



Bermuda amalgamations and mergers

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1 Introduction

The Companies Act 1981 of Bermuda (the Act) provides procedures by which Bermuda companies may amalgamate or merge both with other Bermuda companies and with companies incorporated in foreign jurisdictions. Given the considerable overlap in the process of effecting an amalgamation or a merger, this memorandum addresses both procedures. The key difference between an amalgamation and a merger is that in an amalgamation two or more companies amalgamate and continue as one company, whereas in a merger two or more companies merge and their undertaking, property and liabilities vest in one of the companies as the surviving company. The choice between procedures will largely be driven by onshore structuring considerations.

2 Scope of memorandum

This memorandum outlines the steps involved in amalgamation and merger procedures under Bermuda law involving Bermuda exempted companies¹, either between themselves or with foreign corporations².

The potential amalgamation and merger scenarios addressed herein are:

- One or more Bermuda exempted companies amalgamating or merging with each other;
- One or more Bermuda exempted companies amalgamating or merging with a foreign corporation and continuing as a Bermuda exempted company; and
- One or more Bermuda entities amalgamating with a foreign corporation and continuing as a foreign corporation.

In the first scenario, the resulting entity will, naturally, be a Bermuda company. In the second and third scenarios, where a Bermuda company amalgamates or merges with a foreign corporation, the resulting entity may be either a Bermuda company or a foreign corporation. Different steps are involved depending on whether the amalgamation or merger involves only Bermuda companies or also involves foreign corporations and whether the amalgamated or surviving company is to be a Bermuda company or a foreign corporation. This memorandum addresses each of the foregoing scenarios.

3 Scenario 1: amalgamation or merger of Bermuda companies and continuation as a Bermuda company

Except in the case of a short form amalgamation or merger (addressed below), the following are required:

- An amalgamation or merger agreement (Agreement)
- Notice to the shareholders of a meeting to approve the Agreement (Notice)
- Shareholder approval of the Agreement (Shareholder Approval), and
- Registration in Bermuda of the amalgamated or surviving company (Registration). The application for Registration will include, among other things, the payment of the prescribed fee³ (Prescribed Fee) and the submission of a statutory declaration (Statutory Declaration).

¹ Subsequent references herein to “Bermuda companies” will mean only Bermuda exempted companies.

² Generally, a local company is a company required to be at least 60% owned and controlled by Bermudians, whereas an exempted company is not subject to requirements for Bermudian ownership or control. There are a number of different considerations that apply when one of the amalgamating or merging companies is a local company which are beyond the scope of this memorandum.

³ Fees are prescribed periodically in regulations made pursuant to the Government Fees Act 1965.

3.1 The Agreement

The Agreement sets out the terms of the amalgamation or merger and must include certain provisions prescribed by the Act. The prescribed provisions speak to matters such as the amalgamated or surviving company's governing documents, management and operation of the amalgamated or surviving company and the method for converting shares of the amalgamating or merging companies into shares of the amalgamated or surviving company or, if any shares are not to be so converted, the amount of money or other securities the shareholders are to receive.

The Agreement is typically a succinct Agreement containing what is required by the Act. It is normally the case that a more detailed agreement to amalgamate or merge is initially entered into among the parties setting out the substantive terms upon which the parties agree to amalgamate or merge.

3.2 Notice

The Act prescribes certain requirements for the Notice. In particular, the Notice must either include or be accompanied by a copy of the Agreement or a summary thereof and state the fair value of the shares of the company. The Notice must also inform the shareholders that any shareholder who dissents in approving the amalgamation agreement is entitled to be paid the fair value of his shares as set out in the notice.

3.3 Shareholder Approval

The Agreement is to be submitted to the shareholders for Shareholder Approval. Every shareholder, whether or not their shares ordinarily carry voting rights, is entitled to vote on the Agreement. Further, a class vote is required where the Agreement contains a provisions constituting a variation of rights of that class. Approval of an Agreement requires, unless the bye-laws of the relevant company provide otherwise, approval of three-fourths of those voting at a meeting where the quorum is two persons who together hold or represent at least one-third of the shares of the company or the relevant class.

3.4 Statutory Declaration

A Statutory Declaration is to be made by an officer of each amalgamating or merging company as to the officer's reasonable belief that:

- The company is and the amalgamated or surviving company will be able to pay its liabilities as they become due
- The realizable value of the amalgamated or surviving company's assets will not be less than the aggregate of its liabilities and the issued share capital of all share classes, and either
- No creditor will be prejudiced by the amalgamation or merger, or
- Adequate notice has been given to all known creditors and no creditor has objected on grounds which are not frivolous or vexatious.

"Adequate notice" requires written notice given to each known creditor of a claim in excess of \$1,000 and a notice published in an appointed newspaper of the company's intention to amalgamate or merge and informing creditors that they may object within 30 days of the notice.

3.5 Registration

An application must be made to the Registrar of Companies in Bermuda for the Registration of the amalgamated or merged company. Such application is to be accompanied by:

- A certified copy of the Shareholder Resolutions
- The registered address of the amalgamated or surviving company
- The memorandum of association of the amalgamated or surviving company

- A statement confirming whether the company is to be registered as an amalgamated company pursuant to an amalgamation or as a surviving company pursuant to a merger,
- The Statutory Declarations, and
- The Prescribed Fee.

