- may register as a segregated portfolio company;[10] and
- may apply to be registered as a special economic zone company.[11]

1.003 Companies may be formed with liability limited by shares, limited by guarantee or unlimited liability.[12] In the case of a company limited by shares, the memorandum must specify that the liability of shareholders is limited and the authorised share capital of the company.[13] The authorised share capital of a company may be denominated in any one or more currencies.

1.004 A company may also be formed with liability limited by shares with or without par value. A company may have some classes of shares with limited liability and others with unlimited liability.[14] A company is not able to maintain share capital with both par value and no par value shares.[15] In addition, where a company maintains no par value shares, the memorandum of association is required to contain the amount of the aggregate consideration for which such shares may be issued[16] and the entire subscription consideration price is treated as capital.[17] Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, the memorandum of association must include a declaration that the liability of its members is limited and the amount of capital with which it proposes to be registered, divided into shares of a certain fixed amount to be also therein specified.[18]

1.005 Where a company is formed on the principle of having the liability of its members limited by guarantee, the memorandum of association is also required to contain a declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges and expenses of the winding up of the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specific amount to be therein named.[19] If the company has more than one class of member, the memorandum of association may contain a declaration that in a winding up of the company the amount of the undertaking of the members of a particular class will be unlimited.[20] A company limited by guarantee may have a share capital.[21]

1.006 A limited liability exempted company may be formed in the Cayman Islands with a name that does not have the word "Limited", "Corporation", "Incorporated", "Société

[10] Companies Law, section 213.
[11] *Ibid*, section 182A(1).
[12] *Ibid*, sections 5 and 9(1).
[13] *Ibid*, section 8(1).
[14] *Ibid*, section 8(2).
[15] *Ibid*, section 8(1). In light of this prohibition, it is questionable whether a company with no par value shares can ever convert to a company with no par value shares or vice versa as any conversion mechanism is likely to require a period in time where both types of shares have been authorized.
[16] Companies Law, section 8(1).
[17] Companies Law, section 34(1). This makes the use of no par value less desirable as the company cannot create a share premium account which can be used for distributions.
[18] Companies Law, section 8(1).
[19] Companies Law, section 9(1).
[20] *Ibid*, section 9(2).
[21] *Ibid*, section 9(3).

Anonyme" or "Sociedad Anónima" or any of their respective abbreviations. However, the name must not be identical or nearly resemble a company already in existence on the register.[22] In addition, there are restrictions on the use of the words "Chamber of Commerce" and "building society" in the name.[23]

1.007 Except with the consent of the Registrar of Companies, no company may be registered with names containing the words:

(a) "royal", "imperial" or "empire" or any other word which in the opinion of the Cayman Registrar suggests or is calculated to suggest the patronage of the Queen or any members of the Royal Family or connected with Her Majesty's Government or any department of that government in the United Kingdom or elsewhere;

(b) "municipal" or "chartered" or any other word which in the opinion of the Cayman Registrar suggests or is calculated to suggest connection with a public board or other local authority or any society or body incorporated by Royal Charter;

(c) "cooperative", "assurance", "bank", "insurance", "trust" or any similar words which in the opinion of the Cayman Registrar, connote any such activities or any derivative of any of the four words or similar words, whether in English or in any other language or in the opinion of the Cayman Registrar suggest or are calculated to suggest any such activities; or

(d) contains the word "gaming" or "lottery" or any similar word which in the opinion of the Registrar connotes any such activity or any derivative of such words or of such similar word, whether in English or in any other language, or in the opinion of the Registrar suggests or is calculated to suggest any such activity.[24]

1.008 A company may have a dual foreign name (including a Chinese name) as part of its official name. The dual foreign name is not required to be transliteration or translation of the English name of the company.[25] There are specific rules for registering a dual foreign name which require a translation or transliteration of the name to be provided to the Registrar of Companies by either a person licensed to provide such company's registered office in the Cayman Islands or a certified translator (together with a statement in prescribed form as to the foreign language in which the dual foreign name is written). It should be noted that where the foreign name does not directly translate into the English name, the Registrar of Companies' practice is to include the English translated name of the foreign name on the certificate of incorporation.

