

Brief - Isle of Man Companies

Background

This briefing note is intended to provide essential information on the formation and management of Isle of Man companies and outline some of the practical uses of the company structure.

Isle of Man Company Legislation

As a result of the introduction of the Isle of Man Companies Act 2006 on 1st November 2006 there are now two separate company law regimes in the Isle of Man: one governed by the Isle of Man Companies Acts 1931-2004 and one governed by the Isle of Man Companies Act 2006.

The English Companies Act 1929 was the foundation for the existing Isle of Man Companies Acts 1931-2004 and many provisions in Isle of Man legislation mirror the equivalent English statutes. Companies incorporated under the Companies Acts 1931-2004 ("1931 Act Companies") are subject to a traditional English company law regime.

Types of Isle of Man Companies

There are numerous types of Isle of Man companies available:

Outlined in this section are the features of each type of company, their benefits and some potential uses. An important factor in deciding to use a particular type of corporate vehicle in a specific transaction is often the tax and regulatory treatment that will be applied to the company in a foreign country. It is therefore imperative in all transactions that appropriate legal and tax advice be sought in all relevant jurisdictions to determine the type of corporate vehicle best suited to a particular set of circumstances or to achieve a particular tax treatment.

The liability of a member of an Isle of Man company may be limited by shares, limited by guarantee or unlimited; these are not mutually exclusive. In addition, shares may be expressed to have par value or no par value.

The following forms of company can be incorporated:

Par Value Company

A par value company can issue shares that have a nominal capital (or par) value. The company will maintain a share capital account in respect of the nominal capital and a share premium account in respect of any premium over the nominal capital paid for such shares. The total amount of the initial authorised share capital and the par value of each authorised class of share must be stated in the memorandum of association. There is no minimum authorised or issued share capital requirement under Isle of Man law.

Fully paid up shares of a par value company may be redeemed from any source if accompanied by a solvency statement signed by all directors authorising the redemption to the effect that the company will still be solvent on a cash flow basis 12 months after the redemption. Save in respect of lawful redemption, repurchase or distribution, a reduction of share capital will generally require the sanction



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of the Isle of Man Courts of Justice.

No Par Value Company

A no par value company issues shares which are expressed as having no nominal value. The proceeds from the issue of shares must be credited to a stated capital account. The number of shares that a no par value company is authorised to issue must be stated in the memorandum of association. This can be unlimited. Fully paid up shares may be redeemed out of any source provided the company can meet certain cash flow solvency tests. Distributions may be made out of stated capital accounts of no par value companies (unlike nominal accounts of par value companies). This adds a greater degree of flexibility where shareholders wish to recover capital. No par value companies are also suited to those companies with a frequently changing membership and limited number of creditors.

Par value companies can convert to no par value companies and vice versa.

Guarantee Company

Guarantee companies abandon the concept of shares altogether. Instead, each guarantor member guarantees to contribute a fixed sum in the event of the company's insolvent liquidation. Guarantee companies may be particularly suited to charitable, social, political or other non-trading purposes. As a guarantor member is under a contingent liability to the company, the articles of association can provide that his interest be non-transferable, without this provision being attacked as a fraud on the minority, as would be the case were that restriction to be applied to a shareholder. This can allow membership of the company to be more closely controlled than in a company with shareholders.

The articles of association could also provide for the appointment of ex-officio or honorary members (who will not necessarily be guarantor members). Depending on the manner in which the articles of association are drafted, it can be easier to protect the rights of minority members in a guarantee company than it is to protect minority shareholders in a traditional company. This may make a guarantee company well suited as a vehicle for sporting or leisure associations, or in any circumstances where shareholdings are unnecessary or undesirable. The fact that a member's interest is a "contingent liability" rather than an asset may also be advantageous in the context of tax and inheritance planning.

It is possible to have a "hybrid" company with both guarantee members and shareholders, either par value or no par value. A company may not, however, have both par value and no par value shares. Hybrid companies are particularly adaptable and useful in the context of international tax planning or asset protection structures. The combination of guarantor members and shareholders permits structures to be set up creating a split between the legal and beneficial ownership of assets. It may be possible to structure a hybrid company in such a way as to be treated by a foreign tax or regulatory authority as a company, a trust or a partnership, as circumstances may require.

Unlimited Company

A par value company or a no par value company may be limited liability or unlimited liability. The holder of unlimited shares has unlimited liability to contribute to the assets of the company on a winding up. The members of the company effectively underwrite the company's liabilities to the extent of their own personal assets. In this respect, an unlimited company has some similarities to a



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partnership. Unlike a partnership, however, an unlimited company has a legal personality, so a creditor of the company can only bring an action directly against a member as part of the process to wind up the company. In return for accepting the greater risks of unlimited liability, a number of the requirements of the Law, particularly in relation to the maintenance of share capital, will not apply to unlimited companies. It is also notable that an unlimited company can reduce the number of its unlimited shares without the consent of the Court, an exception to the general rule that a reduction in capital requires the Court's consent.

