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The International Comparative Legal Guide to:

Corporate Governance 2017

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Country Question and Answer Chapters:

Bermuda

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1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The main corporate entities in Bermuda are private companies limited by shares. There are two types of private companies limited by shares:

- exempted companies ("exempted companies"): which are companies that are owned by non-Bermudians and which carry on business outside Bermuda from a principal place of business in Bermuda; and
- local companies ("local companies"): which are companies that: (i) are controlled by Bermudians, where at least 60% of the total voting rights in the company are exercisable by Bermudians and the percentage of directors and of beneficial ownership in the company's shares is not less than 60% (known as the "60/40 Rule"); or (ii) have a licence from the Minister of Finance of Bermuda to carry on business notwithstanding that the criteria in (i) is not met.

The 60/40 Rule does not apply to companies whose shares are listed on a designated stock exchange (or the subsidiary of such a company) nor to companies within certain prescribed industries, including insurance, telecommunications, energy, hotel operations, banking or international transportation services (by ship or aircraft).

Exempted companies may conduct business from within Bermuda with entities outside Bermuda or with other exempted undertakings in Bermuda. Exempted companies are prohibited from carrying on business in Bermuda except in certain circumstances, which include dealing in securities and acting as manager or agent for, or consultant or advisor to, affiliated exempted companies or permit companies to the exempted company, or to an exempted partnership in which the exempted company is a partner, or carrying on reinsurance business or, in the case of mutual funds, selling or distributing their shares in Bermuda.

1.2 What are the main legislative, regulatory and other corporate governance sources?

Legislation and Common Law

The legal system in Bermuda is based on statute and common law. Decisions of the English courts are highly persuasive in Bermuda. The Bermuda court system is comprised of the Magistrate's Court, the Supreme Court (the "Supreme Court") and a Court of Appeal, with certain cases being subject to a final right of appeal to the Privy Council of the United Kingdom.

All Bermuda companies are subject to the provisions of the Companies Act, 1981 (as amended) (the "Companies Act"). The Companies Act, together with applicable common law rules, is the primary source of corporate governance regulation of Bermuda companies.

For companies which are listed on the Bermuda Stock Exchange (the "BSX") corporate governance is also promulgated through the BSX Listing Regulations (the "Listing Regulations"). There are ten sections to the Listing Regulations. Section I – Listing Regulations is generic and applicable to all issuers and the remaining nine sections are applicable to specific types of products or securities. The Listing Regulations are available on the BSX website at www.bsx.com.

Constitutional Documents

In addition, corporate governance is regulated by the constitutional documents of a company. Such documents include the memorandum of association (the "memorandum") and bye-laws ("bye-laws"). The memorandum will state whether the objects of a company are restricted (for example in the case of a special purpose vehicle) or unrestricted. A Bermuda company has the capacity, rights, powers and privileges of a natural person, subject to any specific provisions in the memorandum. The bye-laws govern the relationship between the company and its shareholders and detail the rights and duties of each. The bye-laws will contain provisions relating to the convening and conducting of meetings of the board and shareholders (among other things).

Corporate governance matters may also be dealt with in a shareholders' or investment agreement relating to the relevant company, whose provisions may override those set out in the bye-laws, subject always to the Companies Act.

Regulatory Bodies

The Bermuda Monetary Authority (the "BMA") regulates Bermuda's financial services sector. The BMA develops risk-based financial regulations that it applies to the supervision of Bermuda's banks, trust companies, investment businesses, investment funds, fund administrators, money service businesses, corporate service providers and insurance companies. The responsibilities of the BMA also include issuing Bermuda's national currency (the Bermuda Dollar, which is pegged to the United States Dollar), managing exchange control transactions, assisting other authorities with the detection and prevention of financial crime and advising the Bermuda Government on banking and other financial and monetary matters. Further information concerning the BMA can be found on its website www.bma.bm.

The BSX is today the world's preeminent fully electronic securities market offering a full range of listing and trading opportunities

for international and domestic issuers of equity, debt, depositary receipts, insurance-linked securities and derivative warrants. The BSX is supervised and regulated by the BMA and, as noted above, promotes corporate governance standards through the Listing Regulations. As a full member of the World Federation of Exchanges, the BSX has been acknowledged as meeting the highest regulatory and operational standards. The BSX is not bound by the European Union Listings Directive or the United States Securities Exchange Commission regulations and has a light but effective regulatory environment.

