Why use Jersey companies for acquisition and investment holding structures?

Briefing Summary: It is well known that Jersey companies are a vehicle of choice for acquisition and investment holding structures, in particular in a private equity context. What may be less well known is that these companies are frequently tax resident onshore. In this briefing we explain some of the reasons (outside of tax residency considerations) that Jersey companies are so popular when structuring transactions.

Service Area: Corporate, Mergers and Acquisitions

Sector: Trust and Company Business

Location: Jersey

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Familiarity

- Jersey company law is founded on the same underlying principles as English company law, and therefore Jersey companies are very familiar to people who are used to dealing with English companies
- On the flip-side, the additional flexibility that Jersey law permits makes it possible for a Jersey company to "look and feel" very similar to, for example, a Delaware company

Flexibility on acquisition and throughout investment holding period

Maintenance of capital: distributions

- Creditor protection in relation to distributions does not rely on any sort of distributable profits / distributable reserves concept, but is instead based on a requirement (subject to certain exceptions) for the directors who authorise the distribution to make a 12-month, forward-looking, cashflow-based solvency statement in a prescribed form
- Because the solvency statement requirement is cashflow- rather than balance sheet-based, a Jersey company may still be able to make distributions when it has accumulated losses (including where it has a negative profit and loss account)

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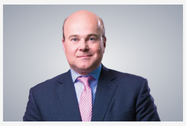

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- Jersey companies have an express power to debit distributions to a share premium account, meaning that issuing consideration shares does not "lock up" retained earnings of a target that are capitalised through the issuance of consideration shares by the acquisition vehicle

Maintenance of capital: redemptions and repurchases

- There is no requirement for distributable profits in order to fund a repurchase or redemption of shares out of a non-capital account, and there is no requirement for available profits in order to fund a repurchase or redemption out of capital; subject to a solvency statement requirement, shares can be repurchased out of any company account (including capital accounts)
- Jersey law does not specify that the repurchased shares must be paid for on purchase, but rather requires the directors' solvency statement to look forward 12 months from the time of payment
- The Jersey repurchase provisions apply equally to depositary certificates representing shares
- Repurchases are on-market for Jersey law purposes if they are undertaken "on a stock exchange"; "stock exchange" is not defined, and is therefore broader than the equivalent requirement of the Companies Act 2006 (which refers to a "regulated market")
- Shares issued as non-redeemable shares can be converted into redeemable shares post-issuance

Maintenance of capital: other factors

- Jersey law does not require any third party valuation in connection with the issue of shares for non-cash consideration
- Share capital can be denominated in any currency, which need not be the company's functional currency for the preparation of accounts
- Jersey law does not impose any restrictions on financial assistance in connection with the acquisition of shares in the relevant company
- Jersey law does not impose any restrictions or limitations on the ability of a Jersey company to pay commissions or give discounts in connection with the issue of its shares
- Jersey law permits what would be referred to in many civil law jurisdictions as "capital contributions", where contributions from shareholders can be credited to capital (share premium) without issuing shares

Incorporation of no par value companies

- In addition to par value companies (which are similar to English companies), Jersey law permits the incorporation of no par value companies
- These companies carry the same benefits as summarised above in terms of capital maintenance, but are even more flexible as shares do not carry a specific nominal or par value
- This means, for example, that issuing shares as part of an employee share plan or converting shares between classes is even more straightforward

Accounts and audit

- A Jersey company is only required to appoint an auditor and prepare audited accounts if it is (or is deemed to be) a public company, if its articles require it to appoint an auditor or if its shareholders have passed an ordinary resolution requiring it to appoint an auditor (which can be reversed)
- Jersey law permits non-market traded companies (whether public or private) to adopt any generally accepted accounting principles (GAAP)
- For market traded companies, one of a prescribed list of GAAP must be applied, which at the time of writing includes UK GAAP, US GAAP, IFRS (both European Commission and International Accounting Standards Board), Canadian GAAP, Chinese GAAP, Indian GAAP, Japanese GAAP and South Koran GAAP (with no current intention to prohibit the use of US GAAP)
- Private companies are not required to file their accounts

Flexibility on exit

Listing options

- In common with English companies, Jersey companies can issue uncertificated securities which can be traded electronically via CREST on markets that participate in that system (including the LSE Main Market, AIM and The International Stock Exchange)
- In addition, Jersey law permits the electronic trading of certificated shares on certain designated markets, including (at the time of writing) the New York Stock Exchange, NASDAQ, the Toronto Stock Exchange, NYSE Euronext Paris and NYSE MKT (and it is possible to request that additional markets are added to the designated list if required)
- This means that Jersey companies may be eligible for direct registration and electronic trading on a wider range of markets than for example English companies, opening up more and cheaper exit options by way of IPO

Mergers and demergers

- Jersey is not part of the EU and therefore the EU Merger Directive does not apply to Jersey companies
- However, Jersey law permits two or more companies (which need not all be Jersey incorporated companies) to merge to form one successor company, and permits statutory demergers
- The Jersey merger and demerger regimes provide flexibility on how assets and liabilities of the participating companies are dealt with and the final shareholder structure, including an ability to "cash out" shareholders, and can therefore be used as an additional method to achieve takeovers, spin-outs etc

Stamp duty

- Jersey does not levy stamp duty or any equivalent transfer tax on transfers of shares (other than where the company is a local residential property holding company or where the company has control over a subsidiary company which is the beneficial owner of local property)

- This can be an advantage both on an exit from an investment, and where an exit involves the IPO of a Jersey company

Migrations

- Jersey companies can "migrate" (that is, change jurisdiction of incorporation without breaking corporate existence) to another jurisdiction that permits the same
- Migrations in to Jersey are also permitted

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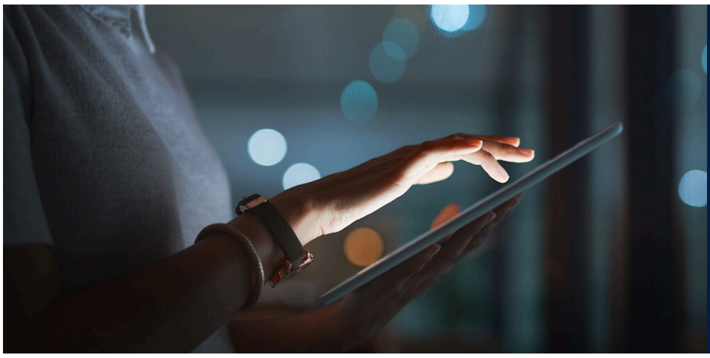

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