As with all of the types of companies, the use of unlimited companies is likely to be driven by international tax planning and regulatory considerations. It is possible to have both limited and unlimited shares in issue.

Single Member Company

It is possible to establish companies with a single shareholder without any loss of the corporate veil.

Public and Private Companies

The Law distinguishes between public and private companies. An Isle of Man company will be a public company if stated as such in the memorandum of association. In addition, an Isle of Man private company will be subject to the additional provisions of the Law applicable to a public company as though it were a public company if it has more than 30 members, (unless the Commission directs otherwise following application by the company) if it circulates a prospectus relating to its own securities or its securities are admitted to trade on a regulated market.

Under the Law a company may be registered as a private company if it has no more than 30 members or if the Isle of Man Financial Supervision Commission ("IoMFSC") is satisfied that by the nature of the company's intended activities its affairs may properly be regarded as the members' domestic concern.

Cell Companies

The Law permits the creation of two types of Isle of Man cell company, the protected cell company ("PCC") and the incorporated cell company ("ICC"). Each is a corporate vehicle giving a flexible structure now widely used in financial transactions. Cell companies may be public or private companies, with limited or unlimited liability. A cell company may issue par value shares, no par value shares or have guarantee members. Unlike a conventional company with a share capital - which may issue only par value shares or no par value shares, but not both - a cell company may issue par value shares in respect of one cell and no par value shares in respect of another. However, individual cells may not issue both par and no par value shares. The name of a cell company must end in the words "Incorporated Cell Company" or "ICC" in the case of an ICC or, in the case of a PCC, end with the words "Protected Cell Company" or "PCC".

PCCs

The key features of the PCC are based upon the model established in Guernsey and the Isle of Man with certain developments unique to Jersey. The PCC is a single legal entity that attributes its assets and liabilities either to the protected cell company itself or to the individual cells it creates. The assets and liabilities of the protected cell company and those attributed to its cells are 'ring-fenced' from



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each other.

ICCs

The ICC is a further development of the PCC concept. Each cell of an ICC is itself an individual incorporated company which can hold assets and incur liabilities in its own name without contamination of or by the assets and liabilities of another cell. The rights of the shareholders in such cells are fettered in that cells, although individual companies cannot act independently of the incorporated cell company that created them. We expect that the combination of the umbrella of the incorporated cell company and the separate legal personality of each individual cell will prove extremely attractive to investors seeking segregation of assets and liabilities within one vehicle whilst allowing those jurisdictions unfamiliar with the PCC concept to recognise and respect such segregation.

Formation of Companies

Name

The chosen name of the company must not be misleading or undesirable. The name of a limited company must end with "Limited" or "Ltd". A public limited company may end its name in "public limited company", "PLC" or "plc".

An informal indication as to whether a name is likely to be approved can be obtained from the Companies Registry and the name can be reserved.

Memorandum and Articles of Association

The memorandum of association sets out the constitution of the company. As well as stating the company's name, generally it must state the following, inter alia:

- whether it is a private or public company;
- whether it is a par value, no par value or guarantee company;
- the full name and the address of each subscriber who is a natural person;
- the corporate name and the address of the registered or principal office of each subscriber which is a body corporate;
- for a par value company – the authorised share capital and the amounts (being fixed amounts) into which the shares of each class are divided;
- for a no par value company - the limit (if any) on the number of shares of each class which the company is to be authorised to issue;
- for a company registered with any limited share – the fact that the liability of a member arising from the member's holding of such a share is limited to the amount (if any) unpaid on it;
- for a guarantee company - the amount which each member undertakes to contribute to the assets of the company on a winding up; and
- for an unlimited company - the fact that there is no limit on the liability of the company's member.

It may also define the objects of the company. There are no statutory limits on the capacity of a



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company to undertake business transactions. However, the objects can be restricted if required. Any transaction outside such restriction will not necessarily be invalid but will render the directors liable to the company for any losses suffered. Any restrictions can be altered by special resolution of the members.

The articles of association set out the regulations governing the internal management and procedures of the company (including rights attaching to shares) and, together with the memorandum, on incorporation form a binding contract between the company and the shareholders. A company may change its articles at any time by special resolution of the members.

