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The International Comparative Legal Guide to:

Mergers & Acquisitions 2014

8th Edition

A practical cross-border insight into mergers and acquisitions

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 46 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

There are no laws or regulations of general application that regulate takeovers of shares in Bermuda companies.

The Companies Act 1981 (the "**Companies Act**") is the statute most relevant to mergers and acquisitions.

The principal regulatory body in Bermuda is the Bermuda Monetary Authority (BMA) which has supervisory jurisdiction over the Bermuda Stock Exchange (BSX), and regulatory jurisdiction over banking, insurance and other financial services in Bermuda. The BSX Listing Regulations (BSXRs) impose a number of obligations on BSX listed companies involved in mergers and acquisitions.

Any examination of the duties of the directors of the target company must begin at section 97 of the Companies Act. A director must act honestly and in good faith with a view to the best interests of the company, which include the interests of both current and prospective shareholders. Such interests remain the primary object of directors' fiduciary obligations. The directors are expected to evaluate and comment on the merits of a bid, but are not required to make a recommendation to shareholders. Directors have a positive obligation to disclose any personal benefit they will obtain from the terms of the proposed takeover.

1.2 Are there different rules for different types of company?

Under the BSXRs, 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 a 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.

1.3 Are there special rules for foreign buyers?

The prior approval of the BMA is required for the issue and transfer of securities by Bermuda companies to foreign buyers (i.e. non-residents of Bermuda), other than in cases where the BMA has granted a general permission.

1.4 Are there any special sector-related rules?

There are material change and change-of-control provisions that must be complied with by entities licensed by the BMA, including insurers under the Insurance Act 1978, banks under the Banks and Deposit Companies Act 1999 and investment businesses under the Investment Business Act 2003.

1.5 What are the principal sources of liability?

Where the acquisition consideration takes the form of shares, the bidder may be liable to pay compensation in respect of loss caused by misstatements in any prospectus directed at the target's shareholders by the bidder. The members of the target's board may also be liable to the target for any negligence or other breach of duty in the performance of their duties, although the bye-laws of the target may contain a release from, and indemnification in respect of, any breach of duty that does not involve fraud or dishonesty.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

The principal means of acquisition are:

- public tender/exchange offer for shares in a target company under section 102 of the Companies Act;
- compulsory acquisition by holders of 95% of shares under section 103 of the Companies Act;
- scheme of arrangement under section 99 of the Companies Act;
- statutory amalgamation under section 104 of the Companies Act;
- statutory merger under section 104H of the Companies Act;
- private purchase of the shares in a target company; and
- private purchase of a target company's underlying business or assets.

Tender Offer

Section 102 (1) provides a mechanism whereby a bidder may compel the acquisition of the shares of shareholders dissenting to a scheme or contract involving the transfer of shares of a target company to a single transferee where the scheme or contract has received the approval of 90% in value of the shareholders of the target.

The bidder has up to four months to achieve the 90% approval, although usually the bidder will specify a much shorter period for acceptance of the offer (e.g. 21 days). Where a scheme or contract involving the transfer or shares in the target has received the approval of the 90% majority (excluding from that calculation shares in the target already held by the bidder or its nominee), the bidder may, within two months of such approval, give notice to any dissenting shareholder to acquire their shares. The bidder is then entitled and bound to acquire those shares on the same terms as those proposed in the scheme or contract approved by the 90% majority, unless the court orders otherwise.

Any application to the court by dissenting shareholders must take place within one month after the date of the compulsory acquisition notice.

Compulsory acquisition by holders of 95% of shares

Section 103 provides a mechanism whereby the holder(s) of no less than 95% of the shares in a company may compulsorily acquire the remainder from the remaining shareholders ("**compulsory acquisition**"). Section 103 does not form part of the tender offer mechanisms provided by Section 102.

Under the Section 103 procedure, the 95% holders may give notice to all the remaining shareholders of their intention to acquire all, and not some, of the remaining shareholder's shares. The terms of the compulsory acquisition must be set out in the notice and must be the same for all remaining shareholders involved. The delivery of a section 103 notice both entitles and binds the 95% holder 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 of the value of its shares.

