GUIDE

APPLEBY

GUIDE TO COMPANIES IN THE CAYMAN ISLANDS

CONTENTS

PREFACE

This Guide is a summary of the law and procedures relating to the establishment and operation of a business company in the Cayman Islands.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of the Corporate Department, using the contact information provided at the end of this Guide.

Appleby
Cayman Islands
June 2016

INTRODUCTION

A Cayman Islands company is similar in most respects to companies and corporations formed elsewhere in the world: shareholder's liability is usually limited and the directors manage the business of the company. A Cayman company is usually limited by shares.

Although two types of offshore companies can be incorporated in the Cayman Islands, the most common type of offshore company is the exempted company. This form of legal entity is used in the Cayman Islands for international business transactions, as investment vehicles and as special purpose vehicles (**SPVs**) in capital markets transactions.

PART A: EXEMPTED COMPANIES

1. CLASSIFICATION

Companies incorporated in the Cayman Islands fall into two principal categories: companies formed to trade primarily in the Cayman Islands, and companies incorporated for the purpose of conducting business outside the Cayman Islands. This Guide is concerned only with the latter kind of company. Companies falling into this category are known as exempted companies.

The Companies Law expressly prohibits an exempted company from trading in the Cayman Islands, except in furtherance of its business carried on outside the Cayman Islands. A company is therefore permitted, for example, to effect and conclude contracts and exercise all of its powers necessary in the Islands, providing it is solely for the carrying on of its business outside the Islands, e.g. an exempted company may have a Cayman bank account or, in some circumstances, maintain an office in the Islands from which it conducts its offshore business.

Exempted companies may be incorporated as single or multiple 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. COMPANY NAMES

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 the Islands (unless the company is in the course of being dissolved and has signified its consent); nor may it contain the words "Chamber of Commerce" or "Building Society". In addition, no company may be registered by a name that contains the words "Royal", "Imperial", "Empire", "Municipal", "Chartered", "Cooperative", "Assurance", "Bank" or "Insurance", except without the consent of the Registrar. Exempted companies need not include "Limited" or "Ltd" in their names. Companies are permitted to have dual foreign names. The translation of the dual foreign name must not be prohibited by any regulatory laws or require approval or permission under any regulatory laws (except such approval or permission as is necessary for the use of such name under the relevant regulatory laws has first been obtained). If the translation of the dual foreign name conforms with the law, the dual foreign name (and such translated name) shall be entered on the register of companies.

A company may change its name (including the addition or change of a dual foreign name) by filing the special resolution with the Registrar. The change of name takes effect on the full execution of the special resolution, but is subject to approval by the Registrar. Once the special resolution is filed with the Registrar and the appropriate fee paid, the Registrar will enter the new name onto the register and issue the appropriate certificate of incorporation altered to reflect the change of name. If the Registrar

determines that a name chosen by a company contravenes the Companies Law or which, in the opinion of the Registrar, is misleading or undesirable, the Registrar may direct the company to change its name.

3. MEMORANDUM OF ASSOCIATION

3.1 Essential Contents

The constitution of an exempted company is comprised of its memorandum and articles of association. The memorandum of every company must state:

- the name of the company; and
- the address of the company's registered office in the Cayman Islands;

In addition, in the case of a company limited by shares, the memorandum must also contain:

- a declaration that the liability of its shareholders is limited; and
- the amount of capital with which it proposes to be registered and the division thereof into shares of a fixed amount, which may be stated in any currency.

An exempted company may propose, however, to be registered with shares without nominal or par value and, in which case, the memorandum must also state the amount of the aggregate consideration for which such shares may be issued. An exempted company is not permitted to divide its capital into both shares of a fixed amount and shares of no par value.

Should a company decide to divide its shares into more than one class, the memorandum may also contain a declaration that in the winding up of the company the liability of shareholders holding a particular class of shares be unlimited.

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

- a declaration that each shareholder 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 shareholder, for the payment of the debts and liabilities of the company contracted before he ceases to be a shareholder; and
- each shareholder 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.

Where a company limited by guarantee has more than one class of members, the memorandum may also contain a declaration that in a winding up of the company the amount of the undertaking of the shareholders of a particular class shall be unlimited.

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

3.2 Objects

The memorandum of an exempted company must also contain an object clause. The objects clause in the memorandum may restrict the company to specific objects. Alternatively, no objects may be specified, or objects may be specified without the company's business being restricted to them. In the absence of specific restrictions in its objects clause, a company will have full corporate capacity to exercise all the

functions of a natural person and the company will have the authority to carry out any object not prohibited by the Companies Law or any other law. Certain types of activity nonetheless still require a company to possess a licence under the applicable regulatory law, e.g. banking and trust business, insurance or company management.

No act of a company and no disposition of real or personal property to or by a company, however, will be invalid by reason of the company lacking the capacity or power to perform such an act. That is to say, an *ultra vires* act will not be invalid if a legal obligation has already been incurred. However, lack of capacity or power may be asserted in the following instances:

- in proceedings by a shareholder or director against the company to prohibit the performance of any act, or the disposition of real or personal property by or to the company; and
- in proceedings by the company (e.g. through a liquidator or the shareholders acting in a representative capacity) against the incumbent or former officers or directors of the company for loss or damage through their unauthorised act.

3.3 Changes

A company may make desired changes to its memorandum with respect to any objects, powers, and status as a limited or unlimited liability company by special resolution.

Following common law a Cayman company is barred from contractually agreeing to fetter its statutory powers. Thus, for example, a contract made by a company that it will not exercise its statutory power to alter its articles will be deemed to be unenforceable.

4. ARTICLES OF ASSOCIATION

A company's proposed articles may be either those regulations set forth in Table A, as found in Schedule 1 of the Companies Law (though in practice the adoption of these articles is rare), or may be specifically drafted to suit a company's needs. If the Table A articles are not adopted as the company's articles, it will be necessary to provide copies of the specifically drafted articles to the Registrar.

5. INCORPORATION

The first step in the incorporation procedure is the reservation of the name with the Registrar. Once the memorandum and articles of association have been prepared, application to incorporate is made to the Registrar.

The Registrar receives the application, comprised of the memorandum and (typically) the articles, the applicable fee payable to the Cayman Islands Government and an affidavit sworn by the subscriber confirming that the operations of the company will be conducted mainly outside the Cayman Islands, then registers the company on the register of companies and signs and issues the company's certificate of incorporation. The registration of the company completes the company's formation and the issue of the certificate forms evidence of the registration.

Incorporation and registration can take as little as a day to complete.

An exempted company may also apply to the Registrar to be registered as an exempted limited duration company. Such an application must be accompanied by an additional application fee.

The Registrar will register an exempted company as an exempted limited duration company if the company has at least two subscribers or shareholders, and:

- where the company was not already registered as a company prior to the application, the memorandum of the company limits the duration of the company to a period of 30 years or less; and, the name of the company includes Limited Duration Company or LDC; or
- where the company was already registered as a company prior to the application but the memorandum did not limit the duration of the company to a period of 30 years or less and the company name did not include Limited Duration Company or LDC, the Registrar has been supplied with a certified copy of a special resolution of the company altering its memorandum to limit the duration of the company to a period of 30 years or less and a copy of a special resolution of the company changing its name (in accordance with the relevant provisions of the Companies Law to change the name of a company).

On registering as an exempted limited duration company, the company will be furnished with the appropriate certificate of incorporation or registration.

The articles of an exempted limited duration company may provide that the transfer of any share or other interest of a shareholder of the company requires the unanimous resolution of all the other shareholders. The articles may also provide that the management of the company vests in the shareholders of the company, e.g. in proportion to their share or other ownership interest in the company and, in such circumstances, the shareholders will be considered the directors of the company but with power, if so provided by the articles, to delegate the management to the board of directors.