Corporate Governance Codes

Bermuda has not adopted a formal overarching corporate governance code but there are several industry-specific corporate governance codes ("Industry Codes") issued by the BMA in its capacity as the regulator for such industries:

Insurance:

- The Insurance Code of Conduct (Revised July 2015): which establishes duties, requirements and minimum standards to be complied with by every (re)insurer that is registered under section 4 of the Insurance Act 1978 (as amended), including the procedures and sound principles to be observed by such persons. Failure to comply with the provisions set out in the Code will be a factor taken into account by the BMA when determining whether a (re)insurer is meeting its obligation to carry out its business in a sound and prudent manner. This Code requires every registered (re)insurer to establish and maintain a sound corporate governance framework, which provides for appropriate oversight of the (re)insurer's business and adequately recognises and protects the interests of policyholders. The framework should have regard for international best practice on effective corporate governance. Corporate governance includes principles on corporate discipline, accountability, responsibility, compliance and oversight.
- The Insurance Manager Code of Conduct 2016 (Issued August 2016): requires insurance managers to implement a documented corporate governance framework which includes policies and processes, and controls which the BMA considers appropriate given the nature, scale, complexity and risk profile of the insurance manager. The Code also includes requirements and recommendations with respect to the composition of the board of an insurance manager and management of conflicts of interests. Insurance managers are expected to comply with both the letter and spirit of this Code.

Trusts, Investment Business and Fund Administrators:

- The Corporate Governance Policy for Trusts (Regulation of Business Act 2011), Investment Business Act 2003 and Investment Funds Act 2006 (Issued January 2014) (together the "Regulatory Acts") (the "Regulatory Acts Policy"): applies to entities that are licensed under the Regulatory Acts and sets out nine principles and related guidance which reinforce key elements of corporate governance. All licensed entities are required, as a statutory minimum licensing criterion, to implement corporate governance policies and procedures. The BMA takes into consideration compliance with the Regulatory Acts Policy when assessing whether a licensee meets the criterion. The Regulatory Acts Policy consists of principles and underlying guidance. The principles are the core of the policy and the BMA expects licensed entities to comply with them. In assessing compliance, the BMA will adopt a proportional approach that reflects the size, complexity, structure and risk profile of the relevant entity's business and recognises that approaches to corporate governance among different institutions may vary notwithstanding the application of the general principle of proportionality.

Banking:

- The Corporate Governance Policy for Banks and Deposit Companies Act 1999 (Issued January 2012): this Code applies to deposit taking companies licensed under the Banks and Deposit Companies Act 1999 and sets out 13 principles and related guidance which reinforce key elements of corporate governance applicable to such companies.

1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

Bermuda companies, like many others, are facing more difficult challenges with respect to corporate governance issues and particularly how to achieve more effective board oversight than ever before. Current hot topics include:

- increasing the number of independent directors on boards (in line with the recommendations made in the Industry Codes);
- board diversity;
- risk management and oversight; and
- succession planning and avoiding entrenchment at board level.

Shareholder involvement/engagement is of increasing importance, as well as dealing with the impact of technology and cyber-security and putting in place effective policies and procedures to manage any associated risk.

2 Shareholders

2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

Under common law principles, shareholders of Bermuda companies are entitled to have the affairs of the company conducted in accordance with general law, and in particular with the company's memorandum and bye-laws. A Bermuda court will generally refuse to interfere with the management of a company at the insistence of a minority of its shareholders who are dissatisfied with the conduct of the company's affairs by the majority or by the board of directors (who are normally elected by the majority). The fundamental proposition of law (under the rule in *Foss v Harbottle* (1843) 67 ER 189) is that a minority shareholder cannot sue for a wrong done to the company or bring proceedings to rectify an internal irregularity in circumstances where the majority can lawfully ratify the same. Generally, the exceptions to this would include:

- where the act complained of is *ultra vires* or illegal and not capable of ratification by the majority;
- where the act complained constitutes a fraud on a minority where the wrongdoers control the company;
- where the act complained constitutes an infringement of individual rights of shareholders, such as the right to vote; and
- where the company has not complied with provisions requiring the act be approved by a special or extraordinary majority of the shareholders.

Rights of all shareholders:

- Personal actions: Any shareholder may complain in their own name and on their own behalf of a wrong done to them as shareholders by other shareholders or by the company, including, under the exceptions to the rule for *ultra vires* acts, breaches of the company's memorandum or bye-laws or an infringement of their personal rights.

- Derivative actions: A derivative action (where the shareholder sues in the company's name rather than its own) may be brought where the act complained of is *ultra vires* the company. A derivative action may also be brought against the directors and promoters who have been guilty of a breach of their fiduciary duties.
- Acts which are prejudicial to the interests of a shareholder: Pursuant to section 111(1) of the Companies Act, any shareholder may make an application to the Supreme Court for a petition for an order if the affairs of the company are being or have been conducted in a manner which is oppressive or unfairly prejudicial to the shareholders, and seek either a winding-up order or an alternative remedy if a winding-up order would be unfairly prejudicial to them.

