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Alan M Klein

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GETTING THE DEAL THROUGH

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Bermuda

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1 Types of transaction

How may businesses combine?

The principal methods of business combination are:
- private purchase of shares of a target company;
- private purchase of a target company's underlying business;
- public offer for shares in a target company;
- statutory merger;
- statutory amalgamation; and
- statutory scheme of arrangement.

In Bermuda, amalgamations and mergers are the most common ways to effect an acquisition. The main difference between a merger and an amalgamation is that an amalgamation involves the convergence of the amalgamating companies and their continuance as a 'new' amalgamated company, while a merger involves the merging of companies resulting in a vesting of assets and liabilities into the 'surviving company'.

Typically, business combinations are structured as triangular transactions. This type of transaction typically involves the buyer establishing a subsidiary company in Bermuda that amalgamates or merges with the target company. The shareholders of the target company may receive:
- cash consideration;
- securities/shares; or
- a combination of the above.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The Companies Act 1981 is the main statute governing business combinations in Bermuda and Part VII deals with arrangements, reconstructions, amalgamations and mergers and provides for:
- amalgamations ;
- mergers;
- schemes of arrangement; and
- purchase of shares.

The M&A market is generally not regulated in Bermuda, however specific regulations may apply depending on the nature of the transaction, including whether the transaction involves public or private entities and whether there are regulated entities involved. Also, a company may in its by-laws have provisions regulating takeovers.

Public M&A transactions involving listed Bermuda entities will be regulated by the Bermuda Stock Exchange (BSX) Listing Regulations, which impose obligations on BSX-listed entities.

Prior approval from the Bermuda Monetary Authority (BMA), Bermuda's principal regulator, will generally be required for the issue or transfer of securities (shares) to foreign buyers, except where a general permission applies (for example, for listed securities). The BMA also regulates particular sectors such as insurers, banks and investment businesses. Certain acquisitions will require a change of control application to be made to the BMA, such as acquisitions of regulated or licensed entities, and in those cases the BMA will evaluate the proposed controllers and senior executives according to the applicable criteria.

3 Governing law

What law typically governs the transaction agreements?

Transaction agreements may be governed by either Bermuda law or a foreign law. In domestic transactions the governing law will be Bermuda law but in transactions involving international companies the choice of governing law for the implementation agreement is a matter for negotiation. Whereas the statutory amalgamation or merger agreement will be governed by Bermuda law.

A scheme of arrangement is effected by means of a court procedure.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The necessary filings will depend on the type of business combination and the nature of a particular transaction.

The following Registrar of Companies filings will attract filing fees:
- application and registration of a merger or amalgamation
- filing of a prospectus or information memorandum in connection with a public offering of shares;
- changes to certain constitutional documents or authorised share capital; and
- director filings in relation to changes to the Register of Directors maintained by the Registrar of Companies.

There are also filing requirements for BSX-listed entities, for example, in relation to notices, approvals and circulars or announcements.

A scheme of arrangement involves a court process and requires particular steps to be followed including the originating summons, petition and court order.

See question 18 in relation to taxes.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The BSX Listing Regulations provide a corporate disclosure policy which requires BSX-listed entities to keep the BSX, shareholders and holders of listed securities informed (without delay) by way of public announcements and/or circulars, of any information relating to the group that:
- is necessary to enable them and the public to appraise the financial position of the issuer and the group;
- is necessary to avoid the establishment of a false market in its securities; and
- might reasonably be expected to materially affect market activity in and the price of its securities.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

BSX-listed entities must comply with the disclosure obligations set out in the BSX Listing Regulations. The BSX Listing Regulations govern stakebuilding and notice must be made to the BSX in respect of any shareholder of a listed entity who directly or indirectly:

- acquires the beneficial interest, control or direction of 5 per cent or more of securities; or
- has a beneficial interest or exercises control or direction over 5 per cent or more of securities and acquires, in aggregate, an additional 3 per cent or more.

In a situation where a listed entity wishes to repurchase in excess of 20 per cent of its listed securities, the entity must obtain prior approval from the BSX whose mandate is to maintain market integrity and ensure equality of treatment for all security holders.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Bermuda law does not impose an all-embracing code of conduct on directors. In practice, a company's memorandum of association and bye-laws comprise its constitution and together with the Companies Act 1981 prescribe the ambit of the directors' powers. Many of the duties and obligations of a director are statutory whereas others are found in common law.

