

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, reflecting the sky and surrounding environment. The building is partially obscured by a semi-transparent blue overlay containing text. The foreground shows a paved plaza with geometric patterns and a few small, cylindrical metal bollards.

Mergers, Consolidations, Schemes of Arrangement and Takeovers in the Cayman Islands

Preface

This publication has been prepared for the assistance of those who considering mergers, consolidations or schemes of arrangement for or between Cayman Islands companies or between Cayman Islands companies and foreign companies as well as takeovers of Cayman Islands companies. It outlines in broad terms the differences of each process and the general requirements for each under Cayman Islands law.

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 Cayman on their specific proposals before taking steps to implement them.

Copies of the Cayman Islands Companies Act, as amended, have been prepared and are available upon request.

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INTRODUCTION

Until relatively recently, the only mechanism available under the Cayman Islands Companies Act for a merger or consolidation between companies was a court approved scheme of arrangement. Sections 86-87 of the Companies Act give the Cayman Islands courts significant flexibility to approve corporate restructuring by way of schemes of arrangement, reconstruction and amalgamation. Section 88 of the Companies Act sets out provisions relating to the power to acquire shares of dissentient shareholders (takeover provisions).

These types of court approved schemes continue to be available for more complex mergers but the Companies (Amendment) Act, 2009 introduced a new, simpler and more cost-effective mechanism for mergers and consolidations between Cayman Island companies and between Cayman companies and foreign companies. Part XVI of the Companies Act now permits contractual mergers and consolidations without the requirement for court approval.

The following comparison is designed to assist in determining which mechanism might best suit the needs of particular companies.

MERGERS, CONSOLIDATIONS, SCHEMES OF ARRANGEMENT, TAKEOVERS COMPARISON		
Mergers/Consolidations	Schemes of Arrangement	Takeovers
Definitions		
<p>"Merger" means the merging of two or more constituent companies and the vesting of their undertaking, property and liabilities in one of such companies as the surviving company.</p> <p>"Consolidation" means the combination of two or more constituent companies into a consolidated company and the vesting of the undertaking, property and liabilities of such companies in the consolidated company.</p> <p>The essential difference between mergers and consolidations is that a consolidation produces a new company different from either of its constituent companies, while in a merger, one of the constituent companies will continue to exist as the other is merged into it.</p>	<p>A "scheme of arrangement" is a court sanctioned compromise or arrangement between a company and its creditors, or between a company and its shareholders, or any class of them. The statute does not restrict the nature of the arrangement that may be agreed between the company and its members/creditors.</p> <p>In addition to the power to compromise with creditors and members, the arrangements and reconstructions provisions in the Cayman Islands Companies Act include provisions relating to facilitating reconstruction and amalgamation of companies and, where a scheme or contract involves the transfer of shares or any class of shares to another company, provides for the power to acquire shares of dissentient shareholders.</p>	<p>A "takeover offer" is an offer for the entire issued share capital of a target company which could become effective without the offeror acquiring 100% of such issued share capital. The Companies Act permits the offeror to acquire 100% of the target company if the offer is accepted by holders of not less than 90% in value of the shares to which the offer relates.</p>
Advantages		
<ul style="list-style-type: none"> Simpler, more cost-effective mechanism for simple restructuring Court approval not required except in cases of dissenting 	<ul style="list-style-type: none"> Courts have significant flexibility to address more complex restructuring Certainty: once court has sanctioned scheme, all members/ 	<p>Subject to conditionality, a takeover offer is generally expected to provide the offeror with control of the target company more quickly than schemes of arrangement.</p>

