

Merger of companies

Insights - 25/09/2015

Merger of companies

Mergers overview

Jersey has simple merger procedures that enable Jersey incorporated companies to merge directly with a wide range of corporate bodies including companies incorporated elsewhere. In this respect, the Companies (Jersey) Law 1991 (the Law) now allows mergers between a “relevant” Jersey company and any other Jersey incorporated body permitted to merge with a company, as well as any foreign incorporated body provided it is not an “excluded body” and such body is not prohibited from such a merger under the laws of its jurisdiction of incorporation.

A “relevant” Jersey company is any Jersey company which is not a cell company or a cell or one with unlimited shares or guarantor members.

Flexible structuring

By operation of law in Jersey all the assets and liabilities of the merging companies are carried forward into the merger company. This may have advantages for clients when structuring deals.

In particular the Law enables Jersey companies to merge with companies incorporated, among others, in the British Virgin Islands, Cayman Islands, Guernsey and Luxembourg.

In addition, there may be advantages to using a merger procedure as opposed to other typically used M&A structuring tools such as takeovers and schemes of arrangement.

For takeovers, the squeeze out provisions under Jersey law, which are broadly similar to English law, require 90% shareholder approval. The approval percentage required for a merger can be as low as 66 $\frac{2}{3}$ % (which is the minimum percentage required to pass a special resolution under Jersey law). Furthermore, there are no prescriptive requirements as to the form of special resolution

necessary or the information which must be sent to shareholders with the notice convening the EGM apart from basic documentation related to the merger such as the merger agreement and the new memorandum and articles of association.

With regards to schemes of arrangement, although schemes require a lower percentage approval (75%) than takeover offers, there is still a requirement to obtain court approval of the scheme and for the second limb of the test, that a “majority in number” approve the scheme, to be satisfied which may make a merger a more attractive route. Unless the company is insolvent, there is generally no court approval required for a merger. The merger agreement can contain any necessary terms for the merger / acquisition, including which entity will be the surviving entity.

In both cases, as a result of having no requirement to go to court or issue a prospectus or scheme document there may also be cost and time savings.

Consents required

The consent of the registrar of companies in Jersey (the “Registrar”) to any merger is required. Where any body other than a Jersey company is to be a party to a merger the consent of the Jersey Financial Services Commission (the “Commission”) will also be required.

When determining whether or not it should consent to a merger, the Commission must consider all relevant circumstances including the interests of creditors, the public and the reputation of Jersey and it has a wide discretion pursuant to the Law to request additional documentation to enable a decision to be made.

Any of the merging bodies can appeal to the Royal Court of Jersey (the “Royal Court”) within one month of a decision by the Commission on the ground that such decision was unreasonable.

If one merging body is insolvent, the Royal Court must also approve the merger. If the Royal Court is satisfied that the merger would not be unfairly prejudicial to the interests of any creditor of any of the merging bodies, it will approve it.

Completion and effect of merger

Following the completion of a merger, in cases where the merged company continues as a Jersey incorporated entity, the Registrar will issue a certificate of incorporation on merger. By operation of the Law:

- the merging companies are merged and continue as one merged company which may be either a new body/company (“newco”) or a survivor body or company (“survivorco”);
- all rights and property of each merging company before the merger become those of the merged company;

- the merged company becomes subject to all criminal and civil liabilities, contracts, debts and obligations of each merged company;
- all actions and other legal proceedings which were pending against each merged company continue; and
- each merged company, except for any survivorco, shall cease to be incorporated.

Merger process

Every merger which is not an internal group merger between subsidiaries and/or a parent company requires approval of a written merger agreement by the shareholders of each merging company. The merger agreement governs the terms of the merger.

The directors of each merging company must resolve that, in their opinion, the merger is in the best interests of the merging company and must each sign a certificate confirming the solvency of such company.

Where a company is insolvent and the directors cannot make the solvency certification, they are required to certify their belief that the Royal Court will permit the merger on the ground that it would not be unfairly prejudicial to the interests of any creditor of any of the merging companies (as well as making an application to the Royal Court).

Merger agreement

There are no restrictions on what may go into the merger agreement and it need not be very detailed but must include:

- whether the merged body will be a newco or a survivorco;
- the memorandum and articles of association (“M&A”) of a newco (or any amendments to the M&A of a survivorco);
- details of proposed directors of the newco (or of any board changes of the survivorco);
- details of the arrangements necessary to complete the merger and provide for the management of the merged body;
- details of any payment to be made to a director or member of a merging company;
- if relevant, the manner in which the securities of each merging company will be converted into securities of the newly merged company or alternatively, confirmation of what the holders will instead receive, and how and when they will receive it; and
- the cancellation of any shares of a merging body held by or on behalf of another merging

company.

The merger agreement may also provide for circumstances in which the merger may be terminated prior to its completion.

Each member must also be informed that they may object to the merger within 21 days of the passing of the special resolution approving the merger agreement. Objection is by application to the Royal Court for an order that the merger would unfairly prejudice the member's interests (provided such member has not previously voted in favour of the merger).

Parent / subsidiary mergers

In the case of any merger between parent and subsidiary:

- the shares of each merging subsidiary are cancelled without any repayment of capital;
- any changes to the M&A of the parent company to take effect on the merger should be specified in the special resolution approving the merger;
- no securities shall be issued and no assets distributed by the merged company in connection with the merger; and
- the capital accounts of each merging subsidiary are to be added to the capital accounts of the parent company.

Mergers of subsidiaries

In the case of any merger only between subsidiaries of the same parent:

- the shares of all merging companies, except the survivorco, shall be cancelled without any repayment of capital;
- any changes to the M&A of the survivorco to take effect on the merger should be specified in the special resolution to approve the merger;
- the issued share capital of the non-continuing companies shall be added to that of the surviving company; and
- the directors of the survivorco should be stated in the special resolution.

The merging companies may elect which company will be the survivorco or whether the merged company will be an entirely new entity.

Notice to creditors and registrar consent

Within 21 days of the approval of a merger by its members, each merging company must also give written notice of the proposed merger to all creditors with claims exceeding £5,000 (of whom the directors are aware after making reasonable enquiries) and also otherwise publish such notice as a newspaper advertisement.

Where the merging company is solvent, the notice must state that the creditor has the right to object and may give notice that it objects to the merger to the company within 21 days of the date of publication of the notice and has a further 21 days following such objection to apply to the Royal Court for any order the Royal Court thinks fit in the circumstances, including restraining the merger from proceeding (unless such creditor's claim has been discharged).

Following the expiration of such notice period, provided the directors have complied with the relevant merger provisions of the Law and no insolvent company is involved in the merger, the merging companies can make the application to merge to the Registrar who will usually take 5 - 10 days to process the application.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

Meet the Author



Raulin Amy

Partner

Jersey

E: rauln.amy@ogier.com

T: [+44 1534 514239](tel:+441534514239)

Key Contacts



Simon Dinning

Partner

Jersey

London

E: simon.dinning@ogier.com

T: [+44 1534 514251](tel:+441534514251)



Nathan Powell

Partner □□□

Hong Kong

E: nathan.powell@ogier.com

T: [+852 3656 6054](tel:+85236566054)

Related Services

Corporate