

# KIRKLAND M&A UPDATE

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## Jurisdiction Shifting – Creative Structuring Opportunities

*A multi-step deal structure including a reincorporation into a more accommodating jurisdiction may offer a creative work-around for parties facing unique jurisdictional requirements.*

As we have noted in prior [M&A Updates](#), when dealmakers face a transaction where one or both of the parties are incorporated outside the Delaware comfort zone, they often confront unexpected structuring issues unique to entities or deals undertaken in that state or country. These may include corporate law, tax, accounting or structuring concerns and, most often, the deal teams will have to adjust the transaction terms to accommodate these issues.

But a [recent decision](#) from the Virginia Supreme Court is a timely reminder that, on occasion, these issues can be managed using some resourceful and creative structuring involving shifting jurisdictions. In the case, a Virginia corporation planned to sell its assets which, under Virginia law, would trigger appraisal rights for minority stockholders. Seemingly to avoid this result, the seller undertook a multi-step restructuring ahead of the sale which began with a “domestication” under Virginia law that shifted its jurisdiction of incorporation to Delaware. Under the Virginia statute, no appraisal rights apply to such a reincorporation. Once reincorporated in Delaware, the seller continued its restructuring, ultimately selling its assets to the buyer. Notably, Delaware does not provide for appraisal rights in an asset sale. The Virginia court dismissed the minority stockholders’ argument that they were entitled to appraisal rights. It rejected a “steps transaction” argument that looked to collapse the multiple steps and focus on the substance of the transaction (i.e., a sale of the company’s assets to the buyer), favoring instead the seller’s assertion that the first-stage move to Delaware had independent legal significance and therefore was effective to shift the appraisal rights analysis to Delaware law.

Virginia also played a prominent role in another jurisdictional shifting structure dating back to 2000. Lycos, a pre-Google era search engine and a Delaware corporation, sought to combine with Terra Networks, a Spanish company, in a \$12.5 billion stock-for-stock merger. Because of quirks in Spanish tax and corporate law, Terra could not issue its shares to Lycos shareholders in a subsidiary merger, the typical structure for acquiring a U.S. public company. To overcome these obstacles, Lycos reincorporated into Virginia immediately before completing a “share exchange” with Terra under Virginia law. A share exchange, an acquisition structure not available under Delaware law, is effectively a tender offer under state law. The parties were able to use this different feature of Virginia law to accommodate their technical Spanish tax and corporate law concerns.

More recently, when Flagstone, a Luxembourg-domiciled reinsurance company, was acquired by Bermuda-incorporated Validus in a cash-and-stock deal, the parties faced limitations under Luxembourg law on the amount of cash that could be included in a transaction unless it was completed under the EU Takeovers Directive (which required the target to be listed in the EU, which Flagstone was not). Taking a page from the Terra/Lycos structure, the transaction was multi-step, with Flagstone first reincorporating into Bermuda and then completing the merger with Validus free of the Luxembourg restrictions.

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Although parties are often forced to accept the unique jurisdictional requirements with which they are faced and structure around those requirements, where possible, a multi-step structure including a reincorporation into a more accommodating jurisdiction may offer a creative work-around for those problems. Dealmakers should, of course, use care in implementing such an approach, being mindful of political and public relations concerns, as well as whether relevant regulatory and judicial authorities will respect the jurisdictional shift and its desired results.

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