

US Innovative Lawyers 2011

RESEARCH PARTNER



Small change, big difference

The tiniest of tweaks adapt the law for a multitude of applications. By *Helen Thomas*

CERTAIN FACTORS ALMOST always matter in takeovers. While bankers tend to concern themselves with strategy, valuation and synergies, corporate lawyers worry about speed, certainty, negotiating leverage or the simple logistics of getting everything done. Each merger or acquisition may have its own nuances, but those elements often remain the same. Tweaking and adapting contracts or structures to better manage those factors is part of the lawyers' job.

Practitioners argue that small changes to established practice can make significant differences to outcomes. And when a new approach so obviously enables greater speed or better negotiating heft, it gets copied. "One interesting aspect of legal innovation is how quickly others follow suit," says David Fox, partner at Kirkland & Ellis. "It is about uncovering an approach that solves a problem where previously others have struggled."

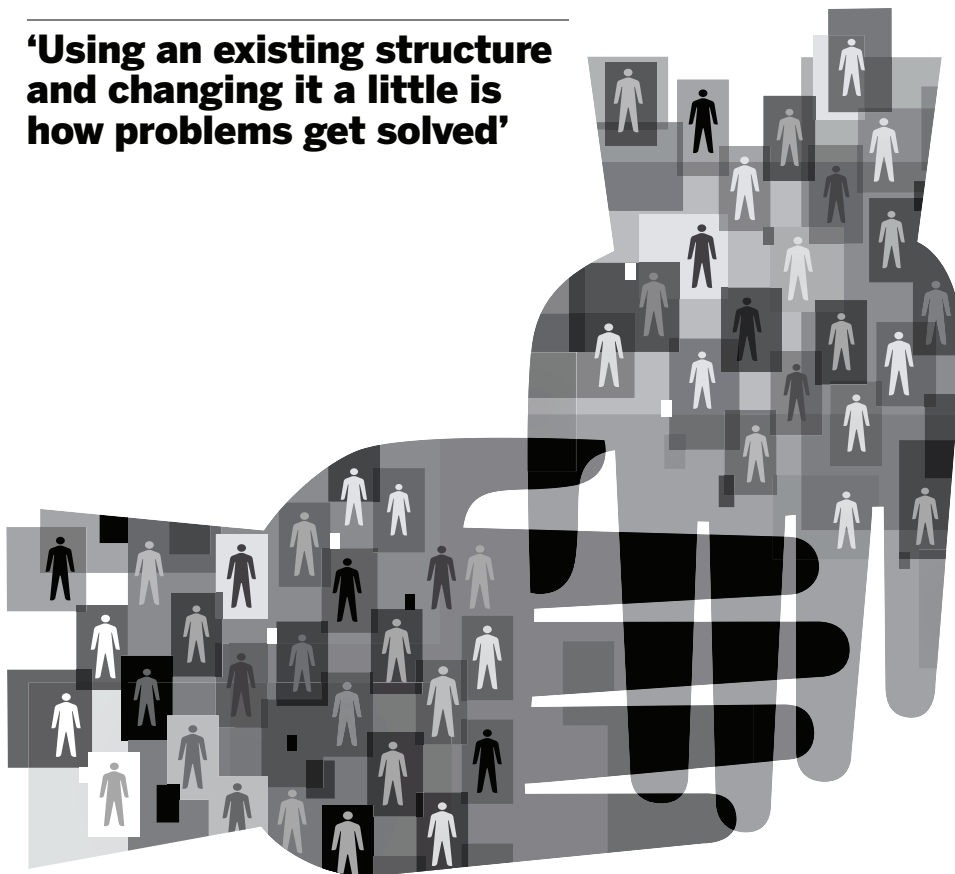
"Lawyers depend a lot on precedent," argues Eileen Nugent, partner at Skadden, Arps, Slate, Meagher & Flom. "But the best way you can be innovative in corporate law is to understand what has been done before and be open to doing things a little differently. Using an existing structure and changing it a little is how problems get solved."

In September 2010, Burger King agreed to be bought by 3G, an investment fund backed by three of Brazil's wealthiest and most prominent businessmen. While negotiations had dragged on for many months, the hamburger chain's board was concerned with moving quickly.

"Time is the enemy of all deals," says Ms Nugent, who was on the team advising the company. "In the Burger King deal, there was a desire on the part of the target's board to get money into the hands of shareholders as quickly as possible."

Moving swiftly helps deal certainty, advisers argue, compressing the window of opportunity for possible interlopers and reducing the risk that the environment moves against you. In the Burger King deal, the parties agreed to proceed using a dual-

'Using an existing structure and changing it a little is how problems get solved'



track process, now known in some circles as a "double whopper".

Tender offers enable companies to close deals more quickly, sometimes using a so-called "top-up" option to enable a buyer to squeeze out minority holders. However, securing financing against such a structure is challenging, meaning private equity groups rely instead on a traditional merger structure. Banks are reluctant to lend into a

deal where the buyer may end up with only majority rather than outright control.

The two law firms involved in the deal, Kirkland & Ellis and Skadden, blended a tender offer with a simultaneous merger process, the latter acting as back-up and as a stick to encourage investors to tender their shares.

