



**BERMUDA**  
**1996 : 21**

**COMPANIES AMENDMENT ACT 1996**

[Date of Assent 24 July 1996]

[Operative Date 24 July 1996]

WHEREAS it is expedient to amend the Companies Act 1981:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:—

**Citation**

1 This Act which amends the Companies Act 1981 (hereinafter referred to as "the principal Act") may be cited as the Companies Amendment Act 1996.

**Amends section 39A of principal Act**

2 Section 39A of the principal Act is amended by inserting next after subsection (2) the following—

"(2A) Section 39 does not prohibit a company from giving financial assistance if there are reasonable grounds for believing that—

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- (a) the company is, and would after the giving of such financial assistance be, able to pay its liabilities as they become due; and
- (b) the realisable value of the company's assets, after the giving of such financial assistance, would not thereby be less than the aggregate of its liabilities, issued share capital and share premium accounts."

### **Amends section 81 of principal Act**

3 Section 81 of the principal Act is amended by deleting subsection (2) and substituting the following—

"(2) Minutes prepared in accordance with subsection (1) shall be kept by the secretary at the registered office of the company and shall be evidence of the proceedings and until the contrary is proved, the proceedings shall be deemed to have been duly held and convened and the business conducted thereat shall be deemed to be valid."

### **Amends section 82 of principal Act**

4 Section 82 of the principal Act is amended in subsection (1) by deleting the words "shall be kept by the secretary at the registered office of the company and".

### **Amends section 90 of principal Act**

5 Section 90 of the principal Act is amended by inserting next after subsection (3) the following—

"(3A) No action shall lie against an auditor in the performance of any function as an auditor contemplated by this Act except in the instance of—

- (a) the company who engaged the auditor to perform such function; or
- (b) any other person expressly authorized by the auditor to rely on his work."

### **Amends section 92A of principal Act**

6 Section 92A of the principal Act is amended by deleting subsection (6) and substituting the following—

"(6) The register shall contain the following particulars with respect to each director and officer—

- (a) in the case of an individual, his present first name, surname and address; and
- (b) in the case of a company, its name and registered office.

(6A) The register of a local company shall state whether any individual possesses Bermudian status within the meaning of the Bermuda Immigration and Protection Act 1956."

**Amends section 98 of principal Act**

7 Section 98(2) of the principal Act is amended in subsection (2) by deleting the words "wilful negligence, wilful default,".

**Inserts new section 98B in principal Act**

8 The principal Act is amended by inserting next after section 98A the following new section—

**"Liability of auditor or officer**

98(B) (1) Where an auditor or an officer is found liable to any person for damages arising out of the performance of any function as such auditor or officer as contemplated by this Act, then the following provisions of this section shall apply.

(2) An auditor or officer may be liable jointly and severally only if it is proved that he knowingly engaged in fraud or dishonesty.

(3) In any case other than that contemplated by subsection (2) hereof, the liability of the auditor or officer, as the case may be, shall be determined as follows—

- (a) the Court shall determine the percentage of responsibility of the plaintiff, of each of the defendants, and of each of the other persons alleged by the parties to have caused or contributed to the loss of the plaintiff. In considering the percentages of responsibility, the Court shall consider both the nature of the conduct of each person and the nature and extent of the causal relationship between the conduct and the loss claimed by the plaintiff;

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(b) the liability of the auditor or officer, as the case may be, shall be equal to the total loss suffered by the plaintiff multiplied by the auditor's or officer's, as the case may be, percentage of responsibility as determined under paragraph (a) hereof.

(4) No auditor or officer whose liability is determined under subsection (3) hereof shall have any liability in respect of any judgement entered against any other party to the action.

(5) Except where agreed in writing between the parties, where the liability of an auditor or officer has been determined in accordance with subsection (3) no other person shall have any right to recover from such auditor or officer any portion of any judgment entered against such other person in respect of the action."

