



Bermuda Corporate Update
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Ram Re House, 2nd Floor
46 Reid Street
Hamilton HM 12
Bermuda

Telephone: 441 295-1593
Facsimile: 441 295-8555
Website: www.milligan.bm
www.richmond.bm

Senior Legal Team:

Lynda Milligan-Whyte
Senior Partner
lmw@milligan.bm

Kulandra Ratneser
Senior Counsel
kratneser@milligan.bm

Kevin G. Bean
Senior Associate
kbean@milligan.bm

Paul A. Harshaw
Senior Associate
paharshaw@milligan.bm

Consultants:

Arthur Hodgson
ahodgson@milligan.bm

William H. Gravely
wgravely@milligan.bm

HSBC TO PURCHASE THE BANK OF BERMUDA LIMITED

On October 28th, 2003 the Bank of Bermuda Limited announced that it has entered into an agreement under which the Bank will be acquired by HSBC Holdings plc ("HSBC"), the second largest financial institution in the world. The agreement has been approved by the Board of Directors of the Bank of Bermuda Limited who will be recommending that the proposed acquisition be approved by the shareholders.

Under the terms of the agreement, shareholders of the Bank of Bermuda Limited will receive a total of US\$45 per share in cash, comprising US\$40 from HSBC and BD\$5 as a special dividend from the Bank of Bermuda Limited. This total of \$45 per share represents a 16.3% premium over the Nasdaq's average closing price for the three months prior to October 24th, 2003.

The proposed acquisition is still subject to a number of conditions including shareholder approval and Bermuda Government consent.

It is the intent of both parties to complete the transaction by the end of the first quarter of 2004. The CEO of the Bank of Bermuda Limited indicated that the said bank will remain headquartered in Bermuda and continue to operate under its own brand. It will also retain its own Board of Directors and management.

Management Team:

Michael Furbert
Director of Finance
mfurbert@richmond.bm

Laquita Bell
Accountant Administrator
lbell@richmond.bm

Shavonna Clayton
Senior Corporate Administrator
sclayton@richmond.bm

Sharron Stewart
Incorporation and Corporate
Administrator
sstewart@richmond.bm

Support Team:

Brian Myrie
Pupil
bmyrie@milligan.bm

Dianne Durham
Executive Secretary/Receptionist
ddurham@milligan.bm

Sally Edwards
Executive Secretary
sedwards@milligan.bm

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Merrill Lynch has acted as financial advisor to the Bank of Bermuda's Board of Directors and issued a fairness opinion in connection with the transaction.

HSBC Group Chairman, Sir John Bond, said *"This is an exciting and important development. We have long respected Bank of Bermuda, whose management shares HSBC's values and international outlook....."*.

The Chairman of the Bank of Bermuda Limited, Joseph Johnson, said *"This is an important, forward-looking move that will enhance our service to clients and ensure our shareholders are rewarded for the value created by our successful growth into a worldwide financial institution."*

The Bank of Bermuda Limited was founded in 1889 and employs some 3,000 people in 13 countries and territories and has assets of US\$11.8 billion. The Bank of Bermuda is engaged in four principal areas of activity:-

- **Global Funds Services**

Provides offshore trust, custody and administration services to the investment fund industry.

- **Private Client Services**

For high net worth individuals with trust and beneficiary services, personal financial advice and integrated management of their financial affairs.

- **Community Banking**

The Bank of Bermuda provides a comprehensive range of banking, credit and investment products in Bermuda to its clients.

- **Corporate Banking**

The Bank of Bermuda provides cash management services to both local and international businesses.

Reasons For Incorporating In Bermuda

- § Respected International Business jurisdiction (built on the principle of "know your customer");
- § Tax Neutral Business Environment (no income, capital gains, transfer or withholding taxes);
- § Business sensitive and well established Legal System (based upon English common law);
- § Minimal Government Annual Reporting except for Restricted Businesses;
- § Access to Capital Markets (through Bermuda Stock Exchange listings);
- § Access to one of the most successful Insurance/Reinsurance Markets in the world;
- § Reliable Banking System;
- § Efficient Support Services (legal, accounting, management, corporate and trust services);
- § State-of-the-Art Global Internet Services and Telecommunications (connecting Bermuda to the world); and
- § Friendly yet efficient business environment for holding Company Meetings.

