GETTING THE DEAL THROUGH

Mergers & Acquisitions

in 66 jurisdictions worldwide

2014

Contributing editor: Alan M Klein

Published by
Getting the Deal Through
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Mergers & Acquisitions 2014

Contributing editor:
Alan M Klein
Simpson Thacher & Bartlett LLP

Getting the Deal Through is delighted to publish the fully revised and updated fifteenth edition of *Mergers & Acquisitions*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Mergers & Acquisitions 2014 examines the law and regulation of business combinations and addresses the most important issues for international deals.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 66 jurisdictions featured. New jurisdictions this year include Angola, Mozambique, Panama, Portugal and Spain. Global and EU overviews are also provided.

Many legal disciplines come into play in large M&A deals. In particular, advisers must take account of competition regulation. This volume contains an appendix covering merger control rules across the world. For a more detailed analysis please refer to another volume of the *Getting the Deal Through* series: *Merger Control*.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingtheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise in this field. We would like to thank Casey Cogut of Simpson Thacher & Bartlett LLP for his stewardship of the title over the last fifteen years. We would especially like to thank and acknowledge Alan M Klein as contributing editor of this and future editions.

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London
May 2014

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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2014
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First published 1999
Fifteenth edition
ISSN 1471-1230

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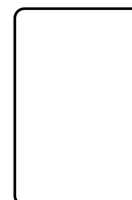
Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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1 Types of transaction

How may businesses combine?

The principal methods of business combination are:
- public tender/exchange offer for shares in a target company;
- statutory merger under section 104 of the Companies Act 1981;
- statutory merger under section 104A of the Companies Act 1981;
- scheme of arrangement under section 99 of the Companies Act 1981;
- private purchase of the shares in a target company; and
- private purchase of a target company's underlying business.

The Companies Amendment (No. 2) Act 2011 (2011 Act) made a number of important changes to the general law. The introduction of the concept of a statutory 'merger' is of particular significance because it enables the parties to choose a transaction form that results in a 'survivor company'. There may also be cross-border mergers; for example, a foreign corporation may merge into a Bermuda company, with the Bermuda company having the status in Bermuda law of the survivor company. 'Intra-group' statutory mergers are also possible, and two wholly-owned subsidiaries of the same holding company may now merge with one another with the result that one of them will be the survivor company.

The statutorily prescribed procedures for mergers and mergers are essentially identical. In the interests of economy, the expression 'merger' will be used hereafter in preference to the expression 'amalgamation', and references to mergers should be read as applying to both mergers and amalgamations, except where otherwise indicated.

Business combinations are typically structured as 'triangular' or 'three-cornered' transactions whereby the acquirer establishes a subsidiary company in Bermuda to combine with the target company The merger consideration for each of the above methods of transaction may take the form of cash, securities or a combination of both.

A merger has a number of significant advantages over business combinations effected by way of tender or exchange offers and schemes of arrangement. Unlike a tender or exchange offer, an acquirer is assured obtaining 100 per cent ownership of a target company where a merger has been approved by the requisite majority of the target company's shareholders. Further, unlike a scheme of arrangement, the Bermuda Supreme Court (the Court) does not need to approve a merger.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Part VII of the Companies Act 1981 (Arrangements, Reconstructions, Amalgamations and Mergers) provides for schemes of arrangement, the purchase of company shares, amalgamations and mergers.

The principal regulatory body in Bermuda is the Bermuda Monetary Authority (BMA). The BMA has supervisory jurisdiction over the Bermuda Stock Exchange (BSX), and regulatory jurisdiction over banking, insurance and other financial services in Bermuda. The BMA does not have a general supervisory jurisdiction over the conduct of business combinations.

Specific permission is required from the BMA pursuant to the provisions of the Exchange Control Act 1972 for the issue and transfer of securities by Bermuda companies, other than in cases where the BMA has granted a general permission. On 1 June 2005, the BMA granted a general permission for the issue and subsequent transfer of any equity securities of a Bermuda company listed on an 'appointed stock exchange' (as defined in the Companies Act 1981) from or to a non-resident of Bermuda, for so long as any equity securities of such company remain so listed. The BSX is an appointed stock exchange.