### **Amends section 104A of principal Act**

9 Section 104A of the principal Act is amended—

(a) by deleting the heading to the section and substituting the following—

**"Survival of exempted company on amalgamation of one or more exempted companies and one or more foreign corporations"; and**

(b) in subsection (1)—

- (i) by deleting the words "An exempted company and a body" and substituting the words "One or more exempted companies and one or more bodies";
- (ii) by inserting next after the word "section" the words "and in sections 104B and 104E"; and
- (iii) by inserting immediately before the word "hereinafter" the words "each such body".

### **Inserts new sections 104B-104G in principal Act**

10 The principal Act is amended by inserting next after section 104A the following new sections—

**"Survival of foreign corporation on amalgamation of one or more exempted companies and one or more foreign corporations"**

104B (1) One or more exempted companies and one or more foreign corporations may apply to the Minister for consent to amalgamate and continue as a foreign corporation (in this section and in sections 104C and 104D referred to as "the surviving corporation") to which the provisions of the laws of the jurisdiction of incorporation of the surviving corporation shall apply.

(2) An application for consent under subsection (1) shall be in such form, and shall be accompanied by an application fee and supported by such documents as the Minister may determine and such documents shall include—

- (a)(i) a certified copy of a resolution of the shareholders or each class of shareholders of each amalgamating company being an exempted company (in this section and in sections 104C and 104D referred to as an "amalgamating exempted company") passed in general meeting in accordance with subsection 106(4A); provided that in the case of a company having only one shareholder, one shareholder present in person or by proxy constitutes the necessary quorum; or
- (ii) if so authorised by the bye-laws, a certified copy of a resolution of the Board of Directors of each amalgamating exempted company approving the amalgamation and naming the country or jurisdiction outside Bermuda of the surviving corporation;
- (b) a copy of each of the advertisements required by section 104B(3);
- (c) a statutory declaration signed by an officer of each amalgamating exempted company declaring that there are reasonable grounds for believing that—

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- (i) the amalgamating exempted company is, and the surviving corporation will be, able to pay its liabilities as they become due;
  - (ii) the realizable value of the surviving corporation's assets will not be less than the aggregate of its liabilities and issued capital of all classes; and
  - (iii) either no creditor will be prejudiced by the amalgamation or adequate notice has been given in accordance with section 108(4) to all known creditors of such company and no creditor objects to the amalgamation otherwise than on grounds that are frivolous or vexatious;
- (d) an irrevocable deed poll, executed by each amalgamating exempted company and its directors, pursuant to which—
  - (i) the amalgamating exempted company and each of its directors may be served with legal process in Bermuda in any proceedings arising out of actions or omissions of any amalgamating exempted company occurring prior to the amalgamation, and provision is made for the appointment of a person within Bermuda as agent for the amalgamating exempted company for the service of process for a period of not less than three years from the date of amalgamation and for a signed acceptance of the appointment; or
  - (ii) the amalgamating exempted company and each of its directors

may be served with legal process at a specified address in the United Kingdom, the United States of America or any other country or jurisdiction acceptable to the Minister, and whereby the amalgamating exempted company and such directors submit to the non-exclusive jurisdiction of the courts of that country or jurisdiction; and

- (e) documentary proof, satisfactory to the Minister, that each amalgamating company being a foreign corporation (in this section referred to as an "amalgamating foreign corporation") has obtained all necessary authorization required under the laws of the country or jurisdiction in which it was incorporated to enable it to make the application.

(3) Not more than three months prior to an application for the consent of the Minister under subsection (1)—

- (a) an amalgamating exempted company shall advertise in an appointed newspaper; and
- (b) an amalgamating foreign corporation shall advertise in a national newspaper in the country or jurisdiction of incorporation,

its intention to amalgamate and continue as a company in the named country or jurisdiction of incorporation of the amalgamating foreign corporation.

(4) The provisions of sections 105 to 107 shall apply, *mutatis mutandis* to an amalgamation under this section in the same way as they apply to an amalgamation under section 104, except that the provisions of section 106 shall apply only to an amalgamating exempted company.

