

Public mergers and acquisitions in Bermuda: overview

Jonathan Betts and Andrea Moniz-DeSouza
Cox Hallett Wilkinson Limited

global.practicallaw.com/4-505-8512

M&A ACTIVITY

1. What is the current status of the M&A market in your jurisdiction?

Bermuda does not have an active local public M&A market.

To the extent that there are public M&A deals, these have generally reflected the trend towards consolidation in the insurance or reinsurance industry. For example:

- In May 2013, Markel Corporation completed its US\$3.1 billion acquisition of Alterra Capital Holdings Limited, a Bermuda company with a dual listing on NASDAQ and the Bermuda Stock Exchange, by way of a merger (see *Question 2*).
- In November 2012, Validus Holdings, Ltd. acquired Flagstone Reinsurance Holdings, S.A., a Bermuda company listed on the New York Stock Exchange, for US\$623 million by way of a merger.
- In August 2012, Canopus Group Limited acquired Omega Insurance Holdings Limited, a Bermuda company listed on the London Stock Exchange, for GB£164 million by way of an amalgamation (see *Question 2*).
- In July 2012, CNA Financial Corporation acquired Hardy Underwriting Bermuda Limited, a Bermuda company listed on the London Stock Exchange, for US\$227 million by way of a merger.

2. What are the main means of obtaining control of a public company?

There are four main means of obtaining control of a public company.

Amalgamation pursuant to the Companies Act 1981

This is the most common way in which acquisitions are effected in Bermuda. This type of transaction typically involves the bidder establishing a subsidiary company in Bermuda (acquisition vehicle) that amalgamates with the target company. The two companies then continue as one amalgamated company. The shareholders of the target company may receive:

- Cash consideration.
- Shares in the bidder.
- A combination of the above.

See *Question 17*.

Unless the bye-laws of the relevant company provide otherwise, a resolution passed by at least 75% of those voting at a shareholders' meeting of the target company and the acquisition vehicle is

required to approve the amalgamation. Any shareholder who did not vote in favour of the amalgamation and is not satisfied that he has been offered fair value for his shares (dissenting shareholder) can, within one month of the notice of the meeting of the shareholders, apply to the Bermuda courts for an appraisal of the fair value of his shares. Such an application would not prevent the amalgamation from taking place. Following an appraisal, the company can choose to pay the dissenting shareholder an amount equal to the fair value of his shares (as appraised by the court) or terminate the amalgamation.

The principal features of the amalgamated company under Bermuda law are the:

- Target company and the bidder's acquisition vehicle continuing in existence as one company.
- Amalgamated company owns the property of both the target company and the acquisition vehicle without the need for any transfer documentation to be entered into since the respective property vests automatically by operation of law.
- Amalgamated company continues to be liable for the obligations of both the target company and the acquisition vehicle and any existing causes of action or the prosecution of pending proceedings continue and are unaffected by the amalgamation. Any judgment in favour of or against the target company or the acquisition vehicle can be enforced by or against the amalgamated company.

Merger pursuant to the Companies Act

This type of transaction is effected in the same way as an amalgamation but the target company and the bidder's acquisition vehicle do not continue in existence as one company. In the case of a merger, either the:

- Bidder's acquisition vehicle will merge into the target company and the target company will continue in existence (the bidder's acquisition vehicle is absorbed by the target company and ceases to exist).
- Target company will merge into the bidder's acquisition vehicle and the bidder's acquisition vehicle will continue in existence (the target company is absorbed by the bidder's acquisition vehicle and ceases to exist).

Implementation of a court sanctioned scheme of arrangement under the Companies Act

In this case, where an application is made by a company or any of its members, the Supreme Court of Bermuda can order a members' meeting to consider a proposed arrangement or compromise between a company and its members (or any class of them) (*section 99(1), Companies Act*).

If a meeting of members is ordered by the court in accordance with section 99(1), the notice of meeting sent to members must include an explanatory statement explaining the effect of the proposed scheme (and in particular, giving details of any material interests

that the directors of the company may have, either as directors or as members of the company).