The Companies Act 1981 requires that directors act honestly and in good faith with a view to the best interests of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Directors must disclose their interest in any material contract or in any person party to a material contract with the company (or its subsidiaries).

Directors must ensure they act on an informed basis after due consideration of relevant materials, deliberation of information and obtaining advice from expert and experienced advisers if appropriate.

Directors are responsible to the company and not directly to the shareholders. However, in practice the interests of the company are typically regarded as identical with those of the shareholders as a whole (as constituted from time to time) therefore avoiding attaching the company's interests to the interests of any one specific shareholder.

When a company is approaching insolvency, the directors should have regard to the interests of the company's creditors in discharging their duties. However, the duty to have regard to creditors' interests is not a freestanding duty and may only be enforced by the company or by its liquidator (if it was in liquidation).

Controlling shareholders do not generally owe other shareholders any fiduciary duties but should not oppress a minority.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

The approval and appraisal rights of shareholders depends on the business combination.

Merger or amalgamation

In relation to a merger or amalgamation, the Companies Act 1981 procedure set out in section 106 must be followed. The directors of each amalgamating or merging company must submit the amalgamation agreement or merger agreement for shareholder approval. A notice must be sent to each shareholder and include a summary or copy of the agreement, state the fair value of shares and state that a dissenting shareholder is entitled to be paid the fair value of his shares.

The Companies Act 1981 provides that unless the by-laws otherwise provide, the resolution of the shareholders approving the amalgamation or merger must be approved by a majority vote of three-quarters of those voting at the meeting and the quorum necessary for such meeting is two persons holding at least more than one-third of the issued shares.

Any shareholder who did not vote in favour of the amalgamation or merger and who is not satisfied that he or she has been offered fair value for his shares can apply to the court to appraise the fair value of his or her shares within one month of the company's issuance of the notice.

Asset sale

In relation to an asset sale, the board will typically have sufficient power to conduct the sale. However, the company's constitutional documents may require the approval of shareholders (or a class) for certain actions.

Share sale

A share sale will require shareholder approval and involvement; account will need to be taken in this regard of the provisions of the by-laws and any shareholder agreement.

Scheme of arrangement

A scheme of arrangement requires approval by a majority in number representing three-fourths of shareholders or class. Once sanctioned by the court, the scheme is binding on all members or class of members and on the company.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Unsolicited transactions or 'hostile takeovers' by way of a takeover bid are permitted in Bermuda, but they are uncommon.

The target company's board of directors must act in good faith and in the best interests of the company, but the board may try to dissuade shareholders from accepting a bid and try to take any other action to prevent the bid from proceeding, including searching for a 'white knight' to circumvent the takeover. A company's by-laws could also contain anti-takeover protections, including a poison pill or other defensive provisions. Disputes concerning hostile bids can lead to litigation.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

The use of deal protection measures such as break fees or reverse break fees are not specifically regulated in Bermuda and such use would be subject to challenge on the basis of the directors' fiduciary duties. The quantum of the fee is negotiated and impacted by bargaining strength and other context-specific factors.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

There are restrictions on foreign ownership of shares in local Bermuda companies such that 60 per cent of the total voting rights in the local company must be exercisable by Bermudians – this is known as the '60/40 Rule' unless a licence to exceed this limit has been granted. There are also restrictions governing the ownership of land by businesses (both local or exempted).

A foreign entity must obtain a special licence from the Bermuda government if it wants to take control of more than 40 per cent of a local company and carry on business in Bermuda. Such a licence typically includes a condition that the prior consent of the minister is required for a change in control of the licensed company. The criteria that are considered as part of an application for a licence include:

- an assessment of the economic situation in Bermuda;
- the nature and previous conduct of the company;
- any advantage or disadvantage that may result from the company carrying on business in Bermuda; and

- the desirability of Bermudians retaining control of the economic resources of Bermuda.

The Companies Act was recently amended with the aim of facilitating direct foreign investment in Bermuda. A Bermuda company may be eligible for an exemption to the 60/40 Rule if its shares are listed on a designated stock exchange (including the BSX) and it engages in business in a prescribed industry including:

- telecommunications;
- energy;
- insurance;
- hotel operations;
- banking; and
- international transportation services (by ship or aircraft).

There are also special licensing regimes for a number of key industries in Bermuda.

