CHAPTER 4

STATUTORY AMALGAMATION PROCEDURE

Background

4.1 Mergers and amalgamations[52] are not uncommon in Hong Kong. The reasons underlying amalgamation or other forms of corporate reorganisation are generally commercial or economic. At present, Hong Kong law does not provide for a simplified and court-free procedure for amalgamation of companies. Companies intending to amalgamate may, however, resort to the process under sections 166 to 167 of the CO which involves a court-sanctioned scheme of arrangement for companies to make provisions to attend to the interests of their creditors and/or members. The arrangement, when approved by the court, will be binding on all the parties concerned and the court has wide powers to make such orders as are necessary to secure that the amalgamation shall be fully and effectively carried out.

4.2 In practice, the use of sections 166 to 167 of the CO to effect an amalgamation is rare. Apart from the complex procedure involved and high compliance costs, the court's restrictive approach in applying the provisions may also be a disincentive.

4.3 Some common law jurisdictions such as Singapore and New Zealand[53] have adopted, in addition to a court-sanctioned procedure, a court-free statutory amalgamation procedure of corporate entities. The idea of introducing the latter option is to facilitate a streamlined amalgamation process for effecting solvent amalgamations while at the same time protecting members and creditors' rights.

Overseas Precedents

4.4 Under both the Singaporean and New Zealand models, there are two forms of court-free amalgamation procedure, one for intra-group amalgamation, being an amalgamation of a holding company with one or more of its wholly-owned subsidiaries, or an amalgamation of two or more wholly-owned subsidiaries of the same holding company (referred to as "short form amalgamation"), and the other for merger of other

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[52] Broadly speaking, a merger may be understood as a combination of two or more companies into a single company, where one survives and the other ceases to exist as a separate business entity. Amalgamation is a legal process by which the undertaking, property and liabilities of two or more companies merge and are brought under one of the original companies or a newly formed company and their shareholders become the shareholders of the new or amalgamated company.

[53] Singapore introduced its court-free amalgamation provisions on 30 January 2006 (sections 215A to 215J of the SCA). The Singaporean model was based on the New Zealand legislation (sections 219 to 226 of the NZCA) which took effect on 1 July 1994.

companies (referred to as "long form amalgamation"). The two models are broadly similar although the Singaporean model may be more stringent in certain aspects, including the protection for the stakeholders.

Long form amalgamation[54]

4.5 A long form amalgamation procedure applies where there is a proposed amalgamation of two or more companies not being of the same group of companies. It is commenced by the preparation of an amalgamation proposal setting out the terms of the amalgamation in detail and all critical information relating to it[55]. Each board of the amalgamating companies must pass a resolution opining that the amalgamation is in the best interests of the company and that the amalgamated company will be solvent. The directors who vote in favour of the resolution must also sign a declaration confirming that the relevant requirements have been satisfied[56]. In Singapore, each board of the amalgamating companies has to make a further solvency statement in relation to the respective amalgamating and amalgamated companies. If the amalgamating company is exempt from audit requirements, the solvency statement has to be in the form of a statutory declaration. If not, the statement shall either be in the form of a statutory declaration or be accompanied by a report from its auditor opining that the solvency statement is not unreasonable given all the circumstances[57].

4.6 The board must then send to the members all the relevant information as may be necessary to enable a reasonable member to understand the nature and implications of the proposed amalgamation[58]. In New Zealand, the information must also include a statement setting out the buy-out right of any dissident member[59].

4.7 Newspaper advertisement of the proposal and manner whereby it may be inspected must be posted at least a specified number of days before the meeting or before the amalgamation proposal becomes effective, and copies of the amalgamation proposal must also be sent to the secured creditors[60].

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[54] Sections 215B to 215C of the SCA; Sections 220 and 221 of the NZCA.
[55] Section 215B(2) of the SCA; Section 220 of the NZCA.
[56] Section 215C(2) and (3) of the SCA; Sections 221(1) and (2) of the NZCA.
[57] Section 215I(2)(b) of the SCA.
[58] Section 215C(4) of the SCA; Section 221(3) of the NZCA.
[59] Under section 110 of the NZCA, a shareholder has a minority buy-out right which has no equivalent in the CO or the SCA. Section 110 of the NZCA provides this right to a shareholder who has voted all his share against a resolution of shareholders in favour of exercising their power under section 106(1)(a) (concerning adoption, alteration or revocation of the companies constitution), section 106(1)(b) or section 106(1)(c) (concerning approval of majority transaction and amalgamation respectively). Accordingly, if a shareholder of an amalgamating company casts all the votes attached to his shares against an amalgamation, but the amalgamation is nevertheless approved, he has a buy-out right.
[60] Section 215C(5) of the SCA; Section 221(4) of the NZCA.