The BMA does not regulate the conduct of business combinations of companies listed on the BSX. There is no equivalent to the City Code on Takeovers and Mergers or the Takeover Panel. The BSX Listing Regulations (BSXRs) impose a number of obligations on listed companies involved in business combinations (see question 5). The BSXRs are not intended to be exhaustive and specifically provide that the BSX may impose additional requirements, or conversely may waive compliance with the BSXRs, to suit the circumstances of a particular case.

3 Governing law

What law typically governs the transaction agreements?

Where the business combination is a transaction involving two companies operating in Bermuda's domestic economy, the transaction documents will be governed by Bermuda law. In a transaction involving international companies, the choice of governing law will be dictated by the factual circumstances and the preferences of the international parties. In a merger transaction, the support agreement or agreement and plan of merger will typically be governed by foreign law (New York or English law is often used), but the merger agreement itself will be governed by Bermuda law.

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?

Generally, there will be no fees payable to the Bermuda government or regulatory authorities in respect to any form of business combination. Where a Bermuda company proposes to issue shares in connection with a business combination, it is required to file a copy of any related prospectus or offering document with the Bermuda Registrar of Companies (ROC) along with an attorney's certificate and a BDA$80 filing fee.

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An application fee of BDA$269 is payable to the BMA and a BDA$80 application fee along with an annual registration fee of at least BDA$1,995 is payable to the ROC if it is necessary to incorporate a Bermuda company for the purposes of the business combination. The BMA will charge a fee of BDA$580 to issue a certificate of compliance in respect to any company regulated by the BMA.

Where one of the transaction parties is listed on the BSX, they will be required to send copies of all proposed shareholder resolutions, documents relating to takeovers, mergers and similar offers, notices of shareholder meetings and proxy reports and announcements to the BSX at the same time they are issued to shareholders.

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?

A company listed on the BSX is required to keep the BSX and shareholders informed without delay of any information relating to the company and its group necessary to enable shareholders to appraise the financial position of the listed company and its group or to avoid the establishment of false market in its securities or that might reasonably be expected to have a material effect on market activity and the price of its securities.

Where shares of a listed company are proposed to be issued in connection with a business combination, an application must be made to the BSX to admit the new shares. If a prospectus is required, the BSXRs stipulate that it must contain such information as is necessary to enable an investor to make an informed assessment of the activities, assets and liabilities, financial position, management, prospects, profits and losses and the rights attaching to the securities in question. The prospectus will also be required to comply with the requirements of section 27 of the Companies Act 1981, and must include financial statements and an auditor's report.

Where the company is listed on an appointed stock exchange or is regulated by a competent regulatory authority outside Bermuda then the contents of the prospectus will be governed by the rules of the appointed stock exchange or competent regulatory authority and section 27 does not apply. Alternatively, where a Bermuda company is listed on an appointed stock exchange and the rules of the appointed stock exchange do not require the company to publish and file a prospectus in the particular circumstances of the transaction then the company is not required to publish and file a prospectus in Bermuda.

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?

A company listed on the BSX is required to disclose the names of all substantial shareholders of the company who own or control directly or indirectly 5 per cent or more of the shares of the company and their respective shareholdings. The company must also disclose the shareholding of the directors and officers of the company. The Companies Act 1981 does not require a company to maintain a register disclosing particulars of the holdings of directors and officers or their dealings in the securities of the company or details of any options issued to directors or officers of the company.

Generally, a company does not have any power to serve a notice on a person whom it knows or believes may be interested in shares of the company, requiring them to provide details of the nature of that interest. However, a number of listed companies have adopted bye-laws conferring a right on the company to request such information from its shareholders and a further power to disenfranchise the shares, which are subject of the inquiry in the event that the person fails to provide the requested information.