(5) The consent of the Minister shall be in such form as the Minister may determine and shall be for such duration, and may be subject to such terms and conditions, as the Minister may specify therein.

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(6) Any documents required for the purposes of subsection (2), other than those specified in paragraphs (a) to (e) inclusive of that subsection, shall be treated as confidential by the Minister or any public officer having access to them.

### **Documents to be filed**

104C (1) Subject to obtaining the consent of the Minister under section 104B(1), an amalgamating exempted company shall within thirty days after the date of issue thereof file with the Registrar a copy of the certificate of amalgamation issued by the appropriate authority of the foreign country or jurisdiction where the surviving corporation is incorporated, or, if no such certificate of amalgamation is issued, such evidence of the amalgamation as the Registrar considers acceptable and such certificate of amalgamation or such evidence, as the case may be, shall contain or have attached thereto the following information—

- (a) a copy of the irrevocable deed poll required by section 104B(2)(d);
- (b) the name of the country or jurisdiction of incorporation of the surviving corporation; and
- (c) the address of the registered office or the principal business address of the surviving corporation in the country or jurisdiction mentioned in paragraph (b).

(2) The Registrar shall file the certificate of amalgamation issued by the appropriate authority of the foreign country or jurisdiction of incorporation of the surviving corporation, or such documentary evidence of the amalgamation as the Registrar considers acceptable, and such certificate shall be a document open to public inspection.

(3) The effective date of the amalgamation is the date shown in the certificate of amalgamation or other documentary evidence referred to in section 104C(2) or as otherwise provided by the laws of the country or jurisdiction of the surviving corporation.



**Restrictions on company to be amalgamated**

104D An exempted company shall not be amalgamated and continued as a surviving corporation under the laws of any other country or jurisdiction unless—

- (a) the country or jurisdiction of incorporation of the surviving corporation is approved by the Minister for the purposes of sections 104B to 104G;
- (b) the laws of the country or jurisdiction of the surviving corporation provide in effect that when an amalgamating exempted company is amalgamated and continued as a surviving corporation in that country or jurisdiction—
  - (i) the property of the amalgamating exempted company is the property of the surviving corporation;
  - (ii) the surviving corporation continues to be liable for the obligations of the amalgamating exempted company;
  - (iii) any existing cause of action, claim or liability in respect of the amalgamating exempted company is unaffected; and
  - (iv) any civil or administrative action or proceedings pending by or against the amalgamating exempted company may be continued by or against the surviving corporation; and
- (c) the Minister is satisfied—
  - (i) that there is no existing liability to prosecution in Bermuda in respect of an amalgamating exempted company;
  - (ii) there is no criminal action or proceeding pending in Bermuda

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- against an amalgamating  
exempted company; and
- (iii) any conviction, or any ruling,  
order or judgment against an  
amalgamating exempted  
company in Bermuda has been  
enforced against such company.

### **Effect of amalgamation of company under section 104B**

104E The effect of an amalgamation under section 104B is the same as in the case of an amalgamation under section 104A, except in so far as the laws of the country or jurisdiction of the surviving corporation otherwise provide.

### **Minister's refusal to grant consent**

104F Where the Minister refuses to grant his consent under section 104B(1), he shall not be bound to assign any reason therefor, and his decision shall not be subject to appeal or review in any court.

### **Regulations**

104G The Minister may make Regulations for carrying out the purposes of sections 104B to 104F."

### **Amends section 107 of principal Act**

11 Section 107 of the principal Act is amended by deleting subsections (4) and (5).

### **Amends section 113 of principal Act**

12 Section 113 of the principal Act is amended in subsection (1)(e) by inserting next after the words "local company" where they first appear the words "where such subsidiary was incorporated on or prior to 31 July 1996".

### **Amends section 114 of the principal Act**

13 Section 114 of the principal Act is amended in subsection (1)(a) by inserting next after the word "Schedule" the words "or is a wholly-owned subsidiary of such a company".

