

**ALERT**  
**(International Version)**  
(No. 1 of 2011)

**RECENT IMPLICATIONS FOR REVERSE TRIANGULAR MERGERS IN THE BRITISH VIRGIN ISLANDS**

22 May 2011  
by Jamal S. Smith

[jamal.smith@thorntonsmith.com](mailto:jamal.smith@thorntonsmith.com)

According to the 2011 Q1 edition of *Assembling value*, a quarterly report by PricewaterhouseCoopers on global merger and acquisition (“M&A”) activity in the industrial manufacturing industry, there has been an increase of 157 percent in volume and 622 percent in value over the same period in 2010 with an average M&A deal now valued at \$500 million. Therefore, understanding how the implications of developing trends in the M&A market, including those in Delaware, London and Hong Kong, become critical to a deal involving a British Virgin Islands’ (“BVI”) company is important to these upcoming deals especially since the BVI serves as the corporate domicile of choice when considering corporate transactions.

**The traditional BVI merger**

In a traditional BVI merger the target company is acquired by the conversion of its shares into the shares of the acquiring company pursuant to a plan of merger. The shareholders of both the acquiring and target companies have the right to vote on the proposed plan of merger approved by the directors with dissenting shareholders having the right to payment of the fair market value of their shares after following a statutory procedure.

After the merger is completed all the assets, including choses in action, of the constituent companies immediately vests in the surviving company and all the liabilities and obligations of the constituent companies become the assets and liabilities of the surviving company, which can be either the target company or the acquiring company with either their names or an entirely new name. The assets and liabilities to be assumed would include any contractual obligation of the target company, such as the obligation not to assign rights without the consent of a third-party, including intellectual property rights. The traditional BVI merger can be applied to any number of companies each being a party to the plan of merger, which generally occurs on a consolidation of group companies during an acquisition or even post-acquisition of a group of companies.

**The reverse triangle merger**

The more complex merger involves the acquisition of a target company without the acquiring company becoming a party to the plan of merger and, therefore, not a constituent company in the merger. This type of merger, typically called a “triangular merger” or a “forward triangular merger” is more common with regulated entities seeking to have an arms-length approach to an acquisition and unlike the traditional merger, the acquiring company will set-up a new subsidiary that will acquire the target and the new subsidiary would be the surviving company. For example, where a BVI subsidiary wishes to become a

[www.thorntonsmith.com](http://www.thorntonsmith.com)

public company without the lengthy and expensive process of an Initial Public Offering it may acquire an existing public company.

There may be additional considerations which require the target company to remain in tact and therefore instead of the subsidiary acquiring the target, the plan of merger can be arranged in such a way that the target company becomes the surviving company. In what is known as the “reverse triangular merger” the target would be the surviving company and the only thing that would change in the target company is its ownership. This is a very popular form of merger to minimize complex contractual issues when acquiring a company.

### **Recent developments in Delaware**

However, even in a reverse triangular merger obtaining shareholder approval of the plan of merger may no longer be the only hurdle in light of the decision on a preliminary motion to dismiss a claim delivered by the Delaware Court of Chancery in *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, C.A. No. 5589-VCP (Del. Ch. April 8, 2011). The importance of that case cannot be underscored since the BVI’s modern company legislation had an earlier genesis in the Delaware corporate statute. The Delaware decision held that the acquisition of a company in a reverse triangular merger may constitute an assignment of an agreement by the company and, as such, violate a restriction in the agreement prohibiting assignments by operation of law.

The background to the Delaware case began when Meso Scale Diagnostics, LLC (“Meso”) who held the exclusive license rights to certain patents and entered into a global consent with Roche Diagnostics SMBH (“Roche”) and others pursuant to an agreement in 2003 whereby Roche acquired the company which held the patents required by Roche and the acquired company then licensed those patents to BioVeris Corporation (“BioVeris”) which was specifically consented to by Meso. However, in 2007 a dispute arose between Roche and BioVeris over Roche’s possible use of the patent rights contrary to the scope of the limited license resulting in Roche’s acquisition of BioVeris through a reverse triangular merger. Meso filed a claim against Roche in June 2010 alleging that Roche’s acquisition of BioVeris was in contravention of the 2003 agreement which provided that “[n]either this Agreement nor any of the rights, interests or obligations under [it] shall be assigned, in whole or in part, by operation of law or otherwise by any of the parties without the prior written consent of the other parties . . .”

According to the traditional view argued by Roche, a reverse triangular merger would not “without more” constitute an assignment since all that changed was the ownership of BioVeris. However, the Delaware court found that there was a valid argument made by Meso that there was “more” than just a change of ownership since Roche terminated BioVeris’ operations leaving it only as the holding company for the patents. As a result the Delaware court refused Roche’s motion to dismiss Meso’s claim casting doubt on the efficacy of a reverse triangular merger in relation to anti-assignment clauses.

If the Delaware court ultimately finds that the reverse triangular merger does in fact violate the anti-assignment clause will mean that parties planning a reverse triangular merger must, in addition to obtaining shareholder consent for the plan of merger, review the target company’s contracts and obtain consents from third-parties where there are anti-assignment provisions. Avoiding this onerous obligation was the primary reason for using a

reverse triangular merger and it may become necessary to re-evaluate the use of this tool in light of these developments.

## **Conclusion**

While the British Virgin Islands remains a key player along with Delaware in the international corporate market, with the resurgence of M&A deals it becomes critical for everyone involved to be cognizant of all the consents required in the various types of corporate restructuring that may take place. In light of the *Meso* litigation in the Delaware courts there may be additional considerations for more complex mergers, like reverse triangular mergers, which are likely to take place as M&A deals move in the direction of their 2007 record levels. Alternative restructuring models may become a common recommendation such as a simple share acquisition of the company rather than a reverse triangular merger depending on the objectives of the transaction to avoid complex contractual non-assignment provisions.

###

If you would like more information about mergers and acquisitions in the British Virgin Islands, contact Jamal S. Smith.

**ABOUT US:** THORNTON SMITH is a full service law firm based in the British Virgin Islands that provides practical solutions for complex legal and business transactions with a suite of value-added services to clients. With a genuinely intimate connection to the local community, the firm represents anyone interested in doing business in or from the British Virgin Islands. Through its affiliated charitable organization, *The William Thornton Foundation*, it is committed to finding practical solutions for the communities in which it operates.