1.009 The name of the company must be displayed outside its registered office and every other office or place in which the business of the company is carried on.[26]

[22] Companies Law, section 30(1).
[23] Companies Law, section 30(1).
[24] *Ibid*, section 30(2).
[25] *Ibid*, section 30(4).
[26] Companies Law, section 52.

The memorandum will contain the names of the initial subscribers. It is usual for the local registered office of the company to provide nominee subscribers to the memorandum.[27] The memorandum must specify the number of shares agreed to be taken by each subscriber.[28] There must be at least one subscriber who must subscribe for at least one share.[29]

1.010 The memorandum will also set out the objects of the company.[30] If no objects are specified or if the objects are specified, but the business of the company is not restricted to the furtherance of those objects, then the company will have the power and authority to carry out any object not prohibited by the Companies Law or any other Cayman legislation.[31]

1.011 No act of a company will be invalidated by reason only of the fact that the company lacks capacity; that is, the ultra vires rule does not apply.[32] A lack of capacity or power can however be asserted in proceedings by a member or a director to prevent the company from taking a particular action by the company against its directors for loss or damage for an unauthorised act.[33]

1.012 The Companies Law permits an exempted company to issue bearer shares but such the issue of such shares is restricted to any person other than a custodian.[34] The Companies Law also expressly prohibits a shareholder from transferring bearer shares to a person other than a custodian and where shares are so transferred; a transferee is required to transfer such shares to a custodian within 60 days.[35] If the shares are not transferred within the prescribed time limit, the shares will be considered null and void for all purposes under the Companies Law.[36]

1.013 Articles provide for the regulation of a company's affairs and are generally registered along with the memorandum upon incorporation.[37] Each memorandum and the articles, if any, must be numbered and filed consecutively and endorsed with the date of the month and year of such filing.[38] The Companies Law contains a table (Table A) setting out standard regulations that may be adopted by reference.[39] However, the general practice has been to exclude Table A in favour of other articles prepared by the Cayman Islands service provider or law firm and a statement dis-applying Table A will normally appear at the beginning of the articles.

---

27 Although it is possible for the subscriber to the memorandum to be some other person such as the original shareholder.

28 Companies Law, section 7(3).

29 Companies Law, sections 5 and 7(2).

30 *Ibid*, section 7(4).

31 *Ibid*, section 7(4).

32 *Ibid*, section 28(1).

33 Companies Law, section 28(1).

34 Companies Law, section 229(1). A custodian is defined under the Companies Law as "an authorised custodian" who is a person licensed under the Companies Management Law (2018 Revision) to act as a custodian of bearer shares or a bank or trust company licensed under the Banks and Trust Companies Law (2018 Revision) or a "recognised custodian" which is an investment exchange or a clearing organisation operating a securities clearance or settlement system and carried on in a country specified in the Money Laundering Regulations (2018 Revision) and which has been approved by The Cayman Islands Monetary Authority to act as custodian of bearer shares. *Ibid*, section 2(1).

35 Companies Law, sections 229(2) and 229(6).

36 Companies Law, section 229(6).

37 *Ibid*, section 26(1).

38 *Ibid*, section 26(2).

39 *Ibid*, section 22(1) and Schedule 1.

1.014 Where articles have been registered, a copy of every special resolution in force must be annexed to or embodied in every copy of the articles issued after such resolution is passed.[40] The articles must also be divided into paragraphs numbered consecutively, bear the same stamp as if they were contained in a deed and be signed by each subscriber to the memorandum in the presence of and attested by at least one witness.[41] If articles are not registered with the memorandum the company may, subject to the conditions of the memorandum, adopt articles which must be signed by each existing shareholder of the company in the presence of and attested by at least one witness or by passing a special resolution.[42]

1.015 In the case of an unlimited company the articles must state the number of members with which the company proposes to be registered and, if the company has a share capital, the amount of share capital with which the company proposes to be registered.[43] In the case of a company limited by guarantee, the articles must state the number of members with which the company proposes to be registered.[44]

