

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay. The foreground shows a paved plaza with geometric patterns and a few small trees.

Merger of Bermuda Companies

Preface

This publication has been prepared for the assistance of those who are considering the merger of Bermuda exempted companies. It deals in broad terms with the requirements and procedures under Bermuda law for effecting such a merger. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

Copies of the Companies Act 1981 of Bermuda have been prepared and are available on request.

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1. INTRODUCTION

This publication outlines the steps necessary under the Companies Act 1981 of Bermuda (the “Act”) for Bermuda companies to merge, resulting in the registration of one surviving company. A separate procedure exists under Bermuda law for the amalgamation of Bermuda companies. A publication on amalgamations is available upon request.

2. MERGER OF BERMUDA COMPANIES

2.1. Merger Agreement

The Act requires that each company proposing to merge must enter into a merger agreement which sets out the terms and means of effecting the merger. In addition, the Act specifies matters which must be dealt with in any such merger agreement. Other matters not required by the Act may be included in the agreement, and indeed particular transactions may require additional issues be addressed in the merger agreement.

2.2. Shareholder Approval

The directors of each Bermuda merging company must submit the merger agreement for approval to a general meeting of members of their respective merging company. All shareholders, whether or not their shares have voting rights, are entitled to vote on whether to approve the merger agreement. If the merger agreement contains provisions which would constitute a variation of the rights of any class of shares of a Bermuda merging company, the holders of shares of that class are entitled to vote separately as a class on the approval of the merger agreement. Unless the relevant company’s by-laws otherwise provide, the resolution of the shareholders or class must be approved by a majority vote of 75 per cent of those voting at the meeting, the quorum for which is two persons at least holding or representing by proxy more than one-third of the issued shares of the company or the class.

2.3. Shareholder Notice

The notice to the shareholders of the general meeting must be accompanied by a copy or summary of the merger agreement and must state:

- (a) the fair value of the shares as determined by each merging company; and
- (b) that a dissenting shareholder is entitled to be paid fair value for their shares.

A shareholder that did not vote in favour of the merger and is not satisfied that he has been offered fair value for his shares, may apply to the court for an appraisal of the fair value of his shares within one month of the giving of the notice of meeting to shareholders.

2.4. Statutory Declaration

A director or officer of each merging company must sign a statutory declaration confirming that there are reasonable grounds for believing that:

- (a) the relevant merging company is, and the surviving company will be, able to pay its liabilities as they become due;

- (b) the realisable value of the assets of the surviving company will not be less than the aggregate of its liabilities and issued share capital of all classes; and
- (c) either that no creditor of the company will be prejudiced by the merger or that all known creditors of the relevant merging company have been given adequate notice of the merger and no creditor has objected to the merger except on frivolous or vexatious grounds. For this purpose, adequate notice is given if a written notice is sent to each known creditor having a claim against the company in excess of \$1,000 and a notice of the intended merger is published in a local newspaper informing creditors that they may object to the merger within 30 days from the date of the notice.

2.5. Filing with Registrar of Companies

Once the shareholder resolutions approving the merger of the companies have been adopted, a filing must be made with the Registrar of Companies to register the surviving company in order for the merger to become effective. The filing must include the following supporting documents:

- (a) a statement confirming which merging company is to be registered as the surviving company pursuant to the merger;
- (b) a certified copy of the members' resolutions of each merging company;
- (c) the memorandum of association of the surviving company;
- (d) the address of the registered office of the surviving company;
- (e) the statutory declarations referred to above; and
- (f) the required filing fee.

The Registrar will register the surviving company on or after the date of filing, as requested in the filing, and will issue a Certificate of Merger indicating the date of registration.

3. INTRA-GROUP MERGERS

3.1. Procedure

An alternative "short form" method of merger is available where the merging companies are a Bermuda holding company and one or more wholly-owned Bermuda subsidiary companies, or two or more wholly-owned Bermuda subsidiaries of the same holding company. Companies merging by this method need not enter into a merger agreement or obtain shareholder approval. The merger may be approved solely by a resolution of the directors of each merging company. A director or officer of each such company will still have to sign the statutory declaration described above, and the filing for the registration of the surviving company is then made.

3.2. Merger of Holding Company and Subsidiary

Where the merging companies are a Bermuda holding company and one or more of its wholly-owned Bermuda subsidiaries, the directors' resolutions of each merging company must provide that:

- (a) the shares of each merging subsidiary company shall be cancelled without any repayment of capital in respect thereof;
- (b) the memorandum of association and bye-laws of the surviving company shall be the same as those of the merging holding company; and
- (c) no securities shall be issued by the surviving company in connection with the merger.

3.3. Merger of Two or More Subsidiaries

Where the merging companies are two or more wholly-owned Bermuda subsidiaries of the same holding company, the directors' resolutions of each merging company must provide that:

- (a) one of the merging wholly owned subsidiary companies will be the surviving company;
- (b) the shares of each merging subsidiary company other than those of the proposed surviving company shall be cancelled without any repayment of capital in respect thereof; and
- (c) the memorandum of association and bye-laws of the surviving company shall be the same as those of the merging subsidiary company proposed to be the surviving company.

In both scenarios of an intra-group merger, the resolutions approving the merger must also state whether or not the merging companies elect to combine their respective authorised share capitals.

Where this short form method of merger is available, consideration should still be given to preparing a merger agreement and obtaining shareholder approval, as the time commitment and cost would not be greatly impacted.

4. CONSEQUENCES OF MERGER

On the date shown in the Certificate of Merger:

- (a) the merger of the merging companies and the vesting of their undertaking, property and liabilities in the surviving company will become effective;
- (b) the surviving company will continue to be liable for the obligations of each merging company;
- (c) an existing cause of action, claim or liability to prosecution will be unaffected;
- (d) a civil, criminal or administrative action or proceeding pending by or against a merging company may be continued to be prosecuted by or against the surviving company;

- (e) a conviction against, or ruling, order or judgment in favour of or against, a merging company may be enforced by or against the surviving company; and
- (f) the Certificate of Merger shall be deemed to be the Certificate of Incorporation of the surviving company; however, the date of incorporation of a merging company is its original date of incorporation and its merger with another company does not alter its original date of incorporation.

Upon registration, the Registrar will strike off the register each Bermuda registered merging company that is not the surviving company. The cessation of a non-surviving merging company in this manner is not considered a winding up under the Act.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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