Recipients of the notice have one month to apply to the court for a valuation of their shares. Within one month of the court valuation, the 95% holders may either acquire the shares at the price fixed by the court, or cancel the transaction.

No appeal lies from an appraisal by the court under section 103.

Scheme of arrangement

Section 99 provides for a scheme of arrangement ("**scheme**"), whereby the terms of the takeover are approved by the shareholders pursuant to a court supervised process.

The court is empowered to sanction any "compromise or arrangement" on the application of any shareholder of the company and the company must be a party to the scheme. Once a scheme has court approval, all shareholders are bound.

Effecting a scheme involves the dissemination of a shareholder meeting notice with an explanatory statement and a dual shareholder approval requirement being both a three fourths majority in value of shareholders and a majority in number. The court has wide powers under section 102 to deal with consequential matters.

Section 99 does not provide for dissenters' appraisal rights.

The period of time between the initial formulation of the scheme and its becoming effective by court order is, at a minimum, eight weeks.

Statutory amalgamation or merger

The effect of an amalgamation is that the pre-amalgamation entities will continue as one and neither will cease to exist. A merger enables the parties to choose a transaction form that results in a 'survivor company'.

The procedures for amalgamations and mergers are essentially identical. An agreement to effect the transaction must be entered into by the companies concerned and must be approved by each company's shareholders. Notice must be given to the shareholders of the fair value of the shares and this notice must indicate that a dissenting shareholder is entitled to be paid as such.

Acquisitions are typically structured as 'triangular' transactions whereby the acquirer establishes a subsidiary company in Bermuda to combine with the target company. The consideration may take the form of cash, securities or a combination of both.

A merger has a number of significant advantages over acquisitions effected by way of tender or exchange offers and schemes of arrangement. Unlike a tender or exchange offer, an acquirer is assured of obtaining 100% ownership of a target company where a merger has been approved by the requisite majority of the target company's shareholders. It can be completed more quickly than a tender or exchange offer or a scheme of arrangement. And while a tender offer requires the acceptance of the holders of 90% in value of the shares which are the subject of the offer, a merger approval resolution only requires the majority vote of three-fourths of those voting at a meeting with a quorum of two persons at least holding or representing by proxy more than one-third of the issued shares, subject to anything to the contrary in the target company's bye-laws (such threshold may be amended to be lower or higher).

Further, unlike a scheme of arrangement, court approval is not needed to approve a merger.

Purchase of shares of target

An acquisition can be effected where the purchaser and any controlling shareholder(s) enter into a share purchase agreement pursuant to which the purchaser will pay cash or some other form of consideration to the selling shareholder(s) in exchange for the controlling interest or, alternatively, where the purchaser buys newly issued shares directly from the target.

Purchase of underlying business or assets of target

Although distinct from a takeover of shares, a purchaser can acquire at an agreed deal price all or substantially all of the underlying business or assets of a target.

2.2 What advisers do the parties need?

Financial advisers, auditors and legal counsel.

2.3 How long does it take?

See question 2.1.

2.4 What are the main hurdles?

See question 2.1.

2.5 How much flexibility is there over deal terms and price?

Subject to any statutory requirement for shareholder and/or court approval or any appraisal of value by the court, the law in Bermuda with respect to acquisitions and takeovers is essentially the common law of contract. For example, in a tender offer or a compulsory acquisition, the bidder is free to offer any price, and to offer cash or shares or both and may also stipulate the percentage level which must be achieved before the offer will become binding.

2.6 What differences are there between offering cash and other consideration?

Where all or part of the consideration takes the form of shares in the bidder, it may be advisable to build in an adjustment mechanism where the merger consideration may be affected by significant changes in share prices.

2.7 Do the same terms have to be offered to all shareholders?

See question 2.1.

2.8 Are there obligations to purchase other classes of target securities?

No, there are not.

2.9 Are there any limits on agreeing terms with employees?

There are none.

2.10 What role do employees, pension trustees and other stakeholders play?

Generally, neither the target company nor the bidder is obliged to consult with employees, pension trustees or other stakeholders in the takeover process.

2.11 What documentation is needed?

See question 2.1.

