

POSSIBLE TRANSACTION STRUCTURES FOR THE TAKEOVER OF A BERMUDA-INCORPORATED COMPANY ("TARGET")

SUBJECT	POSSIBLE TRANSACTION STRUCTURES		
	(1) Amalgamation/ Merger	(2) Scheme of Arrangement	(3) Voluntary Offer followed by Compulsory Acquisition
Structure	<p>Offeror forms a wholly owned acquisition vehicle in Bermuda (the "Acquiring Co"), which will then enter into an amalgamation or merger agreement with the Target. Shares in the Target held by the existing shareholders will be cancelled in consideration of the receipt of cash or securities from the offeror. If a merger is chosen, the Acquiring Co and the Target will merge, with the Target being the "surviving company", pursuant to Section 104H of the Act. If an amalgamation is chosen, Acquiring Co and Target will continue as one amalgamated company (the "Amalgamated Company").</p> <p>The Target/ the Amalgamated Company then becomes the wholly owned subsidiary of the offeror. The assets and liabilities of each of the Target and the Acquiring Co will become the assets of the "surviving company" or the Amalgamated Company, depending on whether the amalgamation route or the merger route is chosen.</p>	<p>Offeror and Target enter into an agreement pursuant to which the Target effects a scheme of arrangement (the "Scheme") under Sections 99 to 102 of the Companies Act 1981 of Bermuda (the "Act"), for the offeror to acquire all of the Target's outstanding shares.</p>	<p>A voluntary bid (the "Voluntary Offer") to all shareholders of the Target is launched by the offeror, and an irrevocable undertaking from the substantial shareholder(s) of the Target that they will accept the Voluntary Offer made to him/them is obtained by the offeror.</p> <p>Upon obtaining acceptances for the offer of 90% in value of the remaining shares in the Target, the offeror can compulsorily acquire the shares of the minority shareholders of the Target under Section 102 of the Act.</p>
Key requirements/ conditions	<p><u>Approval requirements</u></p> <p>Pursuant to Section 106 of the Act, the amalgamation or merger is deemed to have been adopted when the following conditions are</p>	<p><u>Approval requirements</u></p> <p>Pursuant to Section 99 of the Act, the following conditions must be satisfied before a Scheme will</p>	<p><u>Voluntary Offer</u></p> <p>The bye-laws of the Target need to be checked to see if they contain any specific requirements as to</p>

	<p>satisfied by each of the Acquisition Co and the Target:</p> <ol style="list-style-type: none"> 1. Separate meetings of different classes of shareholders have been held; and 2. At each such meeting, a majority representing 75% of those voting at the meeting¹, the quorum of which is two persons at least holding/representing by proxy, more than one-third of the issued shares of the Target or the class, unless the bye-laws of the relevant company provide otherwise², <p>subject to dissenting shareholders' rights to make an application to the Court to appraise the fair value of his shares, the application of which has to be made within one month of giving of the notice convening the shareholders' meeting³.</p>	<p>become effective:</p> <ol style="list-style-type: none"> 1. Separate meetings of different classes of shareholders who are affected by the Scheme have been held (the “Meeting(s)”); 2. At each such Meeting, a majority in number representing at least 75% in value of the shareholders present and voting at such Meeting has approved the Scheme; and 3. The court has made an order sanctioning the Scheme. 	<p>takeovers/voluntary offers.</p> <p><u>Compulsory Acquisition</u>⁴</p> <p>Under Section 102 of the Act, the offeror has the right to compulsorily acquire the shares of the minority shareholders of the Target if the following conditions are met:</p> <ol style="list-style-type: none"> 1. The offeror has made an offer for all the shares; 2. The offeror has received acceptances of at least 90% in value of those Shares (not being shares already held by, or by the nominee of, the offeror or its subsidiaries at the date of the offer); 3. The 90% threshold was reached within four months of making of the offer; 4. The offeror has given notice to any dissenting shareholder that it desires to acquire his shares,
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¹ Each share of an amalgamating or merging company carries the right to vote in respect of an amalgamation or merger whether or not it otherwise carries the right to vote.

² The bye-laws of the amalgamating or merging companies may reduce the threshold for shareholder approval of an amalgamation or merger to a simple majority. The merger process was introduced into Bermuda in 2011. Whilst many companies' bye-laws reduced the voting threshold in the case of an amalgamation, some were not updated following the introduction of the merger process so it is possible that an amalgamation may require a simple majority whilst a merger may require a 75% majority. If this is the case an amalgamation may be preferred over a merger.

³ Within one month of the Court appraising the fair value of any shares, the company shall be entitled either to pay the dissenting shareholder an amount equal to the value of his shares as appraised by the Court or terminate the amalgamation.

⁴ Another compulsory acquisition regime is also available under Section 103 of the Act, whereby the holders of 95% of shares or any class of shares in a company (the “**Majority Holder(s)**”) may give notice to the remaining shareholders or class of shareholder, of the Majority Holder(s)'s intention to acquire their shares on the terms set out in the notice. The Majority Holder(s) must offer the same terms to all the remaining shareholders. Upon such notice being issued, the Majority Holders can compulsorily acquire the minority shareholdings, subject to the minority shareholders' rights to apply to the Court for the value of their shares to be appraised. In such case, the majority shareholders will be entitled to acquire the minority shares at the price fixed by the Court.

