Cayman Islands Statutory Mergers

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Introduction

Since its introduction in 2009, the Cayman Islands statutory merger and consolidation regime has become an incredibly useful tool in Cayman Islands corporate practice. This mechanism, set out in Part 16 of the Companies Act, enables two or more companies to merge into a single surviving entity or consolidate into a newly formed company, with minimal procedural complexity and automatic vesting of assets and liabilities. Mergers are commonly used for cross-border M&A, redomiciliation of parent companies, corporate group restructuring, investment fund reorganisations, take-private transactions and de-SPACs.

The regime is available to all Cayman Islands-incorporated companies, including the widely used exempted company, and also supports mergers with overseas companies — provided the law of the foreign jurisdiction permits it.

A merger results in one of the existing companies surviving, while the other(s) cease to exist. In a consolidation, a new company is formed, and all the original companies are dissolved upon completion. This article focuses on mergers, which are far more common in practice than consolidations.

Following is an overview of some of the common uses for Cayman Islands statutory mergers, an introduction to the key documents and steps, an explanation of the legal effects of a merger, and practical considerations. Importantly, we also look at the rights of dissenters and how this is an attractive commercial feature of a Cayman Islands statutory merger.

Common Use Cases for Cayman Islands Statutory Mergers

The flexibility and efficiency of the merger process makes it suitable for a broad range of transactions.

Cayman Islands vehicles are widely used in cross-border M&A, both as acquirors and targets. A statutory merger may be used to combine a Cayman Islands company with, for example, a U.S., Japanese, BVI, or Hong Kong company, enabling the parties to create an integrated business platform or new holding structure.

Where a foreign company is the survivor in a merger, the merger may also serve as a form of exit from the Cayman Islands jurisdiction. This can be desirable in order to list a company on a stock exchange that does not currently allow the listing of Cayman Islands companies, such as the Tokyo Stock Exchange.

Intra-group mergers are frequently used to simplify complex group structures — for example, merging multiple subsidiaries under a single holding entity. This is particularly useful:

- in advance of a financing, IPO, or acquisition
- for optimal tax structuring
- as part of post-acquisition integration
- to reduce administration and annual fees

Conveniently, multiple companies (that is, more than two) can be folded up in the one merger, if required. The statutory process eliminates the need to engage in a formal liquidation process of companies that do not survive the merger, and can avoid triggering contractual change of control clauses (of course, subject to specific contractual terms).

As noted above, some groups use Cayman Islands statutory mergers to effectively redomicile a holding company into or out of the Cayman Islands. For example, a foreign parent might merge with a Cayman Islands subsidiary, with the Cayman Islands entity surviving. The merger process avoids the limitations that exist in some jurisdictions around company continuations.

The Cayman merger process has also been used frequently to take-private U.S. listed Cayman Islands companies and to give effect to de-SPACs. Undoubtedly novel uses will continue to emerge.

Statutory Requirements for Mergers

To effect a merger under the Companies Act, the following documents are required:

- A plan of merger, which must provide certain details, including:
    - names of the constituent companies
    - terms and conditions of the merger
    - the manner and basis of converting shares
    - proposed amendments to the constitutional documents (if any)
    - the effective date
- Approval from the board of directors of each constituent company
- A special resolution of the members of each constituent company (typically a two-thirds majority at a general meeting), and any other authorisations that may be required by a constituent company's articles of association
- Secured creditor consent (if applicable)
- A director's declaration as to solvency and other prescribed matters

A company's articles of association or shareholder agreements may prescribe higher thresholds or additional steps. If a constituent company has issued preferred shares, often preferred shareholder consent will be required pursuant to the protective provisions in the articles and shareholders' agreement.

Once approvals are secured, the following documents are filed with the Cayman Islands Registrar of Companies:

- the plan of merger
- resolutions of the directors and shareholders
- director declarations
- certificates of good standing for each entity
- the merger filing fee

An optional step is to request that the Registrar pre-vet these documents in advance of the effective date of the merger. We recommend pre-vetting to ensure the merger closing proceeds smoothly. Upon the effective date of the merger, the Registrar issues a certificate of merger, which acts as prima facie evidence of compliance with all requirements of the Companies Act in respect of the merger.