2.12 Are there any special disclosure requirements?

See question 1.2.

2.13 What are the key costs?

Professional fees payable to advisers.

2.14 What consents are needed?

See question 2.1.

2.15 What levels of approval or acceptance are needed?

See question 2.1.

In addition, while the Companies Act does not confer any right of the pre-emption on shareholders, the BSXRs do.

The directors of a BSX-listed company are required to obtain the consent of shareholders in a 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% 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.

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 should be approved by the shareholders.

2.16 When does cash consideration need to be committed and available?

This is not applicable in Bermuda.

3 Friendly or Hostile

3.1 Is there a choice?

"Just say no" is not a realistic option for a target board unless it has a powerful battery of defences already in place.

3.2 Are there rules about an approach to the target?

There are no rules that are specific to the Bermuda market.

3.3 How relevant is the target board?

The target board is always relevant but perhaps less so if the bidder acquires a significant stake and then launches a tender offer.

3.4 Does the choice affect process?

There are difficulties with commencing a takeover with a 'hostile' scheme of arrangement. Generally, it will be easier to acquire a target by amalgamation or statutory merger.

4 Information

4.1 What information is available to a buyer?

The following information is publicly available:

(a) memorandum of association;
(b) certificate of incorporation;
(c) notice of registered address;
(d) register of charges;
(e) any filed prospectus;
(f) directors and officers register;
(g) share register;
(h) any filings with or announcements to the BSX; and
(i) any pending legal proceedings or judgment.

4.2 Is negotiation confidential and is access restricted?

Generally, yes. Also, see question 8.1.

4.3 When is an announcement required and what will become public?

See question 4.2.

4.4 What if the information is wrong or changes?

See question 4.2.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

A formal offer may be preceded by private treaty acquisitions of shares or on-exchange purchases.

5.2 Can derivatives be bought outside the offer process?

There is nothing in Bermuda law or regulation to prevent the use of derivatives outside the offer process.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Generally, Bermuda company law does not regulate stakebuilding. The rules of the relevant listing exchange or market where the shares are traded may impose disclosure obligations. In the case of a target listed on the BSX, the BSXRs do not impose any requirement that the purchase of a particular percentage of shares in a BSX listed company be disclosed to the target or the market by the buyer. However the target is required to take steps to prevent the development of a false market in its securities, and to ensure that all shareholders are treated equally. Consequently, the target may be obliged to disclose information about the number of shares acquired by the buyer directly or indirectly outside the offer process.

5.4 What are the limitations and consequences?

As noted above, the limitations on stakebuilding outside the offer process will be matters of the rules of the relevant exchange or market and/or the target's bye-laws, which will also govern the consequences. Some Bermuda companies have adopted bye-laws which positively require that a buyer notify the company when the buyer has reached a particular level of direct or indirect ownership. In addition, a company's bye-laws may confer a right on the company to require its registered shareholders (including any intermediary holding shares as a bare trustee) to disclose information about any dealings in the target's shares, and provide that the target may impose sanctions for failure to disclose the information requested on a timely basis, including the suspension of the voting rights attached to the shares held by the recalcitrant shareholder.

6 Deal Protection

6.1 Are break fees available?

Break fees are permitted, subject to the target board's fiduciary duties and the common law rules relating to penalties. The statutory prohibition against a company giving financial assistance for the acquisition of its own shares was abolished in 2011. Bermuda practice in this area has long been influenced by market practices in the US and Canadian securities markets, and break fees in excess of 1% of the target's equity value are common where the principal market in which the target's securities are traded is in North America. Notwithstanding the widespread use of break fees as a deal protection, the proper exercise by the target board of its fiduciary duties requires the board to be satisfied that its agreement to a particular break fee is in fact appropriate and necessary in the particular circumstances of the proposed transaction.

6.2 Can the target agree not to shop the company or its assets?

Subject to compliance by the target's board with its fiduciary duties, the company may grant the buyer exclusivity by agreeing not to shop the company or its assets. However, where the board of the target has not sufficiently canvassed the universe of qualified potential purchasers or merger partners, the proposed transaction may be challenged on the basis that the target board failed to exercise its fiduciary duties.

