

Important News - Cayman

New process for mergers and consolidations in the Cayman Islands

In brief:

- A new regime will shortly be introduced in the Cayman Islands, pursuant to which less complex mergers and consolidations involving Cayman Islands companies can be effected without Court approval.
- The procedure prescribed by a new Part XVA to be inserted into the Companies Law (2007 Revision) will provide for an efficient merger and consolidation process which is likely to save companies significant time and costs in carrying out restructuring.

Introduction

Forthcoming amendments to the Companies Law (2007 Revision) aim to provide a more simple and efficient process for less complex mergers and consolidations involving Cayman Islands companies.

The Companies Law 2007 Revision (the Companies Law) provides for mergers, amalgamations, and reconstructions of companies in the Cayman Islands through a scheme of arrangement process. Currently, approval of a scheme of arrangement must be given not only by the necessary majority of shareholders and creditors but also by the Grand Court. However, a new Part XVA to be introduced to the Companies Law within the next few weeks will supplement these provisions by prescribing a new merger and consolidation process for companies limited by shares, which does not require court approval. The result should be that less complex mergers and acquisitions are much easier to implement in the Cayman Islands.

What does it mean?

The new Part XVA provides for two or more Cayman Islands companies to engage in either a "merger" or a "consolidation". A merger is defined as the merging of two or more constituent companies and the vesting of their undertaking, property and liabilities in one of the companies as the surviving company. A Cayman Islands company can merge or consolidate with either another Cayman Islands company, or a foreign company. A consolidation is defined as the combination of two or more constituent companies into a consolidated company and the vesting of the undertaking, property and liabilities of such companies to the consolidated company.

Part XVA prescribes a set procedure to be followed in order to give effect to a merger or consolidation. The first step is for the directors of each constituent company to approve a written plan which specifies how the

respective companies propose to either merge or consolidate (the Plan). The Plan must contain certain information about the merger or consolidation specified in Part XVA, including the conditions on which the merger or consolidation will occur, names of the directors of each company, and the proposed date of implementation. Ordinarily, the Plan will also specify how the shares in the constituent companies will be dealt with, and it can provide for some or all of the shares in each constituent company to be converted into different types of property such as debt obligations or shares in the surviving or consolidated company.

The Plan may be approved following one of two voting procedures

1. A special resolution procedure: If the shares to be issued to each shareholder in the consolidated or surviving company are not altered and will have the same rights and economic value as the shares held in the relevant constituent company, the Plan may be passed by a special resolution of the shareholders of each constituent company voting together as one class; or
2. A shareholder resolution procedure: In this procedure, the Plan may be passed by a shareholder resolution of each constituent company passed by a majority in number representing two thirds in value of the shareholders voting together as one class. A shareholder resolution is not required for a merger between a parent company and a subsidiary.

Protecting creditors

In order to protect the position of creditors and their rights of priority, the consent of all secured creditors must be obtained before the Plan is approved. Unsecured creditors are protected by a requirement that the directors of the merging companies issue a statutory declaration that the

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unsecured creditors will not be prejudiced by the arrangements.

Importantly, dissenting shareholders will now have a right in certain circumstances to receive a payment of the fair value of their shares upon their dissent to the merger or consolidation. This is on the condition that they follow a prescribed process, which involves issuing a statement demanding payment for shares if the merger or consolidation is authorised by vote. If the parties fail to agree a fair value of the shares, either party is able to file a petition with the Grand Court to seek a declaration as to the fair value of the shares.

Implementing the plan

Once the Plan has been approved, a duly authorised director of each constituent company must file the Plan with the Registrar of Companies, together with a number of key documents. These include a certificate of good standing for each constituent company, a list of the assets or liabilities of each constituent company, and an undertaking that a copy of the certificate of merger or consolidation will be given to members and creditors and published in the Cayman Islands Gazette.

The merger or consolidation becomes effective on a date specified by the Registrar, being no less than 90 days after the date of registration. This means that it is possible to terminate or amend the Plan in the 90-day period following filing.

Once the merger or consolidation is effective, all the rights and property of each of the constituent companies will vest automatically in the surviving or consolidated company. This means that the surviving or consolidated company will be automatically liable for all the debts, contracts, obligations and liabilities of each constituent company, and any existing claims, proceedings or ruling involving each of the constituent companies will be automatically continued against the surviving or consolidated company.

Maitland believes that these changes will complement the arrangement and reconstruction provisions currently found in the Companies Law, and provide a more efficient process for effecting less complex mergers and consolidations in the Cayman Islands.

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