6. POST-INCORPORATION

Typically, upon the issue of the certificate of incorporation, the subscriber will transfer the initial share to the company's intended registered holder. Additional shares may then be issued to the party or parties that subscribe for some or all of the balance of the shares making up the company's authorised share capital. Nominee arrangements (i.e. arrangements for holding shares on behalf of the actual, beneficial owner(s)) are permitted. In such a case, the subscriber may continue to hold the initial share, and any additional shares issued, as nominee for and on behalf of the beneficial owner(s), whose identities will not be entered in the Register of Members.

The initial subscriber will frequently be a representative of the local management company that has been engaged to provide a registered office and/or other company management services on the company's behalf. This representative (or the management company) will usually appoint the first directors of the company and will transfer the share(s) that it holds to the beneficial owner. These directors and officers will typically be nominated by the promoters or by the beneficial owners (to whom, or to whose nominees, some or all of the authorised share capital will have been issued in the course of the organisation). The first directors will complete the initial steps of the organisation process, including:

- adopting the first director's resolutions;
- appointing the officers and service providers of the company;
- issuing such number of the remainder of shares authorised by the company's memorandum as have been subscribed for;
- adopting the company's common seal (if any);
- writing up the company's registers of members and directors; and
- completing all necessary filings with the Registrar.

The directors and officers will then continue their management of the company's operations in accordance with the memorandum and articles, by passing resolutions in order to authorise the company to enter into its planned engagements.

7. ANNUAL RETURNS

In January of each year after the year of its registration, each exempted company must furnish to the Registrar a return that must be in the form of a declaration, which states that:

- since the previous return or since registration, as the case may be, there has been no alteration in the memorandum, other than an alteration in the name of the company of the objects, powers or matters set out in the memorandum, and already reported;
- the operations of the exempted company since the last return or since registration, as the case may be, have been mainly outside the Islands; and
- the company has not traded in the Islands with any person, firm or corporation except in furtherance of the business of the exempted company carried on outside the Islands.

Should an exempted company fail to furnish to the Registrar the return, then the company will incur a penalty and be liable to being struck off the register.

8. CONTINUANCE AND DISCONTINUANCE

A company with limited liability and having a share capital incorporated under the laws of a jurisdiction outside the Cayman Islands (foreign company) may continue by way of transfer as an exempted company incorporated under the Companies Law provided that the laws of the foreign jurisdiction where it was incorporated permit or do not prohibit such a transfer. Such transfer by way of continuation does not create a new company or other new legal entity, nor does it affect the property of the foreign company or any legal proceedings commenced by or against the foreign company. The transferring foreign company is effectively pulled up by its roots from the foreign jurisdiction and replanted in the Cayman Islands as the same legal entity but now governed by Cayman Islands law rather than the law of the foreign jurisdiction. A foreign company wishing to transfer to the Cayman Islands (registrant) must apply to the Registrar to be registered by way of continuation as an exempted company in the Cayman Islands.

8.1 Continuance

The registrant must file various documents with the Registrar on making an application to continue in the Cayman Islands as an exempted company. These include:

- a certified copy of its charter, statutes, memorandum and articles, or other instrument constituting its constitution (and a certified translation into English, where appropriate); and
- a list containing the names and addresses of its directors.
- The registrant must also file a notice with the Registrar of the proposed registered office in the Islands.

A director of the registrant must also file with the Registrar:

- a signed declaration that the operations of the company will be conducted mainly outside the Islands; and
- an undertaking that notice of the transfer will be given within 21 days to the secured creditors of the company.

A director of the registrant must also file with the Registrar a voluntary declaration or affidavit, which includes a statement of the assets and liabilities of the registrant made up to the latest practicable date and which also states that, having made due enquiry, he is of the opinion that:

- there is no outstanding petition, order or resolution to have the registrant wound up or liquidated;
- no receiver or administrator has been appointed in respect of the registrant's property or affairs;
- no scheme of arrangement has been entered into or made in the foreign jurisdiction whereby the rights of creditors would be suspended or restricted;
- the registrant is able to pay its debts as they fall due;
- the application for continuance is bona fide and not intended to defraud creditors of the registrant;
- any consent or approval to the transfer required by any contract or undertaking entered into or given by the registrant has been obtained, released or waived, as the case may be;
- the transfer is permitted by and has been approved in accordance with the charter documents;
- the laws of the relevant foreign jurisdiction with respect to the transfer have been complied with; and
- the registrant will, upon registration, cease to be incorporated, registered or exist under the laws of the relevant foreign jurisdiction.

A person who, being a director, makes a declaration or affidavit without reasonable grounds will be guilty of an offence and may be liable on summary conviction to a fine and imprisonment.

The Registrar will not subsequently register a transferring foreign company until he is satisfied that:

- the name of the registrant is acceptable. This can be achieved by providing the name or list of proposed names of the company to the Registrar for prior approval. If the proposed name is unacceptable, for example if there is an existing company in the Cayman Islands with a similar name, the registrant must change its name within 60 days of registration;
- the appropriate fee has been paid;
- the registrant is constituted in a form or substantially a form which could have been incorporated as an exempted company;
- the registrant, if it is (or will when registered by way of continuation be) prohibited from carrying on its business in or from within the Islands unless licensed under any law, has applied for and obtained the requisite licence; and
- there is no reason why it would be against the public interest to register the registrant.

Upon registration, the Registrar will issue a certificate that the foreign company is registered by way of continuation as an exempted company. The certificate of registration is conclusive evidence that the registrant has complied with all of the requirements of the Companies Law in respect of registration. The Registrar will also enter the date of registration and other relevant particulars of the foreign company in the register of companies.

A registrant must, within 90 days of registration, pass a special resolution in accordance with the Companies Law to make such changes, if any, to its charter documents as are necessary to ensure that they comply with the requirements of the Companies Law as they relate to an exempted company. Alternatively, if the Registrar so directs, the registrant may apply to the Court for an order approving such changes and the Court, if satisfied that the changes are necessary, may approve them accordingly and make such consequential orders as it thinks fit. A copy of the special resolution or the order of the Court

must be filed with and registered by the Registrar. The requirements of the Companies Law prevail until such time as the charter documents comply with it.

Upon registration, the Registrar will place notice in the Gazette of the registration of a registrant, the jurisdiction under whose laws the registrant was previously incorporated, registered or existing and the previous name of the registrant if different from the current name.

8.2 Provisional Registration

A foreign company may also apply to be provisionally registered by way of continuation as an exempted company limited by shares under the Companies Law. Provisional registration allows a foreign company flexibility to circumvent any commercial time constraints. The requirements are similar to the procedure for a foreign company to fully transfer to the Cayman Islands, though there are subtle differences, and payment of an additional fee is required. For specialist legal advice on this issue, please refer to the contacts at the end of this Guide.

8.3 Discontinuance

Conversely an exempted company incorporated and registered under the Companies Law with limited liability and a share capital may be de-registered and continue as a body corporate under the laws of a foreign jurisdiction. Such transfer by way of continuation does not create a new company or other new legal entity, nor does it affect the property of the exempted company or any legal proceedings commenced by or against the exempted company. The exempted company (applicant) may apply to the Registrar to be deregistered in the Islands.

The applicant must:

- propose to be registered by way of continuation in a jurisdiction which permits or does not prohibit the transfer of the applicant;
- pay to the Registrar a fee equal to three times the annual fee that would have been payable by an exempted company;
- file with the Registrar notice of any proposed change in its name and its proposed registered office (or agent) for service of process in the relevant jurisdiction; and
- deliver to the Registrar an undertaking signed by a director that notice of the transfer has been or will be given within 21 days to the secured creditors of the applicant.