If the proposed scheme is then approved by a majority of the members (or class of members) in number representing 75% of the value of shares held by those members present and voting at the meeting (either in person or by proxy), the proposed scheme is binding on the members or class of members and the company if it is subsequently sanctioned by the court (and the order sanctioning the proposed scheme is delivered to the Registrar of Companies for registration).

In exercising its discretion whether to sanction the scheme, the court must be satisfied (among other things) that the:

- Approval of the scheme was reasonable.
- Majority of shareholders acted bona fide.
- Statutory provisions have been complied with.

The court also considers whether the scheme is necessary. The sanctioning of a scheme is not merely a rubber-stamping exercise by the court once the requisite majorities have been obtained. The court exercises genuine discretion.

Takeover offer

A company (whether incorporated in Bermuda or not) can make an offer to the target company's shareholders to acquire all of their shares in the target company. Where a majority accepts this offer, there are powers under the Companies Act to acquire any shares held by the target company's shareholders that did not accept the offer (see *Questions 13 and 20*).

HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common?

Hostile bids are allowed but have not been common in the limited number of public mergers and acquisitions that have occurred in the Bermuda market. This is principally because it is a very small market largely confined to Bermudian investors. A hostile approach may be viewed as being potentially damaging to business and commercial relationships on the island.

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated, and by whom?

There are no regulations specifically regulating takeovers. However, the Companies Act 1981 applies to all companies registered in Bermuda and the Bermuda Stock Exchange Regulations (Exchange Regulations) apply to all companies listed on the Bermuda Stock Exchange (BSX).

There are no regulatory bodies for takeovers. However, the Exchange Regulations appoint a Listing Committee, consisting of six members, who apply, interpret and enforce the Exchange Regulations.

See box, *The regulatory authorities*.

PRE-BID

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

For a recommended bid, the target company will generally look to limit the scope of due diligence undertaken and, in particular, withhold sensitive financial and business information until the bidder has proved a genuine interest in making the acquisition.

Hostile bid

Due diligence in a hostile bid will be limited to information that is publicly available.

Public domain

The following information is publicly available:

- At the Registrar of Companies:
 - the certificate of incorporation and memorandum of association;
 - the address of the registered office;
 - any prospectus or offer document required to be filed pursuant to the Companies Act;
 - certain other filings required pursuant to the Companies Act.
- At the Registered Office:
 - details of directors and officers. The register of directors and officers is open for inspection during business hours;
 - the names and addresses of the shareholders, details of the number of shares held, the amount paid up on the shares and the date on which the person was entered in the register of members as a shareholder. The register of members of a company is open for inspection during business hours (however, shares can be held by, and registered in the name of, a nominee);
- At the Bermuda Stock Exchange (BSX): any filings with or announcements to the BSX, including published accounts and auditors' reports.
- At the Registry of the Supreme Court: any pending legal proceedings or judgments.

Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

There are no rules on maintaining secrecy until the bid is made. In the case of a company listed on the Bermuda Stock Exchange, the Exchange Regulations state that:

- Investors and the public must be kept fully informed by listed issuers.
- Immediate disclosure must be made of any information that might reasonably be expected to have a material effect on market activity in listed securities or their prices.

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

To increase the likelihood of success, a bidder can seek irrevocable undertakings from key shareholders of the target company before making the offer. In the case of a proposed amalgamation or merger, the undertaking would be to vote to approve the amalgamation or merger on the terms set out in the notice of shareholders' meeting circulated by the target company.

There are no disclosure requirements or other restrictions on the nature or terms of the agreement.

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

The directors or executive officers of the target must deliver written notice and details, without delay, to the Bermuda Stock Exchange if they become aware of any shareholder who:

- Acquires a beneficial interest, control or direction of 5% or more of the target's securities or securities convertible into the target's securities that leads to becoming a holder of 5% or more of the target's securities, or any change in the identity of such a shareholder.
- Has a beneficial interest or exercises control or direction over 5% or more of the target's securities (or securities convertible into the target's securities) and the shareholder acquires, in aggregate, an additional 3% or more of the target company's securities.

Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

In the case of an amalgamation or merger, the bidder, target company and acquisition vehicle will enter into an agreement and plan of amalgamation or merger (Plan) that sets out the terms on which the amalgamation or merger is to be effected. Among other things, the Plan is likely to include:

- The various conditions to completion of the amalgamation or merger, including shareholder approval in accordance with the terms of the Companies Act 1981.
- Details of the rights of dissenting shareholders.
- Provisions for settlement of the amalgamation or merger consideration.
- Provisions for the conduct of the target company's business between entering into the Plan and completing the amalgamation or merger.
- Representations and warranties in relation to the target company.
- Provisions to prevent the target company soliciting alternative bids.

- Provisions for dealing with unsolicited alternative bids.
- Break fees (*see Question 10*).

The board of the target company is free to:

- Undertake not to solicit competing bids.
- Not disclose information that is not in the public domain.
- Procure that members of the target company and its directors, officers, employees or agents do not solicit such bids or disclose such information.

In the case of unsolicited offers, it is usual for the Plan to provide for a "fiduciary out" that effectively enables the board of the target company to:

- Terminate the Plan.
- Accept an alternative bid where it is determined to be on more favourable terms.

The Plan may give the bidder the right to submit an improved offer before the board of the target company determines which of the competing proposals is more favourable.

Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

Break fees are increasingly common where there are specified events that cause the offer to fail. For example, in the case of a proposed amalgamation or merger, the Plan (*see Question 9*) is likely to provide that a fee is payable to the bidder where the board of the target company recommends a competing bid and the acquisition takes place within a certain period of time from the date of the Plan.

As a matter of practice, break fees tend to range from 1% to 4% of the amalgamation or merger consideration. If the Bermuda court considers that the break fee is a penalty for terminating the Plan, the fee would be unenforceable.

Committed funding

11. Is committed funding required before announcing an offer?

An offer can be announced before financing has been obtained.

ANNOUNCING AND MAKING THE OFFER

Making the bid public

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

There are no specific provisions regulating bid announcements or setting out any timetables for the offer to be made to, and accepted by, the target company's shareholders.

Offer conditions

13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

Generally, there is no requirement that a bid is made for a specific percentage of the target company's shares.

Section 102 of the Companies Act 1981 provides for the compulsory acquisition of minority shareholders. Where an offer is made by a company for shares (or any class of shares) in a Bermuda company and, within four months of the offer, the holders of not less than 90% of the shares which are the subject of that offer accept it, the bidder can, at any time within two months after the date which the approval is obtained, by notice, require the remaining shareholders to transfer their shares on the terms of the offer. As a result, the bidder may wish to include a pre-condition that the offer is subject to receiving acceptances for at least 90% of the shares, so that it is in a position to forcibly acquire the remaining 10%. Dissenting shareholders can apply to the court, within one month of the notice, objecting to the transfer, though they must prove unfairness, not merely that the scheme is open to criticism.

In the case of an amalgamation or merger, the Plan (*see Question 9*) will include a condition that the amalgamation or merger is approved by the requisite percentage of the shareholders in accordance with the terms of the Companies Act.

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

In the case of an amalgamation or merger, the notice of meetings of both the target company and the acquisition vehicle must include, or be accompanied by, a copy or a summary of the amalgamation or merger agreement (the agreement that makes the amalgamation or merger effective as a matter of Bermuda law, rather than the Plan) (*see Question 9*) and must expressly state both:

- The fair value of the shares as determined by each amalgamating or merging company.
- That a dissenting shareholder is entitled to be paid the fair value for his shares.

It is very likely that the target company's shareholders will be provided with a "fairness opinion" (or a summary of its contents) confirming the basis for the valuation of the shares and the price being offered.

For a recommended bid, the main documents seen by the target company's shareholders include:

- An announcement to the shareholders, issued by the target company.
- An offer document, issued by the bidder and the target company.
- An acceptance form, issued by the bidder.
- A prospectus, if required, issued by the bidder.

In the case of a hostile bid, only the bidder would issue the offer document and prospectus. In addition, the target company can issue:

- An announcement rejecting the offer.
- A defence document or other documents distributed to shareholders at regular intervals over the offer period setting

out the arguments for not accepting the bid (including, for example, profit forecasts and asset values).

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

There are no requirements for a target's board to inform or consult its employees about the offer.

