SPOT THE DIFFERENCE: MERGERS AND AMALGAMATIONS IN CORPORATE TRANSACTIONS

Posted on March 2, 2022

Categories: Insights, Publications

Corporate transactions take on many different forms, including arm's length mergers and acquisitions transactions and related party corporate reorganizations. One common element of many corporate transactions is the combination of two or more corporations into a single successor corporation, often referred to by those involved with corporate transactions as a "merger". The legal concept of "merger" exists in the U.S.; under Canadian law, however, a typical method of combining two or more corporations is referred to under corporate statutes as an "amalgamation". Although an amalgamation is similar in principle to a U.S. merger, there are some key differences that are relevant considerations when structuring corporate transactions and completing diligence on target corporations.

Under Canadian law, the amalgamating corporations continue as one corporation that shares each pre-amalgamating entity's rights and liabilities. Neither predecessor is dissolved – each survives in the resulting entity. The Supreme Court of Canada has analogized the legal concept of amalgamation to "a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands"[1], effectively maintaining their shared history while taking on a new form.

In contrast, in the U.S., corporate mergers have the effect of one corporation surviving and the other(s) ceasing to exist as legal entities. The surviving corporation absorbs the liabilities and assets of the other non-surviving entities. Consolidations are also available in the U.S. as illustrated by the corporate statute in Delaware; although similar to Canadian amalgamations, a key distinction is that the resulting corporation is considered a "new corporation" under Delaware law. In neither case does the resulting corporation retain the histories of all its predecessors. As such, contractual obligations from any non-surviving entities legally undergo an assignment and could therefore be subject to anti-assignment provisions contained in contracts to which the non-surviving entities are a party.

If a potential corporate transaction triggers an anti-assignment provision in a contract, a corporation will likely be required to obtain consent from the other parties to the contract if it wishes to ensure the resulting entity can avail itself of that contract's benefit. In M&A transactions, the contracts that a target company are party to may be a key component in the value the purchaser attributes to the transaction. In corporate reorganizations

that are often implemented for tax purposes or to simplify corporate structures, it is likely important to avoid disrupting status quo with respect to contractual rights and obligations of the entities within the corporate group. For these reasons, among others, understanding the distinction between U.S. mergers and Canadian amalgamations, and the interaction such concepts have with anti-assignment provisions, is crucial for determining whether anti-assignment provisions are triggered so that any necessary third party consents can be obtained.

The consequences of failing to obtain third party consent were considered in MTA Can Royalty Corp v Compania Minera Pangea, SA de C.V. ("**MTA Can Royalty**")[2], where the Superior Court of Delaware applied the U.S. merger concept to an amalgamation completed under Canadian law. Notably, the amalgamated party conceded that the amalgamation at issue in the case was "equivalent to a merger under Delaware law." As a result, the surviving entity was unable to benefit from a contract of the Canadian predecessor that included an anti-assignment clause prohibiting assignment "by operation of law or otherwise". If the amalgamated party seeking to benefit from the contract had not conceded the equivalence of an amalgamation under Canadian law with a merger under Delaware law but rather distinguished between the two legal concepts, the Court's decision regarding the inability of the "surviving entity" to benefit from its predecessor's contract may have been different.

Whether a corporate transaction involves an M&A transaction or an internal corporate reorganization, it is critical that parties remain cognizant of jurisdictional nuances, particularly when colloquial terms have the potential of confusing legal concepts from different jurisdictions. In the case of U.S. mergers and Canadian amalgamations, the Delaware Court's decision in MTA Can Royalty serves as a cautionary tale.

For further advice on structuring domestic or cross-border corporate transactions, please contact the author or another member of McMillan LLP's Business Law Group.

[1] [1975] 1 SCR 411
[2] *MTA Canada Royalty Corp.* v. *Compania Minera Pangea*, *S.A. de* C.V., C. A. No. N19C-11-228 AML, 2020 WL 5554161 (Del. Super. Sept. 16, 2020)

by Caroline Samara and William Burke (Articling Student)

A Cautionary Note


mcmillan