
THE MERGERS & ACQUISITIONS REVIEW

SEVENTH EDITION

EDITORS

SIMON ROBINSON AND MARK ZERDIN

LAW BUSINESS RESEARCH

THE MERGERS & ACQUISITIONS REVIEW

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SIMON ROBINSON AND MARK ZERDIN

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PUBLISHER'S NOTE

In presenting this seventh annual edition of *The Mergers & Acquisitions Review*, the publisher would like to extend warm and heartfelt thanks to editor Simon Robinson, who has recently retired from Slaughter and May. Simon has held the position of editor of *The Mergers & Acquisitions Review* since its inauguration seven years ago, and Simon and his partners at Slaughter and May have been instrumental in the success of The Law Reviews series. Thank you Simon.

The publisher would like to welcome Mark Zerdin, also a partner at Slaughter and May, as current and future editor of *The Mergers & Acquisitions Review*. We are delighted to have Mark on board, and we look forward to future editions in Mark's very capable editorial hands.

Gideon Robertson
Publisher, The Law Reviews
August 2013

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EDITOR'S PREFACE

This past year has seen some surprising twists and turns, not only in the mergers and acquisitions markets but also in the economic and political environments. November saw the re-election of Barack Obama, although this had less of an impact on the markets than an announcement by Ben Bernanke in May that the US Federal Reserve would consider a slowdown in its programme of quantitative easing. On the other side of the Pacific, Xi Jinping has outlined a new communist doctrine – the ‘Chinese dream’. The doctrine reflects the changing economic outlook in China where growth will be increasingly consumer rather than investment-led. A new political rhetoric has also emerged in Japan as Shinzo Abe, elected in a landslide December victory, seeks to reinvigorate the Japanese economy. Both rebrandings flirt with nationalist sentiment and the attitude of these two countries towards one another will continue to bear on the region’s business environment.

In Europe, despite an awkward Cypriot bailout, the sovereign debt crisis showed signs of stability and government bond yields are falling. Europe also improved its attractiveness in the eyes of investors and remains the largest destination for foreign direct investment. However, there has yet to be a return to growth. Investors seem split fairly evenly between those who believe Europe will emerge from the crisis in the next three years, and those who believe it will take five years or more. In any event, a return to the boom years is unlikely in the near future, particularly as the emerging markets see a relative slowdown. The IMF data for 2012 shows that the combined growth rate of India and China is at its lowest in over 20 years while global growth fell below 2.5 per cent in the second half of 2012. This global slowdown continues to pull M&A figures down making 2012 the fifth consecutive year in which deal values fell globally.

There are reasons for optimism though, particularly in the US market which has seen some substantial deals (the acquisitions of Heinz and Virgin Media being particular highlights). These deals have been made possible by the return of debt financing where the right deal can attract very favourable terms. Equities have also performed much more strongly over the past year. In May 2013 both the Dow Jones and the FTSE 100 hit record highs – validating to some extent the aggressive monetary policies pursued in

the US and the UK. Whether political will can start to lift the markets more broadly still remains to be seen.

I would like to thank the contributors for their support in producing the seventh edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin

Slaughter and May

London

August 2013

Chapter 13

BRITISH VIRGIN ISLANDS

Jacqueline Daley-Aspinall and Murray Roberts¹

I OVERVIEW OF M&A ACTIVITY

British Virgin Islands (BVI) companies are employed in geographically diverse corporate structures, with the effect that challenging global economic conditions have continued to dampen the mergers and acquisitions environment involving BVI companies. Following global trends, impacted by the persisting eurozone crisis and slowing Chinese growth,² BVI M&A activity in 2012 lagged slightly behind 2011 levels and remained some way below deal volumes prior to the onset of the global financial crisis. During the 12 months ending 31 December 2012, 641 completed M&A transactions involving BVI companies were reported,³ a decrease of 13 per cent from the number of reported transactions completed during the prior year period.⁴ Total deal value for completed M&A transactions involving BVI companies fell from US\$45.8 billion in 2011⁵ to

1 Jacqueline Daley-Aspinall is a partner and Murray Roberts is an associate at Harney, Westwood & Riegels.

2 Paul Ballew, Dun & Bradstreet Chief Economist, 'D&B's Global Economic Outlook 2012 in Review and 2013 Outlook', December 2012.

3 Zephyr database, published by Bureau van Dijk. The number of BVI companies involved in confidential, unreported transactions or employed as single-asset holding vehicles which may be bought and sold privately means that these statistics cannot be exhaustive, but they are an accurate indicator of trends relating to announced transactions. These statistics include mergers, demergers, majority and minority stake acquisitions, IPOs, joint ventures, share buy-backs, venture capital and private equity transactions, institutional and management buy-outs and management buy-ins.

