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THE ACQUISITION OF A BUSINESS – IS A STATUTORY MERGER IN
TERMS OF SECTION 113 OF THE COMPANIES ACT 71 OF 2008
PREFERABLE TO A COMMON LAW SALE?

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I. INTRODUCTION

Two or more companies may decide that their businesses should be combined for a number of reasons. This may, for example, be done in order for the companies to have access to new markets, to increase their market share, to increase their profitability by reducing the inefficiencies involved in the running of two or more companies in the same business area or to acquire technology, infrastructure, expertise and/or skill in new practice areas.¹

Before the advent of the Companies Act 71 of 2008² South African law did not make provision for 'mergers' as that term is understood in many other jurisdictions.³ South African law did not recognise any mechanism by which one entity could be combined with another in terms of a statutory process, also referred to as a 'consolidation' in certain jurisdictions.⁴ One of the most significant changes proposed for the Companies Act was to make provision for a legal process by which companies could be combined.⁵ The concept of the amalgamation or merger of companies was accordingly introduced into our law, so as to enhance the efficiency of business combinations and to promote flexibility in this regard.⁶ It is significant that the statutory process of amalgamating or merging companies was adopted in addition to the existing forms of business combinations and/or acquisitions, such as the sale of a business as a going concern, the common law scheme of arrangement and offers to acquire the shares and/or other securities in a company.⁷ Companies therefore now have at their disposal an additional mechanism by which to engage in business combinations and/or acquisitions, and are

¹ Ben McClure 'The basics of mergers and acquisitions' 2010 at 2, available at <http://i.investopedia.com/inv/pdf/tutorials/ma.pdf>, accessed on 30 October 2014.

² As amended by the Companies Amendment Act 3 of 2011 and the Financial Markets Act 19 of 2012.

³ Maleka Femida Cassim 'The statutory merger in South African law' (2008) 16 *Juta's Business Law* 40.

⁴ Farouk HI Cassim (managing ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) 676.

⁵ *Memorandum on the Objects of the Companies Bill, 2008*, Companies Bill 61D of 2008 para 1.2.

⁶ *Ibid* para 9; Maleka Femida Cassim 'The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 1)' (2008) 20 *SA Merc LJ* 1 at 22.

⁷ Cassim et al *op cit* note 4 at 675.

required to consider in each proposed transaction the relevant circumstances to determine which mechanism will be most effective in giving effect to that transaction.⁸ This is in line with the move in the Companies Act towards self-regulation and the object of the Companies Act to encourage entrepreneurship.⁹ The main purpose of this work is to compare the requirements for, manner of implementation and consequences of an amalgamation or merger as contemplated in the Companies Act, referred to herein as a 'statutory merger', with that of the common law sale of a business.

(a) *The common law merger*

One of the ways in which two or more companies could have combined their businesses before the introduction into our law of the statutory merger was by way of a sale of a business, usually as a going concern.¹⁰ For purposes of this minor dissertation, a 'common law merger' can be illustrated by what is known in the South Africa law of taxation as an 'amalgamation transaction'. An amalgamation transaction in terms of s 44 of the Income Tax Act 58 of 1962 contemplates a transaction which may, in its simplest form, be implemented as follows, so as to achieve a result which is similar to that of a statutory merger:

- company A sells all of its assets and liabilities to Company B (subject to certain permissible exceptions);
- in consideration for the above sale, company B issues to company A shares and/or assumes certain or all of the debts of company A;¹¹
- company A transfers those shares which are issued to it by company B as aforesaid to its shareholders as a dividend in specie; and
- company A is wound-up or deregistered.¹²

⁸ Cassim op cit note 3 at 40.

⁹ Section 7(b)(i).

¹⁰ See HS Cilliers, ML Benadie & JJ Henning et al *Corporate Law* 3 ed (2000) 460–1 for a description of a traditional 'merger' in South African law prior to the introduction of the statutory merger.

¹¹ The consideration may also be a combination of the issue of shares and the assumption of debts.

¹² Phillip Haupt *Notes on South African Income Tax* 32 ed (2013) 369.

The result of the above would be that the assets and liabilities of company A become that of company B and company A ceases to exist, with the former shareholders of company A becoming shareholders of company B in the process. In this way company B becomes the owner of the business which was previously operated by company A.¹³

(b) The statutory merger under the Companies Act framework

In terms of the preamble to the Companies Act, one of the reasons for the enactment of the Act was to 'provide for equitable and efficient amalgamations, mergers and takeovers of companies'.¹⁴ The Act makes no distinction between an 'amalgamation' and a 'merger', and defines an 'amalgamation or merger' in s 1 as:

[A] transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in-

- (a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or
- (b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with any such new company or companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement'.¹⁵

¹³ It is important to note that this example is for illustrative purposes only and that a number of variations of this structure can be implemented as a common law merger.

¹⁴ It is peculiar to note that this object was not included in the purposes of the Companies Act in s 7.

¹⁵ Section 1. An 'amalgamating or merging company' (referred to herein only as a 'merging company') is defined in s 1 as a company which is a party to an agreement which provides for a statutory merger. See also Robert Gad & Janel Strauss 'Company mergers and tax (part 1)' 8 March 2012 at 3, available at <http://www.ensafrica.com/news/company-mergers-and-tax-part-1?id=584&STitle=tax%20ENSight>, accessed on 18 August 2014, where the view is expressed that the use of the word 'vesting', as defined in *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 175, in the continuous present tense may be seen to imply that a merging company may not 'acquire', as a result of a statutory merger, rights or

It is interesting to note that a distinction was drawn in the Companies Bill of 2007¹⁶ between a statutory merger as contemplated in paragraphs (a) and (b) of the definition of an 'amalgamation or merger' in s 1, by referring to a merger within the meaning of paragraph (a) as an 'amalgamation', and a merger contemplated in paragraph (b) as a 'merger'. This distinction was not carried through to the final version of the Act and it would therefore appear that the ultimate intention of the legislature was to not distinguish between amalgamations and mergers, unlike in many other jurisdictions.¹⁷

While a number of variations of the statutory merger exist, an example of a statutory merger which is comparable to that of a common law merger as contemplated in s 44 of the Income Tax Act, as described above, can be achieved by company A and company B implementing a statutory merger in terms of which:

- company B (the merging company) survives the transaction;
- all of the assets and liabilities which were held by company A before the merger are held by company B after the implementation of the transaction;
- company A is deregistered pursuant to the merger; and
- the shares which the shareholders of company A held before the transaction are converted into shares in company B.¹⁸

The result of such a statutory merger is the same as that of the common law merger described above — the assets and liabilities of company A become that of company B and company A ceases to exist, with the former shareholders of company A becoming shareholders of company B pursuant to the transaction.

obligations already held by it before the implementation of the merger. It would, however, appear that such an interpretation would be unduly narrow, especially in light of the fact that the assets and liabilities which are subject to a statutory merger may be allocated amongst the merged companies in terms of the merger agreement, as described in more detail in chapter II of this dissertation paper below.

¹⁶ GN 166 GG 29630 of 12 February 2007.

¹⁷ Cassim op cit note 6 at 2-3.

¹⁸ This conversion happens automatically and by operation of law. Cassim et al op cit note 4 at 687.

Other examples of business combinations which may be achieved by way of a statutory merger, many of which are possible because of the flexibility afforded by the Companies Act in respect of the nature of the consideration which may be given pursuant to a statutory merger,¹⁹ include:

- two (or more) companies are combined into one newly incorporated company, such that the pre-existing companies are dissolved in the process (referred to as a ‘new company merger structure’);
- two (or more) companies are combined in such a manner that one of the pre-existing companies ceases to exist as a result of the merger and the other continues to exist after it has absorbed the other (referred to as a ‘surviving company merger structure’);
- two (or more) companies are combined in such a manner that after the implementation of the merger a newly formed company is the holding company of each of the pre-existing companies, which continue to exist;
- triangular mergers;²⁰ and
- any number of combinations of the above.²¹

Furthermore, the fact that cash may be paid as the consideration in a statutory merger also creates the opportunity to use the statutory merger as a squeeze-out mechanism²² by which the minority shareholders of a company

¹⁹ Section 113(2)(d). ‘Consideration’ is widely defined in s 1 as meaning ‘anything of value given and accepted in exchange for any property, service, act, omission or forbearance or any other thing of value, including (a) any money, property, negotiable instrument, securities, investment credit facility, token or ticket; (b) any labour, barter or similar exchange of one thing for another; or (c) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly’. There therefore appears to be almost no restriction on the forms of consideration which may be paid to the shareholders of a merging company. Such consideration may include shares or other securities, such as debentures, of a surviving company or a company which is not a party to the merger. See the wording of s 113(2)(e) in this regard. This appears to pave the way for the use of triangular mergers in South African law. The use of the words ‘juristic person’ in s 113(2)(e) indicates that the consideration may also be shares in a foreign or external company. Also, the use of the words ‘other property’ in s 113(2)(c) implies that the consideration may also include cash. The flexibility as regards cash consideration is in contrast with jurisdictions such as the Netherlands and Norway, which do not make provision for a cash consideration in a merger. Cassim op cit note 6 at 25-6.

²⁰ For a detailed discussion regarding triangular mergers see Cassim op cit note 6 at 27–32.

²¹ See further in this regard Cassim et al op cit note 4 at 678-715.

²² For a more detailed discussion regarding squeeze-out mergers, also known as freeze-out mergers, see Maleka Femida Cassim ‘The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 2)’ (2008) 20 SA *Merc LJ* 147 at 148-55.

may be eliminated.²³ It is accordingly clear that, much like the common law merger, the statutory merger is a flexible mechanism, in which there may even be more than one company which survive or are created as a result of the transaction.

Statutory mergers are primarily regulated in terms of ss 113, 115 and 116 of the Companies Act. These provisions are primarily based on the law of mergers as it applies in the United States of America, specifically that of the Delaware General Corporation Law.²⁴ Section 113 stipulates the requirements for the conclusion of a statutory merger transaction, s 115 prescribes the required approvals for the implementation of a statutory merger and s 116 regulates the implementation and consequences thereof.

It is important to note that the requirements of s 112 of the Companies Act are not applicable to statutory mergers, notwithstanding the fact that a statutory merger by its very nature contemplates the transfer of all of the assets of one company to another company. A distinction is to be drawn in this regard between a disposal of assets, as is required for s 112 to apply to a transaction, and a transfer that is effected by operation of law as a result of a statutory merger. It would appear that a transfer of assets by operation of law does not amount to a disposal as contemplated in s 112.²⁵

II. FORMALITIES FOR THE CONCLUSION AND IMPLEMENTATION OF A MERGER

Under the Companies Act 61 of 1973 each of the mechanisms by which companies could be combined had its own, unique requirements and restrictions, which lead to complexity and an extensive range of considerations that had to be taken into consideration each time a decision was to be made as to how to implement a particular transaction. The

²³ David Yuill 'The New South African Merger Procedure' *Expert Guide - Mergers and Acquisitions* June 2013 at 106, available at <http://www.bowman.co.za/FileBrowser/ArticleDocuments/Expert-Guide-MergersandAcquisitions-2013.pdf>, accessed on 18 August 2014. For a further discussion of a freeze-out or expropriation of minority shareholders by way of a statutory merger, see Reinier Kraakman, John Armour & Paul Davies et al *The Anatomy of Corporate Law – A Comparative and Functional Approach* 2 ed (2004) 202-8.

²⁴ Title 8, chap 1 of the Delaware Code. Cassim et al op cit note 4 at 16.

²⁵ Cassim et al op cit note 4 at 693. See further in this regard below.

Companies Act has now simplified this to a large extent, given that certain 'fundamental transactions' (being proposals to dispose of all or the greater part of the assets or undertaking of a company, proposals for statutory mergers and proposals for schemes of arrangement) are subject to the same approvals, as prescribed in s 115 of the Companies Act. Notwithstanding this simplification, it is important to bear in mind that each of the fundamental transactions still has its own additional requirements and/or consequences, as set out in the Act, which need to be considered before selecting a transaction structure. It is also important to note that additional authorisations or formalities may be required or have to be complied with for the implementation by a company of either a common law or a statutory merger.²⁶

(a) The common law merger

A common law merger will inevitably amount to a disposal of all or the greater part of the assets or undertaking of a company, and will therefore be governed by ss 112 and 115 of the Companies Act.²⁷ The term 'all or the greater part of the assets or undertaking' is defined in s 1 of the Act as:

- '(a) [I]n the case of the company's assets, more than 50% of its gross assets fairly valued, irrespective of its liabilities; or
- (b) in the case of the company's undertaking, more than 50% of the value of its entire undertaking, fairly valued.'

For purposes of determining whether a disposal falls within the ambit of the abovementioned definition, s 112(4) prescribes that 'any part of the undertaking or assets of a company to be disposed of ... must be fairly valued in the prescribed manner',²⁸ which must be done 'as at the date of the

²⁶ This may include any restrictions placed on a company in its memorandum of incorporation, rules or in terms of a shareholders agreement in respect of that company.

²⁷ Note that in terms of item 2 of Schedule 1 to the Companies Act a non-profit company may only dispose of its assets or undertaking for 'fair value', save if such disposal is in the ordinary course of its non-profit activities.

²⁸ It would appear that the manner of calculating assets and turnover described in reg 164 of the Companies Regulations, 2011 GN 351 GG 34239 of 26 April 2011 would be the most appropriate calculation method to be used in this regard, despite the lack of clarity of the wording of the Act in this regard. See Carl Stein & Geoff Everingham *The New Companies Act Unlocked* (2011) 283 and Johan Latsky 'The Fundamental Transactions Under the

proposal, which date must [also] be determined in the prescribed manner'.²⁹

Accordingly, where a common law merger, for whatever reason, does not contemplate a disposal of all or the greater part of the assets or undertaking of a company as defined in s 1, it will not be regulated under ss 112 and 115.³⁰ As regards the meaning of the word 'disposal', if one takes into account the judicial precedent in respect of the 1973 Companies Act,³¹ in light of the fact that the wording of s 228 thereof is similar to that of the current Companies Act, it would appear that the word 'disposal' is to be given its ordinary meaning, namely to permanently transfer ownership.

Certain transactions are specifically excluded from the requirement to comply with the provisions of ss 112 and 115. Such transactions include a disposal pursuant to a business rescue plan, a disposal between a wholly-owned subsidiary³² and its holding company,³³ a transaction between 'two or more wholly-owned subsidiaries of the same holding company' or a tripartite transaction between a wholly-owned subsidiary, its holding company *and* 'one or more wholly-owned subsidiaries of that holding company'.³⁴ These exemptions are laudable and are in line with the purposes of the Companies Act³⁵ to increase efficiency, flexibility and to encourage investment in South

Companies Act: A Report Back from Practice After the First Few Years' (2014) 2 *Stell LR* 361 at 364 in this respect.

