Offshore mergers and consolidations in the Cayman Islands

Resource type: **Articles: know-how**

Status: **Law stated as at 01-Mar-2012**

Jurisdiction: **Cayman Islands**

This article seeks to provide a high-level summary of the merger and consolidation procedure under Cayman Islands law.

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Simon Raftopolous and Jacob MacAdam, Appleby (Cayman) Ltd

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M&A deals in the Cayman Islands can be structured through various types of transactions. These include asset and share purchases, squeeze-outs (which can be effected with over 90% control), mergers, consolidations and schemes of arrangement with mergers and consolidations being the most common methods used.

This article seeks to provide a high-level summary of the merger and consolidation procedure under Cayman Islands law.

Mergers and consolidations versus a scheme of arrangement

The merger and consolidation provisions of the Companies Law (2011 Revision) (Companies Law) provide an efficient method of effecting a merger or consolidation (Merger Procedure) without the need for the approval of the Cayman Islands Court (Court).

Before amendments to the Companies Law in 2009, a Court approved scheme of arrangement was the only method by which two or more companies could combine under Cayman Islands law. Schemes of arrangement are still used in the Cayman Islands, although these tend to be the preserve of more complex business restructurings. The Merger Procedure allows for a simpler and more cost-effective means by which companies can merge or consolidate.

The advantages of the Merger Procedure include that:

- The approval of the Court is not required.
- The timing for a merger or consolidation is generally shorter than for a scheme of arrangement.
- While shareholders do have certain rights of dissent and appraisal under the Merger Procedure, these rights will not delay or impede the merger or consolidation arrangements.

The distinction between a merger and a consolidation

The Companies Law distinguishes between a merger and a consolidation. A merger involves the merging of two or more constituent companies and the vesting of their undertaking, property and liabilities in the surviving company. A consolidation involves the combination of two or more constituent companies into a consolidated company and the vesting of the undertaking, property and liabilities of the companies in the consolidated company. In a merger, one company remains as the surviving entity, similar to a merger under Delaware law. In a consolidation, a new entity is formed and each consolidated company (that is a Cayman Islands company) will be struck off by the Registrar of Companies in the Cayman Islands (Registrar).

Any two or more Cayman Islands incorporated companies limited by shares can merge or consolidate (other than segregated portfolio companies). One or more Cayman Islands companies can merge or consolidate with one or more foreign companies (provided that the laws of the foreign jurisdiction permit the merger or consolidation) and the surviving or consolidated company can either be a Cayman Islands company or a foreign company.

The plan of merger or consolidation

In the case of both a merger and a consolidation, the Companies Law requires that the directors of each constituent company must approve and sign a plan of merger or consolidation (Plan).

The Plan is typically a short form document, governed by Cayman Islands law. The Plan normally forms a schedule to the more detailed merger or consolidation agreement. The Plan must contain certain detailed information concerning the companies involved in the transaction, including:

The date on which the merger or consolidation is to take effect.

The rights and restrictions attaching to the shares in the consolidated or surviving company.

Any proposed amendments to the existing memorandum and articles of association (in the case of merger), or the proposed new memorandum and articles (in the case of a consolidation).

The names of the directors of the surviving or consolidated company.

The names of any secured creditors and the nature of their secured interests.

The terms and conditions of the proposed merger or consolidation, including where applicable, the manner and basis of converting shares in each constituent company into shares in the consolidated or surviving company or into other property.

Director and shareholder approval

The Plan must be approved by the directors and the shareholders of each constituent company. The shareholder approval takes the form of:

A special resolution of the shareholders of each such Cayman Islands constituent company (this is a resolution passed by a two-thirds majority of the shareholders attending and entitled to vote at a quorate meeting, or any greater threshold as provided for in the company's articles of association).

Any other authorisation as may be specified in a constituent company's articles of association.

Practitioners should be alert as to what constitutes a quorum for a shareholders meeting. Under Cayman Islands law, there is no prescribed minimum as to what constitutes a quorum and accordingly a fraction of the shareholders may pass a special resolution. The Companies Law does permit shareholder resolutions to be passed by a written resolution (provided this is permitted by the company's articles of association) but a written resolution will only be valid if it is signed by all of the shareholders entitled to vote.

If a copy of the Plan is given to every shareholder of each subsidiary company to be merged, and unless shareholders agree otherwise, a shareholder resolution is not required where a parent company registered in the Cayman Islands seeks to merge with one or more of its subsidiaries that are also registered in the Cayman Islands. Typically, this is referred to as a "vertical amalgamation".

