

Bermuda

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M&A ACTIVITY

1. Please give a brief overview of the public M&A market in your jurisdiction.

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

One of the only significant deals in the last three years was the 2009 takeover battle for IPC Holdings, Ltd. (IPC), a Bermuda reinsurance company listed on the NASDAQ Global Select Market. In early 2009, the board of IPC agreed the terms of a definitive amalgamation agreement with another Bermuda-based reinsurer, Max Capital Group (Max Capital) (that agreement being subject to shareholder approval), which was an all share deal providing that the shareholders of IPC would, in consideration for their shares, receive 58% of shares in the amalgamated reinsurer (see *Question 2* for a description of the amalgamation process).

However, in March 2009, a rival Bermuda reinsurer, Validus Holdings (Validus), made an all share counter-offer for IPC and, in a bid to derail the Max Capital deal, then improved its bid price with a combined cash and shares offer.

IPC shareholders subsequently rejected Max Capital's proposal at IPC's annual general meeting and, as a result, Max Capital terminated the proposed acquisition deal. Subsequently, Flagstone Reinsurance Holdings Ltd, another Bermuda reinsurer, stepped in with a combined cash and share offer, but the boards of Validus and IPC agreed the terms of a definitive amalgamation agreement that was approved by the shareholders of both companies at special general meetings in September 2009; a deal valuing IPC in excess of US\$1.4 billion (as at 1 March 2011, US\$1 was about EURO.7).

Another notable trend is the privatisation of a number of infrastructure fund groups listed on the Australian Stock Exchange over the last three years, in particular:

- Intoll Group's AUD3.4 billion acquisition by Canadian Pension Plan Investment Board (as at 1 March 2011, US\$1 was about AUD0.9).
- Macquarie Communications Infrastructure Group's AUD2.2 billion acquisition by the Canadian Pension Plan Investment Board.
- Macquarie Advanced Investment Group's (a group comprising Macquarie Capital and a consortium of other investors) AUD836 million acquisition of Macquarie Capital Alliance Group.

In each case, the listed target was a "stapled entity" comprising a Bermuda company and either an Australian trust or corporation. The acquisitions of the Bermuda companies were effected through court-sanctioned schemes of arrangement under the Bermuda Companies Act, 1981 (Companies Act) (see *Question 2*).

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

The three main means of obtaining control of a public company are as follows:

- By way of amalgamation under the Companies Act. This is the most common way in which acquisitions are effected in Bermuda. This type of transaction typically involves the bidder establishing a subsidiary company in Bermuda (the acquisition vehicle) that amalgamates with the target company, with the two companies continuing as one amalgamated company. The shareholders of the target company may receive cash consideration, shares in the bidder or some combination of the two (see *Question 17*).

Unless the bye-laws of the target company or the acquisition vehicle provide otherwise, a resolution passed by at least 75% of those voting at a shareholders' meeting of the target company, and the acquisition vehicle, is required to approve the amalgamation. Any shareholder who did not vote in favour of the amalgamation and is not satisfied that he has been offered fair value for this shares (dissenting shareholder) can, within one month of the notice of the meeting of the shareholders, apply to the Bermuda courts for an appraisal of the fair value of his shares. This application does not prevent the amalgamation from taking place, but rather, following an appraisal, the company may choose to pay to the dissenting shareholder an amount equal to the fair value of his shares (as appraised by the court) or terminate the amalgamation.

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

- the target company and the bidder's acquisition vehicle will continue in existence as one company;
- the amalgamated company will own the property of both the target company and the acquisition vehicle without the need for any transfer documentation to be entered into, since the respective property vests automatically by operation of law; and

- the amalgamated company continues to be liable for the obligations of both the target company and the acquisition vehicle, and any existing causes of action, or the prosecution of pending proceedings, continue and are unaffected by the amalgamation. Any judgment in favour of, or against, the target company or the acquisition vehicle can be enforced by, or against, the amalgamated company.
- Through implementation of a court-sanctioned scheme of arrangement under the Companies Act.

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

If a meeting of members is ordered by the court under section 99(1), the notice of the meeting sent to members must include an explanatory statement explaining the effect of the proposed scheme (and, in particular, giving details of any material interests that the directors of the company may have, either as directors or as members of the company).

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

In exercising its discretion whether or not to sanction the proposed scheme, the court must be satisfied (among other things):

- that the approval of the proposed scheme was reasonable;
- that the shareholder majority acted bona fide; and
- that statutory provisions had been complied with.

The court will also consider whether the proposed scheme is necessary. The sanctioning of a proposed scheme is not merely a rubber-stamping exercise by the court once the requisite majorities have been obtained, and the court will exercise genuine discretion.

- A company (whether incorporated in Bermuda or not) making an offer to the target company's shareholders to acquire all of their shares in the target company and, if necessary, utilising the powers under the Companies Act to acquire any shares held by the target company's dissenting shareholders not accepting an offer approved by a majority (see *Questions 13 and 20*).

HOSTILE BIDS

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.

REGULATION AND REGULATORY BODIES

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

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

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

PRE-BID

Due diligence

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

Recommended bid

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

Hostile bid

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

Public domain

The following information is publicly available:

- The certificate of incorporation and memorandum of association.
- Details of directors and officers.
- The address of the registered office.

