

PORTCULLIS TRUSTNET NEWSLETTER NEWSFLASH BULLETIN (2006/1)[↓]

MICA (P) 131/11/2005

This Newsletter is published by Portcullis TrustNet (Singapore) Pte Ltd, (Co. Reg. No. 198900404M) whose, registered office is at 6 Temasek Boulevard, #09-05, Suntec Tower Four, Singapore 03898, under permit No. MICA(P) 131/11/2005 from the Registrar of Newspapers, Licensing Services Division, Media Development Authority, Singapore. Whilst every effort is made to ensure accuracy, no responsibility is accepted by the Portcullis TrustNet Group for errors or omissions. This Newsletter does not purport to be comprehensive and does not constitute and is not to be construed as the provision of legal, investment or tax advice or as an invitation or solicitation to make any investment. Readers should not act in reliance upon any statement contained in this publication without first obtaining appropriate professional advice.

BRITISH VIRGIN ISLANDS COMPANY LAW **FURTHER UPDATE**

TOPICS

1. BUSINESS COMPANIES (AMENDMENT) ACT 2005
2. RESERVE DIRECTORS
3. APPROVED FORMS
4. COMMON SEAL
5. BEARER SHARES
6. SEGREGATED PORTFOLIO COMPANIES

[↓] *Portcullis TrustNet" is a marketing term of reference and convenience used to refer collectively to a global network of companies offering trust, corporate and fund administration services. A list of the individual companies currently in this network may be found at www.portcullis-trustnet.com Each company in this network is subject to the supervisory authority of the jurisdiction in which it is incorporated. Each company in this network is a separate legal entity with no power to bind, act for or represent any other company in this network. A company that is in this network is not, does not purport to be and is not to be deemed thereby to be resident, established, incorporated or doing business within the jurisdiction of any other company in this network. A company that is in this network does not thereby have, does not purport to have and is not to be deemed thereby to have its office or any branch or agency thereof in the jurisdiction, country or territory of any other company in this network. No liability is accepted by any single company in this network for the acts or omissions of any other company in this network or any of its directors, officers or employees.*

©Portcullis TrustNet (Singapore) Pte Ltd.

1. BUSINESS COMPANIES (AMENDMENT) ACT **2005**

BVI BUSINESS COMPANIES (AMENDMENT) ACT 2005 PASSED WITH GRANDFATHERING PROVISIONS FOR INTERNATIONAL BUSINESS COMPANIES (“IBCS”).

In our December Newsflash Bulletin 2005/1 we updated you on the proposed draft amendments to the BVI Business Companies Act 2004 (“BCA”) and discussions held in November by the FSC with BVI financial services industry.

On 20 December 2005 the BVI Legislative Council passed the BVI Business Companies (Amendment) Act 2005 (“the Amendment Act”). Generally the Amendment Act confirms the points mentioned in our December newsletter. Specifically the Amendment;

- a. extends the director appointment rule from 30 days to 6 months¹;
- b. provides for the ability to appoint reserve directors²;
- c. sets out provisions deeming a person to be a “shadow” director in certain circumstances³; and
- d. addresses what was previously an issue relating to the priority of charges created by an international business company (“IBC”) prior to re-registration⁴.

The Amendment also sets out provisions which grandfather in all IBCs that are automatically re-registered under the BCA on 1 January 2007. The purpose of this newsletter is to provide more detail on the grandfathering provisions.

Generally the expression “grandfathering” or “grandfathered” is used to refer to an exception that allows an old rule to continue to apply to some existing situations when a new rule would otherwise apply instead in all future situations.

The effect of grandfathering in terms of the provisions of the Amendment Act is that all automatically re-registered IBCs (“relevant IBC”) will on 1 January 2007 continue to be allowed to follow certain rules currently provided for by the IBC Act. The Amendment Act also exempts relevant IBCs from following equivalent provisions in the BCA which would otherwise have resulted in a double up of procedures for relevant IBCs e.g. where a relevant IBC acquired its own shares the IBC, without the exemption, may have needed to satisfy the BCA solvency test as well as equivalent tests in the IBC Act⁵.

¹ Section 113(1)

² Section 113(7)&(8); also see section 112 regarding consent to act

³ Section 109(6)

⁴ See Part VIII generally

⁵ It is arguable what provisions of the BCA would need to be followed and how this would have worked in practice.

