

Cayman Companies: New Merger and Consolidation Provisions

Following the amendments to the Companies Law (2007 Revision) ("Companies Law") changing the provisions of that law relating to the winding up of companies, further amendments have been enacted, introducing new provisions for mergers and consolidations of companies. These amendments, contained in the Companies (Amendment) Law, 2009 came into effect in May 2009.

Prior to these amendments, mergers of Cayman Islands companies had to be effected by means of schemes of arrangement and ancillary orders under sections 86 and 87 of the Companies Law. These sections, which required such a scheme to be approved by majorities of the shareholders (or classes of them) of the relevant companies and by the court, were designed to make a scheme which had been so approved binding upon a dissenting minority. There was some uncertainty as to the application of these sections where a merger was consensual, and there was no dissenting minority. Where those sections were not applicable, no means existed to vest the assets and liabilities of one company in another company by operation of law. Such assets and liabilities had to be transferred and novated contractually, with the necessary notices being given and consents obtained. Similarly, there was no means of terminating the existence of the transferor company, other than by normal winding up or administrative dissolution. As a result, the merger procedure, where available, was time consuming and costly.

The Companies (Amendment) Law 2009 have introduced new provisions which permit contractual mergers and consolidations, with no requirement for court approval, and a procedure whereby the assets and liabilities of a company can, by operation of law, vest in another company upon such a consolidation or merger.

Mergers and Consolidations

A merger is the merging of two or more constituent companies, the vesting of their undertakings, property and liabilities in one of those companies as the continuing company and the dissolution, without formal winding up, of the constituent companies other than the continuing company. A consolidation is the combination of two or more constituent companies into a consolidated company, the vesting of the undertaking, property and liabilities of the constituent companies into the consolidated company and the dissolution, without formal winding up, of all the constituent companies. The difference, therefore, is that a merger results in one constituent company continuing to exist as the continuing

company, whereas consolidation results in a new consolidated company.

Constituent Companies

Any company limited by shares incorporated under the Companies Law (other than an exempted segregated portfolio company) may participate in a merger or consolidation as a constituent company. A foreign company may similarly participate, provided that the continuing company, in the case of a merger, or the consolidated company, in the case of a consolidation, is established under the Companies Law.

Plan of Merger or Consolidation

A written plan of merger or consolidation ("Plan") must be approved on behalf of each constituent company by its board of directors. The Plan must contain the following particulars:

- the name of each constituent company, the name of the continuing or consolidated company and the registered office of each such company;
- in relation to each constituent company, the designation and number of each class of shares;
- the date on which it is intended that the merger or consolidation is to take effect, if it is to take effect otherwise than on the date of registration of the Plan;
- the terms and conditions of the proposed merger or consolidation, including the manner and basis of converting shares in each constituent company into securities (which may be shares, debt obligations or other securities) in the consolidated or surviving company, or into other property (which may be money or other property, or a combination of money, other property and such securities);
- the rights and restrictions attaching to the shares in the consolidated or continuing company;
- in the case of a merger, any proposed amendment to the memorandum and articles of association of the continuing company, or, if none is proposed, a statement to that effect, or, in the case of a consolidation, the proposed new memorandum and articles of association of the consolidated company;



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- any amount or benefit paid or payable to any director of a constituent company, consolidated company or continuing company, upon the consolidation or merger;
- the name and address of any secured creditor of a constituent company and the nature of the secured interest; and
- the names and addresses of the directors of the surviving or consolidated company.

A Plan may contain a provision that, at any time prior to the date that it becomes effective, it may be terminated by the directors of any constituent company, or amended by the directors of all the constituent companies to change the name of the consolidated company, change the effective date of the merger or consolidation, or effect such other changes to the Plan as the Plan may expressly authorise the directors to effect in their discretion.

