

INTERNATIONAL CORPORATE STRUCTURES

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The monthly newsletter for clients and friends of LCN Legal and for anyone involved in creating and maintaining corporate structures.

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Sometimes, the true nature of a transaction is just not clear. The physical actions of the parties involved, or a functional analysis of the arrangements, may be inconclusive. From a legal perspective, a number of different interpretations may be possible. This can be the situation whether the transaction is between members of a group or between independent parties and so in each case, the words used by the parties to document the commercial arrangement can be critical.

For example, the recent UK case of HMRC v Findmypast revolved around the nature of the supply of services made by Findmypast, which provided access to genealogical information through the internet. Customers could either subscribe for a specified period, or get access on a 'pay-as-you-go' basis, by buying vouchers. The key question involved the VAT treatment of the vouchers, and whether customers were just paying for access to specific records, or whether the vouchers instead conferred a package of rights, which included the right to search the relevant records. As you would expect, the first port of call was to look at the contractual

arrangement between the parties, and how the supplies were described. This was of course not the whole story, and the court also attempted an economic analysis of the arrangements, before deciding that the only service which customers had paid for was the viewing of documents, rather than merely the right to search.

Sometimes, lack of clarity is purely historic, and it impacts on the legal or tax treatment of a previous state of affairs. Other times, the arrangements are ongoing, and the question can arise as to whether it is possible to transform from one legal form to another.

For example, one group company may make a loan to another, and this may not be reflected in a written contract. Later, the group may want to transform the bilateral loan into a bond - for example, so that the bond can be listed on a recognised stock exchange, and can benefit from the Quoted Eurobond Exemption for withholding tax purposes. Is it possible to transform the nature of the relationship, purely by words?

Clearly, the interpretation of this kind of situation will very much depend on the facts and the applicable laws. But in general, there are three main questions from a legal perspective:

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1. Whether the proposed arrangements as a whole are a sham (i.e. something intended to deceive). Few corporates or advisers would want to be involved in anything of that nature.
2. Whether the proposed arrangement is a legal impossibility – for example, under English law it is impossible to extend the term of a lease as such; an attempted extension takes effect as a surrender of the old lease and the grant of a new one. These types of issues are relatively rare, but they can arise.

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Paul Sutton is co-founder of LCN Legal and a corporate lawyer with over 20 years' experience of international corporate structures, including as a Director of KPMG's law firm in the UK and as a corporate partner in international law firm Pinsent Masons. He has led the legal aspects of group reorganisation projects involving assets totaling over US\$25 billion and is a contributor to the LexisNexis online Transfer Pricing resources.



Paul Sutton

Paul Sutton
Co-Founder, LCN Legal

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How to assemble your team of tax adviser superheroes



BY IAN BARRON

I have often been asked what makes a good international tax adviser. My general response is that I ask one key question: whether that person has the overall potential to be an in house Head of Tax ("HOT").

In my dealings with global tax advisers in Europe, Asia and the US, I have always assessed them under two main criteria:

A. The 'given' features, which include:
Honesty
Integrity
Respectful
Personable
Technically strong

B. The additional features, which include:
Strong commercial awareness
Looks beyond theory
Sees the broader picture
Makes a point of really understanding the client's business
Listens and doesn't preach
Doesn't start the billing clock at every opportunity
Maintains regular contact
Talks 'we' not 'I' (i.e. a team player)

Before sharing some of my experiences of dealings with advisers, let me first make the point that this article is covering ongoing working relationships, rather than one off specific projects which may just require the help of specialist tax lawyers or other subject matter experts.

I have generally worked with global offices of the Big 4 accounting firms as, in recent years, this tended to be the policy adopted by the HQ tax senior management seeking consistent advice and support. However, as I was fortunate in having been around before such tax adviser policies were introduced, I used to select my advisers on a country by country basis using my HOT approach.

Sometimes I'd appoint a Big 4 office but without being tied to that particular firm in other countries. In other cases, I'd also speak with tax lawyers or specialist advisers and select the one who best fit my needs for the work involved and the country concerned. Following the introduction of the head office policies on appointing tax advisers, I had to justify any out-of-policy choice, but 'grandfathering' prevailed, as did being able to highlight quality and expertise issues in certain countries necessitating a non-standard appointment.

Although I understood the HQ desire for a single global tax advisory firm for planning and compliance, in practice this didn't tend to work for all countries. For example, in one major country, the partner believed he should turn the billing clock on as soon as the phone rang or he received an e mail. Despite me

telling him that we didn't like working that way, he persisted. As he wouldn't adapt his approach, he was replaced on our case.

Another area that disappointed me with a few advisers was an obsession to produce extensive theoretical presentation decks at meetings. This made me think they weren't sure how to deal with our matter. Most of the time I just wanted to discuss the practical aspects of a project or issue.

