

Cayman Islands Lead The Way For Change

By Anne Todd

2010 – 2011 was a very busy period for the advisory committee and legislators who engaged in amending the Cayman Islands Companies Law with an eye to removing the stumbling blocks which have troubled lawyers and clients alike in recent times. The Companies (Amendment) Law, 2011 (the "Law") resolves these issues and some of the most important changes are highlighted below. There are also amendments to the regime concerning segregated portfolio companies and mergers and consolidations which are not discussed here but which will be the subject of a future article.

Reaching A Majority

Investors wanting to set up a joint venture vehicle or a fund are necessarily interested in the internal workings of their company and the rights attaching to shares. Some of the most frequent bones of contention are in relation to winding up, amendments to the name of the company or to its Memorandum and Articles of Association. Cayman Islands law specifies that these, as well as certain other matters, require a special resolution in order to alter the status quo.

The threshold for special resolutions used to require at least a two thirds majority of entitled shareholders who actually voted. "Cherry-picking" special resolution voting thresholds according to the subject matter of the vote was not permitted so for instance it was not possible to write into the Articles a 75% majority to wind the company up but only a two thirds majority to amend the Articles. Now, the new provisions expressly permit different special resolution thresholds (subject to the minimum two thirds majority being retained) which should allow much more commercial flexibility and make for simpler and more cost effective drafting.

The Issue Of Shares

The previously unrecognised concept of Treasury Shares is now acknowledged by the Law. Provided that there is no prohibition on holding Treasury Shares in the Articles and subject to obtaining the relevant authorisation and compliance with its Memorandum and Articles, a Cayman company may now hold as Treasury Shares, shares which it has redeemed or repurchased or which have been surrendered to it. It can later cancel those shares so that they form part of the authorised but unissued share capital as was automatically the case previously or it can transfer them to a third party for some or no consideration or at a discount to par value.

The number of Treasury Shares which a company may hold is unlimited and the Law does not provide for any pre-emption rights in favour of existing shareholders prior to the Treasury Shares being sold or transferred although this may be dealt with in the Articles of Association. The Treasury Share concept is one which is recognized by many other jurisdictions and which may prove valuable in the Cayman context for employee share schemes, bonus issues and generally as consideration for a purchase. For the period of time that the company holds its Treasury Shares, it will not be entitled to vote those shares or exercise any other right attaching to the shares and will not be entitled to any distribution for example by way of dividend or a winding up distribution (other than an issue of fully paid bonus shares which themselves will be treated as Treasury Shares).



Hot Listings

It is often the case that shares in a Cayman company are listed on a foreign stock exchange. The Law has introduced provisions which allow registration and transfer of such shares to be made electronically in accordance with the rules of certain approved exchanges provided that the system for recording may be reproduced in legible form. This allows for much more flexibility and brings the legal position into line with the commercial reality making the Cayman Islands a more modern and attractive jurisdiction for listings.

The Mercury Is Falling

The cause of much angst around closings involving Cayman companies were the points raised by the infamous English "Mercury Case"¹ which set out complex guidelines for the execution of documents and deeds to ensure their validity and effectiveness. Suddenly, lawyers and clients were no longer able to pre-position signed execution pages to enable a smooth closing which often involved significant numbers of documents and found themselves having to give complicated and unwieldy instructions for signing. Often these instructions may not have been heeded or correctly fulfilled and the closing meeting would rumble on. The Law sweeps all that complexity away and allows a return to the old regime where signature pages to documents - be they deeds, contracts or other instruments - may be signed in advance of their finalisation and later attached to the final and agreed form of document by or on behalf of the signing party with his express or implied consent.

One Good Deed Deserves Another

The new legislation has also relaxed the requirement to have companies sign powers of attorney as deeds or under seal – a particularly important detail where the attorney-in fact is himself being conferred with the power to execute a further deed or an instrument under seal on behalf of the appointing company. Both Cayman and non Cayman companies may now appoint an attorney-in-fact without the requirement for the power of attorney to be made as a deed or under seal. The frustration and delay to a foreign entity which had, but for this requirement, prepared and executed a perfectly good power of attorney should now be eradicated and the issue of "hidden" powers of attorney embedded in the body of longer transactional documents which are not signed as deeds is also elegantly addressed.

It's All In The Name

Important for overseas clients, particularly those in Asia and the Middle East, is the ability now to have names of exempted companies registered in both English and in a foreign language or script which need not be a translation or transliteration of the English name. Subject to existing limitations on names, the foreign name can precede or follow the English name and will appear in a company's Memorandum and Articles and its certificate of incorporation. The name must be translated or transliterated by a certified translator (as defined in the Law).