

CORPORATE

Take Privates

The last few years have been standout years for take private transactions globally – representing the most active years since 2007 - with Bermuda-incorporated listed companies involved in a number of the largest deals, including the matters below in the blue boxes.¹

What is driving the rush to the listco exit ramp? A convergence in the valuations of public companies - particularly in sectors adversely affected by COVID-19 - with their private company counterparts, record levels of private equity dry powder, relative ease (and affordability) of fundraising, increasing activism of minority public company shareholders, geopolitics and regulatory push factors have all played their part.

Much of the focus of take private activity, particularly involving businesses operating in Asia, has been on US-listed companies in

the mid- and small-cap space. With Chinese businesses arguably the principal targets of the US Holding Foreign Companies Accountable Act passed in late 2020, this trend appears likely to continue. However, we also see increased take private activity in Hong Kong and elsewhere.

A number of factors will be relevant to structuring a take private, including: local law and listing requirements; the nature of the proposed acquisition; the proportion of the shares controlled by the bidder group; and anticipated public and independent shareholder take-up. In broad terms, it is more common to see mergers used in the North American markets, whereas a scheme remains de rigueur in Hong Kong.

Apollo and Athene's US\$11.43 billion merger - both Apollo and Athene underwent mergers under both Bermuda and US law as a 'double-dummy' merger transaction

Apollo's US\$2.6 billion acquisition and take private of Aspen Insurance, previously dual-listed in New York and Bermuda

The acquisition and take private of aircraft leasing company, Airastle, in a \$2.4 billion deal involving its de-listing from the NYSE

The HK\$4.6 Billion acquisition of TPV Technology by CEIEC (and its concert parties) and the company's dual de-listing from the Hong Kong and Singapore stock exchanges

The CVC-backed bid for Hong Kong-listed i.T. Limited, announced at the end of 2022

1. Walkers advised on the Athene and Aspen acquisition, one of the acquirors on the acquisition of Aircastle, TPV Technology on certain post-privatisation matters and is acting for the bidder group on the proposed take private of i.T. Limited.

So how do you take a Bermuda listed company private? Bermuda's Companies Act provides three mechanisms:



merger or amalgamation



scheme of arrangement



tender offer and squeeze-out

Most take private proposals have the company's founders to the fore - even if it is private equity underpinning the bid - and they nearly always involve cashing-out the public shareholders, with founders and/or senior management rolling over their shares into the bidding company. In weighing up a take private proposal, it is crucial for the board to ensure that its fiduciary duties are discharged appropriately and independently. This involves considering the bid in the context of what, in the reasonable and objective opinion of the directors, is in the best interests of the company as a whole (including all of its present and future shareholders). The board of directors of a target company is well-advised to establish a special committee of independent directors to consider and negotiate the proposal. Bermuda law does not require active 'go-shop' provisions - as seen in Delaware, for example - requiring the special committee to actively solicit competing bids.

However, it is increasingly common for the deal terms to include a 'fiduciary-out' - permitting the special committee to speak to other potential bidders and ultimately to switch to a competing bid if it is in the interests of the company to do so - and corresponding break fee clauses. Care must be taken to ensure that these provisions are enforceable as a matter of Bermuda law and consistent with market practice.

Although it is difficult to forecast anything with certainty in the current climate, we expect the upward trend of take private transactions to continue throughout 2021. With close to 40 Bermuda companies listed on the NYSE and NASDAQ combined and approximately 20% of companies listed in Hong Kong incorporated in Bermuda, the jurisdiction is certain to remain at the forefront of the take private wave.

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