6.3 Can the target agree to issue shares or sell assets?

Subject to compliance by the target's board with its fiduciary duties, the company could (at least in theory) agree to issue shares or sell assets to the buyer. However, the powers conferred on the board to issue shares and to sell assets shares form part of the general powers of management conferred on the board by the Companies Act and the bye-laws, and the target board will be required to exercise such fiduciary powers for the proper business purposes of the company, and not for the collateral purpose of protecting a particular deal. The rules of the principal stock exchange on which the target's shares are traded may also impose a limit on the number of shares the directors may issue without a shareholder vote.

In theory, the target board may enter into an asset lock-up agreement with a bidder or potential bidder to sell a particular asset or specified assets in exchange for an agreement by the bidder to make a bid, or in exchange for a particular period of exclusivity or the opportunity to undertake due diligence. Asset lock-ups are rare in Bermuda practice. The target board generally will be unwilling to enter into such arrangements because if the target company agrees to sell off its "crown jewels" it will be a less attractive acquisition target and will attract fewer bidders, resulting in the elimination of meaningful competitive bidding for the target. In the absence of a strong commercial justification, an asset lock–up agreement will likely attract enhanced scrutiny and run more risk of being found unacceptable as a breach of fiduciary duty.

6.4 What commitments are available to tie up a deal?

In addition to agreeing to a break fee, the parties may enter into an "exclusivity" or "lock-out" agreement whereby the target agrees, for a limited and defined period of time, that it will not solicit a transaction with any other prospective purchaser during the exclusivity period. Such agreements are often called "no shop" agreements, and there are very few transactions in Bermuda practice which proceed without some form of "no shop" agreement.

"No talk" agreements, in which the target agrees not to engage with anyone other than the bidder regarding a potential transaction during the exclusivity period, are less common. While the target board may agree not to solicit or encourage approaches from new third party bidders, the target board will continue to have certain responsibilities if the target was already engaged in discussions with a third party prior to the exclusivity agreement, or if subsequently there is an unsolicited proposal which the target board considers is a *bona fide* competing proposal. The target board may agree to provide the bidder with information regarding any competing proposals and to grant the bidder with a right to match or top the competing proposal so that the target board does not become obliged to recommend the competing proposal.

Where the principal shareholders of the target are in favour of the proposed transaction, they may be willing to enter into lock-up arrangements whereby the principal shareholders agree to vote their shares in favour of the transaction, subject to any necessary "fiduciary outs".

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Subject in each case to the compliance by the target's directors with their fiduciary duties, the deal conditions agreed to by the target board may include:

- a break fee, as discussed above;
- an exclusivity or "lock-out" agreement, as discussed above;
- a covenant by the target board to "force-the-vote" in the event of the emergence of a competing proposal; and
- a condition to closing that there has been no 'material adverse change', that is to say, no event or change in circumstances materially and adversely affecting the assets, financial results, business or prospects of the target.

7.2 What control does the bidder have over the target during the process?

The board of directors of the target company has fiduciary responsibilities to the target company, and cannot surrender control of the target company's business during the process. However, the board of directors of the target company may enter into an implementation agreement with the buyer whereby the target board agrees that, pending the effective completion date of the transaction, the target board will keep the business of the target in a holding pattern and carry on its business in the usual course. The target may agree it will not, unless in accordance with the terms of previously existing arrangements or with the consent of the bidder, dispose of or acquire any material business assets or enter into any material new commitments or contracts. Similarly, the target may agree not to declare any dividends or make any distributions, or return any capital to its shareholders or issue any further shares or grant any options to acquire further shares in the target or capitalise any of its reserves.

7.3 When does control pass to the bidder?

The concept of "control" in the Companies Act is the ability of a person holding more than 50% of the shares in the company to elect a majority of the board of directors of a company. Each case will depend on its own particular facts, but normally a director can be elected by a resolution passed by a simple majority of votes, and therefore the bidder will achieve ownership when the bidder holds more than 50% of the voting shares issued by the target. It should be noted that the bye-laws of some companies provide for a staggered board or a supermajority vote on the election of directors, and there may be advance notice provisions which have the effect of slowing down the ability of the bidder to achieve control. It is even possible that the bidder cannot achieve control despite having a sufficient number of voting shares because the target has issued a class of shares which has weighted voting rights to a subsidiary, as in *D.E. Shaw Oculis Portfolios v Orient-Express Hotels Ltd 2010 Bda.LR 32*.