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<p>shareholders where price of shares cannot be agreed</p> <ul style="list-style-type: none"> • Shorter timelines • Shareholder approval not required for Cayman parent and subsidiary merger • Surviving company may be a foreign company 	<p>creditors of relevant class concerned bound by scheme</p> <ul style="list-style-type: none"> • Specific provisions for transferring undertakings or property from one company to another 	<ul style="list-style-type: none"> • Terms of offer can be more readily revised if competing offer arises or new information comes to light
Procedure		
<ul style="list-style-type: none"> • Directors of each constituent company must approve written plan of merger ("Plan") • Particulars of Plan must include: <ul style="list-style-type: none"> ◦ Name of each constituent company ◦ Name of surviving company ◦ Registered office of each company ◦ Designation and number of each class of shares of each constituent company ◦ Date on which merger intended to take effect ◦ Terms and conditions of proposed merger, including manner and business of converting shares ◦ Rights and restrictions attaching to shares in surviving company ◦ In case of merger, any proposed amendment to memorandum and articles of association of surviving company or statement that no change required ◦ In case of consolidation, proposed new memorandum and articles of association of consolidated company ◦ Any amount or benefit paid or payable to any director of constituent 	<ul style="list-style-type: none"> • Proceedings commenced by way of Petition and Supporting Affidavit • Interlocutory summons for order convening meeting of company's members/creditors must be filed with petition <ul style="list-style-type: none"> ◦ Court will fix date for substantive hearing of petition ◦ Notice of substantive hearing must be given to members/creditors as part of scheme documentation • Supporting affidavit must include: <ul style="list-style-type: none"> ◦ Particulars to enable court to determine whether appropriate to convene class meetings of members/creditors and, if so, composition of classes ◦ Particulars to enable court to determine proposed time and place for required meetings and method of giving notice ◦ Description of purpose and effect of proposed scheme and why scheme necessary • Scheme documentation must include particulars as follows: <ul style="list-style-type: none"> ◦ Sufficient to satisfy court that scheme documentation provides member/creditor with sufficient information to make informed decision about merits of proposed scheme ◦ Explanatory memorandum of scheme documentation 	<ul style="list-style-type: none"> • Takeover offer sent to shareholders • If target company publicly listed, offer documents to be filed with relevant exchange; target company may be subject to certain rules and regulations in jurisdiction of listing • If acceptances received, within four months of offer, from holders of at least 90% in value of shares affected by offer, offeror may, at any time within two months of expiry of that four months, give notice to dissenting shareholders (a "squeeze-out notice") that their shares will be compulsorily acquired on the same terms as under the takeover offer • Dissenting shareholders have one month from the date of the squeeze-out notice date to apply to Grand Court to give reasons why shares should not be compulsorily acquired • Grand Court has discretion to make any order considered appropriate but will generally not interfere with compulsory acquisition unless dissenting shareholder treated differently from other shareholders of same class

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<p>company, consolidated company or surviving company upon consolidation or merger</p> <ul style="list-style-type: none"> Names and addresses of directors of surviving or consolidated company 	<p>must draw attention to fact that members/creditors have right to attend and be heard at hearing of petition</p>	
Approvals/Consents		
<p>Shareholders:</p> <ul style="list-style-type: none"> Plan must be authorized by special resolution of members of each constituent company and such other authorisation as may be specified in constituent company's articles of association Shareholder approval not required for merger of Cayman parent with Cayman subsidiary but, absent waiver, every shareholder entitled to copy of Plan <ul style="list-style-type: none"> For these purposes, parent is company that owns at least 90% of issued shares of each class in subsidiary that are entitled to vote <p>Creditors:</p> <ul style="list-style-type: none"> Each holder of fixed or floating security interest of constituent company must consent to Plan unless court waives consent (on application of constituent company that has issued the security) <ul style="list-style-type: none"> If secured creditor does not consent, constituent company may apply to court to waive consent requirement Secured lenders may require specific arrangement as to priorities as condition of consent <p>Regulator:</p> <ul style="list-style-type: none"> Where constituent company licensed or regulated by Cayman Islands Monetary Authority ("CIMA") Plan of merger or 	<p>Shareholders:</p> <ul style="list-style-type: none"> Scheme must be approved by relevant members of company at special meeting convened by court <ul style="list-style-type: none"> Approval must be by 75% in value of members, or each class of members, present and voting either in person or by proxy Founders or insiders who have separate interests or rights may be treated as separate and distinct class <p>Creditors:</p> <ul style="list-style-type: none"> Scheme must be approved by majority in number representing 75% in value of creditors, or each class of creditors, present and voting either in person or by proxy <p>Court:</p> <ul style="list-style-type: none"> Court must be satisfied of following before sanctioning scheme: <ul style="list-style-type: none"> Classes properly constituted Statutory voting thresholds achieved Meetings convened and held in accordance with court directions Scheme properly explained to shareholders/creditors so they can exercise informed vote Scheme is one which intelligent and honest man, who is member of relevant class and properly acting, might reasonably approve 	<p>Shareholders:</p> <ul style="list-style-type: none"> Offer can become unconditional at any threshold but is generally set at 50.1% of ordinary shareholders for control, 75% for delisting purposes or 90% of the shares to which the offer relates in order to utilise the statutory squeeze-out mechanism Squeeze out of minority requires acceptances under the takeover offer from holders of 90% of shares to which offer relates <p>Court:</p> <ul style="list-style-type: none"> When dissenting shareholders apply, Grand Court has discretion to make any order it considers appropriate but will generally not interfere with compulsory acquisition unless dissenting shareholder treated differently from other shareholders of same class

