



AMALGAMATIONS IN THE CAYMAN ISLANDS



Bermuda companies have been able to amalgamate for around one quarter of a century and triangular amalgamations or so called squeezeout mergers involving a bid vehicle are a common technique in takeovers or going private transactions involving Bermuda companies in many public equity markets around the world. The British Virgin Islands has long had provisions which permit a similar technique. These were described in my articles in the February 2007 and May 2007 editions of our Bulletin.

Suffice to say here that these transactions can be done in Bermuda or the British Virgin Islands without the need for the target company to effect a scheme of arrangement and hence without the need for a sanction from the Supreme Court of Bermuda or the High Court of the British Virgin Islands.

The technique is also infinitely more elegant than the somewhat cumbersome method under old English law involving a share exchange (often requiring a 90% acceptance or a traditional scheme), transfer of assets and liabilities and a winding up.

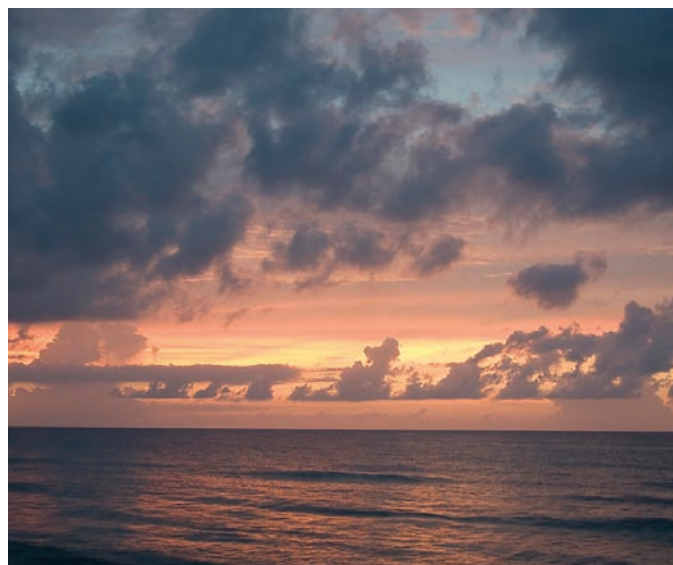
Amalgamations in the Cayman Islands are therefore to be welcomed even though they must be effected through a 'special' scheme of arrangement requiring the sanction of the Grand Court. The scheme of arrangement must have been proposed for the purpose of or in connection

with (i) the "reconstruction" or "amalgamation" of the bid vehicle and the target and (ii) the transfer of the whole or any part of the undertaking of any company concerned in the scheme. It is only in such a case that the Grand Court may then give effect to the reconstruction or amalgamation by making an order providing for:

(a) the transfer to the bid vehicle of the undertaking, property and liabilities of the target;

- (b) the continuation by or against the bid vehicle of any legal proceedings pending by or against the target;
- (c) the provisions to be made for any dissentient shareholders of the target;
- (d) the dissolution, without winding up, of the target.

It is refreshing that it has been acknowledged that the terms "reconstruction" and "amalgamation" are commercial terms and that their meanings are not exact or definite.



"What does "reconstruction" mean? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on – that would be a mere sale – but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in

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AMALGAMATIONS IN THE CAYMAN ISLANDS

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the new company or resuscitated company. Substantially the business and the persons interested must be the same. ...

Now what is an amalgamation? An amalgamation involves, I think, a different idea. There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam – a blending of two undertakings. It does not necessarily follow that the whole of the two undertakings should pass – substantially they must pass – nor need all the incorporators be parties, although substantially all must be parties. The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, but not merely the continuance of one concern. An amalgamation may take place, it seems to me, either by the transfer of undertakings A and B to a new corporation, C, or by the continuance of A and B by B upon terms that the shareholders of A shall become shareholders in B. It is not necessary that you should have a new company. You may have a continuance of one of the two companies upon the terms that the undertakings of both corporations shall substantially be merged in one corporation only.'

(Per Buckley J in *Re South African Supply and Cold Storage Co* [1904] 2 Ch 268).

