

Cayman Companies: An Overview

1 Statutory background

The principal statute pertaining to substantive company law in the Cayman Islands (“Cayman”) is the Companies Law (Revised) (the “**Companies Law**”). The Companies Law is substantially derived from the UK Companies Act 1948 and its predecessor, the English Companies Act 1862 and was originally enacted in the Cayman as the Companies Law (Cap. 22, Law 3 of 1961).

A complementary Cayman statute, the Local Companies (Control) Law (2007 Revision), is closely integrated with the Companies Law, and establishes a regulatory regime for the purpose of ensuring that companies which carry on business within the Islands are controlled by Caymanians, subject to certain exceptions (including licensed banks and trust companies) or exemption granted by the Governor in Cabinet.

In addition to local statute law, English common law and equitable principles form part of the substantive law of Cayman and English common law principles and precedents are followed in Cayman where applicable and provide a gloss on the local statute law.

2 Types of Cayman companies

Under the Companies Law a limited liability company may be incorporated as either:

- an “exempted company” - a company which has been registered by the Registrar of Companies in accordance with s.163 of the Companies Law as an exempted company on the basis of a declaration by the incorporating subscriber to the effect that the operations of the company are to be carried on mainly outside Cayman; or
- an “ordinary company” – a term not directly defined by the Companies Law but is the commonly used term for companies incorporated within Cayman and not being registered as an “exempted company” under the Companies Law.

Under the Companies Law, a company may be incorporated on the basis that the liability of its members is limited to the amount unpaid on their shares, i.e. limited by shares, or less commonly, limited to specified amount in the event of a winding up, referred to as limited by guarantee. An unlimited company may also be incorporated under the Companies Law. Companies limited by guarantee and unlimited companies are both of limited commercial use and outside the scope of this discussion.

Under the Local Companies (Control) Law an ordinary company incorporated under the Companies Law may take two forms:

- the “*non-resident company*” - (sometimes referred to as an “ordinary non-resident company”), is an ordinary company certified by the Cayman Financial Secretary under s.2(3) of the Local Companies (Control) Law as one not carrying on or intending to carry on business within Cayman and therefore not subject to 60% Caymanian control;
- the “*local company*” - (sometimes referred to as an “ordinary resident company”), is an ordinary company incorporated within Cayman and defined by s.2(1) of the Local Companies (Control) Law but not being either a “non-resident company” or an “exempted company” for the purposes of carrying on business within Cayman and is subject to 60% Caymanian control and ownership requirements imposed by the Local Companies (Control) Law.

The exempted company and non-resident company are the vehicles almost invariably used for financial and trust business, because they are not subject to Caymanian control, ownership and licensing requirements imposed by the Local Companies (Control) Law. Of the two, the exempted company is the preferred corporate structure in off-shore business, because of the greater confidentiality and flexibility afforded to it under the Companies Law.

2.1 The exempted company

An exempted company may not carry on business within Cayman, except in furtherance of its business carried on outside Cayman. The exempted company enjoys a number of privileges and exemptions and is the type of vehicle we usually recommend to clients wishing to form a company for offshore business - these include:

- minimal annual reporting requirements which consist only of a statement, signed by the company secretary or a director, that the company has conducted its operations mainly outside the Cayman Islands and has complied with the provisions of the Companies Law;
- it does not have to file with the Registrar of Companies an annual return disclosing details of its shareholders;
- its register of members does not have to be kept at the registered office and is not open to public inspection thereby preserving the identity of shareholders;
- it is not required to hold an annual meeting of its members;
- it may issue shares without nominal or par value;
- it may hold treasury shares;
- it may issue bearer shares provided they are fully paid up and held by a licensed custodian;
- it may be registered as a limited duration company, limited life company or a segregated portfolio company;

- its name need not end in the word “Limited” or “Ltd.” - however, if it is a limited duration company (see 14 below) its name must end in the words “Limited Duration Company”, or “LDC”;
- it may deregister itself within Cayman and transfer by way of continuation to another jurisdiction, where the laws of that other jurisdiction so permit or if incorporated outside Cayman may seek to transfer and be continued as an exempted company within Cayman;
- it is entitled to receive from the Cayman Government, a “Tax Exemption Undertaking”, exempting it from any future Cayman taxes for a period of up to 30 years. The Government normally grants a 20 year undertaking initially which is normally renewable for a further 10 years on expiry; and
- it may be merged or consolidated with another Exempted Company or a foreign company.