Mandatory offers

16. Is there a requirement to make a mandatory offer?

There are no requirements to make a mandatory offer.

If shares in a Bermuda company are transferred to another company (transferee) resulting in the transferee holding 90% in value of the shares (or any class of shares) of the company, the transferee must (within one month of the date of transfer of those shares) give notice of the transfer to the remaining shareholders of the company (or the remaining holders of the particular class of shares) (*section 102(2), Companies Act 1981*). The remaining shareholders can (within three months of receiving the notice) give notice to the transferee requiring the transferee to acquire their shares.

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

There is no restriction on the type of consideration that can be offered. In the case of an amalgamation or merger, the consideration can be:

- Cash.
- Shares in the bidder.
- Shares in the amalgamated or merged company.
- A combination of any of the above.

See *Question 2*.

18. Are there any regulations that provide for a minimum level of consideration?

There are no regulations that provide for a minimum level of consideration.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

There are no regulations that provide for a minimum level of consideration that a foreign bidder can offer to shareholders.

POST-BID

Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

The holders of 95% of the shares (or any class of shares) in a company (purchasers) can give notice to the remaining shareholders of the company (or of the remaining holders of the particular class of shares) of their intention to acquire their shares on the terms set out in the notice (*section 103, Companies Act 1981*). The purchasers are entitled and bound to acquire the shares on the terms unless a remaining shareholder applies to the court, within one month of the notice, for an appraisal of the value of the shares being purchased. Following an appraisal, the purchasers can acquire all the shares involved at the price fixed by the court or cancel the notice previously given.

For the right to compulsorily acquire shares under section 102 of the Companies Act, see *Question 13*.

Restrictions on new offers

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

There are no restrictions on a bidder launching a new offer for, or buying shares in, the target company after it has failed to obtain control of the target company.

De-listing

22. What action is required to de-list a company?

A company whose listing is primarily on the Bermuda Stock Exchange (BSx) can de-list from the BSx by giving it 90 days' notice provided that either the company has:

- An alternative listing on another stock exchange for its listed securities.
- Obtained approval to de-list from the holders of each class of its listed securities by way of:
 - a 75% majority vote at a duly convened meeting of those holders; or
 - by obtaining the prior written approval of at least 75% of the holders of each class of its listed securities.

A company whose listing is primarily on another stock exchange can voluntarily withdraw its listing if it gives the BSx at least 60 days' notice.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

The target company's board can seek to persuade the shareholders not to accept an offer from a bidder or to obtain a higher offer. However, the directors owe a duty to the shareholders to act in the best interests of the company as a whole. They must therefore:

- Give the offer due consideration.
- Put the offer to the shareholders to determine whether to accept it or reject it.

A target company can adopt a "poison pill" defence to a hostile bid. There are typically two approaches, commonly known as:

- "Flip in". This is usually contained in a company's bye-laws and provides that existing shareholders have the right to subscribe for more shares in the target company at a discounted price where a hostile bidder reaches a certain percentage of ownership in the target company, or where a bid is made.
- "Flip over". This gives current shareholders the right to purchase shares in the target company from the bidder once the takeover has taken place.

The validity of a poison pill was specifically considered by the Supreme Court of Bermuda in *Stena Finance v Sea Containers (Civil Jurisdiction 1989, No. 178)*. In this case, the court decided that it could not interfere if "the directors have not exercised their power for some collateral purpose and have exercised their power fairly between shareholders and not in such a way as to favour improperly one section of the shareholders against another..."

There is generally no objection to a target company's board seeking an alternative offer for the target company from a third party "white knight".

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

No stamp duty is payable in respect of any instrument executed by or relating to an interest in an exempted company. An "exempted company" is a company that is:

- Generally owned by non-Bermudians.
- Carries on business:
 - outside Bermuda; or
 - within Bermuda with other exempted companies.

Stamp duty can, however, be payable in respect of transactions involving "Bermuda property", which include a local company. A local company is a company that is:

- Generally at least 60% owned and controlled by Bermudians.
- Carrying on business within Bermuda.