Despite the occasional negative experience, during my career I've been lucky to work with some really terrific advisers from the Big 4/ Big 10 as well as tax lawyers, transfer pricing advisers and other subject matter experts in various countries. We built mutual trust and respect and were able to talk openly with each other. I didn't require voluminous justification papers; their word and short summary was more than sufficient. I'm fortunate to count them as friends too.

From that select band, do I have a no.1 adviser? Yes, a consultant in Italy who I've known for years who meets all my HOT criteria. He has exceptional knowledge of economics, accounting and tax plus he makes sure he keeps informed on EU, US and international tax developments.

It has been a pleasure and a privilege to work with them all. My sincere thanks, you know who you are.

Ian Barron is a strategic tax consultant to LCN Legal. Prior to this, Ian had a long tax career at American Express where he was Vice President and Head of Corporate Tax for the EMEA Region for 19 years.

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3. Whether the variation or transformation is to create something "wholly different". A bond – which is essentially just an acknowledgement of a debt – is arguably not wholly different from a loan. Similar arguments could be raised in the transformation of the provision of strategic services which include know-how, to the grant of a franchise.

As long as the answer to those three questions is "no", then it may well be possible (from a legal perspective) to transform one arrangement into another, with different characteristics, by using the right words.

7 reasons why LEX LUTHOR

might not start a corporate simplification project

It's well known that Lexcorp, Lex Luthor's vast business empire, includes thousands of companies all over the world. You might wonder why he doesn't simplify it, and reduce what must be a huge administrative burden. No doubt a profusion of companies may be helpful in money laundering and disguising the proceeds of crime. But of course Lex has a very carefully cultivated public image, and the advent of Country-by-Country reporting is not something he wants to be seen to ignore.

For other corporate groups, sometimes it's obvious that the number of legal entities may need to be cut down. The group may have 128 dormant companies, each of which have done nothing for 15 years. There may be a global policy at head office level which instructs local management to implement a policy of legal entity reduction. Or a key regulator may decide that the group's haphazard corporate structure represents an unacceptable risk, and needs to be addressed. In these situations, you just go ahead and do it. ("You" being the CFO, FD, Company Secretary or whoever has responsibility for the legal structure of the group globally or in the relevant region.)

In other cases, removing unnecessary legal entities might seem like a tempting idea. But, like Lex, you will want to evaluate it first. Here are some of the key hurdles which can sometimes prevent a much-needed simplification project:

1. COST

Corporate simplification projects require resource. It might seem like it's just a matter of signing a few forms to strike the relevant companies off, but that's not the case. You will need to involve each of the key functions in the group, from legal and tax to HR and insurance. You'll need a

methodology to establish that removing the companies will not trigger material liabilities or the loss of material assets. You may need to appoint liquidators. And you may need to take specific corporate actions to deal with issues that emerge.

2. THE FINANCIAL BENEFIT IS UNCERTAIN AND IS DEFERRED

Although removing companies should produce ongoing cost savings – such as audit and company secretarial charges – it is notoriously difficult to quantify them. So you're talking about incurring a significant upfront cost to produce an uncertain, deferred benefit. In our experience, if the possibility of cost savings is expected to be the main driver, then the project probably won't go ahead.

3. CORPORATE MEMORY ISSUES

This one can be a killer. For directors to approve the removal of a company, they need to be reasonably satisfied that there are no outstanding liabilities or assets which need to be dealt with. Proving a negative can be challenging, especially if key members of staff have moved on, and there's little information about why the company exists and what it has done. Addressing this issue properly takes a consistent, systematic approach.

4. YOU DON'T HAVE ENOUGH TIME

Keeping a major corporate simplification project on track requires a big investment of time. Setting up the core team. Agreeing the parameters. Setting budgets. Creating standard approaches. Setting deadlines. Monitoring progress and troubleshooting. Perhaps you can't spare that time, and perhaps the project just isn't important enough for you to prioritise.

5. YOUR COLLEAGUES DON'T HAVE ENOUGH TIME

Legal entity reduction projects usually involve issuing due diligence questionnaires to a variety of people within the group. This means asking people to take time out of their schedules to focus on something else. Overcoming the 'too busy' factor takes focus and determination.

6. YOUR DIRECTORS DON'T ACTIVELY SUPPORT IT

This is another critical reason why corporate simplification projects can grind to a halt. You need serious support from heavy-hitters to overcome blockages – such as dealing with the 'too busy' phenomenon, or taking a view on the materiality of potential issues.

7. YOU COULD MESS IT UP

By 'mess it up' we mean: you could incur costs which are disproportionate to the perceived benefits, the project might never get off the ground, removing a company could trigger a significant, unexpected liability, or some other mishap could befall the project. These outcomes should be very unlikely with careful planning, but they're still possible. Much safer to do nothing, and to leave your successor with the potential task.

