years while global growth fell below 2.5 per cent in the second half of 2012. This global slowdown continues to pull M&A figures down making 2012 the fifth consecutive year in which deal values fell globally.

There are reasons for optimism though, particularly in the US market which has seen some substantial deals (the acquisitions of Heinz and Virgin Media being particular highlights). These deals have been made possible by the return of debt financing where the right deal can attract very favourable terms. Equities have also performed much more strongly over the past year. In May 2013 both the Dow Jones and the FTSE 100 hit record highs – validating to some extent the aggressive monetary policies pursued in

the US and the UK. Whether political will can start to lift the markets more broadly still remains to be seen.

I would like to thank the contributors for their support in producing the seventh edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

**Mark Zerdin**

Slaughter and May

London

August 2013

## Chapter 16

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# CAYMAN ISLANDS

*Wendy L Lee*<sup>1</sup>

### I OVERVIEW OF M&A ACTIVITY

Despite signs of a stabilising economy, the Cayman Islands witnessed a 1 per cent decrease in new company registrations in 2012 compared to 2011; 8,971 new companies were incorporated compared to 9,064 a year earlier.<sup>2</sup> However, even with this decline, as of 31 December 2012, there were a total of 93,612 active Cayman companies, almost on par with the 93,693 Cayman companies that were active at the end of 2008 (which was the highest number of active Cayman companies recorded on a year-end basis to date).<sup>3</sup>

The Global Financial Centres Index (GFCI), an instrument for tracking the shifts in competitiveness of global financial centres, published in the first quarter of 2013, recently placed the Cayman Islands as the fourth highest-ranking offshore jurisdiction – a fall of one place in both the offshore and overall jurisdiction GCFI rankings published during the same period a year earlier.<sup>4</sup> According to the GFCI 13, the Cayman Islands increased its overall financial centres ranking, moving up three places to 41 from a ranking of 44 in the GFCI 12 published six months earlier in September 2012.<sup>5</sup>

The Cayman Islands economy is not immune to global economic pressures and it derives a significant amount of its business from the United States. The United States' slow and uneven economic recovery, volatility in global markets, continuing uncertainty about the stability of the eurozone and reports of a slowdown in the growth of the BRIC

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1 Wendy L Lee is a senior associate at Harney Westwood & Riegels.

2 General Registry of the Cayman Islands statistics.

3 *Id.*

4 Global Financial Centres Index 13, March 2013 at p. 26 and Global Financial Centres Index 11, March 2012 at p. 26 (GFCI 11). In the GFCI 11, the Cayman Islands was ranked 40th in the GCFI's overall jurisdiction rankings.

5 *Id.* at p. 5 and Global Financial Centres Index 12, September 2012 at p. 27.

nations – Brazil, Russia, India and, in particular, China – materially affected Cayman Islands and global M&A transactions in 2012.

There were 519<sup>6</sup> completed M&A deals<sup>7</sup> in 2012 involving Cayman Islands entities,<sup>8</sup> down from 612 completed transactions in 2011, a fall of approximately 15 per cent.<sup>9</sup> Total deal value for M&A transactions completed in 2012 involving Cayman Islands entities also fell to US\$38.7 billion in 2012 from US\$44.2 billion in 2011.<sup>10</sup>

There were a total of 97 Cayman M&A transactions completed in the first quarter of 2013, a modest decline from the 100 deals completed in the same period the previous year but down a significant 39 per cent from the 159 completed transactions in the fourth quarter of 2012.<sup>11</sup> Total deal value for completed M&A transactions involving Cayman Islands entities in the first quarter of 2013 was US\$6.2 billion, a decrease of approximately 40 per cent compared with the same period in 2012.<sup>12</sup> Similarly, total deal value for Cayman M&A deals completed in the first quarter of 2013 was also lower by approximately US\$1.4 billion compared with total deal value for Cayman M&A transactions completed in the fourth quarter of 2012.<sup>13</sup>

This decline in Cayman M&A transactions is not inconsistent with global M&A statistics for 2012 – the total number of worldwide M&A deals (40,613 transactions), as well as total global M&A deal value, fell to the lowest level since 2009, and aggregate worldwide M&A deal value declined 8 per cent to US\$2.57 trillion compared to US\$2.78 trillion in 2011.<sup>14</sup> In the first quarter of 2013, global M&A aggregate deal value increased 18 per cent to US\$690.3 billion compared to the same period in 2012; however, there were only 8,396 global M&A transactions in Q1 2013 – the lowest quarter since Q3 2005 (7,990 deals).<sup>15</sup>

As a result of ongoing economic volatility and uncertainty, a significant amount of M&A transactions involving Cayman Islands companies continued to be minority-interest deals as opposed to majority interest or total acquisitions. Of the 519 Cayman Islands-completed M&A deals in 2012, 312 of them were minority stake transactions.<sup>16</sup> Approximately 46 per cent of the 612 Cayman M&A deals completed in 2011 were minority interest acquisitions.<sup>17</sup> Similarly, of the 97 M&A transactions completed in the

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6 Zephyr database published by Bureau van Dijk.

7 Id. Deals include acquisitions, IPOs, planned IPOs, institutional buy-outs, joint ventures, management buy-ins, management buy-outs, mergers, demergers, minority stake transactions, share buy backs, private equity and venture capital deals.

8 Id. Based only on deals where a Cayman Islands entity was either an acquirer or target.

9 Id.

10 Id. Based on number of deals with known deal value.

11 Id. Based only on deals where a Cayman Islands entity was either an acquirer or target.

12 Id. Based on number of deals with known deal value.

13 Id.

14 Press Release: Dealogic M&A Review, Full Year 2012, Preliminary Results, 19 December 2012.

15 Dealogic M&A Review, First Quarter 2013, 2 April 2013.

16 Zephyr database published by Bureau van Dijk.

17 Id.

first quarter of 2013 involving Cayman Islands entities, 61 per cent or 59 transactions were minority-interest deals.<sup>18</sup>

In recent years, Cayman Islands companies have also more commonly been targets in M&A deals rather than acquirers. In 2012, Cayman Islands companies were targets in 355 of 519 completed Cayman M&A transactions.<sup>19</sup> Furthermore, 65 per cent of the 99 completed Cayman M&A deals in the first quarter of 2013 involved Cayman entities as targets.<sup>20</sup>

Total completed initial public offerings involving Cayman Islands companies were also down in 2012; only 55 Cayman Islands companies went public compared to 88 completed IPOs in 2011.<sup>21</sup> Not surprisingly, aggregate deal values for completed IPOs involving Cayman companies also dropped significantly in 2012 to US\$2.2 billion from approximately US\$9 billion in 2011.<sup>22</sup>

Even though parts of the global economy appear to be recovering, in the first quarter of 2013 there were only six completed IPOs involving Cayman Islands companies realising a total aggregate deal value of US\$209 million – a significant decline from the US\$619 million in aggregate deal value generated from the 16 IPOs completed in the first quarter of 2012 and the US\$847 million in total deal value produced from the 17 IPOs that were completed in Q4 of 2012.<sup>23</sup>

While overall, the Cayman Islands economy continues to be dominated by the financial services, banking and insurance industries, there has been increased Cayman M&A activity in the energy, resources, mining, extraction and other raw minerals sectors as a result of consolidation and certain demand for natural resources. M&A activity is also strong in the technology sector particularly among Cayman-incorporated Asian-based companies. Many M&A deals involving Cayman entities are likely to have an Asian component due to economic growth in the Asian markets and the fact that the Cayman Islands continues to be a preferred offshore jurisdiction for Asia-Pacific transactional work.<sup>24</sup>

## **II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A**

Mergers, consolidations, amalgamations, schemes of arrangements and takeovers in the Cayman Islands are governed by the Companies Law (2012 Revision) (the Companies Law). The Companies Law is substantially derived from the UK Companies Act 1948 and its predecessor, the English Companies Act 1862, and was originally enacted in the Cayman Islands as the Companies Law, Cap 22 (Law 3 of 1961). In addition to

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18 Id.