4 Zephyr database, published by Bureau van Dijk.

5 Id.

US\$32.9 billion in 2012,⁶ remaining some distance short of the US\$50.8 billion volume of reported transactions completed in 2007,⁷ at the height of the pre-credit crisis global economy.

Measured by the number of completed reported transactions, M&A activity involving BVI companies contracted further during the first quarter of 2013, when 156 deals were completed,⁸ representing a 5 per cent decline in the number of reported BVI M&A transactions completed in the same period in the previous year and an 8 per cent fall in the number of transactions completed in the fourth quarter of 2012.⁹ Meaningful comparisons of BVI M&A activity by dollar volume during the first quarter of 2013 are affected by the completion, in March 2013, of Rosneft's US\$55 billion takeover of the BVI company TNK-BP,¹⁰ a single transaction whose value was greater than the total BVI deal volume in 2012. Although anomalous for statistical purposes, Rosneft's acquisition of TNK-BP stands out as a bright spot in the modern BVI M&A landscape, and serves as a fitting signal of the increasing importance of the BRICS economies to the continuing strength of the BVI as a corporate domicile.

The prevalence of BVI companies employed in cross-border corporate structures, holding assets located in jurisdictions other than the BVI, means that the performance of the BVI M&A market is inextricably linked with the vitality of global mergers and acquisitions. It therefore follows that the fall in the number of BVI M&A transactions reflects worldwide M&A figures. Just over 8,100 worldwide deals were announced during the first quarter of 2013,¹¹ a fall of 16 per cent from the same period in 2012 and marking the slowest quarter for M&A, by number of deals, since the third quarter of 2004.¹² In 2012, global mergers and acquisitions fell for the fifth consecutive year to the lowest level recorded both by volume and value since 2004.¹³

The residual impact of the 2008 financial collapse aside, the underlying structural pillars of both the number and profile of existing BVI companies provides cause for optimism. During the 12 months ending 31 December 2012, 64,099 new BVI business companies were incorporated,¹⁴ increasing the total number of active BVI business companies to just over 459,000.¹⁵ Although many of these newly incorporated

6 Id.

7 Id.

8 Id.

9 Id.

10 James Marson, *The Wall Street Journal*, 'Rosneft Completes \$55 Billion Takeover of TNK-BP', 21 March 2013.

11 Thomson Reuters, *Mergers & Acquisitions Review*, First Quarter 2013.

12 Id.

13 Zephyr published by Bureau Van Dijk, *Zephyr Annual M&A Report*, Global 2012, 'Global M&A deal value lowest for five years, suppressed by weaker results in North America and Europe'.

14 BVI Financial Services Commission Statistical Bulletin, Q4 2012, Vol. 29, December 2012, p. 2.

15 Id., p.1.

BVI companies will inevitably be used as lending vehicles or blocker companies that may never be involved directly with M&A activity, others may, depending on market conditions in the coming years, be the bidding vehicles or valuable asset-holding targets of major future mergers and acquisitions.

In addition to the sheer number of new incorporations, the profile of existing BVI companies remains strong: at the end of the first quarter of 2013, 38 BVI companies were listed on either the Alternative Investment Market (AIM) or the Main Market of the London Stock Exchange,¹⁶ and, as at 31 December 2012, 43 BVI companies were registered and reporting with the US Securities and Exchange Commission.¹⁷ Although the Hong Kong Stock Exchange (HKSE) granted acceptable overseas jurisdiction status to the BVI in December 2009,¹⁸ paving the way for BVI companies to list on the HKSE, the number of BVI companies listed on the HKSE remains small.¹⁹ The 12 months ending 31 December 2012 witnessed a number of BVI companies list on the New York Stock Exchange, NASDAQ, AIM and PLUS Markets,²⁰ although the total number of IPOs of BVI companies in 2012 fell some way short of the number of IPOs of BVI companies that took place in 2007.²¹ Notwithstanding the slowdown in new listings, BVI companies continue to be well represented on the world's stock exchanges, providing those companies with critical access to the capital required to fund acquisitions at a time when it remains challenging to obtain acquisition finance.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The principal company law statute in the BVI is the BVI Business Companies Act, 2004 (as amended) (the Companies Act), which succeeds the International Business Companies Act 1984 (as amended) and sets out standard provisions relating to a broad range of company law matters. The Companies Act also sets out the framework of a number of specific deal structures that may be used to implement M&A transactions involving BVI companies, including statutory mergers and consolidations, court-approved plans of arrangement and schemes of arrangement, and squeeze-out provisions that facilitate takeover bids involving BVI-incorporated target companies,²² although many M&A transactions involving BVI companies are instead structured as a straightforward share sale and purchase. The legal bodies of common law and equity have been extended to

16 London Stock Exchange publication, *Stock Market Reports and Statistics – New and Further Issues*.

17 US Securities and Exchange Commission publication, *Number of Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission*.

