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Corporate M&A 2022

Bermuda: Law & Practice

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BERMUDA

Law and Practice

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1. TRENDS

1.1 M&A Market

Bermuda, a premier offshore financial centre for international business, has proactively responded to the COVID-19 pandemic. A climate of anticipation can be said to describe the current M&A landscape. There has been a steady deal flow in Bermuda throughout the pandemic, including some high-value transactions, although the volume of transactions has not recovered to pre-pandemic levels. The insurance sector continues to be a primary M&A transaction space, but is by no means the only sector experiencing M&A activity in Bermuda.

1.2 Key Trends

Given the role offshore jurisdictions play in international business, the top trends in Bermuda mirror those seen in onshore jurisdictions, particularly in the United States.

Companies seeking business combinations in 2021 tended to be looking to unlock value by finding targets that presented the opportunity to achieve exceptional synergies – and not just the standard cost-savings that result from combining two organisations.

1.3 Key Industries

While the (re)insurance sector has continued to be a mainstay of M&A activity in the past 12 months, there has also been activity across a range of sectors such as oil and gas, pharmaceuticals and life sciences, finance and asset management, and manufacturing, which evidences the value placed in Bermuda by international business.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

The primary means for acquiring a company in Bermuda are as follows:

- scheme of arrangement ("scheme") under Section 99 of the Companies Act 1981 of Bermuda (the "Companies Act");
- 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;
- statutory amalgamation under Section 104 of the Companies Act;
- statutory merger under Section 104(H) 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.

Scheme of Arrangement

Section 99 provides for a scheme to be carried out pursuant to a court-supervised process, whereby the terms of the takeover are approved by the shareholders.

On the application of any shareholder of the company, the court is empowered to sanction any "compromise or arrangement", 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. It also involves a dual-shareholder approval requirement, being both a 75% majority in value of shareholders and a majority in number. The court has been granted extensive

powers under Section 102 to deal with consequential matters.

Dissenters' appraisal rights are not provided for under Section 99. At a minimum, the period of time between the initial formulation of the scheme and its becoming effective by court order is eight weeks.

Tender Offer

Section 102 (1) provides for 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 period of time the bidder has to achieve the 90% approval is up to four months, although the bidder will usually specify a much shorter period for acceptance of the offer (eg, 21 days). Where the approval of the 90% majority (excluding from that calculation shares in the target already held by the bidder or its nominee) has been received for a scheme or contract involving the transfer of shares in the target, 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 – which does not form part of the tender offer mechanisms provided by Section 102 – 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").

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 shareholders' shares. The terms of the compulsory acquisition have to be set out in the notice and have to 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. The period of time within which the 95% holder may either acquire the shares at the price fixed by the court, or cancel the transaction, is within one month of the court valuation. Appraisal by the court under Section 103 is final and the court's determination may not be appealed.

Statutory Amalgamation or Merger

The effect of an amalgamation under Section 104 is that the pre-amalgamation entities will continue as one and neither will cease to exist. A merger under Section 104(H) enables the parties to choose a transaction form which results in a "survivor company".

Essentially, the procedures for amalgamations and mergers are 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.

Typically, acquisitions are 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 offers notable advantages over an acquisition effected by way of scheme of arrangement and tender or exchange offers. Unlike a scheme, court approval is not needed to approve a merger. In contrast to a tender or exchange offer, an acquirer can be 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. Also, it can be completed more quickly than a tender or exchange offer or a scheme. Moreover, 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 75% 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 a threshold may be amended to be lower or higher).

Purchase of Shares of Target

An acquisition can be carried out pursuant to a share purchase agreement between the purchaser and any controlling shareholder(s), 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 different from an acquisition of shares, a purchaser can acquire all, or substantially all, of the underlying business or assets of a target at an agreed deal price.

2.2 Primary Regulators

There are no laws or regulations of general application that regulate M&A activity in Bermuda companies. The Companies Act is the statute that is most relevant to M&A deals, although where the parties to the transaction include a regulated licensed insurance company in Bermuda, for example, there are regulatory approvals related to change of control required under the legislation governing insurance companies.

