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A UAE merger play that can set precedents

As a statutory coming together, the NBAD-FGB deal sets the bar high

By Fraser Dawson

In July, the boards of First Gulf Bank (FGB) and the National Bank of Abu Dhabi (NBAD) approved the merger of FGB and NBAD, forming what will be considered the biggest bank in the Middle East and North Africa, with Dh642 billion in assets and a combined market capitalisation of approximately Dh106.9 billion. The merger remains subject to certain conditions, including approval by the Securities and Commodities Authority and approval of shareholders, and will be effected by way of statutory merger. So what exactly is a statutory merger and why is it important?

It's magic

In legal terms, a statutory merger is akin to a magic trick whereby two playing cards are merged into one, with the remaining playing card having all the characteristics of both original cards. Two companies become one with the assets and liabilities of both still intact — Abracadabra!

It is not available in every country (for example, there is no concept of statutory merger in the UK) but, where it is available, it can be very advantageous when compared to other 'traditional' merger routes, which require the transfer of all assets and liabilities to be undertaken contractually.

A 'traditional' merger also often requires third-party approval to be obtained. With a business which has a large number of counterparties, such as FGB, it is not practical or efficient to obtain all such approvals individually.

For example, a bank would need to obtain the consent of all its account holders to transfer their accounts to the surviving company if a traditional merger was implemented, unless such consent has already been given in the account terms and conditions.

From a business perspective a statutory merger is also beneficial as synergies such as cost savings and greater market penetration arising from the merger can be realised earlier and should be more readily achievable.

What steps are involved?

First, the shareholders of the disappearing company must pass a shareholder resolution to dissolve the company and merge; second, the shareholders of the surviving company must pass a resolution to increase the company's share capital.

And third, the surviving company must issue shares to the shareholders of the disappearing company. Under the UAE Companies Law (Federal Law No. 2 of 2015 concerning Commercial Companies), details of the conditions and methods of the merger are to be contained in a merger agreement which, in the case of the FGB-NBAD transaction, is yet to be made public.

The UAE Companies Law also gives rights to shareholders (holding at least a 20 per cent stake) and creditors of any merging company to object to the merger within 30 days from the date of shareholder approval for the former and within 30 days of being notified in writing of the merger for the latter.

It will be interesting to see how these possible obstacles to implementation are dealt with once further details are disclosed publicly.

De facto 'squeeze-out'

Another advantage of the statutory merger regime is that, provided that the relevant shareholder approvals described above have been obtained and all other conditions have been satisfied, shareholders in the disappearing company will automatically become shareholders in the surviving company.

Contrast this to an acquisition carried out by making a contractual offer for shares, where shareholders who do not accept the offer will remain shareholders in the company being acquired. This result in administrative problems for the acquiring company — the non-accepting shareholders may be prejudiced, as they will typically hold illiquid stock which will be difficult to sell.

In most English law-inspired jurisdictions (including the Dubai International Financial Centre) this situation is avoided by the acquiring company initiating a "squeeze-out" under which the remaining shareholders of the target are forced to sell their shares at the offer price once a shareholding threshold is reached, typically 90 per cent.

However, many countries, including the UAE, do not have laws that permit a "squeeze-out" to occur.

Historical use

The FGB-NBAD merger is the second time that the UAE's statutory merger regime has been used in the context of a highly publicised and systematically important commercial transaction, with the other being the merger of the Abu Dhabi real estate developers Aldar and Sorouh in 2013.

Interestingly, the other merger of banking giants which took place in the UAE in recent times — Emirates Bank and National Bank of Dubai forming Emirates NBD — was primarily carried out through an exchange offer, with a new holding company being inserted above the existing companies (although, following closing, Emirates Bank and NBD did in fact merge with the new holding company by way of statutory merger).

We speculate that, if the ENBD transaction were done today, given further experience and precedent of the statutory merger regime, this transaction might also have been principally effected through a statutory merger.

At present, much of the detail around the FGB-NBAD merger is publicly unavailable. Once this information is disclosed, it is likely that many additional questions will be answered — such as how the prescribed shareholder and creditor objection periods provided for in the Companies Law are dealt with.

Given the prevailing view that the UAE's banking sector will go through a period of consolidation, the DGB-NBAD merger is a very significant transaction in setting an example for future deals.

Although statutory mergers will not be appropriate in all cases, their advantages may prove compelling in future deals and we anticipate the use of statutory mergers in future mega mergers.

—The writer is an associate at Gibson, Dunn & Crutcher LLP.