A director of the registrant must also file with the Registrar a voluntary declaration or affidavit, which includes a statement of the assets and liabilities of the registrant made up to the latest practicable date and which also states that, having made due enquiry, he is of the opinion that:

- there is no outstanding petition, order or resolution to have the applicant wound up or liquidated;
- no receiver or administrator has been appointed in respect of the applicant's property or affairs;
- no scheme of arrangement has been entered into or made in the foreign jurisdiction whereby the rights of creditors would be suspended or restricted;
- the applicant is able to pay its debts as they fall due;
- the application for continuance is bona fide and not intended to defraud creditors of the registrant;
- any consent or approval to the transfer required by any contract or undertaking entered into or given by the applicant has been obtained, released or waived, as the case may be;
- the transfer is permitted by and has been approved in accordance with the charter documents;

- the laws of the relevant foreign jurisdiction with respect to the transfer have been complied with; and
- the applicant will, upon registration, continue as a body corporate limited by shares.

A person who, being a director, makes a declaration or affidavit without reasonable grounds will be guilty of an offence and may be liable on summary conviction to a fine and imprisonment.

The Registrar will not subsequently register a transferring foreign company until he is satisfied that:

- the applicant, if licensed under the Banks and Trust Companies Law (Revised), or the Insurance Law (Revised) has obtained consent of the Governor to the transfer; and
- the Registrar is not aware of any other reason why it would be against the public interest to de-register the applicant.

Upon deregistration, the Registrar issues a certificate that the applicant has been de-registered as an exempted company and specifying the date of such de-registration. The Registrar will also give notice to the Gazette of de-registration, the jurisdiction under the laws of which the applicant has been registered by way of discontinuation and the name of the applicant, if changed.

9. MANAGEMENT AND ADMINISTRATION

9.1 Registered Office

Every company must have an office registered in the Cayman Islands to which all communications and notices can be sent. Notice of the address of the registered office must be given to the Registrar who will record the address and publish it by Public Notice. Any member of the public is entitled, on request to the Registrar, to be informed as to the location of the registered office of any company.

The name of a Cayman company must be easily legible on the outside of every office or place in which the business of the company is carried on.

A company may, by resolution of the directors, change the location of the registered office of the company to another location in the Islands provided that, within 30 days from the date on which the resolution was passed, the company delivers to the Registrar a certified copy of the resolution of the directors authorising the move.

9.2 Internal Governance: the Articles of Association

The articles of a company govern its internal organisation, management and administration. The rights and duties of the shareholders as against the company, and as between the shareholders themselves, are set out in the articles, which constitute a contract between these parties.

As stated above, a company may adopt all or any of the regulations set forth in Table A of the Companies Law or, alternatively, a company may adopt a set of specifically drafted bespoke regulations. In practice, the Table A articles are rarely adopted; they do, however, provide a starting point from which specifically tailored provisions can be developed. Appleby has developed a variety of articles that are specifically drafted to reflect current market standards. There is considerable scope for overlap between the procedures set out in the Companies Law and those that may also be contained in the company's articles, and a company can always provide in its articles to adopt a procedure that is more onerous than that contained in the Companies Law. Appleby can advise on all aspects of a company's articles. For more information, please refer to the contacts at the end of this Guide.

The regulations contained in the articles are subordinate to the provisions contained in the memorandum. Accordingly, subject to any conditions contained in its memorandum, a company may, by special resolution of the company's shareholders, alter or add to its articles.

There is nothing in the Companies Law that permits the public to inspect, or to obtain copies of, a company's articles, as filed with the Registrar. The articles are, therefore, a private document.

9.3 Requirements for Officers or Representatives in the Cayman Islands

The Companies Law does not stipulate a procedure for the appointment of directors; accordingly, the appointment of directors is something that will be governed by the company's articles. A Cayman Islands company is not required to appoint officers (apart from one or more directors), although it is advisable (and usual) for the board of directors to appoint a secretary. Other officers, such as chairman, president, vice-president, treasurer or an assistant secretary, are wholly optional.

The Companies Law provides that the secretary (and any manager) is an officer of a Cayman Islands company. The responsibilities of the secretary include seeing that the administration of the company's affairs is duly discharged, including circulation of notices of directors' and general meetings and ensuring that all appropriate filings with the Registrar are made in a timely manner.

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 and a copy must be sent to the Registrar. A company must amend the register and notify the Registrar if there are any changes among its directors or offices, or changes in the particulars contained in the register, within 30 days of the change. Failure to notify the Registrar in the 30 day period shall result in a fine.

9.4 Directors

The board of directors typically manage the business of a Cayman Islands company. Provisions for appointment of the initial directors, and election of their successors, will be included in the company's articles. The articles will also make provision for matters such as directors' qualifications, terms of office and retirement, removal and rotation of directors, regulation of directors' meetings, proceedings of the board and notice requirements, and the manner of determining questions that arise at board meetings. Sole directors and corporate directorships are permissible.

If an action not within the company's objects is taken by the directors, then the act will be *ultra vires*. However, the objects of a Cayman Islands company are generally unrestricted and, usually, the company's articles (or Table A) authorise the directors to transact the business of the company and to exercise all its powers so long as the powers are not, by the Companies Law or the articles themselves, required to be exercised by the company, i.e. the shareholders in general meeting. The articles may also permit the directors to delegate any of the powers exercisable by them to any one of their number, e.g. a managing director or to committees or to the company's officers.

The number of directors of a company and the names of the first directors are determined in writing by a majority of the subscribers of the memorandum. The articles will set out the mechanism for establishing their remuneration. There is usually no requirement for a director to hold shares in the company.

The number of directors is set out in the articles, and is usually neither less than one nor more than ten (unless the shareholders by ordinary resolution determine otherwise). The directors are generally granted the power to appoint any person to be a director, either to fill a vacancy or as an additional director.

A company may, by ordinary resolution, increase or reduce the number of directors and appoint and remove directors.

The office of director will be vacated if the director:

- resigns his office by notice in writing to the company;
- becomes bankrupt;
- is found to be or becomes of unsound mind;
- ceases to be a director by virtue of, or becomes prohibited from being a director by reason of, an order made under any provision of the law or enactment.

The duties and liabilities of directors of Cayman companies are governed by the Companies Law as supplemented by English common law in so far as common law has not been amended by statutory provisions. There are three broad categories of duties that directors are obligated to uphold in discharging their duties: the common law duty of skill and care, fiduciary duties and statutory duties. For a detailed description of directors' duties, together with a discussion of the liabilities of acting as a director, please refer to the Guide to Directors' Duties in the Cayman Islands.

The Directors Registration and Licensing Law, 2014 imposes registration obligations on directors of registered mutual funds and certain securities investment businesses (**Covered Entities**). Licences are required for "Professional Directors", being natural persons appointed to the boards of 20 or more Covered Entities and corporate directors of Covered Entities.

9.5 Board Meetings

As stated above, a company's business decisions are made by the board of directors. The convening and conduct of a board meeting will be dependent upon the articles. While the Companies Law 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. 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 (though telephonic participation at a board meeting is not explicitly recognised by the Companies Law). Failure to give adequate notice may render the proceedings void.

The Companies Law provides that, subject to the memorandum and articles of a company, a meeting of the board of directors or any committee of the directors (or shareholders or class thereof) may be validly convened and business conducted, as provided by the articles, with only one director (or shareholder) being present. A company's articles will usually indicate the notice requirements for calling a meeting, who may call a meeting, who may vote and how board resolutions are passed. Appleby's Articles provide that a director may call meetings as they think fit.

9.6 General Meetings

Exempted companies are not required to convene an annual general meeting unless the articles otherwise provide.

The directors may convene an extraordinary general meeting (**EGM**) whenever they think fit. The directors may also convene an EGM upon the requisition in writing of one or more shareholders holding in aggregate not less than one tenth of such paid up capital of the company as at the date of the requisition carries the right to vote at a general meeting.

Generally at least five days' notice is required for the convening of a members' meeting. Notice should specify the place, date and hour of the meeting and, in the case of EGMs, the general nature of the business to be considered. All shareholders entitled to attend and vote at a general meeting are entitled to receive notice.