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 investment business in Bermuda. The BSX Listing Regulations (BSXRs) impose a number of obligations on BSX-listed companies involved in M&A.

2.3 Restrictions on Foreign Investments

Generally, all local Bermuda companies have to be at least 60% owned and controlled by Bermudians. This is known as the "60-40 rule". In keeping with a policy intended to stimulate foreign direct investment in Bermuda, public companies listed on the BSX in a "prescribed industry" are eligible to apply for a waiver from the 60-40 rule. Prescribed industries include telecommunications, energy, insurance, hotel operations, banking and international transportation services (by ship or aircraft). This waiver allows BSX-listed and reporting local companies the choice and scope to seek capital internationally.

Otherwise, an acquisition of a local company which would see its ownership not comply with

the 60-40 rule (usually when non-Bermudians are to control the company at board and/or shareholder level) can be achieved by applying for a licence under Section 114B of the Companies Act.

The approval of the BMA is required prior to the issue and transfer of securities by Bermuda companies to foreign buyers (ie, non-residents of Bermuda), other than in cases where the BMA has granted general permission (eg, for Bermuda companies with shares listed on an appointed stock exchange).

2.4 Antitrust Regulations

No antitrust regulations apply to business combinations in Bermuda, as Bermuda has no competition laws.

2.5 Labour Law Regulations

From a statutory perspective, the main sources of employment law are the Employment Act 2000, the Workers Compensation Act 1965, the Human Rights Act 1981, and the Occupational Safety & Health Act 1982, which collectively deal with employment standards, rights, compensation and workplace discrimination. In addition, there is a body of trade union legislation governing the rights of unionised employees.

The contract of employment between the parties is also a source of law between them which, if governed by Bermuda law, will be subject to common law and jurisprudence from the Bermuda courts.

2.6 National Security Review

There are no national security reviews of acquisitions in Bermuda.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

NKWE Platinum Ltd v Glendina Pty Ltd & Others 2021 affirmed the conventional understanding of the effect of an amalgamation under Bermuda law.

The principal issue raised in this case was the legal effect of an amalgamation under Sections 104 to 109 of the Companies Act. Contrary to the argument that there was a "transfer" of the property from the amalgamating companies to the amalgamated company, the court held that amalgamating companies continue to exist as an amalgamated corporation and, as such, they continue to possess all the property and rights they had before the amalgamation. There may be a dilution of ownership in the sense that it is shared with the other amalgamating company or companies, but there is not the complete divestiture of property or rights that is a fundamental characteristic of an assignment. The property of each amalgamating company becomes the property of the amalgamated company by operation of law and not by way of transfer or by operation of contract.

3.2 Significant Changes to Takeover Law

There have been no significant changes in the past 12 months to the law relevant to takeovers, nor are any significant changes likely to be forthcoming in the next 12 months.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

See **2.1 Acquiring a Company**.

4.2 Material Shareholding Disclosure Threshold

Stakebuilding is not regulated, generally, under Bermuda company law. Disclosure obligations may, however, be imposed under the rules of the relevant listing exchange or market where the shares are traded. Where a target is 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. Accordingly, the target may be obliged to disclose information about the number of shares acquired by the buyer directly or indirectly outside the offer process. For example, the directors or executive officers of a BSX-listed company must notify the BSX if they become aware of any shareholder who, either directly or indirectly, acquires a beneficial interest in the target's securities (or securities convertible into the target's securities) so as to own or exercise control or direction over 5% or more of the shares of the target and any time such holding is increased in 3% increments.

4.3 Hurdles to Stakebuilding

The limitations on stakebuilding outside the offer process, as well as the consequences, will be matters of the rules of the relevant exchange or market and/or the target's bye-laws. A number of Bermuda companies have adopted bye-laws which oblige a buyer to notify the company when the buyer has reached a particular level of direct or indirect ownership. Furthermore, a target 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 determine 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 dilatory shareholder.