All of these reasons are perfectly legitimate reasons why Lex Luthor might say to himself "OK, let's forget it."

However, there is another way – which is not to start with a major corporate simplification project at all. Lex could just choose a small number of companies to remove, maybe 5 or 6. Go with the easy ones. Give himself a reasonable time to deal with them. And take it from there.

LCN Legal has published a free guide to removing dormant companies, and a free due diligence log and checklist for corporate simplification projects. To get your free copies, just email us at info@lcnlegal.com.

QUOTE OF THE MONTH
"IT'S NOT WHO I AM
UNDERNEATH, BUT WHAT
I DO THAT DEFINES ME."
Batman, in *Batman Begins*



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HOW WONDER WOMAN SMASHES LEGAL OBSTACLES AND CREATES SALES AT LIGHTENING SPEED

A well-organised corporate structure is undeniably an essential foundation for any great business.

But as Wonder Woman knows, for many businesses, such as providers of maintenance services, software, subscription services, consulting services, and power-by-the hour services, customer contracts are their life blood. Unless a business has the deepest of pockets, the achievement of sales targets is often the number one metric. Yes, service delivery is also critical, but until you've made a sale, a customer can't experience the quality of delivery of your product or service.

For these businesses, the process of converting sales leads into revenue involves more than just selling a proposition to decision-makers. It also involves going

through a journey of negotiation and due process to get a contract signed on the dotted line... and to unlock the ongoing cashflow. So legal agreements and lawyers are a necessary (Dr) Evil for superheroes in the sales process.

By the very nature of their training, most lawyers are rightly concerned about spotting issues and risks and generally protecting their clients from unexpected future loss. Even the most commercial of lawyers is unlikely to be focussed on reducing a business' lead time for converting potential sales into cash. Unfortunately, lawyers are frequently perceived as little more than 'blockers' in the sales process, and even those lawyers who are supposed to be on your side can often cause unnecessary delay. At worst, they can kill the deal outright.



Wonder Woman understands how critical lead conversion systems are to our corporate businesses of all sizes. That's why we've worked with her to create a new free report which covers the Six Key Questions for Removing Unnecessary Legal Delays in Your Sales Cycle.

We don't have the space to reproduce it here, but if you email us at info@lcnlegal.com, we will gladly send you a copy.

Intercompany Agreements Toolkit



LCN Legal is one of the very few independent law firms with a dedicated focus on helping multinational groups to put in place effective intercompany agreements. Because we don't give tax or transfer pricing advice, we are able to work collaboratively with corporates and their existing internal or external tax teams to get the job done as smoothly as possible.

WE OFFER THREE LEVELS OF SUPPORT.

- **Toolkits of tried and tested template intercompany agreements**, with telephone support from senior lawyers who specialise in this area. Our templates provide the peace of mind of working from documents which have been specifically created for the purpose and refined over a number of years, rather than hand-me-downs or freebies with no assurance of quality or relevance. Our ICAs are compliant with OECD guidelines on transfer pricing.
- **Template agreements tailored for each applicable group**, using our standard documents and following our 5-step process to minimise the time spent by clients and their tax advisers to finalise the documents
- **Full service legal support**, including aligning the legal design of intercompany agreements with regulatory, corporate governance and risk objectives, hands-on support with due diligence and implementation, and assistance with setting up ongoing processes and reviews of intercompany agreements and the corporate structures to which they relate

For more information, email us at info@lcnlegal.com, or call us on +44 20 3286 8868.

EVOLUTION OF A CORPORATION: DC Comics

- 1890** Malcolm Wheeler-Nicholson born in Greeneville, Tennessee
- 1925** He founds Wheeler-Nicholson, Inc., to syndicate his stories and comic strips
- 1933** 'Superman' character is created by Jerry Siegel and Joe Shuster, high school students, Cleveland, Ohio
- 1934** Wheeler-Nicholson sets up National Allied Publications (NAP)
- 1939** The character of Batman is debuted in Detective Comics
- 1938** Siegel and Shuster sell the "Superman" character to DC. Superman debuts in DC's new title, "Action Comics"
- 1937** Detective Comics, Inc. (DC) formed as a JV between Wheeler-Nicholson and publisher Harry Donenfeld. Wheeler-Nicholson is later forced out.
- 1935-1936** NAP launches three comics titles: "New Fun", "Adventure Comics" and "Detective Comics"
- 1946** NAP and DC merge to form National Comics Publications, later renamed National Periodical Publications (NPP)
- 1967** NPP is purchased by Kinney National Company, which later purchases Warner Bros. Seven Arts and becomes Warner Communications
- 1989** Warner Communications merges with Time Inc.

TESTIMONIAL for LCN legal

*An excellent event.
The most insightful two hours I've spent in a long time.*

Director, Property Development Group