18 Hong Kong Stock Exchange Listing Decision HKEEx-LD84-1, December 2009.

19 Hong Kong Stock Exchange, *List of Acceptable Overseas Jurisdictions*.

20 Zephyr database, published by Bureau van Dijk.

21 Zephyr database, published by Bureau van Dijk.

22 Part IX of the Companies Act.

the BVI by statute,²³ and final appeal from the Eastern Caribbean Supreme Court lies by way of appeal to the Judicial Committee of the Privy Council in the United Kingdom. This combination of a flexible company law statute and the legal certainty conferred by English jurisprudence is central to the BVI's popularity as a corporate domicile.

Many statutory provisions of the Companies Act are expressed to be subject to any contrary provisions in the memorandum and articles of association of the BVI company (memorandum and articles) and, since it is common for BVI companies to contract out of certain statutory provisions in their memorandum and articles, the contents of the constitutional documents of BVI companies very often determine how M&A transactions involving BVI companies are structured. This is especially the case when structuring the acquisition of a minority stake in a BVI company, a joint venture in which the joint venture vehicle is a BVI company or negotiating amendments to the memorandum and articles in parallel with a strategic investment into a BVI company. In these types of transactions, when the parties may, for example, wish to create bespoke rights attaching to different classes of shares, restrict the circumstances in which dividends may be paid or create pre-emption, drag or tag rights as conditions of the investment, certain of the standard provisions set out in the Companies Act may be commercially undesirable. The memorandum and articles are therefore a key element of the legal framework for M&A involving BVI companies, and the flexibility of the Companies Act's provisions are drafted to this end.

The BVI has no equivalent of the non-statutory rules and codes of conduct that are a common feature of the M&A landscape in many jurisdictions, especially in M&A transactions in which the target company is publicly listed. There is no takeover code in the BVI that governs the treatment of shareholders in takeover bids in respect of BVI companies, and there is no non-statutory code of corporate governance setting out expected standards of good practice in relation to board leadership or relations with shareholders. Nor are there any BVI-specific listing rules or disclosure rules applicable to listed BVI companies, since there is no stock exchange in the BVI. However, since BVI companies are listed on stock exchanges in jurisdictions in which investors expect the protection afforded by such rules and codes of practice, it is common for the memorandum and articles of listed BVI companies to be amended to incorporate share control restrictions such as mandatory bid provisions or disclosure requirements, which may affect a bidder's stakebuilding strategy in advance of a takeover offer.

M&A activity involving regulated entities in the BVI will be subject to additional statutory requirements: the prior consent of the BVI Financial Services Commission will be required in advance of a change in significant ownership of a target company that is regulated under, for example, the Securities and Investment Business Act 2010 (such as companies that conduct investment business or that are regulated funds) or that holds a licence under the Banks and Trust Companies Act 1990 (such as companies conducting banking or trust business). However, given the small number of regulated entities taken as a percentage of the total number of active BVI companies, it is comparatively infrequent

23 Common Law (Declaration of Application) Act 1705 and the West Indies Associated States Supreme Court (Virgin Islands Act) 1969.

that cross-border M&A transactions involving BVI companies involve the acquisition of a BVI-regulated entity.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

In 2012, the BVI House of Assembly passed into law the BVI Business Companies (Amendment) Act 2012 (the Amendment Act) and the BVI Business Companies Regulations, 2012 (the Regulations), which came into effect in October 2012. The Amendment Act and the Regulations represent the first substantive amendments to the Companies Act in six years, and are intended to ensure that the BVI's company law regime remains flexible, attractive and best able to meet the requirements of international business, although few of the legislative changes are likely to have a material impact on cross-border M&A transactions involving BVI companies.

i Alternate directors

A minor amendment to the Companies Act, but one that provides a practical solution to logistical problems that may historically have arisen at completion meetings involving a BVI company, is to permit an alternate director to sign written resolutions in place of his or her appointing director as well as to attend and vote at meetings.²⁴ Prior to the entry into force of the Amendment Act, alternate directors were limited solely to attending meetings, and could be authorised to sign documents but not written resolutions.