2.2 The non-resident company

A non-resident company under the Local Companies (Control) Law is similarly restricted in its activities by not being permitted to carry on business within Cayman.

The Companies Law requires a non-resident company to maintain a publicly available register of past and current members at its registered office. Furthermore, a director or secretary is required to file an annual return to the Registrar of Companies stating the names and addresses of members, directors and officers and the amount of paid-up capital. Although non-resident companies are unable to receive a tax exemption undertaking from the Government, they are currently not subject to any form of taxation in the Cayman Islands.

3 General incorporation requirements and procedure

A Cayman company is incorporated by the subscription (signature) of the members (shareholders) to the memorandum of association. Traditionally the incorporating agent or law firm provides a nominee subscriber for the initial incorporation, who signs the memorandum of association (the objects of the company) and articles of association (the regulations governing the management of the company) and by passing a resolution procures the company to issue shares to the intended shareholders of the company.

3.1 Directors and officers

A Cayman company is required to have a minimum of one shareholder and one director. The appointment of officers is entirely optional, but usual practice is to appoint a company secretary.

3.2 Exempted company - declaration by subscriber as to business outside the islands

In the case of an application to register an exempted company, there must be submitted to the Companies Registrar, a declaration signed by the subscriber declaring that the operations of the proposed exempted company are to be conducted mainly outside Cayman.

3.3 Non-resident company – no intention to carry on business within the islands

In the case of an application to register a non-resident company under the Local Companies (Control) Law the incorporating agent confirms to the Financial Secretary that the company does not intend to carry on business within Cayman and requests that it be incorporated as a non-resident company.

3.4 Certificate of incorporation

Upon the filing of the memorandum and articles of association and payment of the incorporation fee, the Companies Registrar will issue a certificate of incorporation. The issuance of the certificate of incorporation is conclusive evidence that the requirements of incorporation and registration under the Companies Law have been met at that date.

3.5 Appointment of first directors and first meeting of directors

The subscribers to the memorandum of association – generally the incorporation agent or law firm – appoint the first directors of the company, who are usually representatives or nominees of the incorporation agent or law firm.

At the first meeting of directors a number of administrative matters are usually addressed including:

- the resignation of the director appointed by the incorporation agent;
- approval of the transfer of shares held by the incorporating subscriber to the proposed shareholders;
- the appointment of the board of directors and any officers by the shareholders;
- approval of the financial year end of the company;
- the appointment of the company's accountants, attorneys and bankers as necessary including the execution of banking mandates;
- adoption of the seal of the company if relevant; and
- approving the application for an initial 20 year Tax Exemption Undertaking from the Cayman Government under s.6 of the Tax Concessions Law (Revised).

4 The Memorandum of Association and Articles of Association

The memorandum and articles of association, together form an effective contract between the members/shareholders and between them and the company itself, setting out their respective rights, obligations and the procedures of corporate governance to be followed, within the overall framework of the Companies Law and other relevant Cayman statute law and common law principles.

4.1 Memorandum of Association

The memorandum of association will contain:

- the name of the proposed company and if an ordinary (not exempted) company, the name must end in the word “Limited” or “Ltd.”;
- the location of its registered office within Cayman;
- the objects of the company and that the business of the company is restricted to those objects, but if no objects are specified or if the business of the company is not restricted to those objects, then the company is authorized to engage in any object not otherwise prohibited by law;
- a declaration that the liability of the shareholders is limited to the amount unpaid on their shares;
- particulars of the authorized share capital of the company including the aggregate amount of the authorized share capital and the shares into which it is divided; and
- in the case of an exempted company having shares without nominal or par value, the memorandum of association must disclose the aggregate amount for which these shares may be issued, subject to the proviso that an exempted company may not have shares of both par value and shares of no par value or nominal value at the same time.

