

1. Background

Company law in both Guernsey and the UK is currently undergoing significant change.

The Companies (Guernsey) Law, 2008 (the “2008 Law”) was approved by the States of Guernsey at the end of January this year. It has been a major review of Guernsey’s company law with some 545 sections and will come into force on 1 July 2008 together with a groundbreaking new online company registration system.

The Companies Act 2006 (the “2006 Act”) was first introduced into the House of Lords in November 2005 under the name of the Company Law Reform Bill (the “Bill”). It received Royal Assent on 8 November 2006.

The Bill was not originally intended to be a consolidating measure, and it was envisaged that, on enactment it would exist alongside the Companies Act 1985 (the 1985 Act) and the Companies Act 1989 (the 1989 Act). However, in June 2006, the government announced its intention to consolidate further provisions of the 1985 and 1989 Acts into the Bill during its passage through the Commons, with the aim of creating a more comprehensive code of company law. Following an amendment in the House of Commons, the bill became known as the Companies Bill, and has now become the Companies Act 2006, with some 1,300 sections.

Apart from a few provisions that came into force upon Royal Assent, the provisions of the 2006 Act are being brought into force in stages; the key dates being 6 April 2007, 1 October 2007, 6 April 2008, 1 October 2008 and 1 October 2009 by which time the whole of the 2006 Act will be in force.

2. Major changes in the 2008 Law:

- New types of company introduced;
- New incorporation procedure and streamlined regulatory regime;
- Clarifies that companies need not have a company secretary;
- Introduction of a new 'solvency test';
- May reduce their capital without court approval; and
- A general scheme of electronic and web-based company communications is introduced.

3. Nature and Types of Companies (Part I)

Sections 1 to 9 of the 2008 Law set out the different types of company. A new “Unlimited Company” (section 8) and a “Mixed Liability Company” (section 9) are introduced alongside the existing Company Limited by Shares, Company Limited by Guarantee and Cell companies (Protected Cell Company and Incorporated Cell Company).

Unlimited Company: section 8 provides that an Unlimited Company may have a share capital. It shall have members whose liability for the company's debts is unlimited while they are members, or within a period of one year after they cease to be members (“unlimited members”). It may, where the company has a share capital, have shareholders. It cannot have any other type of member.

Mixed Liability Company: section 9 provides that a Mixed Liability Company may have a share capital. It may have guarantee members, unlimited members, and (where the company has a share capital) shareholders. Subject to

the provisions in the company's memorandum or articles, a person may be a member of more than one type. The memorandum or articles may make provision for any adjustments or contributions to be made between members in respect of their liabilities to the company and, if no such provision is made, their liability shall be joint and several to the maximum extent of their liability to the company.

4. Incorporation (Part II)

The first major change in this part of the 2008 Law is that an application for the incorporation of a company shall be made to the Registrar by a corporate service provider (defined in the Law as a person who holds a full fiduciary licence within the meaning of the Regulation of Fiduciaries, Administration Businesses and Company Directors' etc (Bailiwick of Guernsey) Law, 2000)) accompanied by:

- The memorandum of incorporation;
- A statement of the first directors;
- A statement of the proposed address of the company's registered office;
- A statement of the first resident agent (resident agent being a new concept – see below);
- The name and address of the founder member(s);
- In the case of a company with a share capital, a statement of the initial share capital;
- In the case of a company with a founder member who is a guarantee member, a statement of initial guarantee;
- A copy of the consent of the Guernsey Financial Services Commission ("GFSC") in relation to a Cell company; and
- A declaration of compliance by the applicant that all requirements of the 2008 Law in respect of the incorporation have been fulfilled.

Incorporations will be submitted online to the Registrar. A standard company incorporation, within 24 hours, will cost £100.00; a rapid company incorporation, within 2 hours, £350.00; and a special company incorporation, within 15 minutes (subject to certain restrictions applying), £750.00.