The grandfathering provisions are set out in the Amendment Act under Part IV of (a new) Schedule 2 (“Schedule 2”). As the effect of the grandfathering in of relevant IBCs allows them to follow the “old” rules, the provisions in Schedule 2 are (by necessity) identical in substance and effect to the relevant provisions in the IBC Act.

A summary of the Schedule 2 provisions and their effect follows⁶;

a. Authorized Capital, Capital and Surplus

Paragraph 7 of the Schedule sets out the definitions of “authorized capital”, “capital” and “surplus”. The definitions are identical to those in section 2 of the IBC Act. Accordingly the use of the terms in relevant IBCs’ memoranda and articles of association is still relevant – which arguably would not have been the case under the BCA.

b. Requirements of Memorandum

Paragraph 8 of the Schedule reflects section 12 of the IBC Act relating to the requirements as to the Memorandum. It also exempts an IBC from following the equivalent BCA provisions set out in section 9. Accordingly there is no requirement for a relevant IBC to amend its Memorandum to comply with section 9 which would generally have been necessary had relevant IBCs been required to meet the BCA provisions.

c. Capital, Redemptions and Dividends

Paragraphs 10 to 23 of the Schedule reflect sections 18 to 37 (omitting section 21) of the IBC Act. These sections deal with capital, redemptions and dividends and are generally the only sections that use the terms “authorized capital”, “capital” and “surplus”⁷. Paragraph 9 of the Schedule exempts an IBC from following the equivalent provisions in BCA sections 56 to 65. This includes an exemption from an IBC following the solvency test in the BCA.

Generally, this means a relevant IBC can follow the same procedures in relation to capital, redemption and dividends as it had done under the IBC Act – this includes matters like procedures relating to capital increases or reductions or a repurchase or acquisition by a company of its own shares.

d. Annual Fee Determination by reference to Authorized Capital

⁶ Note paragraph 6 which sets out that Schedule 2 applies to relevant IBCs

⁷ Sections 104, 105 and 105A also make reference to the terms “authorised capital”, “capital” and “surplus” but this is in relation to fees for IBCs which are also included in the grandfathering provisions. Section 111 of the IBC Act also contains a reference to “capital” but the relevant provision is reproduced in section 242 of the BCA.

Paragraphs 30 and 31 of the Schedule reflect section 104 (a), (b) and (t), and section 105 (a), (b) and (c) respectively. These sections determine an IBC's annual fee. The fee is determined by reference to a company's authorized capital being either USD50,000.00 or less, or more than USD50,000.00.

The benefit of these grandfathering provisions is that it avoids the need to review all relevant IBCs' memoranda of association so as to confirm the share number which in turn would allow one to determine the fee amount. This would have been necessary without the grandfathering provisions and would have proved a substantial administrative burden for many parties, particularly the Registrar of Corporate Affairs, Registered Agents and companies each of whom are directly affected by the annual fee determination.⁸

A copy of the relevant Schedule 2 transitional provisions are annexed to this newsletter for reference purposes only.

2. RESERVE DIRECTORS

The BVI Business Companies Act 2004 (as amended) ("BCA") introduces the concept of a reserve director which is not available under the International Business Companies Act 1984 ("IBC Act").

Section 113(7) allows a sole member/director of a company, notwithstanding anything contained in the memorandum or articles, by instrument in writing to nominate a person as a reserve director to act in the place of the sole director in the event of his death. There are however some points worth noting;

- 1) The nominee can not be a disqualified person named under section 111(1) of the BCA⁹;
- 2) A person shall not be nominated as a reserve director, unless he has consented in writing to be nominated as such¹⁰.
- 3) The nomination of a person as a reserve director of the company ceases to have effect if;

⁸ Paragraph 29 of the Schedule exempts a company from equivalent annual registration fees in the BCA.

⁹ namely; (a) an individual who is under 18 years of age; (b) a person who is a disqualified person within the meaning of section 260(4) of the Insolvency Act; (c) a person who is a restricted person within the meaning of section 409 of the Insolvency Act; (d) an undischarged bankrupt; and (e) a person who, in respect of a particular company, is disqualified by the memorandum or articles from being a director of the company.

¹⁰ Section 112

- (a) before the death of the sole member/director who nominated him,
 - (i) he resigns as reserve director, or
 - (ii) the sole member/director revokes the nomination in writing; or
- (b) the sole member/director who nominated him ceases to be the sole member/director of the company for any reason other than his death¹¹.