BERMUDA AS THE JURISDICTION OF CHOICE FOR JOINT VENTURES

General

Assuming Bermuda is the jurisdiction of choice and a company is the vehicle of choice for international joint ventures, regulation of the joint venture will essentially be by the agreement negotiated and the provisions of the Bermuda Companies Act, 1981 ("Bermuda Companies Act") applicable to the company. The Bermuda Companies Act regulates, inter alia, 'local companies' and 'exempted companies'. In the context of an international joint venture, the parties would elect to carry on the venture through an 'exempted company', similar in nature to what is referred to as international business companies or IBCs in other offshore jurisdictions, since an 'exempted company' is one which is exempted from the requirements of the Bermuda Companies Act which are applicable to 'local companies'.

The Bermuda Companies Act is a modern corporate statute with the most recent modernization amendments completed in July of 1996 adding further flexibility to the use of exempted companies in the international context. Regulation of exempted companies is not onerous and the primary regulatory steps are prior to incorporation and include:-

Filing with BMA

Filing an application with the Bermuda Monetary Authority ("BMA") to obtain permission to incorporate the exempted company. The application would disclose who the proposed beneficial shareholders will be and each beneficial shareholder would be required to provide a Personal Declaration form which is submitted to the BMA and all information filed with the BMA is protected by statutory confidentiality and such information is not accessible to public scrutiny.

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Exemption from Taxes

Exempted companies are prohibited from carrying on business within Bermuda (but may carry on the international business from Bermuda) or holding any real property within Bermuda without prior governmental approval.

Under current Bermuda law, there is no Bermuda income tax, withholding tax, capital gains tax or capital transfer tax payable by exempted companies with respect to its income. It is possible to obtain an undertaking from the Minister of Finance in Bermuda under the Exempted Undertakings Tax Protection Act 1966 of Bermuda (as amended) that, in the event of there being enacted in Bermuda any legislation imposing tax computed on profits or income, or computed on any capital asset, gain or appreciation, or any tax in the nature of estate duty or inheritance tax, such tax shall not, until the year 2016, be applicable to the exempted company, except insofar as such Bermuda tax may apply to persons ordinarily resident in Bermuda for foreign exchange control purposes who hold shares, debentures or other obligations of the exempted company or such tax as may be applicable to any property within Bermuda leased or let to the exempted company.

Similarly, under current Bermuda law, there is no tax payable in Bermuda by the exempted company on either the issuance of notes, shares, debentures or other similar securities and there is no tax payable in Bermuda on the exempted company on the repayment of such notes or debentures or on a return of capital or distribution on shares of the exempted company.

Unlike many other jurisdictions, Bermuda will permit the joint venture exempted company to deal in any currency (other than Bermuda currency) and Bermuda's exchange control legislation will not hinder the conduct of the joint venture's business. Similarly, there are no restrictions on foreign ownership of a Bermuda exempted company in that incorporation of an exempted company in itself is an exemption from the normal Bermuda rule that requires at least 60% Bermudian ownership of a local company.

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Summary of Bermuda Companies Act Provisions

In order to assist advisors considering Bermuda as the base for the joint venture charter, we have summarized some of the more important provisions of the Bermuda Companies Act to assist foreign advisors in order to facilitate a comparative analysis with the client's home jurisdiction. The provisions summarized below are subject areas of common interest to joint venture participants and the discussion below assumes the joint venture company is an exempted company governed by the Bermuda Companies Act:-

(i) Voting Rights

The Bermuda Companies Act provides that proposals or questions tabled at a general meeting of shareholders in a general meeting shall be decided by a simple majority of votes or by such greater majority as may be specified in the joint venture company's bye-laws. Each shareholder is entitled to one vote for each share held which may be cast in person at the meeting or by proxy. Although voting at general meetings in most instances is done on a show of hands, a poll may be demanded by (a) the Chairman of the meeting, (b) at least three shareholders present in person or represented by proxy, (c) any shareholder or shareholders present in person or represented by proxy holding between them 10% of the total voting rights of all the shareholders entitled to vote at such meeting, or (d) a shareholder or shareholders present in person or represented by proxy holding shares of the company entitled to vote at such meeting and on which an aggregate sum has been paid-up equal to at least 10% of the total sum paid-up on all such shares entitled to vote.

(ii) Quorum

The number of shareholders required to constitute a quorum at any general meeting shall not be less than two shareholders but the joint venture company bye-laws may provide for any greater quorum in order to ensure a meeting could not be properly constituted without the agreed upon representation from the various joint venture participants.

RICHMOND GROUP LIMITED AND ITS AFFILIATES

Richmond Corporate Services Ltd. - provides corporate administration and compliance services to Bermuda companies, partnerships and trusts.