The company may adopt the standard or default articles of association in the form of “Table A” to the First Schedule to the Companies Law governing the internal governance, procedure and conduct of the company or as is usually the case, the company will exclude those articles and adopt a customized version of those articles favoured by the incorporation agent or incorporating law firm. In practice however and likely for reasons of commercial expediency and convenience, the articles of association of exempted companies and ordinary companies tend to follow fairly closely the standard Table “A” articles with few substantive variations.

4.2 Amending the memorandum and articles of association

The company may at any time by “special resolution” – generally 2/3rds of its voting shares (unless a greater percentage is specified in the articles of association) on a poll:

- alter the objects or powers contained in its memorandum of association;
- alter or add to its articles of association;
- changes its name; or
- wind itself up voluntarily or be wound up by the court.

A copy of any special resolution passed by any company must be provided to the Registrar of Companies within 15 days.

The location of the registered office within Cayman may also be changed at any time by an ordinary resolution of its board of directors and on notice to the Registrar of Companies.

5 Issuance of shares

The Companies Law affords a good deal of flexibility as to the form or classes of shares which may be issued by a limited company.

5.1 Premium shares

Shares may be issued at a premium, in which case the value of the premiums on those shares is to be held in a share premium account and applied by the company as it sees fit subject to the limitations if any, imposed by the memorandum and articles of association.

5.2 Discount shares

Subject to an authorizing resolution of the company, the approval of the Cayman Grand Court and provided the company has been in existence for at least one year, it may issue shares of any class at a discount.

5.3 Redeemable shares

The company may issue redeemable shares (or convert shares issued as non-redeemable into redeemable) and for the protection of shareholders the Companies Law imposes a number of requirements for the redemption or purchase by the company of its own shares including the establishment of a capital redemption reserve to avoid reducing the amount of the company’s authorized capital. Fully paid shares may also be surrendered for no consideration. Shares redeemed, repurchased or surrendered may be cancelled or kept as treasury shares (see below).

5.4 Bearer shares

Bearer shares (i.e. shares represented by a certificate which do not record the owner's name and which are transferable upon delivery of the certificate) may be issued by a Cayman company if authorized by its article of association to do so. Consistent with the concern to prevent money laundering and the "know your client" protocol, the Companies Law imposes restrictions on the holding, transfer and disposition of bearer shares, requiring that they be issued to and held by a licensed "custodian".

5.5 Treasury Shares

Shares which have been redeemed, repurchased or surrendered may be kept by a Cayman company as treasury shares which can be subsequently cancelled or sold by the company without regard to capital maintenance rules increasing flexibility with share capital, particularly for fund vehicles with regular subscriptions and redemptions.

6 The Register of Companies

The Registrar of Companies is required to maintain a register of Cayman companies containing:

- the memorandum of association and articles of association;
- the name of the company and the number assigned to the company;
- the location of the registered office within Cayman;
- the amount of capital of the company (and where the shares capital is divided into shares, the nominal or par value of the shares);
- the names and addresses of the subscribers and the shares taken by each, the date of execution and date of filing of the memorandum of association; and
- where appropriate, whether the company is limited by guarantee or is unlimited as to liability.

7 Ongoing requirements for a Cayman company

7.1 Registers

Every company is required to maintain:

- a registered office within Cayman to which communications and notices may be sent - the location of the registered office is a matter of public record, notified to and published by the Registrar of Companies;
- a register of its members (shareholders) with the names and addresses of the shareholders and particulars of the number of shares held by each and the

- share certificate number (if any) and the date upon which the shareholder became or ceased to be a shareholder;
- a register of officers and directors containing the names and addresses of the company's officers and directors; and
- a register of mortgages recording the details of all security interests granted by the Company.