²⁹ The manner of determining the date of the proposal would not appear to have been prescribed yet. The date of a proposal may be either the date on which an agreement in respect of a disposal is concluded, whether such agreement is unconditional or not, the date of the actual disposal of an asset or, the preferred view, on the date on which an agreement in respect of the disposal of an asset becomes unconditional. Piet Delport *Henochsberg on the Companies Act 71 of 2008* (2014) 408; Latsky op cit note 28 at 365-6; Cassim et al op cit note 4 at 720.

³⁰ See the discussion of statutory mergers below regarding the provisions of s 115.

³¹ *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd (No. 2)* 2010 (1) SA 634 (WCC) para 12. See also in this regard *Ally v Courtesy Wholesalers (Pty) Ltd* 1996 (3) SA 134 (N) 145D and *Alexander v Standard Merchant Bank Ltd* 1978 (4) SA 730 (W). As regards the general meaning of the word 'disposal' see *Cullinan Properties Ltd v Transvaal Board for the Development of Peri-Urban Areas* 1978 (1) SA 282 (T) at 285-6.

³² A 'wholly-owned subsidiary' is defined in s 1, and bears the meaning ascribed thereto in s 3(1)(b).

³³ See s 1 for the definition of a 'holding company'.

³⁴ Section 112(1).

³⁵ Section 7. See also in this regard Department of Trade and Industry 'Company Law for the 21st Century' in GN 1183 GG 26493 of 23 June 2004.

African companies.³⁶ It is, however, unfortunate that similar carve-outs do not apply in statutory mergers, although it is understandable that the inclusion of such exemptions could significantly impact on the interests of third parties to a statutory merger.³⁷

A notice convening a shareholders meeting at which a disposal of all or the greater part of the assets or undertaking of a company is to be considered must be delivered to shareholders in the prescribed time and manner³⁸ and must be accompanied by a written summary of the provisions of ss 115 and 164 of the Companies Act. This is similar to what is required in a statutory merger, as discussed below, but must, in addition, also include a summary of the 'precise terms of the transaction or series of transactions'³⁹ to be considered at the meeting, which summary must satisfy the 'prescribed standards'.⁴⁰ It is also important to note that a resolution of the shareholders approving a s 112 disposal is valid only if such resolution approves a 'specific transaction'.⁴¹ Similar requirements to approve of specific transactions do not appear elsewhere in the Companies Act, and it is not clear why this

³⁶ Nigel Boardman 'A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008' in Tshepo Mongalo (ed) *Modern Company Law for a Competitive South African Economy* (2010) 310.

³⁷ In this regard, see the discussion of the statutory merger below.

³⁸ See s 6 and reg 7 read with reg 89 (1) of the Companies Regulations in this regard.

³⁹ Section 112(3). Cassim et al op cit note 4 at 721 argue that this, read with s 115, means that a series of agreements which collectively result in the disposal of all or the greater part of the assets or undertaking of a company will be subject to the requirements of s 112. It is unfortunate that the legislature chose not to state so explicitly in s 112. I would nonetheless agree with the aforementioned view, especially when s 112 is read in light of the requirements of s 115(1), which refers to 'an agreement or series of agreements'. It is also unfortunate that the legislature failed to use the defined term 'series of integrated transactions', as used in s 1, in referring to a series of agreements, as this would have reduced the uncertainty in this regard. Compare this to the position under s 228 of the 1979 Companies Act, where a series of transactions which collectively amounted to a disposal of the majority of the assets of a company did not fall within the ambit of that section. *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W) at 147-8.

⁴⁰ It is interesting to note that the boards of the merging companies are not required to give a recommendation to the shareholders of those companies regarding the transaction. It has been argued that some form of independent expert's report on the proposed transaction should be considered for South African law, as is seen in a number of foreign jurisdictions. Ezra Davids, Trevor Norwitz & David Yuill 'A microscopic analysis of the new merger and amalgamation provisions in the Companies Act 71 of 2008' in Tshepo Mongalo (ed) *Modern Company Law for a Competitive South African Economy* (2010) 358; Cassim op cit note 6 at 15-17.

⁴¹ Section 112(5). As to the meaning of 'specific', see *Ally* supra note 31 at 146, where it was found to mean 'capable of being exactly named or indicated', and that the transaction under consideration must be 'exactly named or capable of being so'. See also *Lindner v National Bakery (Pty) Ltd* 1961 (1) SA 372 (O) at 378-9 in this regard.

requirement was included for s 112 disposals only. Some authors suggest that the object of these requirements are to give shareholders control over disposals by a company, in order to ensure that the board of a company does not have the general authority to dispose of the assets of that company.⁴² Whilst such an argument would make sense, it is unclear as to why similar protections should not be afforded to shareholders in other fundamental transactions, such as statutory merger, where shareholders are just as exposed as in the event of a disposal.

While a common law merger, in the event that it constitutes a s 112 disposal, is also subject to the approval requirements of s 115,⁴³ including the passing of the relevant resolution by the shareholders of the disposing company,⁴⁴ an immediate difference and advantage of this procedure lies in the fact that it is only the company making the disposal which is required to obtain the approvals contemplated in s 115, as opposed to each of the merging companies, as is the case in a statutory merger.⁴⁵ This also means that the dissenting shareholder appraisal remedy contemplated in s 164 of the Companies Act will be available to shareholders who vote against a resolution approving a common law merger in the same way and subject to the same requirements as are applicable to a dissenting shareholder in a statutory merger, as described in more detail in chapter III of this dissertation paper.

Also, in contrast with a statutory merger, in a common law merger a separate application will have to be made in accordance with the provisions of ss 79 to 83 of the Companies Act by the relevant parties for the winding-up and/or deregistration of any company which will cease to exist pursuant to the implementation of the merger.

⁴² Cassim et al op cit note 4 at 721; Boardman op cit note 36 at 308.

⁴³ Section 112(2).

⁴⁴ This is in contrast to corporate laws in the United Kingdom and Australia, where no shareholders resolution is required for a disposal by a company, but is similar to the laws of a number of states in the United States of America. Boardman op cit note 36 at 311-13.

⁴⁵ See the discussion regarding the statutory merger below for a more detailed analysis of s 115.

(b) *The statutory merger*

(i) *Initiating a statutory merger*

Two or more profit companies⁴⁶ may amalgamate or merge only if each of the amalgamated or merged companies⁴⁷ to the transaction will satisfy the solvency and liquidity test contemplated in s 4(1) of the Companies Act following the implementation of the merger.⁴⁸ The board of directors of each of the merging companies are therefore required to consider whether each of the merged companies will satisfy the solvency and liquidity test following the implementation of the merger in question, and only if they are able to reasonably conclude that the solvency and liquidity test will be so satisfied may they put the relevant merger agreement to a vote by the respective shareholders in accordance with the provisions of s 115.⁴⁹

It is therefore clear that the boards of *each* of the merging companies must pass a resolution to the effect that the merged companies will satisfy the solvency and liquidity test *before* the merger agreement is put to and adopted by the shareholders of each company.⁵⁰ This is one of the main creditor protection mechanisms which serve to ensure that creditors will not be prejudiced by a statutory merger.⁵¹

⁴⁶ Note that the definition of a company, in s 1, does not include a foreign or an external company. A statutory merger can therefore not be done between such companies and a South African company. In terms of item 2 of Schedule 1 to the Companies Act a non-profit company may amalgamate or merge only with another non-profit company, and the provisions of ss 113, 115 and 116 apply mutatis mutandis to such mergers.

⁴⁷ In terms of s 1 an 'amalgamated or merged company' (referred to herein only as a 'merged company') is any company which is formed as a result of the implementation of a statutory merger or any merging company which survives the implementation of a statutory merger and which holds any of the assets or liabilities which any of the merging companies held before the implementation of the merger.

⁴⁸ Section 113(1).

⁴⁹ Section 113(4). Section 113(6) however provides that this requirement does not apply to a company which is in business rescue, provided that the merger has been authorised in an approved business rescue plan.

⁵⁰ What is peculiar about this is that the board of directors of one company may be required to pass a resolution to the effect that another company would reasonably appear to be solvent and liquid. The relevant board will have to obtain certain information to satisfy itself in this regard, and this may pose certain practical challenges.

⁵¹ Davids et al op cit note 40 at 346.

Notice of the shareholders meeting⁵² at which the merger agreement will be considered must be delivered to all of the shareholders of the merging companies and must be accompanied by prescribed information in accordance with the requirements of s 113(5) of the Companies Act.⁵³

In terms of s 113(2) a statutory merger must be recorded in writing.⁵⁴ The written agreement⁵⁵ must describe how the transaction will be implemented, including details of the following:⁵⁶

- if a company is to be incorporated as a result of the transaction, the wording of the memorandum of incorporation of that company;
- the details of the director(s) of each merged company;
- the manner in which the securities of each merging company will be 'converted into' securities in a merged company;⁵⁷
- in respect of any securities in a merging company which are not converted into securities of a merged company, the consideration to be received by the holders of those securities;
- the consideration to be received by any holder in the course of the merger instead of fractional securities;
- the manner in which the assets and liabilities of the merging companies will be allocated amongst the merged companies;⁵⁸

⁵² The predominant view is that a resolution authorising of a statutory merger, or for that fact any fundamental transaction, in accordance with s 115 is required to be adopted at a physical meeting, and may not be passed by way of round robin resolution in accordance with s 60. Latsky op cit note 28 at 363.

⁵³ The notice must include a copy or summary of the merger agreement and the provisions of ss 115 and 164. This is also required in terms of s 164(2).

⁵⁴ A similar requirement does not apply in a common law merger.

⁵⁵ It is not clear whether the board of a company is empowered to amend the terms of this agreement after the agreement has been approved by the shareholders of that company, but before the agreement has been implemented. See Cassim op cit note 6 at 17-18 in this regard.

⁵⁶ Section 113(2).

⁵⁷ The securities in a merging company may also be exchanged for other property in terms of s 113(2)(c). The Act does not prescribe how the securities are to be converted. The parties to a merger therefore have substantial freedom to decide how to give effect to the conversion.

⁵⁸ Section 113(2)(f). The parties to a transaction may therefore decide how the assets of the merging companies are to be distributed amongst the merged companies on implementation of the merger, whether by way of sole or joint ownership of the whole or only part of the assets, provided that the merged companies will be solvent and liquid, as per s 116(7).

- any further arrangements regarding the merger, including strategic or other arrangements required for the operation of the merged companies;
- an estimate of the costs to be incurred in the implementation of the merger; and
- in the event that a statutory merger is entered into between a subsidiary and its holding company,⁵⁹ a merger agreement must provide that shares which become held by an entity in itself as a result of the implementation of the merger must be cancelled without any payment when the transaction is implemented. In such an instance there is therefore no *conversion* of shares.⁶⁰

Save for the above, the parties to a statutory merger have contractual freedom to structure the transaction in the way which will best achieve their commercial objectives. The Companies Act would appear to place almost no limit on the matters which may be contained in a merger agreement.⁶¹

(ii) Required approval for a statutory merger

Section 115⁶² prescribes that a statutory merger may be implemented only if a number of approvals have been obtained (save if the merging of a company has been approved pursuant to an adopted business rescue plan).

First, to the extent that the transaction is subject to the jurisdiction of the Takeover Regulation Panel (established in terms of s 196 of the Companies Act) in accordance with the provisions of s 118, a compliance certificate must be issued for the transaction or the transaction must receive an exemption from the Takeover Regulation Panel.⁶³

⁵⁹ Section 113(1). Such a transaction remains subject to the provisions of ss 48(2) and 48(3), which provide that a subsidiary company should not acquire more than ten per cent of the issued shares of its holding company, and that a transaction should not result in a subsidiary company being the sole shareholder of its holding company.

⁶⁰ Section 113(3); Davids et al op cit note 40 at 349; Cassim op cit note 6 at 25.

⁶¹ Yuill op cit note 23; Davids et al op cit note 40 at 344.

⁶² It is important to note that the approvals and other provisions of s 115 apply to all fundamental transactions. These requirements will therefore also apply to a common law merger, to the extent that it entails the disposal of all or the greater part of the assets or undertaking of a company.

⁶³ Section 115(1)(b). A statutory merger is an 'affected transaction', as defined in s 117(1)(c), if it involves at least one regulated company, as described in s 117(1)(i). A more detailed

Secondly, a special resolution authorising the transaction must be adopted by the shareholders of *each* of the merging companies at a meeting which is called for purposes of the passing of such a resolution, where the quorum is such number of shareholders as will be able to exercise at least 25 per cent of all the votes that could be tendered on the merger.⁶⁴ As noted above, this is one instance in which a statutory merger differs significantly from a common law merger. In a statutory merger, a special resolution is to be passed by each of the companies to the transaction. This may be an expensive and time consuming process, especially in the case of publicly listed companies or in widely held companies. In a common law merger, however, the only company which is required to pass a shareholders resolution is the company which is disposing of all or the greater part of its assets or undertaking. Accordingly, in instances where it may be a challenge for the acquiring party in a merger to pass a special resolution, it will be advantageous to implement the transaction by way of a common law merger, as opposed to a statutory merger.⁶⁵

It is important to note that s 115(4) provides that the voting rights which are in the control of an 'acquiring party',⁶⁶ a person 'related'⁶⁷ to an acquiring party or a 'person acting in concert'⁶⁸ with any acquiring party or a person related to an acquiring party may not be included when calculating whether a quorum is established at a meeting called for purposes of approving a fundamental transaction, and the voting rights in respect of those shares may not be counted when determining whether a sufficient number of votes have

analysis of the regulation of mergers by the Takeover Regulation Panel is beyond the scope of this dissertation paper.

⁶⁴ Section 115(2)(a).

⁶⁵ Cassim et al op cit note 4 at 682.

⁶⁶ An 'acquiring party', in terms of s 1, 'when used in respect of a transaction or proposed transaction, means a person who, as a result of the transaction, would directly or indirectly acquire or establish direct or indirect control or increased control over all or the greater part of a company, or all or the greater part of the assets or undertaking of a company'. As to the meaning of 'control', see Delpont op cit note 29 at 418.

⁶⁷ A person is related to an acquiring party if that person is connected to the acquiring party in the manner described in s 2(1)(a)-(c). See the definition, in s 1, of 'related' in this regard.

