



Guide to Companies in Bermuda

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PREFACE

This Guide takes into account the Companies Act 1981 (the “Companies Act”) including all of the recent amendments to the Companies Act and is divided into five parts:

- A. Exempted Companies
- B. Overseas (‘Permit’) Companies
- C. Arrangements, Reconstructions and Amalgamations
- D. Mergers and Takeovers
- E. General Information

Under the heading of General Information, we have dealt with such matters as banking facilities in Bermuda, accountants, mutual and mutual fund companies, winding up and other topics.

This Guide is concerned primarily with “exempted companies” and “permit companies”; no reference has, therefore, been made to those provisions of the Companies Act that regulate the carrying on of business by local companies in Bermuda. Broadly speaking, local companies are required to have at least 60% of their issued share capital beneficially owned by Bermudians. Exempted companies are formed primarily for the benefit of non-residents of Bermuda, to enable such persons to carry on business outside Bermuda or with other exempted undertakings in Bermuda. “Exempted”, in relation to an exempted company, implies exemption from, inter alia, the requirement that at least 60% of the equity be beneficially owned by Bermudians.

All references in this Guide to “dollars” or “\$” are to Bermuda dollars. There is parity between the Bermuda dollar and the United States dollar.

It is recognised that this Guide will not completely answer the detailed questions that clients and their advisers may have. It is intended to provide a sketch of Bermuda’s legal and regulatory environment in relation to exempted and permit companies. The Guide is, therefore, designed as a starting-point for a more detailed and comprehensive discussion of the issues.

Whilst we have made every effort to ensure the accuracy of the statements made herein, we accept no liability for any errors. In all cases expert legal advice from a qualified practitioner of Bermuda law should be obtained.

Appleby
Hamilton, Bermuda
September 2010

INTRODUCTION

Bermuda's statute law on companies is contained in the Companies Act 1981 (the "Companies Act"). Until 1970, it was only possible to incorporate a limited liability company in Bermuda pursuant to a private Act of the Legislature. In 1970, the concept of incorporation by registration was introduced. Nearly all companies are now incorporated by registration, although incorporation pursuant to a private Act is still available and must be used where the general statute law will not accommodate the proposed structure, internal organisation or method of operation of the entity. This ability, with necessary philosophical limitations, to design a private Act to meet some or all of the special needs of a company is a feature not commonly found in other jurisdictions.

PART A EXEMPTED COMPANIES

1. Classification

Bermuda companies fall into two principal categories: companies incorporated by Bermudians to trade primarily in Bermuda and companies incorporated by non-Bermudians for the purpose of conducting business outside Bermuda. This Guide is concerned only with the latter kind of company. Companies falling into this category are known as "exempted companies" and are so-called because they are exempted from those provisions of Bermuda law which stipulate that at least 60% of the equity must be beneficially owned by Bermudians (§114, Third Schedule). Permit companies (i.e. overseas companies that have received a permit to carry on business in or from within Bermuda) are dealt with in Part B of this Guide.

In general terms, the Companies Act restricts an exempted company from carrying on business in Bermuda, except to the extent that it is so authorised by its constitutional documents and has been granted a license by the Minister of Finance (the "Minister"), who will form a view as to whether or not the granting of such a license is in the best interests of Bermuda (§129). Having said that, there are certain activities that are expressly excluded from the requirement for a license. Such activities include: doing business with other exempted undertakings (e.g. exempted companies, permit companies, exempted partnerships and exempted unit trust schemes) in furtherance of the business of the exempted company that is being conducted outside Bermuda; dealing in securities of exempted undertakings, local companies or partnerships; carrying on business as manager or agent for, or consultant or advisor to, any exempted company or permit company which is affiliated (whether or not incorporated in Bermuda) with the exempted company or an exempted partnership in which the exempted company is a partner or, in the case of mutual funds, selling or distributing their shares in Bermuda.

The Companies Act also makes provision for, amongst other things, the incorporation of single shareholder companies. The reader should therefore be aware that, in this Guide, references to shareholders also embrace the sole shareholder of such a company.

2. Incorporation

a. By Registration

The first step in the registration procedure is the reservation of a name with the Registrar of Companies (the "Registrar"). A company may also apply for registration of a secondary name, in a foreign language and non-roman script, to be used in addition to its primary name (§10A). The application to form a company is then submitted to the Bermuda Monetary Authority (the "Authority"), which should include

the name of the proposed company, the nature of its intended business and the proposed ownership of the company (§6).

Concurrently, approval is sought from the Authority for the intended beneficial ownership of the company, details of which are confidential. Personal Declarations signed by the beneficial owners must be supplied, unless the owners are already sufficiently well known to the Authority or are public companies (in which case a copy of the latest annual report will be required).

The Memorandum of Association of the company (“the memorandum”) is submitted to the Registrar. The memorandum will state, amongst other things: the share capital of the company and its division into shares of a specified par value; whether the liability of the shareholders is limited or unlimited; and the objects (i.e. business purposes) and powers of the company (§11). Companies may be incorporated with unrestricted objects and the powers of a natural person. The memorandum can also specify the period, if any, fixed for the duration of the company, or the event, if any, upon which the company is to be dissolved.

The consent of the Minister of Finance (“the Minister”) to incorporate a company is only required in respect of companies that engage in so-called restricted activities, e.g. investment business; trust business, mutual fund business, deposit taking and money services and insurance (§129A). The Minister will require information that demonstrates that the company has adequate knowledge and experience available to it. The Minister may, at his discretion, grant or refuse his consent and need not give any reason for his decision.

Ordinarily, an incorporation that requires only the approval of the Registrar can be accomplished in 24 to 48 hours. Where the consent of the Minister is required, the time needed is usually three to five working days from the date that the Bermuda attorneys have received all necessary information relating to the proposed company, and all Personal Declarations from the proposed beneficial owners. However, in the event of a genuine emergency, in cases where the consent of the Minister is required, a procedure is available to permit incorporation within two to four days.

b. Pursuant to a Private Act of the Bermuda Parliament

This procedure is relatively straightforward and not as costly as might be expected. Corresponding to the registration procedure, it is necessary to reserve the proposed name with the Registrar and to advertise the proposed incorporation by means of a Private Bill Notice in a Bermuda newspaper. The principal hurdle to be surmounted, in practice, is the review of the Bill by the Joint Standing Committee on Private Bills, whose favorable report will invariably ensure a smooth passage for the Bill through the legislative process.

The Bill (which, when enacted, is known as the Incorporating Act) corresponds to the memorandum of a registered company and will set out, amongst other things, the proposed objects and powers of the company. In addition, provisions will be embodied which address any special features of the proposed company.

After the Bill has been enacted (the process usually having taken six to eight weeks), the company is incorporated by the filing of a memorandum, signed by at least three persons who are normally nominees resident in Bermuda. Once incorporated, the company is subject to the provisions of its own Incorporating Act read together with the general company law of Bermuda.

It should be noted that this ability to petition the Legislature (for a private Act which modifies or waives the requirements of some public statute or creates provisions which have statutory force where they do not presently exist) is not restricted to applicants seeking incorporation, but is also available to registered companies. This may be important when incorporation must take place at a time when the Legislature is not in session.

3. Constitution

We have now reached the point where the company is in being. The company will at this time receive an exchange control designation from the Authority (see Part A: 6.a) and will on the date on which the memorandum is filed with the Register of Companies (“the Registrar”) have made the first payment of the annual government fee (see Part A: 5), as this fee must be paid. The Registrar will then register the memorandum and issue a certificate of incorporation showing the date of registration. From the date of registration of a company the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company (§14(3)).

Whichever method of incorporation has been adopted, the signatories to the memorandum are the provisional directors of the company who act as such until the first board of directors is elected (§69). The provisional directors will have subscribed to the bye-laws of the company (which govern the company’s internal organisation, management and administration, see Part A: 4.b.), will allot the share capital and will convene the so-called “statutory meeting”, which is deemed to be the first annual general meeting of the shareholders of the company.

At the statutory meeting (§70), the shareholders will confirm the bye-laws, elect the first board of directors and appoint auditors. The first board of directors meets immediately following its election for the purposes of, amongst other things, electing the company’s officers for the ensuing year, fixing the company’s financial year-end, opening bank accounts, establishing the company’s registered office and dealing with other matters necessary to put the company in a position to commence business (for example, in the case of an insurance company, appointing insurance managers and taking steps to secure registration of the company under the Insurance Act 1978).

a. By Registration

Each subscriber to the company must sign the memorandum in the presence of at least one witness, who will attest the signature (§7(4)). Once the memorandum is registered it will bind the company and its shareholders (§16).

The memorandum of every company must state:

- the name of the company and, in the case of a company limited by shares or a company limited by guarantee, the word “Limited” as the last word of the name (subject to certain powers to dispense with “Limited”, for example, in the case of charitable companies) (§7(1)(a));
- in the case of a company limited by shares or a company limited by guarantee, that the liability of its members is limited (§7(1)(aa));

- the objects of a company or that its objects are unrestricted (§7(1)(b));
- the secondary name of the company, if any, i.e. the name of a company that is in a foreign language or a script other than roman script in addition to the primary name of the company (§7(1)(bb));
- the names, addresses and nationalities of the persons who subscribe their names to the memorandum and which of them, if any, has Bermudian status (§7(1)(d));
- whether the company is to be an exempted company (§7(1)(e));
- the maximum land holding powers of the company in relation to land situate in Bermuda and, where it is proposed that the company shall acquire a particular parcel of land, a full description of that parcel (§7(1)(g)); and
- the period, if any, fixed for the duration of the company, or the event, if any, on the occurrence of which the company is to be dissolved, i.e. the company will be limited in duration and the winding-up of the company will be automatically triggered upon the lapse of the stated period or occurrence of the stated event (§7(1)(h)).
- In addition, in the case of a company limited by shares, the memorandum must also state (§7(2)):
- the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount; and
- that the persons who subscribe their names to the memorandum agree to take such number of shares of the company as may be allotted to them respectively by the provisional directors, not exceeding the number of shares for which they respectively subscribe, and that they agree to satisfy such calls as may be made on them by the directors.

Further, in the case of a company limited by guarantee, the memorandum must also state that:

- each member undertakes to contribute to the assets of the company in the event of it being wound up while he is a shareholder; or
- within one year after he ceases to be a member, for the payment of the debts and liabilities of the company contracted before he ceases to be a member; and
- each member undertakes to contribute to the costs and expenses of winding the company up, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, but which will not exceed a specified amount (§7(3))(unless the company is a mutual company, see Part E: 3).

b. Objects

Historically a company was required to set out in its memorandum its objects and powers. Typically, companies established a broad range of bespoke objects and powers, in addition to the statutory objects and powers set out in the now repealed Second Schedule and First Schedule of the Companies Act,

respectively. The rationale for including such a broad range of objects and powers was to ensure that a company had the requisite corporate capacity and power to enter into as wide a range of business as possible.

Since 2007 the Companies Act has permitted a company to have unrestricted objects and the capacity and powers of a natural person (§11). For those companies that adopt such objects and powers, and thereby enjoy unfettered capacity and power, the ultra vires rule would become redundant. It should be noted that companies in existence prior to December 29, 2006 are still subject to the law which applies to corporate capacity and powers.

c. Secondary Name

A company may apply to the Registrar of Companies for registration of a secondary name, defined as a name of a company in a script other than roman script and in addition to the primary name of the company (§10A). An application for registration of a secondary name must be in the form determined by the Registrar and must be accompanied by a certificate signed by a person authorized to administer oaths certifying the accuracy of the English translation of the secondary name and that the person is fluent in the language and script used to express the secondary name (§10A(3)(a)). In addition, a copy of the text in electronic form must also be supplied (§10A(3)(b)). The Registrar will then enter the secondary name on the register and the effective date of registration, together with the primary name, and will issue a certificate of the secondary name (§10A(4)).

A company may only use its secondary name on a document if its primary name is also shown on the document in close proximity to the secondary name (§10A(8)).