One of the benefits in having a reserve director is that it eliminates some of the costs and delays that may otherwise arise upon the death sole member/director. These costs and delays can arise because where a sole member/director dies there is often no one to update the register of members in respect of the transmission of the shares and moreover no shareholder to appoint a new director who could in turn resolve the updating issue.

Where this situation arises and subject to the circumstances of a specific case, the person entitled to deal with the deceased member's interest (usually the administrator) generally needs to make an application to the BVI court to have the register of members rectified. The appointment of a reserve director would generally cut out this requirement entirely avoiding costs and delays which can sometimes be rather extensive.

3. APPROVED FORMS

In our December newsletter we mentioned that the approved forms necessary for the purposes of filing matters with the Registrar of Corporate Affairs had not been published. Many of the approved forms have now been released and are available on the BVI FSCs website at www.bvifsc.vg.

4. COMMON SEAL

In our November newsletter we set out that the requirement to keep a common seal was optional. The Amendment has changed the requirement such that it is now mandatory for a company incorporated under the BCA to keep a common seal.

¹¹ Section 113(8)

5. BEARER SHARES

Grace Period for Bearer Shares Issued Prior to 01.01.05

The BCA did not previously provide for a grace period for bearer shares issued prior to 1 January 2005. The IBC Act allows such bearer shares until 31 December 2010 to be deposited with a custodian. The Amendment has addressed the apparent discrepancy by providing for the same grace period, the effect of which is that on re-registration all IBCs that had issued pre 01.01.05 bearer shares will continue to receive the benefit of the grace period available under the IBC Act¹² i.e. they have until 31 December 2010 to be deposited with a custodian after which a bearer share will lose its entitlements¹³.

Should One Use Bearer Shares?

For some people the term “bearer shares” carries with it connotations of being in some way illicit. The ease with which bearer shares can be transferred with little or no paper trail and the related anonymity in respect of ownership of bearer shares may be one of the reasons that give rise to such connotations. However as the rules governing the transfer of bearer shares change the views held with respect to bearer shares should also.

The BVI Business Companies Act 2005 (as amended) (“BCA”) includes specific rules that are designed to immobilize bearer shares and set out specific requirements where bearer shares are issued¹⁴, in particular, that a bearer share must be held with an authorized or recognized custodian approved by the BVI Financial Services Commission.¹⁵

The effect of the BCA rules is that where a company incorporated under the BCA issues bearer shares they will be subject to stringent requirements upon issue and transfer. These are much more onerous than the rules applicable to registered shares¹⁶.

In addition to a bearer share being held with a custodian the following points are worth noting;

- a. Full due diligence material on the beneficial owner must be kept by the custodian. This generally includes a passport copy, professional reference and evidence of residential address. Similar information will also need to be kept by the BVI registered Agent.¹⁷

¹² See Part IV, Schedule 2

¹³ See section 68

¹⁴ See Division 5, Part III generally

¹⁵ section 67 for definitions of “authorized custodian” and “recognized custodian”

¹⁶ See Division 5, Part III generally

¹⁷ See generally the Anti-Money Laundering Code of Practice 1999 and Aide Memoire #3

- b. In addition to the above information the custodian must also hold the full name of any other person having an interest in the bearer share¹⁸, for example a charge holder.
- c. A bearer share certificate may not be transferred directly between recognized custodians. The certificate may only be transferred via the registered agent.¹⁹
- d. Where beneficial ownership in a bearer share is transferred the relevant notice must be provided to the custodian, without which the transfer will not be effective.²⁰ This means that notwithstanding beneficial owner may have done everything to transfer their interest and the company may have resolved to transfer the same, the transfer will not be effective till the relevant notice is filed with the custodian.
- e. If for any reason the rules are not met then generally bearer share becomes disabled and does not carry any of the entitlements which it would otherwise carry²¹. This means the bearer share will not be entitled to vote, to receive distributions or to take a share in the assets of the company on its winding up or on its dissolution²².

Apart from general due diligence requirements to which registered agents are subject the above rules do not apply to registered shares.

6. SEGREGATED PORTFOLIO COMPANIES

Regulations

The Segregated Portfolio Companies Regulations, 2005 were promulgated on 21st December 2005. The regulations deal with application, functionaries, audit and other matters relating to the formation and business of segregated portfolio companies which are available under the BCA.