19 Id.

20 Id.

21 Id.

22 Id. Based on number of deals with known deal value.

23 Id.

24 Id.

Cayman Islands statutes, English common law and equitable principles form part of the substantive law of the Cayman Islands.

Under the Companies Law, a 'merger' is defined as the merging of two or more constituent companies and the vesting of their respective undertaking, property and liabilities in the surviving company by operation of law.<sup>25</sup> A 'consolidation' means the combination of two or more constituent companies into a consolidated company and the vesting of the undertaking, property and liabilities of such companies in the consolidated company.<sup>26</sup> Under Cayman law, in a merger, only one of the merging entities survives; whereas in a consolidation, the constituent companies continue on as the consolidated company.

Prior to the introduction of the statutory merger and consolidation regime in the Cayman Islands in 2009, the only procedure available under the Cayman Islands Companies Law to effect a merger or consolidation between companies was a court-approved scheme of arrangement. Pursuant to the provisions of the Companies Law, the Cayman Islands courts had (and continue to have) significant authority to approve acquisitions and corporate restructurings by way of schemes of arrangements, amalgamations and reconstructions.<sup>27</sup>

Court-approved schemes of arrangements are still available for more complex mergers and consolidations but the new statutory merger and consolidation regime provides a much simpler, more efficient and cost-effective way for both Cayman Islands companies limited by shares and Cayman Islands companies and foreign companies (other than Cayman Islands segregated portfolio companies) to merge or consolidate, subject to the express provisions to the contrary in the constitutional documents of such companies. Court approval is no longer necessary for contractual mergers and consolidations as they can now be accomplished by shareholder approval and a registration process. Furthermore, shareholder approval is not required if a Cayman parent company<sup>28</sup> wishes to merge with its Cayman subsidiary provided that a copy of the plan of merger is given to every shareholder of the subsidiary (unless the shareholder waives the right to receive it).<sup>29</sup> This provision of the Companies Law does not apply to Cayman parent-subsidiary consolidations.

In accordance with the provisions of the Companies Law, the directors of each Cayman Islands constituent company are required to approve a written plan of merger or consolidation (the Plan) containing matters outlined in the Companies Law (which is submitted for shareholder approval if necessary), as well as file the Plan and certain required declarations with the Registrar of Companies in the Cayman Islands (the

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25 Section 232 of the Companies Law.

26 *Id.*

27 Sections 86 and 87 of the Companies Law.

28 Under the Companies Law, a 'parent company' is one that owns shares of another company representing at least 90 per cent of the votes at a general meeting of such company (Section 232 of the Companies Law).

29 Section 233(7) of the Companies Law.

Registrar).<sup>30</sup> The Plan must be approved by special resolution of the shareholders of each merging or consolidating Cayman company in addition to any other authorisation specified in the company's articles of association.<sup>31</sup> Some or all of the shares whether of different classes or of the same class in each merging or consolidating Cayman company may be converted into or exchanged for different types of property (including the shares, debt obligations or other securities in the surviving company or consolidated company or money or any other property whatsoever, or a combination thereof) as provided for in the Plan.<sup>32</sup>

Each holder of a fixed or floating security interest in a Cayman company merging or consolidating under Cayman law must also consent to the Plan.<sup>33</sup> Such secured creditors may impose certain requirements as a condition for providing consent (i.e., they may ask to be given certain priorities in relation to their security). If a secured creditor refuses to provide such consent, the Cayman Islands company can apply to the Grand Court in the Cayman Islands to have the requirement to obtain such consent waived.<sup>34</sup>

The Companies Law also sets out takeover provisions relating to the power to acquire shares of dissentient shareholders. In general, under the Companies Law, a shareholder of a Cayman company that dissents from a merger or consolidation is entitled to be paid the fair value of its shares.<sup>35</sup> There is a strict notice and objection procedure under the Companies Law resulting in the Grand Court of the Cayman Islands determining the fair value of the shares held by all dissenting shareholders if the value cannot be agreed to between the company and dissenting shareholders.<sup>36</sup> Shareholders of a constituent Cayman company will not be entitled to exercise dissenters' rights in certain important circumstances including if they hold shares of a company that are listed on a recognised stock exchange or interdealer quotation system.<sup>37</sup>

The effective date of a merger or consolidation is the date the Plan is filed with the Registrar or such later date (not to exceed 90 days from the date of filing) as specified in the Plan.<sup>38</sup> A certificate of merger or consolidation issued by the Registrar is *prima facie* evidence of compliance with all statutory requirements.<sup>39</sup>

As soon as the merger or consolidation becomes effective the following will apply:

- a* in the case of a consolidation, the memorandum and articles of association filed with the Plan will immediately become the memorandum and articles of association of the consolidated company;

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30 Sections 233(3), (4) and (9) of the Companies Law.

31 Section 233(6) of the Companies Law.

32 Section 233(5) of the Companies Law.

33 Section 233(8) of the Companies Law.

34 *Id.*

35 Section 238 of the Companies Law.

36 *Id.*

37 Section 239 of the Companies Law.

38 Section 234 of the Companies Law.

39 Section 233(12) of the Companies Law.



- b all rights, property, business, undertakings, goodwill, benefits, immunities and privileges of each of the constituent companies shall immediately vest in the surviving or consolidated company; and
- c subject to any agreements between the applicable parties, the surviving or consolidated company shall be liable for all mortgages, charges, security interests, contracts, obligations, claims, debts and liabilities of each of the constituent companies.<sup>40</sup>

A Cayman company is not statutorily prohibited from providing financial assistance with respect to the acquisition of its own shares. Accordingly, in such circumstances, a Cayman company may provide financial assistance if the board of directors of the company, in discharging its fiduciary duties and acting in good faith, concludes that the provision of such financial assistance is for a proper purpose and in the best interests of the company.

In addition to the Companies Law, M&A involving Cayman Islands licensed companies will require compliance with industry-specific legislation (i.e., the Banks and Trust Companies Law, Insurance Law and Mutual Funds Law) including, in certain circumstances, obtaining the prior approval of the Cayman Islands Monetary Authority (CIMA). Regardless of the merger provisions in the Companies Law, CIMA has the authority to ensure that a licensed Cayman company complies at all times with its obligations under the Islands' regulatory laws.<sup>41</sup>

Companies listed on the Cayman Islands Stock Exchange are also regulated by the Cayman Islands Stock Exchange Listing Rules and the Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares.

