International Comparative Legal Guides

Mergers & Acquisitions 2020

A practical cross-border insight into mergers and acquisitions

14th Edition

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The Isle of Man has two corporate law regimes: one provided by the Companies Acts 1931 to 2004 (the "Companies Acts"); and the other provided by the Companies Act 2006 (the "2006 Act"). The Companies Acts are based, to a large extent, on English company law whilst the 2006 Act follows the international business company model available in a number of other offshore jurisdictions.

Companies incorporated under the 2006 Act are governed solely by its provisions and (save in relation to liquidation and receivership) are not subject to the provisions of the Companies Acts. Equally, present and future companies incorporated under the Companies Acts are not subject to or affected by the terms of the 2006 Act.

The Isle of Man does not have its own takeover code. However, the UK Takeover Code applies to offers for the following types of Isle of Man companies:

(a) companies whose securities are admitted to trading on a regulated market or a multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man;

(b) public companies (incorporated under the Companies Acts), other than companies falling within (a) above, who are considered by the UK Takeover Code Panel to have their place of central management and control in the United Kingdom, the Channel Islands or the Isle of Man; or

(c) companies incorporated under the 2006 Act, other than companies falling within (a) above, and private companies incorporated under the Companies Acts which are considered by the Panel to have their place of central management and control in the United Kingdom, the Channel Islands or the Isle of Man, provided that:

  (i) any of their securities have been admitted to trading on a regulated market or a multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man at any time during the 10 years prior to the relevant date;

  (ii) dealings and/or prices at which persons were willing to deal in any of their securities have been published on a regular basis for a continuous period of at least six months in the 10 years prior to the relevant date, whether via a newspaper, electronic price quotation system or otherwise;

  (iii) any of their securities have been subject to a marketing arrangement as described in section 693(3)(b) of the UK Companies Act 2006 at any time during the 10 years prior to the relevant date; or

  (iv) they have filed a prospectus for the offer, admission to trading or issue of securities with the registrar of companies or any other relevant authority in the United Kingdom, the Channel Islands or the Isle of Man (but in the case of any other such authority only if the filing is on a public record) at any time during the 10 years prior to the relevant date.

For further information regarding the UK Takeover Code, please refer to the UK chapter in this publication.

Each of the Isle of Man's two corporate law regimes contain similar provisions relating to schemes of arrangement and, in the context of a general offer, the compulsory acquisition of shares held by dissenting shareholders. However, the 2006 Act also provides for statutory mergers, involving two or more companies incorporated under the 2006 Act, which have become increasingly common in the context of M&A transactions in the Isle of Man. This chapter therefore focuses on M&A transactions involving target companies incorporated under the 2006 Act.

1.2 Are there different rules for different types of company?

Where the target company's securities are listed either on the International Stock Exchange ("TISE"), which has an Isle of Man branch, or on any other international stock exchange, the rules of the relevant exchange will need to be considered. In addition, shares of listed Isle of Man companies may be held and transferred in uncertificated form, subject to compliance with the applicable Isle of Man Uncertificated Securities Regulations and the relevant company's articles of association.

1.3 Are there special rules for foreign buyers?

There are no restrictions on foreign investment or exchange control legislation in the Isle of Man.

1.4 Are there any special sector-related rules?

Change-of-control rules are applicable to all entities which are licensed or regulated by the Isle of Man Financial Services Authority, including banks and trust and corporate service providers which are licensed under the Isle of Man Financial Services Act 2008 (the "FSA") and insurance companies which are regulated under the Isle of Man Insurance Act 2008.

In addition, rules applicable to licensed Isle of Man telecommunications and e-gaming companies will also need to be considered in the context of M&A transactions involving such companies.

1.5 What are the principal sources of liability?

A director of an Isle of Man company owes fiduciary duties to the company. Broadly, directors must act in good faith, exercise their powers for a proper purpose and keep their company's confidence. Whilst it is common for directors of Isle of Man companies to be indemnified for certain breaches of duty, pursuant to section 112 of the 2006 Act, a company may not indemnify a director unless he has acted honestly, in good faith and in what he believed to be in the best interests of the company and, in the case of criminal proceedings, he had no reasonable cause to believe his conduct was unlawful.