These registers are required to be kept at the company's registered office within Cayman, except in the case of the register of members of an exempted company, which may be kept at any place either within or outside Cayman.

7.2 Accounts and auditors

The Companies Law requires that every company keep proper books of account, showing details of all receipts, expenditures, purchases, sales and assets and liabilities of the company, reflecting a true and fair view of the state of the company's affairs and explaining its transactions.

There is no statutory requirement for the filing or auditing of company accounts, and how and to what extent the books of account are made available to the shareholders of the company is generally a matter addressed in the articles of association or by the directors. The standard Table "A" articles of association impose upon the directors a duty to keep proper books of account and gives them a broad discretion as to what extent the books of account may be made available for inspection by the shareholders, subject always to direction by the shareholders in a general meeting.

The Table "A" articles of association contemplate that a profit and loss statement and a balance sheet for the current period be presented to the shareholders at the annual general meeting and make provision for the auditing of accounts as determined by the shareholders in general meeting or by the directors. The practice however in small, closely held or exempted companies, varies considerably and particularly in the case of exempted companies, the formal presentation of accounts and auditing of them, is usually waived.

8 Annual filing requirements

8.1 Ordinary companies

Every ordinary company is required hold an annual general meeting and within 21 days of that meeting, to file in January of each year with the Companies Registrar an annual return (s.41) together with the annual Company Registry fees, setting out:

- all persons who were members of the company on the 14th day after the annual general meeting of the company;
- those who have ceased to be members of the company since the last annual return was filed; and

- the paid up capital of the company, par value of the shares, the number of issued shares up to the date of the summary, details of the calls made on the shares, details of shares forfeited.

8.2 Exempted companies

Every exempted company is required to file in January of each year with the Registrar of Companies an annual return in the form of a declaration, together with the annual Company Registry fees, setting out that:

- there has been since the last annual return no change to the memorandum of association (other than a possible change in the name of the company);
- the operations of the company since the last annual return have been mainly outside the islands;
- in compliance with the Companies Law, the company is not trading within the islands except in furtherance of its off-shore business; and
- any bearer shares issued are kept by a licensed custodian.

9 Management of the Cayman company

Consistent with established English common law principles, the day to day management of the Cayman company is delegated to its board of directors and, subject to the express provisions in the articles of association, the authority of the shareholders in the day to day operation of the company is limited to their power to appoint and dismiss the directors.

The quorum for a meeting of the board of directors is governed by the articles of association and may be one or any greater number specified in the articles.

9.1 Shareholders' meetings

Exempted companies are not required to hold annual (general) meetings of shareholders. Ordinary companies are required to call a general meeting at least one a year.

The articles of association set out the voting rights and procedural requirements in relation to annual general meetings, but in the absence of such provisions in the articles of association, the Companies Law specifies that every member shall have one vote, a meeting may be called on 5 days' notice and three members may summon a general meeting of the company.

10 Availability of information to the general public

Very little information pertaining to the registration of Cayman companies is available publically. The only available to the general public from the Companies Registry Office in respect of Cayman companies is:

- the name of the company;
- the type of company (i.e. an ordinary or exempted company); and
- the location of its registered office.

The register of mortgages and charges of an ordinary or an exempted company is open to inspection by members of the company and creditors of the company at the company's registered office.

The register of members of an ordinary company is open to inspection by members and the general public at its registered office.

11 The company seal

A Cayman company may have a corporate/company seal and if authorized by its articles, may have duplicate seals, overseas. The Companies Law does not require that the seal be affixed to documents which are executed under seal. Any contract which is expressed to be executed by the company as, or makes clear on its face that it is intended to be a deed, is deemed by the Companies Law to be executed as if made by deed or under seal.

12 Financial year end

A Cayman company may specify any date for its financial year end.

13 Migration of an exempted company

As noted previously one of the privileges of an exempted company is its ability to migrate from Cayman to another jurisdiction or conversely a foreign company may migrate to Cayman and continue as an exempted company under Cayman law.