ii Reuse of company names

Amendments to the Companies Act enable names of BVI companies to be reused in certain circumstances. The amendments are framed by reference to the circumstances in which the name of a dissolved company or a company that has been continued out of the BVI may be reused, in addition to when the name of a company that has since changed its name may be used by another company. These legislative changes are a welcome response to the increasingly limited number of company names that have not previously been used in a jurisdiction in which over 900,000 companies have been incorporated, over 450,000 of which remain active.²⁵

iii Conversion of shares

The Companies Act has been amended expressly to provide that, where shares in a BVI company are issued in, or converted to, one class or series, they may be convertible into another class or series in the manner specified in the memorandum and articles.²⁶ This mechanism was not expressly contemplated by the previous legislation and will be a useful tool in certain joint ventures and similar transactions, providing certainty that

24 Section 130A of the Companies Act.

25 BVI Financial Services Commission Statistical Bulletin, Q4 2012, Vol. 29, December 2012, p. 2.

26 Section 36(1)(f) of the Companies Act.

shares will be capable of automatic conversion on the occurrence of a specified external event.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

BVI companies form part of corporate structures across the globe, and virtually all reported BVI M&A transactions involve BVI companies that hold key underlying assets in jurisdictions other than the BVI. Revenue legislation in the BVI is structured such that it is unlikely to affect any transaction or corporate structure that does not have a commercial operation in the BVI, creating a *de facto* separation between the jurisdiction of a BVI company's domicile and the jurisdiction of its commercial activity.

Deal flow involving BVI companies continues to originate from North America and Europe, and BVI M&A activity remains strongly supported, as it has been for a number of years, by the BRICS²⁷ economies. Although, in a global M&A context, the fortunes of the BRICS economies were mixed during the 12 months ending 31 December 2012, with 2012 deal value involving China, Russia and South Africa falling from 2011 levels but deal value involving Brazil and India increasing,²⁸ the BRICS economies, and emerging markets more generally, are of central overall importance to the BVI M&A environment.

i Africa

BVI companies are frequently used in structuring investment into Africa. Investment into the target African jurisdiction may be made either directly through a BVI company or, in order to take advantage of the web of double taxation treaties into which sub-Saharan African nations have entered, through a subsidiary of the BVI company that has been incorporated in a jurisdiction with which the target African country has entered into a double taxation treaty.

According to statistics quoted in *The New York Times*, the International Monetary Fund forecasts that between 2011 and 2015, seven of the 10 fastest-growing economies in the world will be in Africa.²⁹ The speed of growth in certain African countries' economies is driven by a number of factors, including greater political stability, a desire to open up to greater foreign investment, increasingly affluent populations, a need for infrastructural development and, in some cases, increasing levels of Chinese direct investment in Africa. Chinese investment in Africa has been estimated at between US\$14.7 billion and

27 South Africa was formally invited to become a member of the BRIC group in December 2010 – Nasreen Seria, Bloomberg, 'South Africa Is Asked to Join as a BRIC Member to Boost Emerging Markets', 24 December 2010.

28 Zephyr published by Bureau Van Dijk, Zephyr Annual M&A Report, Global 2012, 'Global M&A deal value lowest for five years, suppressed by weaker results in North America and Europe'; Zephyr published by Bureau Van Dijk, Zephyr Annual M&A Report, South Africa, 2012.

29 Nicholas D Kristof, *The New York Times*, 'Africa on the Rise', 30 June 2012.

US\$40 billion,³⁰ with the latter estimate, made by China's ambassador to South Africa, reportedly³¹ including capital flowing into Africa from offshore financial centres such as the BVI. As a result of the substantial number of BVI companies involved in the structuring of transactions in Africa, and the familiarity of BVI vehicles to participants in the M&A markets in Greater China, BVI companies are expected to play an increasingly important role in investment into, and the growth of, African countries' economies.

During the 12 months ending 31 December 2012, BVI companies were involved in a number of significant transactions relating to underlying African assets, including the admission to trading on AIM of Premier African Minerals Limited, a BVI company with mineral projects located in western and southern Africa;³² the acquisition by BVI-incorporated Elephant Copper Ltd from AIM-quoted African Eagle Resources plc of two Zambian companies holding copper assets in Zambia;³³ and the acquisition by West African Minerals Corporation, an AIM-quoted BVI company, of a minority interest in Compagnie Minière du Cameroun, a Cameroon-based iron ore and mineral exploration company, with the result that the target company became an indirect wholly-owned subsidiary of the purchaser.³⁴

ii Greater China

BVI companies have been synonymous with offshore vehicles for many Hong Kong investors since the late 1980s, and the volume of new incorporations of BVI companies emanating from Hong Kong and the wider Far East region in the subsequent decades has underpinned the growth of the BVI as a corporate domicile.