The FSA creates criminal offences relating to misleading statements and practices. By way of example, a person is guilty of an offence (unless he can avail himself of an appropriate defence) where that person:

(a) makes a statement, promise or forecast which he knows to be misleading, false or deceptive for the purpose of inducing another person to enter into an investment agreement or to exercise any rights conferred by an investment; or

(b) engages in a course of conduct which creates a false or misleading impression as to the price or value of any investments if that person does so for the purposes of inducing another person to acquire or dispose of those investments.

In addition, civil liability could potentially be incurred by a director in tort and/or contract (in which regard Isle of Man law is broadly similar to that of England and Wales) and criminal liability could also arise under the Isle of Man Theft Act 1981.

The Isle of Man Insider Trading Act 1998, which contains similar provisions to those contained in the Criminal Justice Act 1993 of England and Wales, will need to be considered where the M&A transaction involves a listed Isle of Man company.

Finally, the directors of an Isle of Man company in financial difficulty face additional liabilities, the most significant of which are:

(i) fraudulent trading – any director who is knowingly a party to the carrying on of a company's business with the intent to defraud creditors or for any fraudulent purpose is liable to make a contribution to the company's assets; and

(ii) preferences – where a transaction is entered into by a company with a substantial or dominant view of putting a creditor into a better position on liquidation than he would otherwise have been, such a transaction can be set aside by the court.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Acquisitions of Isle of Man companies are typically structured in one of three ways:

(a) a contractual offer;

(b) a scheme of merger; and

(c) a scheme of arrangement.

In relation to a contractual offer (which could be structured as a private contractual acquisition or a public takeover), a bidder makes an offer directly to shareholders, which they can individually accept or reject. Where a bidder receives acceptances in respect of at least 90% of the target company's shares (excluding shares already held by the bidder), it can compulsorily acquire the remaining shares held by minority shareholders pursuant to a statutory squeeze-out procedure set out in the 2006 Act.

Statutory schemes of merger have become increasingly common in M&A transactions involving Isle of Man companies, especially in relation to complex business combinations and where there is a United States dimension to the transaction (given the popularity of mergers in the States). Whilst both constituent companies must be Isle of Man companies, bidders incorporated outside the Isle of Man can incorporate wholly owned bidcos on the Island quickly and inexpensively in order to make use of the merger regime. The directors of each constituent company must approve the scheme of merger and a resolution of the shareholders of each company must be approved by the holders of at least 75% of the voting rights exercised in relation thereto.

Dissenters to both a contractual offer and a statutory merger have the right to be paid in cash the fair value of their shares as agreed with the company or, if an agreement cannot be reached within the statutory timeframe, as appraised by independent appraisers pursuant to section 161 of the 2006 Act.

Court approved schemes of arrangement under section 157 of the 2006 Act are typically structured either as a cancellation scheme (where the target company's issued shares are cancelled and new shares are immediately re-issued to the bidder(s)) or a transfer scheme (where the target company's shares are transferred to the bidder in return for payment of consideration). A scheme must be approved by a majority, in number, of the target company's shareholders representing at least 75% in value of the shares voted. The principal benefit of a scheme is that if all the necessary approvals are obtained, and the court sanctions the scheme, the terms of the scheme will become binding on all members of the relevant class(es) of shareholders or creditors, whether or not they voted for or against the scheme.

Whilst the level of acceptances required to acquire 100% of a target's shares by way of a scheme of merger and a scheme of arrangement will be lower than the level of acceptances required in the context of a contractual offer, a scheme of merger and a scheme of arrangement will only be an option in the context of a non-hostile/recommended offer where the co-operation of the target is forthcoming.

2.2 What advisers do the parties need?

The parties should engage Isle of Man advocates to assist (in the case of the bidder) with carrying out legal due diligence on the target, and for each party preparing the relevant transaction documents (whether or not in conjunction with onshore legal advisers), representing the parties in the Isle of Man courts (where a scheme of arrangement is used) and advising on Isle of Man legal and regulatory matters. Generally, auditors, tax and financial advisers are also engaged.

2.3 How long does it take?

Depending on the complexity and transaction structure, the acquisition of an Isle of Man target could take anywhere between a few weeks and a number of months.