In *Citizens and Graziers' Life Assurance Co Ltd v Commonwealth Life (Amalgamated) Assurances Ltd* (1934) 51 CLR 422 the High Court of Australia had to consider whether a transaction constituted an 'amalgamation' of two companies and Dixon J described the concept as follows:

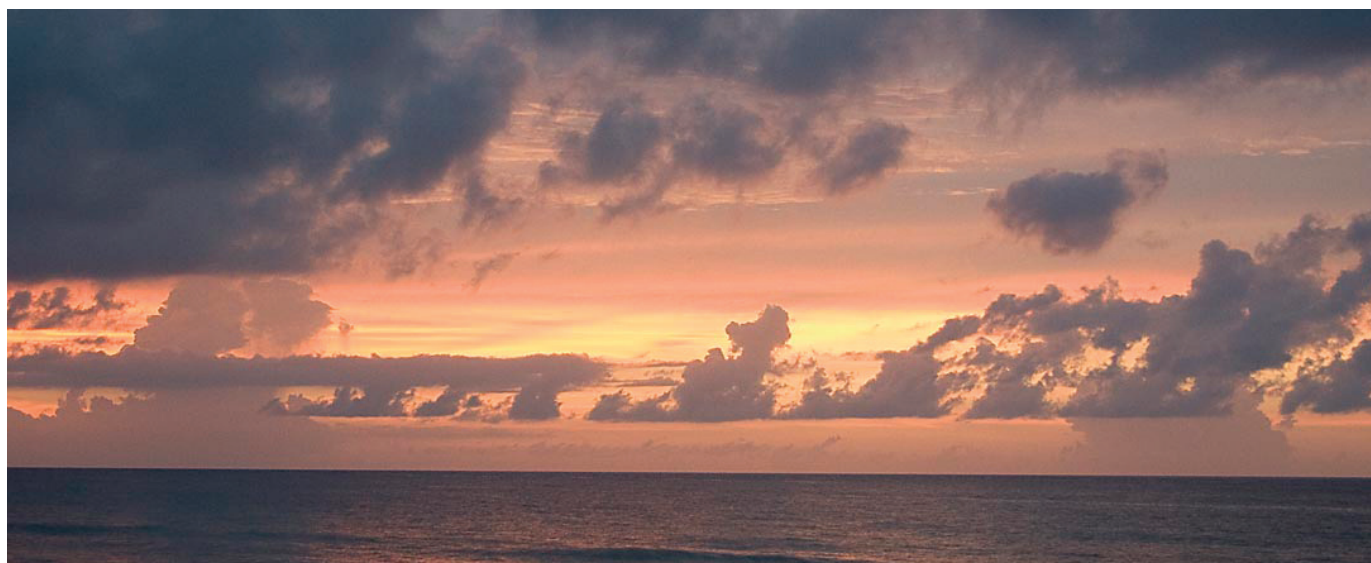
'The union of shareholders, which amalgamation involves, is, of course, not concerned with the members of the combining corporations as persons. It is the reorganization of share capital that matters. The replacement of two separate systems of share capital by one appears to be required before a union of two companies limited by shares

can justly be called an amalgamation of the companies. In the process of reorganization, classes or divisions of shares, or amount of share capital, in one or other or both of the old companies may find no representation in the one system of capital which emerges. But the substantial result must be to reduce for practical purposes two or more organizations of capital to one, and two or more incorporated companies to one. The amalgamation to which the clause in the memorandum refers is not a mere combination of businesses separately conducted, but an amalgamation of companies. There is no context to enlarge the meaning of the expression. To accomplish such an amalgamation, it seems necessary, either to consolidate the constituent elements of the old companies into a new one, or to merge in one of the old companies the constituent elements of the other. Possibly a transaction may be an amalgamation although the corporate existence of the consolidating companies, or of the merged company, may be continued for some special and definite purpose. But the continuance of two corporations under separate control, organized with their separate systems of share capital and capable of independent activities, appears to me inconsistent with an amalgamation of more than their existing enterprises.'

