

CONYERS

Continuance of Foreign Corporations in Bermuda

Preface

This publication has been prepared for the assistance of those who are considering the continuance of a foreign corporation into Bermuda as a Bermuda exempted company. It deals in broad terms with the requirements and procedures under Bermuda law for effecting a continuance; it is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

Before proceeding with a continuance, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

Copies of the Bermuda Companies Act 1981 have been prepared and are available on request.

Conyers Dill & Pearman

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1. INTRODUCTION

This publication outlines the steps necessary under the Companies Act 1981 of Bermuda (the “Act”) for a company incorporated outside of Bermuda (a “foreign corporation”) to continue into Bermuda as a Bermuda exempted company. Under Bermuda law, a Bermuda exempted company may also merge or amalgamate with a foreign corporation, with the surviving or amalgamated entity continuing as a Bermuda exempted company. A separate publication relating to such mergers or amalgamations is available upon request.

In order to ensure that a foreign corporation will discontinue from the foreign jurisdiction and continue in Bermuda as a Bermuda exempted company at the same time, it is suggested that before any application is made, all the appropriate documentation first be completed both in Bermuda and in the jurisdiction in which the foreign corporation is currently incorporated.

Any foreign corporation may continue into Bermuda in accordance with the procedures set out below.

2. CONTINUANCE IN BERMUDA

2.1. Procedure

An application must initially be made to the Bermuda Monetary Authority (“BMA”) seeking permission for the shareholders of the foreign corporation to be shareholders of the company upon its continuance in Bermuda. This application should include:

- (a) a statement of the proposed business of the company;
- (b) information concerning the beneficial owners of the company; and
- (c) a copy of the opinion of foreign counsel referred to below.

An insurance company will also need to make an application to obtain approval for its insurance business as a preliminary step to obtaining an insurance licence upon its continuance in Bermuda.

Prior to continuing into Bermuda, Conyers Dill & Pearman, the BMA and the Registrar of Companies (the “Registrar”) must be supplied with an opinion of counsel in the jurisdiction in which the foreign corporation is registered to the effect that all necessary authorisations under the laws of that jurisdiction have been obtained to allow the foreign corporation to continue into Bermuda. In addition, the financial statements for the foreign corporation prepared for a period ending within twelve months of the proposed date of continuance will also be required.

Once the relevant consent has been received from the BMA, a filing for registration of the foreign corporation in Bermuda is made with the Registrar. The filing must include:

- (a) the original signed memorandum of continuance;
- (b) the address of the registered office in Bermuda of the company;
- (c) a copy of the legal opinion issued by the foreign counsel;

- (d) the financial statements;
- (e) the appropriate annual government fee; and
- (f) the required filing fee.

The Registrar will register the memorandum of continuance on or after the date of filing, as requested in the filing, if satisfied that the foreign corporation is in compliance with the Act, and will issue a Certificate of Continuance.

Upon registration of the memorandum of continuance, the continuance will become effective and the foreign corporation will become a Bermuda exempted company to which the Act and any other laws in Bermuda apply as if the foreign corporation had been incorporated in Bermuda on the date of the registration. The memorandum of continuance will be deemed to be the memorandum of association of the company in lieu of any of its previous constitutional documents. The Certificate of Continuance will be deemed to be the company's Certificate of Incorporation.

The company must forward a copy of the Certificate of Continuance issued by the Registrar to the competent authority in the jurisdiction from which it was discontinued. Some foreign jurisdictions require an opinion of Bermuda counsel confirming the consequences for the company of its continuance in Bermuda (which are set out below).

Every corporation that continues into Bermuda is required to ensure that it adopts bye-laws conforming to Bermuda law. Board and shareholder meetings (dealing with matters such as appointing a secretary and/or resident representative, and establishing a registered office in Bermuda) must also be held. It is our policy that these actions be carried out by the foreign entity prior to continuance, to be effective upon continuance, thus resulting in the corporation being in full compliance with Bermuda law upon its continuance in Bermuda.

2.2. Consequences of Continuance

Upon continuance of a foreign corporation as an exempted company under the Act:

- (a) the property of the foreign corporation will continue to be the property of the company;
- (b) the company will continue to be liable for the obligations of the foreign corporation;
- (c) any existing cause of action, claim or liability to prosecution in respect of the foreign corporation will be unaffected;
- (d) any civil, criminal or administrative action or proceeding pending by or against the foreign corporation may be continued by or against the company; and
- (e) any conviction against, or any ruling, order or judgment in favour of or against the foreign corporation may be enforced by or against the company.

The continuance of a foreign corporation under the Act does not create a new legal entity or prejudice or affect the continuity of the company which was formerly a foreign corporation, now a Bermuda company continued in Bermuda.

In addition, the Bermuda courts will apply the laws of evidence and the rules of procedure with the intent that no claimant against the continued company shall be prejudiced in pursuing, in or under the laws of Bermuda, a bona fide claim that existed prior to the date of continuance and which could have been pursued under the laws then governing such foreign corporation.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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