

Cayman Islands - Statutory Mergers - Loan Financing

Background

Privatisations by way of a Cayman Islands statutory merger are often financed by secured loans from banks. The merger process is frequently used to "take private" international Chinese businesses listed in the United States through a Cayman Islands incorporated company. Two "constituent companies" usually feature in a Cayman statutory merger; a newly incorporated Cayman company (the "**Merger Sub**") that merges with and into an existing, listed Cayman company (the "**Target**"), with the Target as the "surviving company". The Companies Law (2020 Revision) (as amended) of the Cayman Islands (the "**Companies Law**") provides that upon the merger becoming effective (the "**Merger Effective Time**"), the Merger Sub shall cease to exist and the rights, the property (including choses in action), and the business, undertaking, goodwill, benefits, immunities and privileges of each of the constituent companies, shall immediately vest in the Target and subject to any specific arrangements entered into by the relevant parties, the Target shall be liable for and subject, in the same manner as the constituent companies, to all mortgages, charges or security interests, and all contracts, obligations, claims, debts, and liabilities of each of the constituent companies.

Other Cayman companies will often feature in the structure, for example acting as borrower and/or as holding company guarantor under the finance documents.

The Companies Law sets out the process, approvals and documents required to be followed, obtained and submitted to the Registrar of Companies in the Cayman Islands (the "**Registrar**") in order to complete a statutory merger, the specific details of which are outside the scope of this memorandum. For the purposes of this memorandum, we set out below, some of the key issues that lenders should be concerned with.

Key Issues

Security

Lenders typically require security to be provided over, amongst other things:

1. shares of the Merger Sub prior to the Merger Effective Time (the "**Merger Sub Share Security**");
2. shares of the Target as the surviving company on and from the Merger Effective Time (the "**Target Share Security**");
3. other assets (such as any bank account to which completion monies have been funded) of the Merger Sub prior to the Merger Effective Time (the "**Merger Sub Asset Security**"); and
4. other assets of the Target on and from (or within a certain time period after) the Merger Effective Time (the "**Target Asset Security**").

We would note the following in relation to the above:

1. Merger Sub Share Security - as the Merger Sub ceases to exist from the Merger Effective Time, the terms of the Merger Sub Share Security would usually provide for the automatic discharge of the Merger Sub Share Security upon the occurrence of the Merger Effective Time.
2. Register of Members - we would usually recommend that the lenders require the register of members of the constituent companies to be annotated with details of the Merger Sub Share Security and Target Share Security respectively. In particular, a copy the annotated and updated register of members of the Target (reflecting the change in ownership) should be delivered to the lenders promptly after the occurrence of the Merger Effective Time.

3. Merger Sub Asset Security and Target Asset Security - given that the Target will, by operation of Cayman law, be liable for all security interests granted by the Merger Sub upon the occurrence of the Merger Effective Time, lenders can (subject to any relevant local law prohibitions or restrictions) consider requiring only the Merger Sub to grant security interests in respect of the relevant assets prior to the Merger Effective Time as the Target will be liable for the security interests granted in respect of such assets upon the occurrence of the Merger Effective Time.
4. Register of Mortgages and Charges - following the execution of the security documents relating to the Merger Sub Asset Security and the Target Asset Security, particulars of the Merger Sub Asset Security and the Target Asset Security should be recorded on the register of mortgages and charges of the Merger Sub and Target respectively. In particular, as the Target will be liable for all security interests granted by the Merger Sub upon the occurrence of the Merger Effective Time, the updated register of mortgages and charges of the Target to be provided to the lenders after the Merger Effective Time should also include particulars of all security interests granted by the Merger Sub.

Merger logistics

1. Dealing with existing secured creditors

All creditors holding a fixed or floating security interest of each of the constituent companies (if any) must have consented to the merger plan or an order of the Cayman Islands court dispensing with such consent must be obtained. If the lenders will obtain such security interests from either constituent company prior to the Merger Effective Date, then the lenders will usually be required to provide written consent to the merger plan (which may be included in one of the finance documents, such as an intercreditor agreement).

2. Shareholder and board approvals

Subject to paragraph (ii) below, the merger must be approved by special resolution of shareholders of both constituent companies (typically at least 66.67 percent of those present and voting, although more bespoke requirements may exist), as well as their respective boards of directors.

The special resolution of shareholders referred to in paragraph (i) above will not be required in circumstances where a company which owns 90 percent of the issued and outstanding shares of the Target seeks to merger with the Target.

3. Filing of the plan of merger

The plan of merger must be filed with the Registrar. It is advisable for lenders to obtain copies of the relevant documentation duly stamped as received by the Registrar. Lenders will review the accompanying documents required to be filed in the form previously approved by the lenders (with such amendments to those documents as recommended by the Registrar).

4. Obtaining the certificate of merger

The certificate of merger is a key document as it constitutes prima facie evidence that the merger is effective. It should also be noted that, in the situation where the lenders require Cayman counsel to opine on the effectiveness of the merger, Cayman counsel will require a copy of the certificate of merger before it is able to issue such an opinion. As such, the terms of the loan documentation would typically include a deadline for the delivery of the certificate of the merger.

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