4.4 Dealings in Derivatives

There are no provisions in Bermuda law or regulation to prevent the use of derivatives.

4.5 Filing/Reporting Obligations

See **4.2 Material Shareholding Disclosure Threshold**.

4.6 Transparency

Where the target is licensed in a particular sector regulated by the BMA (eg, insurance, banking and investment business), material change or change of control provisions may apply, in which case notification to the BMA of any intention to control the target will be required. Otherwise, there may be threshold triggers in a specific company's bye-laws which, for example, require a notice to be sent to all other shareholders offering to purchase their shares.

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

The Companies Act does not require public disclosure in the context of an acquisition. However, disclosures by the target may be necessary under applicable listing rules. For instance, the BSXRs generally require a target that is listed to keep the BSX, shareholders of the target, and other holders of its listed securities informed without delay, by way of public announcements and/or circulars, of any information relating to the group that:

- is necessary to enable them and the public to appraise the financial position of the target and the group;
- is necessary to avoid the establishment of a false market in its securities; and

- might reasonably be expected to materially affect market activity in, and the price of, its securities.

5.2 Market Practice on Timing

The BSXRs leave little room for manoeuvre, in that they require a listed target to keep the BSX, shareholders of the target and other holders of its listed securities informed "without delay". See **5.1 Requirement to Disclose a Deal** for further details.

5.3 Scope of Due Diligence

Due diligence is customarily undertaken in a manner similar to that followed in most established and recognised jurisdictions. Rarely would due diligence not be undertaken, other than where a competing bidder forgoes due diligence as a competitive advantage. That said, if the bid is hostile then the only information which might be available for due diligence would be that in the public domain.

Company Information that Is Publicly Available in Bermuda

At the Registrar of Companies

- The Certificate of Incorporation and Memorandum of Association of a Bermuda incorporated company;
- the address of the registered office;
- the register of directors;
- any prospectus or offer document required to be filed pursuant to the Companies Act (although the prospectus filing requirement was amended to permit companies listed on approved stock exchanges to forego this requirement);
- any registered charges against the company; and
- any other filings required pursuant to the Companies Act.

At the Registry of the Supreme Court

Details of legal proceedings and judgments are kept at the Registry of the Supreme Court.

At the BSX

Published accounts, auditors' reports and other filings and announcements are filed with the BSX.

At the Registered Office

- The register of directors and officers sets out names and addresses; and
- the register of members sets out the names and addresses of members, 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.

It is not unusual for the target company to attempt to limit the scope of due diligence undertaken and, in particular, withhold sensitive financial and business information until it is clear the bidder has a genuine interest in proceeding with the transaction.

5.4 Standstills or Exclusivity

Exclusivity agreements are more commonly seen in Bermuda M&A transactions.

5.5 Definitive Agreements

From a documentation standpoint, the principal instruments setting out the acquisition terms in respect of a tender offer would comprise a circular or announcement summarising the terms and conditions of the offer, the offer document, an acceptance form, and a prospectus, if required.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

There is no prescribed statutory time period for negotiations or due diligence. However, in

committing to any such period, particularly with respect to any corresponding exclusivity that is to apply between the parties, the directors of any Bermuda company must be comfortable that doing so is in the best interests of the company. This is to ensure that there has been appropriate exercise of their fiduciary duties, particularly to act in the best interests of the company and avoid fettering their discretion to do so.

During the pandemic, lockdowns and mandatory remote working did make certain due diligence procedures, such as company and court searches and examination of company books, more difficult to carry out, or, in some instances, impossible while restrictions remained in place. Thankfully, most were for brief periods only, and did not hinder the M&A deal process to any great extent, or for a particularly long time.

6.2 Mandatory Offer Threshold

There are no requirements to make a mandatory offer, unless it is set out in a company's bye-laws that ownership of a particular percentage of the company's shares triggers a mandatory offer for the balance of its issued shares. In addition, see **2.1 Acquiring a Company** with regard to a tender offer.

