

A CROSS-JURISDICTIONAL EXAMINATION OF MERGERS AND AMALGAMATIONS

Effects and Proposals for Reform

Singapore first introduced a regime for statutory amalgamation in 2005. The regime was modelled on similar regimes in the US, New Zealand, and Canada. This article will examine the legal analysis and characterisation of amalgamations in these jurisdictions, in particular, how courts in those countries have dealt with the question of whether an amalgamation effects a transfer of property, rights, and obligations by operation of law. The article argues that the legal model of continuity adopted by the Canadian and New Zealand courts is both legally more consistent and commercially more attractive than a model premised on transfer. It ends by briefly considering the uses to which amalgamations may be put and suggests additional areas for further research and reform.

LIM Wee Teck*

LLB (Hons) (National University of Singapore);

Director, Knowledge Management (Practice Development),

WongPartnership LLP.

I. Introduction and overview

1 Singapore first introduced a regime for statutory amalgamation in 2005. Based on equivalent regimes in the US, New Zealand and Canada, the procedure has not seen the same degree of use here as compared to those other jurisdictions.¹

* The views expressed in this article are those of the author, and not representative of the views of his firm nor any of its partners.

1 Although this could be changing. Data collated by the Business Times and the Accounting and Corporate Regulatory Authority indicate that a growing number of SMEs have been using the amalgamation procedure. See "More SMEs taking the merger route", *The Business Times* (7 June 2010). However, as far as this author is aware, no listed company has used the amalgamation procedure yet.

2 This article will examine the legal analysis and characterisation of amalgamations² in these other jurisdictions. In particular, because amalgamations appear to effect a transfer of property, rights and obligations by operation of law, it appears to run counter to a number of common law principles that restrict transfers under certain circumstances. If these principles apply in the context of an amalgamation, they place restraints on the utility of the statutory amalgamation procedure for Singapore companies. The way that courts in the US, New Zealand and Canada have dealt with similar issues will be useful in giving guidance on how we might approach such questions. Paragraphs 4–26 (US), paras 27–37 (Canada) and paras 38–50 (New Zealand) of this article will therefore provide an overview of the effects and consequences of amalgamations in these three jurisdictions.

3 Paragraphs 51–71 of this article will then consider the competing characterisations that may be accorded to the amalgamation process and, in particular, whether it should be seen as resulting in a transfer of property, rights and obligations or whether the paradigms used in the US, New Zealand and Canada might prove to be a more attractive way of understanding what happens. Paragraphs 72–78 of this article then conclude by briefly considering the uses to which amalgamations may be put and suggest additional areas for further research and reform.

II. Mergers in the US

A. *Merger legislation in the US*

4 In the early 19th century, most US corporations were created by special Acts of the state legislatures. Accordingly, the early statutes authorising corporate combinations tended themselves to be special Acts. Towards the end of the 19th century, enabling statutes of general applicability began to appear. In 1893, New Jersey enacted its first merger statute of general applicability titled: “An Act to authorize corporations incorporated under the laws of this state to merge and consolidate their corporate franchises and other property.” Other states eventually followed suit, and most states now have general merger statutes.³

2 The term “merger” is more commonly used in the US. In this article, the term “amalgamation” when used generally will refer to both mergers and statutory amalgamations.

3 Nelson Ferebee Taylor, “Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions” (1998) 76 NCL Rev 687.

5 As readers will be aware, corporation law in the US is a matter of state, rather than federal, law. It is not the intent of this article to examine the corporation merger laws of each state in the US. Happily, a number of state corporation law statutes⁴ are based on the current Model Business Corporation Act (“MBCA”)⁵ (with minor variations between them), while some others⁶ are based on the 1969 version of the MBCA.

6 §11.02(a) of the MBCA⁷ states:

One or more domestic business corporations may merge with one or more domestic or foreign business corporations or eligible entities pursuant to a plan of merger, or two or more foreign business corporations or domestic or foreign eligible entities may merge into a new domestic business corporation to be created in the merger in the manner provided in this chapter.

7 The effect of a merger is dealt with in §11.07(a)⁸ as follows:

When a merger becomes effective:

- (1) the corporation or eligible entity that is designated in the plan of merger as the survivor continues or comes into existence, as the case may be;
- (2) the separate existence of every corporation or eligible entity that is merged into the survivor ceases;
- (3) all property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survivor is *vested in the survivor without reversion or impairment*;
- (4) all liabilities of each corporation or eligible entity that is merged into the survivor are *vested* in the survivor;
- (5) the name of the survivor may, but need not be, substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger;
- (6) the articles of incorporation or organic documents of the survivor are amended to the extent provided in the plan of merger;
- (7) the articles of incorporation or organic documents of a survivor that is created by the merger become effective; and
- (8) the shares of each corporation that is a party to the merger, and the interests in an eligible entity that is a party to a merger, that

4 Eg, Arkansas, Mississippi, Montana, Wyoming, Florida, Idaho, Indiana, Kentucky, Michigan, Nebraska and Oregon.

5 Model Business Corporation Act 2003.

6 Eg, Alabama, Alaska, Missouri, New Mexico, Illinois, Pennsylvania and West Virginia.

7 Model Business Corporation Act 2003 §11.02.

8 Model Business Corporation Act 2003 §11.07.

are to be converted under the plan of merger into shares, eligible interests, obligations, rights to acquire securities, other securities, or eligible interests, cash, other property, or any combination of the foregoing, are converted, and the former holders of such shares or eligible interests are entitled only to the rights provided to them in the plan of merger or to any rights they may have under chapter 13 or the organic law of the eligible entity.

[emphasis added]

8 The 1969 edition of the MBCA provides:⁹

Any two or more domestic corporations may merge into one of such corporations pursuant to a plan of merger approved in the manner provided in this Act.

9 And the effect of a merger is dealt with as follows:¹⁰

When a merger or consolidation has become effective:

(a) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation.

(b) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.

(c) Such surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Act.

(d) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, of a public as well as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and *deemed to be transferred to and vested in such single corporation without further act or deed*; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.

(e) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations

9 Model Business Corporation Act 1969 §71.

10 Model Business Corporation Act 1969 §76.

may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by such merger or consolidation.

(f) In the case of a merger, the articles of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its articles of incorporation are stated in the plan of merger; and, in the case of a consolidation, the statements set forth in the articles of consolidation and which are required or permitted to be set forth in the articles of incorporation of corporations organized under this Act shall be deemed to be the original articles of incorporation of the new corporation.

[emphasis added]

B. *Merger effects in the US*

10 The Official Comment to §11.07(a) of the 2003 edition of the MBCA states:¹¹ “A merger is not a conveyance, transfer or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. It does not give rise to a claim that a contract with a party to the merger is no longer in effect on the ground of non-assignability, unless the contract specifically provides that it does not survive a transfer.” The Official Comment to §76 of the 1969 edition of the MBCA is silent on this point.

11 Unlike Canada and New Zealand (as will be seen later), US courts have not arrived at a universal, all-embracing theory to explain or characterise the legal process by which property, rights and liabilities held by the merging corporations end up held by the merged corporation.¹² This is partly due to minor variations in the language used in the merger provisions of the statutes of each state, and partly due to the finer differentiations of the types of mergers that can be carried out in the US.¹³ An additional factor is that, rather than starting

11 Model Business Corporation Act Annotated, Vol 1 (American Bar Association, 4th Ed, 2008).

12 See, generally, Philip M Haines, “Comment: The Efficient Merger: When and Why Courts Interpret Business Transactions To Trigger Anti-Assignment and Anti-Transfer Provisions” (2009) 61 Baylor L Rev 683; Jolisa Dobbs, “Keeping It Fast by Merging Around Consents to Assign” (2006) State Bar of Texas Oil, Gas, and Energy Resources Law Section Report (December 2006).