The registration and subsequent use of a secondary name by a company does not affect the rights and obligations of the company or render defective any legal proceedings that are continued or commenced by or against the company in its primary name (§10A(9)).

d. Change of Name, Alteration of Objects, Limited or Unlimited Liability

A change of name, a change of objects (§12) and a change from limited to unlimited liability require a resolution of the shareholders passed at a general meeting of the company. In the case of a change of name (§10), the change is effective upon filing the prescribed documentary evidence with the Registrar. This is also true of an alteration of a company's objects. However, unless an affidavit can be sworn and filed to the effect that the two directors swearing the affidavit do not know of any specified person who can make an application to the Court for an annulment, there is a 21 day waiting period following the passing of the shareholders' resolution before the filing can be made.

It should be mentioned that no company may be registered with a name, or seek to change its name to a name which, in the opinion of the Registrar, is undesirable (§8). There are certain specific restrictions on the choice of name for a company. For instance, the name may not be identical to, or closely resemble, that of another company incorporated in Bermuda; nor may it contain the words "Chamber of Commerce", "Royal", "Imperial", "Municipal", "Chartered", "Cooperative" or "Building Society" (§8(2)).

e. Fetter of Company's Power

Following the principles enunciated in the UK case of *Russell v Northern Bank Development Corporation Ltd* [1992] 3 All ER 588 (decided in the House of Lords) a company was barred from contractually agreeing to fetter its statutory powers, i.e. those powers reserved to the shareholders. Thus, for example, a contract made by a company that it will not exercise its statutory power to alter its bye-laws was deemed to be unenforceable. Since 2007, however, a company has been able to circumvent the Russell decision in specific circumstances. Subject to the provisions of a company's constitutional documents, a company may agree to fetter its statutory powers in the following circumstances (§24A):

- change of name (§10) or secondary name (§10A);
- alteration to the memorandum (§12) or bye-laws (§13);
- alteration of share capital (§45) or reduction of share capital (§46);
- removal of directors (§93);
- shareholder approval for long-form amalgamations (§106); and
- voluntary winding up of a company (§161 and §201).

Should a company wish to remain subject to the restrictions set out in Russell, then the company should insert a clause into its bye-laws that states that 'notwithstanding the foregoing, the Company may not agree that any of the powers in sections 10, 10A, 12, 13, 45, 46, 93, 106, 161 or 201 (or any combination thereof) of the Companies Act 1981 that are reserved to shareholders shall, in whole or in part, not be exercised'.

f. Continuance and Discontinuance

i. Continuance

A company incorporated outside Bermuda, i.e. a foreign corporation, may apply to the Minister to be continued in Bermuda as an exempted company, provided the applicant can demonstrate that it has obtained all necessary authorizations required under the laws of the country in which it was incorporated to enable it to effect the migration to Bermuda (§132C). The foreign corporation must also provide a memorandum of continuance in such form as the Minister may determine and financial statements prepared for a period ending within 12 months of the proposed date of continuance (§132C(2)(b) and (c) respectively). The foreign corporation must, also, within one month after the date of registration of the memorandum of continuance, pay the appropriate fee payable as an exempted company (§132(3A)) (see Part A: 5).

Continuance of a foreign corporation as an exempted company means that, amongst other things: the property of the foreign corporation continues to be the property of the company; the company continues to be liable for the obligations of the foreign corporation; and any existing cause of action, claim or liability to prosecution in respect of the foreign corporation is unaffected (§132E(1)(a) to (e)).

The result of continuance in Bermuda is that the foreign corporation becomes a company to which the Companies Act and any other laws of Bermuda apply, as if it had been incorporated in Bermuda on the date of its registration (§132D).

The continued company must, as soon as is practicable from the date of continuation in Bermuda, ensure that it has adopted bye-laws which conform to the requirements of the Companies Act (§132F).

ii. Discontinuance

A discontinuance procedure is available to any exempted company in Bermuda which may make application to the Minister for consent to be continued in another country or jurisdiction outside Bermuda, as if it had been incorporated under the laws of that other country or jurisdiction (§132G). This assumes, of course, that such other country or jurisdiction can and will accept the importation of the Bermuda company.

An exempted company cannot be discontinued out of Bermuda unless (§132G(2)):

- a resolution of the shareholders (or each class of shareholder) is passed in general meeting approving the discontinuance, where each share has the right to vote irrespective of whether it carries such right; or, the discontinuance is approved in accordance with the company's bye-laws;
- a statutory declaration has been signed by the directors of the company stating that the company is solvent and can meet all of its liabilities and obligations and that the discontinuance will not adversely affect the interests or rights of bona fide creditors or shareholders; and
- an irrevocable deed poll is executed by the company and its directors pursuant to which:
 - the exempted company and each of its directors may be served with legal process in Bermuda arising in any proceedings arising out of actions or omissions of the company occurring prior to the discontinuance and provision is made for the appointment for an agent within Bermuda who can receive service of process for a period not less than three years from the date of discontinuance; or
 - the exempted company and each of its directors may be served with legal process at a specified address in the United Kingdom, United States of America or any appointed jurisdiction, and that the company and directors submit to the non-exclusive jurisdiction of the relevant courts of that country or jurisdiction; and
 - at least 14 days prior to the discontinuance the company advertises in an appointed newspaper and in a national newspaper in each jurisdiction within which it carried on a substantial part of its trade or business its intention to discontinue under the Companies Act and continue in the named jurisdiction.

A company cannot be discontinued unless a notice of the discontinuance is filed with the Registrar, which includes (§132H):

- the effective date of discontinuance;
- the name of the jurisdiction in which the company will continue;
- the address of the registered office or the principal business address of the company in the jurisdiction in which the company will continue;
- a copy of the statutory declaration, as described above; and
- a copy of the irrevocable deed poll, also described above.

A discontinued company must, within 30 days of discontinuance, file with the Registrar a copy of the instrument of continuance issued to the company by the appropriate authority of the jurisdiction in which the company has continued (§132H(2)).

The effect of discontinuance is that the company becomes subject to the laws of the jurisdiction into which it continued (§132I).

4. Management and Administration

a. Registered Office

Every company must have a registered office in Bermuda, which may not be a post office box (§62(1)). The company may change its registered office at any time, but the Registrar must be notified of such a change (§62(3)).

b. Bye-laws

The bye-laws of a company govern its internal organisation, management and administration (§13). They are a private document, subject neither to governmental review nor to public inspection. Their adoption and amendment is a two-stage process in the sense that the directors may adopt and amend bye-laws. However, such adopted or amended bye-laws must be submitted to a general meeting of the company and are operative only to the extent that they are approved at such meeting.

All references to “bye-laws”, below, refer to a set of recommended bye-laws, compiled by Appleby for a company in Bermuda, that reflect the provisions and ethos of the Companies Act 1981 (including its latest amendments) and the practical advantages of incorporating a company in Bermuda. Whilst these bye-laws have been referred to (the bye-laws referred to are the ‘2007 Appleby Standard Private Exempted Company Bye-Laws (with power to sell)’ and are afterwards referred to in this Guide as ‘BL’), the bye-laws of a company can be tailor-made to suit a company’s needs or altered if the appropriate procedure is complied with. The reader should pay special attention to the bye-laws of a company as they may well differ from the bye-laws compiled by Appleby and referred to in this Guide. Appleby can advise on all aspects of a company’s bye-laws. For more information, please refer to the contact details at the end of this Guide.

The bye-laws must provide for, amongst other things (§13(2)): the holding of an annual general meeting in each year (BL 17), an audit of the accounts of the company once in every year (BL 39), the transfer and transmission of shares (BL 12 and BL 13, respectively), and the quorum for general meetings (BL 19).

The bye-laws may also regulate such matters as the allotment of shares (BL 5), the payment for shares (BL 7), the declaration and payment of dividends (BL 34), the duties and responsibilities of the company’s officers (BL 26 and BL 27), the calling of and voting at meetings (BL 17 and BL 18), and the conduct of the affairs of the company generally (§13(3)).

c. Requirements for Officers or Representatives in Bermuda

The Companies Act requires that an exempted company have two individual directors and also outlines the requirements for exempted companies to have Bermuda resident representation which include having one of the following appointed, being ordinarily resident in Bermuda:

- a director; or
- a secretary (corporate or individual); or
- a resident representative (corporate or individual)(§130).

Since 2007, a company is no longer required to appoint officers with the specific titles of president/vice-president or chairman/deputy chairman (§91(4)). The provision regarding the appointment of officers provides more flexibility in the titles of officers of the company. In addition, the Companies Act states that officers may or may not be directors (§91(4)). The bye-laws of companies incorporated prior to 2007 will need to be amended to enable such a company to take advantage of these changes.

The resident representative may be an individual or a company (§130(1)(c)). The resident representative has prescribed duties and obligations under the Companies Act (§130(6) to (12)). Corporate directors are not permitted.

A company must have a secretary who will hold office in accordance with the bye-laws (§92; BL 32). The secretary may be an individual or a company (§130(1)(b)).

Every company must maintain a register of directors and officers at its registered office, stating the name and address of each director and officer of the company (BL 11). This register is open for inspection by members of the public without charge (§65). A company must amend the register if there are any changes among its directors or offices, or changes in the particulars contained in the register, within 14 days of the change (§92A(2)).

d. Directors

The business of a company is managed by its board of directors (BL 27), which is elected at the statutory meeting of the shareholders (§91(1)). The term of office of a director generally runs from one annual general meeting to the next (BL 22); however, the bye-laws may provide for longer terms and retirement by rotation. The directors may, subject to the bye-laws of the company, exercise all the powers of the company except those powers that are required by the Companies Act or the bye-laws to be exercised by the shareholders of the company (§91(5); BL 27.2).

Any individual may be appointed as an alternate director by, or in accordance with, a resolution of the shareholders, or by a director in such manner as may be provided in the bye-laws (§91(2A); BL 24). An alternate director has all the rights and powers of a director (§91(2A)) except that he cannot attend or vote at a meeting otherwise than in the absence of the director to whom he has been appointed an alternate (§91(2B); BL 24.2). The shareholders may, at any general meeting, increase the maximum number of directors and, if provided for in the bye-laws, fill, or authorise the directors to fill, any vacancies created (BL 22.2). Should a vacancy occur on the board, the remaining directors may fill such a vacancy (§91(3)). Directors, upon written request deposited at the registered office of the company, are entitled to receive notice of any general meeting of the company, and to attend and be heard at any such meeting (§91B; BL 19.4).

Subject to contrary provisions in the company's bye-laws, the shareholders of a company may, at a special general meeting convened for that purpose, remove a director and appoint another person in his place (§93; BL 22.3). A director is entitled to notice of and to attend and speak at any such special general meeting (§93(1)).

i. Director's Duties

The duties of a company's officers (which includes directors) have been codified in the Companies Act and are broadly reflective of the position at common law. Every officer, in exercising his powers and discharging his duties, must:

- act honestly and in good faith with a view to the best interests of the company; and
- exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (§97(1)).

A company is permitted, either by contract or in its bye-laws, to indemnify its officers against, or to exempt them from, any liability attaching to them by reason of their office, other than in respect of fraud or dishonesty (§98: BL 42). A company may advance monies to an officer (or auditor) for the costs of defending any civil or criminal action involving allegations of fraud or dishonesty against the officer (or auditor) on the condition that they shall repay the advance if the allegations are proved. A company may purchase and maintain insurance for the benefit of its officers (§98A).

Our associated company, Appleby Services (Bermuda) Ltd., offers corporate administrative and resident representative services. For further detail on the duties and responsibilities of directors and officers of Bermuda companies, please see the 'Appleby Guide for Directors and Officers of Bermuda Companies'.

ii. Director's Interests

The Companies Act specifically provides that, without limiting the generality of the above duties, an officer of a company is deemed not to be acting honestly and in good faith if, in addition to certain other disclosures, he fails to disclose at the first opportunity at a meeting of directors or by writing to the directors:

- his interest in any material contract or proposed material contract with the company or any of its subsidiaries; or
- his material interest in any person that is a party to a material contract or proposed material contract with the company or any of its subsidiaries (§97(4) and (5)).

The effect of failure to make a declaration is that, as the director is deemed not to be acting honestly and/or in good faith, he is in breach of his duties and may be held personally liable for any loss the company suffers as a result of such breach. The word "material" in relation to a contract or proposed contract is, according to the Companies Act, to be construed as relating to the materiality of the contract or proposed contract in relation to the business of the company to which disclosure must be made (§97(5)(b)). An interest that occurs by reason of the ownership or direct or indirect control of not more than 10% of the capital of a person is not considered "material" (§97(5)(c)).