Approvals and Consents

Shareholders

A Plan is required to be approved by shareholders' resolution of each constituent company, passed by a majority in number representing 75% in value of all shareholders voting together as a single class. Further, if the shares to be issued to each shareholder in the consolidated or continuing company have the same rights and economic value as the shares held in the constituent companies, the Plan must be approved by special resolution of those shareholders, voting together as a single class.

Note that, in relation to each of the above resolutions, a shareholder is entitled to vote, regardless of whether his shares are voting shares or non-voting shares under the relevant constituent company's articles of association. However, where the Plan relates to a merger of a parent company incorporated under the Companies Law with one or more of its subsidiaries incorporated under that law, no approvals by shareholder resolution are required, but a copy of the Plan is required to be given to every shareholder of each subsidiary company to be merged, unless that shareholder waives his right to receive a copy of the Plan. For these purposes, a parent company is a company that owns at least 90% of the issued shares of each class in a subsidiary that are entitled to vote, and the subsidiary company is a company at least 90% of the issued shares of which (of one or more classes) that are entitled to vote are owned by a parent company.

Creditors

The consent of each holder of a fixed or floating security interest of a constituent company in a proposed merger or consolidation is also required to be obtained, but if a secured creditor does not grant his consent then the constituent company that granted the security may apply to the Grand Court to waive the requirement for that

secured creditor's consent, and the Grand Court may grant such a waiver upon such terms as the security to be granted by the consolidated or continuing company or otherwise, as the Grand Court considers reasonable.

In practice, documents for both secured and unsecured facilities are likely to contain covenants against merger or consolidation without the consent of the lenders, and secured lenders are likely to require specific arrangements as to priorities as a condition of that consent.

Regulator

Where any constituent company is licensed or regulated by the Cayman Islands Monetary Authority ("CIMA"), the consent of CIMA will have to be obtained for the merger or consolidation and, if any constituent company is licensed by CIMA the continuing company (if not the licensed company) or the consolidated company, will require an equivalent licence.

Filing and Registration

Once the authorisations and approvals described above have been obtained, the Plan must be signed by a director of each constituent company on that company's behalf, and filed with the registrar of companies ("Registrar") together with, in relation to each constituent company, a certificate of good standing and a director's declaration that:

- the constituent company is, and the consolidated or continuing company will be, immediately after the merger or consolidation, able to pay its debts as they fall due;
- the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent companies;
- no petition or other similar proceeding has been filed and remains outstanding, and no order has been made or resolution adopted to wind up the constituent company in any jurisdiction;
- no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the constituent company, its affairs, its property or any part thereof;
- no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the constituent company are, and continue to be, suspended or restricted;
- the assets and liabilities of the constituent company as at to the latest practicable date before the making of the declaration;

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- in the case of a constituent company which is not the continuing company, the constituent company has retired from any fiduciary office held immediately prior to the merger or consolidation;
- a copy of the certificate of merger or consolidation will be given to the members and creditors of the constituent company and published in the Cayman Gazette;
- where relevant, the constituent company has complied with any applicable requirements under the regulatory laws.

Where a constituent company is a foreign company, the form of declaration differs slightly, and is required to include a statement that the foreign company will, upon the merger or consolidation becoming effective, cease to be incorporated, registered or exist under the laws of the jurisdiction of its incorporation. Also, in the case of a foreign company, the Registrar is required to be satisfied that there is no reason why it would be against the public interest to permit the merger or consolidation.

Effective Date and Effect of Registration

A merger or consolidation is effective upon registration of the Plan by the Registrar, unless the Plan provides that it will take effect on a future specified date or on the date of the occurrence of a future specified event after registration, but no such date may be later than the 90th day after the date of registration. As soon as the merger or consolidation becomes effective, the following consequences ensue:

