

Revisions to the Cayman Islands Companies Law

This article first appeared in the June edition of the Cayman Islands Journal

June 2009

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Mergers and acquisitions (or “M&A” as these types of transactions are commonly referred to in the legal and financial industries) have always formed one of the cornerstones of corporate business. A company, once profitable, seldom remains static; rather, corporations are constantly seeking out new opportunities for growth either by investing in new assets, divesting existing assets, or enhancing operational capacity. Quite often the best way to accomplish these goals is to combine with other companies. Even in a financial downturn, M&A activity can increase as companies scramble to move assets, streamline operations, enter into strategic alliances and, for those corporations that continue to thrive, perhaps even pick up some ‘bargains’ along the way.

Until recently, a Cayman company could not combine with another company except by way of an ‘arrangement’ which required the parties involved to petition the Grand Court of Cayman for approval. However, the Cayman Islands Government recently amended the Companies Law to adopt long-awaited ‘merger provisions’. The new legislation will serve to bridge what has

been a significant ‘gap’ in Cayman companies law by allowing corporations that want to combine, to do so without having to go through a costly and cumbersome Court-driven process.

The availability of these new provisions will serve to streamline corporate M&A transactions. Multinational corporate groups with one or more Cayman entities will now be able to restructure more readily, and foreign corporations seeking to combine with a Cayman entity will benefit from this simpler process.

Definition of “Mergers” and “Consolidations”

The new legislation makes a distinction between a “consolidation” and a “merger”. In a consolidation, a new entity is formed from the combination of each participating company. The participating companies, as a consequence, cease to exist and are each struck off by the Registrar of Companies. By comparison, in a merger, one company remains as the surviving entity, having in

effect absorbed the other merging parties that are then struck off and cease to exist.

The Process

In both scenarios, the directors of each participating Cayman company must approve the plan of merger or consolidation setting out, amongst other things, detailed information about the companies involved in the transaction and the terms of the deal. Depending upon the structure of the transaction, the plan must be approved by either a two-thirds majority of shareholders or a majority holding 75 per cent of the value of the outstanding shares. If the combination is between a parent company and its subsidiaries, each of which are registered in Cayman, only directors' authorisations from each participant are required. This latter kind of transaction is often referred to as a "vertical short form amalgamation". Interestingly, the new legislation fails to include a similar provision requiring only directors' approval to the merger of two wholly-owned subsidiaries of a common parent (often referred to as a "horizontal short form amalgamation").

The consent of each secured creditor of the participating companies to the proposed combination must also be obtained. In the event that a particular secured party objects, the company that has issued the relevant security may make an application to the Court to have the requirement for consent waived, upon the condition that the surviving or consolidated entity grant such security as may be satisfactory to the objecting secured party.

Once the requisite approvals have been obtained or waived, the plan of merger or consolidation must be submitted to the Registrar along with various supporting documents. Upon receipt of a satisfactory submission, a certificate of merger or consolidation will be issued by the Registrar. The combination will be effective as of the date of the certificate, unless a subsequent effective date, not later than 90 days after the date of registration, is specified in the plan.

Merger or Consolidation with Foreign Companies

The revised legislation also provides for the merger or consolidation of companies incorporated in Cayman with companies incorporated in foreign jurisdictions. The parties to the transaction may conduct the merger or consolidation in the jurisdiction of the foreign entity if its laws permit or may choose to continue as a Cayman-registered company. In the latter scenario, the process for merging or consolidating is basically the same as for combinations involving solely Cayman-registered entities. Foreign companies wishing to combine with Cayman companies in this jurisdiction should note that consent or approval to the transfer of *any security interest* granted by the foreign company to the resulting Cayman entity in the transaction is required, unless otherwise released or waived by the secured party.

Effect of a Merger or Consolidation

Upon a merger or consolidation taking effect, all property of every description owned by the consolidating or merging entities immediately vests in the surviving or consolidated company by operation of law. The surviving or consolidated company is then liable for and subject to, all obligations, debts, liabilities, charges, security interests, claims and potential claims, proceedings, convictions, judgments, rulings and orders as the combining entities were prior to the effective date of the merger or consolidation.

Rights of Dissenters

The new legislation will introduce, for the first time in Cayman companies' law, express appraisal rights for dissenting shareholders. A shareholder who intends to exercise his right to dissent to any proposed merger or consolidation transaction must provide a written objection to the relevant company prior to the vote on the combination. Any such objection must include a statement that the shareholder proposes to demand payment for his or her shares if the combination is approved by the members.

A company that has received any notices of dissent must deal with these in the manner specified in the

legislation and within specific time periods. Ultimately dissenting shareholders have a right under the new legislation to be paid out the fair value of their shares. If no price can be agreed between a company and the dissenters, the matter will be referred to the Court for determination.

Dissent rights may not be available to shareholders in some circumstances such as for shares listed on a recognised stock exchange or interdealer quotation system.

In the long term, these new business combination provisions will greatly facilitate the conduct of cross-border M&A transactions and enhance the appeal of the Cayman Islands as a jurisdiction of choice for conducting such business.

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June 2009
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