An acquisition, merger or consolidation involving a Cayman company will also involve directors' duties under Cayman common law. Recent case law involving Cayman Islands-based investment funds have turned the spotlight on directors' duties and in particular, the discharge and application of such duties. In August 2011, the Grand Court in the Cayman Islands found in *Weaving Macro Fixed Income Fund Limited (In liquidation) v. Stefan Peterson & Hans Ekstrom* that the independent directors of a Cayman investment fund were guilty of wilful neglect and default because they failed to discharge their duties as directors and were ordered to pay damages of US\$111 million plus costs. While the judgment does not create any new directors' duties, the court held that: (1) directors owe fiduciary duties to their companies to act *bona fide* in the best interests of the company; (2) directors have a duty to exercise reasonable care, skill and diligence; (3) while directors may delegate to external advisers to assist them, they must take an active role in supervising those they delegate to; and (4) they must apply their independent judgement and minds to the decisions they make, as well as to the documents they are asked to review and execute. The decision is currently subject to

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40 Section 236(1) of the Companies Law.

41 Section 233(2) of the Companies Law.

an appeal.<sup>42</sup> While *Weaving* was decided in the context of the hedge fund industry, the principles established in the case are instructive in relation to director duties under Cayman law generally.

### III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

In response to worldwide economic changes, global regulatory requirements and in order to best address the needs of international business, legislation in the Cayman Islands continued to evolve. From 2011 through to early 2013,<sup>43</sup> the Cayman Islands enacted a further set of amendments to its Companies Law. Some of those that relate to or could affect M&A are discussed in further detail below.

#### i Mergers and consolidations

A Cayman Islands company can merge or consolidate with a foreign company (a company not incorporated in the Cayman Islands) provided that the applicable laws and constitutional documents of the foreign company permit such a merger or consolidation and following the recent amendments, the surviving or consolidated company can now also be a foreign company.<sup>44</sup>

The authorisation requirements for mergers and consolidations were also simplified so that the Plan need only be approved by special resolution of the shareholders of each Cayman company and any other authorisation specified in the company's articles of association.<sup>45</sup> A special resolution must be passed by a majority of at least two-thirds (or such higher percentage as may be specified in the Cayman company's articles of association) of shareholders entitled to vote, either voting in person or, where proxies are allowed, by proxy at a general meeting or by unanimous written resolution executed by all shareholders entitled to vote.<sup>46</sup> In contrast, Cayman schemes of arrangements require approval by a majority in number representing 75 per cent in value of affected members or class of members (or creditors or class of creditors), as the case may be, who attend and vote in person or by proxy at a court-sanctioned meeting of the members (or creditors) or of each applicable class.<sup>47</sup>

The recent amendments to the Companies Law also provide a Cayman Islands company with increased flexibility to establish different voting thresholds for the passing of special resolutions at shareholder meetings with respect to different matters (subject to the majority of two-thirds minimum).<sup>48</sup> For example, a Cayman company may now

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42 An appeal of the August 2011 decision was recently concluded in April 2012, and a decision of the Cayman Islands appeal court is expected in 2013.

43 Time of writing.

44 Section 237(7) of the Companies Law.

45 Section 233(6) of the Companies Law.

46 Section 60 of the Companies Law.

47 Section 86(2) of the Companies Law.

48 Section 60 of the Companies Law.

specify that the majority required to pass a special resolution to wind up the company by voluntary liquidation may be higher than that required to approve a merger or consolidation.

Recent changes to the Companies Law state that where the merger or consolidation involves a foreign company, a director of the Cayman Islands company must, in addition to meeting the other requirements of the Companies Law, give a declaration or affidavit with respect to the foreign company including, without limitation, satisfying the Registrar that the merger or consolidation is permitted by the constitutional documents and the jurisdiction of incorporation of the foreign company and that the foreign company is not being wound up.<sup>49</sup> Such declaration must be made by the director having made due enquiry and any such director will now be deemed to have made such due enquiry if he or she obtains a declaration from a director of the foreign company confirming the same matters.<sup>50</sup>

Where the surviving or consolidated company is to be a foreign company, such company must file with the Registrar an undertaking that it will promptly pay dissenting shareholders of a Cayman constituent company the amount, if any, they are entitled to receive under the dissenters' rights provisions of the Companies Law along with evidence of the merger or consolidation from the jurisdiction of the surviving or consolidated foreign company.<sup>51</sup>

If the Cayman Islands company is not the surviving entity, the Registrar will strike off the Cayman Islands company and shall immediately publish in the Cayman Islands Gazette a Government Notice to the effect that the company in question has been struck off the register, the date on which it has been struck off and the reason for its removal.<sup>52</sup>

The recent amendments to the Companies Law requires that any merging or consolidating Cayman company that is not the surviving company retire from any fiduciary office held by it no later than immediately prior to the effective time of the merger or consolidation.<sup>53</sup>

## **ii Treasury shares**

While it is still not possible for a Cayman company to issue shares directly into treasury, as a result of the 2011 amendments to the Companies Law, provided there is no prohibition in the company's articles of association and the memorandum and articles of association of the company are complied with, upon a repurchase, redemption or surrender of shares, Cayman companies can now decide whether to cancel those shares so that they form part of the authorised but unissued share capital (as was the case prior to the recent Companies Law amendments), or hold them as treasury shares and resell them at a later date (including for no consideration or at a discount to par value).<sup>54</sup> A

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49 Section 237(7) of the Companies Law.

50 Section 237(8) of the Companies Law.

51 Section 237(10) of the Companies Law.

52 Sections 236(3) and 158 of the Companies Law.

53 Section 233(9)(f) of the Companies Law.

54 Section 37A of the Companies Law.

Cayman company will not be entitled to receive distributions or exercise any voting rights in relation to treasury shares that it holds.<sup>55</sup>

### **iii Redemption, repurchase and surrender of shares**

Amendments to the Companies Law relating to the redemption, repurchase and surrender of shares provide a Cayman exempted company with more flexibility to manage its share capital, as well as assist with group restructurings. The term ‘fully paid’ and ‘paid up’ with respect to a share has been redefined as the payment of par value of a share without the inclusion of any share premium.<sup>56</sup> Therefore, the redemption or repurchase of shares will now be possible if only the nominal (par) value of such shares have been paid.

Shares originally issued as non-redeemable can now be converted into redeemable shares and a Cayman company’s articles of association or a shareholders’ resolution can authorise the directors of a Cayman company to determine the manner or terms upon which any redemption or purchase will be made.<sup>57</sup> Subject to the provisions of the company’s articles, a Cayman company can now also surrender fully paid shares for no consideration unless as a result of the surrender there would be no issued shares of the company other than treasury shares.<sup>58</sup> Upon surrender, the relevant shares will be cancelled unless they are held as treasury shares.<sup>59</sup>

### **iv Documents to be kept at the registered office and registers**

The register of members of a Cayman company can be kept at the registered office of the company or in the case of an exempted Cayman company, at any other place within or outside the Cayman Islands. Recent Companies Law amendments also permit Cayman exempted companies to maintain in any country or territory one or more branch registers of such category or categories of shareholders it may determine.<sup>60</sup> The Companies Law also now permits the principal register of members of a Cayman exempted company to be kept in a different jurisdiction than its branch registers, provided that a duplicate copy of all branch registers is kept at the place where the principal register is located within 21 days of establishing a branch register or within 21 days of making a change in the details recorded in a branch register.<sup>61</sup> These provisions may be particularly helpful to those Cayman exempted companies that have multiple classes of shares or shareholders, or that are located in multiple jurisdictions.

