

# **RESOLUTIONS IN TERMS OF THE** **2008 COMPANIES ACT**

## **Newsletter 9 / 2013**

### ***1. DIRECTORS' RESOLUTIONS***

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- 1.1. Under the 1973 Companies Act ("the 1973 Act") directors were elected by the shareholders and there were a number of transactions which required shareholder approval.
- 1.2. Under the 2008 Act, however, the position of directors has strengthened. Directors are tasked with the management of a company and, unless there is a provision to the contrary in the company's MOI or in the Act, a directors' resolution alone is sufficient authority for a particular act.
- 1.3. If the MOI does restrict the directors' powers or authority, their acts can be ratified by a special resolution of shareholders.
- 1.4. Acts which contravene the Act cannot be ratified by shareholders.
- 1.5. With regard to third parties dealing with a company in good faith, a company's actions will be deemed to be valid (and the company will be bound) despite a prohibition in the MOI or a lack of authority on the part of directors. This does not apply if the people purporting to be directors were not directors or if the company is infenced.
- 1.6. Under the 2008 Act, directors' resolutions (including round robin resolutions) can be passed by a simple majority unless the MOI provides otherwise.
- 1.7. The Minutes or resolution can be signed by the chairperson of the meeting and this will be sufficient evidence of the resolution.
- 1.8. It is therefore possible to have a valid directors' resolution with only one signature (that of the chairperson).

### ***2. SHAREHOLDERS' RESOLUTIONS***

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- 2.1. If required, shareholders' resolutions (including round robin resolutions) may be passed by a simple majority unless the MOI or the 2008 Act requires a higher percentage.
- 2.2. Details of those resolutions requiring a special resolution are set out in sections 65 (11) and 65 (12) of the Act.

### **3. CONFIRMATION OF IDENTITIES OF SHAREHOLDERS AND DIRECTORS**

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- 3.1. Under the 1973 Act:
- (a) A director became entitled to act on election and on delivery to the Company of a Consent to Act as director (CM27) and the company was obliged to keep a register of directors and to advise CIPRO (now CIPC) of any changes to the register by way of a CM29 form.
  - (b) Failure to file the above forms timeously was a criminal offence.
  - (c) Accordingly, companies often entrusted these functions to their auditors.
- 3.2. It was therefore prudent for parties dealing with a company under the 1973 Act to obtain a CIPRO search (which was quite reliable because of the threat of criminal prosecution) and to have the auditors countersign the resolutions of shareholders and directors to confirm their identities and authority to act.
- 3.3. Under the 2008 Act:
- (a) A director who is appointed or elected (or entitled to act *ex officio*) is required timeously to deliver to the company a consent to act as director.
  - (b) The company is obliged to keep a “record” (not a register as in the 1973 Act) of directors and to advise CIPC (via Form CoR39) of changes to directors within 10 business days of the change.
  - (c) The 2008 Act does not say whether a director’s authority to act ceases if the CoR39 form is not delivered to CIPC timeously. It is submitted that the director’s authority will remain valid.
  - (d) Failure to file the above forms is no longer a criminal offence: at worst it appears that an administrative fine may be payable.
  - (e) Companies may no longer entrust these functions to their auditors because it is no longer obligatory for some companies to have auditors: the obligation on a company to be audited will depend on that company’s public interest score.
- 3.4. The 2008 Act has therefore created a situation where it is no longer possible for a third party to rely on a CIPC search and auditors’ countersignature of resolutions to be satisfied as to the identities and powers of directors.

### **4. RECOMMENDATIONS**

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- 4.1. It is critical that a party dealing with a company satisfy itself as to:
- (a) The identity of the people authorised to represent the company; and
  - (b) The power of the company (and its representatives) to conclude the transaction in question.
- 4.2. It is possible that the only evidence of a valid resolution of a company will be a copy of a directors’ resolution signed by the chairperson of the meeting. In some cases (depending on the 2008 Act and the company’s MOI) a shareholders’ resolution will not be required at all.
- 4.3. If the third party does not confirm the identity and powers of a company’s directors and if it turns out there was a defect in their appointment or a



restriction on their powers, the transaction will be valid but, if the company suffers a loss as a result of the transaction, the third party may be exposed to a shareholder's claim.

- 4.4. A third party can confirm the identities and powers of directors for each transaction by obtaining:
- (a) A copy of the company's share register (to confirm the identities of the shareholders).
  - (b) A shareholders' resolution confirming that:
    - (i) the directors (whose names are listed in the shareholders' resolution) have been properly appointed;
    - (ii) the directors are not precluded by the 2008 Act, the MOI or shareholders' agreement from concluding the proposed transaction; and
    - (iii) to the extent that shareholder authorisation is required by the 2008 Act or the MOI, the shareholders authorise the transaction.
  - (c) Copies of each director's acceptance of appointment;
  - (d) A directors' resolution signed by all directors;
  - (e) Copies of the company's MOI and shareholders' agreement.
- 4.5. The danger of asking for all of the above documents is that, if something important is overlooked, the third party cannot hide behind the protection given by the Turquand rule (the effect of this rule is that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal rules and procedures). The above documents must be requested if the company is ring-fenced.
- 4.6. As an alternative to the list in clause 4.4 above, the third party can retain the protection afforded by the Turquand Rule by taking reasonable steps to ascertain the identities and powers of the parties representing the company. In most cases, this should consist of:
- (a) A directors' resolution signed by all directors;
  - (b) A CIPC search (the directors' names on the search should accord with the names on the resolution, failing which further investigations should occur);
  - (c) A shareholders' resolution confirming that:
    - (i) the directors (whose names are listed in the shareholders' resolution) have been properly appointed;
    - (ii) the directors are not precluded by the 2008 Act, the MOI or shareholders' agreement from concluding the proposed transaction
    - (iii) to the extent that shareholder authorisation is required by the 2008 Act or the MOI, the shareholders authorise the transaction.
- 4.7. Auditors' countersignature of resolutions will be useful but not decisive.

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