Regulations to deal with other matters in the BCA, for example the reuse of names are yet to be promulgated. It is not clear when such regulations may be available.

¹⁸ section 71

¹⁹ section 73(4)

²⁰ section 75

²¹ section 68(1)

²² section 68(2)

TRANSITIONAL PROVISIONS FOR BUSINESS COMPANIES ACT

The following is an unofficial reproduction of Schedule 2, Part IV of the BVI Business Companies (Amendment) Act 2005. Whilst every effort has been made to ensure correctness, no responsibility is assumed for any errors which may appear.

PART IV TRANSITIONAL PROVISIONS APPLYING TO FORMER ACT COMPANIES THAT ARE AUTOMATICALLY RE-REGISTERED UNDER PART III

Division 1 - Preliminary

Scope of this Part.

6. This Part applies to a former Act company that is automatically re-registered under Part III of this Schedule.

Interpretation for this Part.

7. In this Part, unless the context otherwise requires

“authorised capital” of a company means the sum of the aggregate par value of all shares with par value which the company is authorised by its memorandum to issue plus the amount, if any, stated in its memorandum as authorised capital to be represented by shares without par value which the company is authorised by its memorandum to issue;

"capital" of a company means the sum of the aggregate par value of all outstanding shares with par value of the company and shares with par value held by the company as treasury shares plus

- (a) the aggregate of the amounts designated as capital of all outstanding shares without par value of the company and shares without par value held by the company as treasury shares, and
- (b) the amounts as are from time to time transferred from surplus to capital by a resolution of directors;

"surplus" in relation to a company, means the excess, if any, at the time of the determination, of the total assets of the company over the sum of its total liabilities, as shown in the books of account, plus its capital.

Division 2 - Memorandum

Memorandum.

8. (1) In place of the requirements specified in section 9, the memorandum of a former Act company incorporated under the International Business Companies Act to which this Part applies must include the following:

- (a) the name of the company;
- (b) the address within the Virgin Islands of the registered office of the company;
- (c) the name and address within the Virgin Islands of the registered agent of the company;
- (d) the objects or purposes for which the company is to be incorporated;
- (e) the currency in which shares in the company shall be issued;
- (f) a statement of the authorised capital of the company setting forth the aggregate of the par value of all shares with par value that the company is authorised to issue and the amount, if any, to be represented by shares without par value that the company is authorised to issue;
- (g) a statement of the number of classes and series of shares, the number of shares of each such class and series and the par value of shares with par value and that shares may be without par value, if that is the case;
- (h) a statement of the designations, powers, preferences and rights, and the qualifications, limitations or restrictions of each class and series of shares that the company is authorised to issue, unless the directors are to be authorised to fix any such designations, powers, preferences, rights, qualifications, limitations and restrictions and in that case, an express grant of such authority as may be desired to grant to the directors to fix by a resolution any such designations, powers, preferences, rights, qualifications, limitations and restrictions that have not been fixed by the memorandum;

- (i) a statement of the number of shares to be issued as registered shares and the number of shares to be issued as bearer shares unless the directors are authorised to determine at their discretion whether shares are to be issued as registered shares or bearer shares and in that case an express grant of such authority as may be desired must be given to empower the directors to issue shares as registered shares or bearer shares as they may determine by resolution of directors;
- (j) whether registered shares may be exchanged for bearer shares and whether bearer shares may be exchanged for registered shares; and
- (k) if bearer shares are authorised to be issued, the manner in which a required notice to members is to be given to the holders of bearer shares.

(2) For the purposes of subparagraph (1)(d), if the memorandum contains a statement either alone or with other objects or purposes that the object or purpose of the company is to engage in any act or activity that is not prohibited under any law for the time being in force in the Virgin Islands, the effect of that statement is to make all acts and activities that are not illegal part of the objects or purposes of the company, subject to any limitations in the memorandum.

(3) In the case of a former Act company that is incorporated under the Companies Act, the capital stated in its memorandum of association in effect at the date of its application to re-register or at the date of its automatic re-registration, as the case may be, shall be its authorised capital for the purposes of this Part.

Division 3 – Capital, redemptions and dividends

Scope of this Division.

9. Paragraphs 10 to 23 apply to a company to which this Part applies in place of sections 56 to 65.

Shares to be fully paid.