4 Scenario 2: amalgamation or merger of Bermuda and foreign corporations and continuation as a Bermuda company

As with Scenario 1, an Agreement, Notice, Shareholder Approval, Statutory Declaration, Registration and payment of the Prescribed Fee are required for the amalgamation or merger of Bermuda companies with a foreign corporation and their continuation as a Bermuda company, except in the case of a short form amalgamation. In addition, the foreign corporation must obtain all authorizations required under the laws of its jurisdiction of incorporation to permit it to amalgamate or merge and continue as a Bermuda company and such authorizations are to be submitted to the Registrar of Companies.

5 Scenario 3: amalgamation or merger of Bermuda companies and foreign corporations and continuation as a foreign corporation

Although the amalgamation or merger of Bermuda companies with a foreign corporation and their continuation (or the surviving company's continuation) as a foreign corporation has similar requirements to the other two scenarios, such as an Agreement and (in respect of the Bermuda entities only) a Notice, Shareholder Approval and Statutory Declaration, there are additional steps and documentation where a Bermuda company or a surviving company will continue as a foreign corporation.

As a preliminary matter, a Bermuda company may only amalgamate and continue as a foreign corporation, or merge so that the surviving company continues as a foreign corporation, if the foreign jurisdiction is an "appointed jurisdiction"⁴ or approved by the Minister. The foreign corporation must obtain all necessary authorizations from its jurisdiction of incorporation and must, within three months of the effective date of the amalgamation or merger, advertise in a national newspaper of its jurisdiction intention to amalgamate or merge and continue in that jurisdiction.

The Bermuda company(ies) must similarly advertise but in an appointed newspaper in Bermuda, execute a deed poll providing for service of legal process on the company once the amalgamation or merger is effective and file a notice (Notice) of its intention to so amalgamate or merge with the Registrar of Companies. Each of the directors of the Bermuda companies must execute a deed poll for the purpose of service of legal process on them after the effectiveness of the amalgamation or merger (together with the deed poll of the Bermuda company(ies), the Deed Polls). The Notice must contain certain prescribed information and be accompanied by a copy of the Statutory Declaration and the Deed Polls as well as the Prescribed Fee. Lastly, within 30 days of the date of certificate of amalgamation or merger by the relevant authority of the foreign jurisdiction (or other evidence of amalgamation or merger), such certificate is to be filed with the Registrar of Companies in Bermuda.

⁴ An appointed jurisdiction is one which has been so designated by the Minister in accordance with Section 2(10) of the Act.

6 Short form amalgamation or merger

A simplified approach to amalgamations and mergers can be undertaken among related companies in two scenarios. The first scenario is where a holding company and one or more of its wholly-owned subsidiaries propose to amalgamate or merge and the second scenario is where two or more of wholly-owned subsidiaries of the same holding company propose to amalgamate or merge. A short form amalgamation or merger dispenses with the requirements to have an Agreement and Shareholder Approval. However, the resolutions approving the procedure must approve certain matters, such as that the shares of certain companies will be cancelled without return of capital and the constitutional documents of the amalgamated or surviving company will be the same as those of the holding company, the company the shares of which were not cancelled or the surviving company, as the case may be.

It is possible to combine the authorized share capital of the amalgamating or merging companies.

7 Appraisal rights

Any shareholder who did not vote in favour of the Agreement and who is not satisfied that he has been offered fair value for his shares may, within one month of the notice of the meeting to approve the Agreement, apply to the court to have the fair value of his shares appraised. An amalgamation or merger may proceed notwithstanding that an appraisal action has been brought. If the court determines that the fair value is higher than that offered by the amalgamating or merging company in the Notice and the amalgamation has not yet become effective, the company may, within 30 days of the appraisal, either pay that higher amount to the dissenting shareholder or terminate the amalgamation or merger agreement. If the amalgamation or merger has become effective, the amalgamated company must pay the difference within 30 days of such appraisal.

8 Effect of amalgamation or merger

The effective date of an amalgamation or merger is the date shown in the certificate issued in respect thereof.

On the effective date of an amalgamation, the property and liabilities of each amalgamating company become the property and liabilities of the amalgamated company. On the effective date of a merger, property and liabilities of the merging companies vest in the surviving and the surviving company continues to be liable for the obligations of each merging company.

In both an amalgamation and a merger, existing actions and claims of or against an amalgamating or merging company are unaffected by the amalgamation or merger and may be continued to be prosecuted by or against the amalgamated or surviving company. Similarly, any judgment in favour of or against an amalgamating or merging company may be enforced by or against the amalgamated or surviving company. The certificate of amalgamation or merger is deemed to be the certificate of incorporation of the amalgamated or surviving company. (However, the date of incorporation of a company remains its original date of incorporation.) However, in a merger alone, each Bermuda registered merging company that is not the surviving company will be struck off the Register of Companies.

Further information

To find out more about our services and expertise, and key contacts, go to: [kennedyslaw.com/bermuda](https://www.kennedyslaw.com/bermuda)

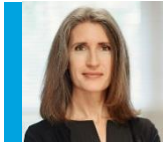
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