If a Cayman company is served with an order or notice from the Cayman Islands Tax Information Authority pursuant to the Tax Information Authority Law (Revised), it shall make available at the company’s registered office, in electronic form or any other medium: (1) the company’s register of members, including in the case of an exempted

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55 Section 37A(7) of the Companies Law.

56 Section 2(4) of the Companies Law.

57 Section 37 of the Companies Law.

58 Section 37B of the Companies Law.

59 *Id.*

60 Section 40A of the Companies Law.

61 Sections 40A(4) and 40A(5) of the Companies Law.

company any branch register; and (2) copies of its books of account or any part or parts thereof specified in the notice or order (if such accounts are kept at any place other than at its registered office or at any other place in the Cayman Islands). If the company fails to comply with the order or notice without reasonable excuse, the company shall incur a penalty of CI\$500 and a further penalty of CI\$100 for every day such non-compliance continues.

Any Cayman company that fails to either: (1) maintain a register of directors and officers at such company's registered office; (2) send a copy of such register to the Registrar in the Cayman Islands within 90 days of the registration of the company; or (3) notify the Registrar of any change to the company's directors and officers within 30 days of such change will now incur a penalty of CI\$1,000 and a further penalty of CI\$100 for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorises or permits such default shall incur the same penalty. The register of directors of Cayman companies must now also contain the names and addresses of alternate directors.

**v Certificates of good standing**

The Companies Law now provides that: (1) a certificate of good standing is evidence of the fact that a company is in good standing on the date that the certificate is issued; and (2) a company is deemed to be in good standing if all fees and penalties under the Companies Law have been paid and the Registrar has no knowledge that the company is in default under the Companies Law.

**vi Paperless share transfers**

Amendments to the Companies Law now permit, if authorised by a company's articles of association or by shareholder resolution, paperless share transfers and electronic share registers for Cayman companies listed on certain approved foreign stock exchanges.<sup>62</sup> These changes not only facilitate the listing of shares of Cayman companies globally but will make it easier to acquire the shares of listed Cayman companies (i.e., effectuate share transfers) without having to use physical share transfer forms.

**vii Execution of documents**

Practical difficulties arose as a result of the English *Mercury*<sup>63</sup> case (a persuasive authority in the Cayman Islands), which called into question the validity of documents where separate signature pages were pre-signed, sent or transmitted by e-mail or fax and then later attached to agreements or contracts. New amendments to the Companies Law provide that contracts or other documents (including deeds and instruments under seal) may be executed in any manner consented to by the parties including the pre-signing of separate signature pages to the contract or document even if the contract or document

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62 Section 40B of the Companies Law.

63 *R (on the application of Mercury Tax Group Ltd and another) v. HMRC & Others* [2008] EWHC 2721.

is not in final form without affecting its validity.<sup>64</sup> The new provisions also validate any execution by this method that took place prior to the passing of the new amendments.<sup>65</sup>

Companies can also now appoint a person to execute a document as a deed or under seal on behalf of the company without the instrument appointing the person itself having to be a deed or instrument under seal.<sup>66</sup>

#### **viii Names in foreign script**

The Companies Law was recently amended to permit company names in foreign script. This means that a Cayman Islands exempted company will be permitted to adopt a 'dual foreign name' in a foreign script (i.e., a Chinese name), which is not necessarily a direct translation or transliteration of its English name.<sup>67</sup> This element has proved popular with Asian markets.

#### **ix Takeovers**

New amendments to the Companies Law have been welcomed particularly in relation to takeovers of Cayman Islands companies listed on various exchanges around the world. A number of listed Cayman Islands companies have recently 'gone private' using the statutory merger provisions.

The introduction of the statutory merger provisions under the Companies Law may result in the use of the merger provisions as a faster and less costly alternative to the statutory squeeze out provisions under the Companies Law. Under Section 88 of the Companies Law, if 90 per cent in value of shareholders have agreed to sell, an acquirer can make a compulsory acquisition ('squeeze out') of the minority after a four-month waiting period from the initial date of the offer. Dissenting shareholders have one month from the date that they have been notified that their shares will be compulsorily acquired to apply to the Grand Court of the Cayman Islands to provide reasons why the shares should not be purchased. The new merger regime provides an alternative route whereby a Cayman Islands bidder could acquire 90 per cent of the shares in the Cayman Islands target company and then merge with the target by way of 'parent/subsidiary merger' without having to undergo a waiting period or obtain shareholder approval.

#### **x Liquidations**

The Companies Law statutory merger provisions could also be used as an alternative solution to liquidation. Instead of formally liquidating a subsidiary that is no longer being used or needed, the Cayman Islands subsidiary could merge with its Cayman Islands parent company thereby transferring any remaining assets and liabilities of the subsidiary to the parent and terminating the existence of the subsidiary.

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64 Section 81(8) of the Companies Law.

65 Section 81(9) of the Companies Law.

66 Section 83 of the Companies Law.

67 Definition of 'dual foreign name' in Section 2(1) and Section 31(1) of the Companies Law.

#### **IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS**

Cayman companies do business all over the world. Cayman exempted companies, while resident in Cayman, must carry on business outside of the Cayman Islands. Significant M&A deals involving Cayman companies continue to originate from the United States and Europe and a substantial amount of current Cayman Islands-related M&A activity involves emerging markets, particularly Asia.

The popularity of Cayman Islands entities globally can be attributed to a number of factors including the ease of incorporation, the fact that the Cayman Islands is a British overseas territory and common law jurisdiction with its foundation in English law, no director or shareholder residency requirements, the flexibility of Cayman corporate structures including the ability to increase capital, distribute capital and issue different classes of shares, and the fact that the Cayman Islands is a major banking centre and has a highly developed professional infrastructure.

##### **i Asia**

A large number of the most significant M&A transactions involving Cayman entities in 2012 and early 2013 involved Asia and this trend is expected to continue. Of the 1,547 companies listed on the Main Board and the Growth Enterprise Market (GEM) of the Hong Kong Stock Exchange as of the end of December 2012, 644 or approximately 42 per cent of them were Cayman Islands companies.<sup>68</sup> As a result of the significant number of Cayman companies based in China, the Cayman Islands is expected to be part of Asia's increasingly important position over the next two decades as a driver of worldwide growth.

However, mergers and acquisitions in the Asia Pacific region experienced a decline in 2012 and early 2013, which, given the prevalence of Cayman companies in China, also negatively affected M&A involving Cayman companies. According to Dealogic statistics, in the Asia Pacific region (excluding Japan) total deal value for 2012 was US\$509.4 billion in 2012, down 5 per cent from 2011 (US\$535.1 billion) and the lowest volume since 2009.<sup>69</sup> The number of transactions in this region was also down to 9,859 in 2012 from 11,689 deals in 2011, which was the lowest activity since 2006 (8,470 deals).<sup>70</sup> In the first quarter of 2013, Asia Pacific (excluding Japan) deal value reached US\$85.3 billion, down 23 per cent on the same period in 2012 (US\$111 billion), and the lowest quarterly volume since Q1 2009 (US\$68.7 billion).<sup>71</sup> The number of deals in this region also fell to 1,957 in Q1 2013, a decline of 23 per cent from Q1 2012 (2,557 deals), and the lowest quarterly deal count since Q1 2006 (1,808 deals).<sup>72</sup>

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68 HK Ex Fact Book 2012, p. 1 and Appendices.