1.016 The memorandum, together with the articles, forms the constitution of a Cayman Islands company. When the memorandum and articles of the company are registered, they bind the company and the members thereof to the same extent as if each member has subscribed affixed his or her seal thereto.[45]

1.017 A copy of the memorandum and the articles must be forwarded to every shareholder if requested on payment of a reasonable sum, not exceeding CI$1.00 for each copy and where provision is not made for payment, the copy must be provided gratuitously.[46]

1.018 Every company must have a registered office in the Cayman Islands to which all communications may be sent.[47] Notice of the situation of the registered office must be provided to the Registrar of Companies and published by public notice.[48] The location of the registered office is a matter of public record.[49] Although the registered office of a Cayman company is set out in its memorandum, the directors of the company may, by resolution, change the location of the registered office provided that within 30 days of the resolution being passed the company must deliver to the Registrar a certified copy of the resolution.[50] The resolution of directors does not physically amend the memorandum and it is therefore possible for a company to have the name of one registered office in its memorandum while maintaining another.

1.019 The minimum number of directors of a Cayman company is one.[51] There is no requirement that any of the directors should be a resident in the Cayman Islands.

---

40 Companies Law, section 63(1).

41 *Ibid*, section 23.

42 *Ibid*, section 25(2).

43 *Ibid*, section 21(1).

44 *Ibid*, section 21(2).

45 *Ibid*, sections 12 and 25(3).

46 *Ibid*, section 29.

47 *Ibid*, section 50.

48 *Ibid*, section 51(1). Public notice is defined under the Cayman Companies Law as a public notice (whether in digital form or not) affixed by the Cayman Registrar at such place as may be determined , from time to time, by the Registrar.

49 Companies Law, section 51(2).

50 *Ibid*, section 11(1).

51 Although this is not expressly stated in the Cayman Companies Law, the position is inferred by section 57 which confirms that a meeting of directors may be validly convened and business conducted where only one director is present.

2. Directors

1.020 The names and addresses of the directors and officers must be entered on a register of directors and officers and kept at the registered office.[52] A copy of the register and any changes to the directors and officers must be filed with the Cayman Registrar within 60 days of the change taking place.[53] There is no requirement that the register of directors and officers be made available for inspection to the public and it will only be disclosed by the Cayman Registrar to persons authorised by the company. It is possible for the registered office of the company to request a certificate of incumbency from the Cayman Registrar listing the names and positions held by the current directors and officers based on their records.[54] The appointment of officers is optional.[55]

1.021 A Cayman company may open and maintain bank accounts in or out of the Cayman Islands insofar this is not restricted or prohibited by the Company's memorandum and articles.

1.022 A Cayman company must keep proper records of account with respect to all monies received and expended, all sales and purchases of goods and the assets and liabilities of the company[56] to give a true and fair view of the state of the company's affairs and to explain its transactions.[57] The records need not be kept in the Cayman Islands but must be retained for a minimum period of five years.[58] Unless the company is subject to the relevant licensing legislation, there is no general requirement that a company appoint auditors or file financial statements with the Registrar of Companies or any other governmental authority. The Companies Law does provide that a company which keeps its books of account at any place other than at its registered office or at any other place within the Cayman Islands shall, upon service of an order or notice by the Tax Information Authority pursuant to the Tax Information Authority Law (2017 Revision), make available, in electronic form or any other medium, at its registered office copies of its books of account, or any part or parts thereof, as are specified in such order or notice; and if the company fails to comply with the order or notice without reasonable excuse, the company shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which such non-compliance continues.[59]

1.023 The seal of the company may be affixed to documents and duplicate seals may be created for use in another jurisdiction, if required and permitted by the company's articles.[60] The Companies Law does not require a physical seal to be fixed to documents that are executed under seal provided that (a) it is expressed to be or is expressed to be executed or otherwise made clear on its face that it is intended to be a deed and (b) it