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?

The Companies Act 1981 contains a partial codification of directors' duties. Every director and officer of a company is required to act honestly and in good faith with a view to the best interests of a company, and to exercise the care, diligence and skill that any reasonably prudent person would exercise in comparable circumstances. Generally, the duties of a director are owed to the company and the interests of the company are determined by reference to the interests of the shareholders (both present and future). No duty is owed to individual shareholders although directors may owe duties to individual shareholders in particular factual situations. A director is required to disclose his or her interests in any material contract or proposed material contract of the company or his or her material interests in any person that is a party to the material contract or proposed material contract with the company or any of its subsidiaries. However, it is common for the by-laws of a Bermuda company to provide that a director who has disclosed his or her interests in a proposed transaction may be counted in the quorum and participate in the board meeting and vote upon the proposed transaction. The BSXRs do not impose any requirement that a director who is interested in a transaction shall abstain from participating or voting. Where a company is insolvent or on the verge of insolvency, the directors owe duties to the company's creditors with respect to the company's assets. However, the duty to creditors is not a freestanding duty and may only be enforced by the company's liquidator.

The general rule is that shareholders are entitled to exercise the voting rights attached to their shares in their own self interest without regard to the interests of other shareholders. A majority shareholder is not a fiduciary and does not owe fiduciary duties to other shareholders. However, a majority shareholder may not use its position to 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 Companies Act 1981 confers wide powers of management upon the board of directors, and the board will normally have sufficient power to enter into a sale of the company's assets. However, the company's constitutional documents may provide that the approval of shareholders is required in particular circumstances. Shareholder approval may be advisable where the transaction will involve a sale of all or substantially all of the company's assets, if the by-laws do not confer express authority on the board. The BSXRs do not generally impose any requirement that acquisitions of another company or transactions with a party connected to a director or substantial shareholder of the company be approved by the shareholders.

The board of directors are not agents for the sale of the shares in a company, and where the transaction involves the transfer of the company's shares, the shareholders must generally consent to the sale. A transaction structured as a scheme of arrangement requires approval by a majority in number of creditors or shareholders (as the case may be) representing 75 per cent in value. Each class of creditors or shareholders (if applicable) must approve the scheme.

A statutory merger requires the approval of the shareholders of the merging companies, but it is often possible for one of the parties to avoid this requirement by utilising a wholly owned subsidiary as one of the merging companies. In a triangular merger, shareholder approval is given by the parent company of the wholly owned subsidiary.

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The quorum for the shareholder meeting to approve the transaction and the necessary voting majority for a merger will be governed by the bye-laws of the merging company, which may make specific provision for mergers and reduce the quorum and super-majority that would otherwise be imposed by the Companies Act 1981 by default. In the absence of specific provision to the contrary in the by-laws, the Companies Act 1981 provides that approval by a 75 per cent majority vote of not less than two persons holding or representing by proxy more than one-third of the issued and outstanding shares of the company (including non-voting shares) is necessary to approve a merger. It is not necessary for separate class meetings to be held for different classes of shares, and all classes of shareholders may vote together, except where the merger agreement contains a provision that would constitute a variation of class rights. This compares favourably with a scheme of arrangement. Unlike tender/exchange offers and schemes of arrangement, a dissenting shareholder in a statutory merger has a right to apply to the Court to appraise the fair value of his or her shares.

The Companies Act 1981 does not confer any right of the pre-emption on shareholders of the company, and no such right attaches to the shares of the company by implication as a matter of common law. It is very common for the by-laws of Bermuda companies to confer upon the directors an opened ended authority to issue shares, without the need to obtain shareholder approval. However, the BSXRs confer a right of pre-emption on shareholders.

