



Conyers Dill & Pearman

# Barbados to Cayman: Companies Transferring By Way of Continuation

## Foreword

This memorandum has been prepared for the assistance of those who are considering the process of transfer by way of continuation to the Cayman Islands of certain types of Barbados companies. It deals in broad terms with the requirements of Cayman Islands Companies Law for the process of transfer by way of continuation and the requirements of Barbados Companies Law for the process of discontinuance. It is not intended to be exhaustive but merely to provide an outline of the relevant rules.

The information regarding the laws in Barbados and the effect of such laws have been provided to us. We have made no investigation of and express no opinion in relation to the laws of any jurisdiction other than the Cayman Islands. In particular, Conyers Dill & Pearman does not advise on the laws of Barbados and this document must not be construed as advice on the laws of Barbados.

Before proceeding with any steps in the process of transfer by continuation in the Cayman Islands, clients are advised to consider the implications in Barbados and to consult with other professional advisers as appropriate. We also recommend that our clients seek legal advice in Cayman on their specific proposals before taking steps to implement them. Conyers Dill & Pearman would be pleased to assist.

This memorandum has been prepared on the basis of the law and practice as at the date referred to below.

**Conyers Dill & Pearman**

27 April 2011

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## 1. INTRODUCTION

The Companies Law (the “CI Law”) of the Cayman Islands provides that a company with limited liability and a share capital under the laws of any jurisdiction outside the Cayman Islands (“the Registrant”) may apply to the Registrar of Companies (the “CI Registrar”) to be registered in the Cayman Islands by way of continuation as an exempted company. The CI Law makes it clear that a new legal entity is not created.

The Barbados Companies Act (“BCA”) provides that companies may migrate from Barbados upon continuance in another jurisdiction. Barbados companies licensed as International Business Companies, Exempt Insurance Companies and International Financial Services Companies are sufficiently similar to the Cayman Islands’ exempted company so as to comply the CI Law and allow the continuance in the Cayman Islands.<sup>1</sup>

## 2. CONTINUANCE IN THE CAYMAN ISLANDS

### 2.1 Procedure

The CI Registrar will register a Registrant by way of transfer if the following conditions are satisfied:

- A. The Registrant is incorporated, registered or existing in a jurisdiction which permits or does not prohibit the transfer of the Registrant. We confirm that Barbados is such a jurisdiction;
- B. The Registrant has paid the CI Registrar a fee equal to the fee payable on the registration of an exempted company;
- C. The Registrant has delivered to the CI Registrar a certified and authenticated copy of its charter, statutes or memorandum and articles of association or by-laws, and

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<sup>1</sup> This memorandum does not address International Societies with Restricted Liability registered in Barbados. We are able to provide information on their migration on request.

- a list of its directors, containing the required particulars (“the Charter Documents”);
- D. The name of the Registrant is acceptable to the CI Registrar or the Registrant has undertaken to change the name to an acceptable name within sixty days of registration;
  - E. The Registrant has filed with the CI Registrar a notice of its proposed registered office;
  - F. The Registrant has filed with the CI Registrar a declaration signed by a director of the Registrant that the operations of the Registrant will be conducted mainly outside the Cayman Islands;
  - G. The Registrant is constituted in a form or substantially a form which could have been incorporated as an exempted company limited by shares under this CI Law;
  - H. The Registrant has delivered to the CI Registrar an undertaking signed by a director that notice of the transfer has been or will be given within twenty-one days to the secured creditors of the Registrant;
  - I. The CI Registrar determines that it would not be against the public interest to register the Registrant;
  - J. The Registrant, if it is (or will when registered by way of continuation be) prohibited from carrying on its business in or from within the Cayman Islands unless licensed under any law, has applied for and obtained the requisite licence, e.g. Insurance Law.

