



EXEMPTED COMPANIES

Procedure for the Incorporation of Companies in Bermuda

By Registration

The first step in the registration procedure is the reservation of a name with the Registrar of Companies (the "Registrar"). The application to form a company is then submitted to the Bermuda Monetary Authority (the "Authority"). The application will supply the name of the proposed company, the nature of its intended business and the proposed ownership of the company.

Concurrently, approval is sought from the Authority for the intended beneficial ownership, details of which are confidential. Personal Declarations signed by the beneficial owners of 10% or more of the voting shares of the company must be supplied, unless the owners are already sufficiently well known to the Authority or are public companies listed on an appointed stock exchange.

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; the objects of the company (i.e. business purposes); and any powers additional to those conferred by law. The Memorandum can 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") is required only in respect of companies which engage in so-called restricted activities, e.g. investment business; trust business, mutual fund business, deposit taking and money services. The Minister will require information that demonstrates that the company has adequate knowledge and experience available to it.

Ordinarily, incorporation, which does not require Ministerial consent, can be accomplished on the same day that the application is received. Where the consent of the Minister is required, the time needed is usually two to three working days from the date that the Authority has received all necessary information relating to the proposed company, and all personal declarations from the proposed beneficial owners.

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 local 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. 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.

after the Bill has been enacted (the process having taken six to eight weeks), the company is incorporated by the filing of a memorandum of association, 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.

Organisation

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 and will on the date on which the Memorandum of Association is filed with the Register of Companies have made the first payment of the annual government fee, as this fee must be paid.

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. The provisional directors will have subscribed to the bye-laws of the company (which govern the company's internal organisation, management and administration), 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, 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).

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 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" (ie 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; 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 fee for the year of incorporation is reduced by 50% if the company is incorporated after 31 August. The fee payable under i) is 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. Provision is made for the conversion of the assessable capital into Bermuda dollars for the purpose of determining the applicable fee.

Share Capital

The Companies limited by shares are no longer required to maintain a minimum share capital. However, a company which writes insurance for its own account is required 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.

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. Subject to observing the prescribed procedures, a company may reduce its share capital to an amount not less than its prescribed minimum share capital. 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. In addition, a company may issue preference shares which, 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. Further, the Companies Act confers on a company, if so authorised by its Memorandum or bye-laws, the power to purchase its own shares. It is also clear that a subsidiary has the power to purchase shares of its parent.

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. 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.

Companies are prohibited from issuing bearer shares. It is not possible to have shares with no par value.

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.

Directors

The business of a company is managed by its board of directors and the first board of directors is elected at the statutory meeting of the shareholders. The term of office of a director generally runs from one annual general meeting to the next; however, the bye-laws may provide for longer terms and retirement by rotation.

Any individual may be appointed 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. An alternate director has all the rights and powers of a director 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. 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. Should a vacancy occur on the board, the remaining directors may fill such a vacancy. 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.

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.

The Companies Act requires that an exempted company have two individuals, ordinarily resident in Bermuda, who serve either:

- one as secretary and one as resident representative, or
- one as secretary and one as director, or
- both as directors of that company.

A company whose shares are listed on an "appointed stock exchange" (eg New York, London or Toronto) may appoint a corporate resident representative instead of meeting the above requirements. The resident representative has prescribed duties and obligations under the Companies Act. Corporate directors are not permitted.

Board (and shareholder) meetings may be held by telephone. The Board may also act by unanimous written resolution.

The duties of a company's officers (which term 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

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. A company may purchase and maintain insurance for the benefit of its officers. The Amendment Act clarifies the Bermuda law position, by permitting the indemnification of directors and officers in circumstances where there have been allegations of fraud and dishonesty. Specifically, under Bermuda law, a company is permitted to advance monies to an officer or auditor of a company for the cost of defending any civil or criminal action involving allegations of fraud or dishonesty against that officer or auditor on condition that such officer must repay the advance if the allegations are proved.

Officers

Every company must have either a President and a Vice-President, or a Chairman and a Deputy Chairman. These officers are elected as soon as practicable after the annual general meeting. In addition, a company must have a secretary and may appoint a resident representative. Other officers, such as a treasurer and an assistant secretary are optional.