10. No share in a company may be issued until the consideration in respect of the share is fully paid, and when issued the share is for all purposes fully paid and non-assessable save that a share issued for a promissory note or other written obligation for payment of a debt may be issued subject to forfeiture in the manner prescribed in paragraph 3.

Kind of consideration for shares.

11. Subject to the memorandum or articles, each share in a company shall be issued for money, services rendered, personal property (including other shares, debt obligations or other securities in the company), an estate in real property, a promissory note or other binding obligation to contribute money or property, or any combination thereof.

Forfeiture of shares.

12. (1) The memorandum or articles, or an agreement for the subscription of shares, of a company may contain provisions for the forfeiture of shares for which payment is not made pursuant to a promissory note or other written binding obligation for payment of a debt.

(2) Any provision in the memorandum or articles, or in an agreement for the subscription of shares of a company providing for the forfeiture of shares shall contain a requirement that written notice specifying a date for payment to be made be served on the member who defaults in making payment pursuant to a promissory note or other written binding obligation to pay a debt.

(3) The written notice referred to in subparagraph (2) shall name a further date not earlier than the expiration of 14 days from the date of service of the notice on or before which the payment required by the notice is to be made and shall contain a statement that in the event of non-payment at or before the time named in the notice the shares, or any of them, in respect of which payment is not made will be liable to be forfeited.

(4) Where a notice has been issued under this section and the requirements of the notice have not been complied with, the directors may, at any time before tender of payment, by resolution of directors forfeit and cancel the shares to which the notice relates.

(5) The company is under no obligation to refund any moneys to the member whose shares have been cancelled pursuant to subparagraph (4) and that member shall be discharged from any further obligation to the company.

Amount of consideration for shares.

13. (1) Subject to the memorandum or articles, shares in a company may be issued for such amount as may be determined from time to time by the directors, except that in the case of shares with par value, the amount shall not be less than the par value; and, in the absence of fraud, the decision of the directors as to the value of the consideration received by the company in respect of the issue is conclusive, unless a

question of law is involved.

(2) A share issued by a company upon conversion of, or in exchange for, another share or a debt obligation or other security in the company, shall be treated for all purposes as having been issued for money equal to the consideration received or deemed to have been received by the company in respect of the other share, debt obligation or security.

Authorised capital in several currencies.

14. (1) The authorised capital, if any, of a company may be stated in more than²³ one currency in which case the par value of the shares, if any, shall be expressed in the same currencies.

(2) The Commission may issue guidelines with respect to the calculation of fees payable pursuant to Part V of this Schedule for companies with an authorised capital stated in a currency other than United States dollars.

Capital and surplus accounts.

15. (1) Upon the issue by a company of a share with par value, the consideration in respect of the share constitutes capital to the extent of the par value and the excess constitutes surplus.

(2) Subject to the memorandum or articles, upon the issue by a company of a share without par value, the consideration in respect of the share constitutes capital to the extent designated by the directors and the excess constitutes surplus, except that the directors must designate as capital an amount of the consideration that is at least equal to the amount that the share is entitled to as a preference, if any, in the assets of the company upon liquidation of the company.

(3) Upon the disposition by a company of a treasury share, the consideration in respect of the share is added to surplus.

Dividend of shares.

16. (1) A share issued as a dividend by a company shall be treated for all purposes as having been issued for money equal to the surplus that is transferred to capital upon the issue of the share.

(2) In the case of a dividend of authorised but unissued shares with par value, an amount equal to the aggregate par value of the shares shall be transferred from surplus to capital at the time of distribution.

(3) In the case of a dividend of authorised but unissued shares without par value, the amount designated by the directors shall be transferred from surplus to

capital at the time of the distribution, except that the directors must designate as capital an amount that is at least equal to the amount that the shares are entitled to as a preference, if any, in the assets of the company upon liquidation of the company.

(4) A division of the issued and outstanding shares of a class or series of shares into a larger number of shares of the same class or series having a proportionally²⁴ smaller par value does not constitute a dividend of shares.

Increase or reduction of share capital.

17. (1) Subject to the memorandum or articles, a company may amend its memorandum to increase or reduce its authorised capital, and in connection therewith, the company may

- (a) increase or reduce the number of shares which the company may issue;
- (b) increase or reduce the par value of any of its shares; or
- (c) effect any combination under (a) and (b).