13 US law allows merging companies to determine if the merged company continues existence as one of the surviving companies or whether neither of the merging companies survives. Depending on which of the merged companies survives, a merger may be characterised as a forward merger or a reverse merger. Generally speaking, a forward merger is more likely to be treated as involving a transfer than a reverse merger. See, generally, Elaine D Ziff, “The Effect of Corporate Acquisitions on the Target Company’s Licence Rights” (2002) 57 Bus Law 767.

their analysis by looking at the character of a merger, courts have tended to approach the issue of merger effects from the angle of the specific transaction involved and within the four corners of its specific doctrines. Hence, for example, the issue of the assignment of patent licences¹⁴ has been accorded a different treatment from leases.¹⁵ Nevertheless, save for a few decisions, the broad consensus is that a merger does not involve a transfer of property or an assignment of rights.¹⁶ Hence, courts have held that restrictive covenants, leases with non-assignment clauses and insurance contracts, for example, may be enforced by the merged corporation.

12 As the purpose of this article is to consider how the effects of mergers have been approached in different jurisdictions, the rest of this section will look at how different state courts have analysed and characterised mergers.

(1) *No assignment or transfer because this is the statutory intent of the merger statute*

13 In *TXO Production Co v MD Mark, Inc.*,¹⁷ TXO Production Co, one of the merging companies, had information in its possession provided to it by the plaintiff, which information was subject to a non-disclosure agreement. Upon merger, that information also became available, effectively, to the other merging company. On a claim that the merger violated the non-disclosure agreement, the Texas Court of Appeal held that to so hold would prevent the flow of TXO's contractual rights to the merged company, Marathon Oil Co.

14 See, generally, Elaine D Ziff, "The Effect of Corporate Acquisitions on the Target Company's Licence Rights" (2002) 57 Bus Law 767; Jolisa Dobbs, "Keeping It Fast by Merging Around Consents to Assign" (2006) State Bar of Texas Oil, Gas, and Energy Resources Law Section Report (December 2006); Jessica L Braeger, "Anti-Assignment Clauses, Mergers, and the Myth about Federal Preemption of Application of State Contract Law to Patent Licence Agreements" (2002) 50 Drake L Rev 639; Sung Yang, "Considerations for the Patent Holder: The Transfer of Patent Licences in the Context of a Merger" (2002) 42 IDEA 515.

15 See, generally, Peter Macaulay, "The Effect of Mergers on Anti-Assignment Provisions in Contracts: A Case Note on *TXO Production Co v MD Mark*" (2001) 53 Baylor L Rev 489; Jolisa Dobbs, "Keeping It Fast by Merging Around Consents to Assign" (2006) State Bar of Texas Oil, Gas, and Energy Resources Law Section Report (December 2006).

16 *HD Supply Facilities Maint, Ltd v Bymoan* 210 P3d 183 at 187 (Nev, 2009): "Indeed, when a relevant merger statute exists, the issue of a covenant's assignability is not controversial ... *As the majority of courts have concluded when considering this issue, in a merger, the right to enforce the restrictive covenants of a merged corporation normally vests in the surviving entity.*" [emphasis added]; Jolisa Dobbs, "Keeping It Fast by Merging Around Consents to Assign" (2006) State Bar of Texas Oil, Gas, and Energy Resources Law Section Report (December 2006).

17 999 SW2d 137 (Court of Appeals of Texas, 1999).

14 It noted that the governing merger statute was based on the MBCA, the comments to which explicitly state that a merger is not a conveyance or transfer and that the surviving corporation automatically becomes the owner of all real and personal property in the event of a merger. It therefore held that under the merger statute it was clear that all of TXO's interests vested in Marathon immediately upon the merger. Further, under these provisions, there was no transfer of the rights of the merging corporation; rather, the rights vested automatically and without further action.

15 Similar results were obtained in, *inter alia*, *Standard Register Company v Cleaver*¹⁸ (construing the Indiana merger effects statute which is *in pari materia* with §11.07(a) of the 2003 MBCA and holding that the merged company was entitled to enforce the restrictive covenants contained in an employment agreement) and in *Brunswick Corp v St Paul Fire & Marine Insurance Co*¹⁹ (construing the Delaware merger effects statute with language substantially similar to §11.07(a) of the 2003 MBCA and considering whether the merged corporation was entitled to take the benefit of an insurance contract entered into by one of its merging corporations).²⁰

(2) *No assignment because the merged corporation succeeds by operation of law to the rights and liabilities of the merging corporations*

16 In *Alexander & Alexander, Inc v Koelz*,²¹ the surviving corporation sought to enforce a non-competition covenant against certain employees, claiming that they had violated the covenant by pursuing the corporation's customers after leaving their employment. The employees argued that the employment contract, as a personal contract, could not be assigned without their consent. The Missouri Court of Appeal, noting that it was dealing with a statutory merger, held that as such, the surviving corporation succeeded to all the rights and liabilities of the preceding corporations. If the rights which inured to the benefit of the surviving corporation did not include those conferred by contracts such as those involved here, the statutory scheme which allowed such mergers would be seriously disrupted.

17 In *Sante Fe Energy Resources, Inc v Manners*,²² on a question of whether the merger of a corporate party to a lease contract with a third

18 30 F Supp2d 1084 (US District Court for the Northern District of Indiana, 1998).

19 509 F Supp 750 (US District Court for the Eastern District of Pennsylvania, 1981).

20 For another example, see also *Braga v Genlyte Group, Inc*, 420 F3d 35 (US Court of Appeals for the First Circuit, 2005).

21 722 SW2d 311 (Mo App, 1986).

22 635 A2d 648 (Superior Court of Pennsylvania, 1993).

party constituted an assignment of the lease contract to the new entity, it was held that when a corporate party to a contract merges with a third party the contract is not assigned to the new entity by operation of law. The court explained that a more accurate description of the transfer would be to say that the merged corporation succeeds to the rights of action and property of the merging companies. The same reasoning was applied in, *inter alia*, *Dodier Realty & Investment Co v St Louis National Baseball Club, Inc*²³ (lease), and *National Instrument, LLC, v Braithwaite*²⁴ (employment contract).

(3) *Doctrine of continuity*

18 On a question of whether the merged entity was a continuation of the merging entities and hence the income of the merging entities earned in the year before the merger could be attributed to the merged entity as its income for that year, it was held in *Birmingham Trust Nat'l Bank v State*²⁵ that “a company organized to take over the assets of an old company, the former being in reality a continuation of the latter, is liable just the same as the old company would have been had it alone continued to do business”. A similar result was reached in *Vulcan Materials Co v United States*,²⁶ where the court stated: “In a merger, [the] attributes of corporate life are transferred to the surviving corporation and are there continued and preserved.”

19 An analogy that has been used but which has not functioned as a universally accepted theory in the US the way it has in Canada and New Zealand has been the analogy of the merging of two rivers into one.²⁷ In *Atlanta Newspapers, Inc v Doyal*,²⁸ the court made reference to this analogy in deciding that a claim of defamation could be brought by the plaintiff against the merged corporation even though the claim arose out of a statement made by one of the merging corporations prior to the merger. The court stated:²⁹ “[T]he existence of the liability [the

23 361 Mo 981 (Supreme Court of Missouri, 1951).