Richmond Financial Managers Ltd. - provides a wide range of management services to its clients. It can also assist in advising insurance professionals on the Bermuda regulatory environment, particularly the capital requirements, solvency margins and liquidity ratios.

Richmond Investments (Bda) Limited - provides investment advisory services to clients of the Richmond Group of Companies who are institutional and high net worth clients.

Contact:

Lynda Milligan-Whyte
Richmond Group Limited
Ram Re House, 2nd Floor
46 Reid Street
Hamilton HM 12, Bermuda

Tel: 441-295-1593
Fax: 441-295-8555
Email: LMW@richmond.bm

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(iii) Special Meetings

Any shareholder or shareholders holding at least 10% of the paid-up capital of the joint venture company carrying the right to vote at general meetings of the shareholders may requisition the holding of a special meeting of shareholders for the purpose or purposes stated in the requisition. In the event the directors of the joint venture company fail to call a special meeting of the shareholders within 21 days in response to such a requisition, the requisitioning shareholders (or any of them holding more than 50% of the total voting rights of all the requisitioning shareholders) may themselves convene a special meeting, which meeting must be held within 3 months of the date of deposit of the requisition. The Bermuda Companies Act similarly provides an avenue for any shareholder to make proposals at any annual general meeting of a company and to circulate the proposal or proposed resolution. Any shareholder or shareholders holding at least 20% of the total voting rights of the joint venture company could so move such a proposal.

(iv) Telephonic Meetings

The Bermuda Companies Act specifically permits a meeting of the board of directors to be held by means of telephonic, electronic or other communication facility such that all persons participating in the meeting can communicate simultaneously and instantaneously with all others involved in the meeting.

(iv) Written Resolutions

Bermuda's Companies Act provides, subject to certain limitations noted below, that anything which may be done by resolution in general meeting may be done without a meeting and without notice of a meeting if done by written resolution signed by all shareholders who at the date of the written resolution were entitled to attend a general meeting and vote on that resolution. Any such resolution becomes effective on the date that the last signatory executes the resolution. A resolution (a) to remove a director prior to the end of his term of office or (b) to remove an auditor prior to the end of his term of office, may not be accomplished by written resolution and must be done through a properly convened meeting of shareholders.

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(iv) Amendments to Constitutional Document

Bermuda's Companies Act provides a procedure whereby holders of at least 20% of any class of the joint venture company's issued share capital may apply to the Bermuda Supreme Court for an order annulling an alteration or amendment to the joint venture company's Memorandum of Association (i.e.: in some jurisdictions known as the Certificate or Articles of Incorporation) notwithstanding the fact that a resolution has been properly passed by the requisite majority of votes at a meeting of the shareholders. If any such application is made the alteration passed at the meeting of shareholders shall not take effect unless and until confirmed by the Bermuda Supreme Court. Any shareholder or shareholders holding 20% or more of the company's total issued shares or 20% or more of any class of the company's shares have standing to bring such an application. In a joint venture company arrangement such a right could be extremely valuable to a minority joint venture participant to ensure that the basis upon which the original joint venture was framed and entered into is not subsequently altered.

(v) Directors and Alternate Directors

The Bermuda Companies Act provides for the concept of alternate directors which is a mechanism extremely important in a joint venture company structure with joint venture participants from many jurisdictions. It is therefore possible in a situation of multiple co-venturers to ensure that each co-venturer will have a board vote through its designated board nominee or an alternate director should the designated board nominee be unable to attend any particular meeting. The alternate director structure can be put in place at the organizational stage of the joint venture company and an alternate director possesses the same rights, responsibilities and obligations as a director.

(vi) Discontinuance

An exempted company may apply for a consent to be continued in another jurisdiction outside Bermuda as if it had been incorporated under the laws of such other jurisdiction. One of the approval steps required to complete such a discontinuance is the passage of a resolution of the shareholders passed in general

meeting by at least 75% of those voting at such meeting. The Bermuda Companies Act also provides for a special shareholder quorum in this situation (irrespective of what the joint venture company's bye-laws might otherwise provide for quorum purposes) being at least two shareholders holding or representing more than 50% of the issued shares of the joint venture company. It is also important to note that in a discontinuance situation, each share of the company carries a right to vote on the discontinuance whether or not such share carries any other right to vote. An alternate approval can be obtained from the board of directors of the company provided the bye-laws of the company specifically so provide. In addition to various consents to be obtained, conditions to be met and other documentation necessary to complete a discontinuance, it is important to note that the country of export must be a jurisdiction approved by Bermuda for discontinuance purposes.