The Registrant must also file a voluntary declaration or affidavit of a director of the Registrant to the effect that, having made due enquiry, he is of the opinion that the following requirements have been met:

- A. No petition or other similar proceeding has been filed and remains outstanding or order made or resolution adopted to wind up or liquidate the Registrant in any jurisdiction;
- B. No receiver, trustee or administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the Registrant, its affairs or its property or any part thereof;

- C. No scheme, order or compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the Registrant are and continue to be suspended or restricted;
- D. The Registrant is able to pay its debts as they fall due;
- E. The application for registration is bona fide and not intended to defraud creditors of the Registrant;
- F. Any consent or approval to the transfer required by any contract or undertaking entered into or given by the Registrant has been obtained, released or waived, as the case may be;
- G. The transfer is permitted by and has been approved in accordance with the Charter Documents of the Registrant;
- H. The laws of Barbados with respect to transfer have been or will be complied with;
- I. The Registrant will, upon registration, cease to be incorporated, registered or exist under the laws of Barbados. This condition can be satisfied under the BCA.

The declaration or affidavit must include a statement of the assets and liabilities of the Registrant made up to the latest practicable date before the making of the declaration or affidavit.

A director who makes such a declaration or affidavit without reasonable grounds to is guilty of an offence and is liable on summary conviction to a fine (US\$ 18,000) and/or imprisonment for five years.

## 2.2 Consequences

Once all the required filings are made with the CI Registrar's office the Registrant will be registered and the certificate of registration will be issued within approximately 3-5 business days. As mentioned earlier, the Registrant may apply for express registration by making the request in the application and paying the prescribed express fees. An express registration and certificate is obtained within 24-36 hours of submitting the relevant documents and fee to the CI Registrar's office.

On the registration the CI Registrar will issue a certificate under his hand and seal of office to the effect that the Registrant has been registered as an exempted company and specifying the date of such registration. The CI Registrar is also required to enter the date of registration in the register of companies. The CI Registrar will also give notice in the Cayman Gazette of the registration of the Registrant, the fact that it was previously incorporated in Barbados and the previous name of the Registrant, if changed.

From the date of the registration, the Registrant continues as a body corporate for all purposes as if incorporated and registered as an exempted company, but without limitation to the generality of the foregoing:

- (a) the capacity to perform all the functions of an exempted company;
- (b) the capacity to sue and be sued;
- (c) perpetual succession; and
- (d) the power to acquire, hold and dispose of property; (and the members of the company shall have liability to contribute to the assets of the company in the event of its being wound up under this CI Law).

Note however, that registration will not operate:

- (a) to create a new legal entity;
- (b) to prejudice or affect the identity or continuity of the Registrant as previously constituted;
- (c) to affect the property of the Registrant;
- (d) to affect any appointment made, resolution passed or any other act or thing done in relation to the Registrant pursuant to a power conferred by any of the Charter Documents of the Registrant or by the laws of the jurisdictions under which it was previously incorporated, registered or existing;
- (e) except to the extent provided by or pursuant to this part of the CI Law, to affect the rights, powers, authorities, functions and liabilities or obligations of the Registrant or any other person; or

- (f) to render defective any legal proceedings by or against the Registrant, and any legal proceedings that could have been continued or commenced by or against the Registrant before its registration may, notwithstanding the registration, be continued or commenced by or against the Registrant after registration.

Additional applications may be appropriate. While corporations are not taxed by the Cayman Islands, one may obtain from the Government a Certificate of Tax Exemption which provides an undertaking against any taxation that might be enacted for the next twenty years. Regulated entities must, in addition, apply to be licensed by or registered with the Cayman Islands Monetary Authority.<sup>2</sup>

### **3. REQUIREMENTS AND PROCEDURE FOR DISCONTINUANCE**

#### **3.1 BCA Requirements**

The BCA provides that the following conditions must be met for continuance in the Cayman Islands and discontinuance in Barbados:

- A. Authorisation by the Registrant's shareholders, by way of special resolution, given at a meeting duly convened. The notice of the meeting must state that dissenting shareholders are entitled to be paid the fair value of their shares. Each share, regardless of stated voting rights, can be voted;
- B. The continuance in the Cayman Islands will not adversely affect the Registrant's creditors or shareholders;
- C. The property of the Registrant will continue to be its property;
- D. The obligations of the Registrant continue to be its obligations;
- E. Any existing cause of action, claim or liability to prosecution is unaffected;
- F. A conviction against or ruling order or judgment in favour of or against, the Registrant can be enforced by or against it;
- G. The Registrant has no liabilities to discharge to the National Insurance Office;

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<sup>2</sup> The requirements of CIMA are beyond the scope of this memorandum. We are able to provide information on request.