Consent of Her Majesty's Procureur to incorporation is no longer required, nor of the GFSC (except in relation to Cell companies) and incorporation will no longer be a Court process.

Another major change here, to both the 2008 Law and the 2006 Act, relates to the memorandum of association which is to be a document of historical status only giving a snapshot of the membership of the company on its formation. The company's constitution should as far as possible be contained in its articles of association. The memorandum formed under the 2008 Law is only required to state that its subscribers wish to form a company and that they have agreed to become its members and, in the case of a company limited by shares, to take at least one share (section 4). The memorandum shall state:

- The company's name;
- That the company's registered office is situated in Guernsey;
- The type of company;
- The type of company in respect of the liability of its members; and
- In the case of a company with share capital:
 - The amount to be paid up on each share;
 - The number of shares to be taken by each of the subscribers to the memorandum;
 - The number and aggregate value of any class of shares; and

- Particulars of the rights attached to those classes.

The statement of capital and initial shareholdings must also include the names and addresses of the subscribers to the memorandum.

The memorandum may also, under section 15(7) “make provision for any other matter, not referred to above, concerning the company, its members or officers.”

All provisions in the memorandum of existing companies, other and provisions required by the new style of memorandum, are deemed to be provisions of the company's articles.

Companies may entrench provisions of their articles, either on formation or subsequently by unanimous agreement by the members. Entrenchment does not prevent a company amending its articles by unanimous resolution of its members.

Unless otherwise provided in the memorandum, a company's objects are unrestricted.

All of the above changes are similar to provisions being made in the 2006 Act.

Other changes in this part of the 2008 Law include:

- A company may be formed with a single founder member (section 13); and
- The Department of Commerce and Employment has power to prescribe different standard articles for all types of company (section 16).

5. Name, Office, Seal and Records (Part III)

The main changes here relate to Guernsey companies.

Section 25 provides that a company may apply to the Registrar to change its name. Application is to be made in the form prescribed by the Registrar accompanied by the special resolution authorising the change of name and a declaration of compliance (change of name) signed by either a director or secretary of the company, that all the requirements of the Law in respect of the change of name have been fulfilled.

Under section 26 a corporate services provider may apply to the Registrar to reserve a name for a company if it intends to apply for the incorporation of that company within 3 months and it is acting on behalf of the persons who wish that company to be incorporated. Where a name has been reserved under this section, for the period for which it is reserved, the name cannot be used in an application for incorporation of a company otherwise than by the person who has reserved that name other than with the consent of the person who reserved the name. Nor can the name be reserved by any other person during that period. A reservation under this section lapses after a period of 3 months commencing on the date the reservation was made.

Sections 30 to 34 concern a company's registered office. Under section 30 a company may change the address of its registered office by giving notice to the Registrar in the form prescribed by the Registrar. The change takes effect upon the notice being registered by the Registrar but, until the end of the period of 14 days beginning with the date on which it is registered, a person may validly serve any document on the company at its previous registered office.

Of note here is that under section 32 a corporate services provider may give notice to the Registrar and each director (at his service address and his usual residential address if that is different) stating that a registered office address which it provides for a company is no longer effective. The notice must state that the company may be struck off the Register in accordance with Part XX if it does not provide a new address for its registered office and must also be accompanied by a declaration of compliance (ineffective office). A company which does not provide a new address for its registered office following such a notice is liable to be struck off in accordance with Part XX.

6. Alteration of Memorandum and Articles (Part IV)

Section 38 restricts the cases in which a company may alter any provision of its memorandum. It may alter its memorandum if it changes its name, converts to a different type of company, moves its registered office on migration or alters or inserts a statement of its objects.

Where a company wishes to alter any provision in its memorandum as provided for in section 15(7) as referred to above (i.e. "any other matter, not referred to above, concerning the company, its member or officers") such change can only be made in accordance with the terms of the memorandum or by unanimous resolution of all its members.