It is common, in order to fuse offshore ownership with onshore operations in mainland China, for investors on the Chinese mainland to use BVI companies to hold shares in a Chinese company (a wholly foreign-owned enterprise), which in turn directly holds assets in China. According to statistics published by the Chinese Ministry of Commerce, the BVI provided 10 per cent of inward foreign direct investment (IFDI) into China in 2010, second only to Hong Kong and more than the European Union and the United States, which each provided 7 per cent of China's IFDI.³⁵ This contrasts with the position eight years before, in 2002, when the BVI provided 5 per cent of China's IFDI, less than the United States, the European Union and Japan.³⁶ If this pattern continues, it is anticipated that the BVI will form an increasingly important foundation for China's crucial role in driving global economic growth.

30 *The Economist*, 'More than Minerals', 23 March 2013.

31 *Id.*

32 Press release: Premier African Minerals Limited, 10 December 2012.

33 Press release: African Eagle Resources plc, 27 July 2012, www.africaneagle.co.uk.

34 Press release: West African Minerals Corporation, 30 July 2012, <http://www.westafricanminerals.com/>.

35 Ken Davies, Vale Colombia Center, 'Inward FDI in China and its Policy Context, 2012', 24 October 2012.

36 PRC Ministry of Commerce, 'Top 15 investors in China as of 2002'.

In light of the strong economic links between China and the BVI, it follows that the acquisition of Chinese assets drove valuable M&A activity involving BVI companies during 2012, including the HK\$6.8 billion acquisition by China Daye Non-Ferrous Metals Mining Limited of the BVI company Prosper Well Group Limited, the controlling shareholder of Daye Nonferrous Metals Co, Ltd, which owns substantial copper mines in Hubei province, central China, and is principally engaged in the production and sale of copper cathodes, gold and silver.³⁷

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Natural resources sector

M&A transactions involving BVI companies in the natural resources sector were at the forefront of BVI M&A activity in 2012 and early 2013, a symptom of the stark reality that the world's finite supply of natural energy and mineral resources is dwindling in proportion to its increasing population, rendering assets in this industry attractive targets regardless of the present health of the global economy.

Rosneft takeover of TNK-BP

In March 2013, Russian state oil company Rosneft completed its US\$55 billion takeover of the BVI-incorporated oil company TNK-BP, reportedly the biggest transaction in Russian corporate history.³⁸ Unusually for a major cross-border deal involving a BVI company, the transaction physically completed in the BVI, leading BVI M&A practitioners to believe that this was the largest M&A transaction ever to complete in the territory. The acquisition renders Rosneft the world's largest publicly traded oil producer by output.³⁹

The AAR Consortium, comprised of three of Russia's leading investment, financial and industrial groups, Alfa Group, Access Industries and Renova and which represented the interests of Russian shareholders in TNK-BP,⁴⁰ sold its 50 per cent stake in TNK-BP to Rosneft for US\$27.7 billion.⁴¹ TNK-BP's other 50 per cent shareholder, the British oil company BP, sold its stake in TNK-BP to Rosneft in a series of transactions pursuant to which BP received approximately US\$12.5 billion in cash and increased its stake in Rosneft to 19.75 per cent.⁴²

37 Press release: China Daye Non-Ferrous Metals Mining Limited, 8 March 2012; circular to shareholders of China Daye Non-Ferrous Metals Mining Limited, 29 December 2011, China Daye Non-Ferrous Metals Mining Limited website, www.hk661.com.

38 Vladimir Soldatkin and Andrew Callus, Reuters, 'Rosneft pays out in historic TNK-BP deal completion', 22 March 2013.

39 AAR Consortium – www.aar.ru/en/.

40 Id.

41 Stanley Reed, *The New York Times*, 'Rosneft completes acquisition of TNK-BP', 21 March 2013.

42 Id.

Rosneft reportedly financed the acquisitions from AAR and BP by a combination of issuing US\$3 billion in Eurobonds,⁴³ borrowing US\$16.8 billion from a consortium of international banks in December 2012⁴⁴ and borrowing a further US\$14.2 billion from a second consortium of banks in February 2013.⁴⁵ In early March 2013, Rosneft also signed long-term crude supply contracts with oil traders Glencore and Vitol pursuant to which Rosneft was to receive a prepayment of up to US\$10 billion that could be used for investment purposes.⁴⁶

Abortive merger of Sedgman Limited and MDM Engineering Group Limited

In November 2012, Australian Stock Exchange-listed Sedgman Limited announced that it would acquire 100 per cent of the issued shares of MDM Engineering Group Limited (MDM), an AIM-quoted BVI company, for approximately £67.9 million.⁴⁷