24 2006 MDBT 11 (Circuit Court of Maryland, 2006).

25 292 Ala 335 at 338 (Supreme Court of Alabama, 1974). This reasoning was followed in *International Paper Co v Broadhead* 662 So 2d 277 (Court of Civil Appeals of Alabama, 1995).

26 446 F2d 690 at 694 (United States Court of Appeals for the Fifth Circuit, 1971).

27 The analogy was first used in *Atlantic & BR Co v Johnson* 127 Ga 392 at 396 (Supreme Court of Georgia, 1907) where the court, quoting *Thompson on Corporations*, said: “The consolidation of two or more corporations is like the uniting of two or more rivers; neither stream is annihilated, but all continue in existence. A new river is formed, but it is a river composed of the old rivers, which still exist, though in a different form. So it is with a consolidated corporation. A new corporation is formed, but not in the sense which works a destruction of the rights of action existing against the old one.”

28 65 SE2d 432 (Court of Appeals of Georgia, 1951).

29 65 SE2d 432 at 437 (Court of Appeals of Georgia, 1951).

merging corporation] had incurred was continuous and uninterrupted. The moment the consolidation order was filed terminating the corporation that incurred the liability was the moment that liability became attached to the consolidated corporation.” And in *Allen v United of Omaha Life Ins Co*,³⁰ the court relied on this reasoning to explain why under the relevant merger effects statutes the merged entity was entitled to receive the policy proceeds from an insurance policy entered into by one of the merging entities before merger.³¹

(4) *A merger results in a transfer by operation of law*

20 In *PPG Industries, Inc v Guardian Industries Corp*,³² the Sixth Circuit addressed the transfer, via merger, of a patent licence. In spite of a clause in the licence forbidding assignment, the licensee merged into another corporation, a competitor of the licensor. This surviving corporation then claimed it had not received the licence via assignment, but rather had succeeded to it by virtue of the merger. The court held that the merger had violated the non-assignment clause: “A transfer is no less a transfer because it takes place by operation of law rather than by a particular act of the parties.”

21 A similar result was reached in *Freeman Mgmt Corp v Shurgard Storage Ctrs, Inc*,³³ where it was held that a merger of one joint venture party with another corporation violated the provision in the joint venture agreement against transfers which had expressly included transfers “by operation of law”.³⁴

22 Interestingly, in *Cincom Sys v Novelis Corp*,³⁵ the Court of Appeals of the Sixth Circuit had occasion to reconsider its decision in *PPG Industries, Inc v Guardian Industries Corp*³⁶ in the light of a change in wording of the governing merger effects statute. Where the language considered in *PPG Industries, Inc v Guardian Industries Corp* was

30 236 SW3d 315 (Court of Appeals of Texas, 2007).

31 See also *Braga v Genlyte Group, Inc* 420 F3d 35 (US Court of Appeals for the First Circuit, 2005).

32 597 F2d 1090 (Sixth Circuit Court, 1979).

33 2007 US Dist LEXIS 37735 (US District Court for the Middle District of Tennessee, 2007).

34 Depending on the wording of the anti-assignment clause, therefore, a different result may be reached from the same principle. In *Dodier Realty & Investment Co v St Louis National Baseball Club, Inc* 361 Mo 981 (Supreme Court of Missouri, 1951), the lessee under a lease containing an anti-assignment clause merged into National Sports, Incorporated. The lease prohibited assignment without the consent of the lessor. The court applied the Missouri effect of merger statute in holding that transfer by merger is by operation of law and was thus not an assignment prohibited by the lease.

35 581 F3d 431 (United States Court of Appeals for the Sixth Circuit, 2009).

36 597 F2d 1090 (Sixth Circuit Court, 1979).

“deemed to be [t]ransferred to and vested in the surviving or new corporation without further act or deed” [emphasis added], the language had been amended to “are vested in the surviving or new entity without further act or deed”, taking out the reference to a deemed transfer. Nevertheless, the court held that what was occurring was in substance a transfer by operation of law and the statutory change of language made no difference to this.

(5) *Analysis of who should bear the risk of the merger given the type of obligation concerned*

23 Finally, courts have also applied a risk analysis to decide whether the type of obligation under review should, in the circumstances, be allowed to be enforced after a merger of one of the parties. This is usually not stand-alone reasoning but is often used to supplement one of the above grounds set out above. This form of analysis is particularly fact sensitive, and the result will depend on the specific circumstances of each case.

24 In *Imperial Enterprises, Inc v Fireman’s Fund Ins Co*,³⁷ the obligation concerned was an insurance policy. The court stated that it would interpret the policy in the insured’s favour and so as to avoid a forfeiture, since the statutory merger caused no increase in the risks or hazards incurred by Fireman’s Fund.

25 In *Star Cellular Tel Co v Baton Rouge CGSA*,³⁸ in deciding whether the rights and obligations under a partnership agreement passed to the merged corporation after the entity that was the original general partner merged with a corporation, the court held that it did. Among other reasons, it found that the merger created no material change in the control of the general partner or in the operations of the partnership as the change was purely formal – the substitution of a new corporate entity for the entity that was the original general partner – and the merger altered none of the pre-merger realities that were crucial to the partnership’s economic interests.

26 On the other hand, in *Nicolas M Salgo Assocs v Continental Ill Properties*,³⁹ the court found that the merger violated the anti-assignment clause, since the parties could have provided an exception to non-assignment if they had desired, but they did not do so. The court placed great importance on the fact that the parties were savvy business entities and that public policy dictated against forcing one party to accept a partner it had not intended to have.

37 535 F2d 287 (US Court of Appeals for the Fifth Circuit, 1976).

38 1993 Del Ch LEXIS 158 (Court of Chancery of Delaware, 1993).

39 532 F Supp 279 (District Court for the District of Columbia, 1981).

III. Statutory amalgamation in Canada

A. *Amalgamation legislation in Canada*

27 As with the US, Canada has a state and federal system, and a comprehensive review of Canadian law on statutory amalgamations would mean having to set out and analyse the laws of each state. This is beyond the scope of this article, and only the federal Canadian Business Corporations Act⁴⁰ will be set out. The key language of the various corporation statutes of the Canadian states is substantially similar.

28 The controlling provision for statutory amalgamations in the Business Corporations Act⁴¹ is s 181. This provides:

Two or more corporations, including holding and subsidiary corporations, may amalgamate and *continue as one corporation*. [emphasis added]

29 The effects of an amalgamation certificate are listed in s 186 of the Business Corporations Act:⁴²

On the date shown in a certificate of amalgamation

- (a) the amalgamation of the amalgamating corporations and their *continuance as one corporation* become effective;
- (b) the property of each amalgamating corporation *continues to be* the property of the amalgamated corporation;
- (c) the amalgamated corporation *continues to be liable* for the obligations of each amalgamating corporation;
- (d) an existing cause of action, claim or liability to prosecution is unaffected;
- (e) a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation may be continued to be prosecuted by or against the amalgamated corporation;
- (f) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated corporation; and
- (g) the articles of amalgamation are deemed to be the articles of incorporation of the amalgamated corporation and the certificate of amalgamation is deemed to be the certificate of incorporation of the amalgamated corporation.