69 Press Release: Dealogic M&A Review, Full Year 2012, Preliminary Results, 19 December 2012.

70 Id.

71 Dealogic M&A Review, First Quarter 2013, 2 April 2013.

72 Id.

**ii Latin America**

The Cayman Islands is one of the top five jurisdictions in the world for investment in and out of Brazil according to 2010 International Monetary Authority statistics. Recent reports also indicate that some US\$67 billion currently flows between the two countries.<sup>73</sup> While Latin America-targeted M&A was up 3 per cent (US\$147.6 billion) in 2012 from 2011 (US\$143.9 billion), M&A in Brazil dropped to US\$69 billion in 2012, down 19 per cent from 2011 (US\$85 billion).<sup>74</sup> In the first quarter of 2013, there were 309 targeted M&A deals in Latin America valued at US\$18.2 billion, down 41 per cent compared to the same period in 2012 and the lowest first quarter since 2005 (US\$8.1 billion).<sup>75</sup> Brazil saw a significant drop in M&A transactions; the jurisdiction saw only 134 deals in the first quarter of 2013 valued at US\$5.1 billion with deal value down 79 per cent from Q1 2012 and activity down 43 per cent over the same period in 2012.<sup>76</sup>

Despite this drop, there were a number of material Cayman M&A transactions involving Latin America in 2012 including a Cayman affiliate of Brazil's Itau Unibanco acquiring a 3.6 per cent stake in Argentina's recently nationalised oil and gas company, YPF SA in June 2012 as collateral for a defaulted loan it had made to members of a wealthy Argentine family who had originally used the proceeds of the loan to buy the YPF SA securities;<sup>77</sup> the acquisition of natural gas compression engineering and transmission services Venezuela-based Cayman companies, WilPro Energy Services (El Furrial) Limited and WilPro Energy Services (PIGAP II) Limited by Venezuela's largest state-owned oil and natural gas company, PDVSA Gas SA in March 2012;<sup>78</sup> and in 2012, a Cayman affiliate of Empresas Copec, a Chilean energy and forestry company with a chain of gas stations throughout Chile acquired additional shares of Colombian energy firm Proenergia Internacional pursuant to Copec's ongoing takeover offer for the company for an aggregate investment of US\$294 million.<sup>79</sup>

**V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES**

**i Share repurchases**

In September 2012, Alibaba Group Holding Limited (Alibaba Group), a Cayman Islands and diversified e-commerce company based in China, completed an initial

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73 CNS Business News, 'Cayman boosts Brazil ties', 4 May 2012.

74 Press Release: Dealogic M&A Review, Full Year 2012, Preliminary Results, 19 December 2012.

75 Dealogic M&A Review, First Quarter 2013, 2 April 2013.

76 Id.

77 Taos Turner, Dow Jones Newswires, 'Brazil's Itau Gets 3.6% Stake in Argentina's YPF as Collateral', June 2012.

78 Streetinsider.com, 'Williams (WMB) Completes Sale of El Furrial, PIGAP II Asset; Will Get \$312M in Deal', 26 March 2012.

79 Research Views, 'COPEC Acquires Additional Minority Stake In Proenergia Internacional For US\$294 Million', 14 March 2012.



repurchase of approximately half of Yahoo's 40 per cent stake in the company.<sup>80</sup> Pursuant to the terms of the deal, Alibaba Group paid Yahoo US\$6.3 billion in cash, US\$800 million of Alibaba Group preference shares and US\$550 million in connection with an amendment to their existing technology and intellectual property license agreement.<sup>81</sup> It was the largest M&A deal involving a Cayman Islands company in 2012 and one of the largest repurchase transactions globally in 2012. Under terms of their agreement, if and when Alibaba Group commences an IPO, it has the right to buy back half of Yahoo's remaining stake.<sup>82</sup>

In May 2012, Cayman-incorporated and NYSE-listed Herbalife Ltd (Herbalife), a global nutrition and weight management company announced it would buy back US\$427.9 million of its shares from Merrill Lynch International as part of its previously announced US\$1 billion share repurchase programme.<sup>83</sup> The company said it was repurchasing the shares because it felt they were undervalued.<sup>84</sup>

## ii Going-private transactions

### *Statutory Companies Law merger provisions*

As a result of the recent changes to the Companies Law, statutory mergers and Cayman companies are now increasingly being used in 'going private' transactions, particularly by publicly listed China-based companies. The lower threshold for shareholder approval and removing the need for court approval has been cited as having advantages over the traditional Cayman Islands scheme of arrangement. Taking companies private involves cashing out all or a substantial portion of a company's public shares so that the company becomes eligible to delist and deregister its shares from the relevant stock exchange. Depending on factors specific to the company, going-private transactions involving Cayman Islands companies are often structured as one-step mergers or as tender offers followed by a parent-subsidary statutory merger.

There were a number of significant 'going-private' transactions completed in 2012 and early 2013 including the acquisition of Cayman-incorporated and NASDAQ-listed Shanda Interactive Entertainment Limited, one of the largest game and entertainment companies in China, via management buy out in a transaction worth approximately US\$740 million;<sup>85</sup> the acquisition of China Mass Media Corporation, a Cayman Islands-incorporated China-based television advertising company that buys advertising space from China Central Television and sells it to clients including Samsung, McDonald's and

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80 Eric Savitz, Forbes, 'Alibaba Group Closes \$7.1B Buyback Of Shares From Yahoo (Updated)', 18 September 2012.

81 Id.

82 Id.

83 Associated Press, 'Herbalife to buyback \$427.9M in stock, shares fall', 3 May 2012.

84 Id.

85 David Barboza, Dealbook.NYTimes.com, 'Shanda Interactive's Shareholders Back Buyout Plan', 15 February 2012.

China Mobile,<sup>86</sup> by its controlling shareholder for approximately US\$925 million;<sup>87</sup> and the US\$173 million acquisition of Cayman company and NYSE-listed ShangPharma Corporation, a China-based organisation that carries out chemical, pharmaceutical, biological and other research by a buyer consortium that included TPG Growth and ShangPharma's CEO, Michael Xin Hui.<sup>88</sup>

### iii Significant minority stake transactions

Pricing in volatile markets continues to be challenging globally. Minority transactions allow sellers to access certain capital markets and permit buyers to take advantage of price volatility and potentially lower company valuations. As mentioned above, a significant number of recent M&A transactions involving Cayman entities have been minority interest deals.

In August 2012, MediaTek Inc acquired a 48 per cent stake in its rival, MStar Semiconductor Inc, a Cayman company, in a tender offer.<sup>89</sup> The two Taiwan-based companies design chips used in televisions and phones. The acquisition has been valued at US\$3.8 billion.<sup>90</sup> MediaTek had then planned to complete a full merger with MStar but the merger has been delayed while the companies await regulatory approvals in a number of countries including China.<sup>91</sup>

In 2012, American Express Co (American Express) completed a US\$125 million investment in Lianlian Pay Inc, a Cayman Islands-based holding company of Lianlian Group, and also announced an operating agreement with Lianlian Group that will allow Lianlian Group to use American Express' mobile payments platform, Serve. The Serve platform, which American Express will license to Lianlian Group, is expected to help power a new Lianlian Group digital wallet that consumers can use to top up mobile phone minutes, pay bills and purchase products or services.<sup>92</sup>

Kenneth Heebner's Capital Growth Management LP purchased an interest in Cayman company Herbalife in October 2012 only to later sell US\$110 million of its interest in the company in the first quarter of 2013.<sup>93</sup> Similarly Third Point LLC, the

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86 Seeking Alpha, 'China Mass Media: Between CCTV and a Hard Place', 20 April 2011.