There are no restrictions on foreign ownership of exempted companies. However, for exchange control purposes, the issue and transfer of any securities in companies involving non-residents must generally notify or receive the prior approval of the BMA.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Under Bermuda law, there are no specific legal restrictions on the conditions to a tender offer, exchange offer or other form of business combination and such conditions are subject to negotiation and market standards.

While conditions are determined by negotiation, typically transactions are subject to limited conditions that include regulatory approval, no material change and shareholder approval and any restrictions under a Shareholder Agreement or internal Takeover Code.

Acceptance thresholds on a takeover bid are often set at 90 per cent of the target shares so that the applicable Companies Act 1981 squeeze-out procedures can be used. Mergers and amalgamations will also be conditional on achieving the relevant shareholder approval thresholds.

In a cash acquisition, a bidder will need to make adequate arrangements to ensure the availability of funds and financing arrangements may be subject to conditions. Wide-ranging pre-conditions to closing are not uncommon in the terms of an offer.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

A target company will typically require comfort or evidence that committed financing is in place for the purposes of the transaction. In respect of a cash offer, the offer announcement should include confirmation that sufficient funding is in place. If required, the buyer and target will negotiate regarding the extent that the target is to assist with the buyer's financing efforts, including preparation of documentation or speaking with lenders.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The Companies Act 1981 provides that if an amalgamation or merger agreement is approved in the manner set out in section 106 (see question 8) it is deemed to have been adopted.

Where a merger or amalgamation has been approved by the requisite majority of shareholders, such approval is binding on all shareholders (other than shareholders who have commenced an appraisal action). Section 106 of the Companies Act 1981 contemplates that a merger or amalgamation approved by a 75 per cent majority of a quorate meeting is sufficient to bind shareholders to a merger agreement. As noted in question 8, the Companies Act 1981 permits the shareholders to provide for a smaller quorum and lower voting majority in the company by-laws.

In relation to a scheme or contract involving the transfer of shares, where the offeror has been approved by the holders of not less than 90 per cent of the value of shares to which the offer relates, the offeror may purchase the remaining shares by giving notice to the remaining 'dissenting' shareholders.

Where a buyer has successfully acquired 95 per cent or more of the shares of a company, the buyer can give notice of the intention to acquire the share of the remaining 5 per cent of the shareholders on the terms set out in the notice. When such a notice is given the buyer is entitled and bound to acquire the shares of the remaining shareholders on the terms set out in the notice unless a remaining shareholder applies to the court for an appraisal. If an appraisal is given by the court, the buyer can either acquire all of the shares at a price fixed by the court or cancel the notice.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Except as otherwise noted in relation to Bermudian ownership and control, there are no specific laws or regulations that apply to the structuring of cross-border transactions.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Bermuda does not have competition laws or waiting or notification periods for completing business combinations. However, regulated or licenced entities must adhere to notification and approval procedures and must obtain the BMA's consent or non-objection (as applicable) under relevant statutory regimes. This would apply, for example, where there is a material change or change of control in relation to a licenced or regulated entity which include insurance companies, trust companies, banks, fund administrator and regulated investment businesses.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies in specific industries, including financial services, broadcasting, telecommunications and transportation, are subject to additional regulations and statutes. This includes foreign ownership rules that may affect business combinations. Also see question 16.

18 Tax issues

What are the basic tax issues involved in business combinations?

Business combinations do not trigger any specific liability to tax in Bermuda.

A company establishes tax residency when it is incorporated in Bermuda. However, exempt undertakings are eligible for a tax exemption certificate which is an assurance from the Minister of Finance that for the period up to 31 March 2035 an exempted undertaking is not liable to pay certain taxes being taxes:

- Imputed on profits or income;
- Computed on any capital asset, gain or appreciation; and
- In the nature of estate duty or inheritance tax.

Any business with employees physically based in Bermuda, whether local or exempted, is subject to Bermuda's consumption tax regime (whether or not they have a tax exemption certificate). No taxes are imposed on tax non-resident businesses in Bermuda.

The sale and purchase of a company's business or assets will attract ad valorem stamp duty which is payable on the transfer of Bermuda land and certain other Bermuda property. No stamp duty is payable on the transfer of any securities listed on the BSX.