[52] Companies Law, section 55.
[53] *Ibid*, section 55.
[54] This is helpful to companies that are required by counter-parties such as banks to obtain an official list of directors of the company. However, it should be noted that the list maintained by the Cayman Registrar is a list provided to it by the company itself and is not conclusive of the directors of the company.
[55] In particular, a secretary may be appointed and if appointed, a secretary is able to perform certain functions under the Cayman Law with the authority of the directors.
[56] Companies Law, section 59(1).
[57] Companies Law, section 59(2).
[58] *Ibid*, section 59(3).
[59] *Ibid*, section 59(2A).
[60] *Ibid*, section 84(1).

is executed in the presence of a witness who attests the signature or at the direction of the individual and in his or her presence and the presence of two witnesses who each attest the individual's signature.[61]

1.024 A Cayman company may specify a date for its financial year-end. This is usually done by directors who are typically authorised to do so in the articles of the company.

1.025 The register of members of a Cayman company must contain the names and addresses of the members of the company and where a company has a share capital, a statement of the shares held by each member distinguishing each share by its number, so long as the share has a number, and the amount paid on each share. The register must also contain the date on which a person became a member and the date on which the person ceased to be a member.[62] An exempted company may cause to be kept in any country or territory one or more branch registers of such category or categories of members as the exempted company may determine from time to time.[63] A branch register is deemed to be part of the exempted company's register of members[64] and is to be kept in the same manner in which the principal register is required to be kept.[65] An exempted company must keep a duplicate of any branch register at the place where the principal register of members is kept duly entered up from time to time.[66]

1.026 In the case of a Cayman Islands exempted company, the register of members may, but need not be kept at the registered office and it need not be available for inspection by the public or any governmental authority in the Cayman Islands.[67] A company is however required make available at the registered office, in electronic form or any other medium, such register, including any branch register in the case of an exempted company, as may be required of it upon service of an order or notice by the Tax Information Authority pursuant to the Tax Information Authority Law (2017 Revision) and if the company fails to comply with the order or notice without reasonable excuse, the company shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which such non-compliance continues.[68]

1.027 Title to listed shares of a company may, if so authorised by such company's articles of association, or (in the absence of any applicable provisions in the company's articles of association) by a special resolution of such company, be evidenced and transferred in accordance with the laws applicable to and the rules and regulations of the relevant approved stock exchange that are or shall be applicable to such listed shares as referred to or specified in such articles of association or special resolution.[69]

[61] Property (Miscellaneous Provisions) Law, 2017 Revision, section 8. The effect of this law is that any document signed in accordance with this law and which is purportedly executed as a deed for and on behalf of a company will be treated as a deed, notwithstanding the fact that no seal has been affixed.
[62] Companies Law, section 40(1).
[63] *Ibid*, section 40A (1).
[64] *Ibid*, section 40A (2).
[65] *Ibid*, section 40A(3).
[66] *Ibid*, section 40A (4).
[67] *Ibid*, section 44(2).
[68] *Ibid*, section 44(4).
[69] *Ibid*, section 40B(1).

3. Share Certificates

1.028 A company may, but is not required to, issue share certificates with respect to its shares. A certificate specifying the shares held by a member of a company and purportedly signed by a person (including by facsimile or other mechanically affixed signature) with the express or implied authority of that company, is admissible in evidence as proof of the title of that member to those shares.[70]

4. Establishment

1.029 Service providers can check the availability of a desired name for a company and arrange for reservation of a name prior to incorporation on payment of a fee between CI$40.00 and CI$120.00 depending on the length of the reservation.[71]

1.030 A company is incorporated by delivery of two signed copies of the memorandum and articles, if any, to the Cayman Registrar.[72] On incorporation, the Registrar of Companies issues a certificate of incorporation which is conclusive evidence of all matters in respect of incorporation and registration.[73]

1.031 Once the company is incorporated, the organisational meetings must be held. The subscribers to the memorandum will typically be the service providers who are arranging for incorporation of the company. They will arrange for a subscriber's resolution to be passed to appoint the initial directors of the company who will, again, be designees of the service provider. The directors will then pass resolutions approving:

- the appointment of officers;
- the registered office of the company;
- the issue of the subscriber's share to the subscriber;
- the transfer of the subscriber's share to the proposed shareholder for whom the company has been incorporated;
- the issue of further shares, if necessary;
- the appointment of new directors;
- the resignation of the initial directors; and
- the adoption of a seal.