H. The Registrant has no liabilities to discharge to the Commissioner of Inland Revenue.

### 3.2 Filing Requirements

The Registrar of Barbados will discontinue the Registrant on the receipt of the following evidence in Director's Declaration (supported by attached documents and certificates) stating that:

- A. Notice of the shareholders meeting was duly sent to the shareholders, directors and auditor of the Registrant;
- B. A special resolution approving of the continuance in the Cayman Islands and discontinuance in Barbados was passed;
- C. An opinion from an attorney-at-law of the Cayman Islands was obtained and that it states:
  - a) the continuance will not affect any obligations or liabilities of the Registrant;
  - b) the continuance will not affect the choice of law applicable to the Registrant prior to the registration of the continuance;
  - c) A conviction against, or ruling, order or judgment in favour of or against, the Registrant may be enforced by or against it;
  - d) The property of the Registrant will continue to be property of the body corporate;
  - e) The Registrant will continue to be liable for its obligations;
  - f) Any existing cause of action, claim or liability to prosecution is unaffected;
  - g) A civil, criminal or administrative action or proceeding pending by or against the Registrant may be enforced by or against it;
- D. The opinion demonstrates that the conditions precedent in the BCA will be satisfied;
- E. That continuance will not adversely affect the Registrant's shareholders;
- F. That continuance will not adversely affect the Registrant's creditors;
- G. The Registrant has no liabilities to discharge to the National Insurance Office;

H. Registrant has no liabilities to discharge to the Commissioner of Inland Revenue;

Upon the Barbados Registrar being satisfied that the requirements have been met and that the Registrant has been continued in the Cayman Islands, he must file the notice and issue a certificate of discontinuance (and send it to the Registrant's representative) and publish notice in the Barbados Gazette. The Registrant then becomes an external company for the purposes of the BCA. Usually the discontinuance application takes four to six weeks to process.

#### 4. TAXATION ISSUES

BCAs licensed as International Business, Exempt Insurance, and International Financial Services companies are taxed on profits on sliding rate of tax from a maximum of 2.5% to 1%. These companies are excused from paying ad valorem stamp duty (except in respect of real estate) and customs duty on certain business related imports, and certain specially qualified employees are allowed concessions on income tax otherwise due. When a Registrant becomes an external company for the purposes of the BCA it incurs no additional tax liability in Barbados. That is, there is no tax liability triggered by discontinuance and tax liability on profits ends on discontinuance in Barbados.

The Cayman Islands do not tax the income or profits of companies or their employees, but exempted companies are not excused from paying stamp duty or customs duty on imported items used in business.

*This publication is not a substitute for legal advice nor is it a legal opinion. It deals in broad terms only and is intended merely to provide a brief overview and give general information. Conyers Dill & Pearman does not advise on the laws of Barbados.*

### **About Conyers Dill & Pearman**

Conyers Dill & Pearman advises on the laws of the Cayman Islands, British Virgin Islands, Bermuda, Mauritius and Cyprus. Conyers' lawyers specialise in company and commercial law, commercial litigation and private client matters.

The combination of Conyers' structure, culture and expertise enables the highest quality, responsive, timely and thorough legal advice. Conyers' strategic global presence in major international business centres allows a seamless 24 hour service.

Conyers' sophisticated client base includes FTSE 100 and Fortune 500 companies. Working with leading local and international firms, Conyers advises on highly complex multi-jurisdictional projects.

Affiliated companies (Codan) provide a range of trust, corporate secretarial, accounting and management services.

Founded in 1928, Conyers has 600 staff, including more than 150 lawyers.

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