Secured creditor approval

The written consent of each secured creditor of each constituent company in a proposed merger or consolidation must also be obtained. Any such consent(s) should be obtained before filing the plan of merger or consolidation with the Registrar. It is not necessary to file the consent(s) with the Registrar. However, if a secured creditor does not consent then the Court may, on application by the constituent company, waive the requirement to obtain consent on the basis that security is to be issued by the consolidated or surviving company (or otherwise as the Court considers reasonable). If the secured creditor(s) consent or a Court waiver is not obtained, the merger or consolidation may potentially be unwound.

The certificate of merger or consolidation and the effective date

Once director, shareholder and secured creditor approval have been obtained, the Plan must be submitted to the Registrar along with, for each constituent company:

A certificate of good standing.

A director's declaration confirming:

that the constituent company is, and the continuing or surviving company will be, able to pay its debts as they fall due immediately after the transaction;

that the position of the unsecured creditors of the constituent companies will not be prejudiced by the merger or consolidation;

that no petition or other similar proceeding has been filed and remains outstanding, and that no order has been made or resolution adopted to wind-up the company in any jurisdiction;

that no receiver (or similar person) has been appointed in respect of the company in any jurisdiction;

that no scheme, compromise or similar arrangement has been entered into in any jurisdiction which restricts or suspends the rights of any creditors of the company;

the assets and liabilities of the company made up to the latest practicable date before the date of the declaration; and

in the case of a constituent company that is not a surviving company, that the constituent company has retired from any fiduciary office held before the merger or consolidation.

An undertaking that a copy of the certificate of merger or consolidation will be given to the shareholders and creditors of each constituent company and published in the Gazette.

On satisfaction of these requirements and the payment of the applicable fee, a certificate of merger or consolidation is issued by the Registrar. The merger or consolidation then becomes effective as of the date the certificate is issued, unless a subsequent effective date, not later than 90 days after the date of registration, is specified in the Plan (Effective Date). On the Effective Date a non-surviving Cayman Islands company is struck off the register, although it is not deemed to be wound-up. On the Effective Date all existing claims, causes and proceedings, convictions, judgments and rulings remain in place as against the surviving company. The rights, obligations, assets and liabilities of each constituent company continue with the surviving entity.

The Registrar will require original documents in order to issue the certificate of merger or consolidation. Accordingly, delivery of such original documents to the Cayman Islands should be factored into the transaction timetable.

Pre-clearance by the Registrar

In practice, the documents that must be submitted to the Registrar are reviewed and signed off by the Registrar in advance of formal submission. The Registrar typically takes four to five working days to review and sign off on the documentation. Copy documents (rather than original documents) can be submitted in connection with the pre-clearance process. The pre-clearance process gives the parties certainty that there will be no last-minute surprises from the Registrar that could result in a delay.

Merger or consolidation with foreign companies

The Companies Law also provides for the merger or consolidation of companies incorporated in the Cayman Islands with companies incorporated outside of the jurisdiction. The process is essentially the same as for Cayman Islands incorporated companies except that, with respect to the foreign entity, the Registrar must be satisfied that:

> The merger or consolidation is permitted or not prohibited by the laws of the jurisdiction in which the foreign company is incorporated and that those laws will be complied with.
>
> No petition or other similar proceeding has been filed and remains outstanding, or order made or resolution adopted to wind up or liquidate the foreign 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 foreign company, its affairs or its property.
>
> No scheme, order compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the foreign company are suspended or restricted.
>
> There are no other reasons why it would be against the public interest to allow the transaction.

The surviving or consolidated company may continue out of the Cayman Islands to the jurisdiction of the foreign company or may choose to continue as a Cayman Islands registered company.

Where the surviving or consolidated company is established or continues its existence under Cayman Islands law, the Registrar must also be satisfied that:

The foreign company is able to pay its debts as they fall due and that the merger or consolidation is not intended to prejudice the position of unsecured creditors of the foreign company.

Consent or approval of the transfer of any security interest granted by the foreign company to the surviving or consolidated company, has been obtained, released or waived and the transfer of the interest is permitted by and has been approved in accordance with the constituting documents of the foreign company, and the laws of its jurisdiction of incorporation have been or will be complied with.

The foreign company will, on the merger or consolidation becoming effective, cease to exist under the laws of the relevant foreign jurisdiction.

The typical method of satisfying the Registrar as to these matters of fact is for a director of the constituent company incorporated in the Cayman Islands to provide a director's declaration to this effect, which would be backed up by an equivalent declaration from a director of the foreign company to the Cayman Islands company.

Where the surviving or consolidated company is to be an overseas company, the Registrar must be satisfied, in respect of each constituent company incorporated under the Companies Law, that:

The merger or consolidation is permitted or not prohibited by the constitutional documents of the constituent overseas company and the laws of the constituent overseas company's jurisdiction, and that those laws and any requirements of those constitutional documents have been or will be complied with.

