

Bermuda

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MARKET AND REGULATION

1. Please give a brief overview of the public M&A market in your jurisdiction. (Has it been active? What were the big deals over the past year?)

Bermuda does not have an active local public M&A market. Indeed, the only significant deal during the last three years was the recommended offer by HSBC Holdings plc to acquire The Bank of Bermuda Limited for US\$1.3 billion (about EUR985 million) in 2004 (a price of US\$45 (about EUR34) per share, in cash, representing a 16% premium on the average closing share price for the preceding three months).

More recently, in July 2006 Cable & Wireless plc (C&W) announced a proposal to acquire the entire issued share capital of KeyTech Limited (KeyTech), Bermuda's largest telecommunications holding company, for US\$205 million (about EUR155 million). The board of KeyTech did not recommend the C&W offer and, to date, C&W has not taken any further action on the offer.

2. What are the main means of obtaining control of a public company? (For example, public offer, legal merger, scheme of arrangement and so on.)

Amalgamation

An amalgamation under the terms of the Bermuda Companies Act 1981 (Act) is the most common way in which acquisitions are effected in Bermuda. This type of transaction typically involves the bidder establishing a subsidiary company in Bermuda (the acquisition vehicle) that amalgamates with the target. The two companies then continue as one amalgamated company. In this case, the target's shareholders may receive a cash consideration, shares in the bidder or some combination of these (see *Question 17*).

Unless the bye-laws of the target provide otherwise, in order to approve the amalgamation, a resolution passed by at least 75% of those voting at a shareholders' meeting is required.

Any shareholder who is not satisfied that he has been offered a fair value for his shares (the dissenting shareholder) may apply to the Bermuda courts within one month of the notice of the meeting of the shareholders, for an appraisal of the fair value of his shares. The existence of dissenting shareholders does not prevent

the amalgamation from taking place, but rather, following an appraisal, the company must either pay an amount to the dissenting shareholder equal to the fair value of his shares (as appraised by the court) or choose to terminate the amalgamation.

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

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

Others

The other main means by which control of a public company can be obtained are:

- A company (whether incorporated in Bermuda or not) making an offer to the target's shareholders to acquire all of their shares in the target.
- By implementing a court sanctioned scheme of arrangement under the Act.

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

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

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

There are no specific regulations on takeovers. However, the Act applies to all companies registered in Bermuda and the Bermuda Stock Exchange Regulations (Exchange Regulations) applies to all companies listed on the Bermuda Stock Exchange (BSx) (see box, *The regulatory authorities*).

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

PRE-BID

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

Recommended bid

For a recommended bid, the target generally limits the scope of due diligence undertaken and, in particular, withholds sensitive financial and business information until the bidder has proved a genuine interest in making the acquisition.

Hostile bid

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

Public domain

The following information is publicly available:

- The memorandum of association.
- Details of directors and officers.
- Details of the shareholders including:
 - the names and addresses of the shareholders;
 - details of the number of shares held;
 - the amount paid up on the shares; and
 - the date on which the person was entered in the register as a member. The register of members of a company can be inspected during business hours (however, shares may be held by, and registered in, the name of a nominee).
- The prospectus or offering document.
- Any filings with, or announcements to, the BSx, including published accounts and auditor's reports.

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

There are no rules as to maintaining secrecy. In the case of a company listed on the BSx (*Exchange Regulations*):

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

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

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

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

8. If the bidder decides to build a stake in the target before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there any circumstances in which shareholdings of associates could be aggregated for these purposes?

The directors or executive officers of the target must deliver a written notice, detailing the matter, without delay to the BSx if they become aware of either:

- Any shareholder who, directly or indirectly, acquires a beneficial interest in or control over 5% or more of the target's securities.
- Any shareholder who, directly or indirectly, has a beneficial interest in or control over 5% or more of the target's securities who then acquires, in aggregate, an additional 3% or more of the target's securities.