As mentioned earlier, a company's articles may contain provision ("provision for entrenchment") to the effect that specified provisions of the articles may be amended or repealed only if conditions are met, or procedures complied with, that are more restrictive than those applicable in the case of a special resolution.

Provision for entrenchment may only be made in the articles on formation or by an amendment by unanimous resolution. Provision for entrenchment does not prevent amendment by unanimous resolution or by order of the Court of other authority having power to alter the company's articles.

7. Corporate Capacity (Part IX)

As mentioned earlier, unless a company's memorandum specifically limits its objects, its objects are unrestricted.

The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything contained in or omitted from the company's memorandum or articles, any resolution of the company or any agreement between the company's members.

In favour of a person dealing with the company in good faith, the powers of the directors to bind the company or authorise another to do so is deemed to be free of any limitation imposed by or deriving from the company's memorandum or articles; any resolution of the company; or any agreement between the company's members.

Contracts may be made by the company in writing under its common seal or on behalf of the company, by a person acting under its authority, express or implied (section 116).

A document is executed for and in the name of a company by affixing of its common seal; by signature of a director or secretary of the company; or by such other means as may be authorised by its memorandum or articles (section 117).

8. Members (Part X)

The significant change in this part is the introduction of 'single member' companies. This reflects the position in UK company law and other similar jurisdictions.

9. Directors (Part XI)

As currently, a company must have at least one director. Certain people may not be a director and these are (section 137):

- A minor;
- A person who is subject to a disqualification order under Part XXV of the 2008 Law;
- A person subject to a disqualification order under section 67a of the Companies (Guernsey) Law, 1994 (as amended); or
- A person who is disqualified by reason of misconduct or unfitness, from acting as director under the law of a district territory or place outside Guernsey.

A person must not be appointed as a director unless he has consented to being a director and declared that he is not ineligible under section 137 to be a director.

As with the 2006 Act, where a director is an individual, the register of directors may contain his usual residential address or his service address (which may be stated as "the company's registered office").

Where a director's address entered in the register of directors is a service address, the company shall keep a record of the director's usual residential address. Additionally, where a person becomes a director of a company and his address entered in the register of directors is a service address, the company must, within a period of 14 days after

the day the person becomes a director, give notice to the Registrar of the director's usual residential address. Similarly with regard to the change and of the date of any change of address.

Where the director's address entered in the register is a service address any person may request the company to disclose the director's usual residential address. The request must contain the following information:

In the case of an individual, his name and address;

- In the case of an organisation, the name and address of the individual responsible for making the request on behalf of the organisation;
- The purpose for which the information is to be used; and
- Whether the information will be disclosed to any other person, and if so:
- Whether that person is an individual, his name and address;
- Whether that person is an organisation, the name and address of an individual responsible for receiving the information on its behalf; and
- The purpose for which the information is to be used by that person.

If a company does not comply with a request within 2 weeks, the person who made the request may make an application to the Court. The Court, if satisfied that the request is made for a proper purpose, may direct the company to comply with the request.

The Registrar shall disclose the director's usual address to the following persons upon written request:

- Her Majesty's Procureur, Her Majesty's Sheriff or Her Majesty's Sergeant;
- The Guernsey Financial Services Commission;
- A police officer;
- A customs officer;
- Such other persons as may be prescribed by the Department of Commerce and Employment.