87 Before It's News, 'China Mass Media (CMMCY) – Going Private News', 5 November 2012 and Zephyr database published by Bureau van Dijk.

88 Tim Burroughs, *Asian Venture Capital Journal*, 'TPG completes take-private of China's ShangPharma', 31 Mar 2013.

89 Tim Culpan, Bloomberg.com, 'MediaTek, MStar Climb After \$3.8 Billion Takeover: Taipei Mover', 24 June 2012.

90 Id.

91 Peter Clarke, EE Times, 'MediaTek-MStar merger delayed', 16 January 2013.

92 Andrew Johnson, Market Watch – *Wall Street Journal*, 'American Express, China payment firm in venture', 18 January 2012.

93 Inyoung Hwang, Bloomberg, 'Kenneth Heebner Buys Goldman Sachs, Hertz; Sells BofA, Herbalife', 15 May 2013.

hedge-fund firm run by Daniel Loeb, acquired an approximately 8.2 per cent interest in Herbalife in January 2013 but sold the position a couple of months later.<sup>94</sup>

#### **iv Drilling, mining, energy and resources sector**

There were some significant M&A deals involving Cayman Islands drilling, mining, energy and resource companies or those that service them in 2012 including the following transactions.

In August 2012, Paradigm Inc, a Cayman company and developer of oil and gas software used for the exploration, discovery and extraction of natural gas, oil, and other subsurface resources was acquired by Apax Partners and JMI Equity from the private equity firm Fox Paine & Company for approximately US\$1 billion in an all-cash transaction.<sup>95</sup>

In June 2012, Caterpillar (Luxembourg) Investment Co, SA, an indirect wholly-owned subsidiary of Caterpillar Inc, acquired all of the issued shares of Era Mining Machinery Limited, a Cayman Islands company listed on the Hong Kong Stock Exchange in a going-private transaction valued at over US\$770 million.<sup>96</sup> Era primarily designs, manufactures, sells and supports underground coal mining equipment in mainland China through its wholly-owned subsidiary Zhengzhou Siwei Mechanical & Electrical Equipment Manufacturing Co, Ltd and Caterpillar is a leading manufacturer of construction and mining equipment, diesel and natural gas engines, industrial gas turbines and diesel-electric locomotives.

Endeavour Mining Corporation, a Cayman exempted company listed on the Toronto Stock Exchange, completed the acquisition of West African miner Avion Gold Corporation in October 2012 in a deal valued at C\$389 million.<sup>97</sup>

#### **v Other notable deals**

In the second-largest M&A deal involving a Cayman Islands company to be completed in 2012,<sup>98</sup> Western Digital Ireland Ltd, a Cayman company, acquired Viviti Technologies Ltd, Hitachi Ltd's hard disk drive business in March. Pursuant to the transaction, Hitachi transferred all shares of Viviti to Western Digital for US\$3.9 billion in cash and 25 million shares of Western Digital common stock valued at approximately US\$0.9 billion, for a total value of approximately US\$4.8 billion.<sup>99</sup> The transaction required the approval of regulators in the United States, Europe and China.<sup>100</sup>

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94 Alexis Leondi, Bloomberg, 'Loeb's Third Point Exited Herbalife Stake in First Quarter', 15 May 2013.

95 Mark Scott, Dealbook, 'Apax and JMI Equity to Buy Paradigm for \$1 Billion', 11 June 2012.

96 Press Release: Caterpillar, Inc – 6 June 2012.

97 Henry Lazenby, MiningWeekly.com, 'Endeavour Mining closes acquisition of Avion Gold', 18 October 2012.

98 Zephyr database published by Bureau van Dijk.

99 Tom Coughlin, Forbes, 'A very long engagement – Western Digital finally acquires Hitachi's HDD Business', 9 March 2012.

100 Id.

In a stock deal valued at approximately US\$1 billion, Youkou Inc, owner of China's most popular online video site acquired its smaller competitor Tudou Holdings Ltd.<sup>101</sup> It is believed that the two Cayman companies combined will control more than one-third of China's online video advertising market.<sup>102</sup>

In February 2013, NYSE-listed company Stanley Black & Decker announced that it had completed its acquisition of Infastech Ltd, a Cayman company and global manufacturer and distributor of specialty engineered fastening technologies headquartered in Hong Kong, from CVC Capital Partners and Standard Chartered Private Equity Limited for US\$850 million in cash.<sup>103</sup>

There were a number of noteworthy IPOs involving Cayman companies in 2012 including the initial public offering of shares of Manchester United PLC, a professional football operator, on the NYSE, which raised approximately US\$234 million after the company lowered its offering price to US\$14 per share,<sup>104</sup> and the US\$265 million initial public offering of Future Land Development Holdings Ltd (Future Land), a Chinese property company that focuses on projects in China's most populous region (the Yangtze River delta including the city of Shanghai), on the Hong Kong Stock Exchange.<sup>105</sup> Future Land was required to price the deal at the bottom of its proposed range<sup>106</sup> signalling again that in general investors remained cautious in 2012.

## vi **Withdrawn transactions**

Despite signs of slowly improving economic growth in certain jurisdictions, the financial crisis continues to affect transactions involving Cayman Islands companies. Amid somewhat volatile global markets and restrained investor sentiment towards initial public offerings and other M&A transactions, in 2012 and early 2013 a number of deals involving Cayman Islands companies were withdrawn.

On 31 May 2012, after receiving orders for just half of its proposed US\$1 billion initial public offering, high-end luxury jeweller Graff Diamonds Corporation, a Cayman exempted company, announced that it was postponing its planned IPO on the Hong Kong Stock Exchange.<sup>107</sup> Three China-based Cayman Islands companies<sup>108</sup>

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101 Loretta Chao, *The Wall Street Journal*, 'Chinese Video Firms Cue Up a Deal', 12 March 2012.

102 *Id.*

103 Press release: Stanley Black & Decker, 'Stanley Black & Decker Completes Previously Announced Acquisition Of Infastech', 23 February 2013.

104 Lynn Cohen, *The Wall Street Journal*, 'Manchester United IPO Fails to Excite the Crowds', 10 August 2012.

105 Elzio Barreto, *Reuters*, 'UPDATE 1-China's Future Land prices \$265 mln HK IPO at bottom of range', 22 November 2012.

106 *Id.*

107 *Wall Street Journal*, 'FOCUS: Graff Diamonds IPO Postponement Dims Allure Of Felda, Formula One IPOs', 31 May 2012; Robert Cookson and Jennifer Hughes in *Hong Kong and Ajay Makan in New York*, *FT News*, Graff Diamonds pulls Hong Kong IPO, 30 May 2012.