[emphasis added]

40 RSC 1985, c C-44.

41 RSC 1985, c C-44.

42 RSC 1985, c C-44.

30 The other statutory amalgamation provisions deal with the requirements for an amalgamation agreement; the process of obtaining shareholder approval; vertical and horizontal short-form amalgamations; articles of amalgamation and the requirements for a statutory declaration of solvency; how amalgamation under other federal acts should be dealt with; and the shareholder's right to dissent.⁴³

B. Amalgamation effects in Canada

31 Unlike the US, Canadian courts have developed and consistently applied a comprehensive theory of amalgamation. This occurred in 1974 with the decision of the Supreme Court of Canada in *R v Black & Decker Manufacturing Co Ltd.*⁴⁴ Prior to this, courts struggled with the question of whether an amalgamation effected a transfer or not. After this, Canadian state and federal courts accepted the theory of fusion laid down by the Supreme Court in that decision.

32 In *R v Black & Decker Manufacturing Co Ltd.*,⁴⁵ criminal charges were brought against the amalgamated company for actions committed by one of the amalgamating companies. The Supreme Court held that the amalgamated company was liable for these actions, and that the effect of the statutory amalgamation provisions in the Canada Corporations Act⁴⁶ (as it was then titled) was "to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be."⁴⁷

33 The court explained that the word "amalgamation" was not a legal term and, accordingly, was not susceptible of exact definition. The term, rather, was mercantile and denoted an economic purpose. This was to build, to consolidate, perhaps to diversify, existing businesses. It was a joining of forces and resources in order to perform better in the economic field.

34 Looking at the economic end result of an amalgamation, the court noted that the amalgamating companies physically continue to exist in the sense that offices, warehouses, factories, corporate records and correspondence and documents are still there, and business goes on. In a physical sense, an amalgamating business or company does not disappear although it may become part of a greater enterprise.

43 See Business Corporations Act (RSC 1985, c C-44) ss 181–186.1.

44 [1975] 1 SCR 411.

45 [1975] 1 SCR 411.

46 RSC 1970, c C-32.

47 [1975] 1 SCR 411 at 422.

35 The court compared the amalgamation process to the processes of acquisition of shares and business assets and noted that these, unlike the amalgamation, did not result in a fusion:⁴⁸

But in an amalgamation a different result is sought and different legal mechanics are adopted, usually for the express purpose of ensuring the continued existence of the constituent companies. The motivating factor may be the Income Tax Act or difficulties likely to arise in conveying assets if the merger were by asset or share purchase. But whatever the motive, *the end result is to coalesce to create a homogeneous whole. The analogies of a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands have been suggested by others.* [emphasis added]

36 It explained the then equivalent⁴⁹ of s 186 of the Business Corporations Act⁵⁰ as being a section that spells out in broad language amplification of a general principle, noting that this was not an uncommon practice of legislative draftsmen.

37 The effects of this decision have since been examined in other situations, and it is to these that we now turn:

(a) In civil proceedings, an action commenced in the name of an amalgamating company could be left to continue in its name.⁵¹ Where proceedings had terminated in judgment, the amalgamated company was entitled to enforce a judgment granted to one of its amalgamating companies.⁵²

(b) Where a guarantee has been given over the debts of one of the amalgamating companies, the guarantee will extend to cover the debts of the entire amalgamated company,⁵³ but this may result in the guarantee being wholly discharged as the risks thereunder are materially increased by the amalgamation.⁵⁴ Where one amalgamating company gave a guarantee over the debts of the other amalgamating company, the guarantee was held to have disappeared upon the amalgamation as a person

48 *R v Black & Decker Manufacturing Co Ltd* [1975] 1 SCR 411 at 421.

49 Corporations Act (RSC 1970, c C-32) s 137.

50 RSC 1985, c C-44.

51 *First Gulf Development Corp v Alfa Laval Inc* (2006) ACWSJ 60; 148 ACWS (3d) 43 (Ontario, Superior Court of Justice).

52 *Sign-O-Lite Signs Ltd v Carruthers* [2000] BCTC 1016 (British Columbia, Supreme Court).

53 *Commcorp Financial Services Inc v Mark v Kellogg Enterprises Ltd* (1995) 33 Alta LR (3d) 176 (QB) (Alberta, Court of Queen's Bench); *Salomon Canada Sports Ltd v Anderson* [2006] BCJ No 791; (2006) BCPC 128 (British Columbia, Provincial Court).

54 *Salomon Canada Sports Ltd v Anderson* [2006] BCJ No 791; (2006) BCPC 128 (British Columbia, Provincial Court).

cannot guarantee his own debts.⁵⁵ But where three corporations were sureties under an indemnity, and two of the three amalgamated, it was held that the remaining corporation was entitled to claim a contribution from the amalgamated corporation as co-surety and that this contribution should be two-thirds – each being the obligations of each amalgamating corporation – and not half, *ie*, based on the number of sureties remaining after amalgamation.⁵⁶

(c) As with guarantees, a charge granted by an amalgamating company continues to remain enforceable against it after amalgamation.⁵⁷

(d) An insurance policy taken out by an amalgamating company continues in favour of the amalgamated company post-amalgamation, unless the policy expressly provides for its termination.⁵⁸

(e) An amalgamated company is liable for any criminal offences and penalties committed by any of its amalgamating companies.⁵⁹

(f) Trade mark registrations taken out by the amalgamating companies continue as the property of the amalgamated company.⁶⁰ And it would seem that upon the amalgamation of the licensor and licensee of certain land mining rights, the obligation to pay royalty under the licence

55 *Clarke v Technical Marketing Associates Ltd Estate* (1992) 8 OR (3d) 734 (Ontario, Ontario Court General Division).

56 *Gainers Inc v Edmonton Oilers Hockey Corp* (1994) ACWSJ 409715; 51 ACWS (3d) 1125 (Alberta, Queen's Bench).

57 British Columbia: *Re Orion Truck Centre Ltd* [2003] BCJ No 1769; (2003) BCSC 1167 (Supreme Court); *Re Manco Home Systems Ltd* (1989) ACWSJ 667763; 13 ACWS (3d) 352 (Court of Appeal); Ontario: *Heidelberg Canada Graphic Equipment Ltd v Arthur Anderson Inc* [1992] OJ No 253 (Ontario Court General Division); *Clarke v Technical Marketing Associates Ltd Estate* (1992) 8 OR (3d) 734 (Ontario Court General Division); *cf Capro Investments Ltd v Tartan Development Corp* (1998) ACWSJ 520876; 79 ACWS (3d) 628 (Ontario, Ontario Court General Division) where an express statement by the chargee that it would not look to the assets of the other amalgamating companies post-amalgamation was held to be binding and estopped it from seeking to exercise security rights over those assets.

58 *Rendall v Royal Insurance Canada* (1997) 34 OR (3d) 762 (Ontario, Ontario Court General Division).

59 *R v Black & Decker Manufacturing Co Ltd* [1975] 1 SCR 411; *Re The Queen and Mercantile Distributing Ltd* (1975) 61 DLR (3d) 481 (British Columbia, Supreme Court).