(2) Where a company reduces its authorised capital under subparagraph (1), then, for purposes of computing the capital of the company, any capital that immediately before the reduction was represented by shares but immediately following the reduction is no longer represented by shares shall be deemed to be capital transferred from surplus to capital.

(3) A company shall, in writing, inform the Registrar of any increase or decrease of its authorised capital.

Division and combination.

18. (1) A Company may amend its memorandum

- (a) to divide the shares, including issued shares, of a class or series into a larger number of shares of the same class or series; or
- (b) to combine the shares, including issued shares, of a class or series into a smaller number of shares of the same class or series.

(2) Where shares are divided or combined under subparagraph (1), the aggregate par value of the new shares must be equal to the aggregate par value of the original shares.

Acquisition of own shares

19. (1) Subject to the memorandum or articles, a company may purchase, redeem or otherwise acquire and hold its own shares but only out of surplus or in exchange for newly issued shares of equal value.

(2) Subject to subparagraph (1), a company may not purchase, redeem or otherwise acquire its own shares without the consent of the member whose shares are to be purchased, redeemed or otherwise acquired, unless the company is permitted to purchase, redeem or otherwise acquire the shares without that consent by virtue of

- (a) the provisions of the memorandum or articles of the company;
- (b) the designations, powers, preferences, rights, qualifications, limitations and restrictions with which the shares were issued; or
- (c) the subscription agreement for the issue of the shares.

(3) No purchase, redemption or other acquisition permitted under subparagraph (1) shall be made unless the directors determine that immediately after the purchase, redemption or other acquisition

- (a) the company will be able to satisfy its liabilities as they become due in the ordinary course of its business; and
- (b) the realisable value of the assets of the company will not be less than the sum of its total liabilities other than deferred taxes, as shown in the books of account, and its capital;

and, in the absence of fraud, the decision of the directors as to the realisable value of the assets of the company is conclusive.

(4) A determination by the directors under subparagraph (3) is not required where shares are purchased, redeemed or otherwise acquired

- (a) pursuant to a right of a member to have his shares redeemed or to have his shares exchanged for money or other property of the company;
- (b) by virtue of a transfer of capital pursuant to paragraph 12(1)(b);
- (c) by virtue of the provisions of section 179; and
- (d) pursuant to an order of the court.

(5) Subject to the memorandum or articles, shares that a company purchases,

redeems or otherwise acquires may be cancelled or held as treasury shares unless the shares are purchased, redeemed or otherwise acquired by virtue of a reduction in capital, in which case they shall be cancelled but they shall be available for reissue; and upon the cancellation of a share, the amount included as capital of the company with respect to that share shall be deducted from the capital of the company.

(6) A company may purchase, redeem or otherwise acquire the shares of the company at a price lower than fair value if permitted by, and then only in accordance with, the terms of

- (a) its memorandum or articles; or
- (b) a written agreement for the subscription for the shares to be purchased, redeemed or otherwise acquired.

Treasury shares disabled.

20. Where shares in a company

- (a) are held by the company as treasury shares; or
- (b) are held by another company of which the first company holds, directly or indirectly, shares having more than 50 per cent of the votes in the election of directors of the other company,

the shares of the first company are not entitled to vote or to have dividends paid thereon and shall not be treated as outstanding for any purpose under this Schedule except for purposes of determining the capital of the first company.

Increase or reduction of capital.

21. (1) Subject to the memorandum or articles and subject to subparagraphs (2) and (3), the capital of a company may, by a resolution of members or by resolution of directors, be

- (a) increased by transferring an amount out of the surplus of the company to capital; or
- (b) reduced by transferring an amount out of capital of the company to surplus.

(2) No reduction of capital shall be effected under subparagraph (1) that reduces the capital of the company to an amount that is less than the sum of

- (a) the aggregate par value of
 - (i) all outstanding shares with par value, and
 - (ii) all shares with par value held by the company as treasury shares; and
- (b) the aggregate of the amounts designated as capital of
 - (i) all outstanding shares without par value, and
 - (ii) all shares without par value held by the company as treasury shares that are entitled to a preference, if any, in the assets of the company upon liquidation of the company.

(3) No reduction of capital shall be effected under subparagraph (1) unless the directors determine that immediately after the reduction

- (a) the company will be able to satisfy its liabilities as they become due in the ordinary course of its business; and
- (b) the realisable value of the assets of the company will not be less than its total liabilities, other than deferred taxes, as shown in the books of account, and its remaining capital;

and, in the absence of fraud, the decision of the directors as to the realisable value of the assets of the company is conclusive.