⁶⁸ Section 115(4A) provides that the phrase 'act in concert' has the meaning ascribed thereto in s 117(1)(b).

been cast in favour of the passing of such a resolution.⁶⁹ This may be an obstacle in intra-group mergers, where all of the parties may be inter-related and therefore precluded from voting.⁷⁰

The special resolution must be approved by at least 75 per cent of the votes which are tendered on that resolution.⁷¹ It may be argued that the introductory wording of s 115(1), which provides '[d]espite section 65', indicates that a special resolution in respect a fundamental transaction is required to be adopted by 75 per cent or more of the shareholders of a company and that this percentage may not be altered in a company's memorandum of incorporation in accordance with s 65(10) of the Companies Act.⁷²

Thirdly, if the holding company of a merging company is a South African company or an external company and the merger will result in the disposal of all or the greater part of the assets or undertaking of both the merging company and of the holding company, a special resolution approving of the transaction is required to be adopted by the shareholders of both the merging company and its holding company.⁷³ It has, however, been argued, correctly in my view, that s 115(2)(b) can only ever apply to a s 112 common law merger, and not to a statutory merger, given that a statutory merger does not contemplate any *disposal* of any assets but merely a *transfer* of those assets

⁶⁹ See Cassim op cit note 22 at 150-2 for a discussion of the protection afforded to minority shareholders in terms of s 115(4). It is, for example, noted that s 115(4) effectively makes it impossible for parties to structure statutory mergers as two-step freeze-out mergers in terms of South African law.

⁷⁰ Latsky op cit note 28 at 377-8. It is suggested that this absurdity may be overcome by the legal maxim that the law does not operate for an impossible purpose, which may be applied to any sphere of law, as per *Gassner NO v Minister of Law and Order* [1995] 1 All SA 223 (C).

⁷¹ Section 1 defines a special resolution as requiring the support of at least 75 per cent of the shareholders of a company, save as provided otherwise in terms of that company's memorandum of incorporation, in accordance with s 65(10).

⁷² Cassim op cit note 6 at 11. For an opposite view see Davids et al op cit note 40 at 356 and Delport op cit note 29 at 417.

⁷³ Section 115(2)(b). If a wholly-owned subsidiary of an external company wishes, for whatever reason, to avoid this requirement, it may choose to first dispose of the relevant assets or undertaking to its holding company, which disposal will be exempt from s 112 by virtue of s 112(1)(b), and thereafter the holding company, which as an external company will not be subject to the requirements of s 112, can dispose of the relevant assets or undertaking to a third party in accordance with the laws applicable to that foreign company. Latsky op cit note 28 at 368.

by operation of law.⁷⁴ Accordingly, this is another fundamental difference between a common law merger and a statutory merger.⁷⁵

Finally, the approval of the court has to be obtained for the implementation of the transaction in the event that the required shareholders resolution is voted against by at least 15 per cent of the shareholders which voted on the matter and any shareholder which so voted against the resolution requires of the relevant company to obtain the approval of the court,⁷⁶ or if a court in any other circumstance grants leave to a shareholder which votes against the resolution to apply to court to review the merger.⁷⁷ If a shareholder requires of a company to obtain the court's approval as aforesaid, it becomes the company's responsibility to obtain such approval at its own cost or to treat the resolution as not having been passed.⁷⁸ Court approval of a statutory merger is therefore not generally a requirement for the implementation of a statutory merger. Fundamental transactions are not done under the auspices of the court, the ordinary remedy for dissenting

⁷⁴ Cassim et al op cit note 4 at 693.

⁷⁵ In terms of the Companies Bill of 2007 the requirement for the shareholders of a holding company to approve of a fundamental transaction by its subsidiary extended not only to the sale or disposal of all or the greater part of the assets or undertaking of a company, but also to statutory mergers, by providing in s 119(2)(b) thereof that a fundamental transaction, whether a transaction contemplated in s 112, s 113 or s 114, required approval 'by the shareholders of the company's holding company, if any, if the transaction by the first company substantially constitutes a parallel transaction by the holding company'. The removal of this wording by the legislature would appear to make it clear that the approval of the shareholders of the holding company of a party to a fundamental transaction is required only in instances where the transaction under consideration constitutes a sale or disposal of all or the greater part of the assets or undertaking of a company.

⁷⁶ Section 115(3)(a). This requirement is unique to South African law and does not appear in comparative foreign law. Davids et al op cit note 40 at 347.

⁷⁷ Sections 115(3)(b), 115(6) and 115(7). The court will grant leave to a person to apply for a review of statutory merger only if the court is satisfied that such person is acting in good faith, is capable of bringing the relevant action and prima facie has a valid case. A resolution approving of a statutory merger will be set aside only if the court is satisfied that the resolution is 'manifestly unfair to any class of holders of the company's securities' or if the passing of the resolution did not comply with any procedural or other requirements of the Companies Act. It is interesting to note that preference shareholders are not given specific protection under the Companies Act, in so far as it relates to fundamental transactions, and that the foregoing is the only protection afforded to them in addition to any protection given to them by terms of the shares issued to them. Cassim op cit note 6 at 12. See also regarding the right of dissenting shareholders to approach the court Cassim op cit note 22 at 171-2. Note that a statutory merger may also be subject to the provisions of chap 4 of the Companies Act to the extent that it is found to fall within the ambit of a 'primary offering', in terms of s 95(1)(i).

⁷⁸ Section 115(5). The company would therefore appear to have the choice whether to apply for such approval, and to pay the cost of any action taken as a result, or to not proceed with the transaction as if the resolution had not been passed.

shareholders in a fundamental transaction instead being the dissenting shareholder appraisal remedy in s 164.⁷⁹ In the same fashion as the dissenting shareholder appraisal remedy, the right to approach the court for relief in terms of s 115(3) is available only to shareholders who actually voted against the passing of the relevant resolution. A shareholder who abstains or who is not entitled to vote on the resolution will accordingly not be able to use these remedies.⁸⁰

(iii) Implementation of a statutory merger

The process of implementing a statutory merger commences by the relevant parties concluding a merger agreement. Once this has been done, the board of directors of each of the merging companies must apply and pass the solvency and liquidity test, whereafter the board, shareholders' and other authorisations, as described above, must be obtained by each of the merging companies.⁸¹ These authorisations must be obtained before the transaction is implemented.⁸²

Each of the merging companies must give notice of the merger to each of their known⁸³ creditors in the prescribed way.⁸⁴ This is another important

⁷⁹ Cassim et al op cit note 4 at 17.

⁸⁰ Ibid at 697.

⁸¹ In instances where it will be difficult, expensive or not possible to obtain the requisite approvals from each of the merging companies, the requirement for an acquiring party to a transaction to obtain these approvals may be avoided by making use of a triangular merger. Should the acquiring company incorporate a new wholly-owned subsidiary company, or take transfer of a shelf company with no assets or liabilities, and structure the transaction as a statutory merger between that subsidiary and the actual target company, the primary acquirer will not be a party to the transaction and therefore not need to obtain the prescribed approvals. See above regarding the passing of a shareholders resolution by the primary acquirer, as the holding company of a wholly-owned subsidiary, in such a statutory merger. It is not clear whether the 'de facto merger doctrine', in terms of which a common law merger which, even though structured as a sale transaction, achieves a result very similar to that of a statutory merger and should therefore also attract the same consequences as a statutory merger, including the dissenting shareholder appraisal remedy, will be adopted in South African law. Byron F Egan 'Acquisition Structure Decision Tree — Choice and Acquisition of Entities in Texas Course' 2012 at 18-21, available at www.jw.com/publications/article/1736, accessed on 17 October 2013; Cassim et al op cit note 4 at 706.

⁸² Delpont op cit note 29 at 406.

⁸³ As regards the meaning of 'known', see ibid at 422 and the definition in s 1 of "knowing", "knowingly" or "knows".

⁸⁴ Section 116(1)(a). In terms of s 116(2), the requirement to give such a notice to creditors does not apply to a company in business rescue, provided that the transaction has been authorised in terms of an approved business rescue plan.

creditor protection mechanism in a statutory merger which does not apply in a common law merger under s 112.⁸⁵

It is, however, not yet clear who or what will constitute a 'creditor' to whom notice of a statutory merger is required to be given. The term 'creditor' is not defined in the Companies Act⁸⁶ and would therefore be expected to be given its ordinary meaning. The term 'creditor' has been defined in dictionaries as '[o]ne to whom a debt is owed', '[o]ne to whom any obligation is owed, whether contractual or otherwise', '[a] person or entity with a definite claim against another, esp. a claim that is capable of adjustment and liquidation'⁸⁷ and as 'someone to whom money is owned'.⁸⁸ The term may either be ascribed a narrower meaning, which refers to only financial creditors of a company as reflected in its books of account, or it may be ascribed a wider meaning, which may include any and all persons to whom that company owes obligations, whether pecuniary or otherwise. The wider interpretation includes contractual creditors and will therefore include third parties with whom a merging company has entered into agreements.

From a practical perspective, the preferable interpretation would be that the term 'creditor' should be understood in the narrower sense, failing which

⁸⁵ Some authors argue that this notice to creditors is unnecessary and may undermine the appeal of the statutory merger, given that creditors already enjoy sufficient protection outside of the Companies Act, especially in light of the fact that the implementation of a statutory merger is subject to the solvency and liquidity of each of the companies which survive the transaction. Davids et al op cit note 40 at 365-6.

⁸⁶ The term 'creditor' was defined in the draft Companies Amendment Bill in GN 1014 GG 33695 of 27 October 2010 as 'a person to whom a company is or may become obligated in terms of any liability or other obligation that would be required to be considered by the company if it were applying the solvency and liquidity test set out in section 4', where 'liability' was defined as 'an existing obligation of an entity arising from past events, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits'. Neither of these definitions made it into the Companies Amendment Act. Latsky op cit note 28 at 374; Davids et al op cit note 40 at 364. It was noted during deliberations of the South African Parliamentary Portfolio Committee on Trade and Industry regarding the Companies Amendment Bill on 8 February 2011, the minutes of which are accessible at <https://pmg.org.za/committee-meeting/12520/>, that 'the definitions of "asset" (d), "creditor" (j) and "liability" (t) [were] to be deleted as these concepts were generally understood'. Although it would have been preferable for the aforementioned terms to have been defined, it will fall to the South African courts to interpret the said terms, possibly with reference to the portfolio committee's deliberate omission of the above definitions. See also in this regard Delport op cit note 29 at 422.

⁸⁷ Bryan A Garner (ed) *Black's Law Dictionary* 10 ed (2014) 449.

⁸⁸ Elizabeth Walter (senior commissioning ed) *Cambridge Advanced Learner's Dictionary* 2 ed (2005) 293.

innumerable notices of a statutory merger will have to be given in certain instances. The counter-argument to this is that it is important for contractual parties to be aware of statutory mergers where the identity of a counterpart to an agreement will change. It should, however, be borne in mind that creditors are in any event protected by the requirement that the merged companies must be solvent and liquid after the implementation of a statutory merger. Furthermore, it would also not appear to be appropriate that all creditors, in the wider sense of the word, be given the right to make challenges against the implementation of a statutory merger, especially where their interest in the affairs of a merging company is very limited. Some authors⁸⁹ argue to the contrary, stating that all creditors, including contractual creditors, are deprived in a statutory merger of their rights under the common law to object to, and refuse, the transfer by a debtor of its obligations to another and are instead given an opportunity only to oppose the merger through the auspices of the court.⁹⁰

It has been suggested that the solution to addressing the practical difficulties in giving notice of a statutory merger may be to apply to court for an order of substituted service.⁹¹ Davids et al⁹² suggest another solution, in terms of which a mechanism of public notification, similar to that seen in the Insolvency Act 24 of 1936, is used. This suggestion appears to be the most practical solution in this regard, but will require legislative intervention to be provided for. Alternatively some type of threshold test may applied for whether notice of a merger is required to be given to a particular creditor.⁹³

Any creditor may within 15 business days of the delivery to it of the aforementioned notice apply to court to have the transaction reviewed on the

⁸⁹ Latsky op cit note 28 at 374-5. See also Cassim op cit note 6 at 14 in this regard.

⁹⁰ See below regarding the right of creditors to oppose a statutory merger.

⁹¹ Latsky op cit note 28 at 375.

⁹² Op cit note 40 at 366.

⁹³ Canadian law, for example, provides that only creditors with claims in excess of Can\$1 000 are entitled to notice of a statutory merger. See also in this regard Cassim op cit note 6 at 14-15.

grounds that the implementation of the merger will cause material prejudice to that creditor.⁹⁴

After the abovementioned 15 business day period has elapsed and if no application has been made by a creditor to review the merger, or if such an application has been made by a creditor and has been disposed of by the court,⁹⁵ provided that all of the requirements of s 115 have been complied with, a notice of the merger must be filed with the Companies and Intellectual Property Commission established in terms of s 185 of the Companies Act (hereinafter referred to as the 'Commission') in the prescribed form and manner.⁹⁶ The notice of merger must confirm that:

- the transaction has satisfied the requirements of ss 113 and 115;
- the transaction has been approved in terms of the Competition Act 89 of 1998, the Banks Act 94 of 1990 and/or the Financial Markets Act (to the extent applicable); and
- the implementation of the transaction is not subject to any further regulatory approval or conditions.⁹⁷

A copy of the memorandum of incorporation of any company incorporated pursuant to the merger must be attached to the notice of merger, which is to be filed with the Commission, and a prescribed filing fee must be paid to the Commission simultaneously.⁹⁸ If there is an amendment

⁹⁴ Section 116(1)(b). Note that a court will grant leave to review a statutory merger in accordance with s 116(1)(c) only if the court is satisfied that the application is made in good faith, that the implementation of the transaction will materially prejudice the rights of the applicant creditor and that the creditor has no alternative remedies available to it. South Africa courts have not yet interpreted the meaning and scope of the phrase 'materially prejudice', although the word 'material', as an adjective, is defined in s 1 as 'significant in the circumstances of a particular matter, to a degree that is (a) of consequence in determining the matter; or (b) might reasonably affect a person's judgement or decision-making in the matter'.

⁹⁵ An application by a creditor to have a statutory merger reviewed will therefore suspend the implementation of the transaction. When known creditors are likely to oppose the implementation of a statutory merger it may therefore not be advisable to do a transaction by way of a statutory merger.

⁹⁶ In terms of reg 89 the prescribed form is Form CoR 89.

⁹⁷ Section 116(4)(a). Form CoR 89 does, however, not contain a statement that the merger has satisfied the requirements of ss 113 and 115, nor does it make provision for a statement that the transaction has been approved in terms of the Financial Markets Act. The prescribed form would therefore not appear to satisfy the requirements for a valid notice of merger as contemplated in terms of s 116(4)(a).