Legal Effect of the Merger

A statutory merger has several automatic consequences:

- the rights, property of every description, and the business, undertaking, goodwill, benefits, immunities and privileges of each constituent company are immediately vested in the surviving company
- the surviving company becomes liable for all mortgages, charges or security interests, and all contracts, obligations, claims, debts and liabilities of each of the constituent companies

- the constituent companies (other than the surviving company) cease to exist without formal winding-up
- any legal proceedings by or against a constituent company continue by or against the surviving entity
- shareholders receive the consideration set out in the merger plan (e.g. cash, shares, other securities), and their old shares are cancelled

This automatic vesting provides continuity of business and significantly reduces administrative burden, particularly where a constituent company is in a group that operates across multiple jurisdictions.

Dissenting Shareholders

One of the attractions of the Cayman Islands statutory merger regime is the way it deals with dissenting shareholders via a parallel process. Shareholders who object to a merger are entitled to payment of the fair value of their shares upon dissenting. To do so, they must give written objection to the merger prior to the shareholder vote on the merger.

If the shareholder vote on the merger is approved, the constituent company must give notice of that fact to each shareholder that made a written objection. Then, a shareholder who elects to dissent must, within the prescribed timeframe, give the constituent company a written notice of their decision to dissent, stating their name and address, number and class of shares and a demand for payment of the fair value of their shares.

Importantly, upon giving a notice of dissent, a shareholder ceases to have any of the rights of a member, except the right to be paid the fair value of that person's shares and certain statutory rights. This means that, provided that a company has obtained all necessary resolutions and consents to approve a merger, it can continue with the merger process, even where there are dissenters. The dissenters are effectively moved into a separate process that protects their rights to fair value without interrupting the merger transaction itself.

If the company and a dissenting shareholder cannot agree on a price for shares, the court intervenes to determine the fair value following a valuation process that considers a broad range of evidence, including expert reports. Appraisal rights are often exercised in take-private transactions, where minority shareholders believe the offer undervalues the company.

Advantages of the Statutory Merger Regime

In summary, the Cayman Islands merger regime offers numerous strategic benefits:

- Speed: Transactions can be completed as soon as documentation is finalised and shareholder consents have been obtained
- Efficiency: No court process is required to approve a merger
- Certainty: The Companies Act provides automatic vesting of all assets and liabilities; the Registrar's pre-vetting process ensures documents are all in order before closing; dissenters are able to obtain fair value through a parallel process that does not disrupt the completion of a merger
- Cross-border capability: Mergers with foreign companies are expressly permitted
- Stakeholder protection: Shareholders and creditors are afforded clear statutory rights
- Low cost: Compared to schemes of arrangement or liquidations, mergers are generally more cost-effective on the legal side

Practical Considerations

In addition to the statutory documents required for a merger, there is typically a merger agreement governing closing mechanics, representations and warranties, and the respective obligations and rights of the parties. An appropriate scope of legal due diligence is required prior to finalising the merger agreement, and a draft merger agreement should always be reviewed by Cayman counsel before it is executed.

It is also prudent to look at contracts with anti-assignment or change of control provisions early in the process, and also consider licences or regulatory approvals requiring notification.

Where a foreign constituent company is involved, legal advice must be obtained to ensure the merger is permitted and will be recognised in its own jurisdiction. Antitrust, foreign investment, and tax issues may also need to be addressed.

As always, practical know-how goes a long way when making filings with the Registrar and dealing with registered agents in Cayman, and accordingly it is best to engage highly experienced Cayman counsel for the most seamless transaction.

Conclusion

The statutory merger regime in the Cayman Islands offers a fast, flexible, and well-established mechanism for strategic transactions. Its speed, certainty, and cross-border utility make it an attractive option for a wide variety of transactions and corporate objectives. Travers Thorp Alberga has extensive experience in mergers, and we are happy to answer any questions you may have.