Dividends

22. (1) Subject to the memorandum or articles, a company may, by a resolution of directors, declare and pay dividends in money, shares or other property.

(2) Dividends shall only be declared and paid out of surplus.

(3) No dividend shall be declared and paid unless the directors determine that immediately after the payment of the dividend

- (a) the company will be able to satisfy its liabilities as they become due in the ordinary course of its business; and
- (b) the realisable value of the assets of the company will not be less than the sum of its total liabilities, other than deferred taxes, as shown in the books of account, and its capital;

and, in the absence of fraud, the decision of the directors as to the realisable value of the assets of the company is conclusive.

Appreciation of assets

23. Subject to the memorandum or articles, a company may, by a resolution of directors, include in the computation of surplus for any purpose under this Part the net unrealised appreciation of the assets of the company, and, in the absence of fraud, the decision of the directors as to the value of the assets is conclusive, unless a question of law is involved.

Division 4 – Immobilisation of Existing Bearer Shares

Scope of this Division.

24. This Division applies to a former Act company incorporated under the International Business Companies Act to which this Part applies in addition to Part III Division 5 of the Act.

Interpretation for this Part

25. In this Part

“authorised custodian” means a person approved by the Commission as an authorised custodian under section 50A(1) or section 50A(2) of the Financial Services Commission Act, 2001;

“custodian” means an authorised custodian or a recognised custodian;

“effective date means 1st January, 2005;

“existing bearer share” means a share in a company that was issued as or converted to a bearer share prior to the effective date and that remains a bearer share in the company on the effective date;

“recognised custodian” means a person recognised by the Commission as a custodian under section 50B of the Financial Services Commission Act, 2001; and

“transition date” means 31st December, 2010.

Issue of bearer shares and conversion of registered shares after effective date

26. (1) Every existing bearer share of a company shall, on or before the transition date

(a) be deposited with a custodian who has agreed to hold the share; or

(b) be converted to, or exchanged for, a registered share.

(2) Subparagraph (1) does not apply to a bearer share that, before the transition date

(a) is cancelled; or

(b) is redeemed, purchased or otherwise acquired by the company as a treasury share.

(3) An existing bearer share in a company is deemed not to have been deposited with a custodian for the purposes of subparagraph (1) until the registered agent of the company has received

(a) in the case of a bearer share deposited with an authorised custodian, notification of the deposit from the authorised custodian in accordance with section 72(1); or

(b) in the case of a bearer share deposited with a recognised custodian, the proof of the deposit of the share and the notice required to be sent by section 71(3).

(4) The Court may, on the application of the company or of a person interested in a bearer share, extend the period specified in subparagraph (1) by such further period or periods not exceeding one year in total as it considers fit.

(5) On an existing bearer share deposited with a custodian in accordance with subparagraphs (1)(a) and (3), it shall for all purposes of this Part cease to be regarded as an existing bearer share and shall thereafter be treated as if it had been issued after the effective date.

Redemption of existing bearer shares

27. (1) Where an existing bearer share in a company is not deposited with a custodian who has agreed to hold the share on or before the transition date, the company may, notwithstanding sections 59 to 62 or any provision in the memorandum or articles, in any shareholders' agreement or in any other agreement, redeem the share.

(2) Subject to subparagraph (3), sections 176(3) and 179 apply to the redemption of bearer shares under subparagraph (1).

(3) Where a company is unable, on making reasonable enquiries, to ascertain the identity or address of the holder of a bearer share

- (a) it is not required to give the member notice under section 176(3); and
- (b) the company shall hold the proceeds of redemption on trust for the owner of the bearer share.

Application for appointment of liquidator

28. Where, after the transition date, a company has one or more existing bearer shares that have not been deposited with a custodian in accordance with this Part, the Commission may apply to the Court for the appointment of a liquidator of the company under the Insolvency Act.

Division 5 – Fees

Scope of this Division

29. The fees in this Division apply to a company to which this Part applies in place of the fees set forth in Schedule 1 of the Act.