MDM, which was admitted to trading on AIM in May 2008, is a South Africa-based minerals process engineering and project management company that provides services to the mining industry.⁴⁸ In 2012, MDM was, among other things, involved in a feasibility and scoping study in respect of the Wassa gold mine in south-west Ghana,⁴⁹ and the detailed engineering and execution phase for the Bulyanhulu gold plant in Tanzania.⁵⁰

Completion of the merger of Sedgman and MDM, to be effected by way of a statutory merger under BVI company law,⁵¹ was expressed to be subject to a number of conditions precedent.⁵² However, in a sign of continuing uncertainty in the global deal-making landscape, Sedgman announced in May 2013 that the proposed merger would not proceed, citing that certain of the conditions precedent were not able to be satisfied by MDM and a revised merger proposal did not gain the approval of the Sedgman board.⁵³

43 Charles Clover, *Financial Times*, 'Rosneft seals \$10bn deal with oil traders', 7 March 2013.

44 Press release: Rosneft, 24 December 2012, www.rosneft.com/.

45 Press release: Rosneft, 13 February 2013, www.rosneft.com/.

46 Press release: Rosneft, 6 March 2013, www.rosneft.com/.

47 Press release: Sedgman Limited, 28 November 2012, www.sedgman.com/En/Pages/default.aspx.

48 MDM Engineering Group Limited, AIM Admission Document, p.6, www.mdm-engineering.com/.

49 Press release: MDM Engineering Group Limited, 27 September 2012, www.mdm-engineering.com/.

50 Press release: MDM Engineering Group Limited, 15 August 2012, www.mdm-engineering.com/.

51 Pursuant to section 170 of the Companies Act; Press release: Sedgman Limited, 28 November 2012, [/www.sedgman.com/En/Pages/default.aspx](http://www.sedgman.com/En/Pages/default.aspx).

52 Press release: Sedgman Limited, 28 November 2012, www.sedgman.com/En/Pages/default.aspx.

53 Press release: Sedgman Limited, 30 May 2013, www.sedgman.com/En/Pages/default.aspx.

Suitability of BVI vehicles for natural resources sector deals

Many investors located in emerging markets, and those structuring joint ventures in respect of underlying assets in emerging markets, regard BVI companies as highly suitable holding vehicles for a number of reasons.

The BVI is a common law jurisdiction, and the final court of appeal from the BVI courts is the Judicial Committee of the Privy Council in the United Kingdom. Co-investors located in different jurisdictions, whose laws and court procedures are unknown to the other, very often find it attractive to structure their investment through a tax-neutral jurisdiction whose laws are underpinned by Commonwealth common law. The speed and ease of incorporating BVI companies and the flexibility of BVI company law provisions such as those relating to making distributions⁵⁴ and appointing and removing directors⁵⁵ add to the attractiveness of the BVI for those structuring transactions in emerging markets.

It therefore follows that, in the natural resources sector, in which drilling and mining operations are often out of necessity conducted in countries in which multi-jurisdictional investors may be unfamiliar doing business, BVI companies were again active participants in M&A transactions in the natural resources sector during 2012 and the first quarter of 2013.

ii Special purpose acquisition companies

The continued popularity of BVI-incorporated special purpose acquisition companies (SPACs), which are essentially cash-rich acquisition vehicles poised to effect a transaction, is closely linked to a global economic environment in which it remains difficult to access bank lending and in which the importance of capital market funding is on the rise. The 12 months ending 31 December 2012 and the first quarter of 2013 saw listings of BVI-incorporated SPACs feature heavily in the numbers of IPOs of BVI companies that took place during that period, reflecting an increasing demand for these vehicles as investors seek strong returns in the post-credit crisis economic landscape.

SPACs, often alternatively referred to as 'cash shells' or 'blank-check companies', are companies incorporated with the sole purpose of raising funds pursuant to an IPO, which proceeds are then used to fund a combination with a target business. On the SPAC's listing, the target business is unlikely to have been identified, although it is common for SPACs to be formed with a view to effecting the acquisition of a target company in a specific industry, geographical region or both, which is often driven by the particular experience of the SPAC's management team.

In July 2012, Infinity Cross Border Acquisition Corporation, a BVI-incorporated SPAC, listed on NASDAQ, raising US\$46 million (including the exercise of an over-allotment option) for the purpose of seeking to acquire and operate a business located in Canada, Europe, Africa or Israel in a sector strategically relevant to China.⁵⁶ The BVI

54 Sections 56 to 58 of the Companies Act.

55 Sections 113 and 114 of the Companies Act.

56 NASDAQ, Infinity Cross Border Acquisition Corp., Company Overview.

company CIS Acquisition Ltd raised US\$40 million⁵⁷ pursuant to its 2012 IPO on NASDAQ, intending to focus on operating businesses with primary operations in Russia and eastern Europe⁵⁸ and, in October 2012, Collabrium Japan Acquisition Corporation, a BVI-incorporated SPAC, listed on NASDAQ, raising US\$40 million for the purposes of focusing on target businesses that either have their primary operations located in Japan or that are operating outside of Japan but are Japanese owned.⁵⁹

