

A New Companies Act for Jamaica

Finally, after over ten years of gestation, we have seen the implementation on 1 February, 2005 of a change in the legislative framework that controls the operations of companies in Jamaica, the Companies Act (“**the Act**”). This following is a summary of some of the more significant changes affecting companies that both modernize our law and bring it closer in line with international trends.

- The *ultra vires* and constructive notice doctrines are abolished and a company now “has the capacity...rights, powers and privileges of an individual” (s. 4(1)) making it possible for a company to engage in any lawful activity without having to pre-state its intention in its memorandum of association. The need for long drawn out memoranda should now be a thing of the past and a stranger to the company may assume that provided the company is conducting a lawful activity, it is acting within its memorandum.
- The concept of the “one man” company is fully embraced (ss. 3(1) & 68(1)), and no longer do ‘one person’ owned companies have to seek a second person that in practice has no involvement nor seeks any interest in the affairs or fortunes in the company, to join with them in its formation.
- Without the need for lengthy objects clauses, it is now possible to collapse the Articles of Association and Memorandum of Association into one document, viz., the Articles of Incorporation (s. 8(1)). Companies incorporated under the 1965 Act are required to file Articles of Continuance within one (1) year of the commencement of the new Act. This is important, otherwise you will not be in compliance with the new law and could ultimately be struck off.
- Companies with a share capital are now to be incorporated without a par value attaching to the share thus removing the notion (important now only by reason of its historical origins) that it is possible to assess the worth of the company from its stated capital. Companies that currently have a par value regime may continue for a period of 18 months after which time it will be deemed to convert to a no par regime.
- Articles of Incorporation (Form 1A in fact) are now assessed to stamp duty as a deed (presently \$100.00) and not on an *ad valorem* basis as a percentage of the authorized share capital as it was formerly.
- For a fee it is possible to reserve a name for 90 days giving promoters an opportunity to conclude their pre-incorporation affairs, such as sign letters of intent, option agreements and memoranda of understanding etc.
- All companies must now appoint a Secretary (s.168(2)) and notify the Registrar of Companies of the appointment of same within 15 days (s.168(6)). All companies incorporated under the previous Companies Act should have submitted a notice of appointment by 29th April, 2005. For those that did not, a penalty of \$1,000.00 will be due whenever the notice is filed.
- Guidance is now given in the Act for how the valuation of non-cash consideration should be given for the issue of shares (s.36(1)(b)). This is likely to mean the preparation of a professional valuation (s.36(5)) and a board resolution approving same(s.36(4)), and in some cases approval of the company in general meeting

- (s.36(7)). Directors are strongly recommended to seek professional advice so as to avoid allegations of breaches under the Act.
- Companies are now permitted to purchase their own shares when they could not before (s.57(1)). This means that there is another way out for disgruntled shareholders, for deceased shareholders' shares to be bought out, to return a surplus to the shareholders or simply to make investing in private companies more attractive. Again however, the Act places directors under an obligation to seek professional advice in order to avoid culpability for a poor decision.
 - Companies may reduce their share capital more readily than before, providing for example greater flexibility to cancel or repay a class of shares or eliminate a minority shareholding (s. 70(1)).
 - Consistent with the two former changes, provided a power is so given in its articles of incorporation a company may issue redeemable shares (ss.56(1) & 61(1)).
 - Director's duties and responsibilities, hitherto a combination of statute and common law are now codified by the Act. Thus they are required: to act honestly and in good faith with a view to the best interest of the company (s. 170(1)(a)); to make certain disclosures to the company; e.g., an interest in contracts (s.191(1)), shareholdings in the company or a company in the group (s.194(1)); to act with the care, diligence and skill of a reasonably prudent person in similar circumstances, which will include, *inter alia*, an assessment of the nature of the company, the nature of the decision, the position of the director and the nature of the responsibilities undertaken by that director though the test creates a dual standard because it is 'not limited to the general knowledge, skill and experience of a director' so that a professional director such as an accountant or lawyer will be held to a higher test in their specialist area (s.170(1)(b)).
 - The new law specifically provides for shadow directors to be included in the Register of Directors; though this may be a little difficult in some cases to predetermine who will act in practice as a shadow director or whom the court will determine as one.
 - The new impositions on directors mean that breaches can lead to significantly increased terms of imprisonment and fines than under the former law.

In general the new law is welcomed: it offers greater simplicity for business promoters, greater flexibility in share financing approaches, clarity in the area of corporate governance and brings us in line with jurisdictions with up-dated law. In practice, it remains to be seen how business persons and professionals grapple with its interpretation and application in unclear areas, especially where regulations are still to be promulgated.