60 *Telpro Investments Inc v Hemingway's Restaurant Ltd* (2000) 10 CPR (4th) 401 (Ontario, Trademarks Opposition Board); *Molson Breweries, A Partnership v John Labatt Ltd* (1994) 56 CPR (3d) 107 (Canada, Trademarks Opposition Board).

agreement disappeared as a corporation cannot be a debtor to itself.⁶¹

(g) Employment contracts and the rights and obligations therein between the amalgamating companies and their employees continue post-amalgamation and may be enforced by the amalgamated company,⁶² and the same applies where the contract is a collective bargaining agreement.⁶³ This would include any restrictive covenants given by the employee.⁶⁴

(h) Because an amalgamation involves a fusion of companies, it does not involve a transfer of rights and liabilities. Hence, clauses requiring consent for a transfer or assignment do not apply,⁶⁵ unless an amalgamation was expressly referred to.⁶⁶

(i) There is no transfer of shares but a conversion of shares upon amalgamation. Hence, a person who received shares in an amalgamated company upon the amalgamation being effected did not receive the shares as a result of a transfer but via a conversion of shares, and that accordingly a clause in a shareholders agreement referring to “transferees” of shares did not apply to him.⁶⁷

IV. Statutory amalgamation in New Zealand

A. *Amalgamation legislation in New Zealand*

38 New Zealand’s statutory amalgamation provisions were incorporated into its Companies Act after a comprehensive review and

61 *Norcen International Ltd v Suncor Inc* (1988) 91 AR 81 (Alberta, Queen’s Bench).

62 *Yellow Pages Group Co v Anderson* [2006] BCJ No 694; (2006) BCSC 518 (British Columbia, Supreme Court); *Pattillo v Murphy Canada Exploration Ltd* (2002) ACWSJ 2780; 113 ACWS (3d) 839 (Alberta, Queen’s Bench).

63 *Neal v Toronto-Dominion Bank* (1997) ACWSJ 413074; 68 ACWS (3d) 23 (Ontario, Superior Court of Justice).

64 *SNC-Lavalin Group Inc v Lebeuf* (1995) ACWSJ 630280; 52 ACWS (3d) 775 (Quebec, Court of Appeal).

65 *Zurich Canadian Holdings Ltd v Questar Exploration Inc* (1998) ACWSJ 521886; 80 ACWS (3d) 417 (Alberta, Court of Appeal); *Loeb Inc v Cooper* (1991) 5 OR (3d) 259 (Ontario, Ontario Court General Division); *Rossi v McDonald’s Restaurants of Canada Ltd* (1991) 1 BLR (2d) 175 (British Columbia, Supreme Court).

66 *Prime Restaurants of Canada Inc v Greey Realty Holdings Ltd* [2003] OJ No 295 (Ontario, Superior Court of Justice).

67 *Sportscope Television Network Ltd v Shaw Communications Inc* (1999) ACWSJ 618778; 86 ACWS (3d) 527 (Ontario, Court of Justice).

overhaul to update its company law. The provisions were derived mainly from Canadian provisions.⁶⁸

39 The key amalgamation provision is currently contained in s 219 of the Companies Act 1993, and it provides as follows:

Two or more companies may amalgamate, and *continue as one company*, which may be one of the amalgamating companies, or may be a new company. [emphasis added]

40 Section 225 of the Companies Act 1993, which deals with the effect of a certificate of amalgamation, states:

On the date shown in a certificate of amalgamation,

- (a) The amalgamation is effective; and
- (b) If it is the same as a name of one of the amalgamating companies, the amalgamated company has the name specified in the amalgamation proposal; and
- (c) The Registrar must remove the amalgamating companies, other than the amalgamated company, from the New Zealand register; and
- (d) The amalgamated company *succeeds* to all the property, rights, powers, and privileges of each of the amalgamating companies; and
- (e) The amalgamated company *succeeds* to all the liabilities and obligations of each of the amalgamating companies; and
- (f) Proceedings pending by, or against, an amalgamating company may be continued by, or against, the amalgamated company; and
- (g) A conviction, ruling, order, or judgment in favour of, or against, an amalgamating company may be enforced by, or against, the amalgamated company; and
- (h) Any provisions of the amalgamation proposal that provide for the conversion of shares or rights of shareholders in the amalgamating companies have effect according to their tenor.

[emphasis added]

41 The other statutory amalgamation provisions deal with the requirements for an amalgamation agreement; the process of obtaining shareholder approval; vertical and horizontal short-form amalgamations; articles of amalgamation and the requirements for a

⁶⁸ Law Commission Report No 9: Company Law Reform and Restatement (1989) at p 146.

statutory declaration of solvency; and powers of the court to deal with an amalgamation proposal.⁶⁹

B. Amalgamation effects in New Zealand

*(1) Carter Holt Harvey Ltd v McKernan*⁷⁰

42 The question of the effect of a statutory amalgamation was first considered in New Zealand in the case of *Carter Holt Harvey Ltd v McKernan*.⁷¹ The Full Court of the Court of Appeal of Wellington had to consider whether a guarantee given by an amalgamating company was enforceable against the amalgamated company. It held that it did.

43 In coming to its conclusion, it considered both Canadian and US case law and engaged in a careful reading of the statutory provisions. It noted first of all the use of the word “continues” in the equivalent then⁷² of s 219 of the Companies Act 1993. This was, to the court, the key word. It explained that as used, the continuance was of one of the corporate entities, and not of the undertakings and operations of those entities.

44 As for the equivalent then⁷³ of s 225 of the Companies Act 1993, the court noted that the use of the word “succeeds” was not to be read as requiring that there be a predecessor and a successor. The merged entity succeeds to the assets and liabilities because that is where they are to be recognised as being or remaining as a result of the continuance of all parties to the amalgamation. This was because the issue of the certificate of amalgamation was merely the mechanical step whereby the process of amalgamation became effective; it did not affect or impinge upon the continuance of all corporate identities in the amalgamated company.

45 Finally, it noted that the legislation was passed in order to simplify the process of amalgamation. The intent was to ensure that the benefits and burdens of the contracts of all merging companies were to continue in force for all purposes. The amalgamated company was to enjoy all the advantages previously conferred on any of the

69 See Companies Act 1993 ss 220–226.

70 [1998] 3 NZLR 403 (Wellington, Court of Appeal).

71 [1998] 3 NZLR 403 (Wellington, Court of Appeal).

72 The court was looking at the statutory amalgamation provisions contained the Companies Act 1955. The wording of these provisions is substantially similar to the current statutory amalgamation provisions in the New Zealand Companies Act 1993, and the crucial words, in particular, are unchanged.

73 The court was looking at the statutory amalgamation provisions contained the Companies Act 1955. The wording of these provisions is substantially similar to the current statutory amalgamation provisions in the New Zealand Companies Act 1993, and the crucial words, in particular, are unchanged.

amalgamating companies and to have their liabilities. It was not to be treated as a different entity or as a new party to the contractual arrangements.

46 Accordingly, in the case of a guarantee, neither amalgamation of the creditor nor of the debtor would discharge the guarantor in respect of post-amalgamation advances, any more than it would discharge pre-amalgamation advances. The amalgamated company simply stood in the shoes of the amalgamating company.

(2) *Elders New Zealand Ltd v PGG Wrightson Ltd*⁷⁴

47 The question of the effect of a statutory amalgamation was recently re-examined by the New Zealand Supreme Court in *Elders New Zealand Ltd v PGG Wrightson Ltd*.⁷⁵ The case itself involved not a statutory amalgamation carried out under Pt 13 of the Companies Act 1993, but a court-sanctioned scheme of arrangement pursuant to s 236(1)⁷⁶ of the Companies Act 1993 where the end result was an amalgamation of the two companies.

48 The case is relevant, however, because the court was asked to decide whether the reference to “amalgamation” in s 236(1) of the Companies Act 1993 should be read as being an amalgamation of the same nature as that carried out under Pt 13, and further, if so, what the effect of such an amalgamation was. This was necessary because one of the amalgamating companies co-owned a number of stock saleyards and it had an agreement with the co-owner that if either wished to dispose of their interest in the stock saleyards, the other co-owner would have a right of pre-emption. When the amalgamating company entered into an amalgamation with another company, the other co-owner of the stock saleyard argued that this amounted to a disposition of property to the amalgamated company which triggered the pre-emption rights.