1.032 A sample of the documents and resolutions for the organisation of a Cayman Islands exempted company is set out in Annexure to this chapter.

1.033 Following these initial meetings, the company is in a position to commence its business activities. The management of a Cayman company is the responsibility of

[70] *Ibid*, section 43.
[71] Between US$48.78 and US$146.34.
[72] Companies Law, section 26(1).
[73] *Ibid*, sections 27(1) and 27(3).

its board of directors. Except as may be expressly provided in the company's articles, the shareholders' main control over the management of the company is through their power to appoint and dismiss its directors.

1.034 A company has the capacity to exercise all the functions of a natural person of full capacity, irrespective of any question of corporate benefit,[74] subject only to any express limitation in the objects or powers and provided that the transaction is not itself illegal. However, the directors of the company owe a duty to the company to ensure that transactions of the company are for the purposes of the company even where they are clearly within its corporate capacity. Where a third party dealing with the company has notice of any breach of this duty the transaction may be avoided by the company and the third party will be liable to account to the company for assets received or profits made. This general rule of law is of particular significance in cases where companies are providing guarantees and/or security in respect of the obligations of third parties.

1.035 The quorum for a meeting of directors or any committee thereof may be one or any greater number specified by the articles.

1.036 Any third party dealing with the company in the ordinary course of its business will generally be entitled to rely on any written or oral contract or agreement executed or entered into by any directors acting on behalf of the company. However, contracts should be presented to the board of directors for approval by resolution prior to execution.

1.037 Exempted companies are not required to hold annual general meetings.[75] The articles generally specify voting rights and the requirements relating to the summoning a meeting, but if no voting regulations are specified every shareholder has one vote and a meeting shall be duly summoned if five days' notice has been given to every shareholder if no regulations relating to the summoning of general meetings are set out.[76] Minutes must be taken of meetings of directors and shareholders but the minute book need not be kept in the Cayman Islands.[77]

1.038 A minute book should be maintained and kept up to date. The minute book is generally maintained at the registered office. Some records, such as the register of directors and officers and register of mortgages, must be maintained at the registered office. The minute book should contain:

(a) the certificate of incorporation;
(b) the memorandum and articles;
(c) the minutes of directors' and shareholders' meetings and any documents referred to in the minutes;
(d) written resolutions of the directors and shareholders;
(e) the Annual Return;
(f) the resignations of directors or officers and signed letters of acceptance of appointment of directors;

[74] *Ibid*, section 27(2).
[75] Companies Law, section 58.
[76] *Ibid*, section 61.
[77] *Ibid*, section 73(1).

(g) copies of share certificates issued and the share certificate stubs;

(h) share transfer forms;

(i) financial statements, if prepared;

(j) the tax exemption certificate (for an exempted company);

(k) the register of directors and officers;

(l) the register of members of the company;

(m) the register of all mortgages and charges specifically affecting property of the company; and

(n) originals of any certificates issued by any governmental authority to the company.

5. Taxation

1.039 There is no income, corporation or capital gains tax applicable either to a Cayman exempted company or on any issue or transfer of any of its shares. In addition, in accordance with the Tax Concessions Law (2018 Revision), a Cayman exempted company may obtain an undertaking from the Governor-in-counsel of the Cayman Islands that the company will not be subject to tax in the Cayman Islands on its income or capital gains or on its dividends for a period of 20 years from the date of the undertaking.