7.4 How can the bidder get 100% control?

As discussed in greater detail in question 2.1 above, the bidder can achieve 100% control through the use of one or more of the following mechanisms:

- In the case of a tender or exchange offer, where the bidder's offer has received acceptance by the holders of 90% or more of the target's shares (not counting shares held by the bidder) the bidder can freeze out the remaining shareholders and acquire their shares on the same terms, pursuant to Section 102.
- If the buyer acquires 95% of the target company's shares, the buyer can compel the remaining shareholders to sell their shares on the same terms, pursuant to Section 103.
- In the case of an acquisition transaction effected by way of a scheme of arrangement pursuant to Section 99, the approval of the terms of the sale and purchase transaction by the requisite majorities of the target's shareholders has the effect of binding all the target's shareholders.
- Where the acquisition is being affected by way of an amalgamation or statutory merger and the buyer has achieved the requisite level of majority approval, all of the target company's shareholders are bound by the shareholder agreement and the buyer is entitled to acquire 100% of the target company's shares if the buyer and the target company agree to make the amalgamation or merger effective by making the necessary statutory filings. In either case, dissenting shareholders will have appraisal rights, and may make an application to have the fair value of their shares appraised by the court.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

Where the shares of the target are listed on the BSX, the target board is not required to publicise discussions and in any event the target board may have entered into a confidentiality agreement with the bidder. However once the bid has been announced, the target board will be required to make ongoing disclosure of material information in order to prevent the development of a false market in the target company's securities and to ensure the equal treatment of all shareholders. In cases where the shares of the target are traded on a foreign stock exchange, the target board will have to take into account the securities laws, stock exchange rules and practices prevailing in the relevant securities market, and consider what disclosures to make in light of applicable securities law and practice.

8.2 What can the target do to resist change of control?

The target board has to act in good faith in the best interests of the company. In the takeover context, the directors should also have regard to the interests of the shareholders as a general body.

There is no general rule in the background law or regulation that the directors of the target are not permitted to take any action to frustrate an unsolicited takeover and indeed the target's directors may legitimately consider that a takeover will damage the target's interests.

Subject to the possibility that the target's constitutional documents may have included certain takeover defences from inception, the options of the target board are limited once a bid has been made. The board may have to rely on its own efforts to persuade shareholders to reject the bid. In addition, if the target carries on a regulated activity or a business that is important to the economic welfare of Bermuda, the target board may wish to lobby the regulatory bodies involved, and/or government. Finally, the board may also search for a more favourable bidder, or "white knight".

As noted above, the target's bye-laws may provide some measure of protection for the incumbent board by providing for a staggered board and advance notice of any shareholder proposal to nominate candidates for election as directors. In addition, the target's shareholders may have authorised the target board to adopt a shareholders' rights plan or to issue blank cheque preferred shares.

8.3 Is it a fair fight?

Generally, it is not a fair fight, in the sense that once a Bermuda target is "put in play" it will be difficult for the target to continue to survive on a standalone basis. The target board has minimal scope for defensive action in the absence of pre-bid, shareholder-approved defences embedded in the target's bye-laws which confer authority on the target board to use their powers to defensive effect.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

- reliable determination by the bidder of a fair price for the target's shares;
- the target's confidence that the bidder is not using the exclusivity period to drive down the price;
- the target's confidence in the ability of the bidder to perform its financial obligations; and
- if the bid is unsolicited, the absence of shareholder approved defences capable of being deployed by the target board.

9.2 What happens if it fails?

There is nothing in Bermuda law which would prevent the bidder from making a fresh bid, although the rules of the relevant exchange or market may impose constraints on the bidder's ability to make a new offer. Depending upon the particular facts, and the reason why the transaction was not consummated, the party in breach may be liable for a break fee or to reimburse the other party's expenses.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in Bermuda.

There are none.

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