If the tender offer failed to reach the level required for full control – about 79 per cent –

Transaction avoided a bank failure that could have cost \$300m

LAWYERS DO NOT OFTEN RECEIVE Christmas cards from their clients' employees. But AmericanWest Bancorp tellers decided to send festive greetings to the team behind a deal to sell and recapitalise the bank. The transaction saved AWB from being seized by the Federal Deposit Insurance Corporation, thereby avoiding a bank failure that could have cost the FDIC an estimated \$300m.

Weighed down by losses on commercial real estate lending, AWB in 2010 was running short of capital, but still had a valuable banking franchise boasting 77,000 customers in Washington, Idaho and Utah.

The difficulty – faced by numerous banks teetering close to collapse – was the bank's \$40m of trust-preferred securities, or TruPS,

which could effectively veto the injection of new equity. Moreover, negotiating with TruPS holders was challenging – the securities had been pooled and repackaged into collateralised debt obligations, which in turn issued bonds to investors.

Morrison & Foerster acted for AWB, while Skadden, Arps, Slate, Meagher & Flom represented a vehicle backed by Goldman Sachs, the bank, and Oaktree Capital, the asset manager.

The lawyers believed they could avoid seeking approval from TruPS holders and shareholders by putting the bank's holding company into bankruptcy. Then, with only the consent of a bankruptcy judge, the bank's assets could be sold.

Conventional wisdom, however, held that a bankruptcy filing would send depositors rushing to withdraw their money. Indeed, when the legal

team went to Washington to put their proposal to regulators, they were met with a sceptical response.

The lawyers argued that AWB's sticky base of depositors would stay with the bank – and then crafted a communication plan to explain to customers what would become the first sale of a US bank through the bankruptcy of its parent.

"As the FDIC begins to reduce the financial assistance and loan guarantees it gives buyers in auctions of failed banks, it is possible that we will see these kinds of deals occur more frequently," says Henry Fields, partner at Morrison & Foerster. "In addition, this could be used to break the impasse with other TruPS holders, even at healthier institutions."

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the deal could switch instead to the merger path. "There hadn't been deals that put all those features together," says Ms Nugent. "To a nonlawyer it just sounds like a nifty thing to do. But the melding of these two forms of agreement is delicate work from a legal point of view."

When advising companies on contested or hostile deal situations, priorities shift. Rather than seeking to make a combination iron-clad and speed it towards completion, lawyers work to unsettle a rival's agreement, introduce doubt or simply gain themselves a foothold in negotiating with counterparties and winning over investors.

Cravath, Swaine & Moore defended Barnes & Noble against Yucaipa, the investment fund headed by Ron Burkle, the activist shareholder who was seeking to increase his holding in the bookseller. The poison pill put in place to prevent Yucaipa's stake-building was eventually upheld by a Delaware court. But Barnes & Noble then bet that it could persuade shareholders to vote against the recommendation of ISS, the influential proxy advisory service.

"We took their tactic, the litigation, and used it against them in the proxy contest," says Scott Barshay, partner at Cravath, of the effort to get investors to vote against Yucaipa's board nominees. "Instead of the usual one-page letter to shareholders, we put out a 40-page white paper laying out our case to institutional shareholders."

When Avis Budget moved to bust up rival Hertz Global's agreed deal to buy Dollar Thrifty, sparking a lengthy battle between the car rental operators, Avis's team knew that the antitrust risk involved in each combination would be pored over by investors. They needed Dollar Thrifty's shareholders to vote against the Hertz deal, something they would hesitate to do unless confident Avis, too, could get a combination with Dollar approved – and was not lagging too far behind Hertz in negotiations with regulators.

"We had to persuade the world that Avis represented a real, credible alternative to the Hertz deal," says Mr Fox at Kirkland & Ellis, who advised Avis on the deal. "Making an antitrust filing before launching an offer for the company, in fact before even Hertz did, bolstered our case with Dollar Thrifty investors."

"It is rare that circumstances provide us with the ability truly to innovate," says one lawyer. "The law and the rules serve as limitations on innovation."

So, too, do the courts. In the industrial gas industry, Air Products' year-long pursuit of Airgas failed after the Delaware courts upheld the company's right to maintain its poison pill. However, the state's Supreme Court had already overturned one innovative twist, upheld by a lower court. In a bid to circumvent Airgas' staggered board device, which allows only a portion of the board to be replaced at once, Air Products won support from Airgas shareholders for a bylaw that would have moved forward its annual meeting by eight months. In court, the two traded blows about the meaning of "annual". But Delaware bolstered Airgas's defences, ruling that the meeting could not be moved. ■