	After the amalgamation or merger has been adopted, the “surviving company” of the merger or the Amalgamated Company shall on application be registered by the Registrar of Companies in Bermuda (the “Registrar”) and a certificate of amalgamation or merger issued to the Amalgamated Company or the “surviving company” of the merger. The amalgamation/merger shall take effect on the date of the certificate.		within two months from the date on which the acceptances as set out in (2) is obtained; and 5. the Court has not, on an application of a dissenting shareholder (which has to be made within one month from the notice served by the offeror under (4)), ordered otherwise.
Procedure	<p>Main steps involved are set out below:</p> <ol style="list-style-type: none"> 1. Acquiring Co and the Target enter into an amalgamation or merger agreement. The amalgamation or merger agreement needs to contain such information as prescribed under the Act; 2. The directors of each amalgamating or merging company approves the amalgamation and convenes their respective shareholders' meeting. The notice convening the shareholders' meeting must be accompanied by a copy or summary of the amalgamation or merger agreement, and state the fair value of the shares as determined by each amalgamating or merging company, and that a dissenting shareholder is entitled to 	<p>Main steps involved are set out below:</p> <ol style="list-style-type: none"> 1. The offeror and the Target enter into an agreement to effect the Scheme; 2. The Target applies to court for permission to convene the Meeting(s); 3. The Target convenes the Meeting(s) and despatches the explanatory statement⁵; 4. The Target holds the Meeting(s); 5. The Target reports result of the Meeting(s) to court and apply for court approval of the Scheme; and 6. The Target lodges copy of the order of court with the Registrar. <p>The Scheme does not take effect until a copy of the order has been delivered to the Registrar for</p>	<p>Main steps involved are set out below:</p> <ol style="list-style-type: none"> 1. Offer is made to all shareholders of the Target in accordance with the bye-laws and other applicable takeover provisions; 2. Consideration may involve an exchange offer and/or cash; 3. Offeror can complete compulsory acquisition procedure pursuant to Section 102 of the Act once 90% threshold is reached and shares can be acquired simultaneously with completion of the acquisition provided shareholders have not applied to court (see point 5 above).

⁵ The explanatory statement is a document which is required to be sent to shareholders of the offeree company under Section 100 of the Act. Section 100 says very little about what is required to be in the explanatory statement. It says simply that the explanatory statement must :

- (a) “explain the effect” of the Scheme;
- (b) state any material interests of the directors (whether as directors, shareholders, creditors or otherwise); and
- (c) state the effect of the Scheme on the directors’ interests insofar as that effect is different from the effect of the Scheme on the “like interests” of others.

	<p>be paid the fair value of his shares;</p> <p>3. Each of the Acquiring Co and the Target holds their respective shareholders' meeting(s).</p> <p>4. Upon approval of the amalgamation or merger agreement by the shareholders of each of the amalgamating or merging companies, the amalgamated or surviving company applies to be registered with the Registrar, and a certificate of amalgamation or merger is issued by the Registrar. The application must be accompanied by <i>inter alia</i>, a statutory declaration by an officer of each amalgamating or merging company that establishes to the satisfaction of the Registrar that there are reasonable grounds for believing that –</p> <p>(a) each amalgamating or merging company is and the amalgamated or surviving company will be able to pay its liabilities as they become due;</p> <p>(b) the realizable value of the amalgamated or surviving company's assets will not be less than the aggregate of its liabilities and issued capital of all classes; and either</p> <p>(c) no creditor will be prejudiced by the amalgamation or merger; or</p> <p>(d) adequate notice has been given to all known creditors of the amalgamating or merging companies and no creditor objects</p>	<p>registration.</p>	
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	<p>to the amalgamation or merger otherwise than on grounds that are frivolous or vexatious.</p> <p>The amalgamation or merger takes effect on the date shown on the certificate of amalgamation or merger.</p>		
Advantages and Disadvantages	<p>Advantages:</p> <ol style="list-style-type: none"> 1. Threshold to approve a merger or an amalgamation is substantially less than that required to exercise squeeze out provisions contained in sections 102 and 103 of the Act - see column 3. Target's bye-laws would need to be checked to verify the approval threshold. 2. The assets and liabilities of the Target can be acquired without transferring the assets themselves or the shares of the Target. <p>Disadvantages:</p> <ol style="list-style-type: none"> 1. The disadvantage of an amalgamation over a merger is that the end result of an amalgamation is not as clear as it is with a merger. With a merger, the Target will be selected as the surviving company and the Acquisition Co will be struck off the register. With an amalgamation, both companies "continue" as one company. As a result mergers are often preferred over amalgamations. 	<p>Advantages:</p> <ol style="list-style-type: none"> 1. All shareholders will be bound by the scheme once the scheme is approved by the requisite majority so the Offeror can be certain of obtaining 100% control of the Target. 2. Threshold to approve a scheme is substantially less than that required to exercise squeeze out provisions contained in sections 102 and 103 of the Act - see column 3. <p>Disadvantages:</p> <ol style="list-style-type: none"> 1. Court involvement means that procedure can be more time consuming and costly than other acquisition structures. 	<p>Advantages:</p> <ol style="list-style-type: none"> 1. Transaction structure is more familiar to US and UK shareholders/ professional advisers than a merger or an amalgamation. 2. Structure is flexible in terms of the consideration that can be offered – cash/shares/ combination of both. <p>Disadvantages:</p> <ol style="list-style-type: none"> 1. Procedure is more cumbersome than a merger or an amalgamation. 2. Threshold required to exercise minority squeeze out rights is high so there is less certainty that the offeror will acquire 100% of the Target.