

With its new Companies Amendment Act, Bermuda is more appealing as a global jurisdiction

By Ernest Morrison and Jonathan Betts

While the UK is bracing itself for the radical changes to company law proposed in the Companies Bill 2006, the largest piece of UK legislation to ever go through the Parliamentary process, the Bermuda legal and business community and Government has also been taking steps to improve companies legislation to meet the evolving demands of international business.

By taking note of the proposed changes in the UK and also legal developments across other parts of Europe and in North America, the Government, with the help of the Bermuda International Business Association, has crafted the Companies Amendment Act 2006 (the “Amendment Act”) that will enhance a number of provisions in the current Companies Act, 1981 (the “Companies Act”). The principal aim of the amendments is to simplify the legislation relating to companies and thus reduce the costs of doing business in Bermuda.

Minimum share capital

The Amendment Act repeals the requirement for a company to have a minimum amount of share capital in order to be registered. Under the Companies Act, the minimum share capital requirement for a company applying for incorporation is \$12,000 (except in the case of a mutual fund company, which could be incorporated for a minimum share capital of only \$1.00). The Amendment Act abolishes this minimum, except in the case of insurance companies whose minimum share capital requirements continue to be regulated by the Insurance Act, 1978, so as to make incorporating a company under the Companies Act more cost-efficient and to bring Bermuda in line with current practice, as no major offshore or onshore jurisdiction imposes a minimum share capital requirement.

Unrestricted objects

The Amendment Act now provides that the objects of a company may be unrestricted. The Companies Act

currently provides that a company must list its objects and powers in its memorandum of association, resulting in a long list of objects that attempt to cover every conceivable activity of the company. The Amendment Act recognizes that listing all possible activities is often an impossible task and therefore a company will now be allowed to adopt unrestricted objects with the necessary corollary powers (although there remains the ability to include specific objects should these be needed for the purposes of particular transactions).

This unrestrictive approach will not only remove the need to change the objects of a company should it wish to commence a new activity but will also remove doubts as to whether a company has corporate capacity to take particular actions.

To reflect changes that have arisen since the Companies Act was introduced, the Amendment Act enables a company to communicate with its shareholders by delivering notices and documents by email or by publishing information on a website.

In order to make it easier for Bermuda companies to carry on business in jurisdictions with non-Roman language characters, the Amendment Act permits a company to obtain approval to have a secondary name, thus enabling it to adopt names in, for example, the Cyrillic and Arabic alphabets, as well as using Chinese characters.

Shares

The Amendment Act clarifies the circumstances in which an offer of shares will be considered to be of a “private character” so as to be exempt from the requirement, which applies in the case of a public offer of shares, to publish a prospectus and file a copy with the Registrar of Companies. Under the Amendment Act, an offer has a private character if there exists a particular relationship

between the company making the offer and the persons to whom the offer is made that distinguishes those persons from any section of the public. If the company or persons has a special interest in the acceptance of the offer by the persons to whom it is made because of the relationship or if the offer is made in consideration or in connection with the provision of services to a company, the offer of shares will be considered to be of a private character.

The Amendment Act permits a company to acquire its own shares to be held as treasury shares. Such shares will not be cancelled but rather held by the company and may be used as a source of cash for it. No dividends are paid on the shares nor rights exercised in respect of them and they are excluded from share calculations. If a company holds shares as treasury shares, it must be entered in the register of members. A company will not be liable in damages for failing to acquire any shares available nor can it be forced to acquire them if it would render the company insolvent.

Resolutions and execution

Bermuda companies are entitled to pass resolutions in writing but the Companies Act currently provides that these must be signed by all members entitled to attend and vote at meetings of the company. The Amendment Act now provides that written resolutions will be effective when signed by the same majority of shareholders as would have been required to pass such resolutions at a physical meeting.

Bermuda companies retain mechanical corporate seals that are effectively treated as the “signature” of the company. Currently, deeds and certain other instruments must be executed under the company seal with either two directors or one director and the secretary witnessing the affixing of the seal.

This requirement can often be a major inconvenience as many international transactions require execution of documents outside Bermuda and there can be logistical problems if the seal is required in different jurisdictions at the same time. The Amendment Act permits such

documents to be executed by an alternative means, namely signature by persons authorized by the company, without the affixing of the seal, thus complimenting the practical realities of business relations with Bermuda.

Directors and officers

The Amendment Act clarifies the circumstances in which a company may fund the costs of directors where they are subject to legal proceedings. Specifically, the Amendment Act provides that a company may advance monies to directors for the costs of defending an action brought, provided they repay such an advance if it is determined that they are guilty of fraud or dishonesty.

Obviously the changes introduced by the Amendment Act are not as wide ranging as the proposed changes to UK legislation - indeed, a number of changes included in earlier drafts of the Bermuda legislation, such as removing the need for a mandatory AGM and removing the prohibition on financial assistance, did not make it to the final slate – but the amendments introduced by the Amendment Act mean that the Bermuda company will look very different going forward. The changes are very much a further step in the right direction towards streamlining and improving the corporate vehicle and continuing to strengthen Bermuda’s position as a leading offshore jurisdiction for doing business.