If, therefore, the transaction involves a "blending of two undertakings" a squeezeout merger can be effected in the Cayman Islands, but only with a court order. If the requirement for a court order has you on the back foot I would invite you to read my article on 'Move & Merge' deals in the December 2007 edition of our Bulletin.



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PRIVATE EQUITY TRENDS IN THE MIDDLE EAST



The Middle East has traditionally been viewed as a source, rather than a target of investment capital. Times have changed. Private equity is now an increasing source for business funding in the Middle East.

Private equity funding to the Middle East has increased in the last four years due to a surge in oil prices, a local real estate boom, the growing sophistication of Middle Eastern investors and Western institutions seeking new emerging markets. Industries and infrastructure are rapidly privatising and some experts estimate that some US\$300 billion to US\$400 billion in assets in the region, from roads to banks to oil pipelines, will be turned over to private hands in coming years. According to Zawya, a leading Middle East business information provider, private equity funds devoted to investing in the Middle East and North Africa grew from US\$316 million in 2004 to US\$5.2 billion in 2006. Private equity funds formed in the Middle East with commitments over US\$1 billion, and even US\$2 billion when targeting the Middle East, North Africa and South Asia (MENASA) region, are now part of the fundraising landscape with a broadened investor base including European and American capital.

A number of crossroads have been reached in the Middle East that private equity investors will find attractive. First, Middle Eastern countries, including the Gulf cooperation countries (GCC), have undertaken to liberalise their economies and are starting to deregulate certain industries. Second, there is a growing number of mid-market owners willing to embrace external expertise and accept private capital in order to expand their businesses while family groups are wishing to exit and monetise their life time's work. Third, Middle Eastern businesses are slowly becoming accustomed to transparency and due diligence requests and are adopting more transparent corporate structures (although they still need to improve their management information systems and corporate governance practices). Fourth, exit strategies are increasing. A public market listing is now viable in the Middle East due to the creation of the Dubai International Financial Exchange (DIFX, which recently acquired a 20% stake in Nasdaq) which should create a regional capital market with enough depth and liquidity in the forthcoming years for successful exits. There is also a growing segment of readily available buyers such as trade buyers and secondary buyers, e.g. other private equity buyers such as deep-pocketed local sovereign wealth funds, local and international private equity funds.

Private equity funds are divided into two broad categories in the Middle East: venture funds and buyout funds. Venture funds invest in early-stage or expanding businesses that have generally limited access to other source of funding. Buyout or leveraged buyout funds tend to invest in more mature businesses, usually taking a controlling interest

and leveraging their equity investment with third-party debt. Leveraged buyouts in the Middle East have not generally used the very high leverage ratios known to Western leveraged buyout ("LBO") financings closed in the last three years. Although both private equity funds and corporates in the Middle East have become more comfortable with using debt, many Middle Eastern funds are just buyout funds which use little or no leverage and seek to achieve their returns by focusing on underlying profitability growth of the companies they invest in. These funds have still generated attractive returns which are comparable to Western LBO fund returns.



The main opportunities in the Middle East for private equity funds are infrastructure assets including greenfield projects, privatisations, private companies and real estate. Unlike in the West, there are very few public companies to acquire. Most Middle Eastern private equity funds operate on a cross-border basis on the fund raising side as well as on the investment side. In addition, private equity, in particular venture capital funds, lends itself nicely to Shari'ah compliant investing where investors benefit from the growth of companies as partners rather than creditors. Many local asset managers and a growing number of Western asset managers are offering Shari'ah compliant alternative assets funds. Shari'ah compliant funds are increasingly attractive to Western investors for several reasons including the search for portfolio diversification, ethical investing and a more limited exposure to debt.