The directors of a BSX-listed company are required to obtain the consent of shareholders in general meeting before issuing any shares or granting any options or similar rights. The consent of shareholders is also required prior to any major subsidiary of the listed company issuing shares or granting options or similar rights if the effect is to materially dilute the percentage equity interest of the listed company and its shareholders in the subsidiary. The above restrictions do not apply if the offering is made to the shareholders of the listed company prorated to their existing holdings or if the existing shareholders of the listed company have given a general mandate to the directors of the company to issue such shares or to grant such options. Where shareholders have given such a general mandate to the directors to allot more than 20 per cent of the issued share capital of the company, then the mandate only continues in force until the conclusion of the next annual general meeting of the company.

Where the company is listed on the BSX as a domestic issuer and the allotment of shares will effectively alter management control of the company, the directors of the company are required to obtain shareholder consent in general meeting prior to issuing any voting shares

In 2010, the BSX waived the requirement of prior shareholder approval to a change in management control in order to facilitate the issuance of new shares by the Bank of N.T. Butterfield & Son Limited (which urgently required a substantial amount of new capital) representing approximately 82.5 per cent of the pro-forma ownership of the bank.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Traditionally, schemes of arrangement had been deemed unsuitable for a hostile process because the bidder lacks the target board's recommendation. Hostile takeovers are rare in Bermuda practice, but not unknown. Typically, the hostile bids have been in the form of a tender or exchange offer. The conventional wisdom was challenged in the bid by Validus Holdings Ltd (Validus) to acquire IPC Holdings Ltd (IPC). Validus offered to acquire IPC through a variety of transaction structures including a hostile scheme of arrangement. Although the Court declined in the light of the particular facts to convene a shareholder meeting to consider the scheme, this transaction illustrates that a scheme may be an option for a hostile bidder. Validus eventually acquired IPC by way of a recommended triangular merger.

It is not unusual for the by-laws of a Bermuda company to contain anti-takeover protections and other provisions favourable to incumbent management. These include: shareholders' rights plans, staggered boards, board power to issue 'blank cheque' preference shares, super-majority provisions for the approval of business combinations and advance notice of shareholder resolutions. In this regard, it should be noted the shareholders are not themselves competent to amend the by-laws, even if an overwhelming majority of shareholders are in favour of the change. The recent decision of Ground CJ in *DE Shaw Oculus Portfolios LLC et al v Orient-Express Hotels Limited et al* [2010] BDA LR 32 confirmed that a subsidiary may own shares in its parent company and may vote on the election of directors to the board of the parent company.

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 BSXRs do not contain any general rules prohibiting 'frustrating action'. Subject to the overriding requirements that the board of directors must comply with its duties to the company, the directors of a company may agree to break fees and other deal protections.

A break fee is permissible if it is intended to induce a proposal that is perceived to be in the best interests of the company or its shareholders, or both, and that the board, as a matter of business judgment, consider might otherwise not be made (either at all, or in sufficiently robust terms).

There is no general requirement that a break fee be approved by shareholders, and neither the Companies Act 1981 nor the BSX imposes any regulatory limit on the quantum of break fees.

In considering the quantum of a break fee, the board should consider the effect on the shareholders and on the universe of other potential counterparties. It is important that the break fee not be seen as coercive on the shareholders. In other words, the break fee should not be so high as to make it almost impossible for the shareholders to vote against the deal for fear of the diminution of value represented by its payment. The break fee should also not be so high as to preclude the emergence of other potential counterparties.

The 2011 Act abolished the rule against financial assistance that Bermuda had enacted in 1981 based on provisions contained in the English Companies Act 1948, as amended.

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?

Almost all regulatory power is vested in the BMA, and the Bermuda government does not have any general power to intervene in business combinations, except in relation to the domestic economy. Generally, a company may only carry on business within Bermuda if it is majority owned (at least 60 per cent) and controlled by Bermudians. Where a company is not controlled by Bermudians, the minister of finance may permit the company to carry on business subject to the terms of a licence under the Companies Act 1981. The overriding criterion for licensing is the 'public interest'. The minister is required to take into account a number of factors, including the economic situation in Bermuda, the due protection of persons already engaged in business in Bermuda and the desirability of retaining in the control of Bermudians the economic resources of Bermuda. A licence granted by the minister of finance will typically include a condition that the prior consent of the minister is required for a change in control of the licensed company. There are

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also special licensing regimes for a number of key industries, including hotels and telecommunications.