6. Government Fees

1.040 In January of each year an exempted company must furnish to the Registrar of Companies a return declaring that there has been no alteration in the memorandum, the operations of the exempted company have been mainly outside the Cayman Islands and that the exempted company has not traded in the Cayman Islands except in furtherance of its business carried on outside the Cayman Islands and all bearer shares are kept by a custodian.[78] This is typically done through the Cayman Islands service provider that provides the registered office for the company.

1.041 Every exempted company must pay an annual fee to the Cayman Islands government calculated in relation to its authorised share capital as at the time of the filing.[79]

1.042 The fees are as follows:

Not greater than US$50,000	US$573.17
Greater than US$50,000 but less than US$1,000,000	US$804.88
Greater than US$1,000,000 but less than US$2,000,000	US$1,687.80
Greater than US$2,000,000	US$2,400.00

78 Companies Law, section 187.
79 *Ibid*, section 169(1).

1.043 The Companies Law provides that where the Registrar of Companies has reasonable cause to believe that a company is not carrying on business or is not in operation, he may strike the company off the register.[80] The company will thereupon be dissolved and its assets will vest in the Cayman Islands Government. Non-payment of annual government fee is the most common cause of striking off.

7. Public Disclosure

1.044 Only limited information is available in the Cayman Islands with respect to a Cayman company. It is possible to ascertain:

- the registered name of a company;
- its date of incorporation and registration number (whether a Cayman company has been or is on the register of companies);
- the name and address of its registered office;
- the type of company it has been registered as; and
- the registered office of the company.

1.045 In addition, it is possible to check at the Grand Court of the Cayman Islands to ascertain if any proceedings have been initiated in the Cayman Islands with respect to the company.

8. Certificate of Good Standing

1.046 A company may apply to the Registrar of Companies for a certificate of good standing.[81] A company shall be deemed to be in good standing if all fees and penalties under the Companies Law have been paid and the Registrar has no knowledge that the company is in default.[82] The Companies Law provides that a certificate of good standing is evidence of the fact that a company is in good standing on the date that the certificate of good standing is issued.[83]

9. Continuations

1.047 A continuation into the Cayman Islands requires a foreign company to make an application to the Registrar of Companies.[84] The application for registration

80 *Ibid*, section 156(1). Striking off will not affect the liability, if any, of any director, manager, officer or member of the Company and such liability will continue and may be enforced as if the company had not been dissolved.
81 Companies Law, section 200A(1).
82 *Ibid*, section 200(A)(3).
83 *Ibid*, section 200(A)(2).
84 *Ibid*, section 201(1).

subsidiaries including: (a) the adoption, modification or operation of any employees' share scheme or any share incentive or share option scheme under which the director or his close associate(s) may benefit; or (b) the adoption, modification or operation of a pension fund or retirement, death or disability benefits scheme which relates both to directors, his close associates and employees of the issuer or any of its subsidiaries and does not provide in respect of any director, or his close associate(s), as such any privilege or advantage not generally accorded to the class of persons to which such scheme or fund relates; and (5) any contract or arrangement in which the director or his close associate(s) is/are interested in the same manner as other holders of shares or debentures or other securities of the issuer by virtue only of his/their interest in shares or debentures or other securities of the issuer.

4.037 Any person appointed by the directors to fill a casual vacancy on or as an addition to the board shall hold office only until the next following annual general meeting of the issuer, and shall then be eligible for re-election.

4.038 Where not otherwise provided by law, the issuer in general meeting shall have power by ordinary resolution to remove any director (including a managing or other executive director, but without prejudice to any claim for damages under any contract) before the expiration of his period of office.

4.039 The minimum length of the period, during which notice to the issuer of the intention to propose a person for election as a director and during which notice to the issuer by such person of his willingness to be elected may be given, will be at least 7 days, and that the period for lodgment of the notices referred to in the preceding sentence will commence no earlier than the day after the despatch of the notice of the meeting appointed for such election and end no later than 7 days prior to the date of such meeting.

(v) *Accounts*[15]

4.040 A copy of either (i) the directors' report, accompanied by the balance sheet (including every document required by law to be annexed thereto) and profit and loss account or income and expenditure account, or (ii) the summary financial report shall, at least 21 days before the date of the general meeting, be delivered or sent by post to the registered address of every member.