In relation to a recommended contractual offer, 90% acceptances can usually be achieved within a relatively short timeframe. However, the compulsory acquisition period to achieve 100% ownership may take another couple of months.

A merger involving Isle of Man companies with only a handful of shareholders and no secured creditors can be accomplished

within a matter of weeks. However, a longer timeframe will be required where, for example, the target company has a large number of shareholders and/or is listed.

In relation to a scheme, the timetable is agreed with the court and it could be effective within five to six weeks of posting the scheme document.

The timetable will be longer where pre-completion third-party approvals (such as regulatory change of control approvals) are required and will also be impacted by any competing bid. In addition, if the Isle of Man target is subject to the UK Takeover Code (please see our answer to question 1.1 above), the structuring and timing of the transaction will need to comply with the requirements of the Code.

2.4 What are the main hurdles?

The main challenges for the bidder are obtaining the necessary level of shareholder acceptances/approvals and any requisite regulatory approvals.

In relation to both the compulsory acquisition of shares held by minority shareholders (in the context of an offer) and a statutory merger, dissenting shareholders have a statutory right to receive payment of the fair value of their shares as agreed with the company or, if an agreement cannot be reached within the statutory timeframe, as independently appraised. A bidder will therefore need to be aware that, in the context of a share-for-share offer, it will have to pay cash to dissenting shareholders who exercise such a statutory right of dissent.

2.5 How much flexibility is there over deal terms and price?

Parties are generally free to contract as they wish as to terms and price, subject to the directors of the Isle of Man company discharging their fiduciary duties, including the duty to act *bona fide* in the best interests of the company.

2.6 What differences are there between offering cash and other consideration?

Again, parties are generally free to contract as they wish with regards to terms and price. However, as noted above, where dissenters have the right to be paid in cash the fair value of their shares, a share-for-share deal may add complexity.

2.7 Do the same terms have to be offered to all shareholders?

In relation to a contractual offer utilising the statutory squeeze-out procedure, the same terms must be offered to all shareholders. However, where an acquisition is structured by way of a statutory merger or a scheme of arrangement, different terms (and consideration) can be offered to different shareholders.

2.8 Are there obligations to purchase other classes of target securities?

There are no statutory or common law obligations to purchase other classes of target securities.

2.9 Are there any limits on agreeing terms with employees?

There are no such limits applicable under Isle of Man law.

2.10 What role do employees, pension trustees and other stakeholders play?

Aside from the bidder's consideration of creditors and employment and pensions matters relevant to the target from a due diligence perspective:

(a) employee, pension or creditor consideration will not be relevant to a contractual offer, save to the extent that there are employees in the Isle of Man; and

(b) there are no employee or pension-specific considerations applicable to a statutory merger or a scheme of arrangement, save that:

  (i) in relation to a scheme of merger, the consent of secured creditors will be required and the surviving Isle of Man company will assume all contracts, obligations, claims, debts and liabilities of each of the other constituent companies, (including any employment and pension liabilities); and

  (ii) in relation to a scheme of arrangement, where the rights of creditors are to be affected their consent will be required.

2.11 What documentation is needed?

For a contractual offer, whilst there is no prescribed documentation under Isle of Man law, the key documentation will typically comprise an announcement (for listed companies), an offer document and a form of acceptance. A notice will also need to be given to dissenting shareholders for the purposes of the compulsory acquisition of their shares under the 2006 Act.

In relation to a scheme of merger, the 2006 Act requires that each Isle of Man constituent company enters into a written scheme of merger setting out certain prescribed information and, for more complex transactions, this is usually accompanied by a detailed merger or framework agreement. In addition, amongst other things, directors of each constituent company must each swear a statutory declaration in the prescribed form and each constituent company must publish a notice of merger in a local newspaper.

For schemes of arrangement, alongside the applicable court documents and notices convening shareholder/creditor meetings, a scheme circular must be provided to the scheme participants containing sufficient information so as to allow them to make an informed decision in relation to the merits of the proposed scheme.

2.12 Are there any special disclosure requirements?

Save as noted in our answer to question 2.11 above, there are no other special disclosure requirements.

2.13 What are the key costs?

The key costs include: fees of financial advisers, corporate brokers, lawyers, accountants and other advisers; documentation and administrative expenses (including court fees in the context of a scheme of arrangement); and commitment fees for any debt financing. No stamp duty is payable in the Isle of Man.