Matters requiring shareholder approval under the Companies Act

The bye-laws of the company will typically specify the relevant majorities for approval by the shareholders on specific matters. The Companies Act provides that certain matters require authority by a company in the general meeting (as well as, in some cases, express authority in the bye-laws). If a higher majority is not specified in the bye-laws, this would mean a simple majority of votes cast at the meeting. Such matters include:

- converting preference shares into redeemable preference shares;
- increasing or reducing the company's share capital;
- altering a company's share capital;
- electing the directors of the company;
- continuances and discontinuances;
- loans to directors;
- waiving the convening of annual general meetings or the presentation of accounts to shareholders and/or the appointment or removal of an auditor; and
- winding-up the company on a voluntary solvent basis.

Subject to any contrary provision in the company's bye-laws, shareholders holding at least 75% of the company's issued share capital have certain rights under the Companies Act including:

- to provide written consent to alter or abrogate all or any special rights attaching to shares or classes of shares (where the memorandum or bye-laws do not preclude such variation);
- to agree to any compromise or arrangement at a meeting of shareholders (shareholders in this case must represent 75% in value of those present and voting at the meeting); and
- to approve an amalgamation or merger.

2.2 What responsibilities, if any, do shareholders have as regards the corporate governance of their corporate entity/entities?

From a Bermuda perspective, shareholders are rarely responsible for the corporate governance of Bermuda entities. There are no institutional investor or shareholder groups that have particular significance in corporate governance.

2.3 What shareholder meetings are commonly held and what rights do shareholders have as regards them?

All meetings of shareholders are known as general meetings. An annual general meeting ("AGM") must be held once in each calendar year, unless the company has elected to dispense with the holding of the relevant AGM. The following are typically dealt with at an AGM:

- establishing the minimum and/or maximum number of directors;
- electing the directors and determining their remuneration;
- considering the financial statements and auditor's report (unless the laying of such financial statements and/or appointment of an auditor has been waived by the directors and shareholders); and
- reappointing the auditors (unless the appointment has been waived).

The directors may also convene general meetings other than AGMs. Such meetings are called special general meetings ("SGM"). Generally, there must be at least 5 days' prior notice of general meetings. Such notice should specify the place, date and time and the general nature of the business to be transacted. All shareholders entitled to attend and vote at a general meeting are entitled to receive notice.

Any holder of shares representing 10% or more of the company's issued share capital is entitled to requisition the convening of an SGM pursuant to section 74(1) of the Companies Act. If the directors do not convene an SGM within 21 days from the date of the deposit of the requisition, the requisitionists, or any of them representing more than 50% of the total voting rights of all of them, may themselves convene a meeting (within three months of the date of the requisition).

Section 77A of the Companies Act permits written resolutions of shareholders *in lieu* of holding a physical shareholders' meeting, unless the bye-laws otherwise provide. Notice of the resolutions must be given to all shareholders. Written resolutions are passed when signed by those shareholders who would be entitled to pass a resolution at a general meeting of the company or by all of the shareholders.

2.4 Can shareholders be liable for acts or omissions of the corporate entity/entities?

The liability of a shareholder in a Bermuda company limited by shares is limited to the unpaid amounts (if any) in respect of their shares. This is the corollary to the principle of separate corporate personality established in *Salomon v A Salomon & Co Ltd* [1897] AC 22.

As a consequence, a company is responsible for its own actions. A company's liability is also its own and does not pass through to its shareholders. The circumstances in which the court will ignore the principle of a company's separate liability and will hold the shareholders accountable for the company's actions (known as '*piercing the corporate veil*') are therefore very exceptional. Such cases would generally involve the legal personality of the company being used for the purpose of wrongdoing where no other remedy is available.

Under section 246 of the Companies Act, if during the course of the winding up of a company it appears that any business of the company has been carried on with the intention to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, any person who was knowingly a party to the carrying on of the business in such manner may be held personally liable without any limitation of liability, for all or any of the debts or other liabilities of the company. Further, the officers of a company may be held liable to imprisonment for offences committed under section 243 of the Companies Act during the course of a winding up of the company and for this purpose '*officer*' means '*any person in accordance with whose directions or instructions the directors of a company have been accustomed to act*' (which may include the shareholders in certain circumstances).

2.5 Can shareholders be disenfranchised?

Yes, the bye-laws or the shareholders' agreement may include provisions in which shareholders may lose their voting rights including, for example, where employee shareholders cease employment with the company or where it is necessary in order to preserve maximum/minimum ownership/voting thresholds.