Other changes in the 2008 Law include:

9.1 Directors liabilities -

- A company may not exempt a director, to any extent, from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company (section 157);
- A company may not provide any indemnity for a director of the company, or an associated company in connection with any of the above;
- A company may indemnify against a liability incurred by a director to a person other than the company or an associated company providing the indemnity does not provide any liability of the director to pay (i) a fine imposed in criminal proceedings; (ii) a sum payable to a regulatory authority by way of penalty in respect of non-compliance with any requirement of a regulatory nature; (iii) in defending criminal proceedings in which he is convicted; (iv) in defending civil proceeding brought by the company, in which judgment is given against him; or (v) in connection with an application to the Court for relief and in which the Court refuses to grant him relief.
- A company may purchase and maintain insurance for a director in connection with any of the liabilities mentioned above;
- A company may ratify the conduct of a director which exceeds his powers or amount to negligence, default or breach of duty or trust in relation to the company but (i) must be taken by the members; and (ii) be by ordinary resolution (unless the memorandum or articles require a higher majority, e.g. unanimity). Where

resolution is proposed as a written resolution, members with a personal interest in the ratification are not eligible members. Where the resolution is proposed at a meeting it is passed only if the necessary majority is obtained disregarding votes in favour of the resolution by members with a personal interest. This does not prevent such members from attending, being counted towards the quorum and taking part in the proceedings.

9.2 Directors' interests -

The 2008 Law provides (section 162 to 167) that directors must disclose their interest in a transaction or proposed transaction with the company. A general disclosure to the board to the effect that a director has an interest (as director, officer, employee, member or otherwise) in a party and is to be regarded as interested in any transaction which may after the date of the disclosure be entered into with that party is sufficient disclosure of interest in relation to that transaction. A transaction in which a director is interested may be avoided by the company at any time within 3 months of being disclosed to the company unless ratified by the shareholders.

9.3 The 2006 Act -

One of the most significant and controversial proposals in the equivalent part to this in the UK 2006 Act has been the codification of directors' duties, introducing a statutory statement of duties replacing many of the existing common law and equitable rules. The provisions in the 2006 Act have not been adopted in the 2008 Law.

Another change in the 2006 Act in this part of the Law, and which has not been adopted in the 2008 Law, is that every company is required to have at least one director who is a natural person.

10. Secretaries (Part XII)

The changes in the 2008 Law are similar to those in the 2006 Act. A company may, but need not, have a secretary. A director of a company may also be its secretary. Where a company has a secretary, section 171 of the 2008 Law provides that the secretary shall take reasonable steps to ensure:

- That all registers and indexes are maintained in accordance with the provisions of the Law;
- That all notices and documents required to be filed or served upon the Registrar or other persons are duly so filed or served;
- That all resolutions, records (other than records of beneficial owners) and minutes of the company are properly kept;
- Copies of the memorandum and articles are kept fully up to date; and
- That the board of directors is aware of any obligations imposed by (i) the memorandum and articles and (ii) the rules of any stock exchange on which the company is listed.

Section 172 of the 2008 Law provides that anything requiring or authorising a thing to be done by or to a director and the secretary of a company is satisfied by its being done by or to the same person acting both as director and secretary. This is contrary to section 280 of the 2006 Act which provides that anything requiring or authorising a thing to be done by or to a director and the secretary of the company is not satisfied by its being done by or to the same person acting both as director and as, or in place of, the secretary.

Under the 2006 Act the requirement for private companies to have a company secretary is abolished (section 270). If, but only if, a private company chooses not to have a secretary, anything that is required or authorised to be done by or to a company secretary is validly done if done by or to a director or a person authorised in that behalf by the directors.

Where a private company chooses to have a company secretary, it is subject to the same obligations as a public company in respect of its secretary (sections 274 to 280) except that the qualification requirements for secretaries of public companies (section 273) do not apply.

There is no requirement that a company secretary be a natural person.

11. Resolutions and meetings (Part XIII)

The 2008 Law introduces a new 'waiver resolution' and a 'unanimous resolution', which will operate alongside the existing ordinary and special resolutions.

All resolutions may be passed either at a general meeting or as a written resolution.

Ordinary resolution: passed by a simple majority of the total voting rights of eligible members.

Special resolution: passed by a majority of not less than 75% of the total voting rights of eligible members.

Waiver resolution: passed by a majority of not less than 90% of the total voting rights of eligible members.