6.3 Consideration

Cash is more commonly used in local M&A transactions as consideration, but the use of shares in merger transactions involving Bermuda companies listed on a recognised stock exchange has been increasing, especially where synergistic companies can see the mutual benefit of working together to enhance the value of both businesses.

The directors of a Bermuda company, subject always to complying with their fiduciary and other duties under the Companies Act, may agree to such cost coverage mechanisms as break fees with the acquiring entity, and part of the consideration is sometimes left outstanding under a promissory note or loan agreement, to be satisfied out of the profits generated by the business post completion. The use of such tools is very specific to the negotiation of the particular deal.

6.4 Common Conditions for a Takeover Offer

Under Bermuda law, there are no specific legal restrictions on the conditions to a tender offer, exchange offer or other form of business combination and, as such, those conditions are subject to the common law of contract, being driven by negotiations between the parties and deal-specific considerations. In the case of a tender offer or a compulsory acquisition, the bidder is free to offer cash, shares, or a combination of both. The bidder can offer any price, and is free to specify the percentage level which must be achieved before an offer will become binding. As a matter of market practice, takeover transactions often include conditions such as shareholder approval, no material adverse change, and any required regulatory approvals. Acceptance thresholds in respect of the target's shares on a takeover bid are often set at 90% so as to enable utilisation of the squeeze-out provisions under the Companies Act, as more particularly described in **6.10 Squeeze-Out Mechanisms**.

6.5 Minimum Acceptance Conditions

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

Section 102 of the Companies Act 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 by which the approval was 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 the bidder 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, although they must prove unfairness, not merely that the scheme is open to criticism.

In the case of an amalgamation or merger, the amalgamation or merger plan 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.

6.6 Requirement to Obtain Financing

It is common practice for a condition relating to the bidder obtaining financing to be used in an M&A deal.

6.7 Types of Deal Security Measures

Break Fees

Break fees are permitted, subject to the fiduciary duties of the board of the target company 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. Market practices in the US and Canadian securities markets heavily influence Bermuda practice in this area, and break fees in excess of 1% of the target's equity value are common where the main market in which the target's securities are traded is in North America. Notwithstanding the widespread use of break fees as a form of 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 appropriate and required in the specific circumstances of the proposed transaction.

"Exclusivity" Agreement

In addition to agreeing to a break fee, the parties may enter into an "exclusivity" agreement (also known as a "lock-out" or "no shop" agreement) whereby the target agrees, for a limited and defined period of time, that it will not solicit a transaction with any other prospective acquirer during the period of exclusivity. Very few transactions in Bermuda practice proceed without some form of "no shop" agreement.

"No Talk" 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 not as common. Although the target board may agree not to solicit or encourage approaches from new third-party bidders, the target board will have ongoing responsibilities if the target was engaged in discussions with a third party prior to the exclusivity agreement, or if, after that point in time, an unsolicited proposal is received which the target board considers to be a bona fide competing proposal. The board of the target 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.

Lock-Up Arrangement

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

Material Adverse Change Clause

Although we are not aware of any recent significant regulatory changes in this context, consideration could be given to using a MAC (ie, material adverse change) clause in order to manage pandemic risk during any interim period.

6.8 Additional Governance Rights

Aside from direct voting power through the acquisition of shareholdings in the target, it would be open to the bidder to seek rights to appoint and remove board members of the target, together with consent rights in respect of certain reserved matters, which in each case could be enshrined in the target's bye-laws and/or any accompanying shareholders' agreement.

6.9 Voting by Proxy

Under Bermuda law, the general position is that only those shareholders who have voting rights attached to their shares are given notice of a general meeting and allowed to attend; the right of holders of non-voting shares to vote on a proposed amalgamation or merger being an exception to this principle.

Any shareholder may appoint a proxy to vote on their behalf at a general meeting.

6.10 Squeeze-Out Mechanisms

A 90% squeeze-out following a general offer is effected as follows.