2.6 Can shareholders seek enforcement action against members of the management body?

Please refer to the response to question 2.1 above.

2.7 Are there any limitations on, and disclosures required, in relation to interests in securities held by shareholders in the corporate entity/entities?

All issues and transfers of shares in Bermuda companies require the prior consent of the BMA, unless a general or specific permission has been granted in respect of such issues or transfers. The BMA has issued a public notice containing the current general permissions available which include where shares of a company are listed on a recognised stock exchange. It is also possible for a company to obtain specific 'blanket' permission to the issue or transfer of shares, for example, pursuant to an employee share incentive scheme.

Notification to the BMA is required by a shareholder or a prospective shareholder of new or increased control in a (re)insurance company that is registered under the Insurance Act 1978, where the new or increased control is at a level of 10%, 20%, 33% and 50%. The new or increased control can be obtained through either a transfer or new issue of shares and can take place at the direct, intermediate or ultimate level of shareholding. In the case of private companies, no person may become a new or increased shareholder unless the BMA has confirmed there is no objection (or failed to confirm within the required 45-day period).

For BSX listed companies, the directors or executive officers must deliver written notice and details to the BSX if they become aware of any shareholders who (i) acquire a beneficial interest, control or direction of 5% or more of the company's securities (or convertible securities) or any change in the identity of such holder, or (ii) has a beneficial interest in or exercises control or direction over 5% or more of the company's securities (or convertible securities) and the shareholder acquires an additional 3% or more of the company's securities.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Management of a company is typically the responsibility of its board of directors. Subject to the bye-laws, the directors may exercise all of the powers of the company except those powers that are required by the Companies Act to be exercised by the shareholders of the company. The directors may delegate day-to-day management to committees and to executive officers.

Directors can be either individuals or corporate entities and sole directors are permitted.

3.2 How are members of the management body appointed and removed?

The board of directors is appointed by the shareholders and the method of appointment is typically set out in the bye-laws, although other documents such as a shareholders' or investment agreement may contain provisions relating to the appointment and removal of directors. Absent any specific provisions in either the bye-laws or such agreements, the first board of directors is elected by the shareholders at the first statutory general meeting of the company and thereafter by the shareholders typically at each AGM unless the company has dispensed with the requirement to hold them. Directors are usually appointed to serve until the next AGM or if earlier until their successor is appointed or elected. However, the bye-laws may provide for longer terms of service and for retirement by rotation.

The bye-laws usually expressly specify the circumstances in which a director must vacate office (for example, if he becomes bankrupt or of unsound mind). Subject to contrary provisions in the bye-laws, the shareholders may also remove a director at an SGM convened for the purpose and appoint another person in his place. At least 14 days' notice of the SGM must be given to the relevant director(s), who would be entitled to attend and be heard at the SGM.

The shareholders may also authorise the remaining directors to fill any vacancies arising on the board.

3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

The bye-laws often provide that the amount of the directors' fees shall be determined by the company in the general meeting. Subject to any restrictions in the bye-laws, the board is typically empowered to determine the remuneration of the directors and there is generally no obligation to disclose the remuneration of each director.

However, a prospectus issued by a company applying for listing on the BSX must contain details of the aggregate remuneration and benefits in kind given to directors in the last financial year.

Some of the Industry Codes make recommendations with respect to the remuneration of the board and management.

Directors do not have to be employees of the company. There is no right to inspect directors' service contracts.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

There is no requirement for a director to hold shares in a Bermuda company.

For listed companies, an internal code of dealing is required which must, as a minimum, prohibit them from dealing in a company's shares for a period from when they become aware of the interim and full year's results of the company until those results are announced.

3.5 What is the process for meetings of members of the management body?

The method for convening and conducting board meetings will usually be set out in the bye-laws, which typically give the board considerable discretion to regulate their own affairs. The bye-laws will typically provide that the length of notice for calling a board meeting must be reasonable in the circumstances. Matters are usually decided by simple majority vote but the bye-laws may prescribe higher majorities or the consent of independent directors, for example. The chairman may also have a casting vote.

A quorum must be in attendance throughout the meeting. The bye-laws will also usually contain provisions requiring declaration of material interests which may prevent a director from being able to vote and count in the quorum (particularly for listed companies). The Companies Act provides that a director who discloses his material interest either in writing or at the first available opportunity may vote and be counted in the quorum, subject to the bye-laws.

Unless the bye-laws provide otherwise, board meetings may be held telephonically or by video conference. The bye-laws usually permit written resolutions of the directors *in lieu* of meetings and such written resolutions typically require unanimous consent, although some companies provide for written resolutions to be valid once signed by a specified majority of the directors.