An officer or director will not be in breach of his duty to the company if he relies in good faith upon financial statements of the company represented to him by another officer of the company or a report of an attorney, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him (§97(5A)).

Most companies' bye-laws make express provision for a declaration of interest by a director. The bye-laws will also usually make specific provision for the ability of a director to be counted in the quorum of a meeting at which a matter in which he has a material interest may be considered (BL 29.4). They will also provide for his ability to vote either at the meeting generally, or on that specific issue. Usually, in the context of companies that are to issue their shares to the public and become listed on a stock exchange, the requirements of the stock exchange will have the dominant effect on the way in which these disclosure provisions are drafted in the bye-laws.

iii. Prohibition of Loans to Directors

Generally, it is not lawful for a company to make a loan, enter into a guarantee, or provide any security in connection with a loan to a person who is its director, a director of its holding company, or to the spouse or child of its director; or to a company of which a director, his spouse or child owns or controls, directly or indirectly, more than 25% of the capital or loan debt, without the consent of any member or members holding at least nine-tenths of the total voting rights of all the members having the right to vote at any meeting of the members (§96(1)).

Where the approval of the company is not given, as required by the Companies Act, the directors authorizing the making of the loan, or entering into the guarantee, or the provision of the security, shall be jointly and severally liable to indemnify the company against any loss arising therefrom (§96(3)).

Under the Companies Act, it is only permissible for a company to make loans in the following three scenarios:

- To provide a director with funds to meet expenditures incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company (§96(1)(a)). The making of a loan for these purposes, however, will not be lawful unless the company has approved the loan at a general meeting at which the purpose of the expenditure and the amount of the loan, or the extent of the guarantee or security, as the case may be, are disclosed; or, on condition that if the approval of the company is not given, then, the loan must be repaid or the liability under the guarantee or security must be discharged, as the case may be, within 6 months of the conclusion of the next annual general meeting of the company (§96(2)).
- In the case of a company whose ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons, to anything done by the company “in the ordinary course of that business” (§96(1)(b)). A loan will not be deemed to have been made “in the ordinary course of business” of a company if it has not been made on normal commercial terms in respect of interest rates, repayment terms and security (§96(5)).

- To advance moneys to an officer or auditor for the costs, charges and expenses incurred by an officer or auditor in defending any civil or criminal proceedings against them (on condition that the officer or auditor repay the advance if any allegation of fraud or dishonesty is proved against them) (§96(1)(c)).

e. Board Meetings

The convening and conduct of a board meeting of a company will be dependent upon the bye-laws (BL 29). However, while the Companies Act does not prescribe any particular period for the giving of notice of a board meeting, the common law requires that adequate notice be given to all directors of a company in order for a board meeting to be duly convened and held (BL 29.2). “Adequate notice” is considered to mean that sufficient notice must be given to each director to enable that director to attend in person or by telephone. Failure to give adequate notice may render the proceedings void.

A quorum must be in attendance at the commencement and throughout the meeting (BL 29.3). Special caution should be paid to the provisions of the bye-laws in relation to ‘material interests’ of directors, which may prevent a director with a material interest from forming part of the quorum and having the right to vote on a particular matter. This is not a requirement of the Companies Act, which requires a director to disclose a material interest either in writing or at the first available opportunity to the board of directors, but rather a requirement of the bye-laws of certain companies, which reflects the listing rules of the stock exchange on which those companies’ shares are listed.

Unless the bye-laws provide otherwise, meetings may be held telephonically (§75A).

Every company must keep minutes of all proceedings of meetings of its directors, which must be signed by the person presiding over the proceedings (§81(1)). The company secretary must keep the minutes at the registered office of the company (§81(2); BL 31).

Written resolutions of the board, which, according to the bye-laws must be unanimous (BL 29.9), may replace the convening of a meeting of the directors for the purposes of approving corporate actions. There must be a minimum of two board meetings in a year. These are usually held before and after the annual general meeting of shareholders. The first will need to deal with the approval of the audited financial statements together with the auditor’s report and the signing of the balance sheet by two directors of the company for presentation to the shareholders. The second will deal, amongst other things, with the appointment of officers following the election of the new board of directors.

f. General Meetings

An annual general meeting (“AGM”) must be held at least once in every calendar year (§71(1)) (and the directors may also convene a special general meeting (“SGM”) whenever they think fit (§71(2))). At this meeting, the shareholders will be asked to deal with the following items:

- establishing the maximum number of directors (§70);
- electing the directors and, if required, the alternate directors and determining their remuneration;
- receiving the audited financial statements, signed on the balance sheet by two directors, together with the auditor’s report; and
- reappointing the auditors and determining their remuneration.

Generally at least five days' notice is required for the convening of either an AGM or an SGM (§75(1); BL 18), which should specify the place, date and hour of the meeting and, in the case of SGMs, the general nature of the business to be considered (§71(3)). All shareholders entitled to attend and vote at a general meeting are entitled to receive notice (§70(2)).

There is no requirement in the Companies Act for shareholder meetings to be held in Bermuda. Accordingly, shareholder general meetings may be held anywhere in the world. Companies that are listed on a stock exchange generally require a longer period of notice. Special care must be paid to the specific rights attaching to each class of shares in relation to receiving notice and attending and voting at the meeting.

Copies of minutes must be preserved in the registered office of the company for a period of six years from the date when they were first required (§273(4)).

i. Convening of a Special General Meeting on Requisition

It is also possible for the shareholders of a company to requisition an SGM, notwithstanding anything in the company's bye-laws, provided they hold at the date of the deposit of the requisition, not less than 10% of the paid-up capital of the company (or in the case of a company not having a share capital, the members represent 10% of the voting rights) (§74). The requisition must state the purposes of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company (§72(2)). If, within 21 days from the date of the deposit of the requisition, the directors do not proceed to convene a meeting, the requisitionists, or any of them representing more than 50% of the total voting rights of all of them, may themselves convene a meeting, which must be convened within three months of the date of the deposit of the requisition (§72(3)).

ii. Voting

In general, the Companies Act merely requires a bare majority of those in attendance and forming a quorum to approve transactions placed before the shareholders (BL 20.1). There are certain exceptions provided for in the Companies Act, e.g. approval of schemes of arrangement (§99(2)) and amalgamations (§106(4A)). A company's bye-laws may require higher majorities for certain other matters, and this is frequently the case with companies listed on appointed stock exchanges.

Shareholders may attend general meetings in person (or, if a company, through the medium of its duly authorised representative) or be represented by proxy (§77(1)). The form of appointment of a proxy is usually determined by the bye-laws of the company or as accepted by the board of directors (BL 21). A proxy-holder may exercise multiple voting rights where he represents different shareholders, whether voting on a show of hands or on a poll (§77). Only another director may act as a director's representative at board meetings (§91A). The following points should be noted:

- a proxy may attend and vote at a meeting of the shareholders, but unless the bye-laws otherwise provide, is not entitled to speak; and
- a shareholder who holds two or more shares may appoint more than one proxy to represent him and vote on his behalf, whether on a show of hands or a poll.

Voting can be conducted by either a show of hands or by a count of votes received in the form of electronic records (§77(3)).

If, at a general meeting, the chairman makes a declaration that a question proposed for consideration has, on a show of hands or by a count of votes received in the form of electronic records been carried (by a particular majority or unanimously) or lost, then an entry to that effect in a book containing the minutes will be conclusive evidence of that fact (§77(4)).

The following people may demand a poll vote (either before or on the declaration of the result of a show of hands or of a count of votes received in the form of electronic records):

- the Chairman;
- at least three members present in person (or represented by proxy);
- a member or members holding at least 10% of the voting rights of all members entitled to vote at the meeting (whether present or by proxy); or
- a member or members holding at least 10% of the paid-up share capital of the votes that entitle such right to vote (whether present or by proxy) (§77(5)).

In the case of an equality of votes, whether on a show of hands or by a count of votes received in the form of electronic records or on a poll, the chairman will, unless the bye-laws of the company provide otherwise, be entitled to the casting vote (§77(8)).

iii. Resolutions in Writing

In accordance with Appleby's recommended bye-laws, the directors may act by unanimous written resolution in lieu of a meeting (BL 29.9).

Prior to 2007 the members of a company were only able to adopt a shareholder resolution in writing provided the resolution was signed by all of the shareholders of the company unanimously. In effect, two different sets of voting requirements existed: if a resolution was voted on at a general meeting, then, subject to the company's bye-laws, only a simple majority of the votes was required. However, if the same matter was decided by a written resolution, the consent of all the members entitled to vote on the resolution was required. These different voting requirements no longer exist. Shareholder written resolutions will be effective if two conditions are met (§77A):

- notice of resolutions and the resolutions have been circulated to all shareholders; and
- the resolutions are signed by shareholders who represent the same majority of votes as would be required if the resolutions had been voted on at a general meeting or as otherwise provided in the bye-laws.

In addition, length of notice provisions do not apply to shareholder written resolutions (§77A(1C)).

Note, however, that a written resolution may not be used to remove a director: a special general meeting must be called for the purpose of removing an officer or director. Likewise, written resolutions may not be used in respect of a resolution to remove an auditor (§93).

iv. Representation of Corporations at Meetings

The Companies Act provides that a shareholder which is a company may appoint a representative to act on its behalf, since it is not capable of acting itself (§78). A representative is a fully authorised agent of the corporate shareholder for the purpose of attending meetings of a company in which the corporate shareholder holds shares. The appointment is subject to any limitations set out in the form of appointment (BL 21). Similarly, a proxy will be constrained by the terms of his appointment. Subject to the specific bye-laws, a corporate shareholder which holds two or more shares, may be able to appoint more than one representative (§78(2)).

Particular care needs to be paid to the bye-laws of the company to ensure that they consider and deal with these issues.

g. Auditors

The Companies Act contemplates that every company will appoint an independent representative of the shareholders as its auditor, and that audited financial statements, prepared in accordance with generally accepted accounting principles, will be placed before the shareholders at each annual general meeting. Such presentation can, however, be deferred for up to 90 days or such longer period as the shareholders may agree upon (§84(3)).

The shareholders of the company appoint the auditor at the statutory meeting and the appointment lasts until the close of the next annual general meeting of the company (§89).

An auditor may be removed by the shareholders in general meeting by a resolution passed by at least two-thirds of the votes cast at the general meeting providing at least 21 days written notice is given to the incumbent auditor (§89(5)). The auditor is entitled to attend and speak at such meetings (§89(5A)). There are also special provisions relating to the replacement of an auditor in the Companies Act (§89).

h. Records and Financial Statements

Every company is required to maintain proper records of account (§83(1)), which are usually kept at its registered or principal business office. If, however, such records are kept at some place outside Bermuda, then there must be kept at an office of the company in Bermuda “such records as will enable the directors or a resident representative to ascertain with reasonable accuracy the financial position of the company at the end of each three month period”. Where the company is listed on an appointed stock exchange, the relevant period for such financial information is six months rather than three (§83(2)).

The financial statements of a company must include (§84):

- a statement of the results of operations for the period;
- a statement of retained earnings or deficit;
- a balance sheet at the end of the period;
- a statement of changes in financial position or cash flow for the period;
- notes to the financial statements, which include a description of the generally accepted accounting principles used in the preparation of the financial statements;
- such further information as may be required by the Companies Act and the company’s memorandum of association and bye-laws; and

- the report of the auditor to the shareholders.

The financial statements must be signed by two directors on the balance sheet before presentation to the shareholders in general meeting (§84(2)).

A company is free to select the generally accepted accounting principles and the generally accepted auditing standards of a country other than Bermuda for the preparation and audit of its accounts, but the principles and standards selected must be expressly identified in the financial statements and auditor's report (§84(1A)).

Every shareholder is entitled to receive a copy of the audited financial statements of the company not less than five days before the general meeting at which financial statements are to be considered and approved (§87(1)). The following are excluded from this entitlement:

- any person not entitled to receive notices of a general meeting;
- more than one of the joint holders of any shares or debentures; and
- any person whose address is not known to the company.

A company that has shares listed on an appointed stock exchange need not send financial statements, as described above, but may instead send their members summarized financial statements, in accordance with the provisions of the Companies Act (§87A). The company must, however, make a copy of the full financial statements of the company available for inspection by the public at the company's registered office (§87C).