108 China Yongda Automobiles Services Holdings Ltd, China Auto Rental Inc and China Putian Food Holding Ltd, as reported in the Zephyr database published by Bureau van Dijk.

also withdrew their planned IPOs in early 2012 including China Yongda Automobiles Services Holdings Ltd, a Cayman company that sells BMWs and Toyotas in China. The company said in May 2012 that it had scrapped its plan to raise up to US\$433 million in an initial public offering in Hong Kong because of deteriorating equity markets.<sup>109</sup>

In March 2012, Cayman Islands-incorporated China Auto Rental Inc, China's largest car rental provider, also withdrew its planned US\$138 million IPO in the United States citing poor market conditions and the difficulty that China-based companies face when trying to list their shares in the United States as reasons for the withdrawal.<sup>110</sup>

Indonesia's state-owned oil producer PT Pertamina withdrew its offer to purchase a 15 per cent interest in Cayman Islands company, Coastal Energy Company, a Houston-based oil and gas explorer for US\$2.6 billion because the parties could not agree on price.<sup>111</sup> Coastal Energy owns assets in the Gulf of Thailand and Malaysia.<sup>112</sup>

In a deal announced in late March 2012 and valued at the time at ¥66.9 billion, Taiwanese company Hon Hai Precision Industry Co, Ltd, the parent company of Foxconn Technology Co, Ltd, one of the world's largest electronics manufacturers (including a manufacturer of Apple products), and its Cayman Islands affiliates, announced their intention to acquire an approximately 10 per cent interest in Japanese consumer electronics maker Sharp Corporation, and almost half of its LCD panel subsidiary Sharp Display Products Corp.<sup>113</sup> The deal would have provided Hon Hai with access to Sharp's manufacturing capabilities in large LCD panels, where it is among the world's leaders. Hon Hai was also supposed to take a major share and jointly operate one of Sharp's key LCD factories in Sakai, central Japan, giving it access to up to half of the panels produced there. The deal at the time was reportedly the biggest acquisition of shares in a Japanese enterprise by a company from Taiwan.<sup>114</sup> However, one year later, in March 2013, it was reported that the deal had stalled and that the parties had failed to come to an agreement on terms.<sup>115</sup>

## **VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS**

There were a total of 226 banks under the supervision of the Cayman Islands Banking Supervision Division at the end of December 2012.<sup>116</sup> According to CIMA, 'the

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109 Yvonne Lee and Prudence Ho, *The Wall Street Journal*, 'Yongda Shelves Hong Kong IPO', 28 May 2012.

110 Pete Sweeney, *Reuters*, 'China Auto Rental cancels \$138 mln U.S. IPO', 24 May 2012.

111 *Jakarta Globe*, 'Indonesia's Pertamina Drops Bid to Buy Coastal Energy on Price', 21 November 2012.

112 Tara Lachapelle, *Bloomberg*, 'Coastal Energy Offers Seen for Thailand Oil: Real M&A', 8 November 2012.

113 Juro Osawa, *The Wall Street Journal*, 'Foxconn Buys Into Sharp', 27 March 2012.

114 *Id.*

115 Bradford Frischkorn and Isabella Steger, *The Wall Street Journal*, 'Sharp-Hon Hai Deadline Lapses But Talks Continue', 27 March 2013.

116 CIMA Banking Statistics 2012, CIMA website.

fundamentals of the Cayman Islands banking sector remain sound and the industry in general has been relatively resilient in a very challenging market environment. Banks continue to consolidate and restructure in search of cost efficiencies, and improvements in operational risk management and governance.<sup>117</sup> Forty of the top 50 banks in the world hold Cayman Islands banking licences.<sup>118</sup> The Cayman Islands continues to be a tax-neutral platform for international capital flows, over 80 per cent of the more than US\$1 trillion on deposit and booked through the Cayman Islands represents inter-bank bookings between onshore banks and their Cayman Islands branches or subsidiaries.<sup>119</sup>

While it is difficult to quantify exactly how much of the capital flows through Cayman entities are specifically used for Cayman M&A transactions or the exact source of financing for Cayman-related M&A deals, Cayman companies are commonly used by multinationals for financial management and treasury operation purposes or as special purpose vehicles in order to assist in the execution of new acquisitions or mergers. Parties in emerging countries have, in particular, used Cayman companies to gain access to liquidity and global markets in order to fund regional trade and job growth in their respective local economies.

2012 saw some signs of economic recovery in the United States and companies globally began to slowly make use of the cash reserves they had kept on their balance sheets.<sup>120</sup> Transactional financing also started to become more accessible.<sup>121</sup> The funding of the acquisition of interests in Cayman companies in 2012 took a multitude of forms – some transactions were all cash deals, a number of transactions used a combination of cash and equity, some were pure stock deals and some were funded by bank financing.

The Cayman Islands are seeing some increased activity in terms of private equity. Cayman Islands private equity funds are often utilised for leveraged buyouts, private investments in public equities, recapitalisations, acquisitions and divestitures. Although exempted Cayman companies are also employed, the most commonly used structure for Cayman private equity funds is the exempted limited partnership (ELP). The total amount of new Cayman ELPs registered in 2012 increased to 2,037 – a significant 32 per cent increase from the 1,897 new Cayman ELPs registered in 2011<sup>122</sup> and comparable to the 2,188 new Cayman ELPs registered in 2008 (the highest number on record to date).<sup>123</sup> However, as at the end of March 2013, the number of new Cayman ELPs registered with CIMA had decreased by 7 per cent (480 ELPs) compared to the 518 new Cayman ELPs registered with CIMA during the same period a year earlier.<sup>124</sup>

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117 Id.

118 Id.

119 Id.

120 Maureen Farrell, CNN Money, 'M&A making a comeback', 14 February 2013.

121 Id.

122 Cayman Islands General Registry Partnership Statistics 2012.

123 Id.

124 Id.

## **VII EMPLOYMENT LAW**

The Cayman Islands Labour Law applies to employees located in the Cayman Islands. Pursuant to the Cayman Islands Labour Law, an employee will not be entitled to severance pay if an acquirer of a Cayman-based business offers the employee the same employment he or she had prior to the acquisition.

The Labour (Amendment) Law, 2011 came into force on 15 March 2011. In circumstances where an employee in the Cayman Islands has worked for at least one year of continuous employment with an employer and has been terminated (other than for misconduct or unsatisfactory performance), the employee will be entitled to one week's severance pay for each completed year of employment for the actual number of full years such employee was employed. Previously severance payments were capped at a maximum of 12 weeks' pay. Similarly, the 12-year restriction is no longer applicable to retirement or resignation allowances that are payable to an employee who has worked at least one full year for an employer and who is not entitled to a pension under the Cayman Islands National Pensions Law.

In an effort to attract new businesses and jobs to the Cayman Islands, the Special Economic Zones Law, 2011 (the SEZ Law) was passed by the Cayman Islands legislature. Among other things, the SEZ Law sets out the process of establishing, regulating and administering special economic zones ('SEZs') within the Cayman Islands. SEZ businesses are enterprises that are located within a SEZ in the Cayman Islands but carry on business mainly outside the Islands. SEZ businesses may be entitled to certain benefits including relief from trade licensing requirements and certain customs duties and reduced work permit fees for foreign workers. Like other exempted Cayman companies, they will also not be subject to income, corporate, capital gains or payroll tax in Cayman. The 60 per cent Cayman ownership rule generally applicable to companies carrying on business in the Cayman Islands will also not apply to businesses located in a SEZ. The first SEZ to be established pursuant to the SEZ Law is Cayman Enterprise City (CEC), which plans to create campuses dedicated to five sectors: information technology, media, biotechnology, derivatives and commodities trading and academics. CEC has stated in a 20 May 2013 press release that: 'Fifty-five companies have moved into Cayman Enterprise City, or have signed up and are in the process of establishing a physical presence in the tax-exempt zone, with another 157 more companies in the pipeline.'