⁹⁸ See Annexure 1 – Table CR 1 to the Companies Regulations.

of the memorandum of incorporation of a merging company as part of a merger, a notice of amendment of the memorandum of incorporation of that company must be filed with the Commission.⁹⁹ Similarly, if a new company is formed as a result of a merger, a notice of incorporation is required to be filed with the Commission.¹⁰⁰

After receiving the filed notice of merger, the Commission is required to register each new company incorporated as a result of the merger and to deregister any merging companies which do not survive the implementation of the merger.¹⁰¹ This is another significant advantage of a statutory merger over the common law merger — there is no need for the formal winding-up of a merging company which does not survive a statutory merger. Instead, the Commission is required to deregister such a company of its own accord on receiving the notice of merger.¹⁰² Given that such deregistration occurs by operation of law, it would appear that the right of an interested party under ss 82 and/or 83 to apply for the reinstatement of a company which has been deregistered may not be available in a statutory merger, while this third party right, which is favourable towards creditors, will always be available in a common law merger.¹⁰³

It is peculiar to note that reg 89(4)(a) of the Companies Regulations provides as follows:

‘If an amalgamation or merger, as defined in section 1, results from the acquisition by one company of all or the greater part of the assets or undertaking of a second company, as contemplated in sections 112 and 117(1)(c)(i), any provision of this Chapter applicable to such an acquisition applies equally to that amalgamation or merger’.

⁹⁹ Section 16(7). See also Form CoR 89 in this regard.

¹⁰⁰ Section 13. See also Form CoR 89.

¹⁰¹ Section 116(5).

¹⁰² Cassim et al op cit note 4 at 681-2.

¹⁰³ It is not clear how such a reinstatement will be given effect to in a statutory merger, given the complexity which may arise in undoing a merger which has been implemented. There should in any event be little need for this remedy in the context of a statutory merger, given that an aggrieved party will be free to enforce any claim which it had against a company which is deregistered as a result of the merger against the surviving merged company or companies in the merger.

This provision is problematic for a number of reasons. First, it is difficult to see how a statutory merger can 'result from' a s 112 disposal, or in fact from any disposal. As noted above, a transaction needs to be specifically designed within the Companies Act framework to be considered a statutory merger. This is especially true in light of the fact that parties may choose whether to structure a transaction as a statutory or as a common law merger. For that reason, it is difficult to see how a merger can incidentally result from a disposal.

Secondly, even if the foregoing is possible, it would appear to be unnecessary for a transaction to be regulated by the provisions of both ss 112 and 113. To the extent that this is what this provision seeks to achieve, it may ultimately be ultra vires the Companies Act, given that this does not appear to be what is envisaged in the Companies Act, regard being had to the meaning of the term 'disposal'. What should be borne in mind is that reg 89 only renders the provisions of chap 5 of the Companies Regulations (insofar as they are applicable to s 112 disposals) applicable to a merger, and not the provisions of chap 5 of the Companies Act.

Thirdly, the regulation refers to disposals contemplated in ss 112 *and* 117(1)(c)(i). Accordingly, the provisions thereof would appear to apply only to regulated companies.

III. CONSEQUENCES FLOWING FROM THE IMPLEMENTATION OF A MERGER

Some of the most significant differences between the common law merger and the statutory merger become apparent only when the consequences of each of these mechanisms are considered. What follows is a brief discussion in this regard.

(a) *The common law merger*

The implementation of a common law merger is flexible, with the parties to the transaction having the contractual freedom to structure the implementation of the transaction as they please,¹⁰⁴ subject to compliance

¹⁰⁴ Davids et al op cit note 40 at 345.

with certain pieces of legislation. It may, for example, even be possible to implement a common law merger with retrospective effect, where the risk in, and benefit to, a business can be transferred with effect from a specific date.

To transfer the ownership of the relevant assets (rights) and liabilities (obligations) to a purchaser in a common law merger, those assets and liabilities have to be delivered to the purchaser in accordance with the forms of delivery recognised in South African law and subject to prescribed legal formalities,¹⁰⁵ such as the delivery of assets,¹⁰⁶ the cession of rights, the delegation of obligations or through assignment or novation.¹⁰⁷ These forms of delivery often include a registration process through the deeds or intellectual property registry office, which can be protracted and may attract substantial transfer costs.

The transfer of contractual rights and obligations from the seller to a purchaser in a common law merger may be effected by way of an agreement between that seller, the purchaser and the counterpart to the relevant agreement, in terms of which the seller's rights in terms of that agreement are ceded to the purchaser and the obligations of the seller are delegated to the purchaser. The point of departure is that the cession by the seller of its rights in terms of an agreement may be done without the consent of the debtor, but that any delegation by a seller of contractual obligations is subject to the consent of the relevant counterparty to the agreement to whom those obligations are owed.¹⁰⁸

It is, however, possible, and in fact quite common, for parties to an agreement to contractually agree that the rights and obligations in terms of that agreement may not be transferred, or that those rights and obligations may be transferred only with the written consent of the counterpart to the agreement. Although personal rights are generally freely transferable, such an anti-assignment clause, also known as a *pactum de non cedendo*, is valid

¹⁰⁵ Cassim et al op cit note 4 at 724.

¹⁰⁶ PJ Badenhorst, Juanita M Pienaar & Hanri Mostert et al *Silberberg and Schoeman's The Law of Property* 4ed (2003) 167.

¹⁰⁷ RH Christie & GB Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 481-90.

¹⁰⁸ Ibid.

and binding, provided that the relevant restriction serves a useful purpose to the debtor.¹⁰⁹ Where these type of anti-assignment clauses appear in the agreements of a disposing party in a common law merger, the consent for the assignment of those rights and obligations pursuant to the merger will accordingly have to be obtained from each of the counterparties to those agreements.¹¹⁰

Where the seller is the holder of certain claims (rights) and is the plaintiff in litigation as at the date of the implementation of a common law merger, the question arises as to whether those claims can be ceded to the purchaser in a common law merger. Prior to the stage of *litis contestatio*, such right will be capable of cession, pursuant to which the seller will have to be substituted by the purchaser in the proceedings. After *litis contestatio*, a claim may also be ceded, although the seller may not be substituted with the purchaser in such action, save with the consent of the court in question. Failing such substitution of the plaintiff the seller may continue to enforce the claim in its own name and pay any proceeds received by it pursuant to the action to the purchaser.¹¹¹

Where the seller is the defendant in pending proceedings and owes corresponding obligations in that regard which are to be transferred pursuant to a common law merger, the delegation thereof before *litis contestatio* will require the plaintiff to substitute the seller with the purchaser, given that the plaintiff may not have legal standing to enforce those claims against the seller, provided that all the formalities for the cession thereof have been complied with by the seller and the purchaser. As with rights which are the subject of pending litigation, the delegation of an obligation after *litis contestatio* may require the leave of the court should the parties wish to substitute the seller with the purchaser. If not, the plaintiff may continue with the action against the seller and once an order is made, the proceeds are

¹⁰⁹ *Paiges v Van Ryn Gold Mines Estates Ltd* 1920 AD 600 at 615; *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd* 1968 (3) SA 166 (A); GF Lubbe & PM Nienaber 'Cession' in WA Joubert (founding ed) *The Law of South Africa* vol 3 Third Reissue (2013) para 164; Schalk van der Merwe, LF van Huyssteen & MFB Reinecke et al *Contract: General Principles* 3 ed (2007) at 473–5.

¹¹⁰ Latsky op cit note 28 at 373.

¹¹¹ Lubbe & Nienaber op cit note 109 para 149.

payable to the plaintiff by the purchaser in the transaction.¹¹² Given that the seller then retains certain obligations pending the finalisation of the proceedings, a seller in a common law merger may in such instance not be deregistered with the Commission until the matter is finalised.

(b) The statutory merger

The terms on which a statutory merger takes effect and the consequences thereof are regulated by Companies Act and the merger agreement in question. The implementation of a statutory merger does, however, not have an impact on any:

- existing liability of any party to the merger agreement to be prosecuted in terms of any laws;
- pending legal proceedings by or against a merging company; and
- existing legal order(s) in favour of or against any merging company.¹¹³

Accordingly, litigation proceedings remain unaffected by the implementation of a statutory merger, whether the dissolving, merging company is the plaintiff or defendant in the matter. It would, however, appear to be suitable for the name of the party to the proceedings to be amended to the extent that the name of that party has been changed pursuant to a merger. It will be interesting to see how this will impact on the established rules regarding the substitution of parties in proceedings and the discretion of the court to allow parties to proceedings to be substituted, especially after *litis contestatio*.

Notwithstanding the flexibility afforded to the parties to a statutory merger, it is questionable whether a statutory merger can be implemented with retrospective effect, given that the transfer of assets and liabilities will generally occur on the filing¹¹⁴ of the relevant notice of the merger with the

¹¹² Ibid para 150.

¹¹³ Section 116(6).

¹¹⁴ It is important to note that there is a debate as to the date on which the filing of a document with the Commission is effective. On the one hand, there is the view, grounded on a literal interpretation of the definition of the word 'file' in s 1, that such filing is effective on the date of the delivery of the relevant document to the Commission in the prescribed manner. The other, more conservative, view, supported by the Commission in a non-binding opinion issued by it in this regard in terms of s 188(2)(b) on 2 November 2011, available at

Commission. It would therefore appear that the date of the implementation of a statutory merger (in other words, the delivery date) must be on the date of the filing of the relevant notice of merger with the Commission only and that it cannot be delayed until after that date.

Given that a statutory merger is implemented in accordance with the provisions of the merger agreement,¹¹⁵ it may be open for the parties to agree that the risk in, and benefit to, the assets and liabilities transferred as part of the transaction will only transfer on a date other than the date on which the ownership therein transfers (in other words, a date other than the date of the filing of the notice of merger with the Commission), provided that both the transferor and transferee companies are in existence as at such agreed date. The preferred view would appear to be, given that the implementation of a statutory merger results in the automatic vesting of the assets and liabilities of the merging company in the merged company by operation of law, with no requirement for delivery, that the risk in, and benefit to, those assets and liabilities must also transfer on the date of the filing of the relevant notice of merger with the Commission.

What appears to be clear is that in certain instances the risk in, and benefit to, the assets and liabilities will not be capable of transfer to the merged company *after* the date of filing, given that the relevant merging company may have been deregistered by that date.

https://www.saica.co.za/Portals/0/Technical/LegalAndGovernance/Non-binding_Opinion_Sec_16_9.pdf, is that the filing of a document, such as a notice of a merger, is effective only after the Commission has taken steps to receive and file the relevant notice, such that any company which is to be registered or deregistered pursuant to the merger can be so registered or deregistered. Given the lengthy delays often experienced in the filing by the Commission of documents, this may result in a substantial delay in the implementation of a statutory merger. This leads to uncertainty. The more conservative view may well be more appropriate in the instance of the filing of a notice of a merger, given that the merged company which is to acquire assets and liabilities as part of a statutory merger will only be incorporated and come into existence after it has been issued with a registration certificate by the Commission. This view does, however, ignore the literal interpretation of a number of provisions of the Companies Act. It would accordingly be appropriate for the legislature to intervene in this regard so as to eliminate the current uncertainties. See in this regard Kate Teubner 'That word "filing"' (2012) 12 (November) *Without Prejudice* 21 and Yaniv Kleitman 'Life under the Companies Act' (2013) 13 (October) *Without Prejudice* 23 at 24-5.

¹¹⁵ Davids et al op cit note 40 at 367.

As regards an agreement providing that the risk in, and benefit to, the assets and liabilities of a merging company will transfer to a merged company *before* the filing of the relevant notice with the Commission, it would make little sense for such an arrangement to be agreed upon, given that any assets or liabilities which are acquired or which will arise from that agreed earlier date to the date of filing will in any event be transferred to the merged company, given that *all* of the assets and liabilities of the merging company transfer to the merged company on the implementation of a merger, with no permissible exclusions.

(i) *Transfer of assets and liabilities*

Once a statutory merger has been implemented, all of the property and obligations of the merging companies become that of the merged company or companies in accordance with the provisions of the merger agreement or 'any other relevant agreement'.¹¹⁶ Cassim et al¹¹⁷ support the view that the term *property* is used in s 116(7)(a) in a wide sense, which includes all forms of property, rights, powers and privileges of whatsoever nature.¹¹⁸ This would appear to be correct.¹¹⁹

What is contemplated in a statutory merger is the vesting of assets and liabilities of one or more companies in one or more other companies by operation of law.¹²⁰ No further legal formalities are therefore required to be complied with for the transfer of such assets and liabilities to the merged company in question.¹²¹ This is probably the most significant advantage of

¹¹⁶ Section 116(7). This provision is always subject to the requirement that the merged company or companies must be solvent and liquid. Note that the provision that a statutory merger takes effect 'in accordance with the provisions of ... any other relevant agreement' does not appear to give the parties to a merger the right to generally contract out of the consequences of a statutory merger. See Davids et al op cit note 40 at 349-50.

¹¹⁷ Op cit note 4 at 681.

¹¹⁸ This includes corporeal and incorporeal property. Davids et al op cit note 40 at 349.

¹¹⁹ Cassim op cit note 6 at 4.

¹²⁰ Ibid at 3 and 5; Davids et al op cit note 40 at 349.

¹²¹ Cassim op cit note 3 at 41. See also Latsky op cit note 28 at 376, where it is noted that similar examples of transfers by operation of law may be found in the s 63 of the Medical Schemes Act 131 of 1998, s 54 of the Banks Act and in the common law doctrine of *huur gaat voor koop*. See for example *Absa Bank Ltd v Van Biljon* 2000 (1) SA 1163 (W), *Nedcor Investment Bank Ltd v Visser* NO 2002 (4) SA 588 (T), *Muller NO v Community Medical Aid Scheme* 2012 (2) SA 286 (SCA) and the foreign law merger provisions considered in *Tecmed (Pty) Limited v Nissho Iwai Corporation* 2011 (1) SA 35 (SCA) for examples in this regard. In *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A) a distinction was

the statutory merger over the common law merger and can result in saving time and costs.¹²² Once a statutory merger has been implemented, a party to which assets are to be transferred as a result of the transaction may enforce that transfer by applying to court for an appropriate order.¹²³

If a merging company, however, holds any immovable or other property which is registered in terms of a 'public regulation' and which needs to be transferred to a merged company pursuant to the implementation of a statutory merger, the transfer of that property may be procured by delivering to the relevant registry a copy of the merger agreement and a copy of the notice of the merger which was filed with the Commission.¹²⁴ While the provisions of s 116(8) would appear to focus on the transfer of immovable property as a result of the implementation of a statutory merger, the provisions thereof should also extend to the delivery of other property of a merging company which is registered in terms of any 'public regulation'¹²⁵ and which becomes the property of a merged company pursuant to a statutory merger. The provisions of s 116(8) therefore focus on the recordal of the transfer of ownership of property, as opposed to the factual transfer of the ownership of that property, which is dealt with in s 116(7).

drawn between a cession and assignment, on the one hand, and a substitution of parties by operation of law in the context of the *huur gaat voor koop* principle on the other. This supports the view that a statutory merger and the transfer of rights and obligations pursuant thereto by operation of law does not infringe on certain contractual restrictions on transfers. See also Michelle Kelly 'A Transfer in Terms of Section 54 of the Banks Act as It Applies to Debtors: Similar to Cession or Sui Generis?' (2001) 13 *SA Merc LJ* 552 at 561, where it is argued that 'a transfer in terms of s 54 is sui generis, and in any event wholly dissimilar to that of an ordinary cession', and Delport *op cit* note 29 at 423, and the authority cited therein, regarding the automatic vesting of assets in a distinct entity pursuant to the conversion of a company to a close corporation.