4.8 The proposal must be approved by a special resolution of members of each of the amalgamating companies at a general meeting[61]. Any creditor or dissident member may apply to the court for relief on the ground of being unfairly prejudiced[62].

4.9 The final step is to lodge the approved amalgamation proposal with the Registrar of Companies for registration, together with a declaration by the directors of the amalgamated company that no creditor will be prejudiced if that company will have a higher proportion of creditors' claims to assets than that of any of the amalgamating companies[63].

4.10 The effect of an amalgamation is that the amalgamated company succeeds to all rights, liabilities and obligations of each of the amalgamating companies[64].

Short form amalgamation[65]

4.11 In the event where the short form amalgamation procedure applies (i.e. a proposed intra-group amalgamation being either an amalgamation of a holding company with one or more of its wholly-owned subsidiaries, or an amalgamation of two or more wholly-owned subsidiaries of the same holding company), certain formal requirements under the long form procedure will be dispensed with, including the preparation of formal amalgamation proposal and some parts of the approval procedure[66].

4.12 In New Zealand, the amalgamation needs only be approved by a resolution of the board of each amalgamating company[67]. The directors voting in favour of the resolution must sign a certificate stating that they are satisfied on reasonable grounds that the amalgamated company will satisfy the solvency test immediately after the amalgamation becomes effective[68]. In Singapore, the approval must be given by a special resolution of each amalgamating company at a general meeting. The board of each company must, before the meeting, make a solvency statement in relation to the amalgamated company and every director who votes in favour of the solvency statement must sign a declaration confirming that all the relevant requirements are satisfied[69].

4.13 All secured creditors of the amalgamating companies must be notified of

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[61] Section 215C(1)(a) of the SCA; Section 221(5) of the NZCA.
[62] Section 215H of the SCA; Section 226 of the NZCA.
[63] Section 215E of the SCA; Section 223 of the NZCA.
[64] Section 215G of the SCA; Section 225 of the NZCA.
[65] Sections 215D to 215G of the SCA and Section 222 of the NZCA.
[66] Section 215D(1) and (2) of the SCA; Sections 222(1) and (2) of the NZCA.
[67] Sections 222(1), (2) and (4) of the NZCA.
[68] Section 222(5) of the NZCA.
[69] Section 215D(5) and (6) of the SCA.

the resolution in advance, though they cannot vote on it. Nevertheless, any creditor may appeal to the court if he considers himself to be unfairly prejudiced by the amalgamation[70].

Considerations

4.14 The current court-sanctioned scheme of arrangement procedure under sections 166 to 167 of the CO is both complex and costly. The introduction of a voluntary, court-free option would simplify the amalgamation process, thereby reducing business costs. The court-free procedure is particularly suitable when the proposed amalgamation is either one which is between a holding company with one or more of its wholly-owned subsidiaries or between two or more wholly-owned subsidiaries of the same holding company, or one which does not involve complex transactions, debt reorganisation or class rights issues. For amalgamations involving such complicated issues, companies should resort to the court-sanctioned procedure.

4.15 The viability of a court-free procedure depends very much on whether there are sufficient built-in measures to protect the interests of relevant stakeholders (e.g. minority shareholders and creditors) and to prevent the procedure from being abused by the management. At the same time, the procedure cannot be made overly complicated, or else it would defeat the purpose of simplifying procedure and reducing costs.

4.16 We propose to introduce a court-free amalgamation regime in Hong Kong along the lines of the Singaporean model which offers greater protection to the stakeholders, except that there would be no need for the report of the company's auditor to be provided together with the solvency statement (see paragraph 4.5). It would likely be difficult for the auditor to give what may amount to a fairness opinion without compromising his professional independence. The key elements of the proposed regime which consists of a short form procedure (for companies within the same group) and a long form procedure (for other companies) are set out in **Table A**.