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?

There is no specific requirement that a tender/exchange offer must be made for a specific percentage of a target company's shares. It is common, however, for an offer to have an acceptance threshold set at 90 per cent of the shares which are subject to the offer in order for the offeror to be able to rely on the applicable squeeze-out procedures, which are contained in the Companies Act 1981. See question 14.

Financing arrangements may be subject to conditions, however, and it is common for a target company to require firm financing as a condition precedent to entering into a support agreement in respect of a friendly tender/exchange offer. It is also common for offerors to include numerous other conditions in the terms of a tender/exchange offer as such an offer could generally be subject to any condition.

In respect of a merger, the merger agreement will contain a condition that the merger is approved by the requisite percentage of the shareholders of each merger in accordance with the terms of the Companies Act 1981.

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?

There are no specific requirements regarding the financing of a business combination.

Although the BSXRs do not directly regulate the conduct of business combinations, if the offeror is a Bermuda company listed on the BSX, the offeror's financial disclosure should include details of how the offer is being financed, and disclose the extent to which (if at all) the assets of the target company will be used to repay the financing. The BSX may also require that the offeror's prospectus or circular include a statement confirming the offeror's ability to perform its financial obligations if there is full acceptance of the offer.

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?

Where a merger 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 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 the case of tender/exchange offers, where the offeror has acquired not less than 90 per cent of the shares to which the offer relates, the offeror may purchase the remaining shares on the same terms and conditions on giving notice to the remaining shareholders. A remaining shareholder has a corresponding right to require the offeror to acquire the shares within three months.

In addition, where one or more holders (the purchasers) hold 95 per cent or more of the shares of a company, they may give notice to the remaining shareholders requiring them to sell their shares on the terms described in the notice. Within one month of receiving the notice, any remaining shareholder may apply to the Court for an appraisal of its shares. Within one month of the Court's appraisal, the purchasers are entitled to either acquire all shares involved at the price fixed by the Court or cancel the notice given to the remaining shareholders. Where shares had been acquired under the notice at a price less than the Court's appraisal, the purchasers must either pay the difference in price or cancel the notice and return to each shareholder concerned the shares acquired and each shareholder must repay the purchaser the purchase price.

15 Cross-border transactions

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

There are no laws or regulations governing cross-border transactions. Generally, as noted above, the Bermudian ownership and control rules will apply where a target company carries on business within Bermuda's domestic economy. Where the target is a Bermuda-listed company, a foreign offeror may incorporate a Bermuda merger subsidiary, which will then merge with the Bermuda target company, with the result that the Bermuda target becomes the wholly owned subsidiary of the offeror. It is also possible for a Bermuda company to 'discontinue' from Bermuda to the same jurisdiction as the offeror corporation, and then enter a merger structure under applicable foreign law.

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?

The BMA in its capacity as a securities regulator does not have any general powers of intervention in business combinations. The Insurance Amendment (No. 3) Act 2010, however, has introduced requirements that an insurer shall not give effect to a 'material change' unless the BMA has indicated that it has no objection. The definition 'material change' is defined to include the acquisition or transfer of an insurance business as part of a scheme under section 25 of the Insurance Act 1978 or section 99 of the Companies Act 1981 and the merger with or acquisition of another business.

Furthermore, the Insurance Act 1978 contains certain change of control provisions that must be taken into account where a business combination involves an insurance company. Subject to the below, a prospective shareholder that is about to become a 10, 20, 33 or 50 per cent 'shareholder controller' of an insurer must first provide the BMA notice in writing of his or her intention to become such a controller. The BMA then has a 45-day period in which to either provide a written notice of no objection or a written notice of objection to the proposed shareholder controller. In the absence of any such written notices, the prospective shareholder is deemed to have been approved as a shareholder controller of the insurer following the 45-day period. This does not apply to any prospective shareholder of an insurer whose shares or the shares of its parent company (if any) are traded on any stock exchange recognised by the BMA. Where the prospective shareholder's shares or the shares of its parent company (if any) are traded on a stock exchange recognised by the BMA, then such prospective shareholder must, within 45 days of his or her becoming a shareholder controller, notify the BMA that he or she has become a 10, 20, 33 or 50 per cent shareholder controller of the insurer.