The private equity market has been supported by the arrival in the GCC in the last couple of years of many leading international investment banks and law firms. With respect to fund structures, the vehicle of choice in the Middle East will generally be a limited partnership established in the Cayman Islands or the British Virgin Islands although private equity funds may also be structured as companies or unit trusts and Bermuda

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PRIVATE EQUITY TRENDS IN THE MIDDLE EAST

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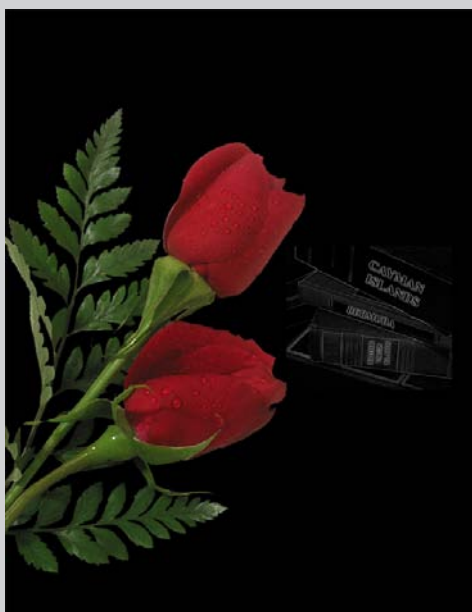
remains a popular jurisdiction. The legal regimes of these jurisdictions, based on English common law, are investor friendly and offer light but firm regulations with international standards. International and Middle Eastern private equity managers and investors are satisfied with the corporate governance features of entities established in these jurisdictions. Entities formed in the Cayman Islands, British Virgin Islands and Bermuda are being used at the fund formation and portfolio acquisition level as well as the co-investment side for both Shari'ah and conventionally structured transactions. Fund formation can be done in as little as one or two business days. In a typical closed-ended private equity fund formed in these jurisdictions, there is generally no requirement for a local custodian or administrator nor is there a requirement to prepare or file a prospectus (although it is customary to provide investors with an offering memorandum). Segregated account companies (SACs) can also be utilised by funds to provide a level of protection of the assets of one account from the liabilities of another. Within the funds industry, the ability to use a SAC is particularly useful for fund managers wishing to establish master-feeder fund structures, structures providing for multiple classes of shares or any structures where the statutory segregation of assets is desired. When shareholder agreements are being used, they will be consistent with what one would expect in an English law or New York law governed agreement. Negotiated terms will include transfer restrictions, board representations, certain veto rights, tag-along rights, drag along rights and an IPO exit clause. Such provisions must accord with the relevant entity's constitutional documents.

Most Middle Eastern countries still have complex operating and legal environments, interventionist attitudes towards private enterprise and underdeveloped financial markets, but there is a willingness to reform with the GCC countries leading the way. Other Middle Eastern countries such as Egypt and Jordan are slowly adopting business-friendly regulations and encouraging private sector investments. Private equity is now recognised in the Middle East as an important alternative asset class. The top global private equity fund managers have established a presence or a local partnership in the region principally to tap into local capital while a growing number of such managers, such as HSBC and The Carlyle Group, are setting up funds targeting regional investments. Local private equity fund managers have acquired a depth and sophistication perhaps inconceivable a mere decade ago. They are starting to develop an impressive track record. It remains to be seen whether the best deals will be won by local players or the increasing number of Western private equity firms setting up offices in the Middle East.



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UNDER CONSTRUCTION



As you may (or may not) have noticed by the “under construction” boxes on the cover of the last two issues, we are gearing up for a new office location.

If you think you've got a good guess as to where this will be – drop us an email with your thoughts.

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We've also added a new section to our website – ‘Subscribe’ is located under ‘Publications’. This allows us to make sure that not only do we have your most current contact information, but will help us to get you the information you actually want and not bother you with things you don't.

So pop on over to www.conyersdillandpearman.com for a quick update.

THE ROLE OF BERMUDA SPV IN AIRCRAFT SECURITISATIONS

– THE SKY’S THE LIMIT

We reported this time last year that Bermuda was seeing an influx of significant aviation finance transactions. Globally, the aircraft operating lease market has attracted a host of new players, in particular hedge funds and private equity firms who historically invested indirectly in the aviation industry through investments in new bonds. Such indirect activity has evolved into aircraft equity, investments in new aircraft leasing companies and direct aircraft ownership, often using an offshore structure. Bermuda special purpose vehicles (SPVs) are playing an important role in the structuring of aircraft portfolio securitisations.

