



10 Things to Know about M&A in Bermuda

By Stephanie Paiva Sanderson, Corporate Attorney

1. What are the most common ways to acquire a private company in Bermuda?

In Bermuda, the most common ways to acquire a private company are through one of the following mechanisms:

1. Amalgamation pursuant to the Companies Act 1981
2. Merger pursuant to the Companies Act 1981
3. A purchase of the shares or substantially all of the assets of the company

2. What are the most common ways to acquire a public company in Bermuda?

These are the four most common ways of obtaining control of a public company in Bermuda:

1. Amalgamation pursuant to the Companies Act 1981
2. Merger pursuant to the Companies Act 1981
3. Court Sanctioned Scheme of Arrangement
4. Takeover offer

Hostile bids are also permitted in Bermuda but are not typical.

3. What type of entities are typically involved?

Bermuda law allows for private acquisitions by both Bermuda entities and foreign entities although the buyer is ordinarily a foreign limited liability company acquiring a Bermuda exempted limited liability company.

4. What is the difference between an amalgamation and a merger under Bermuda law?

In Bermuda, the amalgamation of two or more companies and their continuance as one entity is a well-established concept. However, Bermuda company law was fairly recently updated to allow for mergers, which is the business combination used in the US and the UK.

The main difference between a merger and an amalgamation is that an amalgamation involves the convergence of the two amalgamating companies and their continuance as a "new" amalgamated company. As a result of an amalgamation, the amalgamated company owns all of the assets, and assumes all of the obligations, of each of the amalgamating companies. A merger, however, involves the merging of one company into another resulting in a vesting of assets and liabilities of the acquisition company into the "surviving company".

5. Is there stamp duty payable on an amalgamation or merger?

There is no stamp duty payable in relation to amalgamations or mergers in Bermuda.

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6. What is the most common way in which acquisitions are effected in Bermuda?

The most common way in which acquisitions are effected in Bermuda is by way of amalgamation and particularly through a triangular structure. This type of transaction typically involves the buyer establishing a subsidiary company in Bermuda (Acquisition Vehicle) which amalgamates with the company to be acquired (Target Company). The two companies then continue as one amalgamated company, in the form of the Acquisition Vehicle.

Shareholders of the Target Company may receive consideration in the form of cash, shares or a combination of both.

Unless the bye-laws of the company 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 his shares (Dissenting Shareholder) can, within one month of the notice of the meeting of the shareholders (SGM Notice), apply to the Bermuda courts for an appraisal of the fair value of his shares. Such an application would not prevent the amalgamation from taking place. Following an appraisal, the Target Company can choose to either pay 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 that the:

- Target Company and the buyer's Acquisition Vehicle continue in existence as one company.
- Amalgamated Company owns the property of both the Target Company and the Acquisition Vehicle which vests automatically by operation of law.
- Amalgamated Company continues to be liable for the obligations of both the Target Company and the Acquisition Vehicle and any existing causes of action may continue to be prosecuted by or against the Amalgamated Company.
- Any conviction, ruling, order or judgment in favour of or against the Target Company or the Acquisition Vehicle prior to the amalgamation occurring can be enforced by or against the Amalgamated Company.

7. What are the typical documents for an amalgamation or merger in Bermuda?

The main acquisition documents on an amalgamation or merger would typically include:

- An agreement and plan of amalgamation or merger setting out the terms on which the amalgamation or merger is to be effected.
- An amalgamation or merger agreement.
- Transaction-specific agreements (as applicable).

8. What are the main features of a share purchase in Bermuda?

Share purchase transactions in Bermuda provide a straightforward acquisition process and the transfer relates only to the shares of a company so there is no change to the entity itself.

The Companies Act 1981 does not impose any restrictions on the transfer of shares in a company but company bye-laws and/or shareholders' agreements (if any) may contain, *inter alia*, restrictions on share transfers, provisions affecting the right to grant security interests over shares, drag-along or tag-along rights.



Stamp duty may be payable on the share purchase of a local Bermuda company (i.e. one that carries on business in Bermuda and is usually at least 60% owned by Bermudians).

9. What are the typical documents for a share or asset purchase in Bermuda?

The main acquisition documents on a share or asset purchase include:

- A share or asset purchase agreement (typically prepared by the buyer).
- A disclosure letter or schedules qualifying the representations and warranties (typically prepared by the seller).
- Conveyance documents (typically prepared by the buyer) including:
 - share transfer form; and
 - assignment/assumption agreements for certain assets or liabilities.
- Employment/consulting agreements with key executives/employees (typically prepared by the buyer).
- Change of control consents (if applicable).
- Release of security documentation (if applicable).
- Any transitional service agreements that are required (specific to the transaction).

10. What documents are available in the public domain?

The following company information is publicly available in Bermuda:

1. At the Registrar of Companies:

- the Certificate of Incorporation and Memorandum of Association of a Bermuda incorporated company;
- the address of the registered office;
- any prospectus or offer document required to be filed pursuant to the Companies Act 1981;
- any registered charges against the company; and
- any other filings required pursuant to the Companies Act 1981.

Recent changes to Bermuda company law will also require companies from the end of 2016 and thereafter to file directors' information with the Registrar of Companies.

2. At the Registry of the Supreme Court: legal proceedings and judgments.

3. At the Bermuda Stock Exchange: published accounts and auditors reports and any other filings and announcements as filed with the Bermuda Stock Exchange

4. At the Registered Office:

- the register of directors and officers setting out names and addresses;
- the register of members setting 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.



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