49 The court held that it did not as an amalgamation of two companies did not involve a transfer of assets. Instead, the assets and liabilities of the amalgamating companies are to be found within, and as part of, the amalgamated company. Hence, as there was no transfer or disposition, pre-emptive rights in respect of the transfer of those assets were not triggered by the amalgamation.

74 [2009] 1 NZLR 577 (New Zealand, Supreme Court).

75 [2009] 1 NZLR 577 (New Zealand, Supreme Court).

76 This section states that “the Court may, on the application of a company or any shareholder or creditor of a company, order that an arrangement or *amalgamation* or compromise shall be binding on the company and on such other persons or classes of persons as the Court may specify and any such order may be made on such terms and conditions as the Court thinks fit” [emphasis added].

50 In its reasoning, the court was persuaded by the decision of the Full Court of the Court of Appeal in *Carter Holt Harvey Ltd v McKernan*.⁷⁷ It noted that the term “amalgamation” as used in the Companies Act 1993 was governed by the concepts of fusion and continuance. While s 225 of the Companies Act 1993 did use the term “succeeds” to describe the process by which property passed to the amalgamated company, it held that the concept of continuance under s 219 coloured the meaning of the term “succeeds”.

V. Statutory amalgamation in Singapore

A. Amalgamation legislation in Singapore

51 The Company Legislation and Regulatory Framework Committee rendered its report in October 2002, and one of its recommendations was the introduction of a more effective and efficient statutory form of merger/amalgamation process to be modelled after New Zealand’s.

52 Its comments are worth setting out in full:

6.1 S 212, CA was originally intended to facilitate amalgamation of companies and their undertakings through wide powers accorded to the courts to effect a transfer of assets and liabilities through such court orders. Because of its restrictive application by the courts, it has rarely been successfully invoked. In today’s business environment of mergers and amalgamations of companies, it is timely for Singapore to introduce a merger process that is clear and efficient and which is tax neutral.

6.2 S 251 and s 259 of the Delaware Corporations Code (Title 8, Chapter 1, Subchapter IX, Merger, Consolidation or Conversion) provide for a streamlined merger process which requires a directors’ resolution in support of a merger, the preparation and circulation of the merger agreement and critical information to shareholders for a shareholders special majority vote, and a filing with the Regulator. Upon the effective date of the filing, the successor corporation assumes, by operation of law, all the rights and interests, as well as the obligations and liabilities of the merged entities.

6.3 The New Zealand Law Reform Commission Company Law Reform: Transition and Revision Report No 16 recommended a process which is modelled on the Delaware Corporations Code. The broad outline of the draft statutory form which illustrates the process and consequences of an efficient merger/amalgamation process which concurrently protects shareholder and creditor rights are set out below. We recommend the introduction of a more effective and

77 [1998] 3 NZLR 403 (Wellington, Court of Appeal).

efficient statutory form of merger/amalgamation process to be modelled on s 188–s 194A, New Zealand Law Commission Company Law Reform: Transition and Revision No 16.

[emphasis added]

53 The recommendation was adopted by the Government, and saw form in the introduction of ss 215A–215G into the Companies Act.⁷⁸ The provisions are substantially similar to the New Zealand provisions. The controlling provision, s 215A, provides as follows:

Without prejudice to section 212 and any other law relating to the merger or amalgamation of companies, 2 or more companies may amalgamate and *continue as one company*, which may be one of the amalgamating companies or a new company, in accordance with sections 215B to 215G, where applicable. [emphasis added]

54 And the section⁷⁹ dealing with the effect of amalgamations states:

On the date shown in a notice of amalgamation:

- (a) the amalgamation shall be effective;
- (b) the amalgamated company shall have the name specified in the amalgamation proposal;
- (c) all the property, rights and privileges of each of the amalgamating companies *shall be transferred to and vest in* the amalgamated company;
- (d) all the liabilities and obligations of each of the amalgamating companies *shall be transferred to and become* the liabilities and obligations of the amalgamated company;
- (e) all proceedings pending by or against any amalgamating company may be continued by or against the amalgamated company;
- (f) any conviction, ruling, order or judgment in favour of or against an amalgamating company may be enforced by or against the amalgamated company; and
- (g) the shares and rights of the members in the amalgamating companies shall be converted into the shares and rights provided for in the amalgamation proposal.

[emphasis added]

78 Cap 50, 2006 Rev Ed.

79 Companies Act (Cap 50, 2006 Rev Ed) s 215G.

B. *Whether ss 215A–215G result in a transfer of assets and obligations*

55 Sections 215A–215G of the Companies Act⁸⁰ differ in two small but significant ways from the equivalent Canadian and New Zealand provisions. Firstly, s 215A states that the amalgamating companies “may amalgamate and continue as one company ... *in accordance with sections 215B to 215G*” [emphasis added]. The additional wording may be read as an adverbial phrase qualifying the words “amalgamate and continue” and that, accordingly, these processes take effect only within, and are limited by, the parameters specified in ss 215B–215G. Secondly, sub-ss 215G(c) and 215G(d) refer to assets and liabilities being “*transferred to ... the amalgamated company*” [emphasis added]. Taken together, on the face of it, therefore, the Singapore amalgamation provisions, unlike the Canadian and New Zealand ones, seem to result in a transfer of assets and obligations.

56 This view is reinforced by the wording of s 34C of the Income Tax Act.⁸¹ This expressly provides for, among other things, the trades and businesses carried on in Singapore of all the amalgamating companies being treated as carried on in Singapore by the amalgamated company beginning from the date of amalgamation.⁸² Other subsections refer specifically to transfers of property taking place.⁸³ These provisions appear to be premised on a framework of statutory amalgamation that involves the transfer of assets and obligations.

57 It is suggested, however, that to construe the amalgamation provisions in this manner would be to defeat the purpose of the legislation, which was to provide a more effective and efficient statutory form of merger/amalgamation process.⁸⁴ Such an approach would find support in the New Zealand cases already cited above. However, over and above case authority, there are substantive reasons to favour such an approach.

80 Companies Act (Cap 50, 2006 Rev Ed).

81 Cap 134, 2008 Rev Ed.

82 Income Tax Act (Cap 134, 2008 Rev Ed) s 34C(6): Arguably, it would not be necessary to stipulate such a continuance effect as being deemed to arise if that is what ss 215A–G of the Companies Act (Cap 50, 2006 Rev Ed) do.

83 See, for example, s 34C(1) of the Income Tax Act (Cap 134, 2008 Rev Ed) which refers to the transfer of intellectual property.

84 In the Explanatory Note to the Companies (Amendment) Bill 2005, it states that: “Clause 49 inserts new sections 215A to 215J to give effect to Recommendation 5.8 of the Report of the Company Legislation and Regulatory Framework Committee.” Recommendation 5.8 stated: “The CLRFC recommends the introduction of a more effective and efficient statutory form of merger/amalgamation process to be modelled after Section 188 – Section 194A of the New Zealand Law Commission Company Law Reform: Transition and Revision Report No 16.”