Conyers Dill & Pearman has advised on a number of such transactions over the last twelve months. Aircastle Limited, an aviation company established in Bermuda by the Fortress Group, led the wave of aircraft portfolio securitisations using a Bermuda SPV as issuer and aircraft acquisition vehicle. Its initial US\$560m securitisation in 2006 was followed in June 2007, by the US\$1.17 billion Class G-1 Notes, with a Standard & Poor’s AAA rating, issued on the back of a portfolio of 59 aircraft on lease to 31 airlines in 21 countries. Following Aircastle’s successful IPO in August 2006, we also assisted on two follow-on listings of shares on the NYSE raising US\$512m in February 2007 and a further US\$349m in October 2007.

We also advised Genesis Lease Limited in structuring and completing a simultaneous securitisation and IPO. The Genesis structure involved two Bermuda SPVs, Genesis Lease Limited (Genesis Lease) as holding company and manager of Genesis Funding Limited (Genesis Funding), the note issuer and aircraft acquisition vehicle. 41 aircraft on lease to 30 airlines in 17 countries were acquired from General Electric Capital Corporation and continue to be serviced by GECAS. Genesis Funding issued US\$810m Class G-1 Notes with a Standard & Poor’s AAA rating in December 2006. The IPO on the New York Stock Exchange successfully raised more than US\$600m.

The corporate structure was of particular interest to the rating agencies in the Genesis transaction. The common share equity in Genesis Funding is held by Genesis Lease in the form of class A shares. A class B share vote is required for certain fundamental corporate actions of Genesis Funding, however, including winding-up, dissolution, merger, consolidation and transfer of assets. The class B shares of Genesis Funding are held indirectly by a Bermuda charitable trust, which mortgaged the class B shares to Deutsche Bank Trust Company Americas, the security trustee. Genesis Funding’s board of directors has one non-independent director, who is also the President of Genesis Lease, and two directors independent from

General Electric and its affiliates. This structure separates Genesis Funding from General Electric and helps ensure bankruptcy remoteness: two of the criteria stipulated for by rating agencies when rating securities in this type of transaction. Genesis Funding is managed and controlled from Ireland and tax resident in Ireland. It is therefore subject to the Irish corporation tax regime on its income to the same extent as if it were organised under the laws of Ireland. The Genesis deal was awarded the AirFinance Journal Overall Deal of the Year of 2006.

We also recently acted in establishing newly launched Babcock & Brown Air Limited. This transaction was similar to Genesis: simultaneously completing a US\$853m securitisation transaction of a 47 aircraft portfolio and an IPO on the NYSE (symbol: “FLY”!) which raised US\$430m, along with a US\$342.9m private debt placement.

Experience drawn from securitisation transactions indicates that the rating agencies take particular notice of the following factors in assigning a credit rating to aircraft securitisation transactions:

- whether the securitised assets can be sufficiently separated from the transferor so that an insolvency of the transferor will not affect the creditworthiness of the assets;
- the overall creditworthiness of the asset pool being securitised; and
- whether any legal issues may affect the cash flow of the transaction.

Bermuda law is particularly amenable to SPV’s seeking to establish bankruptcy remoteness. Under Bermuda law it is only in specific cases (for the most part, where there is evidence of fraud) that the separate corporate personality of an SPV will be ignored so as to allow creditors of an SPV to commence proceedings against its shareholders or to allow creditors of shareholders to proceed against the SPV. English common law is highly persuasive in this context. SPV’s incorporating in Bermuda therefore have the opportunity to achieve high credit ratings, so long as the asset pool in question is otherwise creditworthy. In addition, political and economic stability, an effective judicial system, a favourable tax regime and the absence of exchange control and currency restrictions make Bermuda the ideal jurisdiction for aircraft and other international securitisation transactions.



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