There is no requirement in the Companies Law for shareholder meetings to be held in the Cayman Islands. 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.

Every company must keep minutes, i.e. written records of all resolutions and proceedings of a company's shareholders (at general meeting or otherwise), and of its directors or managers (at meetings or otherwise).

(a) **Voting**

In general, the Companies Law merely requires a bare majority of those in attendance and forming a quorum to approve transactions placed before the shareholders. There are certain exceptions provided for in the Companies Law, e.g. approval of schemes of arrangement. A company's articles may require higher majorities for certain other matters, and this is frequently the case with companies having shares listed on approved stock exchanges.

The mechanics of voting will be set out in the articles. The articles will typically provide that at a general meeting, a resolution put to the vote will be decided on a show of hands unless a poll is demanded and, unless a poll is demanded, a declaration by the chairman that a resolution has been carried (by a particular majority or unanimously) or lost, and an entry to that effect has been recorded in the book of proceedings will be conclusive evidence of the fact. On a show of hands, every shareholder present in person (or by proxy) is typically entitled to one vote. No shareholder will be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of share in the company have been paid.

A company's articles will usually provide for the method of appointing a proxy.

(b) **Special Resolutions and Resolutions in Writing**

A special resolution under the Companies Law is a resolution adopted by a majority of not less than two-thirds (or any greater majority specified by the company's articles) of shareholders being entitled to vote at a general meeting, of which notice specifying the intention to propose the particular resolution as a special resolution has been duly given, or a written resolution unanimously adopted by all the shareholders entitled to vote at a general meeting of the company.

A special resolution will normally take effect upon execution of the written instrument or the adoption of the special resolution by the necessary majority of shareholders at the general meeting duly convened to consider the special resolution. Proxy voting at such a meeting is permitted, if the articles of the company so provide.

Resolutions may be passed by unanimous written consent of the members without the need for a meeting. In the case of such written resolutions, the Companies Law provides that the effective date shall be the date on which such written instrument (or the last of such, if two or more counterparts are used) is executed.

A copy of any special resolution passed by a company must be forwarded to the Registrar within 15 days and annexed to the articles.

(c) **Representation of Corporations at Meetings**

The articles will usually regulate for the representation of corporations at meetings. For example, Appleby's Articles provide that any corporation which is a shareholder of the company may, by resolution of its directors, authorise such person as it thinks fit to act as its representative at any meeting of the company or of any class of shareholders of the company, and the person so authorised will be entitled to exercise the same powers on behalf of the corporation which he represents as that corporation could exercise if it were an individual shareholder of the company.

9.7 **Auditors**

There are no general requirements in the Companies Law for securing audited financial statements: whether there are will depend on the company's articles. Appleby's Articles, for example, provide that from time to time the company (or, failing them, the directors) may determine:

- that the accounts of the company be audited and the appointment of an auditor;
- that a profit and loss account, balance sheet, group accounts and/or reports be prepared and sent to each shareholder or any person entitled thereto; and
- that a copy of every balance sheet be laid before the company in general meeting together with a copy of the auditor's report.

Note, however, that certain categories of companies require licences to conduct their business under specific local legislation, for example insurance companies, and will be required to file audited accounts under the provision of such legislation.

9.8 **Records and Financial Statements**

The Companies Law requires companies to keep proper books of account with respect to their business dealings so that such books indicate a true and fair record of the company's affairs and explain its transactions. This includes keeping account with respect to:

- all sums of money received and expended by the company and matters in respect of which the receipt and expenditure takes place;
- all sales and purchases of goods of the company; and
- the assets and liabilities of the company.

The books of account may be kept at the registered office or at such other place as the directors of the company think fit. Such books must at all times be available for inspection by an inspector appointed by the Court or an inspector appointed by the company. Inspection of a company's books by shareholders of the company who are not directors may be regulated by the company's articles.

Cayman companies are required to keep proper accounts but there is presently no requirement that such accounts be audited or that any accounts be filed with the Registrar or any other regulatory authority in the Cayman Islands unless the company holds a licence or is otherwise regulated under the laws of the Cayman Islands.

9.9 **Employment of Personnel**

The majority of exempted companies have no employees in the Cayman Islands, although some do establish offices and engage staff locally. All persons other than Caymanians require permission to seek or to take up employment in the Cayman Islands. Employment of skilled and experienced non-Caymanian personnel by an exempted company will usually be permitted where it can be demonstrated that there are no qualified Caymanians available.

9.10 **Investments**

Cayman Islands exempted companies are free to acquire, hold and deal in all types of investment properties, save that an exempted company which is authorised to issue bearer shares may not hold land in the Cayman Islands.

9.11 **Registration of Mortgages and Charges**

The register of mortgages and charges is required to show any and all property of a company which is subject to mortgages or charges, such as an encumbrance or a security interest of some kind. Entries in this register must include, in respect of each such mortgage or charge: a short description of the property subject to the same; the amount (value) of charge created; and the name(s) of the mortgagee(s) or person(s) entitled thereto. Such particulars must be written up in the register immediately. If any property of the company is mortgaged or charged without an entry being made on the register, then every director, manager or other officer who knowingly and wilfully authorised the omission of such entry will be liable to a fine.

The register of mortgages and charges must be kept at the registered office of the company and must be open to inspection by any creditor or shareholder of the company at all reasonable times. Should inspection be refused then the Judge sitting in chambers may compel an immediate inspection of the register.

9.12 **Contracts**

The restriction that an exempted company may not trade in the Cayman Islands except in furtherance of its business conducted outside the Cayman Islands does not prevent it from effecting and concluding contracts in the Cayman Islands and exercising in the Cayman Islands all its powers necessary for the carrying on of its business outside the Cayman Islands, or entering into contracts with other Cayman Islands exempted companies.

The Companies Law provides that contracts on behalf of any company may be made by:

- a contract which, if made between two individuals would be required by law to be in writing and to be made by deed or under seal, may be made by instrument that is sealed with any seal of the company; or, is expressed to be, or is executed on behalf of the company and expressed to be executed as, or otherwise makes clear on its face that it is a deed;
- any contract which, if made between private persons would be required by law to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing and signed by any person acting under the express or implied authority of the company; and
- any contract which, if made between private persons, would by law be valid although made by parol, i.e. oral agreement only and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company.

Any contract made in one of these ways may be varied or discharged in the same manner, and all contracts made as such will bind the company and its successors (including executors or administrators, as the case may be).

Where a contract purports to be made by a company or by a person on behalf of a company prior to the company being registered, then the contract has effect as being entered into by the person purporting to act on behalf of the company and that person will be personally liable for the contract. However, a company once registered, may ratify the contract and thereupon the company will be bound by the contract and will be entitled to the benefit of the contract from the date of registration. If a company elects as such, then the person who entered into such a contract will be deemed to have been duly authorised to act on behalf of the company and will cease to be personally liable on the contract.

A company may, by deed or instrument under seal, empower a person either in a general capacity or in respect of a specified matter to be its attorney to execute deeds or instruments under seal on its behalf and, in which case, a deed or instrument under seal signed by an attorney on behalf of a company will bind the company as if the company executed the deed or instrument itself.

A company may maintain a common seal, which must bear the name of the company in legible characters and be maintained at its registered office. If the articles permit, however, the seal may kept at a location other than the registered office, or be duplicated exactly and kept at any location(s) around the world. A company may authorise any person to affix the duplicate seal and the person affixing the duplicate seal must write the date (by his hand) on the deed or instrument to which it is affixed.

A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company.

9.13 Electronic Records

Electronic records and electronic transactions are legally recognised in the Cayman Islands. So, for example, where a document has to be in writing for legal purposes, a document in electronic form will, subject to exceptions, meet that requirement. An electronic version of an original document may also be used as evidence of the original provided that the electronic version is an accurate representation of the original. Digital signatures are also permitted. For more information on the use of electronic records, please refer to the contacts at the end of this Guide.