2.14 What consents are needed?

Other than those referred to in our answers to questions 1.4 and 2.10 above, there are generally no third-party authorisations, consents, approvals, licences, validations or exemptions required from any governmental authorities or other official bodies in the Isle of Man in connection with M&A transactions involving Isle of Man companies.

A scheme of arrangement is subject to the sanction of the court, although the court's principal role is to ensure procedural fairness and not to assess the commercial benefits of the proposal. Whilst any shareholders or creditors who object to the scheme are entitled to attend the relevant court hearing to object, an objection solely on the grounds that it is a "bad deal" commercially is usually unlikely to succeed if the scheme has the support of the requisite majorities.

2.15 What levels of approval or acceptance are needed?

Please see our answer to question 2.1 above.

2.16 When does cash consideration need to be committed and available?

There are no Isle of Man legal considerations relevant to determining when cash consideration needs to be committed and available. In practice, however, financing would typically be in place prior to an offer being made.

3 Friendly or Hostile

3.1 Is there a choice?

An acquisition or takeover of an Isle of Man company may be recommended by the board of directors of that company or, if not recommended, there may be a hostile bid with an approach directly to the shareholders. Whether an offer is recommended or hostile depends on the view of the target's board, acting in the best interests of the company and the shareholders. It should be noted that Isle of Man companies incorporated under and governed by the 2006 Act do not have their register of members available as a matter of public record, so if the board of such a company does not approve the offer and pass on the details of the offer to the company's shareholders, a bidder may not have the ability the approach shareholders directly.

Due diligence information available to a hostile bidder will be limited to publicly available information. In order to comply with their statutory and fiduciary duties, however, the directors of an Isle of Man target will need to give due consideration to any genuine offer to evaluate whether it is in the best interests of the company.

3.2 Are there rules about an approach to the target?

There is no Isle of Man legislation that governs the nature of an approach.

3.3 How relevant is the target board?

The target board's decision on whether or not to recommend the bid to the company's shareholders will be very relevant, especially given that those companies regulated by the 2006 Act do not have a public register of members, which in turn means that without the target board passing on the offer to the target's shareholders, the bidder will be thwarted.

If the acquisition is by way of a statutory merger or scheme of arrangement the directors will need to approve the terms of the transaction on behalf of the company. The target board will therefore (other than for hostile contractual offers) generally have a degree of control over the acquisition process.

3.4 Does the choice affect process?

A hostile bid for a company governed by the 2006 Act would be difficult to achieve due to it not having a public register. Isle of Man companies also generally have constitutional documents that would require director approval to transfer shares, so an unsolicited and unapproved bid for a non-listed company could prove difficult.

4 Information

4.1 What information is available to a buyer?

The information available to a bidder (other than publicly available information) will be at the discretion of the board.

Publicly available information is limited to the relevant company's registered name, number and office, details of directors (and company secretary or registered agent, as applicable) and constitutional documents. For companies incorporated and existing under the Companies Acts, a list of shareholders is also available via the company's annual return. If the target company is listed, additional information may be available (for example, securities and regulatory filings). A search of the court register in the Isle of Man will disclose any actions or petitions pending before the Isle of Man's High Court.

4.2 Is negotiation confidential and is access restricted?

Yes, negotiation is confidential and access is restricted.

4.3 When is an announcement required and what will become public?

There is no Isle of Man regulation relating to the formulation or content of any announcement.

4.4 What if the information is wrong or changes?

This is not applicable. Please see question 4.3 above.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Subject to anything to the contrary in the target's articles of association (and assuming that the UK Takeover Code does not apply) there is generally no restriction on buying shares outside of the offer process. However, there are commonly provisions within a non-listed company's articles of association that permit the directors to refuse to register share transfers.

5.2 Can derivatives be bought outside the offer process?

The Isle of Man does not have any restrictions on doing this.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

There are no stakebuilding rules applicable under the laws of the Isle of Man. For publicly listed companies there may be relevant exchange rules (including under the UK Takeover Code) but such rules are not governed by Isle of Man law.