It is possible to waive the preparation and presentation of the audited financial statements in any one year provided that all shareholders and all directors of the company consent either in writing or at a general meeting (§88).

Copies of financial statements and summarized financial statements must be preserved in the registered office of the company for a period of six years from the date when they were first required (§273(4)).

i. Employment of Personnel

Although the majority of exempted companies have no employees in Bermuda, many do have their own offices and staff here. All persons other than Bermudians require the permission of the Minister of Labour and Immigration to seek or take up employment in Bermuda. This Minister will allow the employment of skilled and experienced non-Bermudian personnel (particularly at the senior executive level) where it can be demonstrated that there are no Bermudian resources available. For a more in depth discussion of this issue, please refer to the 'Appleby Guide to Working Overseas'.

j. Investments

Except for restrictions on its ability to invest and deal in Bermuda real property (i.e. land in Bermuda) (§129), an exempted company is free to acquire, hold and deal in all types of investments.

k. Registration of Charges

The Companies Act established a system of registration with respect to charges created by a Bermuda-incorporated company over its assets (§55). The system also extends to charges on property in Bermuda, which are created or acquired by a company incorporated outside Bermuda, whether or not it is a permit company. For the purposes of the Companies Act a “charge” includes any interest created in property by way of security, including any mortgage assignment, pledge, lien or hypothecation.

The Registrar maintains the Register of Charges. Registration is not compulsory, nor is it necessary in order to ensure the validity of a charge. Registration does, however, govern the relative priority of charges created on or after 1 July 1983 (the date upon which the Companies Act came into effect). A charge registered on or after this date will have priority over an unregistered charge in respect of the same subject matter.

There is a government fee for registering a charge: \$309 where the charge secures a principal amount of \$1,000,000 or less, and \$541 where the principal amount secured exceeds \$1,000,000.

l. Contracts

Historically, a company was required by statute to affix its common seal to various instruments or documents, most commonly, deeds. The use of the common seal for executing such documents has become anachronistic practice in modern day commerce. It is now possible for companies to execute deeds and other instruments (such as share certificates or debentures) by the signature of an authorized person, i.e. a person acting under the express or implied authority of the company (§21(1)(a)). Companies that wish to continue to use a seal can still do so, and any deed or document to which the common seal is fixed will bind the company (§21(2)).

m. Electronic Records

In the past, a company could deliver documents (for example, notices, reports, instruments, and registers) in hard copy via post, mail or facsimile. Since 2007, however, it has been possible for a company to deliver via electronic mode (including e-mail and website postings) an “electronic record” of such documents and may include an electronic code or device to decrypt or interpret the electronic record (§2A). This means, for example, that a Bermuda publicly listed company may, subject to the provisions of its bye-laws, communicate with its shareholders by posting information (proxy material and notices of shareholders meetings) on a website. A shareholder, however, still has the option to elect to receive a document in physical form (§2A(4A)). The Registrar of Companies is empowered to accept filings electronically (§2B), but this provision is not yet operative. Once the Registrar has developed specific “e-delivery” guidelines an operation date of this section will be published in the Gazette.

It is also worth noting that if a provision is made for the inspection or reproduction of any book or paper then it is permissible to allow inspection or reproduction in electronic form (§273(3)).

5. Taxation

In Bermuda there are no taxes on profits, income or dividends, nor is there any capital gains tax, estate duty or death duty. Profits can be accumulated and it is not obligatory to pay dividends.

The Bermuda Government has enacted legislation under which the Minister is authorised to give an assurance to an exempted company, permit company, exempted partnership or exempted unit trust scheme (each an “exempted undertaking”) that “in the event of there being enacted in these Islands any legislation imposing tax computed on profits or income or computed on any capital asset, gain or appreciation, then the imposition of any such tax shall not be applicable to such entities or any of their operations”. In addition, there may be included an assurance that any such tax “and any tax in the nature of estate duty or inheritance tax, shall not be applicable to the shares, debentures or other obligations” of such entities. This assurance may be for a period ending not later than 28 March 2016. The assurance is applied for as a matter of routine by this firm and is invariably granted for the full period. There is an application fee of \$160.

The only “tax” imposed on an exempted company (so long as it does not have an office with employees in Bermuda) is an annual government fee, the first payment of which is made immediately upon incorporation and subsequent payments of which are made in January of each year.

Annual government fees are payable as follows:

- Where the “assessable capital” (i.e. in the case of a joint stock company, its authorised share capital and share premium account; in the case of a mutual company, its reserve fund; and in the case of a mutual fund, its authorised capital) is:

1) \$0 - \$12,000:	\$1,995
2) \$12,001 - \$120,000:	\$4,070
3) \$120,001 - \$1,200,000:	\$6,275
4) \$1,200,001 - \$12,000,000:	\$8,360
5) \$12,000,001 - \$100,000,000:	\$10,455
6) \$100,000,001 - \$500,000,000:	\$18,670
7) \$500,000,001 or more:	\$31,120

The above fees are determined by reference to the company’s assessable capital on incorporation for the year of incorporation and the company’s assessable capital on 31 August in the preceding year for subsequent years.

- Where the company’s business includes the management of any unit trust scheme, \$2,905 is payable in respect of each unit trust scheme managed as at the first day of each calendar year. Lower levels of fees apply for foreign sales corporations.

The fee for the year of incorporation is reduced by 50% if the company is incorporated after 31 August. Provision is made for the conversion of the assessable capital into Bermuda dollars for the purpose of determining the applicable fee.

6. Share capital and Debentures

a. Exchange Control

The Exchange Control Act 1972 and the Exchange Control Regulations 1973 govern exchange control.

Generally, exempted undertakings are designated by the Authority as “non-resident” for exchange control purposes, which means that they are free to deal in any currency of their choosing, other than “resident” Bermuda dollars.

The Authority has the responsibility for vetting, on a strictly confidential basis, the proposed beneficial ownership of business enterprises with a foreign ownership component, and any changes in such ownership. Thus, the consent of the Authority must be obtained before any shares or other securities of an exempted company can be issued or transferred. The information to be supplied will correspond to that given at the time of making the application to incorporate a company (see Part A: 2). A general permission with respect to the issue and transfer of securities would ordinarily be given in the case of a public offering (on the basis of a prospectus supplied to the Authority for informational purposes, to be filed thereafter with the Registrar) or, subject to certain conditions, of a private offering made to institutional investors.

b. Share Capital

Bermuda companies are no longer subject to any general requirements with respect to minimum share capital (§7(2)(a)). However, a company that writes insurance is required by the Insurance Act 1978 to have a minimum authorised and issued share capital of at least \$120,000, all of which must, prior to the company's registration as an insurer, be fully paid in cash or marketable securities (for more detailed information, see the "Appleby Guide to the Insurance Act 1978").

On an insolvent winding-up, a shareholder of an exempted company (being a limited liability company) is liable for up to, but not exceeding, the amount then remaining unpaid on his shares. It is also possible to incorporate companies whose shareholders' liability is unlimited.

The authorised capital of a company may be increased by resolution of the shareholders in general meeting if authorised by the company's bye-laws (§45). This is frequently accomplished at the first general meeting of the shareholders after the company is incorporated. For any Bermuda company that is set up, whether in private ownership or public ownership, there must be a subscriber for the share capital. The subscriber may be one or more individuals, trusts, partnerships or companies, or any combination thereof.

Subject to observing the prescribed procedures, a company may also reduce its share capital (§46). Any exempted company may, if so authorised by its bye-laws and the shareholders in general meeting, divide its shares into several classes and attach thereto any preferential, deferred, or special rights, privileges or conditions; consolidate and divide its share capital; subdivide its share capital; make provision for the issue and allotment of nonvoting shares; cancel authorised but unissued shares; and change its currency denomination (§47). In addition, a company may issue preference shares that, if authorised by its bye-laws, are redeemable at the option of the company and which, if authorised by its memorandum, are redeemable at the option of the holder (§42).

Ordinarily, where a person is acquiring or is proposing to acquire shares in a company, it is not lawful for the company or any of its subsidiaries to give financial assistance, directly or indirectly, to that person for the purpose of that acquisition before, or at the same time as, the acquisition takes place, or to offset his liabilities after the event (§39). However, this rule is relaxed if there are reasonable grounds for believing that the company is, and would after the giving of such financial assistance, still be able to pay its liabilities as they become due. In addition, the rule may be relaxed in certain other situations, subject to meeting tests set out in the Companies Act (§39A to §39C). More advice should be sought if a transaction involving financial assistance is being considered.

c. Issue Price of Shares

The shares in the capital of a Bermuda company must have a designated “fixed amount”, i.e. par value, which must be initially stated in its memorandum of association (§7(2)(a)), but may subsequently be changed (§45). Such change may only be effective if authorized by a company in general meeting and in accordance with the company’s bye-laws, and can be either by subdivision of the shares to create a lower fixed amount (§45(1)(b)) or by consolidation of shares to create a higher fixed amount (§45(1)(c)). Shares may not be issued for an amount less than the fixed amount, and a company must issue shares either for cash or for value, which meets or exceeds that fixed amount.

Any amount paid for shares over and above the fixed amount must be credited to the “share premium account” of the company (§40). The share premium account can only be used to (§40(2)):

- pay up unissued shares of the company to be issued to members of the company as fully paid bonus shares (§40(2)(a)); or
- write off expenses of the company (preliminary or expenses or commission paid or discount allowed on any issue of shares or debentures) (§40(2)(b)); or
- provide for the premiums payable on redemption of any shares or any debentures of the company (§40(2)(c)).

Companies are prohibited from issuing bearer shares (§53).

d. Redemption of Shares by a Company

The principle of the preservation of capital of a company requires that certain tests be met if a company is to redeem or repurchase its shares, including determining that the company is and will be solvent after effecting the redemption or repurchase (§42A(5)). The Companies Act also determines the funds that may be used for these purposes (§42A(6A)).

Unless the bye-laws of the company otherwise require, or unless the company’s constitution does not provide for it, the redemption of redeemable preference shares or the repurchase of shares by a company does not require shareholder consent. A reduction of capital requires a procedure that includes advertising the proposed reduction of the company’s capital, and obtaining the consent of the shareholders.

e. Acquisition by a Company of its own Shares

The Companies Act confers on a company, if so authorised by its Memorandum or bye-laws, the power to purchase its own shares and to acquire and hold its own shares as treasury shares (§42A). It is also clear that a subsidiary has the power to purchase shares of its parent.

There are certain restrictions on a company’s ability to finance the acquisition of its own shares (§42A). There is a statutory solvency test that, if met, will enable a company to provide what is termed “financial assistance” in connection with the acquisition of its own shares (§39A to C). More advice should be sought if a transaction involving financial assistance is being considered.

f. Treasury Shares

Treasury shares are defined as “issued shares that have been acquired by the company itself and have not been cancelled but have been held by the company since they were acquired” (§42B). Shares held as treasury shares are separate and distinct from shares that are repurchased for cancellation. An acquisition by a company of its own shares to be held as treasury shares may, subject to its bye-laws, be authorized by its board of directors (§42B(5)).

There are a number of conditions that must exist in order for a company to hold or acquire shares as treasury shares:

- the company’s constitution, i.e. memorandum and bye-laws must permit the company to acquire and hold shares as treasury shares (§42B(3));
- a company may not acquire its own shares to be held as treasury shares if, as a result of the acquisition, all of the company’s issued shares, other than the shares to be held as treasury shares, would be non-voting shares (§42B(4)); and
- an acquisition of shares to be held as treasury shares is expressly forbidden if the company would be rendered insolvent as a consequence of the acquisition (§42B(6)).

A company that acquires its own shares to be held as treasury shares may hold, cancel or dispose of the shares for cash or in kind consideration (§42B(7)). If the treasury shares are cancelled, then the amount of the company’s issued share capital will be diminished by the nominal value of those shares, but the cancellation will not be taken as reducing the amount of the company’s authorized share capital (§42B(8)).

If a company holds shares as treasury shares, then the company must be entered in the register of members as holding the shares (§42B(9)), but the company is forbidden from exercising any rights attached to those shares (§42B(10)). In addition, no dividends can be paid in respect of those shares (§42B(11)). A company holding shares as treasury shares can, however, in respect of those shares, make an allotment of shares as fully paid bonus shares (§42B(12)(a)) or pay any amount payable on the redemption of the shares (if they are also redeemable shares) (§42B(12)(b)) (e.g. in connection with employee share option plans or share dividends).