The BVI is a popular jurisdiction in which to incorporate SPACs not only because the memorandum and articles of association of BVI companies can be easily amended to reflect any necessary requirements of the stock exchange on which the SPAC's shares are to be listed, but also because of the range and flexibility of statutory mechanisms in the BVI pursuant to which the SPAC can effect a business combination when a suitable target has been identified. The Companies Act prescribes⁶⁰ a statutory merger and consolidation process pursuant to which two or more companies may merge or consolidate, with the effect either that one of the constituent companies survives (a merger) or that both constituent companies consolidate into an altogether new company (a consolidation). A BVI company may also merge with its parent company⁶¹ or may merge or consolidate with a company (including a parent company) incorporated in a jurisdiction other than the BVI.⁶² The implementation of a SPAC's business combination by way of a court-supervised plan of arrangement or scheme of arrangement under the Companies Act⁶³ is an option often considered in transactions when it is necessary to obtain court approval in a prescribed manner for the purposes of obtaining a Section 3(a)(10) exemption from the registration requirements of the United States Securities Act of 1933.

iii UK taxation changes

Under political and fiscal pressure to raise revenue in a recessionary climate, the coalition government in the United Kingdom introduced, as part of its 2013 Budget, significant changes to the way in which high-value residential properties in the UK are subject to UK taxation, especially where such property is held by 'non-natural persons'.

These changes have had some impact on the use of BVI companies in corporate structures in which the underlying asset is high-value UK residential property, principally by triggering a 'de-enveloping' process in which the property is removed from the ownership of the BVI company and moved into personal ownership, or by triggering intra-group reorganisations of the companies and trusts involved in the property holding structure with the aim of mitigating overall UK taxation liability. However, the volume of intra-group reorganisations and 'de-enveloping' transactions involving BVI companies in response to these UK legislative changes has not been as substantial as some

57 NASDAQ, 'CIS Acquisition prices IPO at \$10', 20 December 2012.

58 NASDAQ, CIS Acquisition Ltd., Company Overview.

59 NASDAQ, Collabrium Japan Acquisition Corporation, Company Overview.

60 Section 170 of the Companies Act.

61 Section 172 of the Companies Act.

62 Section 174 of the Companies Act.

63 Sections 177 and 179A of the Companies Act respectively.

practitioners had anticipated, with many high-net-worth individuals either retaining existing structures to insulate the property from UK inheritance tax and to preserve their confidentiality, or by converting their offshore company holding structure into an offshore trust holding structure.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The BVI has developed into one of the world's leading offshore financial centres principally because of its attractiveness as a corporate domicile, rather than due to the sophistication of its banking infrastructure. Unlike other offshore jurisdictions such as the Cayman Islands, where 40 of the world's 50 top banks hold banking licences⁶⁴ and total banking assets exceed US\$1.6 trillion,⁶⁵ only six entities in the BVI hold a general banking licence issued by the BVI Financial Services Commission.⁶⁶ This means that the banking infrastructure in the BVI is mainly suited to servicing the requirements of local businesses and the retail banking needs of the resident population of approximately 29,000, and it is rare that substantial levels of capital flow through BVI banks for the purpose of financing major cross-border M&A transactions involving BVI companies. Accordingly, the financing of M&A transactions involving BVI companies is ordinarily dictated by market conditions and acquisition financing trends in the jurisdiction in which the underlying assets are located, and there is no discernible pattern of M&A financing practice particular to the BVI.

Global acquisition finance trends in 2012 saw banks remain cautious in providing committed financing for acquisitions⁶⁷ and, according to data from Dealogic, the majority of deal activity resulting from the capital which flowed to companies in 2012 involved refinancings, rather than leveraged buyouts or deals for general corporate purposes. However, Thomson Reuters figures show that the availability of high-yield committed financing in the United States increased in the second half of 2012, when the equity portion of leveraged buyout financing fell to 33 per cent from the average of 42 per cent since the beginning of 2008, approaching the average figure from 2007 of 30 per cent.⁶⁸ Although such figures suggest that the position in the United States is improving, European analysts predict⁶⁹ that restricted access to traditional loan funding will continue in Europe, meaning that private debt funds may begin to become lenders of growing significance in a post credit-crisis environment in which banks have been forced to shrink balance sheets.

