PANORAMIC

PUBLIC M&A

Bermuda

Public M&A

Contributing Editor

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STRUCTURES AND APPLICABLE LAW

Types of transaction
How may publicly listed 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 one company merging with another company resulting in a vesting of assets and liabilities in the surviving company. Bermuda's amalgamations and mergers regime allows for the combination of more than two companies at one time, and for Bermuda companies to combine with overseas companies and as a result either migrate overseas or remain in Bermuda.

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 or shares; or
- a combination of the above.

Law stated - 20 March 2024

Statutes and regulations
What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The Companies Act 1981 is the main statute governing business combinations in Bermuda. Part VII of this Act provides for arrangements, reconstructions, amalgamations, mergers, schemes of arrangement and purchases 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 Bermuda entities that are listed on the Bermuda Stock Exchange (BSX) will also need to ensure compliance with any requirements of the 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 (eg, for listed securities). The BMA also regulates particular sectors, such as insurers, banks, investment businesses and digital asset 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 regulatory criteria.

Law stated - 20 March 2024

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

There are no specific laws or regulations that apply to the structuring of cross-border transactions.

Law stated - 20 March 2024

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.

Law stated - 20 March 2024

Transaction agreements
Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the 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.

Law stated - 20 March 2024

FILINGS AND DISCLOSURE

Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

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;
- for local companies that are not listed on an appointed stock exchange, 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 entities listed on the Bermuda Stock Exchange (BSX), 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.

Business combinations do not trigger any specific liability to 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, which includes the transfer of Bermuda land and certain other Bermuda property will attract ad valorem stamp duty. No stamp duty is payable on the transfer of any securities listed on the BSX.

Law stated - 20 March 2024

Information to be disclosed

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

The BSX Listing Regulations provide a corporate disclosure policy that requires BSX-listed entities to keep the BSX, shareholders and holders of listed securities informed (without delay) by way of public announcements 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.

Law stated - 20 March 2024

Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public 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.

Law stated - 20 March 2024

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? 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 by-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.

Regulated financial institutions are also subject to certain governance codes established by the Bermuda Monetary Authority.

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 to 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 in liquidation).

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

Law stated - 20 March 2024

Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

The approval and appraisal rights of shareholders depends on the nature of 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 that includes a summary or copy of the agreement, states the fair value of shares and that a dissenting shareholder is entitled to be paid the fair value of his or her 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 the meeting is two persons holding at least more than one-third of the issued shares. Each

shareholder of an amalgamating or merging company carries the right to vote irrespective of whether it is a voting share or not.

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 or her shares can apply to the court to appraise the fair value of his or her shares within one month of the giving of the company's issuance of the notice.

A short-form procedure may be followed, which dispenses with the need for shareholder approval in the case of a combination of a parent company and its subsidiary or subsidiaries, or between subsidiaries.

Asset sale

In relation to an asset sale, the board will typically have sufficient power to conduct the sale, save where it relates to the whole assets or a substantial asset of the company. In this case, shareholder approval should be sought from a corporate governance perspective. Additionally, 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-quarters of shareholders or class. Once sanctioned by the court, the scheme is binding on all members or class of members and on the company.

Law stated - 20 March 2024

COMPLETING THE TRANSACTION

Hostile transactions
What are the special considerations for unsolicited transactions for public companies?

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.

Anti-takeover defences include poison pills (shareholder rights plans), business combinations (mergers or sales of assets), restructuring (including declarations of dividends, or share or debt issuances), changes to business operations and litigation.

If a Bermuda target company is listed on an overseas stock exchange, the restrictions on takeovers (eg, the Takeover Code in the United Kingdom) applicable by virtue of the listing may limit the scope for anti-takeover defences.

In 2023, a poison pill was adopted by Bermuda-based insurer BF&M Limited, which is listed on the Bermuda Stock Exchange (BSX), to defend against a takeover by Argus Group (another local insurer) when the latter acquired a 36.9 per cent stake from an existing shareholder. The adoption of such a defence has been approved by the Supreme Court of Bermuda, although the continuation of any poison pill will be limited by the application of the improper purpose doctrine applicable to directors of the Bermuda company and the power of shareholders of a Bermuda company to remove directors by an ordinary resolution of shareholders.

Disputes concerning hostile bids can lead to litigation.

Law stated - 20 March 2024

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 public 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 their use could 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.