**Amends section 129 of principal Act**

14 Section 129 of the principal Act is amended in subsection (1)—

- (a) by deleting paragraph (d); and
- (b) in paragraph (e)(iii) by inserting next after the words "exempted undertaking" the words ", or a local company, or any partnership which is not an exempted undertaking".

**Repeals and replaces section 130 of principal Act**

15 Section 130 of the principal Act is repealed and replaced by the following—

**"Requirements for officers or representatives in Bermuda**

130 (1) Subject to subsection (2), every exempted company shall—

- (a) have a minimum of two directors, other than alternate directors, ordinarily resident in Bermuda; or
- (b) have a secretary who is ordinarily resident in Bermuda and a director, other than an alternate director, who is ordinarily resident in Bermuda; or
- (c) have a secretary who is ordinarily resident in Bermuda and a resident representative; or
- (d) in the case of a company the shares of which are listed on an appointed stock exchange, have a resident representative.

(2) The requirements of subsections 1(b) and 1(c) shall not be satisfied if the secretary of a company is also appointed as the director or the resident representative referred to in such subsections.

(3) For the purposes of this section, the secretary shall be an individual ordinarily resident in Bermuda but an exempted company may appoint, in addition to a secretary, assistant or deputy secretaries, whether individuals or corporations and whether or not resident in Bermuda.

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(4) A resident representative of a company, other than an exempted company, the shares of which are listed on an appointed stock exchange, or any wholly-owned subsidiary of such company, shall be an individual ordinarily resident in Bermuda but any exempted company may appoint, in addition, assistant or deputy resident representatives, whether individuals or corporations and whether or not resident in Bermuda.

(5) A resident representative shall:

- (a) be entitled to attend, to be heard at, and to receive minutes of all proceedings of, all meetings of the directors and members of the company or of any committee of such directors;
- (b) upon giving notice to the company of an address for the purposes of receipt of notices, be entitled to receive notice of any meeting of the directors or members, or any committee of such directors; but accidental omission to give such notice shall not invalidate any action taken at any such meetings;
- (c) act as agent for the service of process in Bermuda.

(6) It shall be the duty of the resident representative in any circumstances where the resident representative becomes aware that—

- (a) the company has committed a breach of any provision of this Act or any regulation made hereunder which will have a material effect on the affairs of the company; or
- (b) any issue or transfer of shares of the company has been effected in contravention of any other statute regulating the issue or transfer of shares,

to make a written report to the Registrar within thirty days of becoming so aware and the report shall contain all relevant particulars unless before such report is made the company has remedied such breach or contravention.

(7) Where the shares of an exempted company are listed on an appointed stock exchange and that exempted company complies with the requirement specified in subsection (1)(d), the resident representative shall—

- (a) within thirty days of becoming aware that the shares of the company have ceased to be listed on an appointed stock exchange, make a written report to the Registrar setting out all particulars in respect of such cessation;
- (b) be entitled to file all documents, and make all applications required or permitted by this Act;
- (c) maintain at his or its office in Bermuda originals or copies of minutes of all proceedings of meetings of directors and members of the company, all financial statements required to be prepared by the company under this Act together with the auditor's report thereon, and all records of account required by section 83 to be kept in Bermuda.

(8) So long as the shares of an exempted company are listed on an appointed stock exchange, the provisions of subsections (1)(d), (7)(b) and (7)(c) shall apply to a wholly owned subsidiary of such company which, in accordance with subsection (1)(d), has a resident representative.

(9) For the purposes of section 92A only, "officer" shall include a resident representative.

(10) The duty of the resident representative under subsections (6) and (7) shall be owed to the Registrar and no resident representative shall be liable to the company or any other person for any report made by the resident representative pursuant to subsections (6) or (7) or any failure or purported failure to make any report under those subsections.

(11) The Minister may make regulations providing for the qualifications of a secretary for the purposes of this section; and any such regulations shall be subject to the affirmative resolution procedure.