Where a company agrees or is obliged to acquire any of its shares to be held as treasury shares, then the company will not be liable in damages in respect of any failure to acquire those shares and the Court cannot grant an order for specific performance of the acquisition of those shares if to do so would render the company insolvent (§42B(14)). Furthermore, on a liquidation of a company that has agreed or is obliged to acquire any of its shares to be held as treasury shares, other shares that carry rights that are preferred to the rights attaching to the shares that are subject to the agreement or obligation must be paid in priority to those shares (§42B(14)(c)).

In certain circumstances treasury shares are excluded from the calculation of any percentage or fraction of the share capital, or shares, of the company or of any class of share capital, or shares, of the company (§42B(15)). Those circumstances referred to are found in sections 12(4), 47(1), 47(7), 89(5), 96(1), 99(2), 102, 103 and 113(1)(c)). A company that holds shares as treasury shares is also not a member of the company for the purpose of the number of shareholders required to requisition a meeting and to circulate a notice to the shareholders of such a meeting (§42B(16)).

g. Bearer Shares

It is not lawful for any Bermuda company to issue bearer shares (§53).

h. Register of Shareholders

Every company must keep a register of its members, i.e. its shareholders in Bermuda (§65). The register of shareholders must detail:

- the names and addresses of the shareholders and the number of shares held by each shareholder distinguishing each share by its number (if the share has a number) and, in respect of shares that are not fully paid, specifying the amount paid or agreed to be considered as paid in respect of such shares; and
- the date on which each shareholder's name was entered on the register as well as the date on which each person ceased to be a shareholder, i.e. any alterations made to the register of shareholders (§65(5)).

The register of shareholders must be kept at the registered office of the company or (after giving notice to the Registrar) at some other convenient place in Bermuda, for inspection.

Provision is made for the keeping of branch registers outside Bermuda by companies:

- whose shares are traded on an “appointed stock exchange”;
- whose shares have been offered to the public pursuant to a prospectus filed with the Registrar (see Part A: 6.i); or
- which are subject to the rules or regulations of a competent regulatory authority (§65(3)).

Except when the register is permitted to be closed (for up to 30 days in the aggregate in each year), the register must be open for inspection by members of the public without charge (§66). The Companies Act makes provision for mutual insurance companies and mutual fund companies to limit access to their shareholder registers.

Usually, where a company is listed on an international stock exchange based in another jurisdiction most of the transactions in its shares are undertaken by the branch registrar in that jurisdiction. In such circumstances, it is more usual for the principal register in Bermuda to be maintained by way of a copy of the more active register maintained by the branch registrar. Where a branch register is established in such circumstances, the principal register in Bermuda must be updated on a regular basis.

Subject to the consent of the Bermuda Monetary Authority, shares of a company may only be transferred by instrument in writing (§272A) (see Part A: 6.k), and as noted at Part A: 6.8, the transfer must be entered in the register of shareholders, which is the primary evidence of title to shares.

The Minister is empowered to make regulations enabling title to securities to be evidenced and transferred without a written instrument. Paperless trading is also permissible when transfers are effected through any mechanism required or permitted by a stock exchange which has been approved by the Minister.

i. Prospectuses and Public Offers

Any permit or exempted company which offers shares to the public must first publish a prospectus, signed by or on behalf of all of the directors, and file a copy of it with the Registrar (§26). The prospectus must be certified by an attorney, either as containing the particulars prescribed by the Companies Act or as having been received or otherwise accepted by an appointed stock exchange or “competent regulatory authority” (e.g. the Securities and Exchange Commission, USA), in which case it is exempt from the Companies Act prospectus disclosure requirements (§26(2)). The Companies Act imposes a fine (currently \$1,000) on each director, provisional director and promoter (person involved in the preparation of the prospectus) of a company who fails to comply with the requirements of the Companies Act (§26(3)). In addition, the Companies Act provides for severe criminal sanctions and civil liability for untrue statements and misstatements contained in the prospectus, respectively (§30 and §31, respectively).

An offer is not treated as an offer to the public if it is (§25(4)):

- an offer to existing shareholders of shares in the company of the same class as the shares comprised in the offer without any right of renunciation (§25(4)(a)); or
- an offer without any right of renunciation to the holders of convertible debentures or debentures having subscription rights in respect of shares into or in respect of which the right of conversion or subscription exists (§25(4)(b)); or
- an offer certified in writing by an officer of the company on behalf of the board of directors to be an offer which the board considers as not being calculated to result, directly or indirectly, in the shares becoming available in the case of an exempted company (or a permit company) to more than 35 persons (§25(4)(c)); or
- an offer having a private character (§25(4)(d)) (n.b. an offer is not automatically of a “private character” by reason that it is one made to members or debenture holders of the company (§25(4B)); however, an offer of shares pursuant to an employees’ share scheme or employees’ share incentive plan is regarded as of a “private character” within the meaning of the Companies Act (§25(4A))); or
- an offer certified in writing by an officer of the company on behalf of the board of directors to be an offer which the board considers as not being calculated to result, directly or indirectly, in shares becoming available to persons other than persons whose ordinary business involves the acquisition, disposal or holding of shares, whether as principal or agent (§25(4)(e)).

Offerings to sophisticated investors of listed securities, which, under the rules of the stock exchange on which the shares are listed do not require the preparation and filing of a prospectus (or where an application has been made for such a listing), are also exempted (§26(1A)). Further exemptions apply where a company is subject to the rules and regulations of a competent regulatory authority and those rules do not require the preparation and filing of a prospectus. For those companies that continuously offer their shares to the public (such as mutual funds), there is a requirement for the issue of a new prospectus or supplementary particulars on the occasion of any material change in the prospectus particulars (§29).

The Minister has the discretion to direct that some or all of the prospectus requirements of the Companies Act shall not apply to a proposed offering of shares (§25(5)).

j. Listing on the BSX

Any exempted company or foreign company can use the facility of the Bermuda Stock Exchange (the “BSX”) for raising capital and trading securities. All listing applications for prospective issuers must be sponsored by one of the BSX’s trading members and specific listing regulations must be complied with. Trading memberships are available to international brokers who meet the BSX requirements, which include a minimum capital requirement and a requirement to incorporate a subsidiary in Bermuda as an exempted company. Our associated company, Appleby Securities (Bermuda) Ltd., can act as a listing sponsor for certain listing applications.

k. Securities Clearance

In general, for any issue or transfer of its shares or debt securities a standard instrument of transfer must be issued and signed by or on behalf of the transferor and the transferee. The transfer must then be recorded on the securities register of the company. Under the provisions of the Exchange Control Act 1972 the issue or transfer of securities in an exempted company requires specific permission from the Bermuda Monetary Authority. However, where the shares or debt securities are to be issued in an initial public offering, or the shares or debt securities are issued by a company the shares of which are listed on an appointed stock exchange, the Bermuda Monetary Authority will generally grant a global permission for the issue and free transfer of such shares or debt securities.

l. Dividends

Bermuda law permits a company to declare or pay a dividend, subject to complying with the tests set out in the Companies Act. The Companies Act tests provide that a company may declare or pay a dividend if there are reasonable grounds for believing that (§54(1)):

- the company is or would after the payment be able to pay its liabilities as they become due; or
- the realisable value of the company’s assets would not thereby be less than the aggregate of its liabilities and its issued share capital and share premium accounts.

Different generally accepted accounting principles will affect the way in which the financial statements of a company are presented and, therefore, will have an impact on a company’s ability to meet these tests. Generally accepted accounting principles in Bermuda are based upon those of Canada.

Contributed surplus is another account of a company (treated as part of the shareholders’ equity) that may be used to make distributions to shareholders but is characterised as a return of capital rather than income. Distributions out of contributed surplus may be made only if the same two solvency tests in respect of a dividend are satisfied. Contributed surplus includes the excess value on a share exchange (see above) and donations of cash or other assets to a company (§40(1) and §54(2)).

m. Appointed Stock Exchanges and Competent Regulatory Authorities

The following is the current list of appointed stock exchanges and competent regulatory authorities:

Appointed Stock Exchanges

- American Stock Exchange, Inc
- Australian Stock Exchange
- Boston Stock Exchange, Inc.
- Bourse de Montreal
- Bursa Malaysia Securities Berhad (formerly known as The Kuala Lumpur Stock Exchange)
- Canadian Dealing Network
- Canadian Venture Exchange (the Alberta Stock Exchange and the Vancouver Stock Exchange merged in November 1999 to become the Canadian Venture Exchange)
- Dubai International Stock Exchange
- European Association of Security Dealers Automated Quotations S.A. (EASDAQ)
- Frankfurt Stock Exchange
- JASDAQ Market
- London Stock Exchange
- London Stock Exchange – Alternative Investment Market (AIM)
- New York Stock Exchange, Inc
- New Zealand Stock Exchange
- Nya Marknaden
- Oslo Børs
- Paris Bourse
- PLUS Markets
- Sao Paolo Stock Exchange
- Shanghai Stock Exchange
- Singapore Exchange Securities Trading Limited
- Societe de la Bourse de Luxembourg S.A.
- Specialist Fund Market
- Stockholm Stock Exchange
- Swiss Exchange
- Taiwan Stock Exchange
- Tel Aviv Stock Exchange
- The Bermuda Stock Exchange
- The Bolsa de Madrid
- The Commission de Surveillance du Secteur Financier
- The Euro MTF Market
- The Euronext Exchange
- The Irish Stock Exchange
- The Johannesburg Stock Exchange
- The Nasdaq Stock Market, Inc (NASDAQ)
- The Stock Exchange of Hong Kong Ltd.
- The Toronto Stock Exchange
- The TSX Venture Exchange
- Tokyo Stock Exchange
- Viennese Stock Exchange

Competent Regulatory Authorities

- Australian Securities and Investments Commission
- Austrian Federal Ministry of Finance
- Bermuda Monetary Authority
- The Commission de Surveillance du Secteur Financier
- Dubai Financial Services Authority
- Financial Services Authority
- Hong Kong Securities and Futures Commission
- Japanese Financial Services Agency and its delegate, the Kanto Local Finance Bureau of the Ministry of Finance of Japan
- Luxembourg Commissariat aux Bourses
- Monetary Authority aux Bourses
- The Monetary Authority of Singapore
- Ontario Securities Commission
- Securities and Exchange Commission of Brazil
- Securities Commission, Malaysia
- Swiss Exchange
- United States Securities and Exchange Commission

n. Investigation, Shareholder Protection and Oppressive Conduct

i. Investigation

The Minister has the power under the Companies Act to appoint an inspector to investigate the affairs of an exempted company and to report on them in such manner as he may direct (§132(1)). Whenever such an appointment is made, the Registrar may make an application to the Court for an order that the assets, books and papers of the company be preserved and not moved, modified, destroyed or deleted (§132(13), See Part A: 6.n.iv). All expenses of the investigation will be at the cost of the company unless the Minister directs otherwise (§132(2)).

The investigation will be held in private unless the company requests that it be held in public (§132(6)). Every officer, agent or employee of the company must produce to the inspector such books or documents as the inspector may require for the purpose of his investigation (§132(3)) and any officer, agent or employee will be liable to a fine if he refuses to do so (§132(4)). The investigator also has the power to take evidence upon oath from any officer, agent or employee (§132(5)).

If the Minister considers, after examining the report compiled by the inspector, that the company or any of its officers, agents or employees of the company have knowingly and willfully done anything in contravention of the Companies Act or any license or permit granted under the Companies Act, then he may direct the Registrar to petition the Court for the winding up of the company (§132(8)(a)). In addition, if the Minister considers that the company or any of its officers, agents or employees of the company are carrying on its affairs in a manner that is detrimental to the interests of the shareholders of the company or the creditors of the company, then he may require the company to take such measures as he may consider necessary in relation to the company's affairs (§132(8)(b)).