## **VIII TAX LAW**

Presently, the Cayman Islands has no income, corporation, capital gains or any other tax applicable to a Cayman Islands exempted company conducting offshore business, including M&A although documents may be subject to (generally nominal) stamp duty if executed in or brought to the Cayman Islands, or produced before a court of the Cayman Islands. The Cayman Islands also does not operate a withholding tax.

Cayman exempted companies can receive a 'tax exemption undertaking' from the Cayman Islands government, exempting them from any future Cayman Islands taxes for a period of up to 30 years. The Cayman Islands government normally grants a 20-year undertaking initially, which is normally renewable for a further 10 years on expiry. Upon

entering the special economic zone, CEC companies receive an exemption from taxation in the Cayman Islands until 2061.

The Cayman Islands is on the Organisation for Economic Co-operation and Development (OECD) 'white list' of jurisdictions that substantially implement international tax standards and, as of March 2013, had signed 31 bilateral tax information exchange agreements (TIEAs) with other countries, most recently with Brazil, Italy, the Czech Republic and Qatar.<sup>125</sup> The Cayman Islands signed its first TIEA in 2001 with the United States. TIEAs are aimed at promoting international cooperation in tax matters through the exchange of information in order to assist in the administration and enforcement of tax laws.

Under the European Union Savings Tax Directive, the Cayman Islands Tax Information Authority also administers bilateral agreements with the 27 EU Member States in relation to the automatic reporting of savings income information, in effect since 2005. In April 2013, the Cayman Islands government also agreed to join the United Kingdom, Germany, France, Italy and Spain in a G5 pilot programme to automatically exchange further tax information. The data that Cayman will pass on to such countries is expected to go beyond the current reporting of interest income on bank deposits held by EU citizens in the Cayman Islands and may include additional bank account information such as the names, addresses, account numbers, account balances and details of payments made to and from such accounts.

The Cayman Islands Tax Information Authority Law (Revised) also provides for a parallel 'unilateral mechanism' for cooperation in tax matters that can be used in addition to bilateral agreements.

Under the Cayman Islands Monetary Authority Law (Revised), CIMA can enter into memoranda of understanding (MoU) with other overseas regulatory authorities to facilitate information exchange and other assistance between CIMA and these other regulatory bodies. CIMA has entered into bilateral and multilateral MoUs and undertakings with regulatory authorities in the United States, Canada, the Caribbean, Central and South America, the United Kingdom, Europe and the Middle East. In March 2012, CIMA entered into a MoU with the US Securities and Exchange Commission. As of May 2013, it had also entered into a MoU with the US Federal Deposit Insurance Corporation and added additional provisions to the MoUs it had already executed with the Office of the Superintendent of Financial Institutions Canada and the UK Financial Services Authority.

The US Foreign Account Tax Compliance Act (FACTA) requires foreign financial institutions to report directly to the US Internal Revenue Service (IRS) information about financial accounts held by US taxpayers, or held by foreign entities in which US taxpayers hold a substantial ownership interest. On 15 March 2013, the Cayman Islands government announced that it would adopt a Model 1 intergovernmental agreement (IGA) with the United States in response to FACTA.<sup>126</sup> Under the Model 1 IGA foreign

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125 Cayman Islands Tax Information Authority, List of Cayman Islands Bilateral Agreements and Arrangements.

126 Press release: Ministry for Financial Services, Cayman Islands government, 15 March 2013.



financial institutions will report to their home government, which will then relay the requested information to the US tax authorities as opposed to the financial institutions directly reporting to the IRS.

The European Securities and Markets Authority (ESMA) Board of Supervisors, at its 22 May 2013 meeting, approved cooperation agreements with 34 regulators including CIMA (collectively, the global regulators).<sup>127</sup> ESMA said it had negotiated the agreements on behalf of all 27 EU Member State securities regulators as well as the authorities from Croatia, Norway, Iceland and Liechtenstein.<sup>128</sup> In order to allow their alternative investment funds such as hedge funds and private equity funds to be marketed in the EU following 22 July 2013, these global regulators now need to sign the cooperation agreements with each of the EU securities regulators to achieve compliance with the minimum conditions imposed under the EU Alternative Investment Fund Managers Directive (AIFMD). In a press release dated 30 May 2013, CIMA stated that it had already signed cooperation agreements with 20 EU securities regulators. The agreements, which are effective from 22 July 2013, will facilitate the exchange of information, cross-jurisdictional on-site visits and mutual assistance in the enforcement of the parties' respective supervisory laws.

## **IX COMPETITION LAW**

In the Cayman Islands, the Information and Communications Technology Authority Law has some provisions designed to prevent anti-competitive practices, but there is no specific antitrust legislation governing commerce. Therefore antitrust concerns involving M&A related to Cayman Islands entities are typically addressed by the legal or regulatory requirements of the relevant onshore jurisdiction.

## **X OUTLOOK**

While the Cayman Islands economy is showing certain signs of recovery after the 2008 financial crisis, the Cayman Islands M&A market and economy are substantially affected by worldwide economic developments. So far in 2013, the US is showing gradual growth in its economy and a recent upswing in M&A, which will have a positive impact on the Cayman Islands.

Europe, however, continues to face challenges including the possible breakup of the eurozone and any slowdown in M&A in the Asia Pacific region will have a material effect on M&A involving Cayman entities. Global or national tax and regulatory policies that could permit taxes to be imposed in certain circumstances on entities like those established in the Cayman Islands or disallow the use of structures involving Cayman entities may also affect the way Cayman entities are used in the future.

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127 Press release: European Securities and Markets Authority, 30 May 2013.

128 Id.

Nevertheless, the Cayman Islands continues to be a leading international financial centre and has in the past adopted a flexible and pragmatic approach to global and regional business. There is nothing to suggest that this will not continue; however, to maintain its attractiveness, the jurisdiction will need to continue to adapt its legislation and business practices to meet the needs of international business in both developed and emerging markets.

## Appendix 1

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# ABOUT THE AUTHORS

### **WENDY L LEE**

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Wendy L Lee is a senior attorney in Harneys' corporate and commercial department. Her practice focuses on mergers and acquisitions, securities law, cross-border transactions, corporate governance matters, insurance law, private equity transactions and corporate restructurings. Ms Lee received a bachelor of journalism degree combined with political science from Carleton University in Ottawa and a JD from Osgoode Hall Law School in Toronto. Prior to joining Harneys, Ms Lee was vice president and assistant general counsel at Allied World Assurance Company AG, a large NYSE-listed insurance and reinsurance company previously domiciled in Bermuda.

Before moving offshore, Ms Lee was also a dedicated US securities and mergers and acquisitions attorney at Cooley LLP in the Silicon Valley, California where she specialised in complex mergers and acquisitions, IPOs and private equity deals for a wide range of clients including technology companies. She also worked at Torys LLP in Toronto where she had a general corporate law practice. Ms Lee is qualified to practise law in the Cayman Islands, Bermuda, Ontario, Canada and California.

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