Part 13

Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-back

(Amended E.R. 1 of 2013)

(Format changes—E.R. 1 of 2013)

(Court-free procedure)

Division 3—Amalgamation of Companies within Group

678. Interpretation

(1) In this Division, a company is a wholly owned subsidiary of another body corporate if it has no members except— *(Amended 35 of 2018 s. 69)*

(a) that other body corporate;

(b) a nominee of that other body corporate;

(c) a wholly owned subsidiary of that other body corporate; or

(d) a nominee of that subsidiary. *(Amended 35 of 2018 s. 69)*

(2) A cancellation of shares under this Division is not a reduction of share capital for the purposes of Part 5.

(3) For the purposes of this Division, a resolution approving an amalgamation mentioned in section 680(1) or 681(1) is an amalgamation proposal that has been approved.

679. Solvency statement

(1) In this Division, a reference to a solvency statement made by the directors of an amalgamating company is a reference to a statement made before the time specified in subsection (2) that—

(a) in the directors' opinion—

(i) as at the date of the statement, there is no ground on which the amalgamating company could be found to be unable to pay its debts; and

(ii) the amalgamated company will be able to pay its debts as they fall due during the period of 12 months immediately after the date on which the amalgamation is to become effective; and

(b) as at the date of the statement—

(i) none of the following exists—

(A) any floating charge created by the amalgamating company;

(B) any other security created by the amalgamating company over a class of assets, to any of which the security interest has not attached; or

(ii) there exists such a floating charge or other security, and each person entitled to the charge or security has consented in writing to the amalgamation proposal.

(2) The time specified for the purposes of subsection (1) is—

(a) if the amalgamation is to be approved by a resolution passed on a poll at a general meeting, the date of the meeting; or

(b) if the amalgamation is to be approved by a written resolution, the circulation date of the resolution.

(3) In forming an opinion for the purposes of subsection (1)(a)(ii), the directors must take into account all the liabilities of the amalgamated company (including contingent and prospective liabilities).

(4) In subsection (2)(b)—

circulation date (傳閱日期) has the meaning given by section 547(1).

680. Vertical amalgamation

(1) A company (***amalgamating holding company***), and one or more of its wholly owned subsidiaries, may amalgamate, and continue, as one company if—

(a) the members of the amalgamating holding company approve the amalgamation on the terms specified in subsection (2); and

(b) the members of each of the amalgamating subsidiaries approve the amalgamation on the terms specified in subsection (2).

(2) The terms are—

(a) that the shares of each of the amalgamating subsidiaries will be cancelled without payment or other consideration;

(b) that the articles of the amalgamated company will be the same as the articles of the amalgamating holding company;

(c) that the directors of each amalgamating company—

(i) are satisfied that, as at the date of the solvency statement made by them, there is no ground on which the amalgamating company could be found to be unable to pay its debts; and

(ii) after taking into account all the liabilities of the amalgamated company (including contingent and prospective liabilities), 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 date on which the amalgamation is to become effective;

(d) that the directors of each amalgamating company have confirmed that as at the date of the solvency statement made by them—

(i) none of the following exists—

(A) any floating charge created by the amalgamating company;

(B) any other security created by the amalgamating company over a class of assets, to any of which the security interest has not attached; or

(ii) there exists such a floating charge or other security, and each person entitled to the charge or security has consented in writing to the amalgamation proposal;

(e) that the person or persons named in the resolution will be the director or directors of the amalgamated company.

(3) An approval for the purposes of subsection (1)(a) must be obtained by a special resolution of the company passed on a poll at a general meeting but not by a written resolution.

(4) An approval for the purposes of subsection (1)(b) must be obtained by a special resolution of the company passed on a poll at a general meeting or by a written resolution.

(5) This section does not apply unless each amalgamating company is a company limited by shares.

681. Horizontal amalgamation

(1) Two or more of the wholly owned subsidiaries of a body corporate may amalgamate, and continue, as one company if the members of each amalgamating company approve the amalgamation on the terms specified in subsection (2). *(Amended 35 of 2018 s. 70)*

(2) The terms are—

(a) that the shares of all but one of the amalgamating companies will be cancelled without payment or other consideration;

(b) that the articles of the amalgamated company will be the same as the articles of the amalgamating company whose shares are not cancelled;

(c) that the directors of each amalgamating company—

(i) are satisfied that, as at the date of the solvency statement made by them, there is no ground on which the amalgamating company could be found to be unable to pay its debts; and

(ii) after taking into account all the liabilities of the amalgamated company (including contingent and prospective liabilities), 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 date on which the amalgamation is to become effective;

(d) that the directors of each amalgamating company have confirmed that as at the date of the solvency statement made by them—

(i) none of the following exists—

(A) any floating charge created by the amalgamating company;

(B) any other security created by the amalgamating company over a class of assets, to any of which the security interest has not attached; or

(ii) there exists such a floating charge or other security, and each person entitled to the charge or security has consented in writing to the amalgamation proposal;

(e) that the person or persons named in the resolution will be the director or directors of the amalgamated company.

(3) An approval for the purposes of subsection (1) must be obtained by a special resolution of the amalgamating company passed on a poll at a general meeting or by a written resolution.

(4) This section does not apply unless each amalgamating company is a company limited by shares.