- (1) *A transfer would mean that certain types of property could not be effectively transferred pursuant to the statutory amalgamation provisions*

58 Where contracts contain non-assignment clauses, such contracts could not be effectively assigned unless the counterparty's consent was obtained. Arguably, personal contracts which the law treats as unassignable without consent (eg, employment contracts) might also have to be dealt with separately. As noted by the court in *Carter Holt Harvey Ltd v McKernan*,⁸⁵ this would mean that amalgamating companies would need to carry out a careful examination of each contract entered into and decide whether any of these may be characterised as personal contracts and, if so, decide if it should seek consent for the assignment of the same.

59 These difficulties, however, are mere administrative *bagatelles* compared to the potential hitches that will arise if the amalgamating companies have assets outside Singapore. For immovables and movables, it is trite law that the law governing the transfer of assets is that of the *lex situs*. For choses in action, the law governing the transfer is the law of the contract. If this is not specified, the formalities for assignment or novation specified by the law of the relevant jurisdiction must be followed. Shares and securities are transferable in accordance with the law of the jurisdiction where the relevant company is incorporated. Intellectual property is assignable in accordance with the law of the jurisdiction where those rights arise.

60 In each of these cases, it would not be possible to rely on s 215G of the Companies Act⁸⁶ to effect the transfer as that section would only have effect within Singapore. Transfers and assignments in accordance with the law of the relevant jurisdiction would be required. Accordingly, for such assets, agreements and documents of transfer may have to be entered into.

61 This, too, would be a mere inconvenience compared to the conceptual difficulty of how a transfer can take place where the transferor ceases to exist before the transferee comes into existence (the transferor and transferee being the amalgamating company and the amalgamated company). Conceptually, the amalgamating and amalgamated companies cannot exist together at the same point in time. The amalgamated company arising phoenix-like as it were from the ashes of the amalgamating companies, at the point in time that the amalgamated company comes into existence there would be no amalgamating company from which the assets could be transferred.

85 [1998] 3 NZLR 403 (Wellington, Court of Appeal).

86 Cap 50, 2006 Rev Ed.

Similarly, at the point in time when the amalgamating companies still exist, there is no amalgamated company to transfer the assets to.⁸⁷

62 Conversely, an amalgamation as understood in Canada and New Zealand would not meet these legal and conceptual difficulties as its effect is akin to a change of form. Such a change would be governed by the law of the jurisdiction of incorporation rather than the *lex situs*. Indeed, such was the approach adopted by the Supreme Court of Western Australia in *Gold and Resource Developments NL v Australian Stock Exchange Ltd.*⁸⁸ In that case, Gold and Resource Developments NL (“Gold”) owned all of the shares of Macraes Mining Co Holdings Ltd (“Holdings”). Holdings in turn held approximately 35% of the issued shares in Macraes Mining Company Limited (“Macraes”). Macraes was listed on the Australian Stock Exchange (“ASX”). Holdings and Macraes were amalgamated under the New Zealand Companies Act. The issue before the court was whether the amalgamation resulted in a disposal of assets held by Macraes to either Gold or Holdings. If so, such a disposal would have had to have met the requirements of the ASX listing rules for such disposals.

63 ASX submitted that it was necessary to consider the practical effect of the amalgamation, which it said was the disposal of Holdings’ assets to the amalgamated company. Gold submitted that it was necessary to consider the law of New Zealand to ascertain the nature of the amalgamation, and then consider whether a disposal was effected within the meaning of the ASX listing rules.

64 The Supreme Court of Western Australia agreed with Gold. It accepted as correct Gold’s submission that since amalgamation was a procedure created by New Zealand law, it was to the law of that country that it was necessary to look in order to ascertain what the consequences of an amalgamation were. Accordingly, to determine whether there was a disposal within the meaning of the ASX listing rules, it was first necessary to characterise amalgamation and ascertain its nature according to New Zealand law and then to consider whether the procedure, so understood, effected a disposal within the definition of the ASX listing rules

65 It examined the relevant provisions on statutory amalgamation in the New Zealand Companies Act 1993 and noted that under New Zealand law, as a matter of statutory interpretation, there was no

87 While the Singapore Companies Act (Cap 50, 2006 Rev Ed) has provisions on pre-incorporation contracts allowing for contracts entered into on behalf of a company prior to its incorporation to bind the company after, it does not have similar provisions on pre-amalgamation contracts.

88 (1998) 30 ACSR 105.

disposal of assets by one of the amalgamating companies on the basis that it ceases to be a separate legal entity. The amalgamated company was not to be treated as a different entity. The court opined:⁸⁹

Difficult though the concept is – at least to those not familiar with it – the amalgamated company ‘is’ as a matter of law Macraes. It is also Holdings, but that does not detract from the force of the proposition that it is to be considered for all purposes as if it were in effect Macraes continuing ‘without subtraction’.

(2) *If ss 215A–215G effect a transfer and not a change in form, it would be more efficient and effective for the amalgamating companies to rely on a simple transfer of business assets*

66 A transfer of business assets from one company to another would typically involve an agreement for the sale of business assets. The vendor company would need to hold a shareholders’ meeting where the approval of the majority of the company’s shareholders would be required.⁹⁰ The purchasing company would only need to approve the purchase by way of a directors’ resolution. The formalities for the transfer of the various assets would only need to be observed for the assets of the vendor company.

67 In contrast, an amalgamation would require the shareholders of both the amalgamating companies to pass special resolutions.⁹¹ The contracts of both amalgamating companies would need to be examined to ascertain if any of them prohibited assignment. Any overseas assets of both these amalgamating companies would need to be formally transferred (assuming the difficulties set out above can be overcome). For the same economic result (*ie*, the assets of both companies held in the hands of one company), an amalgamation procedure that results in a transfer of assets would require double the work to be done. This seems to run counter to the expressed intent of the provisions.

(3) *An amalgamation as understood in Canada and New Zealand would offer a real alternative to acquisitions of shares or business assets*

68 In a share acquisition, the purchaser acquires a subsidiary together with all its assets and liabilities. The company is acquired lock, stock and barrel with minimal legal formalities. The target company becomes a subsidiary of the purchasing company, and while its liabilities are acquired as part of the transaction, these liabilities are ring-fenced

89 *Gold and Resource Developments NL v Australian Stock Exchange Ltd* (1998) 30 ACSR 105.

90 Companies Act (Cap 50, 2006 Rev Ed) s 160.

91 Companies Act (Cap 50, 2006 Rev Ed) ss 215C and 215D.

from the assets of the parent company. If the purchaser wishes to be the sole shareholder, it will need to purchase the shares of all of the target company's shareholders. If the company is a public company and the target's management is hostile to the purchaser, the acquisition can still take place if enough shareholders can be persuaded to part with their shares.

69 In an acquisition of business assets, only the consent of a majority of the target's shareholders need be obtained. However, contracts may need to be novated or consents of counterparties may need to be obtained. Formalities for the transfer of all other assets will also need to be observed. The purchaser can, however, cherry-pick assets and need not burden himself with liabilities he is not willing to take on.

70 An amalgamation as understood in Canada and New Zealand would require two-thirds of the shareholders of both amalgamating companies to approve the transaction. The amalgamation agreement may provide for the squeeze-out of minority dissenting shareholders.⁹² Accordingly, this process would require fewer shareholders to accept the merger for it to be effected, although the percentage is higher than for an acquisition of business assets. The co-operation of the management of the target will be required, however, so the merger will need to be a friendly one. There are less legal formalities for the amalgamation than for an acquisition of business assets. However, assets may not be cherry-picked and, as between the amalgamating companies, liabilities are not ring-fenced.