No petition or other similar proceeding has been filed and remains outstanding, and no order has been made or resolution adopted to wind-up or liquidate the constituent overseas 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 surviving company, its affairs or its property.

No scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction under which the rights of creditors of the surviving company are suspended or restricted.

There are no reasons why it would be against the public interest to allow the merger or consolidation.

The typical method of satisfying the Registrar as to these matters of fact is for a director of the constituent company incorporated in the Cayman Islands to provide a director's declaration to this effect, which would be backed up by an equivalent declaration from a director of the foreign company to the Cayman Islands company.

Rights of dissenting shareholders

The Companies Law provides that a shareholder of a company incorporated in the Cayman Islands is entitled to be paid the fair value of his shares on dissenting to a merger or consolidation.

A shareholder who intends to exercise his entitlement to dissent must provide a written objection to the constituent company before the shareholder vote on the transaction. Any such objection must include a statement that the shareholder proposes to demand payment for its shares if the merger or consolidation is approved by the shareholders. If shareholder approval is obtained, the constituent company must provide any shareholder that has provided a written objection with a notice of authorisation. Within twenty days following the date of the authorisation notice, a dissenting shareholder must provide the constituent company with a formal written statement of its decision to dissent, including its name and address, the number and classes of shares owned, and a demand for payment of the fair value of such shares.

A company that has received any notice of dissent must, within specified time periods, make a written offer to each dissenting shareholder to purchase its shares at a price that the company determines to be the fair value. If agreed by the shareholder, monies must be paid to the dissenting shareholder within thirty days of the offer being made. If no price is agreed, the company must file a petition with the Court for a determination of the fair value of the shares of all dissenting shareholders and any dissenting shareholder is permitted to be involved in the proceedings.

Dissent rights are not available to a shareholder of a constituent company provided such shareholder receives, in exchange for his shares:

> Shares of a surviving or consolidated company, or depository receipts in respect of these.
>
> Shares of any other company, or depository receipts in respect of these, that are either listed or held of record by more than two thousand holders at the effective date of the merger or consolidation.
>
> Cash in lieu of fractional shares or fractional depository receipts as described above.
>
> Any combination of the shares, depository receipts and cash in lieu of fractional shares or fractional depository receipts described above.

If the consideration paid to the shareholder in exchange for his shares is anything other than one of the forms above, dissent rights will be preserved.

Under Cayman Islands law, only the registered shareholder of a company (the person whose name has been entered into the register of members) can exercise the right to dissent and that shareholder

can only do so in respect of all (but not some) of his shares. Any custodian holding shares on behalf of a large number of nominees should be mindful of this.

Treatment of all shareholders does not need to be the same

There is no requirement under the Companies Law for shareholders of a company to be treated the same or for all the shareholders to receive identical consideration in respect of the merger or consolidation. Some or all of the shares, whether of different classes or of the same class, in each constituent company may be converted into or exchanged for different types of consideration (such as shares, debt obligations or other securities in the surviving company or consolidated company or any other corporate entity, or money or other property, or a combination of these). Therefore, the consideration payable to each shareholder should be carefully documented in the merger or consolidation agreement.

Timing

As considered above, the time it takes to effect a merger or consolidation under the Companies Law is typically less than that for a court sanctioned scheme of arrangement. However, the timing will be dependent on a number of factors including:

The notice period specified in the articles of association of the relevant constituent company to convene a shareholder meeting.

Obtaining secured creditor consents.

The submission of original documents to the Registrar.

The usual timescale from the signing of the merger or consolidation agreement to receipt of the certificate of merger or consolidation is somewhere between three to five weeks.

Conclusion

The Merger Procedure is a flexible and user friendly mechanism for a wide variety of M&A transactions. The Cayman Islands remains an attractive and well respected jurisdiction for cross-border M&A and is well placed to remain the jurisdiction of choice for offshore mergers and consolidations.

Contributor details

Simon Raftopolous

Appleby (Cayman) Ltd.

T +1 345 814 2748
E *sraftopoulos@applebyglobal.com*
W *www.applebyglobal.com*

Qualified. South Africa, 2001; England and Wales, 2003; Ireland, 2004; Cayman Islands, 2006

Areas of practice. Corporate finance; M&A.

Recent transactions

- Advising Renren Inc in connection with the acquisition by way of merger of Wole Inc.
- Advising Flexpoint Ford in connection with the acquisition of GeoVera Insurance Group Holdings, Ltd. by way of merger.

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Jacob MacAdam

Appleby (Cayman) Ltd.

T +1 345 814 2016
E *jmacadam@applebyglobal.com*
W *www.applebyglobal.com*

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