

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay containing text. The foreground shows a paved plaza with a pattern of light and dark tiles.

Bermuda Public Companies: Offshore Companies – Onshore Exchanges

Preface

This publication has been prepared for the assistance of those who are considering the formation of public companies in Bermuda. It deals in broad terms with the requirements of Bermuda law for the establishment and operation of such entities. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

Before proceeding with the incorporation of a public company in Bermuda, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

A copy of the Bermuda Companies Act 1981, as amended, is available on request.

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1. INTRODUCTION

In recent years the number of Bermuda companies listed on stock exchanges around the world has been increasing steadily; hundreds of companies are currently listed. In addition, many more companies have been formed in Bermuda in the last few years with a view to listing on exchanges at a later date.

For some time Bermuda (an overseas territory of the United Kingdom) has had strong commercial ties with Hong Kong (a former British dependency). As a result, many hundred Bermuda companies are listed on the Hong Kong Stock Exchange. A significant number of Bermuda companies access North American capital markets through US stock exchanges.

Bermuda companies are listed on a number of other stock exchanges ranging from the Stock Exchange of Singapore to the Toronto Stock Exchange to the London Stock Exchange.

Why Bermuda?

(a) Tax

At the date of this publication, Bermuda corporate income tax (CIT) applies only to certain Bermuda constituent entities that are members of Multinational Enterprise Groups with consolidated financial statements showing annual revenue of at least 750 million Euros for at least two of the last four fiscal years. For all Bermuda companies which are out of scope of CIT, there is no Bermuda income or profits tax, withholding tax, capital gains tax, capital transfer tax, estate duty or inheritance tax payable by such Bermuda company or its shareholders, other than shareholders ordinarily resident in Bermuda.

(b) Location and Infrastructure

Bermuda's geographical location further contributes to its popularity. The island is approximately 90 minutes by air from New York, and there are regular direct flights from London and other major US cities.

Bermuda has a sophisticated infrastructure and a long history of accommodating international businesses (the first international company having been incorporated by Conyers in the 1930s). Approximately 75% of the Fortune 100 companies maintain a presence in Bermuda. Telecommunications services are very well developed, and there is a high level of professional services available (including representation on the Island by all of the major international accounting firms).

(c) Political Stability and Legal System

Bermuda has a stable political and social environment reflecting its status as an internally self-governing British territory with a tradition of parliamentary government dating from 1620.

Bermuda's legal system is based upon that of the United Kingdom. Decisions of the English and other commonwealth courts are highly persuasive in Bermuda. The Supreme Court of Bermuda is the first instance court in Bermuda, exercising unlimited jurisdiction. An appeal lies, as a matter of right, from a decision of the Supreme Court to the Court of Appeal for Bermuda and thereafter, in more limited circumstances, to the Judicial Committee of the Privy Council in the United Kingdom. Bermuda's corporate law is flexible and is largely based upon the corporate law of the United Kingdom, although it also includes provisions that are derived from other commonwealth jurisdictions or that are unique to

Bermuda. The key corporate legislation, the Companies Act 1981 (the “**Act**”), is amended regularly to keep pace with international commercial developments.

While the Act does not distinguish between public and private companies, certain provisions that are of particular relevance to public companies (relating, for example, to offers of securities) have been carefully drafted so as not to conflict with and/or to correspond to securities regulation by foreign authorities (such as the United States Securities and Exchange Commission (the “**SEC**”). Further, as discussed in more detail below, Bermuda corporate law provides a number of flexible options for redomestication and restructuring which are very useful in the public company context.

(d) Balanced Regulation

Bermuda’s Government and business community have traditionally worked together to ensure that the reputation and integrity of the jurisdiction are preserved without the need for overly burdensome regulation. This system of “balanced regulation” is generally characterised by a significant level of cooperation between the business community and Government.

(e) Intangibles

Finally, in addition to (and, to some extent, as a result of) the benefits outlined above, there appear to be certain intangible benefits of establishing in Bermuda. Among other things, Bermuda’s reputation and profile in the offshore business community seems to offer a higher level of comfort to investors than that afforded by other offshore jurisdictions. Bermuda practitioners have considerable experience with the requirements of onshore regulators and exchanges and, in turn, the SEC, the NYSE and other regulatory authorities and major stock exchanges around the world deal with Bermuda companies on a regular basis and appear to be satisfied with the Island’s legal system and regulatory environment.

Existing Bermuda Public Companies

Given Bermuda’s highly developed insurance and reinsurance industry, it is not surprising that a number of publicly quoted insurance holding companies are incorporated in Bermuda. Bermuda is also a growing centre for public companies in a wide variety of industries ranging from shipping and aircraft leasing to oil and gas services, construction, telecommunications and biotechnology.

2. ESTABLISHMENT IN BERMUDA

There are five principal ways in which a Bermuda public company can be established:

- (1) incorporation of a new Bermuda company followed by an IPO;
- (2) spin-off of shares of a Bermuda company;
- (3) share swap of an existing foreign public company’s shares for shares of a Bermuda company;
- (4) redomicile of an existing foreign public company to Bermuda by way of a continuation or amalgamation; and
- (5) triangular amalgamation or merger.