71 Conversely, if an amalgamation results in a transfer of assets, while it retains some of its advantages over the share acquisition, its advantages as compared to an acquisition of business assets is considerably reduced: more shareholders need to be persuaded to come on board (and these will be those of both companies), and depending on the assets involved the formalities for transfer may be as or possibly more onerous (bearing in mind that the assets of both companies – and not just one – will need to be dealt with).

VI. Uses and proposals for reform

72 Given the relatively recent availability in Singapore of statutory amalgamations as an alternative to the acquisition of shares or business assets, it might be useful to end this article with a brief look at how it has been used in the other jurisdictions (most notably the US and Canada) and to briefly touch on areas that might merit further consideration and reform.

92 See paras 72–78 of this article for more on this topic.

73 As noted above, the need to obtain the approval of the board to a plan of amalgamation has meant that amalgamations can only be used where the boards of the amalgamating companies are receptive to the merger. The amalgamation form may be used where companies are of comparatively equal strengths and the merger is one that is sought to be presented to the public as a “merger of equals”. Other than this, however, the amalgamation form has been utilised for the following purposes:

(a) *To achieve a reverse listing.* This can be particularly useful where the listed company is a special purpose acquisition company and the last decade has seen a resurgence of the use of this vehicle in the US.⁹³ The Singapore Exchange has recently proposed allowing special purpose acquisition companies to be listed. Assuming that no transfer of assets and obligations takes place in an amalgamation, the amalgamation provides a less onerous procedure for acquiring a company's business.

(b) *To squeeze-out minority shareholders.*⁹⁴ As noted above, the requirement for a two-third majority means that an amalgamation can be approved (subject to receiving court approval) even if not all the shareholders agree. Unlike the US,⁹⁵ Canada⁹⁶ and New Zealand,⁹⁷ Singapore's provisions do not expressly provide a buy-out right for dissenting shareholders. However, the same economic result could be achieved by giving the dissenting shareholders a cash pay-out or redeemable preference shares in the amalgamated company, which shares can then be redeemed once the amalgamation has been finalised.⁹⁸

(c) *To allow property of the amalgamating companies to be held by the amalgamated company without breaching anti-assignment clauses or otherwise having to obtain counterparty consent.* As noted in the cases from Canada and New Zealand

93 See, generally, Aden R Pavkov, “Ghouls and Godsenders? A Critique of ‘Reverse Merger’ Policy” (2006) 3 Berkeley Bus LJ 475; Tim Castelli, “Note: Not Guilty by Association: Why the Taint of their ‘Blank Check’ Predecessors Should Not Stunt the Growth of Modern Special Purpose Acquisition Companies” (2009) 50 BCL Rev 237.

94 See, generally, Lynne Taylor, “Minority Buy-Out Rights in the Companies Act 1993” (1997) 6 Canta LR 539.

95 Model Business Corporation Act 2003 §11.02(b.1).

96 Canadian Business Corporations Act (RSC 1985, c C-44) s 190.

97 New Zealand Companies Act 1993 s 106 read with s 110.

98 This method was suggested by D G C Menzel, QC in “Corporate Reorganisations and Amalgamations” in *Special Lectures of the Law Society of Upper Canada: Developments in Company Law* (1988). While it is possible that a court might not approve such a structure under s 215H of the Companies Act (Cap 50, 2006 Rev Ed), ultimately, there should be nothing fundamentally objectionable about it as the companies involved could always reach the same result through the process of a sale of business assets and eventual winding up of the target company.

cited above, amalgamations (as understood in Canada and New Zealand) do not trigger anti-assignment or pre-emption clauses. Unless the contracting parties have expressly included amalgamations in the ambit of such clauses, an amalgamation may be a useful way to avoid being caught by such clauses. Other effects described in the survey of cases set out above may also provide food for thought for innovative structuring.

74 For companies to be able to achieve these results, the effects of an amalgamation under Singapore law need to be clarified, in particular, whether it should be seen as giving rise to a transfer of assets and obligations, or not. As the decisions of courts in the US have shown, just what the best response to that question should be is not an easy one, affecting as it does a wide range of transactions. However, rather than leaving the question to the courts to decide, it is submitted that this is an issue best dealt with as a matter of policy by the Legislature.

75 Should it be decided that the preferred position should be that amalgamations give rise to transfers, it is submitted that the word “continues” in s 215A of the Companies Act⁹⁹ should be deleted. As dealt with above, the reference to the word “continues” in s 215A carries with it the weight of Canadian and New Zealand case law construing such language as controlling the effects of statutory amalgamations (*ie*, that no transfer takes place), and an amendment deleting the word – with an appropriate explanatory statement – would help to place the matter beyond doubt.

76 On the other hand, it is suggested that a statutory amalgamation framework that does not result in transfers of assets and obligations would be more attractive and beneficial for companies. If this view is accepted, to clarify the position, it is submitted that the addition of language such as that used in the Texas merger effects statute, *ie*, “without any transfer or assignment having occurred”, could be considered.¹⁰⁰

77 It is also submitted that the right of shareholders to dissent and to be bought out if they are not willing to be brought along into the amalgamated company should be incorporated. In this respect, it may not be necessary to look to the Canadian or New Zealand provisions as it is suggested that language similar to that in s 216 of the Companies

99 Cap 50, 2006 Rev Ed.

100 Under these circumstances, knock-on revenue consequences may need to be considered. In this respect, the framework of the US in specifically according different revenue treatment based on principles of continuity and by categorising mergers into combinations, forward mergers and reverse mergers might merit further study.

Act¹⁰¹ according discretion to the court to order a purchase of shares and other remedies should be sufficient.

78 Finally, it is suggested that the relationship between the amalgamation provisions and the Singapore Code of Takeovers and Mergers (“Code”) should be refined.¹⁰² The Code expressly provides that it applies to amalgamations,¹⁰³ save for certain of its provisions. However, where the amalgamation (as might be the case where the listed company is a special purpose acquisition company) is intended to have the same economic and business effects as an acquisition of business assets, it is suggested that there is no compelling reason to subject the amalgamation to the Code. A similar argument may be made where the amalgamation is intended to be a merger of equals between two listed companies which, in the form of the amalgamated company, will remain listed, carrying on essentially the same business post-amalgamation.¹⁰⁴

VII. Conclusion

79 In his Budget Speech 2010, the Minister for Finance, Mr Tharman Shanmugaratnam, noted the importance of innovation to the Singapore economy, and spoke of the Government’s policy to encourage mergers and acquisitions. It is submitted that a clarification of the legal effects and consequences of statutory amalgamation would be a small but useful additional step in helping to attain this goal.

101 Cap 50, 2006 Rev Ed.

102 This question too merits more study. In New Zealand, the Takeovers Panel noted in its Submission to the Commerce Committee on the Business Law Reform Bill that, under New Zealand law, amalgamations fell outside the ambit of the New Zealand Takeovers Code. As a result, parties had been using amalgamations as a means of avoiding the requirements of the Takeovers Code. It recommended that the matter be considered by the New Zealand Parliament. Subsequently, in a separate recommendation made to and at the request of New Zealand’s Minister of Commerce, the Takeovers Panel suggested that companies subject to the Takeovers Code be prohibited from relying on the statutory amalgamation provisions unless it was a for a short-form vertical or horizontal merger.

103 See the definition of “offer” and the accompanying note.

104 It is submitted that shareholders who disagree with the amalgamation could either be bought out or, as the companies remain listed post-amalgamation, could exit by selling their shares after the amalgamation exercise to persons more convinced by the business case of the amalgamation.