A copy of any petition must be served on the company at least seven clear days before the day set by the court for the hearing of the petition (§132(9)). If the Court, on the hearing of the petition, is satisfied as such, then the Court may make an order for the winding up of the company, impose a fine of \$2,000 on the company, or impose a fine on any officer, agent or employee of the company who has knowingly and willfully authorized or permitted such contravention (§132(10)).

ii. Shareholder Protection

The Minister may also, on an application of that proportion of the members of a company, as in his opinion warrants the application, by reference to their shareholding, appoint an inspector to investigate the affairs of a company (§110(1)). The application must be supported by evidence showing the applicants have good reason for, and are not actuated by malicious motives in requiring the investigation. The Minister may also require the applicants to give security for payment of the costs of the inquiry (§110(2)) and the applicants will be liable for the costs of the inquiry, unless the Minister directs that they be paid by the company (§110(8)).

All officers and agents of the company must disclose to the inspector all books and documents in their custody or power (§110(3)). The inspector also has the power to take evidence upon oath from any officer or agent in relation to the business of the company (§110(4)). Where any officer or agent refuses to disclose any book or document, or to answer any question relating to the affairs of the company, then he will be liable to a fine and the Court, in any event may, on conviction, order him to produce the books or documents in respect of which he was convicted (§110(5)).

On the conclusion of the investigation the inspector will report to the Minister, and a copy of the report will be forwarded to the company and a further copy may, at the request of the applicants and at the discretion of the Minister, be forwarded to the applicants (§110(7)).

iii. Oppressive Conduct

Any member of a company who complains that the affairs of the company are being conducted or have been conducted in a manner that is oppressive or prejudicial to the interests of the shareholders can make an application to the Court, with a view to bringing to an end the matters complained of (§111).

If on such a petition the Court is of the opinion that the company's affairs are being conducted or have been conducted as aforesaid but to wind the company up would also unfairly prejudice those shareholders that have cause to petition, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable, then the Court may make any order it thinks fit (§111(2)). The Court, therefore, has a broad discretion to act. For example, the Court may regulate the conduct of the company's affairs in the future, or for the purchase of the shares of any shareholders of the company by other shareholders or by the company. Where an order makes an alteration or provision to alter or add to a company's memorandum or bye-laws, then the company is forbidden to make any further alterations to either its memorandum or its bye-laws without leave of the Court (§111(3)). A copy of the order therefore must be delivered to the Registrar for registration within 14 days of the order (§111(4)).

iv. Preservation of the Books and Assets

Where the Minister has made such an order, the Registrar may apply to the Court ex parte for an order that the assets, books and papers of the company be preserved, i.e. not moved, modified or deleted (§112(1)). The test the Court will use in deciding whether or not to grant an order is whether "there is a likelihood that the assets of the company will be transferred or that the books and papers of the company may be moved, modified, destroyed or deleted" (§112(2)). If such an order is made, the company may apply to the Court for the order to be discharged and the Court may confirm the order, vary the order in such manner as it considers just or discharge the order (§112(3)). This can include an order for the custody, inspection and copying of the books and papers of the company.

PART B OVERSEAS (PERMIT) COMPANIES

1. Introduction

An overseas company, that is to say a company incorporated outside Bermuda, which seeks to “engage in or carry on any trade or business in Bermuda” may only do so with a permit issued by the Minister (§133). The overseas company may be looking to establish its principal business office or, more usually, a branch office in Bermuda. Section 133 of the Companies Act does not, however, apply to a mutual fund which is administered from Bermuda (§133A).

2. ‘Engaging in business in Bermuda’

Whether an overseas company requires a permit is frequently a question of fact to be determined in the light of those activities that are, or are intended to be, carried on, by or on behalf of the company, in or from Bermuda. An overseas company will be deemed to be engaging in, or carrying on, a trade or business in Bermuda if it occupies premises in Bermuda, or if it makes known by way of advertisement, or by an insertion in a directory, or by means of letterheads, that it may be contacted at a particular address in Bermuda, or if it is otherwise seen to be engaging in, or carrying on, a trade or business in or from Bermuda on a continuing basis (§133(4)). An overseas company will not be deemed to be carrying on business in Bermuda simply because meetings of its officers or shareholders are held in Bermuda, or because the company acquires, holds and deals in all types of securities issued or created by a Bermuda entity (§133(4)(a) to (c)).

3. Application procedure

An overseas company with a permit issued by the Minister is known as a “permit company”. The intention to apply for a permit must be advertised in a local newspaper, specifying the company’s name and the trade or business that it proposes to engage in or carry on in Bermuda (§134(3)). The application, with prescribed supporting documents (certified copies of the company’s constitutional documents, its latest audited financial statements and, where appropriate, personal and financial references for the directors and beneficial owners of the company), will provide the prescribed particulars of the company, including the name and address of its proposed principal representative in Bermuda and of its proposed local bankers. The application must also disclose the reason for requiring a permit as opposed to forming an exempted company; exchange control prohibition and tax disadvantage, amongst other reasons, have been accepted in this context.

4. Restrictions and requirements

Generally, a permit company will be carrying on its business, and will only be allowed to do so, in the same manner as an exempted company, (i.e. outside Bermuda) from a place of business within Bermuda, or with other exempted undertakings (§143). It is subject to many of the provisions of the Companies Act that govern companies incorporated in Bermuda; for example, those relating to prospectuses required in connection with public offerings.

A permit company must appoint and maintain a principal representative in Bermuda and give notice to the Registrar of the prescribed particulars of its principal representative (§136A). If any of these particulars are altered, details must be given to the Registrar within 21 days. If it has not already done so on its application for a permit, a permit company is required, upon receipt of its permit, to provide certain information to the Registrar, including a list of persons resident in Bermuda who are authorized to accept, on its behalf, service of process and any notices required to be served on it. That list would ordinarily include the principal representative. The permit granted by the Minister is a public document open to inspection.

A permit company must keep, at the principal place in Bermuda from which it carries on business, “such records of its acts and financial affairs as will show adequately the trade or business it is engaging in or carrying on or has

engaged in or carried on in Bermuda”. However, if the records of the company’s acts and financial affairs are kept at some place outside Bermuda, there must be kept at an office of the company in Bermuda such records as will enable the directors to ascertain, with reasonable accuracy, the financial position of the company at the end of each three month period (§145). In neither case are these records required to be filed with any governmental or other authority in Bermuda (except in the case of a permit company which is registered as an insurer under the Insurance Act 1978).

A permit company may not commence its business in or from Bermuda until it has made the first payment of the annual government fee. The fee (\$1,995 or, for insurers, open ended mutual funds and companies engaged in “finance business”, \$4,125) becomes payable annually thereafter, on or before 31 March. If the permit company is engaged in the business of managing unit trust schemes, there will be an additional fee of \$2,905 in respect of each scheme managed. Where a permit is issued after 31 October in any year, the appropriate fee payable for that year is reduced by 50%.

A permit company, like an exempted company, may apply to the Minister for an assurance exempting it from future taxation, for a period ending not later than 28 March 2016 (see Part A: 5)(§151).

PART C ARRANGEMENTS, RECONSTRUCTIONS, AND AMALGAMATIONS

1. Arrangements

The court may, on the application of a company, creditor or shareholder (or liquidator in the case of a company being wound up), order a meeting where a compromise or arrangement is proposed between a company and its creditors or between a company and its shareholders (or any class of them) (§99(1)).

Every creditor or shareholder must be put on notice of the meeting (§100(1)). With every notice there must also be a statement explaining the effect of the arrangement and any material interests of the directors, whether as directors, shareholders, creditors or otherwise, and the effect of the arrangement in so far as it is different from the effect on the interests of other persons (§100(1)(a)). Similarly, where the arrangement affects the rights of debenture holders of the company, the said statement must also give an explanation as respects the trustees of any deed for securing the issue of the debentures (§100(2)). If the notice is made by way of advertisement, then the advertisement must either include a statement to the above effect, or it must give a place where shareholders or creditors may obtain copies of such a statement (§100(1)(b)).

The arrangement will be sanctioned if 75% of the creditors or shareholders, as the case may be, present and voting either in person or by proxy at the meeting, agree (§99(2)). The order will have effect when a copy of it is delivered to the Registrar for registration and a copy is annexed to every copy of the memorandum of association of the company issued after the order has been made (§99(3)).

2. Reconstructions

The Companies Act contains provisions for facilitating the reconstruction of companies (pursuant to a scheme of arrangement between a company and its shareholders or creditors) with the sanction of an order of the Court (§101). Where it is shown that such an arrangement involves the whole or any part of the undertaking or property of a company (“the transferor company”) being transferred to another company (“the transferee company”), then the court may order (§101(1)(a) to (f)):

- the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;
- the allocation or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company, which under the arrangement are to be allotted or appropriated by that company to or for any person;
- the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- the dissolution, without winding up, of any transferor company;
- the provision to be made for any person, who within such time and in such manner as the Court directs dissent from the compromise or arrangement; and
- such incidental, consequential and supplemental matters as are necessary to ensure that the reconstruction be fully and effectively carried out.

“Property” includes all assets, rights and powers of every description and “liabilities” includes duties.

The Minister’s consent is required and an affidavit to that effect must be lodged with the Court before an order can be made (§101(2)). Where an order is made, every company in relation to which the order is made must deliver a copy of the order to the Registrar for registration within seven days of the order being made (§101(4)).

a. Compulsory Buy-out of Dissenting Shareholders

Where the scheme of arrangement involves the transfer of shares or any class of shares in a company, then the Companies Act also provides for the transferee company to acquire the shares of dissenting shareholders (§102 and §103).

Under section 102, a scheme supported by 90% in value of the shares or shares of a class of a company that were the subject of the scheme may force the scheme of arrangement on the holders of the remaining 10% of shares or shares of that class (§102(1)). When calculating the 90% threshold, shares already held at the date of the offer by (or by a nominee for) the transferee company or its subsidiary are disregarded. The 90% approval must be garnered within four months of making the offer of the scheme by the transferee company. At any time within two months after the date on which such approval is obtained, the transferee company may give notice to any dissenting shareholder that the transferee company desires to acquire his shares. When such notice is given, the transferee company is entitled and bound to acquire the shares subject to the notice on the same terms under which the shares of the shareholders who have already approved the scheme are to be transferred to the transferee company, unless the court, on an application by the dissenting shareholders, within one month on which the notice was given, orders otherwise.

The test the court will use in determining whether the dissenting shareholders have suffered oppression is the test used in determining whether there has been Oppressive Conduct (see Part A: 6.n.iv). The existence of oppression in these circumstances will turn on the offer price of the shares and the Court will simply look to the value being given to the shareholders as a whole and not to the loss of control or influence or dilution in respect of individual shareholders. Accordingly, oppression will be quite a difficult matter to prove.

If the transferee company already holds 10% or more in value of the aggregate value of the shares to be acquired (where “aggregate value” means the value of the transferee company’s existing shares plus the value of the other shares of the same class that is subject of the offer) then, in order to take advantage of

the compulsory transfer procedure under section 102, the transferee company must offer the same terms to all holders of the shares and the holders who approve the scheme must not only satisfy the 90% test set out above but must be not less than three-fourths in number of the holders of the shares subject to the scheme not already held by the transferee company.

Where a dissenting shareholder makes an application to the court, but the court declines to make an order contrary to the scheme of arrangement, then the transferee company will, on the expiration of one month from the date the dissenting shareholder's application has been disposed of, transmit a copy of the notice to the transferor company together with an instrument of transfer executed on behalf of the dissenting shareholder by any person appointed by the transferee company.

The transferee company will also pay to the transferor company the consideration for the shares, which by virtue of section 102 the transferee company is entitled to acquire. Any sums received by the transferor company in relation to this process will be paid into a separate bank account, and those sums together with all other sums received under section 102 will be held on trust for the relevant dissenting shareholders.

The transferor company will then register the transferee company as the holder of those shares.

b. Buy-out of Minority

Under section 103 of the Companies Act, the holders of not less than 95% of the shares or class of shares of a company ("the majority shareholders") may acquire the shares of the remaining minority shareholders, provided that the terms offered are the same for all of the holders of the shares whose acquisition is involved (§103(1)).

Under this procedure, the majority shareholders need only give notice to the remaining shareholders of their intention to acquire their shares. When the notice is received, the acquiring shareholders are entitled and bound to acquire the outstanding shares on the terms set out in the notice unless one of the remaining shareholders, within one month of receiving such notice, applies to the court for an appraisal. Within one month of the court appraising the shares, the majority shareholders shall either acquire the shares at the price fixed by the court or cancel the notice (§103(4)). There is no appeal from the court's valuation of the shares (§103(5)).

The costs of any application to the court under section 103 are discretionary (§103(6)).