3.6 What are the principal general legal duties and liabilities of members of the management body?

Common Law Duties:

At common law, a director owes a fiduciary duty and a duty of skill and care to the company. Bermuda law follows the English common law principle that such duties are owed to the company and not individual shareholders. Where a company is solvent, a director's duty to act in the best interests of the company includes having regard to the interests of shareholders. But when a company is insolvent, the board must also have regard to creditors' interests.

The fiduciary duty has four aspects:

- a duty to act in good faith;
- a duty to exercise powers for a proper purpose;
- a duty to avoid conflicts of interests with the company; and
- a duty not to take a personal profit from opportunities resulting from his directorship.

The duty of skill and care:

- requires a degree of skill (although the test is subjective);
- requires diligent attention to the business; and
- entitles a directors to rely on others (co-directors or company officers) but not to the extent of absolving a director from his responsibility by delegation to others.

Statutory Obligations:

In addition, the following statutory provisions, many of which arise in the context of an insolvent company, are applicable to directors and give rise to obligations and potential liability:

- Section 97 of the Companies Act (Duty of Care): requires a director in the exercise of his powers and the discharge of his duties, to act honestly and in good faith with a view to the best interest of the company and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. A director will be presumed not to act in good faith if he fails to disclose an interest in a material contract or person party thereto.
- Section 237 of the Companies Act (Fraudulent Preference): applies to transfers or dispositions (including mortgages, conveyances and delivery of goods) made within six months of the winding up of a company, that are carried out with the dominant intention of preferring one creditor over another at a time when the company was unable to satisfy all creditors' claims in full.
- Section 246 of the Companies Act (Fraudulent Trading): enables a court (on the application of a liquidator or any creditor or shareholder of the company) to make an order imposing personal liability on directors for any or all of the company's debts if he is knowingly a party to fraudulent trading, which occurs when a company carries on business with intent to defraud creditors, or any other person's creditors or for any fraudulent purpose. Bermuda courts are guided by the standard borrowed from the UK's 'wrongful trading' provisions.
- Section 36C of the Conveyancing Act 1983 (Transactions at an Undervalue): a creditor may seek to set aside a disposition of the company's property at an undervalue.

Civil and Criminal Liability:

A director can be criminally liable under the general laws of theft and fraud. If a company commits an offence under the Proceeds of Crime Act, 1997, and it is shown to have been committed with the consent and connivance of an officer of the company or can be attributable to any neglect on his part, the officer and the company are liable under that Act.

Further, the Bribery Act 2016, which received Royal Assent in 2016 and is expected to come into force in 2017, provides for indictable offences of bribing and being bribed, including bribery of foreign public officials.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Please see our answer to question 1.3.

3.8 What public disclosures concerning management body practices are required?

There are no prescribed disclosures.

3.9 Are indemnities, or insurance, permitted in relation to members of the management body and others?

A company may, either by contract or pursuant to its bye-laws, indemnify its officers against or exempt them from any liability in respect of any loss arising or liability for which the officer may be guilty in relation to the company other than in respect of fraud or dishonesty. A company may purchase and maintain insurance for the benefit of its officers.

4 Other Stakeholders

4.1 What, if any, is the role of employees in corporate governance?

Employees do not generally have a significant role in corporate governance.

4.2 What, if any, is the role of other stakeholders in corporate governance?

There are no institutional investors or other shareholder groups that have particular significance in corporate governance.

4.3 What, if any, is the law, regulation and practice concerning corporate social responsibility?

Bermuda companies are not currently legally required to, and currently do not generally report on, social, environment and ethical issues.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The board of directors would be responsible for disclosure and transparency.

5.2 What corporate governance related disclosures are required?

There are no prescribed disclosures.

5.3 What is the role of audit and auditors in such disclosures?

This is not applicable.

5.4 What corporate governance information should be published on websites?

For larger and/or listed companies, we would recommend that copies of all constitutional documents, board committee charters and any corporate governance policies or procedures (or a summary of them) are published on the website.

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Natalie has over 18 years' experience advising on a range of corporate and regulatory matters including corporate governance issues; IPOs; banking and private equity transactions; mergers and acquisitions (with particular expertise in regulated entities); joint venture and special purpose vehicles; and offshore corporate, partnership and limited liability company structures (with particular expertise in relation to complex global restructuring projects involving Bermuda entities).

Natalie is a certified director of the Institute of Directors and is Executive Committee Member and Chairman of the Regulatory Sub-Committee of the Institute of Directors – Bermuda Branch.

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