(vii) Holding of Land in Bermuda

Although exempted companies are not permitted to own land in Bermuda, exempted companies may enter into a lease with a term not greater than 21 years on land in Bermuda. There is no restriction on an exempted company owning land outside of Bermuda.

Asset Protection

In many instances it is absolutely key to the establishment of a joint venture that the assets of the joint venture clearly be out of the reach of litigants. Bermuda is one of the few jurisdictions that has specific legislation permitting the creation of a special purpose trust and such special purpose trusts are useful in terms of corporate structuring for specific purposes such as joint venture operations.

For more information on Joint Ventures or Special Purpose Trust please contact Lynda Milligan-Whyte, Senior Partner at lmw@milligan.bm.

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ESTATE PLANNING – STAMP DUTY ON BERMUDA PROPERTY

Bermuda Domicile

On the death of an individual who had been domiciled in Bermuda just prior to death, an affidavit must be prepared and filed in the Supreme Court setting out the value of the Bermuda Property in that person's estate. Bermuda Property is specifically defined in the Stamp Duties Act to include real estate situated in Bermuda, Bermuda denominated currency and securities and other financial instruments and chattels which are located in Bermuda.

Deductions

In ascertaining the value of an estate for purposes of stamp duty, the following deductions may be made from the gross value of the estate:-

- (a) reasonable funeral expenses;
- (b) the value of any legacy or other benefit to a surviving spouse;
- (c) gifts to registered charities or for purposes which, in the opinion of the Minister of Finance, are charitable;
- (d) all debts or encumbrances incurred or created by the deceased bona fide for full consideration in money or money's worth wholly for the deceased's own use or benefit; and
- (e) reasonable expenses of valuing the property for purposes of stamp duty on the affidavit of value.

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Calculation of Stamp Duty

The stamp duty is determined in respect of the net value of the estate. The first \$50,000.00 is excluded from stamp duty. The next \$150,000.00 of value attracts an ad valorem stamp duty of 5%; the next \$800,000.00 of value attracts an ad valorem stamp duty of 10%; and the remainder of the value attracts an ad valorem stamp duty of 15%. For example, where an estate has a net value \$500,000.00 the stamp duty would be calculated as follows:-

On first \$50,000.00:	\$ Nil
On next \$150,000.00	\$ 7,500.00
On remaining \$300,000.00	<u>\$ 30,000.00</u>
Total Stamp Duty	<u>\$37,500.00</u>

It should be noted here that all other calculations of stamp duty in this article will be based on an assumed net value of property of \$500,000.00. The actual value of the estate property may differ and so the actual stamp duty payable would, accordingly, be different.

Stamp duty is payable only on the value of the Bermuda Property beneficially owned by the deceased. However, if the property or any part of it is left for the benefit of the surviving spouse, then the value of the property or of such part so left for the benefit of the surviving spouse is excluded from the gross value of the estate for purposes of stamp duty. If the deceased has, during his lifetime, disposed of part of the property, then the stamp duty on the value of the property remaining in the deceased's estate will, of course, be lower. If the deceased has, during his lifetime, disposed of all of his property then no stamp duty would be payable on death.

Joint Ownership

Spouses will generally own their real property together as joint tenants. The advantage of joint tenancy is that immediately upon the death of one spouse the surviving spouse becomes the sole owner of the property. No part of the real property will vest in the estate of the deceased spouse.

For stamp duty purposes, the value of the real property is divided by the number of joint tenants existing immediately before the deceased's death and the resulting portion of the value of the property is taken into account for the purpose of calculating the stamp duty payable on the affidavit of value of the deceased's estate.

On the other hand, when real property is owned in tenancy in common, on the death of one of the co-owners, the value of the portion of the real property vested in the deceased immediately prior to his death will be included in the deceased's estate.

In either case, if the whole of the real property in the deceased's estate goes to the benefit of the surviving spouse, no stamp duty is payable on the value of that property.

There are several methods and options available when planning one's estate so as to minimize the costs of stamp duty which will be payable on a deceased person's estate. Careful consideration must be had during the planning process. For more information on the use of such options please do not hesitate to contact the writer. This article is intended as general information and should not be used or substituted for specific legal advice which should be sought when engaging in one's estate planning.

For more information please contact Kevin G. Bean, Senior Associate at kbean@milligan.bm.

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