- in the case of consolidation, the memorandum and articles of association of the consolidated company filed with the Plan immediately become the memorandum and articles of association of the company;
- the rights, property of every description of the business, undertaking, goodwill, benefits, immunities and privileges of each constituent company immediately vest in the continuing or consolidated company;
- subject to any specific arrangements entered into by the relevant parties (for example in relation to priorities), the continuing or consolidated company is liable for and subject to, in the same manner as the constituent company, to all mortgages, charges or security interests and all contracts, obligations, claims, and other liabilities of each of the constituent companies;
- every existing claim, or proceeding, whether civil (including arbitration) or criminal, pending at the time of the merger or consolidation by or against a constituent company, is continued by or against the surviving or consolidated company;
- a conviction, judgement, ruling, order or claim, due or to become due, against a constituent company applies to the continuing or consolidated company instead of that constituent company;

- the Registrar strikes from the register of companies any constituent company that is not the continuing company in a merger or each constituent company that participates in a consolidation and such a striking off, notice of which is required to be published in the Cayman Gazette, is not a winding up within Part V of the Companies Law.

If a Plan is terminated or amended after it has been filed with the Registrar but before it has come effective, notice of such termination or amendment must be filed with the Registrar, and a copy of the notice of amendment or termination so filed must be sent to any person entitled to vote on, consent to, or be notified of the Plan.

Rights of Dissenting Shareholders

A shareholder of a constituent company incorporated under the Companies Law is entitled to payment of the fair value of his shares upon dissenting from a merger or consolidation, in accordance with, and subject to the procedures provided in, the Companies Law.

To exercise this entitlement, a dissenting shareholder must give to the constituent company notice of his objection before the shareholder vote to authorise the merger or consolidation. That objection must state that the shareholder proposes to demand payment for his shares if the merger or consolidation is authorised by shareholder vote.

A constituent company is required, within 20 days after the date of the shareholder vote authorising the merger or consolidation is made, give written notice of the authorisation to each shareholder who has made a written objection and, within 20 days from the date on which that notice is given, each shareholder who elected to do so must give written notice to the constituent company of his decision to dissent stating his name and address, the number and class of shares in respect of which he dissents, and a demand for payment of the fair value of his shares. A shareholder who dissents, must do so in respect of all of the shares that he holds in the relevant constituent company, and upon giving notice of dissent, the shareholder ceases to have any of the rights of a shareholder of the company except the right to be paid the fair value of his shares and certain related rights in connection with the determination of the fair value.

Within seven days after the expiry of the period within which notices of dissent must be filed or, if later, the date on which the Plan is filed, the constituent company, the surviving company or the consolidated company, as applicable, must make a written offer to each dissenting shareholder to purchase his shares at a specified price that the company determines to be their fair value and if, within 30 days following the date on which the offer is made, the offering company and the dissenting shareholder agree the price to be paid for the shares, then that company must pay the agreed price, in money, to the dissenting member. If the offering company and the dissenting member fail to agree on the price within that 30



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day period, then the company is required to apply to the Grand Court for determination of the fair value of the shares of all dissenting shareholders. Dissenting shareholders are permitted to make such a petition.

Limits on Rights of Dissenting Shareholders

The above rights are not available to a shareholder of a constituent company whose shares in the company are shares of a class for which an open market exists on a recognised stock exchange or recognised interdealer quotation system at the expiry date of the period allowed for written notice of an election to dissent expires.

Similarly, these rights are not available in respect of any class of shares of a constituent company if the holders of those shares are required, by the terms of the Plan, to accept in exchange for the shares any of the following:

- shares of a consolidated company, or depository receipts in respect of such shares;
- shares of any other company, or depository receipts in respect of such shares, which at the effective date of the merger or consolidation are listed on a national securities exchange or designated as a national system security on a recognised interdealer quotation system or held of record by more than two thousand holders;
- cash in lieu of fractional shares or fractional depository receipts described above; or
- any combination of the shares, depository receipts and cash in lieu of fractional shares or depository receipts described above.

Summary

These new provisions introduce a more efficient and cost effective means of merging or consolidating companies under the Companies Law without recourse to the courts (except in limited circumstances), whilst preserving protections for secured creditors and dissenting minority shareholders.

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