The Insurance Amendment (No. 3) Act 2010 recently made notification to the BMA of changes in controllers less onerous for certain insurers. Instead of having to notify the BMA each time a change in controller occurs as per the above, insurers registered as Class 1, Class 2, Class A, Class B and Special Purpose Insurers under the Insurance Act 1978 must only file a list of every person who has become or ceased to be a shareholder controller of such insurer on an annual basis, at the same time they file their annual financial statements with the BMA.

Similar change-of-control provisions also exist for certain other licensed entities including banks under the Banks and

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Deposit Companies Act 1999 and investment businesses under the Investment Business Act 2003.

17 Sector-specific rules

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

See question 16.

18 Tax issues

What are the basic tax issues involved in business combinations?

Bermuda does not have any income or capital taxes, and a business combination will not trigger any liability for capital gains or otherwise result in any liability to tax in Bermuda. No stamp duty is payable on the transfer of any securities listed on the BSX. However, where the transaction involves the sale and purchase of a company's business or assets ad valorem stamp duty will be payable on the transfer of Bermuda land and certain other Bermuda property.

19 Labour and employee benefits

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

The regime established by the Employment Act 2000 does not regulate business combinations. As a matter of contract, senior company executives may be entitled to resign or be paid an agreed sum on a change of control, but generally a business combination will not affect the terms of an individual's contract of employment with a target company. The contracts of employment are not automatically transferred to the purchasers of the company or its 'business undertaking', except where the transaction is effected by merger, as the survivor company will continue to be liable for the target company's obligations, including its liabilities to employees. It is common for the terms of a share option scheme to provide that options become exercisable upon a 'change of control', which the scheme documentation may define as including a sale of the company's assets or business. Where the transaction is structured as a merger or a scheme, the holders of stock options in the target company may be granted options for shares in the merged or restructured 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?

In a members' voluntary winding-up under section 205 of the Companies Act 1981, the subsequent sale of all the part of the business of a company by the liquidator in exchange for securities of another company must be approved by the simple majority of the shareholders present and voting (either in person or by proxy) at the relevant meeting.

Section 99 of the Companies Act 1981 is a direct copy of the English equivalent provisions, which permit a company to enter into an arrangement with its members or its creditors to vary or discharge existing obligations or create new rights or obligations, provided that the statutory majority in number and three-quarters in value approve the arrangement and the Court provides its sanction. The key components to a successful scheme require careful definition of the classes of members or creditors who are entitled to vote and the approval by the necessary majority. Members or creditors with significantly different interests such that they cannot reasonably confer and consult together need to be divided into different classes and each class needs to pass the scheme independently. In the case of a group of companies, it is not possible to have a composite scheme for all companies within the group, but a separate scheme must be proposed and passed by each relevant entity.

Update and trends

M&A activity continues to be affected by the credit crisis. The ability of Bermudan companies to raise capital has also been affected. Bermuda has relaxed its local ownership and control rule (known colloquially as the '60:40 rule') for companies carrying on business in certain prescribed industries, including banking, insurance, telecommunications, energy and hotels. The relaxation of the 60:40 rule coincided with the establishment of an umbrella regulatory authority with responsibility for supervising and regulating multiple industry sectors, including telecommunications. Historically, the telecommunications and public broadcasting sectors were regulated by four bodies, and it is anticipated that the introduction of a single regulatory body for telecommunications will facilitate the convergence of telecommunications, media and information services in the local market, and that this will likely lead to consolidation through mergers and acquisitions.