- Within one month of the offeror (together with its subsidiaries and nominees) holding in aggregate 90% in value of the shares in the target, including those held prior to the offer, the offeror must serve a notice notifying the remaining shareholders that the offeror holds 90% of the shares.
- Dissentient shareholders have three months from receipt of the notice to give the offeror notice requiring the offeror to acquire their shares on the terms of the offer or on such terms as may be agreed, or as the court thinks fit to order.
- The offeror has two months from the date of reaching 90% in which to give a compulsory acquisition notice to the remaining shareholders that the offeror wishes to acquire their shares. A compulsory acquisition notice is normally given at the same time as the notice of 90% ownership.
- Dissentient shareholders have one month from receipt of the compulsory acquisition notice to apply to the court to set aside the compulsory acquisition.
- Within one month of the offeror becoming entitled and bound to acquire the remaining shares (typically one month after serving the compulsory acquisition notice in the absence of any application to the court), the offeror must send to the target:
  (a) a copy of the compulsory acquisition notice;
  (b) a share transfer form signed by the offeror and a person appointed by the offeror to sign on behalf of the dissentient shareholders; and
  (c) the consideration.
- The target must then register the offeror as the holder of the shares and hold the consideration on trust for the dissentient shareholders.

An alternative method of compulsory acquisition applies if a shareholder (or group of shareholders) acquires 95% or more of the shares. Use of this method will give any dissentient shareholder appraisal rights similar to those which apply on a merger or amalgamation.

6.11 Irrevocable Commitments

It is not unusual to encounter shareholder undertakings and similar voting agreements in Bermuda public M&A transactions. Shareholders who individually or collectively hold significant tranches of equity in the target may become

involved in the transaction at a relatively early stage, with a view to deciding whether they are supportive of the deal. Such shareholder undertakings may be irrevocable and their content is otherwise driven by transaction-specific considerations.

7. DISCLOSURE

7.1 Making a Bid Public

Public disclosure may be required by the applicable stock exchange upon which the target is listed. For example, a BSX-listed company must keep the BSX, shareholders of the company and other holders of its listed securities informed without delay, by way of public announcements and/or circulars, of any information relating to the company (or its group) that:

- is necessary to enable them and the public to appraise the financial position of the company and the group;
- is necessary to avoid the establishment of a false market in its securities; and
- might reasonably be expected to materially affect market activity in, and the price of, its securities.

Additionally, where an acquirer becomes a holder of 5% or more of a local company, the local company must notify the BSX.

Apart from this, there is no requirement for public disclosure under Bermuda law. For a BSX-listed company, public disclosure is required on the signing of the relevant transaction agreement. Public disclosure typically happens right after the execution of an agreement and plan of merger/amalgamation or an implementation agreement (as applicable).

7.2 Type of Disclosure Required

In the case of an amalgamation or merger, the notice of shareholders' meetings of both the target and the bidder 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 merger or amalgamation plan) and must expressly state both:

- the fair value of the shares as determined by each amalgamating or merging company; and
- that a dissenting shareholder is entitled to be paid the fair value for their shares.

Commonly, the target's shareholders will be provided with a "fairness opinion" (or a summary thereof) confirming the basis for the valuation of the shares and the price being offered.

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

- an announcement to the shareholders, issued by the target;
- an offer document, issued by the bidder and the target;
- an acceptance form, issued by the bidder; and
- a prospectus, if required, issued by the bidder.

Where it is a hostile bid, only the bidder would issue the offer document and prospectus. In addition, the target can issue:

- an announcement rejecting the offer; and
- a defence document or other documents of a similar nature sent to shareholders at regular intervals over the offer period laying out the arguments for not accepting the bid.

7.3 Producing Financial Statements

There are no specific requirements regarding the financing of a business combination and, in particular, no requirement for the bidder to produce financial statements. 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.

The Companies Act requires companies to keep financial statements. Furthermore, companies must lay the following at a general meeting of the members:

- financial statements, which must include the following –
  - (a) results of operations for the period;
  - (b) retained earnings or deficit;
  - (c) a balance sheet;
  - (d) a statement of changes in financial position or cash flows;
  - (e) notes to the financial statements; and
  - (f) such further information as required; and
- an auditor's report.