CORPORATE LAW

Firm	Innovation	Originality	Rationale	Impact	Total	Description
STAND-OUT						
Kirkland & Ellis	3G's acquisition of Burger King	7	8	8	23	Created a new dual-track deal structure that addressed the concerns of both parties where the use of a traditional structure would have failed. The structure has since been replicated in a number of deals.
Morrison & Foerster	Recapitalisation of AmericanWest Bancorp through sale to private equity-backed buyer	7	8	8	23	Faced with debt obligations of \$40m in trust-preferred securities, the firm came up with the idea to use section 363 of the US bankruptcy code to sidestep the need for corporate consent and allow American West Bank, AWBC's healthy subsidiary, to continue in business.
Skadden, Arps, Slate, Meagher & Flom	Acting for SKBHC in the private equity firm's acquisition of AmericanWest Bancorp	7	8	8	23	The firm's work in convincing the regulator and other parties that this transaction could work required thorough understanding and sophisticated presentations about the practical implications of using section 363 of the bankruptcy code to recapitalise the subsidiary of a highly leveraged banking group.
Skadden, Arps, Slate, Meagher & Flom	Burger King's acquisition by 3G	6	8	8	22	Helped to refine and implement the first-ever simultaneous tender offer and long-form merger over a two-week timeframe. Making the conditions, covenants and timing constraints in deal agreements work was a challenge as it was the first time such a deal had been done.
Cravath, Swaine & Moore	Defending Barnes & Noble against a group of investors	7	7	7	21	Took a strategic and counterintuitive approach, including creating a shareholder rights plan "poison pill", the defence of the rights plan, a proxy fight and getting shareholder approval.
Gibson, Dunn & Crutcher	Defending Tenet Healthcare against a hostile takeover by Community Health Systems	7	7	7	21	Orchestrated a novel strategy, which included a "poison pill" and a disclosure lawsuit against CHS.

HIGHLY COMMENDED

Kirkland & Ellis	Advising Avis Budget on its bid for Dollar Thrifty	8	7	5	20	The unorthodox strategy of making an antitrust filing prior to Avis making a bid for Dollar Thrifty enabled Avis to move forward on an offer without a formal bid and was key in getting Dollar Thrifty's investors to vote down a first bid from rival Hertz Global.
Cravath, Swaine & Moore	Terra Industries	6	7	6	19	When Terra was faced with a hostile bid from a larger rival, which was in turn the target of another hostile bid, the firm created a successful strategy for Terra to regain control of the timetable and the decision-making process.
Dewey & LeBoeuf	China Aviation Industry General Aircraft's \$210m acquisition of Cirrus Industries, the US aviation manufacturer	7	6	6	19	Acting for the CAIGA in the first reverse triangular merger to be approved by the Chinese regulatory authorities responsible for foreign investments, the firm overcame significant cross-border political and regulatory hurdles and set a precedent for future Chinese investment in US technologies.
Fulbright & Jaworski	Building of the Long Beach courthouse	6	6	7	19	With a deep understanding of commercial theory, public policy and county, state and federal law, the firm guided Meridiam Infrastructure through the first-ever procurement and delivery of a building project using "performance-based infrastructure".
Paul, Weiss, Rifkind, Wharton & Garrison	Collaboration between Shanghai local government and Walt Disney on new theme parks	6	7	6	19	In the first joint venture on the Chinese mainland between a state-owned enterprise and one of the west's iconic companies, the firm developed a unique tripartite deal structure to satisfy both parties.

COMMENDED

Paul Hastings	JPMorgan Chase's precedent-setting cross-border transaction	5	6	7	18	In a deal that has opened up the Hong Kong stock exchange to international companies wishing to establish a secondary listing with depository receipts, the firm advised JP Morgan Chase on Brazilian mining company Vale's listing in Hong Kong.
Akin Gump Strauss Hauer & Feld	Dow Chemical's joint venture with Mitsui project financing and management	6	6	5	17	In an unusually compressed six-week time frame, involving a consortium of European and Japanese banks under US law, the firm created a global template for further joint ventures between the two companies.
Cleary Gottlieb Steen & Hamilton	Uniting Mexico's Femsa with Heineken of the Netherlands to make a global beer business	5	6	5	16	To meet the demands of Femsa to remain independent while not diluting the Heineken family's majority shareholding, the firm developed an "allotted share delivery instrument" to allow the deal to close in record time.
Dechert	Ventas acquisition of Atria for \$3.1bn	5	5	6	16	Needing to obtain regulatory approval in 24 states for 118 senior care facilities, the firm created a "prototype application", which enabled regulatory approval to be achieved in record time.
Freshfields Bruckhaus Deringer	Traveler's sale of Global Business Payments to Western Union	5	7	4	16	Navigated potentially deal-breaking US-UK merger and acquisitions differences and competing interests to create a harmonised mid-Atlantic agreement.
Proskauer Rose	Grifols' acquisition of Talecris	5	6	5	16	In one of the largest leveraged buyouts since 2008 with complex multi-jurisdictional issues, the firm persuaded the US Federal Trade Commission to forego antitrust litigation, and made the acquisition possible through a complex escrow structure to raise proceeds while antitrust approval was pending.
Skadden, Arps, Slate, Meagher & Flom	Advantest's unsolicited takeover of Verigy, the world's third-largest semiconductor business	5	6	5	16	In a deal signalling a change in Japan's corporate culture, Skadden devised a strategy that overcame significant multi-jurisdictional antitrust hurdles through a "proposed proposal".