¹²² Cassim *et al op cit* note 4 at 681; Davids *et al op cit* note 40 at 349.

¹²³ Section 115(9). An interested party may apply to court for an order that assets be transferred, that shares be issued, that a merging company be dissolved or for any other order which the court may choose to make, to give full effect to a statutory merger.

¹²⁴ Section 116(8).

¹²⁵ The term 'public regulation' is defined in s 1 as 'any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority', while 'regulatory authority' means 'an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry'.

In addition to immovable property,¹²⁶ one for example thinks about intellectual property¹²⁷ which may be registered with the Commission in terms of the Registration of Copyright in Cinematograph Films Act 62 of 1977, the Patents Act 57 of 1978, the Copyright Act 98 of 1978, the Trade Marks Act 194 of 1993 or the Designs Act 195 of 1993, mining and prospecting rights which are registered with the Mineral and Petroleum Titles Registration Office in terms of the Mineral and Petroleum Resources Development Act 28 of 2002, as read with the Mining Titles Registration Act 16 of 1967,¹²⁸ and licences which are granted in terms of other pieces of legislation and/or recorded in some other form of registry. A number of these laws will have to be aligned with the statutory merger provisions of the Companies Act.

Two difficulties arise from the provisions of s 116(8). First, there may be an extensive delay between the date on which a notice of a merger is delivered to the Commission and the date on which the parties to that merger receive written confirmation from the Commission that such notice has been filed by it.¹²⁹ Given that a copy of the filed notice, presumably with satisfactory proof of the filing thereof with the Commission, is required to procure the transfer of property registered in terms of a public regulation, this may put a delay on the completion of a statutory merger. Secondly, it is not clear how this section will be applied in foreign jurisdictions to the extent that property, such as immovable property, of a South African company is held and registered in a foreign jurisdiction and required to transfer pursuant to a statutory merger.¹³⁰

On the contrary, the automatic acquisition by the merged company of the liabilities of the merging company, whether or not the merging company is able to quantify or was aware of the existence of those liabilities, is one of

¹²⁶ As registered in terms of the Deed Registries Act 47 of 1937 or any other property legislation. The process of transferring immovable property in a statutory merger has been simplified and aligned with s 116(8). See par 4.7 of the Chief Registrar's Circular 28 of 2013, available at https://www.lawsoc.co.za/upload/files/crc_2013_28.pdf, in this regard. The transfer of such property is procured through an endorsement of the relevant title deed.

¹²⁷ It has been noted that the laws regulating the transfer of intellectual property have not yet been aligned with the statutory merger process and that the normal procedures are still required to be complied with in this regard. Yuill op cit note 23 at 108.

¹²⁸ See in this regard Delpont op cit note 29 at 423-4

¹²⁹ See the discussion above in this regard.

¹³⁰ The answer to this question may lie in the principles of private international law. A consideration of those laws is, however, beyond the scope of this dissertation paper.

the distinct disadvantages to the statutory merger, which may dissuade companies from utilising the statutory merger mechanism.¹³¹ It is important to note that that *all* of the obligations of the merging company transfer to the surviving merged company pursuant to the implementation of a statutory merger.¹³² The business of a merging company therefore transfers, by operation of law, in its totality, unlike in a sale pursuant to a common law merger, where the acquirer may choose to acquire certain assets or liabilities and elect not to take transfer of other specified assets or liabilities.¹³³ This means that even if a comprehensive due diligence investigation is completed in respect of a merging company, there may still be unknown, unliquidated, contingent or other liabilities¹³⁴ for which the merged company (or companies, as the case may be) will become liable on the implementation of the merger and which may become known only at a later stage.

The above constitutes a significant commercial risk to parties who wish to implement a transaction by way of a statutory merger, which is exasperated by the fact that, given the potentially unknown nature of obligations, the parties to a statutory merger may often not be able to allocate the relevant liabilities to a specific merged company. It is for this reason likely that each merged company will be jointly and severally liable for such obligations in accordance with s 116(7)(b), which provides that *each* of the merged companies is responsible for 'all of the obligations of every' merging

¹³¹ Cassim et al op cit note 4 at 682.

¹³² See in this regard the definition of 'amalgamated or merged company' in s 1, as described in chapter II above, and the wording of s 116(7).

¹³³ Yuill op cit note 23 at 107. One way of avoiding this problem would be for a merging company to either dispose of, extinguish or otherwise transfer, before the implementation of the statutory merger, to a third party those of its assets and/or liabilities which the parties do not wish to transfer to the surviving merged company. Another option would be to implement the transaction by way of a merger where there are two or more surviving companies, and to allocate to a special purpose vehicle, which may be held only by the former shareholders of the relevant merging company, those assets and/or liabilities which the de facto acquiring party does not wish to take transfer of. This remains subject to the requirement that each of the merged (surviving) companies must be solvent and liquid following the implementation of the merger. See also Davids et al op cit note 40 at 368 in this regard. Another option may be to hold back a portion of the consideration payable in respect of the merger for a prescribed period of time, during which unknown or contingent liabilities may arise.

¹³⁴ Cassim op cit note 6 at 4-5. See Peter Dachs & Annalie la Grange 'Income Tax Implications Of The New Company Law Merger Provisions' (2012) 61 *The Taxpayer* 3 and the references therein to *First National Bank of SA Ltd v Lynn NO* [1996] 1 All SA 229 (SCA), in which the authors argue that contingent and unliquidated liabilities will also transfer to merged companies by operation of law as part of a statutory merger.

company.¹³⁵ The parties may of course agree that one of the merged companies will be responsible for all, if any, of the unknown, contingent or unliquidated liabilities of the amalgamating companies, although this may cause practical difficulties in so far as the passing of the solvency and liquidity test in respect of the merged companies is concerned.

Another manner in which to mitigate against the risk of acquiring unknown liabilities is to structure a statutory merger as a triangular merger, in terms of which a merging company, which is a target company, is absorbed into the wholly-owned subsidiary of a de facto acquiring company in terms of a merger between the target company and that subsidiary, and to which the de facto acquiring company need not necessarily be a party. In this manner the liabilities of the merging company do not have to be assumed by the primary acquiring company, but will be held by wholly-owned its subsidiary (as the merged company), thereby providing a measure of protection for the primary acquiring company against claims in respect of the liabilities of the target company, including contingent and unknown liabilities.¹³⁶

A further benefit of a triangular merger is that where a wholly-owned subsidiary of a de facto acquiring company is used for the implementation of a merger, the appraisal rights afforded in terms of s 164 will only be available to the holding company, as the sole shareholder of the actual party to the merger, and not to the shareholders of the de facto acquiring party, thereby minimising, or even eliminating, the risk of that any dissenting shareholder appraisal rights will be exercised. Voting rights in respect of the merger are also not afforded to the shareholders of the de facto acquirer in the transaction, given that the transaction is actually concluded by a subsidiary of that entity. This is criticised by some authors as being inappropriate, given that the shareholders of the de facto acquirer are directly affected by the

¹³⁵ Delpoit op cit note 29 at 424. I do not, however, agree with Delpoit's view that the merger agreement *must* provide that each of the merged companies are jointly and severally liable for the whole of the obligations of the merging company (or companies, as the case may be).

¹³⁶ Cassim et al op cit note 4 at 705. This is of course be subject to the power of a court to pierce the corporate veil in any transaction, whether in terms of s 20(9) or in terms of the common law. To guard against the risk of the assumption of unknown liabilities, an acquiring party may require some form of security from the remaining parties to the transaction, or obtain insurance cover.

merger and should therefore have all the rights afforded to shareholders in a statutory merger.¹³⁷ As noted above, it is also unlikely that a statutory merger will be required to be approved by way of a special resolution passed by the shareholders of the holding company of a party to a statutory merger in terms of s 115(2)(b). Accordingly, the shareholders of a de facto acquiring company in a triangular merger should not be entitled to vote on a statutory merger.

As noted by Davids et al,¹³⁸ a *reverse* triangular merger,¹³⁹ in which a de facto acquirer can acquire a target company through a subsidiary that merges into the target company, can also be used to limit the de facto acquirer's exposure to the liabilities of the target company, while at the same time avoiding issues regarding the assignment of rights and obligations and the transfer of licenses or other agreements of the target company, given that the target company itself is the surviving merged company.¹⁴⁰ The fact that the target company is a surviving merged company also means that a reverse triangular merger can be used as a means to obtain an accelerated listing of an acquiring entity without going through the normal procedures required to do so, if the target company is already listed prior to the merger.¹⁴¹

(ii) *Transfer of contractual rights and obligations*¹⁴²

Once a statutory merger has been implemented, there is an automatic cession of rights and delegation of obligations, by operation of law, which would not appear to be capable of prevention by some prior agreement between a merging company and a third party.¹⁴³ The assets and liabilities of a merging company which transfer to a merged company may also include

¹³⁷ Cassim op cit note 6 at 30.

¹³⁸ Op cit note 40 at 344.

¹³⁹ See generally regarding reverse triangular mergers Cassim op cit note 22 at 147-8.

¹⁴⁰ Cassim op cit note 6 at 30. It should, nonetheless, be noted that our courts may yet find that anti-assignment provisions are triggered in reverse triangular mergers. See Byron Lloyd Nicol 'The legal effect of amalgamations and mergers upon third-party contracts containing anti-transfer provisions' (2013) 25 *SA Merc LJ* 30 at 39-41.

¹⁴¹ McClure op cit note 1 at 5.

¹⁴² See generally in this regard Nicol op cit note 140.

¹⁴³ Section 116(7). Davids et al op cit note 40 at 351 note that it would have been preferable for the transfer of contractual rights and obligations to have been specifically legislated for, as opposed to falling within the general ambit of s 116(7), so as to avoid the uncertainty which is seen in this regard in foreign jurisdictions.

rights and obligations of a contractual nature. These rights and/or obligations will be enforceable against, or owed by, third parties and will therefore have a significant impact on persons which will, in all likelihood, not be parties to the merger agreement. An analysis is accordingly necessary as to whether or not all contractual rights and/or obligations will in all instances transfer from a merging company to a merged company by operation of law pursuant to a statutory merger.

As a general rule, the 'property' of a merging company which transfers by operation of law in accordance with s 116(7)(a) includes contractual rights,¹⁴⁴ while it would also appear to be clear that contractual obligations will fall within the ambit of the 'obligations' which transfer by operation of law as provided for in s 116(7)(b).¹⁴⁵ The general rule in s 116(7) is therefore also applicable to contractual rights and obligations, and as such, contractual rights and obligations will, as a rule, automatically transfer to a merged company by operation of law pursuant to a statutory merger.

It has been argued that one instance in which contractual rights or obligation may not be capable of transfer by operation of law as a result of a statutory merger is where the rights or obligations which are to be so transferred arise from purely personal contracts, given that the obligations in terms of such contracts can be performed by a particular person only.¹⁴⁶

(iii) The impact of the transfer of contractual rights and obligations pursuant to a statutory merger on anti-assignment clauses and change in control provisions

Where an underlying agreement is silent on the cession and/or assignment of the rights and/or obligations created in terms thereof, the general rule in s 116(7) will apply and accordingly, those rights and obligations will be

¹⁴⁴ Cassim et al op cit note 4 at 681-4.

¹⁴⁵ Nicol op cit note 140 at 31.

¹⁴⁶ The same rule generally applies to agreements relating to patents and other intellectual property. Cassim op cit note 6 at 5-6. See also Nicol op cit note 140 at 50-51 and 55-6 and Delport op cit note 29 at 423 in this regard.

capable of transfer as part of a statutory merger without the consent of any third party.¹⁴⁷

Where an agreement contains an express prohibition against, or the requirement for consent for, the cession and/or assignment of the rights and/or obligation created in terms of it, it is likely that such a clause will not apply in a statutory merger, as such prohibition or the requirement for consent, as the case may be, may not extend to a transfer of rights or obligations by operation of law, as is seen in a statutory merger, as opposed to a consensual cession, assignment or novation of rights and obligations.¹⁴⁸ It is for this reason argued that a transfer by operation of law does not amount to a cession or assignment as is prohibited in many agreements.¹⁴⁹ South African law, for example, recognises that a voluntary transfer by cession is not the same as the vesting of a right by operation of law in a legal successor.¹⁵⁰

Where an agreement, however, contains a prohibition or other restriction not only against cession and assignment, but generally against any transfer of rights, such prohibition may well be found to be effective in the face of a statutory merger. Such a provision may be subject to a breach or may require compliance with certain formalities by a party who enters into a statutory merger in order to avoid such a breach,¹⁵¹ as a transfer of rights or obligations by operation of law is nonetheless a transfer. It has been suggested that this intention is apparent from the wording of s 116(7) (as that wording was amended by the Companies Amendment Act 3 of 2011), which provides that rights and obligations transfer in terms of a statutory merger ‘in

¹⁴⁷ Cassim op cit note 6 at 5.

¹⁴⁸ Ibid. This view is widely supported by South African authors. See for example Cassim et al op cit note 4 at 683, Davids et al op cit note 40 at 350 and Nicol op cit note 140 at 32, 37, 44 and 55.

¹⁴⁹ Latsky op cit note 28 at 376. See *Crous NO v Utilitas Bellville* 1994 (3) SA 720 (C) regarding a transfer by operation of law in terms of the law of succession, which was not seen to be a voluntary disposal triggering a pre-emptive right. See also *Dage Properties (Pty) Ltd v General Chemical Corporation Ltd* 1973 (1) SA 163 (A) in respect of a transfer by operation of law pursuant to a court order.

¹⁵⁰ *Paiges* supra note 109 at 616; *Capespan (Pty) Ltd v Any Name 451 (Pty) Ltd* 2008 (4) SA 510 (C) at 519C; *Born Free Investments 364 (Pty) Ltd v Firstrand Bank Ltd* [2014] 2 All SA 127 (SCA) para 9. See also van der Merwe et al op cit note 109 at 474-5.

¹⁵¹ Yaniv Kleitman ‘Giving us an American headache’ (2013) 13 (July) *Without Prejudice* 20.

accordance with the provisions of the amalgamation or merger agreement, or any other relevant agreement'.¹⁵² The same reasoning will apply to an agreement which explicitly prohibits the transfer of rights and/or obligations in terms thereof pursuant to a statutory merger or some other operation of law.