10. TAXATION

At the time of writing, there is no taxation on profits, income or dividends, nor is there any capital gains tax, corporation tax, or taxes in the form of withholdings, estate duties or inheritance tax under Cayman Islands law. Profits may be accumulated and it is not obligatory that a company make distributions or dividends.

An exempted company may apply to the Governor of the Cayman Islands for a written undertaking that, should taxes ever be introduced into the Cayman Islands, the company will remain tax-free for a period of up to 30 years from the date of the undertaking. This undertaking is normally granted for up to 20 years, in the first instance, and may provide that (in addition to the exemption from capital gains, profits and income taxes) no tax in the nature of estate duty or inheritance tax shall be payable on, or in respect of, shares, debentures or other obligations of the company.

An exempted company is required to pay an annual fee to the Cayman Islands Government. This fee (annual government fee) is calculated by reference to the company's registered capital (as stated in the

memorandum). The annual government fee is first payable upon the filing of the company's memorandum at the time of incorporation and, subsequently, in January of each year following the year of incorporation. Should an exempted company default in submitting its return or the annual government fee, then the company will incur a penalty.

Should an exempted company fail to furnish the Registrar with an annual return, annual fee, or penalty fee, as the case may be, then the company will be liable to being struck off the register by the Registrar, though the Registrar will give the defaulting company one month's notice before taking such action.

11. SHARE CAPITAL AND DEBENTURES

11.1 Exchange Control

There are no exchange controls in the Cayman Islands, which allows free transfer of funds in and out of the Islands, in any currency, with equal freedom to open and maintain accounts in any currency.

11.2 Share Capital

The Companies Law provides for the limitation of the liability of the shareholders of companies which have a share capital, in cases where the share capital is limited by shares, or by guarantee. In the case of a company with shareholders' liability limited by shares, the limit of liability is the amount, if any unpaid on the capital subscribed. Accordingly, on an insolvent winding up, a shareholder will be liable up to, but not exceeding, the amount then remaining unpaid on his shares. In addition, it is possible to incorporate a company with no limit on the liability of members, referred to as an unlimited company.

The Companies Law allows a company limited by shares or a company limited by guarantee and having a share capital, subject to its articles and the passing of a shareholder resolution, to alter the conditions of its memorandum to:

- increase its share capital (and please note that an exempted company having no shares of a fixed amount may increase its share capital by such number of shares without nominal or par value, or may increase the aggregate consideration for which such shares may be issued);
- consolidate and divide all or any of its share capital to create a larger number of shares;
- convert all or any of its paid-up shares into stock, and reconvert that stock into paid-up shares of any denomination;
- subdivide its shares or any of them into shares of an amount smaller than that fixed by the memorandum, providing the amount unpaid on each of the reduced shares, if any, is proportional to the amount paid on the share from which it was derived, i.e. the share capital remains unchanged; and
- cancel shares which, at the date of the passing of the resolution that created them, have not been taken (or agreed to be taken), and diminish the share capital by the amount of shares so cancelled or, in the case of shares without nominal or par value, diminish the number of shares into which its capital is divided.

Where a company's share capital has increased, through any of the above methods, and approved by ordinary shareholder resolution, then the Registrar must be given written notice within 30 days of the resolution. A fee must be paid in the case of an increase of shares.

Subject to confirmation by order of the Grand Court of the Cayman Islands, a company may, if its articles so provide, by special resolution reduce its issued share capital in any way, including by reducing the liability on any of its partly-paid shares, cancelling any share capital which is lost or unrepresented by

assets, or paying off any excess share capital, and the company may alter its memorandum as necessary by reducing the amount of its authorised share capital and its shares. The prescribed procedure for obtaining such an order of the Grand Court seeks to ensure that any creditors are not prejudiced by the capital reduction.

The articles of a Cayman Islands company will typically also provide for the division of the share capital into shares of several classes, and the attachment thereto of such preferential, deferred or special rights, privileges or conditions (including without limitation conditions with regard to dividend, voting, return of share capital or otherwise) as the company, acting by special resolution, may determine.

No statutory provisions exist prohibiting the grant of financial assistance to a person who acquires shares in a Cayman company. Common law rules apply, and a decision by the company's directors to provide such assistance must be made in good faith, for a proper purpose and in the interests of the company. The terms of such assistance should be on an arm's length basis.

11.3 Issue Price of Shares

As stated above, the shares of an exempted Cayman company may be without nominal or par value, which must be stated in the company's memorandum along with the amount of the aggregate consideration for which the shares may be issued (provided that the exempted company does not also issue shares of a fixed amount). If a company issues shares of a fixed amount, then a company may issue fractions of a share, providing the articles permit. In such circumstances, the fraction of the share will be subject to and carry the corresponding fraction of liabilities, rights and other attributes of a whole share of the same class. The nominal or par value of a share may be expressed in an amount which is a fraction or a percentage of the lowest available unit of legal tender of the currency in which the capital of the company is expressed.

A company may also issue shares at a discount provided that such issue has been authorised by an ordinary resolution of the company and is sanctioned by the Grand Court. Certain additional conditions will apply in any such case.

Any amount paid for shares over and above the fixed amount, whether for cash or otherwise (a sum equal to the aggregate amount of the value of the premiums on those shares), must be transferred to an account called the share premium account of the company. Where a company issues shares without par value, the consideration received must be paid up share capital of the company. Subject to a company's memorandum or articles, and providing that no distribution or dividend may be paid if it would mean that the company would not be able to pay its debts as they fall due in the ordinary course of business, immediately following the date on which payment is made (the solvency test), then the share premium account may be used, *inter alia*, for:

- paying distributions or dividends;
- paying up unissued shares of the company to be issued to shareholders;
- writing off preliminary expenses of the company;
- writing off the expenses of, or the commission paid or discount allowed on, any issue of share or debentures of the company and redeeming and repurchasing shares.

The Companies Law imposes severe criminal and civil sanctions on any company, director or officer who willingly and knowingly authorises a distribution if it would mean the company would not be able to pay its debts in the ordinary course of business.

11.4 Redemption or Purchase of Shares by a Company

A company's articles must authorise the redemption or repurchase of shares or such actions will not be permitted. The articles will usually state whether shares are redeemable or re-purchasable by the company alone or redeemable also by the shareholders. The following requirements must also be met:

- the shares to be redeemed or purchased must be fully paid;
- there must be a remaining shareholder holding a share following the redemption or purchase;
- in certain circumstances, payments must be made to/from the company's capital redemption reserve;
- there must be adherence to the redemption provisions contained in the company's articles or, in the absence of such provisions, shareholder resolutions will need to be passed to deal with the manner of redemption or purchase of shares; and
- in respect of a payment out of capital or from the share premium account, the solvency test will need to be satisfied, i.e. that the company is able to pay its debts as they fall due in the ordinary course of business.
- There is no statutory requirement to evidence the solvency test in any form, although, if there is any doubt in respect of the company's solvency, it would be prudent to seek auditor verification. If it is later discovered that the company was not solvent, then the company's directors could, among other things, incur personal liability.

Under the Companies Law, a company may pay for the redemption or purchase of shares:

- from profits;
- from the proceeds of a fresh issue; or
- out of the share premium account.

A company may also pay for the redemption or purchase of shares out of capital provided that the company meets the solvency test outlined above.

Shares may also be redeemed or purchased at a premium and the source of the payment may be:

- from profits;
- from the share premium account; or
- out of capital.

If the payment is derived from profits, it follows that the company is solvent.

The company must satisfy the solvency test contained in the Companies Law for the payment to be made from the share premium account or out of capital.

Accordingly, the solvency test in respect of redemption or purchase of shares at a premium applies in respect of a payment from the share premium account or a payment out of capital.