13.1 Deregistration as an exempted company - migration from Cayman

An exempted company incorporated in Cayman may apply to the Registrar of Companies to deregister itself as a Cayman company and to transfer by way of continuation to another jurisdiction which allows or does not prohibit the migration. Upon the Registrar being satisfied of a number of matters by way of declaration or affidavit filed on behalf of the company and upon payment of the necessary fees, the Registrar may issue a certificate of deregistration upon which date, the company ceases to be a Cayman company and continues as a company in the new jurisdiction.

13.2 Continuance as an exempted company - migration into Cayman

Similarly, a company incorporated outside Cayman may apply to the Registrar of Companies to transfer by way of continuation as an exempted company from that other jurisdiction to Cayman. The Registrar upon being satisfied of a number of matters by way of declaration or affidavit filed on behalf of the company and upon payment of the necessary fees may issue a certificate certifying the registration of the company by way of continuation as an exempted company. From the date of registration, the company continues as if incorporated and registered as an exempted company under Cayman law.

14 Limited Duration Companies

Amendments to the Companies Law in 1993 saw the introduction of Part VIII to the Companies Law permitting an exempted company to be registered as or converted into a limited duration company (“LDC”). The intention of the amendments was to make available in Cayman an offshore corporate vehicle with a limited life corresponding to the “Limited Liability Company” in the United States and as a result to receive treatment by the Internal Revenue Service as partnerships. They do, however, have many aspects of corporate existence, including separate legal personality and limited liability.

To be registered as an LDC an exempted company must:

- have a name which ends in “Limited Duration Company” or “LDC”;
- have at least two subscribers or shareholders; and
- have a provision in its memorandum of association limiting the duration of the company to 30 years or less.

The articles of association of an LDC may if desired:

- vest management of the company in the members, either equally per capital or in proportion to their share ownership or in some other manner; and
- provide that the transfer of any share or other interest of a member in the company requires the unanimous resolution of all other members.

An LDC, like any other Cayman company is liable to being wound up by or subject to the supervision of the court or voluntarily upon the members passing a special resolution to wind up the company, but in addition the provisions of the Companies Law provide that an LDC is deemed to have commenced a voluntary winding up and dissolution in the following circumstances:

- when the period fixed for the duration of the company expires;

- subject to any provision to the contrary in the memorandum or articles of association, upon the expiration of 90 days from:
 - the death, insanity, bankruptcy, dissolution, withdrawal, retirement or resignation of a member;
 - the redemption, repurchase or cancellation of all of the shares of a member of the company; or
 - the occurrence of any event which under the memorandum or articles of association terminates the membership of a member of the company,unless there remain at least two members of the company and they unanimously resolve within that 90 day period to continue its existence; and
- upon the termination of any period or the happening of any event, where the memorandum or articles of association require the company to be wound up and dissolved on the termination of that period or the happening of that event.

An LDC has the option at any time, upon payment of the required fee, to cease to be an LDC by:

- converting back to an exempted company;
- deregistering in Cayman for the purposes of continuing in another jurisdiction; or
- amending its memorandum of association to provide for a duration of the company that exceeds 30 years.

15 Segregated Portfolio Companies

The Segregated Portfolio Company (“SPC”) was introduced by amendment to the Companies Law in 1998 as Part XIV of the Companies Law. Under the SPC provisions an exempted company may apply to be registered as or converted into an SPC.

The concept behind the SPC is that while the company remains a single legal entity it may have its assets and liabilities divided between separately identified and designated portfolios (“Portfolios”) with the assets and liabilities of each Portfolio legally separate or segregated from the assets and liabilities of other Portfolios within the company.

The company may issue one or more classes of shares for each Portfolio and the proceeds of those shares are to be included in and accounted for in the assets of the Portfolio for which they are issued.

