

# Cayman Islands mergers and consolidations

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## 1. Introduction

The Cayman Islands Companies Act (Revised) (**Companies Act**) permits contractual mergers and consolidations, without the need 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 merger or consolidation.

## 2. Mergers and consolidations

2.1 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 surviving company and the dissolution, without formal winding up, of the constituent companies other than the surviving company.

2.2 A consolidation is the combination of two or more constituent companies into a new 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.

2.3 The difference, therefore, is that a merger results in one constituent company continuing to exist as the surviving company, whereas consolidation results in a new consolidated company.

2.4 Any company limited by shares incorporated under the Companies Act (other than an exempted segregated portfolio company) may participate in a merger or consolidation as a constituent company with other Cayman companies or foreign companies (provided that the laws of the foreign jurisdiction permit such merger or consolidation). A key feature of the law is that the surviving or consolidated company may either be a Cayman company or a non-Cayman company.

## 3. Plan of merger or consolidation

3.1 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 surviving 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), but such date shall not be a date later than the ninetieth day after the date of such registration
- the terms and conditions of the proposed merger or consolidation, including the manner and basis of converting shares in each constituent company into shares in the consolidated or surviving company, or into other property (which may be shares, debt obligations or other securities in the consolidated or surviving company or any other corporate entity, or money or other property, or a combination of such property)
- the rights and restrictions attaching to the shares in the consolidated or surviving company
- in the case of a merger, any proposed amendments to the memorandum and articles of association of the surviving company, or if none are 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
- any amount or benefit paid or payable to any director of a constituent company, consolidated company or surviving 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

3.2 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, the effective date of the merger or consolidation, or to effect such other changes to the Plan as the Plan may expressly authorise the directors to effect in their discretion.

## 4. Approvals and consent

Shareholders

4.1 A Plan is required to be approved by shareholders of each constituent company by way of:

- a. a special resolution, which requires the approval of a majority of at least two thirds of the shareholders (or such higher majority as may be specified in the constituent company's articles of association) entitled to vote in person or, where proxies are allowed, by proxy at a general meeting; and
- b. such other authorisation, if any, as may be specified in the constituent company's articles of association

4.2 Where the Plan relates to a merger of a parent company incorporated under the Companies Act with one or more of its Cayman Islands incorporated subsidiaries, shareholders' approvals by special resolution are not required if a copy of the Plan has been 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 the purposes of mergers and consolidations, a parent company is a company that holds at least 90% of the issued shares entitled to vote at a general meeting in another company, and such company is referred to as a subsidiary company. Given a special resolution is not required to approve the merger in these circumstances, recent case law has explored whether shareholders of companies that effect 'short-form' mergers are entitled to be paid the fair value of their former shares upon dissenting from the merger under section 238 of the Companies Act (see paragraph 7.6 below).

## Creditors

4.3 The consent of each holder of a fixed or floating security interest of a constituent company must be obtained in a proposed merger or consolidation. If a secured creditor does not grant his consent, the constituent company that has issued the security may apply to the Grand Court to waive the requirement for secured creditor's consent, and the Grand Court may grant a waiver for such consent upon such terms as to security to be issued by the consolidated or surviving company, or otherwise as it considers reasonable.

4.4 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

4.5 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 a merger or consolidation and, if the constituent company is licensed by CIMA, the surviving company (if not the licensed company) or the consolidated company will require an equivalent licence.

# 5. Filing and registration

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

- a. the constituent company is, and the consolidated or surviving company will be, immediately after the merger or consolidation, able to pay its debt as they fall due
- b. the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent companies
- c. 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
- d. 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 of it
- e. 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
- f. the assets and liabilities of the constituent company made up to the latest practicable date before the making of the declaration (in our recent experience, the statement of assets and liabilities filed with the Registrar needs to be dated at least within thirty days of the filing)
- g. in the case of a constituent company that is not the surviving company, the constituent company has retired from any fiduciary office held or will do so immediately prior to merger or consolidation
- h. a copy of the certificate of merger or consolidation will be given to the shareholders and creditors of the constituent company and published in the Cayman Gazette; and
- i. if applicable, the constituent company has complied with any applicable requirements under the regulatory laws

5.2 Where a constituent company is a foreign company (i.e. a non-Cayman 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.

## 6. Effective date

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 the future specified event after registration, but such date shall not be a date later than the ninetieth day after the date of registration.

## Effect of Registration

6.1 As soon as the merger or consolidation becomes effective, the following occurs:

- in the case of consolidation, the new memorandum and articles of association filed with the Plan immediately become the memorandum and articles of association of the consolidated company
- the rights, property of every description and the business, undertaking, goodwill, benefits, immunities and privileges of each constituent company vest immediately in the surviving or consolidated company
- subject to any specific arrangements entered into by the relevant parties, the surviving or consolidated company shall be liable for and subject, in the same manner as the constituent companies, to all mortgages, charges or security interests, and all contracts, obligations, claims, debts, and liabilities of each constituent company
- 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 a surviving or consolidated company
- a conviction, judgment, ruling order or claim, due or become due, against a constituent company applies to the surviving or consolidated company instead of that constituent company; and
- the Registrar strikes off from the register of companies any constituent company that is not the surviving company in a merger or each constituent company that participates in a consolidation
- the notice of such striking off will be published in the Cayman Gazette

6.2 If a Plan is terminated or amended after it has been filed with the Registrar but before it has become 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 everyone entitled to vote on, consent to, or be notified of the Plan.

## 7. Rights of dissenting shareholders

7.1 A shareholder of a constituent company incorporated under the Companies Act 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 Act.

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

7.3 A constituent company is required, within 20 days after the date of the shareholder vote authorising the merger or consolidation, to give written notice of the authorisation to each shareholder who has made a written objection.

7.4 Within 20 days immediately following the date on which that notice is given, each shareholder who elects to dissent 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.

7.5 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 the date on which the Plan is filed, whichever is later, 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 thirty days following the date on which the offer is made, the offering company and the dissenting shareholder agree upon the price to be paid for the shares, then the company must pay the agreed price in cash to the dissenting member. If the offering company and the dissenting member fail to agree on the price within that 30 day period, then the company is required to (and any dissenting shareholder may) apply to the Grand Court for a determination of the fair value of the shares of all dissenting shareholders.

7.6 The Grand Court has determined that the statutory appraisal process also operates in respect of short-form mergers (as referred to at paragraph 4.2 above). A more detailed overview of the decision and the Grand Court's reasoning can be found in Ogier's earlier articles: [Short-form mergers – appraisal rights confirmed in the Cayman Islands in Changyou judgment](#) and [Appraisal rights confirmed in Cayman Islands short-form mergers](#).

## **8. Limits of rights on 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. 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

## 9. Conclusion

9.1 The Cayman statutory merger provisions provide an efficient and cost effective means of merging or consolidating companies under the Companies Act without recourse to the courts (except in limited circumstances), whilst preserving protections for secured creditors and dissenting minority shareholders.

9.2 Please note that this briefing only sets out a general summary of the position under Cayman Islands law and does not in any way constitute legal advice. Specific legal advice should be sought on any specific transactions.

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