A company is not prohibited from purchasing its own warrants subject to and in accordance with the terms and conditions of the relevant warrant instrument or certificate. No specific provision in the memorandum or articles is required, as the directors may instead rely on the general power in the memorandum to buy and sell and deal in personal property of all kinds.

A transfer of shares in an exempted company would not attract stamp duty. If, however, the company is a land holding corporation, i.e. a Cayman company that holds land in the Cayman Islands, then the company may be subject to a share transfer tax, which is effectively a stamp duty anti-avoidance measure.

11.5 Acquisition by a Company of its own Shares

The Companies Law provides that a company limited by shares, or limited by guarantee and having a share capital may, if authorised by its articles, purchase its own shares, including any redeemable shares. A company may not purchase any share unless it is fully paid or, if following the purchase, there would no longer be any shareholder of the company holding shares. In the event that the articles are silent as to the manner in which the company is to effect a purchase of its own shares, it will be necessary for the resolution that authorises the purchase to set out a procedure for effecting such purchase.

A redemption or purchase of shares may only be effected using funds representing profits of the company or the proceeds of a fresh issue of shares made for the purpose of the redemption, or, subject to the solvency requirement, out of capital. Any premium payable on a redemption or purchase of shares must have been provided for out of the company's profits or its share premium account before or at the time of purchase, or, subject to the solvency requirement, may be paid out of capital.

Payments out of capital for the purchase by a company of its own shares will not be lawful, unless the company is able to pay its debts as they fall due in the ordinary course of business, immediately following the date on which the payment is made.

11.6 Treasury Shares

Shares that have been purchased or redeemed by a company or surrendered to the company shall be classified as treasury shares, although a company may not redeem or purchase any of its shares if, as a result of the redemption or purchase, there would no longer be any issued shares of the company other than shares held as treasury shares. Treasury shares are only permitted if:

- the memorandum and articles do not prohibit the company from holding treasury shares;
- the relevant provisions of the memorandum and articles (if any) are complied with; and
- the company is authorised in accordance with its articles or by a resolution of the directors to hold such shares as treasury shares prior to the purchase, redemption or surrender of such shares.
- A company holding treasury shares may, at any time:
- cancel the shares (thus reducing the issued share capital but not the authorised share capital); or
- transfer the shares to any person, whether or not for valuable consideration (including at a discount to the nominal or par value of such shares).

As long as the company holds treasury shares, it shall be entered in the register of members as holding those shares, but the company: shall not be treated as a shareholder for any purpose; shall not vote the treasury shares; and shall not be entitled to receive a distribution or dividend in respect of a treasury share. However, bonus shares may be allotted as fully paid in respect of a treasury share, and shares allotted as bonus shares shall be treated as treasury shares.

11.7 Bearer Shares

The Companies Law was amended on 13 May 2016 by the Companies (Amendment) Law, 2016, so that no company, whether new or existing, can issue bearer shares after that date.

An existing company that has bearer shares in issue must, by notice or through the appropriate custodian, advise the beneficial owner of the requirement to convert the shares into registered shares. The notice must be addressed to the beneficial owner "or, if applicable the custodian of a bearer share". As all bearer shares must now be in the hands of a custodian, a custodian is always going to be "applicable". The notice should invite the beneficial owner (whether directly or through the custodian) to provide the name of the person who will now be the registered holder of the shares. The company must then register the shares in the name provided. If no name is provided, the company shall register the shares in the name of the custodian. The deadline to issue the notice to the custodian/beneficial owner and ask for a name in which to register the shares is 13 July 2016, which is also the deadline to change the register of members.

Each company that converts bearer shares into registered shares must file with the Registrar a declaration by 31 January 2017, confirming that any bearer shares have been converted. A company that fails to file the declaration by the deadline shall not, for the purposes of the Companies Law, be considered to be in good standing.

11.8 Register of Members

The subscribers of the memorandum will be deemed to have agreed to become shareholders of the company and, upon registration of the company, will be entered as members on the register of members. Each person subsequently becoming a shareholder will also be registered.

Every Cayman company must establish and maintain an up-to-date register of current members. Typically, the register will be located at the company's registered office, although an exempted company may keep one or more branch registers, of any category or categories of members, in any country or territory. A branch register is deemed to be part of the exempted company's register of members, and shall be kept in the same manner in which the principal register is required or permitted to be kept. Where a company keeps a branch register, an up-to-date copy of the branch register must be kept at the place where the principal register is kept.

The register of members must indicate:

- details of the names and addresses of the members of the company;
- the respective number (and class) of shares held by each member;
- the amount paid (or credited as paid up) on the shares held; and
- the date a shareholder became, and ceased to be, a member.

Companies that have listed shares on approved stock exchanges may also keep a register of listed shares, if authorised by the company's articles or by way of a special resolution. The company must also keep a register of non-listed shares at its registered office.

A share or other interest of a member in a company is personal estate. A share or other interest of a member is capable of being transferred if: a transfer is expressly or impliedly permitted by the articles of the company; and any restriction or condition on the transfer of the shares or interest set out in the regulations of the company is observed.

11.9 Prospectuses and Public Offers

No prospectus filing requirements exist in the Cayman Islands under the Companies Law unless the company constitutes a mutual fund under the Mutual Funds Law, and there is no Cayman Islands governmental or regulatory review.

11.10 Listing on the CSX

The Cayman Islands Stock Exchange (the **CSX** - www.csx.com.ky) has become one of the world's fastest growing exchanges. The CSX was established to provide a listing facility for the specialist products of the Cayman Islands, being mostly offshore mutual funds and specialist debt securities. The CSX is firmly focused on international capital markets and providing an efficient and sophisticated listing regime. Many of the world's leading financial institutions have listed their products on the exchange. The CSX is recognised and accepted by leading institutions and market players as a blue chip listing environment, which assists in providing investors with the necessary degree of comfort to invest in a fund.

The CSX is recognised, affiliated or is a member of a number of International organisations, e.g. Asia Pacific Offshore Institute and the European Securitisation Forum. It is also recognised by the UK, for example, as a recognised stock exchange, which allows companies whose securities are listed on the CSX to take advantage of the 'quoted Eurobond exemption', which means that interest paid on securities listed on the CSX can now be paid without deduction of UK tax. Appleby (Cayman) Ltd. are listing agents for the Cayman Islands stock exchange and have significant experience in the listing of investment funds on this exchange and numerous other global stock exchanges.

Any exempted company or foreign company can use the facility of the CSX for raising capital and trading securities. All listing applications for prospective issuers must be sponsored by one of the CSX's trading members and specific listing regulations (**CSX Listing Rules**) must be complied with. The CSX listing rules reflect currently accepted international standards and seek to achieve a sound balance between providing appropriate issuers with access to the capital markets at the earliest possible opportunity, while providing investors with certain safeguards and with sufficient and timely information to enable them to make informed decisions as to the value and merits of listed securities.

When a company is listed, it is given space to publish its marketing materials on the CSX website. The site can provide hyperlinks to the company's own website or to other sites providing analytical data for the company. The CSX also automatically updates Bloomberg with any public information given to it.

11.11 Securities Clearance

Table A or the company's articles will provide for the transfer of shares or debt securities. For example, Appleby's Articles provide that, 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, and then recorded in the register of members.

There is no CIMA, government approval or clearance required for a transfer of securities in an exempted company under the Companies Law. There may be approval requirements, however, where the company is licensed under other legislation, e.g. as a trust company or bank.

11.12 Dividends

Dividends may be paid out of profits or out of the share premium account of a company, but may not be paid out of a company's capital. Where the intention is to provide the flexibility to pay dividends out of share premium, the articles should contain a provision which permits this. No dividend may be paid to the shareholders out of a company's share premium account unless the distributing company will be able to pay its debts as they fall due in the ordinary course of business immediately following the date on which the distribution is proposed to be paid.