Stamp duty is not payable on an amalgamation or merger (including an amalgamation or merger of a local company) as there is no transfer of the shares in the target company. In an amalgamation or merger, the shares of the target company are simply cancelled.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

There are no merger control or banking regulations that apply in the case of a public offer.

26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

There are restrictions on foreign ownership of shares in local companies (*see Question 24*). In a local company, 60% of the total voting rights in the company must be exercisable by Bermudians (60/40 Rule). A local company must obtain a licence from the Minister of Finance under section 114B of the Companies Act 1981 to own and operate the company if it wants to operate outside the 60/40 Rule.

The Companies Act was recently amended with the aim of facilitating direct foreign investment in Bermuda. Local companies can apply for an exemption to the 60/40 Rule if:

- Its shares are listed on a designated stock exchange (including the Bermuda Stock Exchange).
- It is engaged as a business in a material way in a prescribed industry.

In such cases, foreign ownership of a company's shares can exceed 40% but this applies only to capital-intensive industries such as:

- Telecommunications.
- Energy.
- Insurance.
- Hotel operations.
- Banking.
- International transportation services (by ship or aircraft).

There are no restrictions on foreign ownership of exempted companies, but the issue and transfer of any securities in these companies involving non-residents for exchange control purposes must receive the prior approval of the Bermuda Monetary Authority, except in circumstances where a general permission is available.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no restrictions on repatriation of profits or exchange control rules for foreign companies.

Bermuda is independent for the purposes of exchange control. Exempted companies are designated non-resident for exchange control purposes, meaning that they are able to operate free of exchange control regulations and can:

- Make payments of dividends.
- Distribute capital.
- Acquire, hold and sell any currency and foreign securities without reference to the Bermuda Monetary Authority.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

Persons engaged in investment business in Bermuda and regulated by the Investment Business Act 2003 (IBA) who deal in securities of the parties to the bid, may be subject to certain restrictions under the IBA.

REFORM

29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

There are currently no impending developments or proposals for reform of the law relating to takeovers in Bermuda.

THE REGULATORY AUTHORITIES

Bermuda Stock Exchange (BSx)

Washington Mall, Hamilton HM11, Bermuda T +44 1 292 7212 F +44 1 292 7619 E info@bsx.com W www.bsx.com

Main area of responsibility. The BSx regulates all companies listed on the market.

Bermuda Monetary Authority (BMA)

BMA House, 43 Victoria Street, Hamilton HM12, Bermuda T +44 1 295 5278 E info@bma.bm W www.bma.bm

Main area of responsibility. The BMA is an independent body that regulates financial institutions in Bermuda. It is also responsible for approving the incorporation of all companies in Bermuda and any changes in the ownership of those companies.

Registrar of Companies

Government Administration Building, 30 Parliament Street, Hamilton HM 12, Bermuda T +44 1 297 7530 F +44 1 292 6640 E jfsmith@gov.bm W www.roc.gov.bm

Main area of responsibility. The ROC assists with the management and daily operation of Bermuda's international and domestic business.

ONLINE RESOURCES

Bermuda Laws Online

W www.bermudalaws.bm

Description. Bermuda Laws Online is a database of Bermuda's statutes and statutory instruments. Its content is provided by the Ministry of Justice and the Attorney-General's Chambers.

Practical Law Contributor details

**Jonathan Betts**

Cox Hallett Wilkinson Limited

T +44 1 294 1544

F +44 1 292 7880

E jbetts@chw.com

W www.chw.com

**Andrea Moniz-DeSouza**

Cox Hallett Wilkinson Limited

T +44 1 294 1542

F +44 1 292 7880

E amonizdesouza@chw.com

W www.chw.com

Professional qualifications. England and Wales, 1998; Bermuda, 2005

Areas of practice. Mergers and acquisitions; private equity; banking; finance.

Recent transactions

- Advising Omega Insurance Holdings Limited in relation to its GB£164 million acquisition by Canopus Group Limited.
- Advising Parex Resources Inc. in relation to its US\$85.1 million acquisition of Ramshorn International Limited.
- Advising Intoll Group in relation to its AU\$3.4 billion acquisition by Canadian Pension Plan Investment Board.

Professional qualifications. Bermuda, 2005

Areas of practice. Investment funds; mergers and acquisitions.