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<ul style="list-style-type: none"> consolidation must be consented to by CIMA Where constituent company licensed by CIMA, continuing company (if not licensed) or consolidated company will require license 	<ul style="list-style-type: none"> Court has power to impose conditions 	
Dissenting Shareholders		
<ul style="list-style-type: none"> Dissenting shareholder of constituent company entitled to payment of fair value of shares upon dissent to merger <ul style="list-style-type: none"> Where parties cannot agree on price, either party may file petition to determine fair value Dissenting rights generally not available if shares listed on recognized stock exchange Rights of dissenting shareholders do not delay or impede effective date but rather run concurrently and may well extend past effective date Shares of dissenting shareholders acquired by company to be cancelled and, if shares of surviving company, are available for re-issue 	<ul style="list-style-type: none"> Dissenting shareholder entitled to appear before court at the sanction application in relation to scheme and argue against it If scheme sanctioned, it is binding on all members, including those dissenting 	<ul style="list-style-type: none"> Dissenting shareholders have one month, from date notice given their shares will be purchased on squeeze out, to apply to Grand Court to give reasons why shares should not be purchased Where no application or court order to contrary, dissenting shareholders bound to transfer shares pursuant to terms of offer
Post-Approval		
<ul style="list-style-type: none"> Plan must be signed by director on behalf of each constituent company and filed with Registrar of Companies together with certificate of good standing and director's declaration or affidavit that: <ul style="list-style-type: none"> Constituent company is, and consolidated or surviving company will be, immediately after merger or consolidation, solvent Merger/ or consolidation bona fide No other similar proceeding outstanding 	<ul style="list-style-type: none"> Copy of court order approving scheme must thereafter be annexed to every copy of company's memorandum and articles of association 	<ul style="list-style-type: none"> Where notice given by offeror and no court order to contrary or application by dissenting shareholders disposed of: <ul style="list-style-type: none"> offeror to transmit copy of notice of desire to purchase shares to target company and transfer consideration representing price payable for shares Target company thereupon required to register offeror company as holder of shares Target company to pay sums received into separate bank account and hold sums on trust for persons entitled to shares

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<p>and no order to wind up constituent company</p> <ul style="list-style-type: none"> No administrator, receiver or trustee acting in respect of constituent company No scheme, order or compromise made whereby rights of creditors or constituent company suspended or restricted Assets and liabilities of constituent company at latest practicable date In case of non-surviving constituent company, that constituent company retired from fiduciary duties Copy of certificate of merger will be given to members and creditors of constituent company and published in Gazette Applicable fees Shares of dissenting shareholders acquired by company to be cancelled and, if shares of surviving company, are available for re-issue 		<p>in respect of which sums received</p> <ul style="list-style-type: none"> Where court makes order, offeror and target to comply with terms of court order
Effect of Court Sanction or Registration		
<ul style="list-style-type: none"> Certificate of merger issued by Registrar of Companies constitutes prima facie evidence of compliance with all statutory requirements In consolidation, memorandum and articles of association of consolidated company filed with Plan immediately become memorandum and articles of association of company Rights and property of each constituent company vest in surviving company Surviving company liable for all debts, contracts, obligations and 	<ul style="list-style-type: none"> Scheme of arrangement effective once copy of court order lodged with Registrar of Companies Once sanction of court given to scheme, scheme binding on all creditors/class of creditors and members/class of members who are parties, and on company Scheme cannot be altered subsequent to sanction even if shareholders and creditors acquiesce 	<ul style="list-style-type: none"> In circumstances where the Court is asked to interfere in a takeover offer, the offeror, target company and dissenting shareholders bound by terms of any Court order

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liabilities of each constituent company <ul style="list-style-type: none"> Existing claims, proceedings or rulings of each constituent company automatically continued against surviving company Registrar strikes any constituent company that is not continuing company and notice of same required to be published in Gazette Plan may specify merger not effective until specified date or occurrence of specified event 		
Timing		
<ul style="list-style-type: none"> Timing dependent on factors such as notice period specified in articles of association to call shareholders meeting Overall time from commencement of merger/consolidation to receipt of certificate of merger minimum of one month and generally in range of two to three months 	<ul style="list-style-type: none"> Court will establish time table from outset Timing dependent on directions given by court as to notice and timing of shareholders meeting and availability of court time Overall time from commencement of proceedings to final approval minimum of three months and generally in range of four to six months 	<ul style="list-style-type: none"> No maximum period for completion of offer although 90% level required to effect squeeze out must be reached within four months of posting of offer document <ul style="list-style-type: none"> Minority shareholders can be squeezed out one month after expiration of four months from beginning of offer period

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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