Incorporation

The first method is relatively self-explanatory. The incorporation process in Bermuda is quite simple and has been streamlined in recent years. A company can be incorporated with a view to an immediate public offering or it can be incorporated with a view to having its shares publicly listed at some time in the future. The latter option has been common in recent times, particularly in the biotech industries.

Spin-off

An existing public company (whether incorporated in Bermuda or another jurisdiction) may choose to incorporate a new Bermuda subsidiary, and then distribute the shares of that subsidiary to its shareholders. The subsidiary generally lists on a stock exchange effective upon the distribution. A spin-off generally is effected where the existing public company decides for commercial reasons that a division of its lines of business is desirable, and it is generally preceded by an internal restructuring of assets, or some form of corporate demerger. A spin-off must accord with the rules governing distributions to shareholders in the jurisdiction of incorporation of the existing public company.

Share Swap

Where an existing public company incorporated in another jurisdiction wishes to move to Bermuda, one method is to interpose a new Bermuda holding company between the foreign company and its public shareholders. This may be achieved by way of a share swap, whereby the public shareholders transfer their shares of the foreign company to a newly incorporated Bermuda company in exchange for shares of the Bermuda company. The result is that the foreign company becomes a wholly owned subsidiary of the Bermuda company, which is then publicly owned (by the same shareholders that originally owned the foreign company). Contemporaneously with the share swap, the shares of the foreign company would be delisted and the shares of the Bermuda company would be listed on the foreign exchange (which need not be the same exchange as the original public company was listed on).

Theoretically, the share swap could be achieved by a series of separate agreements between each shareholder and the newly incorporated Bermuda company. In practical terms, however, this would not be realistic in respect of a publicly owned company. As such, it is necessary to ensure that the laws of the jurisdiction of incorporation of the foreign company provide a mechanism for binding any shareholders who refuse (or simply fail) to approve such a transaction if the transaction has been approved by a threshold majority. For example, a number of inversions involving UK and Hong Kong companies have been achieved pursuant to court sanctioned schemes of arrangement under English and Hong Kong law.

Continuations or Amalgamation into Bermuda

Alternatively, an existing public company incorporated in another jurisdiction may wish to change its jurisdiction of incorporation to Bermuda without terminating its corporate existence or requiring the insertion of a new holding company. Assuming it is possible under the laws of its present jurisdiction of incorporation, such a company can move to Bermuda by using the continuation or amalgamation process under Bermuda law.

(a) Continuation

The continuation process allows a company to migrate to Bermuda without interrupting its corporate existence. In other words, a company incorporated outside Bermuda can continue into Bermuda as the same entity and be registered as a Bermuda company along with all of the assets and obligations of the company prior to its continuation.

This process requires that the laws of the company's present jurisdiction of incorporation allow the company to continue to Bermuda. Some jurisdictions impose requirements such as majority shareholder approval.

(b) Amalgamation

Bermuda law allows a company incorporated in another jurisdiction to continue its existence in Bermuda by amalgamating with a Bermuda company (which can be a wholly owned subsidiary of the foreign company). Unlike the merger procedure available under the Act, an amalgamation under Bermuda law does not involve the termination of the existence of either company. Rather, in the case of an amalgamation, both companies continue as one company in the form of the amalgamated company - a common analogy is that of two rivers meeting and continuing as one. The assets and liabilities of each company become the assets and liabilities of the amalgamated company. From a Bermuda law perspective, many of the same considerations relevant to the continuation of a foreign company into Bermuda will be relevant to the amalgamation of a foreign company into Bermuda.

Triangular Amalgamation or Merger

Finally, it is possible for an existing public company incorporated in another jurisdiction to amalgamate or merge with a special purpose company incorporated in the same jurisdiction but owned by a newly incorporated Bermuda company on terms that provide for the public shareholders to receive their amalgamation/merger consideration from the special purpose company's Bermuda parent.

Typically, a Bermuda purpose trust (which can be established for commercial purposes, rather than for the benefit of beneficiaries) would be established for the purpose of facilitating the transaction. The purpose trust would incorporate a Bermuda holding company (which is ultimately to be the public holding company) which would in turn incorporate the special purpose company. (While it raises additional complexities, the same objective can sometimes be achieved by having the existing public company incorporate the Bermuda holding company and the special purpose company as subsidiaries.)

The special purpose company and the existing public company would then amalgamate or merge under the laws of the jurisdiction of their incorporation. The terms of the amalgamation or merger would provide that all shares of the existing public company would be cancelled, and as consideration the public shareholders would receive shares in the Bermuda holding company. Immediately thereafter, the shares in the Bermuda holding company owned by the purpose trust (or the amalgamated/merged company) would generally be cancelled, with the effect that the public shareholders would own all of the shares of the Bermuda holding company, which in turn would own all of the shares of the amalgamated/merged company.