3. Amalgamations

Specific provisions of the Companies Act govern amalgamations (pursuant to which by operation of law, two or more companies limited by shares amalgamate and continue as one company) (§104-109).

a. The Amalgamation Agreement

Two companies registered in Bermuda may amalgamate and continue as one company (§104) provided each company proposing to amalgamate enters into an amalgamation agreement, which sets out the terms and means of effecting the amalgamation (§105). In particular, the agreement must set out (§105(1)):

- the provisions that are required to be included in the memorandum;

- the name and address of each proposed director of the amalgamated company;
- the manner in which the shares of each amalgamating company are to be converted into shares or other securities of the amalgamated company;
- if any shares of an amalgamating company are not to be converted into securities of the amalgamated company, the amount of money or securities that the holders of such shares are to receive in addition to or instead of securities of the amalgamated company;
- the manner of payment of money instead of the issue of fractional shares of the amalgamated company or of any other securities which are to be received in the amalgamation;
- whether the bye-laws of the amalgamated company are to be those of one of the amalgamating companies and, if not, a copy of the proposed bye-laws; and
- details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated company.

If shares of one of the amalgamating companies are held by or on behalf of one of the other amalgamating companies, then the amalgamation agreement must also provide for the cancellation of those shares when the amalgamation becomes effective without any repayment of capital in respect thereof. In addition, it is not possible to provide in the agreement for the conversion of such shares into shares of the amalgamated company (§105(2)).

The directors of each amalgamating company must submit the amalgamation agreement before the shareholders of their respective companies and gain shareholder approval (§106) before the amalgamation agreement can be effected and the amalgamated company can be registered by the Registrar (§108). Special attention should be paid to the provisions of the bye-laws of the respective companies that apply to meetings. Appropriate notice must therefore be given to the shareholders, and they should also be sent a summary of the amalgamation agreement and a statement of the fair value of their shares (§106(2)).

At the meeting, each share of an amalgamating company is entitled the right to vote, irrespective of whether it carries that right (§106(3)) and, if the amalgamation agreement contains a provision that would constitute a variation of the rights attaching to any class of shares, then the holders of such shares are entitled to vote separately as a class (§106(4)). Unless the provisions of the bye-laws provide otherwise, the resolution of the shareholders or class must be approved by a majority of 75% of those voting at the meeting, where the quorum is two people holding (or representing by proxy) more than one-third of the issued shares of the company (or the class) (§106(4A)).

Should the amalgamation agreement receive approval then the dissenting shareholders are entitled to receive fair value for their shares and, if they are not satisfied that they have been offered fair value, then they may apply to the Court within one month of the notice of the meeting to assess the fair value of their shares (§106(6)). Costs of such an application are discretionary (§106(6D)). The company can then either pay the value determined by the Court or terminate the agreement (§106(6A)). Should the amalgamation have proceeded prior to the Court appraisal then the amalgamated company must pay the difference between the amount paid to the dissenting shareholder and the value determined by the Court (§106(6B)).

An amalgamation agreement may provide that at any time before the issue of a certificate of amalgamation the agreement may be terminated by the directors of an amalgamating company, notwithstanding that approval may have already been given by the shareholders (§106(7)).

b. Registration

After the amalgamation has been adopted, the amalgamated company must apply to the Registrar for a certificate of amalgamation (§108(1)). The application must include (§108(2)):

- a certified copy of the resolution of each amalgamating company;
- the registered address of the amalgamated company; and
- the memorandum of the amalgamated company.

A statutory declaration must also be attached to the application that states that there are reasonable grounds for believing that (§108(3)):

- each amalgamating company is and the amalgamated company will be able to pay its liabilities as they become due;
- the realizable value of the amalgamated company's assets are not less than the aggregate of its liabilities and issued share capital; and
- either no creditors have been prejudiced by the amalgamation or that creditors were put on notice and no creditor objects otherwise than on grounds that are frivolous or vexatious. Notice is adequate if notice in writing was sent to each creditor having a claim for more than \$1,000 and a notice is published in an appointed newspaper (§108(4)).

On the date shown in a certificate of amalgamation issued by the Registrar (§109(a)-(g)):

- the amalgamation of the amalgamating companies and their continuance as one company will become effective;
- the property of each amalgamating company will become the property of the amalgamated company;
- the amalgamated company will continue to be liable for the obligations of each amalgamating company;
- an existing cause of action, claim or liability to prosecution will be unaffected;
- a civil, criminal or administrative action or proceeding pending by or against an amalgamating company may be continued to be prosecuted by or against the amalgamated company; and
- the certificate of amalgamation will be deemed to be the certificate of incorporation of the amalgamated company; however, the date of incorporation of a company is its original date of incorporation and its amalgamation with another company does not alter its original date of incorporation.

The effect of the amalgamation is that the amalgamated company becomes liable for all the obligations and liabilities of each amalgamating company (§109).

c. Amalgamation of a Bermuda Exempted Company with a Foreign Corporation and Continuation as a Foreign Corporation

The companies to be amalgamated may include “foreign corporations”, i.e. bodies incorporated outside of Bermuda, provided the foreign law permits such cross-border amalgamations, and continuance as an exempted company (§104A(2)). An amalgamated company made up of one or more exempted

companies and one or more foreign corporations may also continue as a foreign corporation (§104B(1)). However, the Companies Act imposes further requirements for such an amalgamation (§104B).

In addition to the above requirements, an exempted company may not amalgamate with a foreign corporation and continue as a foreign corporation unless an irrevocable deed poll is executed by the directors of the exempted company, pursuant to which (§104B(2)(b):

- the exempted company and each of its directors may be served with legal process in Bermuda arising in any proceedings arising out of actions or omissions of the company occurring prior to the amalgamation and provision is made for the appointment for an agent within Bermuda who can receive service of process for a period not less than three years from the effective date of amalgamation; or
- the exempted company and each of its directors may be served with legal process at a specified address in the United Kingdom, United States of America or any appointed jurisdiction, and that the company and directors submit to the non-exclusive jurisdiction of the relevant country's or jurisdiction's courts.

Furthermore, not more than three months prior to the effective date of the amalgamation, each exempted company must advertise in an appointed newspaper and each foreign corporation must advertise in the jurisdiction in which it was incorporated or is presently registered its intention to amalgamate and continue as a company in the foreign jurisdiction (§104B(e)).

An exempted company must not amalgamate unless the Registrar has received notice of the amalgamation, which contains (§104C(1)):

- the effective date of the amalgamation;
- the name of the foreign jurisdiction;
- the address of the registered office or the principal business address of the amalgamated corporation in the foreign jurisdiction;
- a copy of the statutory declaration (as above); and
- a copy of the irrevocable deed poll.

The amalgamated corporation must also file with the Registrar a copy of the certificate of amalgamation issued by the appropriate authority or foreign jurisdiction, within 30 days of its issue (§104C(2)).

d. Short Form Amalgamations

Where the amalgamating companies are affiliates of one another (i.e. as holding company and subsidiary or as subsidiaries of the same holding company), there is a “short form amalgamation” procedure available (§107), which avoids the requirements of an amalgamation agreement and shareholder approval.

A holding company and one or more of its wholly-owned subsidiary companies may amalgamate and continue as one company (§107(1)) if the amalgamation is approved by a resolution of the directors of each amalgamating company, which provides that:

- the shares of each amalgamating subsidiary company will be cancelled without any repayment of capital in respect thereof;

- the memorandum will be the same as the memorandum of the amalgamating holding company; and
- no securities will be issued by the amalgamated company in connection with the amalgamation.

Two or more wholly-owned subsidiary companies of the same holding company may amalgamate and continue as one company (§107(2)) if the amalgamation is approved by a resolution of the directors of each amalgamating company, which provides that:

- the shares of all but one of the amalgamating subsidiary companies will be cancelled without any repayment of capital in respect of such shares; and
- the memorandum will be the same memorandum of the amalgamating subsidiary company whose shares are not cancelled.

The amalgamating companies also have the option of combining their respective authorized share capitals. Irrespective of whether they exercise this option, their choice must be stated in the resolution approving the amalgamation (§107(3)).

PART D MERGERS AND TAKEOVERS

1. Introduction

Bermudian companies, private and public, have been involved in considerable merger and acquisition activity with companies listed on a number of international stock exchanges. These transactions have been both friendly and hostile.

For example, Bermuda companies:

- have been used as the acquirer, in a bid being made to acquire a listed company (set up in Bermuda or another jurisdiction), which is to be taken private by the owner of the acquirer; and
- have been the subject of hostile and friendly acquisitions, on the basis noted below.

2. Friendly Acquisition of a Bermuda Company

These usually are accomplished by an acquisition of the share capital of the target Bermuda company, pursuant to an offer of shares or cash made by an acquirer. Sometimes the transaction is structured as a direct acquisition of the shares from the existing shareholders of the Bermuda company or, more usually, the transaction is structured as an amalgamation (merger) of the target company into another Bermuda subsidiary company set up by the acquirer for the purpose.

As a result of this latter structure, the shares of the Bermuda company which is the target cease to exist in the amalgamation and are replaced by shares issued by the acquirer itself directly to the former shareholders of the Bermuda company. The amalgamated company becomes a wholly-owned subsidiary of the acquirer.

3. Hostile Acquisition of a Bermuda Company

In the context of a hostile acquisition of a Bermuda company, a number of alternatives have been used:

- a straight offer of cash for the purchase of shares;

- an offer of shares of the acquirer by way of simple exchange;
- an offer of shares of the acquirer as part of an amalgamation; or
- a combined offer of shares and cash.

In the context of acquisitions, it should be noted that the Companies Act provides for the following mechanisms:

- the acquisition of a minority interest, when the acquirer has the support of 90% in value of the shares of the company, excluding those shares already held by the acquirer (see the discussion at Part C: 2.a, which also applies to acquisitions)(§102);
- the acquisition of a minority share interest when the acquirer holds 95% of the issued shares of a Bermuda company (see the discussion at Part C: 2.b, which also applies to acquisitions) (§103); and
- the acquisition of control of a Bermuda company by an amalgamation, pursuant to the provisions of §104-109 (See Part C: 3).

In a transaction involving either an amalgamation or a takeover, a prospectus or a formalised document such as a proxy statement is usually not required under Bermuda law. However, it is highly likely that the rules of the stock exchange on which the shares of the target company are listed will have significant effect on the manner in which a company implements a merger, or deals with an offer. Subject to such rules, it is possible to structure defense mechanisms to takeovers.

4. Defence Mechanisms to a Hostile Bid

a. Shareholders Rights Issue Agreement (the "Poison Pill")

A shareholders rights issue agreement, or as it is commonly referred to, a “Poison Pill”, is a plan designed to deter a hostile takeover bid by diluting the percentage shareholding of the acquiring company in the target Bermuda company. A shareholders rights plan may be found in a shareholders agreement or under the provisions of the bye-laws of the company.

Typically the rights issue agreement is triggered by a specified triggering event and grants shareholders, as a “bonus”, the right to purchase additional shares in the target Bermuda company in proportion to their current shareholding, at a substantial discount to market price, if a hostile person acquires over a certain specified percentage (the specified triggering event - usually 20%) of the target Bermuda company’s voting shares. The hostile person itself is not permitted to purchase shares at a discount. The effect of the Poison Pill is to dilute the percentage shareholding of the acquiring company in the target Bermuda company, while increasing the proportional interests of the other existing, friendly shareholders. The theory is that the hostile person will not acquire the requisite percentage shareholding to confer voting control of the target company while the plan is in force because of the massive dilution it would face, thus protecting the target Bermuda company from a hostile takeover.

The right of the directors to issue such “bonus” shares is subject always to the fiduciary duties of the directors to act in the best interests of the company. Acting in the best interests of the company does not necessarily mean that directors must obtain the very best price available for each individual share. Further, directors are entitled to have regard to any number of "proper" issues including "bonuses" to existing shareholders. Moreover, pre-existing contractual obligations to provide such bonuses will, more than likely, determine the issue in advance so that it must be "proper" for the directors to comply with their pre-existing contractual or bye-law obligations.

In *Stena Finance B.V. v Sea Containers Ltd.* (the “Sea Containers Case”), the Supreme Court of Bermuda considered the phenomenon of takeover bids as a method of corporate control, and the use of deploying the “Poison Pill” as a mechanism to block a takeover and the implications this had on the target Bermuda company’s directors’ exercise of their powers and duties as directors.