As regards change in control provisions, it will be a factual question as to the interpretation of the relevant clause in an agreement to determine whether or not the statutory merger in question results in a change in control.¹⁵³ To the extent that a statutory merger does result in a change in control which is prohibited by an agreement, the implementation of the statutory merger may amount to a breach of the underlying contract.

Should the parties to an agreement specifically wish to ensure that any change in control of, or transfer of rights and obligations by, a party to that agreement, whether consensual or by operation of law, is to be restricted, the parties should expressly provide in that agreement that the prohibition against assignment or a change in control applies not only in relation to a contractual or some other form of consensual assignment, but also to an assignment or change in control by operation of law, including but not limited to a transfer as a result of a statutory merger. Such restrictions would appear to be effective notwithstanding the implementation of a statutory merger and will be breached by a party in the event that it is a party to a statutory merger.¹⁵⁴ Another way of imposing on a party to an agreement a restriction against the implementation by such party of a statutory merger would be to provide that no resolution may be put to, or passed by, the board of directors or shareholders of that company to enter into a statutory merger without the prior written consent of the counterparty to the agreement in question. It is to be noted, however, that imposing such a restriction on a party may make that party an unattractive target from a takeover perspective, as that party will not be able to enter into a statutory merger with a proposed acquirer without the

¹⁵² This is in accordance with the principle of freedom of contract, in terms of which the consequences of s 116(7) are freely and voluntarily waived. Cassim op cit note 6 at 5-6. This view holds true in light of the amended and clarified wording of s 116(7), in which the words 'in accordance with the provisions of ... any other relevant agreement' were added.

¹⁵³ Anonymous Note 'Effect of corporate reorganization on nonassignable contracts' (1960) 74 *Harvard LR* 393 at 394; Davids et al op cit note 40 at 350.

¹⁵⁴ Cassim op cit note 6 at 5; Cassim et al op cit note 4 at 683.

consent of the contractual counterpart. Such a restriction should therefore be imposed on a company only after due consideration of the circumstances of the particular company.

Although the South African courts have not yet delivered any judgments regarding the interpretation of s 116(7) and the effect thereof on contractual restrictions, it is probable that our courts will take into account the wording of the relevant anti-assignment clause, the merger structure used, the nature of the contracts which are subject to the merger, the nature of the rights which are to be transferred as well as any other factors which the courts consider relevant to the rights of third parties to a statutory merger in reaching a conclusion in this regard.¹⁵⁵

In light of the fact that s 5 of the Companies Act provides that a court may consider foreign company law when interpreting the provisions of the Act, and given that the principles applicable to statutory mergers are to a large extent based on foreign legislation (especially the corporate laws of Delaware, as noted above),¹⁵⁶ it is unfortunate that the transfer of rights and obligations pursuant to a statutory merger and the impact thereof on anti-assignment clauses is not clear in foreign jurisdictions such as the United States of America or Canada either, especially given the absence of express regulation in this regard in the Companies Act.¹⁵⁷

It is therefore important to consider, *before* the implementation of a statutory merger, the contractual provisions of all third party contracts of the merging companies to determine whether the statutory merger will have an impact on any third party contracts and whether or not any action is required to be taken in that regard.¹⁵⁸

¹⁵⁵ Frederic C Woodward 'Assignability of contract' (1904) 18 *Harvard LR* 23; Nicol op cit note 140 at 52.

¹⁵⁶ Cassim et al op cit note 4 at 677.

¹⁵⁷ Latsky op cit note 28 at 375; Shannon D Kung 'The Reverse Triangular Merger Loophole and Enforcing Anti-Assignment Clauses' (2009) 103 *Nw U L Rev* 1037. See also Nicol op cit note 140 at 37-39.

¹⁵⁸ Cassim et al op cit note 4 at 683.

(iv) *The impact of the transfer of contractual rights and obligations pursuant to a statutory merger on contractual pre-emptive rights provisions*

A further question which arises is whether or not a statutory merger will have any impact on contractual pre-emptive rights of first refusal, the type of which are most often seen in private companies incorporated under South African law. Similar to the principles which are applicable to anti-assignment and change in control provisions, as described above, it would appear that a statutory merger will in most instances not trigger such pre-emptive rights.¹⁵⁹

(v) *Transfer of licences and other authorisations*

Whether or not a licence or authorisation held by a merging company will automatically transfer to a merged company pursuant to a statutory merger will probably depend on the wording of the statute in terms of which that licence or authorisation was issued, with due consideration of the provisions of s 116.

The starting point in determining whether a licence, or in fact any other 'thing', will automatically transfer to a merged company pursuant to a statutory merger is to determine whether that 'thing' constitutes *property* (or an *obligation*) as contemplated in s 116(7). A licence does in fact appear to be property.

The question then arises as to whether or not the provisions of another piece of legislation can override the general provisions of s 116(7). What may be relevant in reaching a conclusion in this regard are the provisions of s 116(9), which provide that:

'If, with respect to a transaction involving a company that is regulated in terms of the Banks Act, there is a conflict between a provision of subsection (7) [of section 116 of the Companies Act] and a provision of section 54 of the [Banks] Act, the provisions of [the Banks] Act prevail.'

It is interesting to note from the above extract that the provisions of s 54 of the Banks Act are specifically provided to prevail over the

¹⁵⁹ Given that pre-emptive rights are usually triggered in consensual transfers of shares, although this will depend on the wording of the relevant pre-emptive right. Latsky op cit note 28 at 375-6.

provisions of s 116(7), while no other pieces of legislation are so carved-out.

While it may be argued that s 116(9) serves to merely confirm the legislature's intention that banks are prohibited from transferring their assets and obligations by way of a statutory merger without complying with the relevant provisions of s 54 of the Banks Act, it may also be argued that it illustrates the legislature's intention that the provisions of s 54 are the sole legislative requirements which prevail over the provisions of s 116(7). It is, for example, important to note that s 5 of the Companies Act provides that the provisions of the Act, including s 116(7) thereof, prevail in the event of a conflict with all other legislation, save for the statutes specified in s 5(4)(b)(i), where the Banks Act is also listed.

The argument that the legislature should have expressly stated so should it have intended that the provisions of any piece of legislation, other than the Banks Act, are to prevail over the provisions of s 116(7) is, however, a weak one. It would have been inconceivable for the legislature to consider every statute which could apply in a statutory merger and to then explicitly carve those statutes out of s 116(7). It is also important to note in this regard s 116(4)(a), which provides that:

'A notice of amalgamation or merger must include-

(a) confirmation that the amalgamation or merger-

- (i) has satisfied the requirements of sections 113 and 115;
- (ii) has been approved in terms of the Competition Act, if so required by that Act;
- (iii) has been granted the consent of the Minister of Finance in terms of section 54 of the Banks Act or obtained the approval of the Registrar of Securities Services in terms of section 64 of the Financial Markets Act, 2012, if so required by that Act; and
- (iv) is not subject to-
 - (aa) further approval by any regulatory authority; or

(bb) any unfulfilled conditions imposed by or in terms of any law administered by a regulatory authority’.

It is clear from s 116(4)(a) that compliance with the Competition Act, the Financial Markets Act and *any further regulatory approval* requirements is mandatory in a statutory merger. The reason for this may, however, be that the aforementioned laws do not outright prohibit the transfer of assets, but merely prescribe legal formalities which are required to be complied with by parties who wish to transfer certain property. There is therefore no real conflict between those laws and the Companies Act, and it is submitted that compliance with both the Companies Act and the underlying legislation will be required in such cases. This would be the prudent approach to take, which may have timing and cost implications for the implementation of a statutory merger. The preferred solution, from a practical perspective, would of course be for relevant laws to be streamlined and brought in line with the statutory merger provisions of the Companies Act.

(vi) *The dissenting shareholder appraisal remedy*¹⁶⁰

The dissenting shareholder appraisal remedy in terms of s 164 of the Companies Act, by way of which a shareholder which is not in favour of the implementation of a fundamental transaction (including a statutory merger and a s 112 disposal) may require of a company to buy out its shares at fair value, is available to a shareholder only if that shareholder notified the relevant company of its intention to vote against the passing of the special resolution to approve of such a fundamental transaction, was present at the meeting at which that transaction was considered and actually voted against

¹⁶⁰ For a discussion regarding the application of the dissenting shareholder appraisal remedy in statutory mergers see Davids et al op cit note 40 at 352-3 and 360-3, Cassim op cit note 6 at 19-20 and Cassim op cit note 22 at 157-171. This remedy is in addition to the other remedies available to aggrieved parties under the Companies Act, including the remedy of relief from oppressive or prejudicial conduct or from the abuse of the separate juristic personality of a company contemplated in s 163. For a discussion regarding the interplay between the dissenting shareholders appraisal remedy and the oppression remedy see Cassim op cit note 22 at 172-4.

the passing of the resolution in question.¹⁶¹ This operates as a primary minority shareholder protection mechanism in fundamental transactions.¹⁶²

What is interesting to note is that if a shareholder becomes entitled to enforce its rights in terms of the dissenting shareholders appraisal remedy pursuant to the passing of a special resolution which authorised a merging company to merge, and that merging company no longer exists pursuant to the implementation of the merger, then the shareholder is entitled to enforce its rights in terms of s 164 against the merged company which is the successor of that merging company.¹⁶³ This means that the dissenting shareholder appraisal remedy does not need to suspend the implementation of a statutory merger, but will add further complications to the closing of the transaction, as further notices will have to be issued by the relevant company to those dissenting shareholders as required in terms of s 164.

IV. ADDITIONAL CONSIDERATIONS RELEVANT TO THE IMPLEMENTATION OF A MERGER

In addition to the Companies Act, whatever other legislation exists which is applicable to business combinations in general will continue to apply to mergers, whether implemented as a common law merger or as a statutory merger. This was briefly mentioned in chapter III above. While it is for the most part settled in our law as to how those pieces of legislation apply to common law mergers, the application of a number of laws to statutory mergers remains untested, as the statutory merger is still fairly new in South African law. It is, for example, not clear whether and, if so, how, insurance legislation, consumer protection legislation, environmental laws,¹⁶⁴ s 34 of the Insolvency Act, s 197 of the Labour Relations Act 66 of 1995 and the provisions of the Income Tax Act apply to statutory mergers.¹⁶⁵ The

¹⁶¹ Section 115(8). A shareholder may therefore not enforce any rights in terms of s 164 if the shareholder abstains from voting or fails to attend the meeting at which it was required to exercise its voting rights.

¹⁶² Cassim et al op cit note 4 at 677.

¹⁶³ Section 164(18).

¹⁶⁴ For the treatment of these obligations in the United States of America see Egan op cit note 81 at 26 and 27.

¹⁶⁵ Yuill op cit note 23 at 108-9.

applicability of some of these laws to statutory mergers is briefly considered below.

(a) *Section 34 of the Insolvency Act*

In a common law merger, protection is afforded to the creditors of the company which is disposing of its business in terms of s 34 of the Insolvency Act, which provides that a company which transfers to another entity its business must, not less than 30 days and not more than 60 days before the date of such transfer, publish a notice of the intended transfer in the Government Gazette and in two issues of an Afrikaans newspaper and two issues of an English newspaper circulating in the district in which that business is carried on, failing which, such transfer of that business will be void as against the seller's creditors for a period of six months after the transfer and will be void against the trustee of the seller's estate if the seller's estate is sequestrated or liquidated at any time within that period.¹⁶⁶

Once a transfer has been published as aforesaid, every liquidated liability of the seller in connection with the business which it wishes to transfer and which would have become due at some future date will immediately fall due and payable upon a demand for payment by any creditor of the company.¹⁶⁷ This could be a major disadvantage to the common law procedure, and it is therefore important to consider whether the same principles will apply in a statutory merger.

Section 34(4) provides that the term 'transfer', as used in that section, 'includes actual or constructive transfer of possession'. Given the wide interpretation of the term 'transfer',¹⁶⁸ it may therefore be argued that the provisions of s 34 may well apply in a statutory merger. It is, however, my view that this is not warranted for a number of reasons. First, as noted above, a statutory merger contemplates a transfer of property by operation of law and not a consensual transfer of property by a party. In a statutory merger there is therefore no transfer *by a seller*, as is contemplated in s 34, given that the transfer occurs *ex lege*. Secondly, creditors are given sufficient

¹⁶⁶ Section 34(1).

¹⁶⁷ Section 34(2).

¹⁶⁸ *Roos NO v Kevin & Lasia Property Investments BK 2002 (6) SA 409 (T)* at 415.

protection in a statutory merger, which includes the protection afforded by the solvency and liquidity test, and the purpose of s 34 would therefore not be served by making it applicable to a statutory merger.¹⁶⁹ Thirdly, the application of s 34 may in many statutory mergers be senseless, as the 'seller' may cease to exist pursuant to the implementation of the transaction.¹⁷⁰

(b) Section 197 of the Labour Relations Act

Section 197 of the Labour Relations Act prescribes that where a business, which includes the whole or a part of any business, trade, undertaking or service,¹⁷¹ is transferred by one employer, as the former employer, to another employer, being the incoming employer, as a going concern,¹⁷² then the incoming employer is by operation of law substituted in the place of the former employer in respect of all contracts of employment in existence between the former employer and its employees immediately before the date of the transfer of that business, with the accompanying rights and obligations in this regard also transferring from the former employer to the incoming employer.¹⁷³ Once again, while s 197 clearly applies in a common law merger, it is worthwhile to consider whether the provisions thereof would apply in a statutory merger.

In answering this question, one has to consider whether a statutory merger involves the transfer of a business as is envisaged and defined in s 197. It would appear that a statutory merger will meet the first part of the inquiry in s 197 — it would be difficult to argue that the assets and liabilities which transfer in a statutory merger do not constitute a business, or at least a

¹⁶⁹ The purpose of s 34 is to protect creditors, by ensuring that a seller (trader) pays its debts to its creditors before disposing of the proceeds which it receives from the sale of its business. See *Harrismith Board of Executors v Odendaal* 1923 AD 530 at 538; *Castleden NO v Volks Furniture Stores (Pty) Ltd* 1967 (3) SA 733 (D) at 736-7; *Galaxie Melodies (Pty) Ltd v Dally NO* 1975 (4) SA 736 (A) at 744-5; *Vermaak v Joubert & May* 1990 (3) SA 866 (A) at 872; *Kelvin Park Properties CC v Paterson NO* 2001 (3) SA 31 (SCA) para 15; *Gainsford NO v Tiffski Property Investments* [2011] 4 All SA 445 (SCA).

¹⁷⁰ A more detailed analysis of the application of s 34 in the context of statutory mergers is beyond the scope of this dissertation paper.

¹⁷¹ Section 197(1)(a).

¹⁷² Section 197(1)(b).