682. Directors of amalgamating company must notify secured creditors of proposed amalgamation

(1) The directors of each amalgamating company under section 680 or 681 must comply with subsection (2)—

(a) if the amalgamation is to be approved by a resolution passed on a poll at a general meeting, at least 21 days before the date of the meeting; or

(b) if the amalgamation is to be approved by a written resolution, on or before the circulation date of the resolution.

(2) Those directors—

(a) must give written notice of the proposed amalgamation to every secured creditor of the amalgamating company; and

(b) must publish notice of the proposed amalgamation in an English language newspaper, and a Chinese language newspaper, circulating generally in Hong Kong.

(3) If the directors of an amalgamating company contravene subsection (1), each of them commits an offence and is liable to a fine at level 3.

(4) In subsection (1)(b)—

circulation date (傳閱日期) has the meaning given by section 547(1).

683. Director of amalgamating company must issue certificate on solvency statement

(1) Every director of the amalgamating company who votes in favour of making a solvency statement must issue a certificate—

(a) stating—

(i) that, in the director's opinion, the conditions specified in section 679(1)(a)(i) and (ii) are satisfied; and

(ii) the grounds for that opinion; and

(b) stating that the condition specified in section 679(1)(b) is satisfied.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine at level 4.

(3) A director of the amalgamating company commits an offence if the director votes in favour of making a solvency statement, or otherwise causes a solvency statement to be made, without having reasonable grounds for the opinion and fact expressed in the statement.

(4) A person who commits an offence under subsection (3) is liable—

(a) on conviction on indictment to a fine of $150,000 and to imprisonment for 2 years; or

(b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

684. Registration of amalgamation

(1) For the purpose of effecting an amalgamation, the following documents must be delivered to the Registrar for registration within 15 days after the approval of the amalgamation proposal—

(a) the amalgamation proposal that has been approved;

(b) every certificate required by section 683(1);

(c) a certificate issued by the directors of each amalgamating company stating that the amalgamation has been approved in accordance with—

(i) this Division; and

(ii) the articles of the amalgamating company;

(d) a notice of appointment of the directors of the amalgamated company;

(e) a certificate issued by the directors, or the proposed directors, of the amalgamated company stating that where the proportion of the claims of the amalgamated company's creditors in relation to the value of that company's assets is greater than the proportion of the claims of an amalgamating company's creditors in relation to the value of that company's assets, no creditor will be prejudiced by that fact.

(2) A document mentioned in subsection (1)(a), (b), (c), (d) or (e) must be in the specified form.

(3) As soon as practicable after the documents mentioned in subsection (1) are registered, the Registrar must issue a certificate of amalgamation.

(4) A certificate of amalgamation may be issued in any form that the Registrar thinks fit.

685. Effective date of amalgamation

(1) A certificate of amalgamation issued under section 684(3) must specify a date as the effective date of the amalgamation.

(2) If an amalgamation proposal specifies a date on which the amalgamation is intended to become effective, and that date is the same as or later than the date on which the Registrar registers the documents mentioned in section 684(1), that date must be specified in the certificate of amalgamation as the effective date of the amalgamation.

(3) On the effective date of an amalgamation—

(a) the amalgamation takes effect;

(b) each amalgamating company ceases to exist as an entity separate from the amalgamated company; and

(c) the amalgamated company succeeds to all the property, rights and privileges, and all the liabilities and obligations, of each amalgamating company.

(4) On and after the effective date of an amalgamation—

(a) any proceedings pending by or against an amalgamating company may be continued by or against the amalgamated company;

(b) any conviction, ruling, order or judgment in favour of or against an amalgamating company may be enforced by or against the amalgamated company; and

(c) any agreement entered into by an amalgamating company may be enforced by or against the amalgamated company unless otherwise provided in the agreement.

(5) As soon as practicable after the effective date of an amalgamation, the Registrar must make a note of the amalgamation in the Companies Register in relation to each amalgamating company.

686. Court may intervene in amalgamation proposal in certain cases

(1) If the Court is satisfied that giving effect to an amalgamation proposal would unfairly prejudice a member or creditor of an amalgamating company or a person to whom an amalgamating company is under an obligation, it may, on application by the member, creditor or person made before the date on which the amalgamation becomes effective, make any order it thinks fit in relation to the amalgamation proposal.

(2) Without limiting subsection (1), the Court may make an order—

(a) directing that effect must not be given to the amalgamation proposal;

(b) modifying the amalgamation proposal in the manner specified in the order; or

(c) directing the amalgamating company or its directors to reconsider the amalgamation proposal or any part of that proposal.

(3) Without limiting subsection (1), the Court may also make an order directing the amalgamated company, or any other party to the proceedings, to purchase shares of a member of an amalgamating company who would be unfairly prejudiced by the amalgamation proposal.

(4) On making an application for the purposes of subsection (1), the applicant must deliver to the Registrar for registration a notice of the application in the specified form.

(5) If the Registrar receives a notice under subsection (4), he or she must withhold registration of the documents mentioned in section 684(1) unless the Court otherwise directs or the application is dismissed by the Court or is withdrawn.

(6) If an order is made under this section, every company in relation to which the order is made must deliver an office copy of the order to the Registrar for registration within 7 days after the order is made.

(7) If a company contravenes subsection (6), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.