- The names and addresses of the shareholders, together with details of the number of shares held, the amount paid up on the shares and the date on which the person was entered in the register of members as a shareholder. The register of members of a company is open for inspection during business hours (however, shares can be held by, and registered in the name of, a nominee).
- The prospectus/offering document.
- Any filings with, or announcements to, the BSx, including published accounts and auditor's reports.

Secrecy

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

There are no rules concerning the maintenance of secrecy. In the case of a company listed on the BSx, the Exchange Regulations state that investors and the public should be kept fully informed by listed issuers, and that immediate disclosure should 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.

Agreements with shareholders

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

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

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

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there circumstances in which shareholdings, or derivative holdings, of associates could be aggregated for these purposes?

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

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

Agreements in recommended bids

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

In the case of an amalgamation, the bidder, target company and acquisition vehicle will 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 will usually include:

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

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

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

Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful? 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 bid to fail. For example, in the case of a proposed amalgamation, the Plan is likely to provide that a fee is payable to the bidder where the target company's board recommends a competing bid, and that acquisition takes place within a certain period of time from the date of the Plan.

As a matter of practice, break fees in these agreements 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 will be unenforceable.

Committed funding

11. Is committed funding required before announcing an offer?

An offer can be announced before financing has been obtained.

ANNOUNCING AND MAKING THE OFFER

Making the bid public

12. 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 company's shareholders.

Offer conditions

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)?

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

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

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

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

Bid documents

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

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

- 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.

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

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

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

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

Employee consultation

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

There are no consultation requirements.

Mandatory offers

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.

It should be noted that section 102(2) of the Companies Act provides that in the event that shares in a Bermuda company



are transferred to another company (the transferee) resulting in the transferee holding 90% in value of the shares (or any class of shares) of the company, the transferee is required (within one month of the date of transfer of those shares) to give notice of that transfer to the remaining shareholders of the company (or of the particular class of shares). The remaining shareholders can (within three months of receiving that notice) give notice to the transferee requiring the transferee to acquire their shares.

CONSIDERATION

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

There is no restriction on the type of consideration that can be offered.

In the case of an amalgamation, the consideration can be cash, shares in the bidder, shares in the amalgamated company or a combination of any of these.

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

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

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

There are no 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?

See *Question 13* regarding the right to compulsorily acquire shares under section 102(1) of the Companies Act. In addition, section 103 of the Companies Act provides that the holders of 95% of the shares (or any class of shares) in a Bermuda company (the purchasers) can 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. The purchasers are entitled and bound to acquire the shares on those terms unless a remaining shareholder applies to the court, within one month of the notice, for an appraisal of the value of the shares being purchased. Following an appraisal, the purchasers can acquire all the shares involved at the price fixed by the court, or cancel the notice previously given.

THE REGULATORY AUTHORITIES

The Bermuda Stock Exchange

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

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

The Bermuda Monetary Authority

Address. BMA House
43 Victoria Street
Hamilton HM12
Bermuda
T +441 295 5278
E info@bma.bm
W www.bma.bm

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

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

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

De-listing

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

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

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

TARGET'S RESPONSE

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

The target company's board can seek to persuade the shareholders not to accept an offer from a bidder or to obtain a higher offer. However, the directors owe a duty to the shareholders to act in the best interests of the company 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 company can 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 and provides that existing shareholders have the right to subscribe for more shares in the target company at a discounted price where a hostile bidder reaches a certain percentage of ownership in the target company, or where a bid is made. The second approach, known as the "flip over", gives current shareholders the right to purchase shares in the target company from the bidder once the takeover has taken place.

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

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

TAX

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

No stamp duty is payable in respect of any instrument executed by an "exempted company", or in respect of an instrument

relating to an interest in an "exempted company". An "exempted company" is a company that is owned by non-Bermudians and which carries on business outside Bermuda from a principal place of business in Bermuda.

Stamp duty may, however, be payable in respect of transactions involving "Bermuda property", which would include a local company (a local company is a company that is at least 60% owned and controlled by Bermudians and which carries on business in Bermuda).

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

OTHER REGULATORY RESTRICTIONS

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

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

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

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

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



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 make payments of dividends, to distribute capital, to acquire, hold and sell any currency and foreign securities without reference to the Bermuda Monetary Authority.

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

Persons engaged in investment business in Bermuda and regulated by the Investment Business Act, 2005 (IBA) who deal in securities of the parties to the bid 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.

CONTRIBUTOR DETAILS



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Areas of practice. M&A; private equity; banking and finance.

Recent transactions

- Advising Intoll Group in relation to its AUD3.4 billion acquisition by Canadian Pension Plan Investment Board.
- Advising Continental Gold Limited in relation to its amalgamation with Cronus Resources Ltd and the subsequent listing of the amalgamated company on the Toronto Stock Exchange.
- Advising Macquarie Communications Infrastructure Group in relation to its AUD2.2 billion acquisition by the Canadian Pension Plan Investment Board.



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Areas of practice. M&A; private equity; banking and corporate finance.

Recent transactions

- Advising Cable & Wireless Communications plc in connection with the sale of its Bermuda operations to Eastlink International Holdings, Inc, part of The Bragg Group, the leading Canadian-based cable and telecommunications provider.
- Advising National Australia Bank Limited in connection with acquisition financing provided to Equity Partners Infrastructure Company No. 1 Limited to enable it to acquire a 17.49% stake in Moto International Holdings Limited, the UK's leading motorway service operator, and subsequent restructuring.
- Advising BearingPoint, Inc in connection with Bermuda law corporate advice relating to the divesture of certain international subsidiaries and assets.