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

In an amalgamation, the bidder, target and acquisition vehicle enter into an agreement and plan of amalgamation (Plan) that

sets out the terms on which the amalgamation is to be effected. Among other things, the Plan is likely to include:

- The various conditions to completion of the amalgamation, including obtaining the approval of the amalgamation by the shareholders of the target in accordance with the terms of the Act.
- Details of the rights of dissenting shareholders.
- Provisions for settlement of the amalgamation consideration.
- Provisions for the conduct of the target's business between entering into the Plan and completing the amalgamation.
- Representations and warranties in relation to the target.
- Provisions to prevent the target soliciting alternative bids.
- Provisions for dealing with unsolicited alternative bids.
- Break fees (*see Question 10*).

The board of the target is free to undertake not to solicit competing bids or to disclose information that is not in the public domain (and may agree to procure that members of the target and its directors, officers, employees or agents do not solicit such bids or disclose such information).

In the case of unsolicited offers, it is common for the Plan to provide for a fiduciary out. This effectively enables the board of the target to terminate the Plan and accept an alternative bid where that bid is determined to be on more favourable terms (provided that, in some cases, the Plan entitles the bidder to submit an improved offer before the board of the target determines which of the competing proposals is more favourable).

10. Is it common on a recommended bid for the target to agree a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable and any restrictions on the size of the payment.

It is becoming increasingly common for there to be a break fee payable if there are specified events that cause the offer to fail. For example, in a proposed amalgamation, the Plan is likely to provide that a fee is payable to the bidder where the board of the target recommends a competing bid and such acquisition takes place within a certain period of time from the date of the Plan.

As a matter of practice, break fees tend to range from 1% to 4% of the amalgamation consideration.

If the Bermuda court considers that the break fee is a penalty for terminating the Plan, the fee is unenforceable.

11. Is committed funding required before announcing an offer?

An offer may be announced before financing has been obtained.

ANNOUNCING AND MAKING THE OFFER

12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements) and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?

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

13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

There is no requirement that a bid must be made for a specific percentage of the target's shares.

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 the offer accept it, the bidder may by notice require the non-tendering shareholders to transfer their shares on the terms of the offer (*section 102(1), Act*). As a result, the bidder may wish to include a pre-condition that the offer is subject to receiving acceptances for at least 90% of the shares so that it is in a position to forcibly acquire the remaining 10%.

Dissenting shareholders may apply to the court, within one month of the notice, objecting to the transfer and must prove unfairness, not merely that the scheme is open to criticism.

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

There are no restrictions on pre-conditions or their contents.

14. What documents do the target's shareholders receive on a recommended and hostile bid? (Please briefly describe their purpose and main terms, and which party has responsibility for each document.)

In an amalgamation, the notice of a meeting of the shareholders of the target must include, or be accompanied by, a copy or a summary of the amalgamating agreement (this is the agreement that makes the amalgamation effective under Bermuda law, rather than the Plan) and must expressly state:

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

The target's shareholders are commonly provided with a fairness opinion (or a summary of its contents) confirming the basis for the valuation of the shares and the price being offered.

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

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

In a hostile bid, only the bidder issues the offer document and prospectus. In addition, the target may issue an announcement rejecting the offer and a defence document or other documents, distributed to shareholders at regular intervals over the offer period, setting out the arguments for not accepting the bid (including, for example, profit forecasts and asset values).

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

There are no consultation requirements.

16. Is there a requirement to make a mandatory offer? If so, when does it arise?

There are no requirements to make a mandatory offer.

However, if shares in a Bermuda company are transferred to another company (the transferee) resulting in the transferee holding 90% in value of the shares of the company (or 90% of any class of shares in that company), the transferee is required (within one month of the date of transfer of such shares) to give notice of this to the remaining shareholders of the company (or of the particular class of shares) (*section 102(2), Act*). The remaining shareholders may (within three months of receiving the notice) give notice to the transferee requiring the transferee to acquire their shares.