3. RELATED LEGAL ISSUES

As has already been noted, Bermuda's corporate law is largely based on English corporate law. While specific legal provisions may vary between the two jurisdictions, the basic concepts are, to a large extent, very similar. Consequently, these concepts will be, to a somewhat lesser extent, similar to corresponding concepts in North American jurisdictions. In addition, the recent increase in the number of Bermuda companies listed on US exchanges has brought with it an increase in the use by Bermuda public companies of a number of corporate tools frequently used by US public companies. These include blank check preferred stock, staggered boards and poison pills.

There are a few aspects of Bermuda law and, in particular, the accommodation that has been made for foreign law and practice, which warrant specific mention.

Free Transferability of Shares

Under Bermuda law, a Bermuda company is not permitted to issue shares to non-residents of Bermuda, and its shares cannot be transferred to non-residents, without the prior approval of the Bermuda Monetary Authority. This restriction, however, which would otherwise be unworkable for a publicly traded company, has been eliminated by the Bermuda Monetary Authority's blanket permission for the issuance and free transferability of all shares of a publicly listed company as long as the company maintains its listing on an appointed stock exchange (which includes most of the world's major exchanges).

Economic Substance

Pursuant to the Economic Substance Act 2018 (as amended) of Bermuda (the "**ES Act**") and related regulations effective as of January 1, 2019, a registered entity other than an entity which is resident for tax purposes in certain jurisdictions outside Bermuda (i.e. not designated by the European Union as a non-cooperative jurisdiction for tax purposes; any such entity, a "non-resident entity") that carries on as a business any one or more of the "relevant activities" referred to in the ES Act must comply with economic substance requirements. The ES Act requires in-scope entities which are engaged in such "relevant activities" to be directed and managed in Bermuda, have an adequate level of qualified employees in Bermuda, incur an adequate level of annual expenditure in Bermuda, maintain physical offices and premises in Bermuda and perform core income-generating activities in Bermuda. The list of "relevant activities" includes carrying on any one or more of: banking, insurance, fund management, financing and leasing, headquarters, shipping (defined to include passenger cruise ships), distribution and service centres, intellectual property and holding entities.

Blank Check Preferred Stock

Traditionally, the rights, privileges and conditions attaching to the shares of a Bermuda company are established by the company's shareholders. However, it is possible for a Bermuda company's bye-laws to allow them to be established by the company's board in respect of a particular class of shares. Such shares, known in the US as "blank check preferred stock", can provide a company's board greater flexibility in raising finance or deterring a hostile bidder.

Staggered Board

One of the most basic forms of defence to a hostile takeover is the staggered board. The Act allows for a company's bye-laws to establish any manner in which the shareholders are to elect or appoint the company's directors and to set any term for such directors to serve. This allows the bye-laws to stipulate that only a percentage of the company's directors are to be elected each year. Further, the bye-laws may provide that the board (rather than the shareholders) may fix the size of the board from time to time, and appoint directors to fill any vacancies resulting from an increase in the size of the board. Since Bermuda law allows the bye-laws to restrict the shareholders' ability to remove directors, these provisions can be highly effective tools to discourage a hostile takeover.

Poison Pill

Similarly, the US practice of adopting poison pill rights plans is designed to encourage potential acquirers to work with a company's board. While perhaps not as common among Bermuda companies as among US companies, poison pills are nevertheless adopted by some boards of Bermuda public companies. This is at least partly due to the fact that the validity of poison pills has been considered by the Supreme Court of Bermuda in *Stena Finance v. Sea Containers*, which appears to be the only decision of a Commonwealth court on this issue. In that case the Court confirmed that the adoption of such a rights plan by the board of a Bermuda company could constitute a "proper and constitutional" exercise of the board's powers.

Chapter 11 Protection

One further element of US law that has found its way into Bermuda practice relates to the restructuring protection available under Chapter 11 of the US Bankruptcy Code. Chapter 11 is a tool used by US companies to gain the protection of the US Bankruptcy Courts without necessarily proceeding to a full liquidation of the company. Bermuda law does not have an equivalent of "debtor in possession" proceedings such as administration in the UK or Chapter 11 in the US. There have been a number of examples, however, of Bermuda public companies with a sufficient nexus to the United States enabling them to file for protection under Chapter 11. In these cases, the Chapter 11 proceedings have often been combined with proceedings in the Bermuda Courts to enable the company to effectively reorganise itself in much the same way that it could have reorganised had it been a US company.

4. SUMMARY

While the phenomenon of publicly quoted Bermuda companies is not a new one, there has been a significant increase in the number of Bermuda companies accessing capital markets over the past several years through stock exchanges around the world. More specifically, there has been a significant increase in the number of Bermuda public companies listed on US stock exchanges. As one would expect, this trend has led to an increased interplay between the law and practice of Bermuda and that of the various on-shore jurisdictions, with the result that the number of differences between Bermuda public companies and on-shore public companies has been reduced. As more Bermuda companies continue to be listed on the world's major stock exchanges, this dynamic will undoubtedly continue.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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