Update and trends

No economic or political developments in Bermuda have significantly affected the M&A market in Bermuda recently and no major legal reforms are planned in connection with the M&A market in Bermuda. Global economic and political developments such as uncertainty arising from Brexit, the Chinese economy and the result of the US presidential election have affected the global M&A market. Bermuda's M&A market is still very active, particularly in the insurance, technology, industrials/chemicals, pharmaceuticals, energy and mining sectors and we are also seeing an M&A trend in relation to global service providers in the financial services sector.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The Employment Act 2000 generally governs the employee and employer relationship and minimum standards with which employers must comply. The Employment Act 2000 provides that where a business is sold, transferred or otherwise disposed of, the period of employment with the former employer must be recognised in order to constitute a single period of employment with the successor employer (as long as the employment was not terminated with severance). However, there is no specific regulatory framework in relation to business combinations.

The continuing or surviving company will typically become the successor employer and assume any associated liabilities.

There is generally no obligation to inform or consult employees or to obtain employee consent in relation to business combinations. However, in some cases:

- certain employees can have contractual rights to receive such notice; and/or
- there can be notice requirements for unionised employees under a collective bargaining agreement.

A share sale does not involve a change in employer and:

- employment contracts continue;
- collective bargaining agreements remain in effect (unless there is an applicable change of control provision); and
- there are generally no notice or consent obligations.

It is important to note that rights can exist in certain employee contracts or under any applicable collective bargaining agreement. For example, certain senior company executives or management staff may be entitled to resign or be paid an agreed sum on a change of control pursuant to their contracts.

There may also be options under share option schemes that become exercisable upon a change of control and holders of stock options may have the option to take shares in the amalgamated or surviving company.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Under Bermuda law, a 'bankrupt' company can be put into liquidation. This authority is contained in Part XIII (Winding- Up) of the Companies Act 1981. Where an insolvent company is involved, the process will take the form of a creditors' voluntary winding up. The company and board usually cooperate during this process. The procedural steps for a winding up are contained in the Companies (Winding-Up) Rules 1982. If the company is uncooperative, it may be necessary for creditors to apply to the court for the appointment of a provisional liquidator or liquidator. In all of these circumstances, the party acquiring the company must deal with the liquidator and determine the best process for acquiring the company, given the fact that it is in liquidation.

Bermuda law also recognises the appointment of receivers. A receiver can be appointed by the court or a creditor pursuant to the powers contained in a security instrument. The receiver will take over control of the company and be the party with which a purchaser must coordinate various matters (eg, due diligence and discussions regarding the structure of any acquisition).

The scheme of arrangement procedure is also available to solvent or insolvent companies under the Companies Act 1981, as amended, whereby the process is court sanctioned.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

In the context of business combinations, purchasers should generally consider any potential risks or liabilities arising from non-compliance with Bermuda's sanctions, anti-corruption, anti-bribery and anti-money laundering regimes. These matters should be considered both in relation to dealings with counterparties and in relation to any pre-existing deficiencies affecting the target business or otherwise.

Bermuda's anti-bribery and corruption laws are undergoing a process of modernisation with The Bribery Act 2016, which is largely modelled on the United Kingdom (UK) bribery legislation, set to come into force in September 2017. The Criminal Code Act 1907 currently contains offences relating to official corruption, extortion by public officers, corrupt practices and other offences that will be superseded by the Bribery Act 2016 once it comes into force in Bermuda.

Further, the UK Bribery Act 2010 provides that it has extra-territorial effect in relation to persons with a 'close connection' with the UK and thus has direct implications for Bermuda, which is a British overseas territory,

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such that Bermuda persons with a nexus to the United Kingdom can potentially be prosecuted in the United Kingdom if they are involved in bribery anywhere in the world.

As a British Overseas Territory, Bermuda implements the international sanctions obligations of the UK. The majority of the sanctions in effect in the UK come from the UN Security Council (UNSC) and the

European Union (EU). The EU measures normally implement in Europe the relevant UNSC Resolutions (Resolutions), and may also impose additional sanctions. The Bermuda International Sanctions Act Regulations 2013 list all of the sanctions regime-related orders in force in Bermuda, and are amended on an ongoing basis to ensure the list remains up to date.

Bermuda has a robust anti-money laundering and anti-terrorist financing legislative framework. The Bermuda Monetary Authority (BMA) has powers to monitor financial institutions for compliance with the Regulations under the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008, which gives the BMA the capacity to impose substantial penalties for failure to comply with many provisions in the Regulations.

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