

# **Incorporation Procedures and Related Topics under the Companies Act 2004**

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As of the 1<sup>st</sup> of January 2005 the procedures to incorporate a company will be totally different. In an attempt to assist in a smooth transition from the old Companies Act to the Companies Act 2004 new procedures will be explored in detail. This paper highlights the following areas

- Corporate Capacity and Powers
- Membership of a Company
- Incorporation Procedures
- Name Reservation Procedures

### *CORPORATE CAPACITY AND POWERS*

The doctrine of Ultra Vires is a well-established principle of company law that states that a company is bound by the objects printed in its Memorandum of Association. Therefore any act of the company, which exceeds the scope of the objects clause as set out in the Memorandum, is void and cannot be ratified even with the unanimous consent of all members. In an attempt to circumvent this doctrine draftsmen would draft long and complex Memoranda.

The Companies Act 2004 abolished the Ultra Vires Doctrine and accordingly companies will possess the capacity rights, powers and privileges of a natural person. Sec. 4(1)

“a company has the capacity, and subject to this Act, the rights, powers and privileges of an individual”

The statutory abolition of this principle should result in the Articles of Incorporation becoming a much simpler document.

The constructive notice rule also compounded the Ultra Vires Doctrine. This rule states that since the memorandum and articles are public documents filed with the Registrar of Companies, a shareholder or an outsider who had dealings with the

company is taken to have notice of contents of those documents whether he had knowledge or even the read the documents.

The Companies Act 2004 also abolishes the rule. As a result, companies must ensure that documents are made known to persons who are required by the Act to know of the existence of the documents and contents thereof.

Any restrictions in the company's articles must be brought to the attention of third parties dealing with the company, as they will be presumed to have notice of the contents of the public records.

### MEMBERSHIP OF A COMPANY

The Companies Act 2004 introduces the concept of the "one man" company. According to Section 3 of the Companies Act, "one or more person can incorporate or join in the formation of a company with or without liability, whether public or private."

The Companies Act, 1965 provides for a minimum of 7 members for a public company and 2 members for a private company.

The definition of "member" has now been expanded to include:

- Trustee in bankruptcy
- Persons named as principal/subsidiary account holders in the register of a licensed securities depository.
- Personal Representatives – (under the Companies Act, 1965 a Personal Representative cannot deal with a deceased member's shares until probate or letter of administrations are granted).

## INCORPORATION PROCEDURES

Companies of all types will cease to be incorporated by subscription of both the Memorandum of Association and Articles of Association. Two documents will be required for incorporation of a company, which are as follows:

- Articles of Incorporation
- Declaration of Compliance

Prescribed Forms of Articles of Incorporation are to be found in the First Schedule of the Companies Act, 2005.

According to Section 8 the Articles of Incorporation should include the following information

- Name of the company
- Registered Office situated in the Island
- The number of directors or the maximum or minimum number of directors of the company
- Classes of shares and the amount of shares
- Restriction on any business that the company may carry on.

The articles of incorporation must be submitted to the Registrar of Companies printed or typewritten or be in some legible form. The legislation has made way clear for future online filing of incorporation documents.

- The Articles of Incorporation must in the case of a company having a share capital, set out:
  - The maximum number of shares if any that a company is authorized to issue and the classes of shares, if any (this presumes the incorporation of a company with different classes of shares at start up)
  - If a company is being formed with two or more classes of shares, or if a class of shares may be issued in a series, a separate document must be filed with the ORC setting out the details relating to those shares or series of shares.

Company Limited by Guarantee without a share capital (Section 16)

“A company formed for promoting commerce, art, science, religion, charity or other useful object...” the objects stated in the Articles of Incorporation must be restricted to the above-mentioned matters.

In light of the above and in consideration of Section 12(h) exemption under the Income Tax Act it may be best to restrict the business that the company may carry on

or to state exactly what objects and powers such a company will have in the Articles of Incorporation.

#### INCORPORATION PROCEDURE – MUTUAL FUND

- Mutual Fund Companies will become registrable under the Companies Act by virtue of Section 27A.
- The Act defines a Mutual Fund Company “as a company having a share capital and incorporated for the purpose of investing the monies of its members for their mutual benefit and stating in its Articles that it is a mutual fund, having the power to redeem or purchase for cancellation its shares without reducing its authorized share capital and is registered under the Securities Act as a mutual fund”.