The SPC must include the letters “SP”, “S.P.” or “SPC” in its name, or the words, “Segregated Portfolio Company”, and each Portfolio is required to be separately identified or designated and must include in its identification or designation, the words “Segregated Portfolio”. The SPC may contract on behalf of or for the benefit of its Portfolios but such contract must identify and specify the Portfolio and that the

contract is executed in the name of or for the account of that Portfolio. Any errors in attributing assets and liabilities to the incorrect Portfolio may now (further to amendments made to the Companies Law in 2011) be corrected by the board of directors without the directors incurring personal liability.

Consistent with the concept of segregated assets and liabilities, the directors of the SPC are required to keep the assets of the Portfolios segregated from one another and from the general assets of the SPC although the Directors are enabled under the Companies Law to move assets between segregated portfolios and between a segregated portfolio and the general assets of the SPC at full value. In the case of liabilities, where a liability is imposed in respect of a particular Portfolio, the liability extends only to the assets attributable to that Portfolio and, unless prohibited by the articles of association, to the general assets of the SPC where the assets of the Portfolio are insufficient to meet the liability, and only to the extent the general assets of the SPC exceed the minimum capital requirement imposed by the Cayman Island Monetary Authority. Liability does not extend to other Portfolios within the SPC.

Detailed examination of the provisions of Part XIV of the Companies Law and the regulation applicable to SPC's is beyond the scope of this discussion and the foregoing is a general introduction to the SPC.

16 Exchange Control

The Cayman Islands have no exchange control laws. There is therefore no restriction on the movement of assets in or out of the Cayman Islands either by residents or non-residents of the Islands. Further, bank accounts may be kept in any currency available at local banks, and the company's share capital may also be expressed in a currency suitable to the requirements of the beneficial owners.

17 Cayman Government Fees

The incorporation and annual fees charged by the Cayman Government for the incorporation and maintenance of Cayman companies are based on the authorized share capital, calculated in Cayman dollars as set out below. The Cayman dollar is officially fixed to the U.S. dollar at the rate of CI\$0.82 : US\$1.00. The authorized share capital categories below denominated in Cayman Island dollars correspond accordingly to US\$50,000, US\$1,000,000, and US\$2,000,000 respectively.

Exempted Company

| Authorized share capital | Incorporation fees | Annual fees |
|--------------------------|------------------------|------------------------|
| 0 - \$42,000 | \$600 (US\$731.71) | \$600 (US\$731.71) |
| \$42,001 - \$820,000 | \$990 (US\$1,097.56) | \$990 (US\$1,097.56) |
| \$820,001 - \$1,640,000 | \$1,884 (US\$2,297.56) | \$1,884 (US\$2,297.56) |
| \$1,640,000 + | \$2,468 (US\$3,009.76) | \$2,468 (US\$3,009.76) |

Non Resident Company

| Authorized share capital | Incorporation fees | Annual fees |
|--------------------------|--------------------|--------------------|
| 0 - \$42,000 | \$575 (US\$701.22) | \$575 (US\$701.22) |
| \$42,000 + | \$815 (US\$993.90) | \$815 (US\$993.90) |

Segregated Portfolio Company

| Authorized share capital | Incorporation fees | Annual fees |
|--------------------------|-----------------------------------|---|
| 0 - \$42,000 | \$600 (as exempted co.) + \$500 | \$600 (as exempted co.) + \$2,000 + \$300 per Portfolio, to a max. of \$1,500 |
| \$42,001 - \$820,000 | \$900 (as exempted co.) + \$500 | \$900 (as exempted co.) + \$2,000 + \$300 per Portfolio, to a max. of \$1,500 |
| \$820,001 - \$1,640,000 | \$1,884 (as exempted co.) + \$500 | \$1,884 (as exempted co.) + \$2,000 + \$300 per Portfolio, to a max. of \$1,500 |
| \$1,640,000 + | \$2,468 (as exempted co.) + \$500 | \$2,468 (as exempted co.) + \$2,000 + \$300 per Portfolio, to a max. of \$1,500 |

FURTHER INFORMATION

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