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AMALGAMATION OF SINGAPORE COMPANIES BY OPERATION OF LAW

Amalgamation

Corporate amalgamation is a concept that provides for the fusion of two or more companies into one amalgamated company which will assume all of the assets and liabilities of the amalgamating companies. The Companies (Amendment) Act 2005 introduced a number of important changes to the Singapore Companies Act (Chapter 50, 1994 Revised Edition) (the "**Act**") including two new schemes to facilitate the combination of companies: 'standard amalgamation' and 'short form amalgamation'.

Prior to the amendment of the Act, if two or more companies sought to combine this could only be effected through a scheme of arrangement (for which approval of the Courts is required) or a share purchase or asset transfer transaction. The statutory amalgamation schemes, however, do not require the sanction of the Courts and can be effected by the passing of a special resolution of the shareholders of each combining company approving the amalgamation. This article provides a summary of the fundamental features and processes of the statutory amalgamation schemes.

Definition and Effect

Amalgamation is a process whereby two or more companies are combined so that the property, rights, privileges, liabilities and obligations of the amalgamating (discontinuing) companies are transferred to, and vest in, one amalgamated (either new or continuing) company by 'operation of law' (i.e. merely by the application of the relevant statutory rules and not through agreement or court order). The shareholders in the discontinuing corporation(s) will become shareholders in the amalgamated company.

Amalgamation will also affect any legal proceedings being undertaken by or against any of the amalgamating companies. Upon the amalgamation, any such proceedings may be continued by or against the amalgamated company and any conviction, judgement or order in favour of or against the any of the amalgamating companies may be enforced by or against the amalgamated company (sections 215G(e) and (f) of the Act).

Under the standard form amalgamation scheme any two or more companies may combine and continue as one entity. Short form amalgamation is an abbreviated form of the more comprehensive standard procedure and is available only for amalgamation between:

(i) a company and one or more of its wholly owned subsidiaries; or
(ii) two or more wholly owned subsidiaries of the same parent.

Under both schemes the parties are free to choose, upon amalgamation, for one of the amalgamating companies to be the amalgamated company or to form a new company for that purpose.

Short Form Amalgamation

Section 215D of the Act dictates the processes that govern short form amalgamation. There are a number of procedural steps to be completed, by both the board and members of an amalgamating company, in order to facilitate a successful consolidation.

Amalgamation Proposal

It is a requirement under section 215B of the Act that all amalgamating companies must produce a proposal (an "**Amalgamation Proposal**") which, amongst other things, sets out:

(i) the terms and conditions of the proposed amalgamation;
(ii) the proposed share structure of the resulting amalgamated company;
(iii) the consideration that the shareholders of an amalgamating company are to receive if their shares are not to be converted into shares of the amalgamated company;
(iv) a copy of the proposed memorandum of the amalgamated company; and
(v) the details of any payment to be made to any member or director of an amalgamating company (other than in accordance with (iv)).

Board Formalities

The board of each of the amalgamating companies must pass a resolution to convene a general meeting so that their members may approve, by special resolution, the Amalgamation Proposal.
Each board of directors must provide written notice, not less than 21 days before the general meeting, of the proposed amalgamation to every secured creditor of their company and must produce a 'solvency statement', in the form of a statutory declaration, which provides that:

(i) the resulting amalgamated company will be able to pay its debts as they fall due during the period of 12 months immediately after the effective date of the amalgamation; and
(ii) the value of the amalgamated company's assets will not be less than the value of its liabilities.

Every director who votes in favour the making solvency statement must sign a declaration stating that, in his/her opinion, the solvency tests have been satisfied and the grounds for that opinion.

Member Formalities

The Amalgamation Proposal must be approved by the members of each of the amalgamating companies who must pass a special resolution to amalgamate on the basis that:

(i) the shares of each amalgamating company (other than the amalgamating company that is intended to form the amalgamated company, if applicable) will be cancelled without any payment or any other consideration;
(ii) the memorandum of the amalgamated company will be the same as the amalgamating companies;
(iii) the directors of the amalgamating companies are satisfied that the amalgamated company will be able to pay its debts as they fall due during the period of 12 months immediately after the effective date of amalgamation; and
(iv) the directors of the amalgamated company are identified in the special resolution.

Regulatory Authorisation

Once the special resolutions authorising the Amalgamation Proposal have been passed by the amalgamating companies, application can be made to the Singapore Accounting and Corporate Regulatory Authority ("**ACRA**") for authorisation of the amalgamation. Application is made to ACRA by way of submission of:

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(i) the approved Amalgamation Proposals of the companies to be combined;
(ii) a declaration signed by the directors of each amalgamating company stating that the amalgamation has been approved in accordance with the Act; and
(iii) the memorandum of the amalgamating company.