A company listed on an appointed stock exchange need not send financial statements to its members, but may send summarised financial statements and the summary must be made available for inspection by the public at the registered office in Bermuda.

The company may elect not to:

- lay financial statements or an auditor's report at a general meeting; or
- appoint an auditor, if all members and directors of a company agree (either in writing or at a general meeting).

Bermuda has not adopted any particular accounting framework as its national standard. IFRS and GAAP are both commonly used accounting frameworks.

7.4 Transaction Documents

Generally there are no disclosure requirements under Bermuda legislation or imposed by Bermuda regulators. However, in specific circumstances certain information must be disclosed. See **4.2 Material Shareholding Disclosure Threshold**, **4.5 Filing/Reporting Obligations**, **5.1 Requirement to Disclose a Deal** and **7.1 Making a Bid Public**.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

Under Bermuda common law, a director owes two types of duty to the company: a fiduciary duty and a duty of skill and care. An individual director must act in good faith in their dealings with or on behalf of the company and exercise the powers and fulfil the duties of the office honestly. This fiduciary duty encompasses the following aspects:

- a duty to act in good faith;
- a duty to exercise powers for a proper purpose;
- a duty to avoid conflicts of interest;
- a duty not to make a secret profit; and
- a duty to act with reasonable skill and care (both subjectively and objectively).

Section 97 of the Companies Act sets out the statutory duties of directors and provides that 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, and it further provides that a director must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Directors generally owe a duty of care to the company itself and not the shareholders or stakeholders in the company. The courts tend to recognise the difficulty of identifying the interests of such an artificial abstraction and, in practice, regard the interests of the company as identical to those of the shareholders as constituted from time to time, therefore avoiding identification of the company's interests with specific members or encouraging short-termism to the detriment of the company as a going concern. There are, however, some circumstances, such as calling meetings, preparing financial statements, recommendations to shareholders, etc, where the directors may owe duties to shareholders on an individual basis.

The directors ordinarily owe no duty of care to the company's creditors, except where insolvency is a reasonably foreseeable prospect.

8.2 Special or Ad Hoc Committees

As stated elsewhere, the directors are not required to make a recommendation to shareholders on the merits or otherwise of a bid. If a recommendation to accept or reject is given, the directors would be best advised to do so in conjunction with advice from independent financial advisers to the board.

When some directors have a conflict of interest, special or ad hoc committees comprising non-conflicted directors can be constituted to consider the merits of a bid.

8.3 Business Judgement Rule

A director must diligently attend to the affairs of the company and in performing directors' duties, each director must display the "reasonable care... that an ordinary man may be expected to take in the same circumstances on his own behalf." Mere errors of judgement have been held not to breach the duty of skill and care. A director is not bound to give continuous attention to the affairs of the company. Their duties are intermittent in nature.

When the courts are called upon to examine the bona fides of the directors, Bermuda courts are typically loathe to second guess a board's exercise of business judgement. As a general rule, the court will only impugn a director's conduct if there is evidence that the director has breached their fiduciary duties. See **8.1 Principal Directors' Duties** for more information on fiduciary duties.

In considering these points, the courts do not require that a board makes what, in hindsight, was the best possible decision, provided that, at the time the decision was taken, it was reasonable and the board properly and diligently exercised its duties of skill and care in reaching the decision.

8.4 Independent Outside Advice

A director is not liable for the acts of co-directors or other company officers solely by virtue of the position. A director is entitled to rely on co-directors or company officers as well as subordinates who are expressly put in charge of attending to the detail of management, provided such reliance is honest and reasonable (although directors cannot absolve themselves entirely of responsibility by delegation to others).

As a general rule, before delegating responsibility to others, the directors in question should satisfy themselves that the delegates have the requisite skills to discharge the functions delegated to them. In addition, the directors must

ensure that an adequate system of monitoring such delegates (eg, managers) is set up.

The directors must, on a regular basis, ensure that their delegates have fulfilled their obligations. The directors should require a regular flow of information from the delegates to ensure that they are carrying out their duties satisfactorily.