Law stated - 20 March 2024

Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, 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 (the 60/40 rule, which is not applicable to exempted companies), 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 amended in 2012 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 Bermuda Monetary Authority (BMA) subject to any general or other permissions given by the BMA.

Law stated - 20 March 2024

Conditional offers

What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

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 preconditions to closing are not uncommon in the terms of an offer.

Law stated - 20 March 2024

Financing

If a buyer needs to obtain financing for a transaction involving a public company, 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 reassurance 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.

Law stated - 20 March 2024

Minority squeeze-out

May minority stockholders of a public company 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, it is deemed to have been adopted.

Where a merger or amalgamation has been approved by the requisite majority of shareholders, this 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. 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 shares 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 the shares at a price fixed by the court or cancel the notice.

Law stated - 20 March 2024

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 or acquisitions involving public companies?

Bermuda does not have competition laws or waiting or notification periods for completing business combinations. However, regulated or licensed 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 licensed or regulated entity, which includes insurance companies, trust companies, banks, fund administrators, investment businesses and digital asset businesses.

Law stated - 20 March 2024

OTHER CONSIDERATIONS

Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

Business combinations do not trigger any specific liability to tax.

In December 2023, legislation introducing a corporate income tax (CIT) was enacted in Bermuda. The CIT aligns with the Organisation for Economic Co-operation and Development's global anti-base erosion rules and from 1 January 2025 will apply a 15 per cent income tax to the statutory income of Bermuda businesses (which are tax resident or have a permanent establishment in Bermuda) that are part of a multinational enterprise (MNE) group with annual revenue of €750 million or more. It does not apply to excluded entities, the definition of which includes government entities and international organisations, investment funds, and pensions.

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 taxes that are:

- imputed on profits or income;
- computed on any capital asset, gain or appreciation; and
- in the nature of estate duty or inheritance tax.

However, where applicable, the liability to pay CIT will apply with the above assurance notwithstanding.

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. Since the introduction of the CIT, some MNE groups with Bermuda entities within their group (Bermuda constituent entities), including in the insurance sector, have looked to record deferred tax assets, which are recognised pursuant to the transition adjustment introduced under the CIT.

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

Law stated - 20 March 2024

Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

The Employment Act 2000 generally governs the employee and employer relationship and minimum standards with which employers must comply. This Act provides that where a business is sold, transferred or otherwise disposed of, the period of employment with the former employer must be recognised 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 this notice; and
- 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.

Law stated - 20 March 2024

Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions 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 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 an alternative procedure available to solvent or insolvent companies under the Companies Act 1981 whereby the process is court-sanctioned.

Law stated - 20 March 2024

Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

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 were modernised with the introduction of the Bribery Act 2016, which came into force in September 2017 and was largely modelled on UK bribery legislation. Certain bribery and corruption offences previously contained in the Criminal Code Act 1907 have been superseded by the Bribery Act 2016.

Further, the UK Bribery Act 2010 has extraterritorial effect and thus has potential direct implications for Bermuda, which is a British overseas territory, such that Bermuda-based companies with a nexus to the United Kingdom can possibly 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 United Kingdom. The majority of the sanctions in effect in the United Kingdom come from the UN Security Council (UNSC) and the European Union. The EU measures normally implement in Europe the relevant UNSC Resolutions, and may also impose additional sanctions. The Bermuda International Sanctions Regulations 2013 list all 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 Super
vision and Enforcement) Act 2008, which gives the BMA the capacity to impose substantial penalties for failure to comply with many provisions in the Regulations.

Law stated - 20 March 2024

UPDATE AND TRENDS

Key developments

What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

The market in Bermuda follows international trends with expectations of increasing M&A and restructuring transactions in the coming year. During 2021–2022 there was a growth in Bermuda-domiciled special purpose acquisition company vehicles involved in listed M&A transactions similar to the US trajectory with activity subdued in 2023.

M&A activity has remained strong in the insurance and investment sector but has also seen transactions in other sectors such as shipping and energy.

As Bermuda is the domicile of a number of significant listed entities it has played an active role in cross-border restructurings including in cooperation with US bankruptcy courts.

There are no current proposals to change the regulatory or statutory framework governing M&A and, other than the introduction of a corporate income tax, no changes are anticipated to the financial sector that could affect business combinations with, or acquisitions of, a public company in Bermuda.

Law stated - 20 March 2024