Unanimous resolution: agreed to by every member of the company.

Other changes in the resolution procedure, the holding of company meetings and including electronic communications with members will be discussed in detail later.

12. Capital and Shares (Part XVII)

Under sections 291 to 300 (inclusive) of the 2008 Law directors may issue shares if authorised by the articles. Authorisation may be for a particular exercise or generally, and may be unconditional or subject to conditions. The authorisation:

- Must state the maximum number of shares to be issued under it;
- The date on which it will expire, not more than 5 years after the authorisation;
- May be renewed for periods not exceeding 5 years; and
- Resolution renewing must state the maximum amount of shares that may be issued under it or the amount remaining to be issued under it and specify the date on which the renewed authorisation will apply.

Where company has only one class of shares, directors may exercise any power of company to issue shares of that class or to grant rights to subscribe for or to convert any security into such shares, except to the extent they are prohibited by the company's memorandum, articles or any resolution of the company.

13. Other major changes in the 2008 Law

- Capital reduction – application to Court no longer required;
- New voluntary striking off provisions;
- Changes to the period for restoration to the Register of Companies;
- New Beneficial Ownership provisions;
- New "solvency test".

13.1 Beneficial Ownership (Part XXIX)

Under sections 483 and 484 of the 2008 Law every company (other than those listed on a stock exchange recognised by the Registrar, open-ended investment companies, closed-ended investment companies or any other class prescribed by the Commerce and Employment Department) must have a Resident Agent who is either:

- An individual, resident in Guernsey, who is a director of the company; or
- A corporate services provider.

A company must maintain a record of its Resident Agent and must notify the Registrar of any change within 14 days after the date of the occurrence.

It is the duty of the Resident Agent to take reasonable steps to ascertain the identity of persons who are beneficial owners of members' interests in the company.

A record of the beneficial owners is to be kept at the company's registered office and shall record in respect of an individual:

- His name;
- Usual residential address;
- Nationality; and
- Date of birth.

And in respect of a company

- Its name;
- Its registered or principal office;
- Its legal form and law by which governed; and
- The register in which it is entered and its registration number.

The Resident Agent may give notice to a member requiring him to disclose whether they are holding their interest for their own benefit or that of another person. A member who fails to comply or makes a false deceptive or misleading statement is guilty of an offence (section 488).

The Resident Agent may give notice to the company (section 488) of any member who has failed to disclose beneficial ownership. On receipt of such notice the company may place such restriction on any rights attaching to such shares as it thinks fit including without limitation:

- Any right to transfer the interest;
- Any voting rights;
- Any right to further shares in respect of those already held; and/or
- Any right to payment due to the member's interest (whether in respect of capital or otherwise) or cancel the member's interest in the company (section 489).

Any member may apply to the court to set aside any such restriction or cancellation and the court may make such order on such terms and conditions as it thinks fit.

Under section 490 the Resident Agent may disclose details of the beneficial ownership on receipt of a certificate from:

- HM Procurer;
- The GFSC;
- A police officer; or
- Customs officer;

for the purpose of any criminal or regulatory investigation or proceedings.

The Resident Agent will be guilty of an offence if he fails to comply with such a notice or if he know or suspects that a certificate has been issued (or is proposed to be issued) and he discloses to any person information or any other matter which may be prejudicial ("Tipping off") (section 491).

13.2 Solvency Test

There are a number of areas where the company must satisfy the 'solvency test'. Such areas include when making a distribution (including a reduction of share capital), paying a dividend or providing financial assistance for the acquisition of its own shares.

When making such distribution or payments the directors must approve a certificate stating that in their opinion the company will, immediately after such distribution or payment, satisfy the solvency test, and the grounds for that opinion.

Essentially the company satisfies the solvency test if it is able to pay its debts as they become due and the value of the company's assets is greater than its liabilities. In the case of a supervised company other requirements may be imposed by the relevant applicable regulatory law.

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