



Bye-laws: A Company's Game Plan

By Kit Cunningham, Corporate Attorney

Name a professional sports team, any sports team. From football to basketball to hockey, they all have one thing in common when they step onto the field, court, or rink; they have a game plan. The key to achieving goals is having a plan, whether for a professional sports team or a company. For companies, the plan starts at a far more fundamental level, before the growth strategy and marketing goals are laid out; it starts with the bye-laws. The bye-laws set out the rights, powers and obligations of the directors, officers and shareholders of a company. It is this initial framework upon which the rest of the company is built.

Companies registered in Bermuda, whether local or exempt, all have one thing in common; their main governance documents are their memorandum of association and bye-laws. The Bermuda Companies Act 1981 (**Companies Act**) is the primary piece of legislation in Bermuda with respect to matters affecting a company's incorporation, and it is the main legislation that affects governance of a company. Section 13 of the Companies Act provides that the administration of every company, meaning both local and exempt, shall be regulated by their bye-laws. Furthermore, the Companies Act provides that a company limited by shares, or other company having share capital, shall in its bye-laws make provisions for: (i) the transfer of share, registration of estate representative of deceased shareholder; (ii) keeping of the company's accounts and making available the financial statements to the members; (iii) an audit of the accounts of the company once at least in every year by an independent representative of the shareholders; (iv) the duties of the secretary to the company; and (v) the number of members required to constitute a quorum at any general meeting of the members of the company. The requirement to hold an annual general meeting and annual audit may be waived if the company has elected to dispense with holding the annual general meeting at a previous meeting, and the company has waived the requirement to have an audit at a general meeting, in accordance with section 88 of the Companies Act.

The bye-laws of a company can either be standard or bespoke. In addition to the mandatory contents of a company's bye-laws required by the Companies Act, standard or "vanilla" bye-laws generally also include:

- (i) issuance of shares, rights attaching to shares, the company's ability to purchase its share, share transfers, share certificates, and the way in which the company deals with fractional shares;
- (ii) power to alter share capital;
- (iii) dividends, power to set aside profits, method of payment of dividends and capitalisation;
- (iv) general meeting requirements;

BeesMont Law Limited

5th Floor Andrew's Place, 51 Church St., Hamilton HM 12, Bermuda
T +1 441 400 4747 F +1 441 236 1999 W beesmont.bm



- (v) elections and appointment of directors and officers, term of a director, alternate directors, removal of a director, director vacancy, remuneration of directors, scope of directors work and powers, duties, meeting of the board of directors, quorum, notice;
- (vi) corporate records such as minutes, location of the minute book, and form and use of seal;
- (vii) financial year end, and appointment and removal of an auditor;
- (viii) winding-up of the company;
- (ix) changes to the constitutional documents (bye-laws and memorandum of association); and
- (x) mergers and amalgamations.

This is not a finite list; however the list reflects the common contents of a standard set of bye-laws for a company in Bermuda. A common addition to these standard bye-laws is the inclusion of a section which gives pre-emption rights to shareholders.

Depending on the nature and industry of the company, bespoke bye-laws may be required, which are tailored to ensure that the company is governed correctly and runs smoothly without any concerns as to how certain activities are carried out. For instance, some of the companies which require bespoke or tailored bye-laws are: (i) insurance companies, (ii) fund companies, (iii) guarantee companies; joint venture companies, (iv) private trust companies, and (v) segregated account companies. These bye-laws will still include the standard bye-laws above, but the conditions and terms under those bye-laws will be different and often more intricate, and include additional bye-laws which are specific to the company and its industry.

Both standard and bespoke bye-laws may allow for the board of director to delegate some of their authority and powers to a delegated person. However, bespoke bye-laws may delegate a broad range of authority and power to the management of a company, such as the CEO and CFO, and may go on to include a bye-law which narrows that scope on specific issues, such as appointment of the CEO, remuneration of the CEO, and appointment of any subcommittee within the company to advise the board.

The decision whether to have standard or bespoke bye-laws should primarily be based on the nature and industry of the company. If the company is quite large, with subsidiaries, a large amount of shareholders, and is involved in an industry which is multinational and or is a regulated industry then bespoke bye-laws would be the likely choice. Standard bye-laws are not to be considered as some inept set of bye-laws for the most basic of companies, they are required by the Companies Act to provide for proper governance of a company and are more than equipped to handle most companies. However, large multinational companies tend to have very specific ways of dealing with situations and specific governance policies which they want to ensure are followed by including them in the bye-laws. It is important to keep in mind that choosing to go with bespoke bye-laws does not give a company complete freedom to include and remove whatever they like in the bye-laws.

Section 13 (1) of the Companies Act sets out the basic requirements for the bye-laws of a company registered in Bermuda. Furthermore, section 13 (5) stipulates that any amendments to the bye-laws proposed by the board of directors of a company are to be approved by the members at a general meeting. This ensures that the



directors of a company cannot take it upon themselves to amend the document which governs their obligations and authority.

When bye-laws are drafted carefully and adhered to, they can provide shareholders with protection from and ensure fairness of board decisions. Bye-laws are fundamental to the success of any company, as they outline the rules of the company and provide comprehensive guidelines to ensure the operations run smoothly.

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BeesMont Law Limited
5th Floor Andrew's Place, 51 Church St., Hamilton HM 12, Bermuda
T +1 441 400 4747 F +1 441 236 1999 W beesmont.bm