#### INCORPORATION PROCEDURES- PUBLIC COMPANIES

- Public companies will be required to have a minimum paid up capital of \$500,000.00
- In order for a public company to do business or exercise borrowing powers the Company must apply to the Registrar on a prescribed form for the issuance of a certificate that the Registrar is satisfied that the value of the company’s allotted share capital is not less than the authorized minimum.
- This application must be accompanied by a statutory declaration in the prescribed form.
- The Minister will have power to vary the minimum capital.

#### INCORPORATION PROCEDURE- PAR VALUE

- The Act provides that companies having a share capital should be incorporated without a par value attaching to the share.
- Section 36(a) – “from the appointed day shares in a company shall be issued without nominal or par value.”
- Within 6 months of the date of commencement of the Act, existing companies may elect to retain shares with par or nominal value and may continue to issue shares as such.

Under the Current Act, companies having a share capital (unless they are unlimited companies) are required to state in the Memorandum of association the proposed total capital of the company and the subdivision of the capital into shares of a fixed denomination such shares are generally known as par value shares. The reality of this regime is that it has been an unreliable measure of the true worth of a company.

Shares may be sold at a premium or a discount and thus the par value would be an accurate index of the value of the investment for the purposes of disposal. With the introduction of no par value the public at large is encouraged to gauge the viability of a company by reference to indices other than a superficial denominated value.

- Failure to elect will result in shares being deemed to have converted at the end of the six months and any shares issued thereafter must be without a nominal or par value
- This election will be made in the form of an ordinary resolution.
- At the end of 18 months after the date of election, where an election has been made, an existing company will be deemed to have a share capital without a nominal or par value.
- The Stamp Duty payable on the Articles of Incorporation should now be the same as that charged for a deed, which presently stands at \$100.00
- This is a change from the present Act where Stamp Duty is calculated on a percentage of the authorized capital of the Company.
- The Articles of Incorporation should be endorsed with the notation from the Stamp Commission that the stamp duty fees have been paid before the document is submitted at the ORC

#### DECLARATION OF COMPLIANCE

- The Articles of Incorporation is accompanied by a Statutory Declaration referred to as a Declaration of Compliance, which can be signed by:
  - An Attorney at Law engaged in the formation of the Company;
  - A person named in the Articles of Incorporation as a Director or Secretary of the Company;
  - A person who is a member of the Institute of Chartered Secretaries and Administrators engaged in the formation of the Company.

#### NOTICE OF SITUATION OF ADDRESS OF A REGISTERED OFFICE

Pursuant to section 106 of the Companies Act 2004, a company shall have a registered office to which all communications and notices may be addressed.

The ORC must be notified address of the Registered Office of the Company in the prescribed form at incorporation of a new company.

The Company must notify the Office of the Registrar of Companies on the prescribed form within seven days of any change of the registered office address.

The notice of address of registered office or change of address of the registered office must be signed by the director, secretary or authorized officer of the company.

### NAME RESERVATION

As of the 1<sup>st</sup> of January 2005, the Registrar may upon payment of the prescribed fee, reserve for 90 days a name for an intended company or for a company about to change its name.

### PROCEDURES FOR NAME SEARCH AND NAME RESERVATION

- Application for name search will be submitted to the ORC in the prescribed form – this form will include the date and time the application was submitted.
- A fee will be paid for name check.
- The result of the name search will be presented to the customer within one working day.
- An applicant may request name reservation for an approved name and pay the prescribed fee.
- A customer can request a name search only or a name search & name reservation.
- A maximum of five applications for name search & name reservation will be accepted by the ORC per customer, in one given day.
- Any requested name for reservation will be checked upon one Customer Service Officer and the Customer Service Supervisor or Manager and approved by the Business Registration Manager or an authorized officer.

- The Customer Service Unit confirming or denying approval of the application will generate a letter. The letter would also advise the customer that the name would be reserved for 90 days and the date when the name reservation expires.
  
- 90 days will include public holidays and weekends.
  
- This letter is to be completed by the end of one working day after the submission of the application.
  
- The reservation of name is to be entered on the internal computer system (excel spreadsheet). The Customer Service Unit and the Business Registration Unit will have access to this information.
  
- The Customer Service Supervisor will keep a manual file of all the applications for name search and name reservation.
  
- The reserved name will also be entered on the ORC website – so our customers will subscribe to the website can view it. The information entered will state when the name reservation will expire.
  
- Once the 90 days is expired the reserved name will be automatically deleted from the ORC website.