(12) Wilful failure by the resident representative to comply with any of the provisions of this section shall be an offence and

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shall render the resident representative or the company liable on conviction to a fine not exceeding five thousand dollars."

### **Amends section 133 of principal Act**

16 Section 133 of the principal Act is amended in subsection (4)—

(a) by deleting the full stop at the end of paragraph (b) and substituting the words "; or"; and

(b) by inserting the following as paragraph (c)—

"(c) the company is buying or selling or otherwise dealing in shares, bonds, debenture stock obligations, mortgages or other securities issued or created by an exempted undertaking, or a local company, or any partnership which is not an exempted undertaking."

### **Amends section 143 of principal Act**

17 Section 143 of the principal Act is amended—

(a) by deleting paragraph (d); and

(b) in paragraph (e)(iii) by inserting next after the words "exempted undertaking" the words ", or a local company, or any partnership which is not an exempted undertaking".

### **Repeals and replaces sections 201 and 201A of principal Act**

18 Sections 201 and 201A of the principal Act are repealed and replaced by the following—

#### **"Circumstances in which a company may be wound up voluntarily"**

201 A company shall be wound up voluntarily—

(a) when the company resolves in general meeting that the company be wound up voluntarily; or

(b) pursuant to section 201A.

**Appointment of liquidator and dissolution of company of limited duration**

201A (1) A company shall be wound up voluntarily upon the expiration of the period fixed for the duration of the company by its incorporating Act or its memorandum or upon the occurrence of the event on the occurrence of which its incorporating Act or its memorandum provides that the company is to be dissolved and thereafter the company shall be dissolved in accordance with this Part.

(2) Where a company is being wound up pursuant to subsection (1)—

- (a) references in this Part to the resolution for voluntary winding up shall be deemed to be references to the expiration of the period, or the occurrence of the event, referred to in subsection (1);
- (b) section 216(1) shall be read as requiring the meeting of the creditors of the company to be summoned within thirty days of the expiration of the period, or the occurrence of the event, referred to in subsection (1);
- (c) sections 208(1), 216(5) and 230 shall not apply to the company.

(3) Subject to section 227, where a company is being wound up pursuant to subsection (1) by way of members' voluntary winding up, within ninety days after the expiration of the period, or the occurrence of the event, referred to in that subsection the members of the company shall appoint one or more liquidators for the purpose of winding up the affairs, and distributing the assets, of the company, and may fix their remuneration, and in the absence of such an appointment within that time period, the Official Receiver shall be the liquidator.

(4) Where a company is being wound up pursuant to subsection (1) by way of a creditor's voluntary winding up and no liquidator has been appointed within ninety days after the

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expiration of the period, or the occurrence of the event, referred to in subsection (1), the Official Receiver shall be the liquidator."

### **Amends section 202 of principal Act**

19 Section 202 of the principal Act is amended in subsection (1) by deleting the words "pursuant to section 201" and substituting the word "voluntarily".

### **Amends section 204 of principal Act**

20 Section 204 of the principal Act is amended in the proviso to that section by deleting the words "in the case of a voluntary winding up under section 201(b)".

### **Amends section 206 of principal Act**

21 Section 206 of the principal Act is amended in subsection (1) by deleting the words "pursuant to section 201(b)".

### **Amends section 272A of principal Act**

22 Section 272A of the principal Act is amended—

(a) in subsection (1)—

- (i) by deleting the words "only with effect from and after the coming into operation of Regulations made under this section"; and
- (ii) by inserting next after the word "instrument" the words "by an appointed agent or in accordance with Regulations made under this section"; and

(b) in subsection (4)—

- (i) by inserting the following as paragraph (a)—

"(a)"appointed agent" means a person appointed by the Minister for the purposes of this section;" and

- (ii) by re-numbering paragraphs (a), (b) and (c) as paragraphs (b), (c) and (d) respectively; and

(c) by inserting the following as subsection (11)—



"(11) The Minister shall cause the appointment of an appointed agent to be published in an appointed newspaper."

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