4.17 One major component of the Singaporean model is to require, for the purpose of the court-free amalgamation, the board of directors to make a solvency statement in the form of a statutory statement[71] in relation to the respective amalgamating and amalgamated companies. The solvency statement is to confirm that –

(a) 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

[70] Section 215H of the SCA and Section 226 of the NZCA.
[71] Section 215J of the SCA.

which the amalgamation is to become effective; and

(b) the value of the amalgamated company's assets will not be less than that of its liabilities, including contingent liabilities.

4.18 The proposed court-free amalgamation procedure applicable for intra-group amalgamation and merger of other companies, following the Singaporean model, contains a number of measures to protect the interests of shareholders and creditors, for example:

(1) requiring the directors of each of the companies concerned to pass a resolution to confirm that the amalgamation is in the best interest of the company and make statements in relation to the solvency of the amalgamating company and the amalgamated company. It will be an offence for any director who votes in favour of or otherwise causes a solvency statement to be made to do so without having reasonable grounds for the opinion;

(2) requiring disclosure of all relevant matters to the members and notification of the proposal to the creditors not less than 21 days before the general meeting to allow them sufficient time to consider the proposal; and

(3) a remedial right of the members and creditors of the company to apply to the court for relief on the ground of being unfairly prejudiced.

4.19 We consider that there is no need to follow the New Zealand model in providing dissident members with a right to be bought-out[72]. Dissident members would usually be bought out in the negotiation process in any event. A right for minority shareholders to object and to lay an unfair prejudice claim before the court, as set out in paragraph 4.18(3), should offer sufficient protection.

[72] See footnote 59 above.

Table A **Key Elements of the Proposed Statutory Amalgamation Procedures**	
Procedure for "Long Form Amalgamation"	Procedure for "Short Form Amalgamation"
(1) A formal amalgamation proposal setting out all the relevant information to be prepared.	(1) The terms and conditions of the amalgamation must conform with those stipulated in the statute. No formal amalgamation proposal is therefore required.
(2) The board of directors of each amalgamating company to: (a) make a solvency statement in relation to the amalgamated and amalgamating company; and (b) pass a special resolution at a general meeting to approve the amalgamation.	(2) The board of directors of each amalgamating company to: (a) make a solvency statement in relation to the amalgamated company; and (b) pass a special resolution at a general meeting to approve the amalgamation. The resolution is deemed to be an amalgamation proposal that has been approved.
(3) A general meeting to be convened to consider the amalgamation proposal. All relevant information including the amalgamation proposal, copy of declarations, statement of any material interests of directors should be sent to every member of the amalgamating company not less than 21 days before the general meeting.	(3) A general meeting to be convened to consider the amalgamation.
(4) Each director of the amalgamating company, who votes in favour of the resolution, to sign a declaration that, in his opinion, all relevant requirements in relation to the amalgamation have been satisfied together with the grounds	(4) Same as the procedure for the Long Form Amalgamation.

of his opinion.	
(5) A copy of the amalgamation proposal to be sent to each secured creditor of the amalgamating company and a notice to published in the newspaper, not less than 21 days before the general meeting[73].	(5) Written notice of the proposed amalgamation to be sent to each secured creditor of the amalgamating company not less than 21 days before the general meeting.
(6) Shareholders' approval by special resolution.	(6) Same as the procedure for the Long Form Amalgamation.
(7) Any shareholder or creditor may apply to the court for relief on the ground of being unfairly prejudiced. The court may stop the proposal from coming into effect, modify it or direct it to be reconsidered by the amalgamating companies.	(7) Same as the procedure for the Long Form Amalgamation.
(8) Relevant documents to be lodged with the Registrar of Companies. Amalgamation to take effect from the date specified in the certificate of amalgamation issued by the Registrar of Companies.	(8) Same as the procedure for the Long Form Amalgamation.

Question 20
Do you consider that there is a need for Hong Kong to have a court-free statutory amalgamation procedure, in addition to the existing court-sanctioned procedure?

Question 21
If your answer to Question 20 is positive, should the court-free statutory amalgamation procedure be based on the elements outlined in Table A above? If you think that there should be alternative or additional elements, please explain.

[73] Creditors are not entitled to vote on the amalgamation proposal but they may apply to the court for relief before the amalgamation becomes effective.