¹⁷³ Section 197(2).

part of a business, as a going concern.¹⁷⁴ It would, however, appear that, even though a statutory merger may involve the transfer of a business *from* a former employer to an incoming employer, such a transfer is not a transfer effected *by* one employer to another as would appear to be required in terms of s 197,¹⁷⁵ given that the transfer occurs by operation of law. It is my view that the finding of the Labour Court in *Schutte v Powerplus Performance (Pty) Ltd*,¹⁷⁶ which case predates the recognition in our law of the statutory merger, that a merger will result in the transfer of a business for purposes of s 197 is no longer conclusive. The term ‘merger’ was used in that case in the sense of a common law merger, or at least a transaction in which there is some form of voluntary agreement to transfer assets, which does not occur in a statutory merger. The provisions of s 197 may therefore perhaps not find application in a statutory merger.

The above view is further supported by the fact that employees appear to enjoy complete protection in a statutory merger, given that all of the assets and liabilities of a merging company, including its contracts with, and obligations owed to, its employees, automatically transfer to the merged company on the implementation of a statutory merger. Each company which survives a merger is also required to be solvent and liquid following the implementation of such a transaction, and this minimises the risk that a surviving merged company will not be able to satisfy its obligations to the employees which are transferred to it pursuant to a statutory merger. Given that employees appear to enjoy even greater protection under a statutory merger than in a disposal which is subject to the requirements of s 197, a finding that the provisions of s 197 do not apply in a statutory merger will also be in accordance with the purposes of s 197, including to ensure the smooth

¹⁷⁴ SR van Jaarsveld, JD Fourie & MP Olivier ‘Labour Law’ in WA Joubert (founding ed) *The Law of South Africa* vol 13(1) Second Reissue (2009) para 816.

¹⁷⁵ See the definition of ‘transfer’ in s 197(1)(b).

¹⁷⁶ (1999) 20 ILJ 655 (LC) at 671.

implementation of commercial transactions and the protection of employees against loss of employment.¹⁷⁷

The absurdity of the application of s 197 in a statutory merger would also seem to indicate that it is not appropriate for the provisions thereof to apply to a statutory merger — if s 197 is found to be applicable in a statutory merger, the merging company (the former employer) will be jointly and severally liable with the merged company (the incoming employer) for certain claims by the employees which are transferred as a result of the merger.¹⁷⁸ This in effect renders it inappropriate for that merging company to be deregistered in accordance with s 116(5)(b), as that company will still have remaining obligations. Another way to look at this is to say that there will be no recourse under s 197, as the former employer would have been deregistered as part of the merger. In light of the foregoing, it will be interesting to see if and how our courts will apply the provisions of s 197 in statutory mergers.

(c) Section 44 et al of the Income Tax Act

Two of the most important pieces of legislation which have not yet been brought in line with the provisions of the Companies Act, in so far as it relates to statutory mergers, are the Income Tax Act and the Tax Administration Act 28 of 2011. It is, for example, not always clear whether, and in which circumstances, a statutory merger would be able to benefit from the tax relief afforded to taxpayers under ss 42 to 47 of the Income Tax Act.¹⁷⁹ While a full discussion of all of these provisions is beyond the scope of this dissertation paper, a closer look at some of the provisions of s 44 is warranted.

¹⁷⁷ *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC); *SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd* (2002) 23 ILJ 2304 (LC).

¹⁷⁸ Section 197(8)-(9).

¹⁷⁹ See Robert Gad & Janel Strauss 'The impact of statutory mergers on current tax legislation (part 2)' 16 March 2012, available at <https://www.ensafrica.com/news/the-impact-of-statutory-mergers-on-current-tax-legislation-part-2?Id=591&STitle=tax+ENSight>, accessed on 18 August 2014 for a more detailed discussion of the treatment of a statutory merger in terms of the Income Tax Act, the Securities Transfer Tax Act 25 of 2007, the Transfer Duty Act 40 of 1949 and the Value-Added Tax Act 89 of 1991.

Section 44 provides tax relief to a company which transfers its assets in terms of an 'amalgamation transaction'. Section 44(1) provides a definition of an 'amalgamation transaction'. In terms of this definition, a merging company must 'dispose' of its assets to a merged company for the provisions of s 44 to apply to a transaction. Paragraph 1 of the eighth schedule to the Income Tax Act defines 'dispose' as specifically including an event which occurs by 'operation of law'. It would therefore appear that the transfer of assets in a statutory merger by operation of law will fall within the required definition of an amalgamation transaction and that tax relief under s 44 may be available to the parties to a statutory merger, provided that all of the requirements prescribed in s 44 are met.

It is also important to note that in terms of s 44 certain assets can be excluded from an amalgamation transaction and that only certain (and not all) debts of a company may be assumed on a tax neutral basis as part of the consideration in an amalgamation transaction,¹⁸⁰ while in a statutory merger *all* of the assets and obligations of the merging companies have to be transferred to a merged company. Also, when an amalgamating company is liquidated, wound-up or deregistered pursuant to an amalgamation transaction, that company's shareholders must, in return, receive shares in the other company in the form of a dividend in specie.¹⁸¹ This process is also not contemplated in a statutory merger, although the flexibility afforded to the parties to a statutory merger¹⁸² as regards the merger agreement may afford some room for simultaneous compliance with both pieces of legislation, despite the fact that the two do not appear to be aligned.¹⁸³

Another important consideration is that for s 44 to apply, the merging company which is to be deregistered as a result of the amalgamation transaction must take steps to be liquidated, wound-up or deregistered within 36 months after the date of the amalgamation transaction or such further

¹⁸⁰ Section 44(1)(b).

¹⁸¹ Section 44(10).

¹⁸² Davids et al op cit note 40 at 342.

¹⁸³ Gad & Strauss op cit note 15. The parties may, for example, agree that the conversion of shares or the consideration payable pursuant to the merger will be in the form of a dividend in specie.

period as the Commissioner may allow,¹⁸⁴ while the deregistration of a company pursuant to a statutory merger occurs immediately on the filing of the relevant documentation with the Commission, as discussed in more detail above. In this regard, the Income Tax Act provides that a company will be *deemed* to have taken steps to liquidate or to wind a company up if any of the actions described in s 41(4) of the Act are taken by that company, which steps do not include a deregistration of a company by the Commission of its own accord, as contemplated in a statutory merger. It is, however, my view that the actual deregistration of a merging company pursuant to a statutory merger will be sufficient for purposes of compliance with s 44(13), and that the deeming provision will therefore not be required to be applied in this regard.

Further inconsistencies between the provisions of s 44 and the statutory merger include that:

- under s 44(13) parties may choose whether to wind a company up, liquidate or deregister a company, whereas the only option in a statutory merger is the automatic deregistration of the company by the Commission;
- only certain types of consideration may be given on a tax neutral basis in terms of s 44, while the consideration in a statutory merger is flexible;¹⁸⁵ and
- not all liabilities may be assumed on a tax neutral basis in terms of s 44, while the statutory merger does not allow any obligations to be excluded from a merger transaction.¹⁸⁶

Save as noted above, this dissertation paper does not consider in detail the requirements and consequences of the Income Tax Act in mergers and the foregoing has been noted merely to emphasise the difficulties which arise in reconciling the requirements for implementing a statutory merger with

¹⁸⁴ Section 44(13).

¹⁸⁵ Andrew Lewis 'New amalgamation provisions not aligned with the Income Tax Act' *DLA Cliffe Dekker Hofmeyr Tax Alert* 27 May 2011 at 8, available at <http://www.cliffedekkerhofmeyr.com/export/sites/cdh/news/files/CDH-Tax-Alert-27-May-2011.pdf>, accessed on 31 July 2014.

¹⁸⁶ Gad & Strauss op cit note 15.

those of s 44. Given that s 44 essentially requires a transfer of assets from one company to another, an exchange of shares as consideration for such transfer and the termination of the existence of the company which so disposed its assets, it would appear that, under appropriate circumstances, the parties to a statutory merger will be capable of benefitting from the tax relief provided in terms of s 44. In light of the abovementioned inconsistencies, it would, however, be preferable for there to be more alignment between the South African tax and corporate laws as are applicable to statutory mergers.

V. THE DECISION WHETHER TO UTILISE A COMMON LAW MERGER OR A STATUTORY MERGER FOR PURPOSES OF GIVING EFFECT TO A BUSINESS COMBINATION

Before considering the advantages and disadvantages of the statutory merger when compared to a common law merger, the question may be asked whether parties to a transaction in fact have the option whether to use either the common law merger or the statutory merger to give effect to a business combination if the proposed transaction falls within the definition of an 'amalgamation or merger' as contemplated in s 1 of the Companies Act. If the provisions of s 113 et al are, for example, preemptory when a transaction falls within that definition, it will restrict the parties from implementing such a transaction as a common law merger.

On a purposive interpretation of the Companies Act, it is preferable to conclude that the provisions of s 113 et al are not preemptory when it comes to the implementation of a transaction which falls within the definition of an 'amalgamation or merger'. This is especially so in light of the purpose and objects of the Act.¹⁸⁷ The preferred view is instead that the parties to a transaction are free to decide whether to structure a business combination as a common law merger or a statutory merger, and that it is only if the parties wish to benefit from the consequences which flow from a statutory merger

¹⁸⁷ See the Memorandum on the Objects of the Companies Bill, 2008 op cit note 5 at 13.

that they are required to ensure that the transaction complies with the provisions of the Companies Act which apply to statutory mergers.

(a) Advantages of the statutory merger when compared to the common law merger and instances in which the use of a statutory merger would be preferable to a common law merger

It follows from the discussion above that there are a number of significant advantages to combining two or more businesses by way of a statutory merger, as opposed to a common law merger. It should also be noted at the outset that the common law merger was traditionally not the preferred mechanism by which to combine businesses, given the costs, legal formalities and time that is normally required for the transfer of the assets and liabilities from one entity to another.¹⁸⁸ These formalities can cause an extensive delay in the finalisation of the implementation of a transaction, although one way in which such delay could be reduced is for the relevant sale assets and liabilities to be disposed of by a de facto seller, in anticipation of the sale of those assets and liabilities to a third party, to a wholly-owned special purpose vehicle. The shares in that special purpose vehicle can then be acquired by a third party acquirer, thereby obviating the need to transfer any assets or liabilities to such third party.¹⁸⁹

In a statutory merger, however, the assets and liabilities and the risk in, and benefit to, those assets and liabilities of the merging company automatically, and by operation of law, vest in the merged company on the implementation of the merger. Generally there is for this reason no need to comply with the legal formalities required for the transfer of assets and liabilities to any merged company and no specific form of transfer or delivery of assets or liabilities is required for the implementation of the transaction. This makes it a much more efficient and cost effective mechanism than the common law merger.

The advantage of the ex lege transfer of assets and liabilities in a statutory merger becomes even more apparent if a merging company is a

¹⁸⁸ Yuill op cit note 23 at 107.

¹⁸⁹ Egan op cit note 81 at 7.

party to numerous contracts which are required to be assigned to a merged company, given that the parties derive the benefit, except in limited instances, of the automatic assignment of the rights and obligations in terms of those agreements to the merged company. This means that the requirement to obtain numerous counterparty consents, as one would require in a common law merger, as a sale, is often not applicable in a statutory merger. Even if the contracts in question contain express restrictions or prohibitions against assignment, it is quite likely that the restrictions or prohibition will be against consensual assignment, and not transfers by operation of law, as discussed above, and would therefore not be affected by the implementation of a statutory merger.

A further instance in which the advantage of the automatic transfer of assets in a statutory merger will be decisive is where a merging company owns a number of immovable properties which are to be transferred pursuant to the merger, for the reason that the properties are automatically transferred to the merged company under s 116(8). This is beneficial from a timing and cost perspective, and includes the saving of conveyancing fees, deeds office costs and other transfer fees.

Another significant advantage of a statutory merger is that the implementation thereof results in the immediate dissolution of each of the merging (in other words, transferring) companies which do not survive the transaction.¹⁹⁰ There is therefore no need for the formal winding-up or deregistration of the disappearing merging company by the parties¹⁹¹ and the relevant companies are instead simply deregistered by the Commission in accordance with the provisions of s 116(5)(b). The same principle applies in the event that a statutory merger results in the incorporation of a new company — the new company need not be formally incorporated, as will be the case in a common law merger. The Commission will instead simply issue a registration certificate to that company after receiving notice of the merger in accordance with s 116(5)(a).

¹⁹⁰ Yuill op cit note 23 at 107.

¹⁹¹ Davids et al op cit note 40 at 342. See also s 83(1) in this regard.

In certain instances it may be an advantage that it is only in a common law merger which is subject to s 112 that a special resolution is required to be adopted by the shareholders of a disposing company's holding company when that disposal also amounts to a disposal of all or the greater part of the assets or undertaking of that holding company. In addition, whereas a disposing company may be required by virtue of s 112(4) to determine the fair value of its assets which are being disposed of in a common law merger, as described in more detail above and which may be a costly exercise, a similar requirement does not apply in a statutory merger. Also bear in mind that the requirement that 'specific' approval is required for a merger applies only in a common law merger which is subject to the requirements of s 112(5).

As discussed, the consideration which may be paid in a statutory merger is widely cast and can seemingly include 'other property', including shares in another company or cash considerations and so forth.¹⁹² The general flexibility afforded to the parties to a statutory merger¹⁹³ is another advantage, as it allows the parties a wide range of options as to how to structure a statutory merger. The use of reverse triangular mergers is, for example, made possible, which, as noted above, can be used to obviate the need to transfer certain property and/or obligations as a result of a merger, thereby also reducing the impact of anti-assignment provisions on the implementation of a merger.¹⁹⁴

Also, to the extent that the brief analysis of s 34 of the Insolvency Act above is correct, the parties to a statutory merger are not required to publish a notice of the transaction in the Government Gazette or any newspapers, and the claims against the merging companies will not become immediately due and payable at the instance of a creditor as a result of the implementation of a statutory merger, unlike in a common law merger. This remains subject to the requirement that notice of a statutory merger is

¹⁹² Cassim op cit note 6 at 25-6.

¹⁹³ Davids et al op cit note 40 at 345.

¹⁹⁴ The statutory merger may even be used to 'demerge' entities, as the operations of two or more merging companies could be allocated amongst three or more merged companies. McClure op cit note 1 at 9-10.

required to be given to each of the known creditors of the parties to a statutory merger.

(b) Disadvantages of the statutory merger when compared to the common law merger and instances in which the use of a common law merger would be preferable to a statutory merger

The main disadvantage to the statutory merger, when compared to a common law merger, is the process and inflexible timetable prescribed by ss 113 and 116. These sections of the Companies Act require various notices to be given before a statutory merger can be implemented, leading to an extended timeframe within which a statutory merger can be implemented. In a common law merger, no notice of the transaction is, for example, required to be given to the Commission or to each of the known creditors of the parties to the transaction, unlike in a statutory merger, although notice of a common law merger is generally required to be given in terms of s 34 of the Insolvency Act.