At least one subscriber must sign the memorandum and articles of association to incorporate a private company. For a public company, two subscribers are needed. It is possible to use corporate nominees who can attend to all registration formalities and then following formation transfer the shares to the ultimate beneficial owner or its nominees. The memorandum and articles of association must be filed with the Registrar of Companies together with the incorporation fee and an application for incorporation which must be signed by a person licensed to carry out trust company business. A certificate of incorporation is then issued, usually within 2 days of the application. In urgent cases, companies can be incorporated the same day upon payment of a 'fast track' fee.

Beneficial Ownership

The identity of the ultimate beneficial ownership must be disclosed on a confidential basis to the Companies Registry. If held in trust, the name of the trust, trustees and name and address of the settlor must be disclosed. The identity of the registered members of the company must be disclosed (on a public basis) annually.

Share Capital

An Isle of Man company may (as detailed above) issue shares with a par value or with no par value, and the shares may confer limited or unlimited liability.

Shares must be issued in registered form and a share certificate. Bearer shares are not permitted. Fractional shares may be issued. Non-voting shares are allowed and share capital may be structured with different rights such as ordinary shares, preference shares having preferential rights to dividends or to distributions on a winding up and redeemable shares. Subject to obtaining relevant shareholder consents and meeting certain solvency requirements a company may purchase its own shares.

A company may, subject to shareholder approval, hold as treasury shares any limited shares which it has redeemed or purchased instead of having to cancel them, though cancellation is still possible. The shares may be transferred to an employee share scheme or sold as required. Treasury shares do not have any voting or other rights.

Stamp duty in the Isle of Man is not payable on the authorised share capital or on the issue or transfer of shares (other than shares of a Isle of Man company owning Isle of Man real estate).

Dividends and Distributions of Capital

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Distributions (including dividends), for a par value company may be made out of any source including any capital account (apart from the capital redemption reserve or the nominal capital account) provided that the directors make the required solvency statement. So Isle of Man companies may, for example, use their share premium account or (in the case of no-par value companies) stated capital accounts to make distributions. Dividends may be paid on all or some only of the classes of shares in issue. Normally, the directors recommend the level of dividend subject to approval by the shareholders.

Redemption and Re-purchase of Shares

The redemption or re-purchase of fully paid shares of par or no par value companies is permitted from any source provided the directors make the required solvency statements. In both cases, a company may not redeem or re-purchase shares if there would no longer be a member holding shares other than redeemable or treasury shares.

An Isle of Man company may give financial assistance to acquire its shares or shares in its Jersey holding company but if that assistance amounts to a distribution of company assets it may need sanction by special resolution.

In order to protect creditors, a reduction of capital is generally subject to confirmation by the court where the shares in the company are limited and the reduction extinguishes or reduces the liability on any amount unpaid on a share or reduces the net assets of the company.

Incorporation Fee

There is a statutory incorporation fee of £100 payable in respect of each type of company. The additional fast track fee is £200 for a 2 hour incorporation or £500 for a 'while you wait' incorporation.

Corporate Purposes

The Companies Registry needs to know the company's corporate purposes. If the company will be involved in banking, insurance, custodian, investment or financial services or certain other sensitive activities, detailed information regarding the proposed activities will need to be disclosed and various other licences may be required.

Registered Office

Every Isle of Man company must have its registered office in the Isle of Man. The Registrar must be satisfied before:

- a) registering a company; or
- b) approving a change of address, that the occupier of the premises proposed to be used as the registered office has authorised the use of the premises for that purpose. If the Registrar ceases to be satisfied that the authority to use an address as a registered office remains effective he may require the relevant company to change its address.

Directors and Secretary



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A private company must have at least one director. Isle of Man companies may have corporate directors if the body corporate acting as a director is registered to provide such services and does not itself have any corporate directors.

There is no requirement for the directors to be resident in the Isle of Man. Corporate directors can be provided by a local corporate services provider.

A company's affairs are usually managed by the directors in accordance with the articles of association which may contain restrictions on the exercise of their powers.

Subordinate cell companies must have the same secretary and registered office as the principal cell company but need not have the same directors.

A director owes fiduciary duties to the company. Directors must disclose to the company the nature and extent of their direct or indirect interests in any transaction to be entered into by the company or by a subsidiary of the company which to a material extent conflicts or may conflict with the interests of the company. In certain circumstances, the directors may be personally liable for the debts of the company if it can be shown that they knew there was no reasonable prospect of avoiding a winding-up but carried on trading or if they were reckless as to whether or not the company could avoid a winding-up. Indemnities in favour of the directors in the company's articles of association are generally invalid (subject to certain exceptions), but a company may purchase insurance cover in respect of its directors' liabilities.

A secretary must be appointed by the directors. There are no qualifications for this office in the case of a private company.

