

# Three laws to nurture business

Natasha Scotland and Neil Horner of Attride-Stirling & Woloniecki look at general offers, schemes of arrangement and amalgamations

**B**ermuda company law provides an ideal framework for conducting corporate takeover activity. Three mechanisms are available under the Bermuda Companies Act, 1981 (the Act), which can be used to acquire control of a Bermuda company.

## General offers

The first alternative available to a prospective acquirer (offeror) of a Bermuda company is to make an offer to all of the shareholders of the relevant target company. Where the offer is approved by the holders of not less than 90% in value of the shares which are the target of the offer, within four months of the offer having been made, the offeror can compulsorily acquire the shares of dissenting shareholders. In calculating the 90% threshold, shares of the offeror, its nominees or subsidiaries cannot be counted.

Where the shares held by the offeror, and its nominees or subsidiaries are greater than 10% of the issued shares in the target company, the offer must also be accepted by not less than 75% of those members whose shares are the subject of the offer. Within one month of the date on which notice of the offer is received, a dissenting shareholder may apply to the court for an order on whatever terms the court thinks fit.

The offeror could also be required to acquire the remaining shares of the company under the Act where the shares acquired in pursuance of the offer reach 90%. The target company in such an instance is required to tell the holders of the remaining shares who have not assented to the offer that the threshold has been reached, within one month of the date of the transfer of the shares to the offeror.

## Schemes of arrangement

A scheme of arrangement or a scheme of reconstruction is also a useful mechanism to effect a merger arrangement. It is essentially a court-approved agreement between the company and its shareholders or creditors that can also be used to effect mergers and amalgamations and can also alter shareholder or creditor rights.

Under this mechanism the target company could propose an arrangement to its shareholders and on the application of the company or the members, the court will order a meeting of the members to approve the

arrangement. At the meeting, if a majority in number representing 75% in value of the shares voted agree to the arrangement, the arrangement will be sanctioned by the court. This quantification applies to each class of shares. This may be a preferential option when it comes to privatisation of a Bermuda company particularly because the threshold for shareholder approval is significantly less than that required under Bermuda law for a general offer.

Procedurally, along with the notice summoning the meeting of the members to approve the arrangement, a statement explaining the effect of the arrangement must also be sent to the members of the company. The statement should contain details of the proposed arrangement and in particular state any material interests of the directors of the company and the effect of such interests on the arrangement.

The scheme may be sanctioned by the court providing for the transfer of shares by the transferee company to the relevant acquirer, or an order can be made in relation to persons who dissent from the arrangement.

## Amalgamations

This mechanism involves two or more companies merging and continuing as one company. Pursuant to the Act, the effect of this is that the property of each amalgamating company becomes the property and liabilities of the amalgamated company. Existing causes of action and claims either for or against each amalgamating company are also unaffected.

Procedurally, each amalgamating company would enter into an amalgamation agreement which should set out the provisions that must be included in the memorandum of the company, the name and address of each

proposed director of the amalgamated company, and the manner in which the shares of each amalgamating company are to be converted into shares or other securities of the amalgamated company.

The amalgamation agreement must be submitted to the shareholders of each amalgamating company. The threshold for approval of the amalgamation is 75% of the shareholders voting at the special general meeting at which meeting the quorum must be at least two persons holding or representing by proxy more than one-third of the issued shares of the company. But this threshold is subject to the provisions of the amalgamating company's bye-laws relating to general meetings. It can therefore be reduced if the target company's bye-law provisions can be amended by simple majority to incorporate these amalgamation considerations in relation to thresholds for meetings.

Dissenting shareholders can apply to the court within one month of the notice convening the special general meeting to approve the amalgamation, to have the court appraise the fair value of their shares. The court, within one month of appraising the fair value of any shares, can order that dissenting shareholders be paid an amount equal to the value of their shares as appraised by the court.

This mechanism, which can be utilised by two or more Bermuda-exempted companies, Bermuda exempted companies and foreign companies continuing as exempted companies, and Bermuda exempted companies and foreign companies continuing as foreign companies, is attractive given the potential for the acquirer to lower the approval threshold for the amalgamation from 75% to a simple majority of the shareholders. It is also attractive given that no court approval is required. Additionally although they can apply to the court for an appraisal of the value of their shares, dissenting shareholders are not statutorily empowered to prevent the amalgamation.

## Conclusion

Bermuda's legislative framework has created a business environment that nurtures and sustains free enterprise supported by informed and appropriate regulation and necessary infrastructure. With take-private transactions playing a key role in equity markets, the three options provided by the Act leave Bermuda well equipped to deal with market demands.

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