The Isle of Man Beneficial Ownership Act 2017 requires companies (other than listed companies) to identify and collect details of the individuals who ultimately own or control 25% or more of the beneficial ownership of the company. The information is not currently required to be made public and is held in a database accessible only by certain designated competent authorities.

5.4 What are the limitations and consequences?

There are no limitations or consequences for Isle of Man private companies save as are applicable under the UK Takeover Code, for which please refer to the UK chapter in this publication.

6 Deal Protection

6.1 Are break fees available?

Yes, break fees are available, although the directors of an Isle of Man company will need to consider carefully whether to include one and whether including one breaches their duty to act in the best interests of the company. See also the UK chapter for companies to which the UK Takeover Code applies.

6.2 Can the target agree not to shop the company or its assets?

Subject to the board of directors adhering to its statutory and fiduciary duties, this is permissible.

6.3 Can the target agree to issue shares or sell assets?

Subject to the board of directors adhering to its statutory and fiduciary duties, this is permissible.

6.4 What commitments are available to tie up a deal?

Irrevocable undertakings, lock-up agreements and voting agreements are all acceptable under Isle of Man law.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Subject to adhering to their duties, the directors of the target are broadly free to negotiate and agree any number of deal conditions. Ultimately, it will be for the shareholders to decide if they want to accept the offer.

7.2 What control does the bidder have over the target during the process?

The bidder would not ordinarily gain control over the target until completion. However, it is not uncommon for restrictions to be put in place if there is to be a time period in between the exchange of deal documentation and completion, in which case bidder protection provisions can be included such as restricting certain actions of the target (e.g. selling its assets) and allowing the bidder to "walk away" if, for example, there are material changes in the circumstances of the target.

7.3 When does control pass to the bidder?

Generally, as per above, this is at completion. There may be circumstances when the bidder purchases shares from one or more (but not all) of the shareholders, in which case, for the most part, control would occur when the bidder had acquired more than 50% of the shares, which would enable it to pass most resolutions and to take control of the board. There are certain limited shareholder approvals that require 75% approval, however, so full "control" would take place at such time as the bidder held in excess of 75% of the shares.

7.4 How can the bidder get 100% control?

There are a number of ways to achieve 100% control. This can be achieved by way of a contractual offer (using the statutory squeeze-out mechanism), a statutory merger or a scheme of arrangement. See our response to question 2.1 above.

8 Target Defences

8.1 What can the target do to resist change of control?

Subject to the provisions of the target's articles of association, the board of directors has limited rights to resist a change of control if it is in the best interests of the company and the shareholders. As mentioned above, the target's register of members for a 2006 Act company is not publicly available but the directors, by dint of their fiduciary duties, will be obliged to consider the terms of any offer and to put that offer to the shareholders with its considered recommendation.

8.2 Is it a fair fight?

Subject to agreeing commercial terms (including price) it is a fair fight. As noted above, however, the directors of the target company typically have the ability to refuse to register the transfer of shares. In practice, however, if the majority (or all) of the shareholders wanted to transfer their shares then they would have the power to replace the board with more willing participants.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The success of an acquisition largely comes down to one thing: price.

9.2 What happens if it fails?

Assuming that the target is not restricted by the UK Takeover Code, the parties can either walk away or else seek to formulate another deal.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

Company law in the Isle of Man is well established and, subject to minor amendments, has not changed for some time. There are trends in how acquisitions are undertaken, however, and the statutory merger regime has proved increasingly popular.

Tristan Head is a Director and joint head of our top tier Corporate and Commercial team. He is one of the Isle of Man's leading corporate lawyers and has over 20 years' experience of advising on complex corporate, commercial and finance transactions.
In addition to advising on domestic and cross-border corporate finance transactions including initial public offerings, rights issues and public/private bond issues, Tristan has extensive experience advising on local and multi-jurisdictional M&A transactions primarily involving financial services businesses.
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Tristan co-leads our Regulatory team which provides contentious and non-contentious advice on all Isle of Man regulatory matters.
Tristan is ranked as a "Leading Individual" in both the Banking and Finance and Corporate and Commercial categories by *The Legal 500* and is also ranked in Band 1 (Corporate and Finance) by *Chambers and Partners UK*. Clients praise Tristan for being a "*clever and responsive problem-solver*" and "*a pleasure to work with*".

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