CONSIDERATION

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

There is no restriction on the type of consideration that can be offered. However, in an amalgamation, the following are commonly used:

- Cash.
- Shares in the bidder.
- Shares in the amalgamated company.
- A combination of cash and shares.

18. Are there any regulations that provide for a minimum level of consideration? If so, please give details.

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

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders? If so, please give details.

There are no specific restrictions on the form of consideration that a foreign bidder can offer to shareholders.

POST-BID

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders? If so, please give details.

A bidder can compulsorily purchase the shares of remaining minority shareholders (*see Question 13*).

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

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

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

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

A company whose listing is primarily on the BSx may de-list from the BSx by giving it 90 days' notice and if either:

- The company has an alternative listing on another stock exchange for its listed securities.
- The company has obtained approval to de-list from the holders of each class of its listed securities either by:
 - a three-quarters majority vote at a duly convened meeting of those holders; or

THE REGULATORY AUTHORITIES

The Bermuda Stock Exchange (BSx)

Head. Greg Wojciechowski (Chief Executive Officer)

Address. Washington Mall
Hamilton HM11
Bermuda
T +1 441 292 7212
F +1 441 292 7619
E info@bsx.com
W www.bsx.com

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

Contact for queries. See telephone number above.

Obtaining information. See website address above.

The Bermuda Monetary Authority (BMA)

Head. Cheryl-Ann Lister (Chief Executive Officer)

Address. BMA House
43 Victoria Street
Hamilton HM12
Bermuda
T +1 441 295 5278
E info@bma.bm
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Main area of responsibility. The BMA is an independent body that regulates financial institutions in Bermuda. It is also responsible for approving the incorporation of all companies in Bermuda and any changes in the ownership of such companies.

Contact for queries. See telephone number above.

Obtaining information. See website address above.

- obtaining the prior written approval of at least three-quarters of the holders of each class of its listed securities.

- The directors did not exercise their power for a collateral purpose.
- The directors exercised their power fairly between shareholders and not in such a way as to favour improperly one section of the shareholders against another.

TARGET'S RESPONSE

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

The target's board can seek to persuade the shareholders not to accept an offer from a bidder or to obtain a higher offer. However, the directors owe a duty to the shareholders to act in the best interests of the company and therefore should give the offer due consideration and put the offer to the shareholders to determine whether to accept or reject it.

A target may adopt a poison pill defence to a hostile bid. There are typically two approaches to this:

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

The validity of a poison pill was specifically considered by the Supreme Court of Bermuda in *Stena Finance v Sea Containers (Civil Jurisdiction 1989: No. 178)*, which stated that the court could not interfere provided:

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

TAX

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

No stamp duty is payable in respect of any instrument executed by an exempted company (that is, a company that is owned by non-Bermudians and which carries on business outside Bermuda from a principal place of business in Bermuda) or in respect of an instrument relating to an interest in an exempted company.

However, stamp duty may be payable on transactions involving Bermuda property, which includes a local company (that is, a company that is at least 60% owned by Bermudians and which carries on business in Bermuda).

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

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable (for example, do the approvals delay the bid process, at what point in the timetable are they sought and so on)?

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

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

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

There are no restrictions on foreign ownership of exempted companies.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

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

Bermuda is independent for the purposes of exchange control. Exempted companies are designated non-resident for exchange control purposes, meaning that they are able to operate free of exchange control regulations and enabling them to do the following without reference to the Bermuda Monetary Authority (BMA) (*see box, The regulatory authorities*):

- Make payments of dividends.
- Distribute capital.
- Acquire, hold and sell any currency and foreign securities.

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

Persons engaged in investment business in Bermuda and regulated by the Investment Business Act 2005 (IBA) who deal in securities of the parties may be subject to certain restrictions under the IBA.

REFORM

29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

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

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