Inaugural Board Meeting

Prior to commencing trading, the initial directors of the company, having been appointed by the subscribers, will hold an inaugural board meeting to determine the following:

- location of registered office;
- adopt corporate seal (if required);
- allot shares to the subscribers and the first shareholders and issue share certificates;
- approve any share transfers;
- appoint bankers;
- approve a secretarial and management agreement;
- fix a financial year; and
- appoint a secretary.

Ongoing Administration

Annual Returns

Before the end of February in each calendar year, every company must deliver an annual return to the Companies Registry and pay the filing fee of, currently, £380. The annual return must set out



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details of the company's share capital, its members and, if it is a public company, its directors. Failure to deliver an annual return by the end of February will result in a late filing fee becoming payable. If no annual return has been delivered by the end of June, the company will be liable to be struck off by the Companies Registry.

Annual General Meetings

A company must hold its first annual general meeting within 18 months of incorporation. Thereafter it must hold an annual general meeting in every calendar year.

Both public and private companies can dispense with the holding of annual general meetings if all their members consent in writing. Meetings of members may be convened by the secretary or by a request from members holding at least one-tenth of the total voting rights.

Annual general meetings, meetings at which special resolutions are proposed to be passed and other meetings of members can all be convened on 14 days' notice. Meetings at shorter notice can be approved by the members. There are no Isle of Man law restrictions on the place where meetings may be held and members may, unless the company's articles of association otherwise provide, participate by telephone. Written resolutions of members are also permitted.

Accounts

Every company must keep accounting records sufficient to show and explain its transactions, to disclose with reasonable accuracy the financial position of the company at any time, and to enable the directors to ensure that its annual accounts comply with the requirements of the Law. It is not necessary for the accounting records be kept in the Isle of Man but they must be open at all times to inspection by the company's officers and its secretary. If accounting records of a public company are kept outside the Isle of Man, returns with respect to the business dealt with in the accounting records must be kept in the Isle of Man and open at all times to inspection by the company's officers and its secretary.

The accounts must be prepared in accordance with generally accepted accounting principles and must show a true and fair view of the profit or loss of the company for the period and of the state of the company's affairs at the end of the period. The accounts of a private company need only be audited if the company's articles of association or a resolution of the company in general meeting require the appointment of auditors. There is no public filing required in respect of the accounts of a private company nor any need to register an accounting reference date.

Registers

Every company must keep registers containing specified details of its members and of its directors and secretary. Where shares are held by nominees, however, there is no requirement that details of the beneficial owners be entered in the register of members. The register of members may be kept either at the company's registered office or at any other place in the Isle of Man where it is made up. The register of directors and secretary must be kept at the company's registered office. The register of members must be open to public inspection. The register of directors and secretary of a private company is not open for inspection to members of the public.

Resolutions

A printed copy of every:

- special resolution;
- written resolution or agreement which, if passed in general meeting, would not have been effective unless passed as a special resolution;
- written resolution or agreement which, if passed in meeting of that class of members, would not have been effective unless passed by a particular majority; and
- resolution or agreement which binds all the holders of a class of shares although not agreed by all of them, must be delivered to the Companies Registry.

Special resolutions of a company are required for the following (although this list is not exhaustive):

- change of company name;
- alteration to the memorandum and articles of association;
- alterations to share capital;
- purchase of own shares by a company; and
- winding-up.

Seal and Stationery

An Isle of Man company is not required to have a common seal, but if it does the seal (and any duplicate seal) must bear the company name in full. It may also have a duplicate official seal, a branch seal for use outside of the Isle of Man and an official seal for securities. The full name of the company and the address of its registered office must appear on its stationery. If there is a reference to the amount of share capital, the reference shall be to paid up share capital of company.

Taxation of Companies in Isle of Man

The general rate of corporate tax in the Isle of Man is 0%. A 10% tax rate still applies in very limited circumstances, for companies engaged in banking business and IOM property transactions. An annual corporate charge of £250 is payable by every company.

Distributions made to non-residents of the Isle of Man from companies taxed at 0% are subject to withholding tax at the rate of 0%.

VAT Registration and EU Trading

Although the Isle of Man is not a member of the EU, it has the distinct advantage of being part of the customs territory of the EU under Protocol 3. A company can register for VAT in the Isle of Man if it maintains a place of business in the Isle of Man. It is therefore possible for Isle of Man and foreign companies to make advantage of the Isle of Man 0% corporate tax rate whilst obtaining the benefits of VAT registration for trade in the EU.

Why the Isle of Man

The Isle of Man has a significant number of different types of companies, each of which might be suitable for use in a different set of circumstances. In addition, the legal system is strong and has been extensively



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tested since Companies Act was passed in 1931 and as a result many clients take confidence in the Isle of Man as a companies' jurisdiction of choice.