The Supreme Court acknowledged that the directors had general powers, derived from section 13(3) of the Companies Act, to do all things on behalf of the company, which encompass the allotment of shares and the grant of options over unissued shares. In the *Sea Containers Case*, the court held that the absence of an express power to issue shares and grant options over unissued shares was not fatal to the directors’ ability to implement the Poison Pill, unless by so doing they were thereby abusing their fiduciary powers. The Court held that the distribution of rights to existing shareholders in anticipation of a possible Hostile Takeover Bid is not unlawful, provided that:

- the directors have the requisite powers under the company's bye-laws to issue such rights;
- they exercise those powers bona fide, that is, not for the purpose of entrenching the existing management of the company; and
- they exercise those powers fairly as between shareholders.

In coming to this conclusion, the court also interpreted section 13(3) of the Companies Act and confirmed that the powers given to the directors are wide, but provided that the directors do not abuse their fiduciary power, the court cannot impose its views in substitution for those of the directors.

The court approved the directors' action in adopting the Poison Pill as one of the means to block a takeover, however their approval was accompanied by the qualification that such action could only be taken, “provided the directors have not exercised their power for some collateral purpose and have exercised their power fairly between shareholders and not in such a way as to favour improperly one section of the shareholders against another.”

Accordingly, for a Poison Pill mechanism to be successful and for the directors to not be in breach of their fiduciary duties, the shares issued must have a high-perceived probability of being taken up by persons/institutions that are friendly to the objectives of the target Bermuda company’s directors. The usual stated rationale for adopting a rights plan is that it will prevent creeping takeover bids and will also allow the board of directors to maximize shareholder value by giving it more time to solicit competing bids or at least force a hostile bidder to negotiate with the board over the price it will pay before the board will lift the plan.

b. Poison Debt

This defensive mechanism generally takes the form of a company issuing debt securities on terms and conditions designed to deter a hostile takeover.

Examples of terms and conditions which may prove a deterrent include:

- covenants that severely restrict the issuer’s ability to sell assets;
- an increase in the interest rates of the debt in the event of a takeover, e.g. issue loan stock with low coupon or at a discount with zero coupon with a provision for repayment at par or at a premium on completion of the takeover;

- an acceleration of the maturity date upon the change of control of the target Bermuda company, i.e. repayment on completion of the takeover; and
- an issuance of debt/securities that are convertible into or carrying rights to subscribe for shares in the target Bermuda company.

c. Voting Poison Pill Plan

The objective of this mechanism is to dilute the acquiring company's voting control. The most effective mechanisms are those that are in place prior to a potential hostile takeover bid. This will help to counter any accusations of mala fides on the part of the directors, which may render the plan invalid or expose the directors to liability for breaching their duties of impartiality. Also, given that these plans will require shareholder approval due to variation of share rights, it is easier to obtain the requisite consent when the spectre of a takeover does not loom. As an alternative, these plans may be created in response to a potential takeover and this will usually involve the potential target company issuing securities pursuant to a bonus issue (which possess special voting features), to its existing common shareholders. Many possible structures may be encountered. One form is where the target company issues shares, which do not have special voting privileges at the outset. Upon the occurrence of a specified triggering event, the shareholders, other than an acquiring company, receive super voting privileges. Another possible form is where the target company's shareholders are issued shares with voting rights that are enhanced with the length of time the securities are held on a continuous basis (see §45 of the Companies Act).

d. Shareholders' Meetings

A defensive measure might include building special majorities and procedures for shareholder action, in particular removal of the Board.

Under Bermuda law, the Board of Directors is only obliged to convene one meeting of the shareholders per year, namely the annual general meeting, at which certain statutory matters must be disposed of, including the election of auditors and the re-election of directors. A special general meeting of shareholders can be called at any time either by the Board of Directors, after giving notice in accordance with the bye-laws, or by the holders of 10% of the shares requisitioning a special general meeting.

The shareholders acting by simple majority, but subject always to special majorities provided by the bye-laws, can take any action, including the removal of directors, provided directors are given notice and an opportunity to be heard. Thus removal can occur before the end of a director's term at a special general meeting. In all events, subject to any supermajority provision, the shareholders may amend bye-laws which provide for a staggered Board of Directors and any special majority necessary to remove them so as to delete such provision.

e. Concert Parties

Generally there is nothing in Bermuda law to prevent shareholders acting together for any lawful purpose including a takeover. Therefore, to counter such "Concert Parties" it is advisable to create a regime, whether in the bye-laws or by way of private Bermuda statute, which sets out the rules for making a bid. The rules of any stock exchange (if the target company is listed) may also require disclosure of concert parties.

The bye-laws can, for example, define the concept of persons acting in concert, and then transfer their voting rights pro rata to all the other shareholders in certain narrowly defined circumstances. Since bye-laws are vulnerable to amendment, it may be preferable to have a private statute. A bye-law amendment to introduce concert party rules will require shareholder consent, and a relatively high level of approval to ensure shareholder buy-in and that the directors will not be criticized. The directors can cause the company to apply for a private act introducing statutory bidding rules without shareholder consent.

f. The Bye-laws

Bearing in mind that the bye-laws of a target Bermuda company will always be susceptible to amendment provided the requisite majority for amendment is achieved, it may nevertheless be useful as a defensive mechanism to build into the bye-laws a list of matters requiring the approval of special majorities. However, restrictions which affect liquidity of the shares may be undesirable or contrary to stock exchange regulations if the company is listed. Also, restrictive bye-laws may unduly hamper the company during ordinary operations. Thus a balance would have to be struck. Typical restrictions would relate to the exercise of votes in certain circumstances, such as unwanted bids, or the disclosure of underlying beneficial interests, with votes in excess of a certain threshold, or in relation to ineligible beneficiaries, being transferred to other shareholders pro rata.

PART E GENERAL INFORMATION

1. Banking Facilities

There are four retail banks in Bermuda, namely, The Bank of N T Butterfield & Son Limited, The Bank of Bermuda Limited (HSBC), Capital G Bank Limited and The Bermuda Commercial Bank. Each of these banks has a network of subsidiaries, affiliates and correspondent relationships throughout the world.

Under the Banks and Deposit Companies Act 1999 the incorporation of exempted companies that propose to engage in “banking business” is permitted.

2. Accountants

There are many firms of accountants in Bermuda available to provide accounting and consultancy services to exempted undertakings. All of the leading international firms have local affiliates. Appleby can provide such services through its associated company, Appleby Management (Bermuda) Ltd.

3. Mutual and Mutual Fund Companies

A “mutual fund” means a company limited by shares, or other company having a share capital, and incorporated for the purpose of investing the moneys of its shareholders for their mutual benefit and having the power to redeem or purchase for cancellation its shares without reducing its authorized share capital and stating in its memorandum that it is a mutual fund (§156A). For more information on mutual funds, please see the ‘Appleby Guide to Mutual Funds and Unit Trusts in Bermuda’.

4. Registers and Inspection

a. Form of Registers

Any book or paper required by the Companies Act (or any other Act), whether public or private, to be kept by the Registrar or a company may be kept in bound books or in any other permanent manner, including a form otherwise than legible (§273(1)).

Copies of minutes and financial statements (including summarised financial statements) must be preserved at a company's registered office for at least six years from the date on when they were first required (§273(4)).

b. Inspection

Where provision is made for the inspection or reproduction of any book or paper then it is permissible to allow inspection or reproduction in electronic form (§272(3)).

The Accountant General, the Registrar, the Official Receiver and any person acting on their behalf are exempt from the payment of any fees or charges for inspecting or copying the register or any books or papers when lawfully entitled to do so (§274).

If it appears to the Minister that an offence has been committed by a company under the Companies Act and evidence relating to the commission of such an offence may be found in any books or papers then, on an application to the Minister by or on behalf of the Attorney-General, a direction may be made by the Minister requiring the secretary to the company (or any other named officer) to produce said books (§276(1)).

i. Registrar of Companies

At the Registrar of Companies, the publicly available documents include:

- Memorandum of Association (§14(1)).
- Certificate of deposit of Memorandum of Association (§14(2)(a)).
- Certificate of Incorporation (§14(2)(b)).
- Any permit required by the company to operate, e.g. exempted companies (§142).
- Certificate of Incorporation on Change of Name (§10).
- A company's secondary name (§10A).
- Notice of location of registered office (§62(1)).
- Notice of place other than registered office where the register of shareholders is kept or a branch register (§62(3)).
- Any alterations to the Memorandum of Association such as an increase or reduction in capital, change of currency of capital, or change in the objects of the company, for example (§12(7A)).
- Particulars of any mortgage or charge registered against the assets (§55).
- Memorandum of satisfaction of a mortgage or charge (§59).
- Registration of appointment of a receiver or manager (§60).
- Instruments of continuance, certificates of discontinuance and any declarations of discontinuance (§132L).
- Certificates of amalgamations (§108).
- Documents related to a winding-up proceeding should that have commenced (§193).
- Any prospectus filed pursuant to a public offering of shares (§26).

- Notices from the Court, which must be filed, such as a notice relating to: a compromise or scheme of arrangement (§99); a reconstruction (§101); an order directing the company as an alternative to the winding up of a company where oppressive conduct has been found (§111); the commencement of winding up by Court (§167); the staying of a winding up; the early dissolution and dissolution of a company (§199B and §200, respectively); a members voluntary winding up (§213); the appointment of a liquidator (§228).

ii. Registry of the Supreme Court

The Registry of the Supreme Court makes available for public inspection documents that are useful in ascertaining whether a company is the subject of legal proceedings or has had a judgment, either by Bermuda or foreign courts, registered against it. The Cause Book will reveal any cause of action commenced against a Bermuda company, while the Register of Judgments will include any judgments registered against it.

iii. Register of Directors and Register of Shareholders

A company must allow the register of its directors and officers to be open for inspection by members of the public for at least two hours a day, during business hours, without charge (§92A(3)). However, should a member of the public want a copy of the register, then they must pay the appropriate fee (§92A(3A)).

The register of shareholders should be easily available for inspection by the shareholders of the company; if it is not made easily available for inspection then the company and every officer of the company will be liable to a fine (currently \$500) and the court convicting the company or the officers, as the case may be, may order the company to make the register immediately available for inspection (§65(6)).

A company must allow the register of its shareholders to be open for inspection by members of the public for at least two hours a day, during business hours (§66(1)). Any member of the public may require a copy of the register, or any part thereof, on payment of the appropriate fee (§66(2)).

If any inspection is refused or if any copy is not sent within 14 days from the receipt of a written request, the company and every officer of the company who is in default will be liable, in respect of each offence, to a fine (§66(3)). In the case of any such default, the Court may order an immediate inspection of the register or direct that copies required be sent to the persons requiring them (§66(4)).

Provided notice is given by way of an advertisement in an appointed newspaper, a Bermuda company may close the register of shareholders for any period not exceeding 30 days in a year (§66(5)).

5. Amendment of Private Acts

A company may amend any provision of its incorporating Act by resolution passed at a general meeting providing the appropriate notice had been given and the Minister has consented to the amendment (§286(1)).

The procedure for a company to amend a provision of its incorporating Act is the same as the procedure to amend a company's memorandum of association (i.e. §12, except the words "private Act" must be substituted for the word "memorandum") (§286(2)).

It is not possible to amend a provision of an incorporating act if to do so would amend any provision of law, e.g. the Companies Act (§286(3)).

6. Winding Up

The winding-up or liquidation of a company may be enforced by the Court or may be commenced voluntarily. Voluntary windings-up may be made by the shareholders, where a company is solvent, or by its creditors, where the company is insolvent. An automatic winding-up of a company may be provided for in its memorandum, creating a company of limited duration. In the case of insolvency, a compulsory winding-up may be ordered by the Court upon a petition presented either by the company itself or by any creditor, including any contributory or contingent or prospective creditor, or by all those parties, together or separately. The compulsory winding-up provisions of the Companies Act have been extended to include permit companies and non-resident insurance undertakings. The Court may also order that the company be reinstated to a position prior to its liquidation or returned to liquidation; in either case the company will be deemed to have continued in existence as if it had not been dissolved.

For more specific advice on companies in Bermuda, we invite you to contact one of the following:

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