The Companies Law does not regulate how profits of a company are to be calculated; however, the articles may contain provisions for this, so long as those provisions are consistent with the overall legal

requirements. The articles may also provide that a company in general meeting may declare dividends, and may restrict the amount of any dividend so declared to an amount recommended by the board of directors.

11.13 Inspection

The Companies Law provides that inspectors may be appointed to inspect the affairs of a company, either by the company by special resolution; or by an order of the Court upon an application by the company's shareholders. With regard to the former, the inspector will report back to such persons as the company directs, by special resolution of its shareholders, and, with regard to the latter, the inspector will report back to the Court.

The number of shareholders required to successfully petition the Court depends on whether or not the company has a capital divided into shares. In the case of a company having a capital divided into shares, not less than one-fifth of the shareholders of the company are required; and, in the case of a company not having a capital divided into shares, not less than one-fifth of the total number of persons entered on the register are required to petition the Court. The costs of the inspection will be defrayed by the shareholders of the company, unless the Court directs that the company bear the costs, which it is authorised to do. The inspector's report will not be publicly available, unless the Court orders otherwise.

All officers and agents of the company are under a duty, regardless of whether the inspector was appointed by the company or by order of the Court, to produce all books and documents in their custody or power to the inspector for examination. In addition, an inspector may examine an officer or agent of the company upon oath in relation to its business. Any officer or agent who refuses to produce any book or document, or answer any such question, will be liable to a fine in respect of each offence.

The inspector's report is admissible in any legal proceedings as evidence of the inspectors in relation to any matter contained in the report.

11.14 Shareholder Protection and Oppressive Conduct

Cayman companies operate on the principle of a majority rule. The justification for the rule is the need to preserve the right of the majority to decide how a company's affairs are managed. Thus, for example, where directors of a company have breached their duties to the company, the company may bring an action against them. Where the directors of the company contain a majority of errant directors unlikely to initiate litigation against themselves, the shareholders can replace the directors who can then initiate the action. A receiver or liquidator may also, of course, commence such litigation. It is also possible for the shareholders in general meeting by ordinary resolution to bring litigation in the name of the company, at least where the directors are alleged to be a party to the wrongdoing, e.g. through a personal, representative or derivative claim. In addition, there are a number of exceptions to the principle of majority rule which offer a shareholder some form of relief. For more information on shareholder protection and oppressive conduct, please refer to the Guide to Protection of Minority Shareholders in the Cayman Islands.

PART B: FOREIGN COMPANIES

1. INTRODUCTION

Companies incorporated in jurisdictions other than the Cayman Islands may conduct business from within the Cayman Islands if they register as a foreign company. Carrying on business in the Cayman Islands includes "the sale by or on behalf of a foreign company of its shares or debentures and offering, be electronic means, and subsequently supplying, real or personal property, services or information from a

place of business in the Islands or through an internet service provider or other electronic service provider". Place of business includes a share transfer or share registration office.

2. APPLICATION PROCEDURE

The registration process is quite straightforward and involves the foreign company filing a number of documents with the Registrar. These include:

- a certified copy of the foreign company's certificate of formation or incorporation, or the equivalent document issued by the relevant authority as evidence of its formation or incorporation;
- a certificate of good standing issued by the relevant authority (or a certified copy thereof), or, if the relevant authority does not issue such certificates of good standing, a declaration signed by a director of the foreign company that the foreign company is in good standing with the relevant authority, in either case, dated no earlier than one month prior to the date of its delivery to the Registrar;
- a certified copy of any charter, bye-laws or memorandum or articles or other constitutional document (whatever it may be called) of the foreign company that is required to be filed with the relevant authority under the laws of the relevant jurisdiction in connection with the incorporation or formation of the foreign company;
- a list of its directors (i.e. any person in accordance with whose directions or instructions the directors of the foreign company are accustomed to act), specifying the name, address, occupation, office held and dates of appointment and removal in respect of each director; and
- the name and address of one person (or more) in the Cayman Islands who is authorised to accept service of process or other notice on behalf of the foreign company.

If any of the above instruments or documents is not written in English then a certified translation is required. If any alteration is made to the aforementioned, then the foreign company must, within 21 days, notify the Registrar. There is also a registration fee which is an annual fee that must be paid in January each year.

If the foreign company ceases to carry on or have a place of business in the Islands it must give notice to the Registrar, who will close the file on the foreign company and any obligation on the foreign company to deliver any documents to the Registrar will cease.

3. RESTRICTIONS AND REQUIREMENTS

Once registered, the foreign company is under a number of obligations. Every foreign company must:

- in every prospectus inviting subscriptions for its shares or debentures in the Islands state the country in which the foreign company is incorporated;
- conspicuously exhibit its name and country of incorporation on every place where it carries on business in the Islands;
- cause its name and country of incorporation to be stated in legible characters on all bill heads, letter paper, notices, advertisements and other official publications; and
- if the liability of its shareholders is limited, cause notice of that fact to be stated in every such prospectus, bill heads, letter paper, notices, advertisements and other official publications in the Islands and to be affixed wherever it carries on its place of business in the Islands.

Provided a foreign company has complied with the above requirements, a foreign company is permitted to hold land in the Islands. Should a foreign company hold land in the Islands which has not complied with the above requirements, then the Governor in Cabinet may, whenever it appears to him to be necessary in the public interest, order the foreign company to transfer any land held by, vested in or belonging to it, to a person capable of holding such lands and of being registered as proprietor. Should a foreign company fail to comply with this order, then the Registrar may apply to the Court for an order that the land vest in the Financial Secretary for the benefit of the Islands and be subject to the disposition of the Governor in Cabinet, and the Court may order accordingly.

The Registrar has the power to prohibit the sale of any shares of any foreign company in the Islands or any invitation in the Islands to subscribe for any shares of a foreign company.

There are also strict licensing requirements for carrying on banking, trust company and insurance business.

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 shareholder (or any class of them). An arrangement includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into different classes (or both). The Court will give directions as to how such a meeting should be summoned.

The arrangement will be sanctioned if 75% of the creditors or shareholders, or class thereof, as the case may be, present and voting either in person or by proxy at the meeting, agree. The compromise or arrangement will be binding on all the creditors or shareholders, or class thereof (or liquidator in the case of a company being wound up), when the Court sanctions the compromise or arrangement. 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 the company issued after the order has been made.

2. RECONSTRUCTIONS AND AMALGAMATIONS

The Companies Law provides for facilitating the reconstruction and amalgamation of companies (pursuant to a compromise or scheme of arrangement between a company and its shareholders or creditors), where the compromise or arrangement has been proposed for the purpose of (or in connection with) the reconstruction of a company or the amalgamation of any two or more companies. Under such a compromise or scheme of arrangement, the whole or part of the undertaking or the property of any company concerned in the scheme (transferor company) will be transferred to another company (transferee company). Any scheme or arrangement under the Companies Law must have the sanction of the court before it is effective and, once sanctioned, will bind all the creditors or shareholders (or the relevant class thereof) who were parties to the scheme, and on the company. The court has wide powers for facilitating the compromise or scheme: the Court may make an order to provide for:

- 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.

Where an order provides for the transfer of property or liabilities, the property or liabilities will be transferred to, and vest in, the transferee company. In addition, if the order so directs, the property transferred may be freed from any charge which, by virtue of the compromise or arrangement, will cease to have effect. Property includes all assets, rights and powers of every description; liabilities include duties.

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.

Due to the relatively cumbersome nature of the court approval process involved in the arrangements discussed above, the most common way of effecting a merger involving a Cayman Islands company is for the entire business of the company (transferor) to be transferred to the transferee company (transferee). The consideration payable by the transferee to the transferor would usually be shares in the transferee issued to the transferor. The transferor is then liquidated and the assets of the transferor (consisting of the shares in the transferee) are distributed up to the shareholders of the transferor thereby resulting in the shareholders of the transferor owning shares in the transferee.