A director will not be liable for a breach of fiduciary duty if they relied, in good faith, upon:

- financial statements of the company presented to them by another officer of the company; or
- a report of an attorney, accountant, engineer, appraiser or other person whose profession lends credibility to the statement made by them.

8.5 Conflicts of Interest

Conflicts of interest have not been the subject of judicial scrutiny in Bermuda.

Avoiding conflicts of interest is part of a director's fiduciary duties under common law. As such, directors must not put themselves in a position where there is an actual or potential conflict between a personal interest or the duties owed to third parties and their duty to the company. For instance, if a director directs business to a company in which they have an interest, perhaps because the person is also a director of that company, then the director is in danger of breaching their fiduciary duty.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers

Hostile bids are permitted in Bermuda, but are fairly rare.

9.2 Directors' Use of Defensive Measures

There is no general rule in the provisions of Bermuda law or regulation that prohibits the directors of the target from taking any action to frustrate an unsolicited takeover in circumstances where the target's directors may legitimately consider that a takeover will damage the target's interests.

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

9.3 Common Defensive Measures

Subject to the inclusion of certain takeover defences in the target's constitutional documents from inception, the target board has limited options once a bid has been made. The board could attempt to persuade shareholders to reject the bid. Additionally, 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 the government. The board may also seek to find a more favourable bidder, or "white knight".

The target's bye-laws could provide certain takeover defences, including a 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, the adoption of enhanced voting rights on a share acquisition by a third party, pre-emption rights, or a mandatory offer upon holding a certain percentage of shares. Moreover, the target's shareholders may have authorised the target board to adopt the shareholders' rights plan or to issue blank-cheque preferred shares.

There does not appear to be any difference in the prevalence of the use of any of these measures as a result of the pandemic.

9.4 Directors' Duties
See **8.1 Principal Directors' Duties**.

9.5 Directors' Ability to "Just Say No"
In the absence of a target board having a powerful battery of defences already in place, "just say no" is not a realistic option for a target board in the face of a determined bidder.

10. LITIGATION

10.1 Frequency of Litigation
Bermuda is a small jurisdiction, and litigation there in relation to M&A deals is relatively rare. An instance of M&A litigation a couple of years ago stood out for its novelty. Few Bermuda M&A deals are hostile in nature and most are concluded with no acrimony.

10.2 Stage of Deal
Any litigation that has been seen in Bermuda usually involves a buyer backing out at the last minute close to completion, or defaulting on the payment of deferred consideration after completion.

10.3 "Broken-Deal" Disputes
A few deals did not take place, but most 2020 deals did close, albeit some rather later than originally intended, with extensions of exclusivity and due diligence timelines to accommodate the unusual and unforeseeable circumstances experienced globally.

11. ACTIVISM

11.1 Shareholder Activism
Shareholder activism is not generally seen in relation to Bermuda companies, but is more prevalent in relation to those which are publicly listed, especially in the US. The most common activism is to change the board of directors to enhance profitability for shareholders, although there have been examples of activists seeking to stir up shareholders to call for a sale to a third party.

11.2 Aims of Activists
As noted above, activists work to increase shareholder returns, either by improving company performance by a change in leadership or by being able to liquidate their investments upon a sale. Companies which have struggled through the pandemic may be ripe for this type of action.

11.3 Interference with Completion
This type of activism has not been observed in Bermuda.

MJM Limited is one of Bermuda's leading law firms. It is a broad-ranging practice with a reputation for excellence in its core practice areas. The firm has extensive experience in advising local and international clients on a wide range of corporate transactions and related company law issues. The lawyers have proven professional skills and have earned a reputation for sound judgement and a practical, commercial approach, based on in-depth knowledge of the legal, regulatory and commercial environment in Bermuda. The firm also offers a high degree of director involvement in the work that it does. Each practice area is led by a director who is recognised as a leading practitioner in Bermuda in their respective field of specialisation. The team's collaborative approach across practice areas enables them to offer a comprehensive and thorough service to their clients.

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