The statutory merger would also appear to have less flexibility than a common law merger as regards the date on which the assets and liabilities transfer as a result of such a transaction. Given that the relevant rights and obligations in a statutory merger transfer automatically on the filing of the required notice of merger with the Commission, the date of which is subject to debate and the processing of which may be lengthy process, as described in more detail above, the date of the implementation of a statutory merger is beyond the control of the parties to the transaction. Given that the implementation of a common law merger is subject to the ordinary principles of contract law which regulate sales, the parties to a common law merger are generally free to stipulate an implementation date for such a transaction.

It should also be noted, in light of the uncertainty as to the date on which a statutory merger is effective, that if the registration by the Commission of a company which is to be incorporated as part of a statutory merger, for example, does not occur on the same day on which a company which is to be deregistered pursuant to that merger is so deregistered by the Commission, this would lead to significant practical implications and

challenges for the implementation of a statutory merger, notwithstanding the interpretation of the definition of 'filing' in the context of the Companies Act. In many statutory mergers it will be imperative for the new company to be incorporated and registered before the relevant assets and liabilities of a merging company can be transferred to that company. The implementation of such a statutory merger must accordingly be delayed until the relevant companies have been registered and deregistered by the Commission. One can only hope that the Commission has put in place effective systems and procedures to ensure that statutory mergers may be seamlessly implemented. This uncertainty, and the associated delays in the implementation of a statutory merger, do not apply in a common law merger.

It is important to also note that the statutory merger is only available if *all* of the assets and liabilities of each merging company are transferred into a merged company or companies. One can therefore use the statutory merger only where one transfers *all* of the assets and liabilities of those companies, and not merely some of them, to the merged company.¹⁹⁵ This can of course in certain instances be overcome by a merging company disposing of those assets and liabilities which the parties to the statutory merger do not wish to transfer to a merged company as part of the transaction. This can, for example, be achieved through a sale or a delegation and the subsequent transfer of the relevant assets, liabilities, rights or obligations by the merging company to a third party prior to the implementation of a statutory merger.

As discussed, one of the most significant disadvantages of the statutory merger is that all of the obligations and liabilities of the merging company, including unliquidated and contingent liabilities and even liabilities which were unknown to the merging company, automatically transfer to the surviving merged company on the implementation of the transaction, unlike in a sale of a business as is contemplated in a common law merger. In a common law merger, an acquirer may 'cherry pick' certain assets of the disposing company which it wishes to acquire and can choose to not take transfer of

¹⁹⁵ Davids et al op cit note 40 at 342.

other assets or of any or all of the liabilities of that company. In order to do so, however, even in a common law merger, it is imperative that the relevant agreement be drafted in clear and specific terms where the acquired assets and, to the extent applicable, liabilities, as clearly identified, so as to ensure that only the intended assets and liabilities are taken over by the acquiring company.¹⁹⁶

In addition, whereas the boards of directors of each of the merging companies in a statutory merger are required to consider the solvency and liquidity test and to resolve that each of the merged companies in that transaction will be solvent and liquid following the implementation of the merger, a similar requirement does not apply in a common law merger, whether it includes the disposal of all or the greater part of the assets or undertaking of a company or not. This is, of course, subject to any other aspect of the common law merger transaction which may trigger the requirement to apply the solvency and liquidity test.¹⁹⁷ This would appear to be a major advantage to the common law merger procedure, as the solvency and liquidity test requires not only that, at the time of the proposed merger, the assets of a company outweigh its liabilities, but also that it appears that the company will be able to pay its debts as and when they become due in the ordinary course of business for a period of 12 months after the date on which the test is applied.¹⁹⁸

It is, however, important to note that even though the parties to a common law merger are not generally required to apply the solvency and liquidity test, the Companies Act provides that the Commission may issue a notice to a company to cease operating if that company is unable to pay its debts as they become due and payable in the normal course of business.¹⁹⁹

¹⁹⁶ Egan op cit note 81 at 9, 10 and 28.

¹⁹⁷ The board of directors of a company to a common law merger may, for example, be required in terms of the Companies Act to apply the solvency and liquidity test as a result of the provision of financial assistance for the subscription of securities (s 44), the provision of a loan or some other form of financial assistance to directors or other related parties (s 45), the making of distributions (s 46) or the issue of capitalisation shares with the option for shareholders to receive a cash payment instead of the issue of such shares (s 47).

¹⁹⁸ Section 4.

¹⁹⁹ Section 22.

Where it appears to be reasonably unlikely that a company will be able to pay all of its debts as they become due and payable, or that a company will become insolvent within the following six month period, that company will further be deemed to be 'financially distressed' within the meaning of s 128(1)(f) of the Companies Act. If a company is financially distressed as aforesaid, the board of that company, if it does not pass a resolution to put the company into business rescue, has the obligation to deliver to the shareholders, creditors, trade unions and employees of the company a written notice to the effect that the company is financially distressed, and must put forth reasons why the board has not put the company into business rescue.²⁰⁰ The giving of such a notice may put the aforementioned persons in a position to apply to court to have the company placed in business rescue. A company which is financially distressed may in addition also be subject to action in terms of insolvency law. It is therefore important to ensure, even in a common law merger, that the parties to a business combination remain solvent and liquid, even though the parties to a common law merger may not be required to pass directors resolutions to that effect.²⁰¹

It has been pointed out that where a common law merger includes the disposal by a company of all or the greater part of the assets or undertaking of that company, both the common law merger and the statutory merger amount to fundamental transactions which are subject to the provisions of s 115, and are therefore required to be approved of by way of special shareholders resolutions. Such special resolution is, however, required to be passed by the shareholders of only the disposing party in the case of a common law merger (and possibly its holding company, as discussed above), but is required to be passed by the shareholders of each of the parties to a statutory merger. In a common law merger, which is subject to s 112, it is only the disposing company which is required to comply with the requirements of s 115 et al. It should be noted though that, subject to the constitutional documents of a company, no such special resolution is required at all for a common law merger which does not involve the disposal

²⁰⁰ Section 129(7).

²⁰¹ Section 131.

of all or the greater part of the assets or undertaking of an entity. This may be a distinct advantage to a common law merger when it is unlikely that the shareholders of a company will approve of a disposal, or where the passing of such a resolution will be costly and time consuming, especially in the listed company environment.

The parties to a statutory merger do also not enjoy the same intra-group relief which is granted to parties to a common law merger which is subject to the requirements of s 112. While the provisions of s 112 do not apply to the sale or disposal of all or the greater part of the assets or undertaking of a company where that transaction is between a holding company and its wholly-owned subsidiary or between two or more wholly-owned subsidiaries of a company, the formalities for the implementation of a statutory merger will apply regardless of the relationship between the parties to the transaction.²⁰²

Furthermore, only in a statutory merger can a creditor apply to court to review a merger.²⁰³ The same right is not granted to the creditors of a disposing company in a common law merger. Where a company to a proposed merger is aware that a creditor of that company is likely to oppose the implementation of that transaction, then the implementation thereof by way of a statutory merger would not be advisable.

In addition, the statutory merger provisions do not extend to foreign or external companies that wish to engage with South African companies, and can therefore not be utilised where such a company may wish to merge with a South African company, although it does extend to domesticated companies which have transferred their registration to South Africa in accordance with s 13 of the Companies Act. Given that a foreign or external company is not competent to be party to a statutory merger, the only way in

²⁰² It has been argued that similar exemptions or alternatively a short-form merger, as is seen in the United States of America, or some other form of intra-group relief or exemption where shareholder approval is not required and where appraisal rights are not present, would be appropriate where a merger does not constitute a risk for minority shareholders or creditors. Davids et al op cit note 40 at 357. See also in this regard Cassim op cit note 22 at 155-7, where this suggestion is supported.

²⁰³ Section 116(1)(b).

which to combine a South African company with a foreign entity would be by way of a common law merger or some other structure.²⁰⁴

An acquiring party in a statutory merger will also often not be able to negotiate any warranties in respect of the transaction, as the merging company, as the disposing entity, will in many instances cease to exist following the implementation of the merger. No indemnities can therefore be provided by such a disappearing company in a merger.²⁰⁵ This 'disadvantage' may in certain instances be used by a transferring or acquired company as a manner by which to avoid such warranties.

Both a statutory merger and a common law merger which involves the disposal of all or the greater part of the assets or undertaking of a company are fundamental transactions which are largely subject to the same approval requirements. Where a common law merger is however, for whatever reason, not subject to the requirements of s 112, the following additional disadvantages can be attributed to a statutory merger when compared to a common law merger:

- such a common law merger may not be subject to shareholder approval or, if shareholder approval is required, different notice, quorum and voting requirements may apply;
- a common law merger which does not amount to a fundamental transaction is not contingent on becoming subject to court approval or other court action pursuant to the provisions of s 115, as is the case in a statutory merger;
- a common law merger which is not subject to the provisions of s 112 will in all likelihood not be subject to the jurisdiction of the Takeover Regulation Panel; and

²⁰⁴ It is submitted by Davids et al op cit note 40 at 354-5 that it is preferable that foreign companies be capable of merging with South African companies. Instead, it is likely that foreign companies will utilise subsidiary South African companies to do such transactions. This has the disadvantage that interested parties, such as creditors, will not enjoy exposure to the larger balance sheet of the foreign holding company in question. Given the potential which such cross-border mergers would unlock for the South African economy, an amendment to the Companies Act has been advocated for, so as to make such mergers possible, as is seen in a number of foreign jurisdictions. Cassim op cit note 6 at 8 makes a similar suggestion in this regard.

²⁰⁵ Egan op cit note 81 at 28.

- the appraisal right for dissenting minority shareholders will be triggered by a statutory merger, but will not be triggered in a common law merger which does not constitute a fundamental transaction.

As noted above, the statutory merger is still a fairly new mechanism in South African law and it is not clear how related legislation, including the Insolvency Act, the Labour Relations Act and the tax legislation discussed above, will be applied in the context of such transactions. This is especially true in light of the fact that some of the ancillary legislation has not yet been aligned with the Companies Act in order to give effect to all of the intended benefits to be derived from using the statutory merger. The various provisions of the Companies Act which regulate statutory mergers have also not yet been interpreted by South African courts. For these reasons, statutory mergers should be approached with caution, notwithstanding the apparent flexibility which is afforded to parties who wish to make use of the statutory merger mechanism.

(c) Other considerations when choosing whether to implement a business combination by way of a common law merger or a statutory merger

Given that a statutory merger must be approved by a special resolution passed by each of the merging companies, at a shareholders meeting at which there are shareholders that can exercise at least 25 per cent of all the voting rights that may be tendered on that matter, it is important to bear in mind that the quorum and the approval requirements in such a voting relates to the percentage of voting rights that may be exercised on that matter, and not the percentage of shareholders or the number of shares held by a shareholder. As noted above, there are instances in which certain shareholders may not vote on the approval of a statutory merger, and any voting rights controlled by an acquiring party in a statutory merger will, for example, be excluded when calculating whether a quorum is present at such a shareholders meeting and for purposes of voting at the meeting.²⁰⁶ The same rules apply in a common law merger, which by virtue of s 112 is subject

²⁰⁶ Section 115(4).

to the requirements of s 115. This should therefore be kept in mind in any merger.

It should moreover be noted that both statutory mergers and common law mergers are generally more appropriate in transactions with a co-operative target, as opposed to potentially hostile transactions, as the implementation of both forms of merger require the support of at least the board of directors of the target company.²⁰⁷

Where the parties to a transaction wish to portray a business combination as a merger of two or more companies of equal status, or where it is important for the parties to the transaction to retain the identity and goodwill of a target company, a statutory merger may be more appropriate than a common law merger.²⁰⁸ In this way the pre-existing companies can be taken up into a newly incorporated company, thereby avoiding the creation of the impression that one of the companies has acquired or taken over the other. A common law merger can of course also be structured into a new company, but such a mechanism will no doubt complicate the transaction.

Triangular mergers may further be structured such that the business of a target company may be acquired by an acquirer through one of its wholly-owned subsidiaries (as the merged company), such that the businesses of both the primary acquirer (in its original form) and the target company (thereafter through the merged company) may continue to be operated without either of the business disappearing, in a manner which may be substantially similar to the way they were operated before the merger. This may be especially appropriate where the nature of the businesses of the primary acquirer and the target company are of such a nature that it would be inappropriate to combine those two businesses.²⁰⁹

²⁰⁷ Davids et al op cit note 40 at 370; Cassim op cit note 6 at 23.

²⁰⁸ Cassim op cit note 6 at 3 and 29. Where businesses which are to be merged are to be kept separate, for whatever reason, triangular mergers may also serve a useful purpose. Another structure which may be used in this regard is the 'top hat' or 'dummy-double structure', where the parties to the merger will be seen as of equal stature in the transaction and where there is no appearance of one company acquiring the other. See Davids et al op cit note 40 at 344-6 for a discussion in this regard.

²⁰⁹ Triangular mergers have the further advantage, where a shell company is used as the merged company, over ordinary two-party mergers that the surviving company has exactly

A vast number of considerations should therefore be taken into account when deciding how to effect a business combination, including, but not limited to, the nature of the businesses which are to be combined, time and cost implications, the solvency and liquidity of the respective companies, the required shareholder approval, the anticipated views of shareholders and the possible effect of minority shareholder protections on the transaction, the protection afforded to creditors, any immovable property which will be required to be transferred, the tax consequences of the transaction, the memoranda of incorporation of the relevant companies and the provisions of any contracts which are to be transferred pursuant to the merger, such as change in control provisions.²¹⁰ As in many other transactions, the tax treatment of a transaction may well be the most important of these considerations.

VI. CONCLUSION

To conclude, one needs to assess each proposed transaction and the advantages and disadvantages of each of the common law merger and the statutory merger, as discussed above, on a case by case basis to determine whether a statutory merger or a common law merger would be the most appropriate method by which to effect the combination of the businesses under consideration. The decision as to which mechanism the parties wish to use therefore needs to take into account the results of an in-depth due diligence investigation, which investigation must focus on the considerations identified in this dissertation paper.²¹¹ What is clear is that the decision of the parties may be driven by tax considerations.

Notwithstanding the above, it would appear that the statutory merger is the preferred method by which to combine businesses where the merging companies either have numerous immovable properties which need to be transferred as a result of the merger, or where they are parties to a substantial number of agreements which have to be assigned as part of the

the same rights and obligations as the target company, such that the likelihood of the merger having any negative effect on the rights of creditors or other third parties is greatly diminished. Cassim et al op cit note 4 at 705.

²¹⁰ Cassim op cit note 6 at 3 and 27.

²¹¹ Nicol op cit note 140 at 33.

proposed business combination, especially where the agreements provide that third party consents are required for the voluntary assignment of those agreements.

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