Where the amalgamated company is to be a new company, or the Amalgamation Proposal provides for a change of the name of the amalgamated company, a copy of any notice or other documentary evidence that the name which is proposed to be used or registered has been reserved must also be submitted to ACRA.
Upon receipt of the relevant documentation and fees, ACRA will issue a notice of amalgamation, together with a notice of incorporation if a new company is to be formed for the purpose of amalgamation. The notice will specify the date on which the amalgamation will take legal effect. On that date all property, rights, privileges, liabilities, obligations, orders and judgements will be transferred and vest in the amalgamated company. On the same date, the shares and rights of the members of the amalgamating company will be converted into shares and rights of the amalgamated company as provided for in the Amalgamation Proposal.

Standard Form Amalgamation

The standard amalgamation procedure is identical the short form procedure except that there are a number of additional requirements that must be satisfied by the directors of each amalgamating company and, in order to protect the rights of minority shareholders, additional approvals that must be obtained.

Additional Board Formalities

Prior to the holding of the required general meetings of the amalgamating companies, each board of directors must, in accordance with section 215C(1) of the Act:

(i) resolve that the proposed amalgamation is in the best interest of the amalgamating company. Every director that votes in favour of this resolution must sign a declaration stating the grounds for that opinion;
(ii) make a solvency statement in relation to their company that, at the date thereof, there is no ground on which that company could then be found to be unable to pay its debts and that the value of that company's assets is not less than the value of its liabilities;
(iii) send to every member of their company, at least 21 days prior to the general meeting:
    (a) a copy of the Amalgamation Proposal;
    (b) a copy of the declarations, as stated in (i) above, given by the directors;
    (c) a statement of any material interests of the directors; and
    (d) such further information as may be necessary to enable a reasonable member of that amalgamating company to understand the nature and implications of the proposed amalgamation.
(iv) send to every creditor of their company, at least 21 days prior to the general meeting, a copy of the Amalgamation Proposal; and
(v) cause to be published in at least one daily English newspaper circulating generally in Singapore a notice of the proposed amalgamation informing members and creditors of their right to inspect, and receive a free copy of, the Amalgamation Proposal.

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Minority Shareholder Protection

Section 215C(1)(b) of the Act states that the Amalgamation Proposal must be approved by any "*other person, where any provision in the amalgamation proposal would, if contained in any amendment to the memorandum of an amalgamating company or otherwise proposed in relation to that company, require the approval of that person*". This section serves to protect the different classes of shareholder (if applicable) where an amalgamating company's memorandum contains a variation clause providing that the class rights of any shareholder can only be altered with the consent of the requisite percentage of votes stipulated for that matter. Accordingly, the consent of any minority shareholders will be required where an Amalgamation Proposal requires the alteration or elimination of that class of shares.

Employees

Section 18A(1) of the Employment Act (Chapter 91, 1996 Revised Edition) (the "**Employment Act**") provides that a transfer of an undertaking will not operate to terminate the contract of service of any person employed by therein and that such contracts of service shall have effect after the transfer as if they had originally made between the transferee and the employees.
The definition of a transfer of undertaking in the Employment Act, (being where an "*undertaking…or part thereof is transferred from one person to another*" (section 18A(1)), encompasses the employees of an amalgamating company (sections 18A(13) and (14) of the Employment Act). Consequently, such employees will be deemed to be employed, upon amalgamation, by the amalgamated company provided that their contracts of employment do not include a change of control clause which would furnish them with option of terminating their employment upon a change of control.

Intervention by the Courts

A creditor or member of an amalgamating company, or any other person to whom such a company owes an obligation, may apply to the High Court for relief (before the effective date of the amalgamation) on the basis that the terms of the Amalgamation Proposal will result in that person being unfairly prejudiced. In such circumstances it is open to the Court to make any order that it thinks fit in relation to the Amalgamation Proposal including that it be modified or not given effect (section 215H of the Act).

Conclusion

In contrast with other consolidation mechanisms, such as schemes of arrangement, the statutory amalgamation procedure avoids many of the procedural complications which would otherwise result from the transfer of assets and liabilities from one company to another. Schemes of arrangement, for example, require that the coordinating party obtain leave from the Courts to convene class meetings to sanction the scheme.

Conversely, the statutory amalgamation schemes need only to be approved by special resolution of the shareholders of the conjoining companies. In the case of a group restructuring, the use of the short form amalgamation mechanism has the added benefit allowing the group companies to avoid the obligation to pay stamp duty upon the transfer of shares amongst themselves.

Nevertheless, an amalgamation may trigger covenants against disposal and raise conflict of law issues in relation to assets and liabilities that are governed by foreign laws. A comprehensive due diligence exercise should therefore form an in integral part of any amalgamation undertaking.