In the case of a solvent company very few problems arise with respect to achieving a successful approval because the Court will have automatic jurisdiction over all the members and a properly sanctioned scheme will be binding on all members including those who do not vote in favour of the scheme or anyone who does not vote.

The by-laws of the company may require review to ensure that the proposed scheme or any of its terms is not subject to a supermajority provision in the bye-laws.

Solvent schemes of arrangement are also used for portfolio transfers in solvent insurance companies. In the case of long-term insurance the consent of the Court and the regulator are required. In an insolvent restructuring, the creditors who vote in favour of the scheme and those who are subject to the jurisdiction of the Court will be bound provided the necessary majorities have been achieved and the Court grants its sanction. The scheme, however, does not bind foreign creditors who have not voted in favour of the scheme. Therefore if there is a category of creditors who do not vote in the scheme and who are not subject to the jurisdiction, those creditors will not be bound. In addition, any property that is the subject of the scheme, which is located in a foreign jurisdiction will be not affected by the operation of the scheme. It is therefore necessary to pass a separate scheme of arrangement in the jurisdiction(s) where those foreign creditors reside or where the property that is the subject of the scheme is located in order to give independent effect to the terms of the scheme. This is often possible in jurisdictions that have adopted a similar regime based on the English Companies Act model, or in the United States under the provisions of the Federal Bankruptcy Code. However, greater difficulty arises in European countries or civil law countries that may not have a similar mechanism.

Although Bermuda will recognise judgments of English courts and a number of Commonwealth jurisdictions, this recognition extends only to money judgments and does not extend to foreign schemes of arrangement. This position differs from the position in the UK, which allows recognition and enforcement of a scheme as a judgment or order (see *Re Cavell Insurance Company*).

21 Anti-corruption and sanctions

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

Bermuda entities engaged in cross-border business combinations must keep in mind international sanctions that may have been imposed on the country in which their counterparty is incorporated, and the potential application of anti-bribery legislation.

Bermuda is an Overseas Territory of the UK. The UK has the power to extend legislation to Bermuda by order of council. Bermuda has also enacted the International Sanctions Act 2003, which empowers the attorney general of Bermuda to make

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regulations enabling legal effect to be given to any international obligation of the UK relating to economic or other sanctions, whether or not it has been extended to Bermuda by order in council. The International Sanctions Regulations 2013 provide for sanctions relating to approximately 20 countries, and al-Qaeda.

The orders covered by the umbrella of the 2013 Regulations are not identical but they typically provide that it is an offence for a person to deal with funds or economic resources owned, held or controlled by or on behalf of a designated person or to make funds or economic resources available to such a person.

Anti-terrorism measures are also potentially relevant. In 2011, the UK extended Part 1 of the Terrorist Asset-Freezing, etc, Act 2010 to Bermuda by order in council.

In addition, Bermuda's anti-corruption and anti-bribery laws may need to be considered. The Criminal Code 1907 contains offences relating to official corruption by government employees and the holders of public office in Bermuda. It is an offence for any person to bribe or attempt to bribe a government employee or public official in Bermuda, but not elsewhere. However, this gap is now covered by UK legislation. It is anticipated that the UK will in the near future extend the application to Bermuda of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which will then be followed by the enactment of further Bermuda legislation to give effect to the Convention in local law.

The UK Bribery Act 2010 provides that the offences created by that Act shall have extra-territorial effect, and may be committed anywhere by a person who has a 'close connection with the UK'(within the meaning of the 2010 Act). The UK Bribery Act 2010 enumerates a number of categories of persons who are to be treated as having a close connection with the UK, including British citizens and British Overseas Territories citizens. Consequently, the UK Bribery Act 2010 has implications for the directors and senior officers of Bermuda companies if they are persons who have a close connection with the UK. Unlike the United States' FCPA regime, the UK Bribery Act does not exempt facilitation payments and does not contain a defence for reasonable and bona fide hospitality provided to government officials.

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 ISSN 1471-1230