Alternatively, the consideration payable by the transferee for the business can be paid in cash or by promissory notes where the shares in the transferee are already held by the shareholders of the transferor. Again, the transferor is liquidated and the surplus cash distributed to its shareholders or, alternatively, the promissory notes are distributed to its shareholders and are usually set off against commensurate obligations of the shareholders to the transferee.

A further alternative is for the transferor to establish the transferee as a subsidiary of the transferor, paying for its shares in the transferee by transferring its business into the transferee. The transferor is then liquidated and the shares it owns in the transferee are distributed up to the shareholders of the transferor.

These arrangements for a transfer of business work without any difficulty where there is unanimous consent of all shareholders involved. If, however, there is a dissenting minority of shareholders, the difficulty with these proposals will be that the minority shareholders may bring a derivative action claiming that there has been a fraud on the minority.

3. COMPULSORY BUY OUT

Where the scheme of arrangement involves the transfer of shares or any class of shares in a company, then the Companies Law also provides for the transferee company to acquire the shares of dissenting shareholders. 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.

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.

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. The transferee company will also pay to the transferor company the consideration for those shares. Any sums received by the transferor company in relation to this process will be paid into a separate bank account and 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.

PART D: GENERAL INFORMATION

1. MORTGAGES OF SHARES IN CAYMAN COMPANIES

In obtaining a security interest in shares in a Cayman Islands company, it is advisable for the security holder to obtain a share mortgage document reflecting the terms of the security arrangement. Mere delivery of a share certificate may be sufficient evidence of a pledge of the shares but does not evidence the detailed terms and conditions of the security arrangements. Furthermore, such a pledge by way of delivery of the share certificate is extremely difficult to enforce and will almost always involve resorting to the Courts for enforcement.

The Companies Law defines a shareholder as the person registered in the register of members. A share certificate is only prima facie evidence of any shareholding reflected in the register of members. Without registration in the register of members, the owner or security holder will have difficulty exercising the rights of a shareholder. In fact, most articles of Cayman companies provide that the company need take no notice of any equitable or other interest in the shares and should look no further than the register of members. Therefore, only the registered shareholder can vote the shares and dividends are payable only to the registered shareholder or its order.

Apart from a simple pledge by delivery of the share certificate, there are two specific ways in which one can effect a security interest in shares of a Cayman company.

1.1 Legal Mortgages

Under a legal mortgage, the shares in the Cayman Islands company are actually transferred to and registered in the name of the mortgagee, but subject to the terms of the mortgage document. The disadvantage of this alternative is that the mortgagee will then appear to be the shareholder of the company even though the underlying mortgage documents evidence the true security nature of the transaction. The advantage of this alternative is that the enforcement of the share mortgage, usually upon the happening of an event of default, becomes much simpler because the mortgagee as the registered shareholder immediately has voting rights and the right to receive dividends. Such share mortgage document would usually provide for the mortgagee to give proxies and account for dividends to the real owner of the shares prior to the happening of an event of default.

1.2 Equitable Mortgages

With an equitable mortgage, the shares remain registered in the name of the real owner who enters into a mortgage document reflecting the terms of the security arrangements. The main disadvantage of this alternative is that the mortgagee will first have to become registered as the shareholder before being able to exercise voting and other rights as a shareholder of the Cayman company.

One difficulty with obtaining an equitable mortgage of shares involves the possibility of fraudulent action by the mortgagor where under the mortgagor obtains a replacement share certificate for the mortgaged shares by, for example, alleging that the share certificate (which is actually in the possession of the mortgagee) has been lost and providing the Cayman company with the appropriate indemnities to enable the duplicate certificate to be issued. The mortgagor, in such circumstances, is able to fraudulently sell, mortgage or otherwise dispose of the shares in the Cayman company to a bona fide third party that acquires an interest in the shares without notice of the equitable mortgage arrangements.

2. REGISTERS AND INSPECTION

A Cayman Islands company is not required to make available to the public any of the register of directors and officers, the register for mortgages and charges, the share register, or the memorandum and articles, unless it is provided for in the articles.

2.1 Register of Mortgages and Charges

The register of mortgages and charges must be kept at the registered office of the company and is available to any shareholder or creditor of the company for inspection. This register relates specifically to encumbrances affecting the property of the company and must set out particulars of any mortgage or other security interest granted by the company. Such particulars must be written up immediately.

2.2 Registry of the Grand Court

The Registry of the Grand 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 Cayman or foreign courts, registered against it. The Cause Book will reveal any cause of action commenced against a Cayman company, while the Register of Judgments will include any judgments registered against it.

3. TERMINATION OF CAYMAN COMPANIES

There are essentially two ways of terminating the registration and existence of a Cayman company after it has served its purpose.

3.1 Strike Off

The simplest alternative is for the Registrar to strike a company off the register as a defunct company. The Registrar is empowered to do this under the Companies Law if the Registrar as reasonable cause to believe that a company is not carrying on business or is not in operation. The Registrar will often strike a company off the register, for example, if it has failed to pay its Government annual return fees. On a regular basis (usually three or four times a year), the Registrar will publish a list in the Cayman Islands Gazette of all companies to be struck off the register as at a date usually falling about one month after such publication. Unless any action is taken by the company to prevent its being struck off, the company will be dissolved on the date specified in the Cayman Islands Gazette. Such strike off does not affect the liability, if any, of any director or shareholder of the company and the company or any shareholder or creditor may apply to the

courts within ten years of the strike off for the re-instatement of the company. Any assets belonging to the company when it is struck off vest in the government for the benefit of the Cayman Islands.

The Registrar will also list a company for strike off as a defunct company if the company makes application to the Registrar or its Cayman Islands service provider on behalf of the company. It is usually possible for a company to dividend out to its shareholders all of its profits (including share premium, subject to a solvency test) once its financial affairs are settled. If there is any substantial share capital left in the company and the company is solvent, it will be necessary to effect a repurchase of all but one of its outstanding shares in order to effect the distribution of most of such share capital to the shareholder. Once the company is left with only non-material assets and liabilities consisting of its minimal share capital, the registered office of the company may apply to the Registrar for the company to be struck off. The registered office will usually require written confirmation from its client of record that the company has ceased to carry on business and has no material assets or liabilities.

The main disadvantage of this alternative is that there is usually no control as to the timing of the dissolution which will depend upon when the Registrar includes the company in the Gazetted list of companies to be struck off. This can be addressed by applying to the Registrar for a particular strike off date and arranging for the publication of an Extraordinary Gazette noting the strike off of the company; in practice, this will incur additional fees and disbursements. The other disadvantage is that this alternative cannot be used, for example, where the company has outstanding unsatisfied liabilities (although non-payment of the government fees may result in the Registrar striking the company off in due course in any event). The main advantage of this alternative is that it is relatively simple and inexpensive.

3.2 Voluntary Liquidation

The other alternative of terminating the existence of a Cayman company involves placing the company into voluntary liquidation and appointing a liquidator. The main advantage of a voluntary liquidation (as opposed to striking a company off as a defunct company) is that the timing of the liquidation is definite and within the control of the shareholders and the liquidator rather than having to wait for the company to be listed for strike off. A voluntary liquidation is also the only way to properly deal with an insolvent company. The main disadvantage of this alternative is the cost involved. There are fees payable to the Registrar and the Cayman Islands Gazette for each of the required notices, there may be legal fees involved in dealing with the liquidation and there may also be other professional fees payable to the liquidator.

4. 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. For more information on liquidations and winding up, see the "Guide to Insolvency in the Cayman Islands".

For more specific advice on company law in the Cayman Islands, we invite you to contact:

Cayman Islands
Bryan Hunter
Managing Partner, Cayman Islands
Corporate
+1 345 814 2052
bhunter@applebyglobal.com

For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found here.