64 Cayman Islands Monetary Authority Banking Statistics 2012.

65 *Id.*

66 British Virgin Islands Financial Services Commission: Regulated Entities.

67 Eric M Rosof, The Harvard Law School Forum on Corporate Governance and Financial Regulation, 'Acquisition Financing: The Year Behind and the Year Ahead', 16 February 2013.

68 Matt Wirz, The Wall Street Journal, 'Debt Loads Climb in Buyout Deals', 16 December 2012; and Eric M. Rosof, The Harvard Law School Forum on Corporate Governance and Financial Regulation, 'Acquisition Financing: The Year Behind and the Year Ahead', 16 February 2013.

69 DLA Piper: European Acquisition Finance Debt Report 2013.

The substantial balance sheets of Chinese state-owned banks such as China Development Bank and Bank of China drove voluminous M&A activity in China in 2012, and Chinese lenders are expected to continue to play a key role in driving M&A financing activity in Asia.⁷⁰ In view of the fundamental importance of China and other Asian economies to M&A activity involving BVI companies, acquisition finance trends in those regions may disproportionately affect BVI M&A activity in the coming year. However, since the commercial arrangements in which BVI companies are employed span the globe, the overall financing of M&A activity involving BVI companies is likely to be cushioned from any stark regional trends.

VII EMPLOYMENT LAW

Since the vast majority of M&A transactions involving BVI companies relate to businesses located outside of the BVI, the treatment of employees of BVI companies in cross-border M&A transactions is typically governed by the laws of the jurisdiction in which the employees are located.

VIII TAX LAW

In the BVI, there are no capital gains taxes, income taxes, corporation or profit taxes, withholdings, levies, inheritance taxes, estate duties or gift taxes, and there is no sales tax or equivalent tax on goods. BVI taxation issues principally become relevant when real estate in the BVI is being acquired, when employees located in the BVI are being paid or when goods are being imported into the BVI.

IX COMPETITION LAW

Competition law issues in respect of M&A transactions involving BVI entities are typically addressed by the legal or regulatory requirements of the relevant onshore jurisdiction in which the underlying target business is located. There are no antitrust laws in the BVI affecting cross-border M&A transactions involving BVI companies.

X OUTLOOK

According to the BVI Premier's 2013 Budget Address, the BVI's gross domestic product grew by 4 per cent in 2012, and a 'slight though sluggish improvement in GDP growth' is expected during 2013.⁷¹ This said, since BVI companies are employed in commercial arrangements around the world, M&A activity involving BVI companies will continue to be affected by broader global economic trends and will remain somewhat divorced from the projected performance of the territory's own economy.

70 Anita Davis, Asiamoney Plus, 'China banks to drive Asian M&A finance', 8 January 2013.

71 2013 Budget Address, 'The Path Towards Economic Growth', p.3.

Significant uncertainty remains in global M&A markets by virtue of an anticipated contraction in Chinese manufacturing, volatile commodity prices and the spectre of sovereign states exiting the eurozone, although the popularity of BVI companies in a broad range of emerging markets should mean that the volume of BVI companies employed in M&A transactions will be supported as those jurisdictions become increasingly sophisticated and more active participants in transactional markets. The fact that BVI companies are used for diverse purposes (for example, as listing vehicles, joint venture companies, asset holding companies and open and closed-ended fund vehicles) cushions the jurisdiction against the effects of a downturn in any one financial sector, thereby further brightening the outlook for the BVI as a corporate domicile in what remain volatile times for the global financial system.

Appendix 1

ABOUT THE AUTHORS

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Jacqueline Daley-Aspinall has been practising law in the British Virgin Islands since 1999. Ms Daley-Aspinall specialises in corporate and commercial matters and has extensive experience in corporate restructuring, public and private offerings of equity and debt securities, mergers and acquisitions and the formation of partnerships and special purpose vehicles. Ms Daley-Aspinall is a member of the Society of Trust and Estate Practitioners, and she also speaks Spanish.

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Murray Roberts is an associate in Harneys' British Virgin Islands office, where he advises on all aspects of British Virgin Islands corporate and commercial law, including mergers and acquisitions, joint ventures, initial public offerings, takeovers, corporate restructurings and corporate aspects of shareholder disputes.

Mr Roberts previously worked at Baker & McKenzie, gaining a broad range of corporate experience in their London and Hong Kong offices. During his time in London and Hong Kong, he advised on public company takeovers, domestic and cross-border public and private M&A, initial public offerings and secondary equity capital raisings. He has advised major listed and unlisted infrastructure funds on shareholder consortium arrangements, and has advised various FTSE-listed issuers on public company regulatory and corporate governance matters. Mr Roberts holds a double first class degree in Modern History from Oxford University and completed his postgraduate legal studies at the College of Law in England.

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