Company incorporated in first six months of year

30. Subject to paragraph 33, a company that is incorporated in the first 6 months of a year shall on or before 31st May in the following year and in each succeeding year pay to the Registrar an annual fee as follows:

- (a) \$350.00 if on the annual fee payment date
 - (i) the authorised capital of the company does not exceed \$50,000,
 - (ii) all the shares of the company have a par value, and

- (iii) the company is prohibited by its memorandum from issuing bearer shares;
- (b) \$1,100.00 if either or both of the following apply to the company on the annual fee payment date
 - (i) the authorised capital of the company exceeds \$50,000, or
 - (ii) the company is not prohibited by its memorandum from issuing bearer shares; and
- (c) \$350.00 if, on the annual fee payment date, the company is prohibited by its memorandum from issuing bearer shares and
 - (i) its authorised capital does not exceed \$50,000 and some or all of its shares have no par value, or
 - (ii) it has no authorised capital and all its shares have no par value.

Company incorporated in second six months of year

31. Subject to paragraph 33, a company that is incorporated in the second 6 months of a year shall on or before 30th November in the following year and in each succeeding year pay to the Registrar an annual fee as follows

- (a) \$350.00 if on the annual fee payment date
 - (i) the authorised capital of the company does not exceed \$50,000,
 - (ii) all the shares of the company have a par value, and
 - (iii) the company is prohibited by its memorandum from issuing bearer shares;
- (b) \$1,100.00 if either or both of the following apply to the company on the annual fee payment date
 - (i) the authorised capital of the company exceeds \$50,000, or
 - (ii) the company is not prohibited by its memorandum from issuing bearer shares; and

- (c) \$350.00 if, on the annual fee payment date, the company is prohibited by its memorandum from issuing bearer shares and
 - (i) its authorised capital does not exceed \$50,000 and some or all of its shares have no par value, or
 - (ii) it has no authorised capital and all its shares have no par value.

Company not prohibited from issuing bearer shares

32. (1) Notwithstanding paragraphs 30 and 31, during the period from 1st January 2005 to 31st December 2007 the annual fee payable by a company that on 31st December 2004 was not prohibited by its memorandum from issuing bearer shares is

- (a) \$1,100.00 if, on the annual fee payment date its authorised capital exceeds \$50,000; or
- (b) in any other case, \$350.00.

(2) Notwithstanding paragraphs 30 and 31 and subject to paragraph 5, during the period from 1st January 2008 to 31st December 2010, the annual fee payable by a company that on 31st December 2004 was not prohibited by its memorandum from issuing bearer shares is

- (a) \$1,350.00 if, on the annual fee payment dates its authorised capital exceeds \$50,000;
- (b) in any other case, \$600.00.

(3) Notwithstanding subparagraph 2, during the period from 1st January 2008 to 31st December 2010 the annual fee payable by a company that on 31st December 2004 was not prohibited by its memorandum from issuing bearer shares if all the company's issued bearer shares are held by a recognised custodian, the registered office and head office of which are situated in the Virgin Islands, is

- (a) \$1,250.00 if, on the annual fee payment date the authorised capital exceeds \$50,000; or
- (b) in any other case, \$500.00.

Increase in annual fee

33. (1) If a company fails to pay the amount due as the annual fee under paragraphs 30 to 32, as the case may be, by the time specified in paragraph 30 or 31, as the case may be, then the annual fee increases by 10 per cent of that amount.

(2) If a company fails to pay the amount due as an increased annual fee under subparagraph (1) at or before the expiration of a period of 2 months from the time specified in paragraph 30 or 31, as the case may be, then the annual fee increases by 50 per cent of that amount.

Company in liquidation

34. Paragraphs 30 to 33 do not apply to a company in liquidation.

Notice of increase or decrease in authorised capital

35. There shall be paid to the Registrar upon the filing of any notice of an increase or a decrease in authorised capital pursuant to paragraph 21 the following fees:

- (a) \$750.00 in the case of an increase of authorised capital from \$50,000 or less to more than \$50,000; and
- (b) in all other cases, \$25.00.

Schedule 1 of this Act to apply

36. All other fees payable by a company to which the provisions of this Schedule apply shall be as set forth in Part I of Schedule 1 of this Act and for this purpose

- (a) any reference to “is authorised to issue no more than 50,000 shares” shall be deemed to be a reference to “has an authorised capital of no more than \$50,000”; and
- (b) any reference to “is authorised to issue more than 50,000 shares” shall be deemed to be a reference to “has an authorised capital of more than \$50,000”.