(vi) *Rights*[16]

4.041 Adequate voting rights will, in appropriate circumstances, be secured to preference shareholders, and the quorum for a separate class meeting (other than an adjourned meeting) to consider a variation of the rights of any class of shares shall be the holders of at least one-third of the issued shares of the class.

(vii) *Notices*[17]

4.042 Where power is taken to give notice by advertisement such advertisement may be published in the newspapers. An overseas issuer whose primary listing is or is to be

[15] Listing Rules, Appendix 3–5.
[16] *Ibid*, Appendix 3–6.
[17] *Ibid*, Appendix 3–7.

on the Exchange shall give notice sufficient to enable members, whose registered addresses are in Hong Kong, to exercise their rights or comply with the terms of the notice. If the overseas issuer's primary listing is on another stock exchange, the Exchange will normally be satisfied with an undertaking by the issuer to do so and will not normally request the issuer to change its articles to comply with this paragraph where it would be unreasonable to do so. There is no prohibition on the giving of notice to members whose registered address is outside Hong Kong.

(viii) *Redeemable Shares*[18]

Where the issuer has the power to purchase for redemption a redeemable share, (1) purchases not made through the market or by tender shall be limited to a maximum price; and (2) if purchases are by tender, tenders shall be available to all shareholders alike. **4.043**

(ix) *Capital Structure*[19]

The structure of the share capital of the issuer must be stated in the articles of association and where such capital consists of more than one class of share it must also be stated how the various classes shall rank for any distribution by way of dividend or otherwise. **4.044**

(x) *Non-Voting or Restricted Voting Shares*[20]

Where the capital of the issuer includes shares which do not carry voting rights, the words "non-voting" must appear in the designation of such shares, and where the equity capital includes shares with different voting rights, the designation of each class of shares, other than those with the most favourable voting rights, must include the words "restricted voting" or "limited voting". **4.045**

(xi) *Proxies*[21]

Where provision is made in the articles as to the form of proxy, this must not preclude the use of the two-way form. A shareholder that is a corporation may execute a form of proxy under the hand of a duly authorised officer. **4.046**

(xii) *Disclosure of Interests*[22]

No powers shall be taken to freeze or otherwise impair any of the rights attaching to any share by reason only that the person or persons who are interested directly or indirectly therein have failed to disclose their interests to the company. **4.047**

(xiii) *Untraceable Members*[23]

Where power is taken to cease sending dividend warrants by post, if such warrants have been left uncashed, it will not be exercised until such warrants have been so left **4.048**

[18] Listing Rules, Appendix 3–8.
[19] *Ibid*, Appendix 3–9.
[20] *Ibid*, Appendix 3–10.
[21] *Ibid*, Appendix 3–11.
[22] *Ibid*, Appendix 3–12.
[23] *Ibid*, Appendix 3–13.

uncashed on two consecutive occasions. However, such power may be exercised after the first occasion on which such a warrant is returned undelivered.

4.049 Where power is taken to sell the shares of a member who is untraceable it will not be exercised unless: (a) during a period of 12 years at least three dividends in respect of the shares in question have become payable and no dividend during that period has been claimed; and (b) on expiry of the 12 years the issuer gives notice of its intention to sell the shares by way of an advertisement published in the newspapers and notifies the Exchange of such intention.

(xiv) *Voting*[24]

4.050 Where any shareholder is, under the Exchange Listing Rules, required to abstain from voting on any particular resolution or restricted to voting only for or only against any particular resolution, any votes cast by or on behalf of such shareholder in contravention of such requirement or restriction shall not be counted.

4.051 Appendix 13 of the Listing Rules require that the articles of association conform with additional provisions relating to (i) the amendment of the memorandum and articles of association of the company, (ii) amendments to different classes of share capital of the company and appointment of proxies, (iii) the time and frequency of holding of annual and other general meetings of the company and the ability of members to inspect the branch register of members in Hong Kong, (iv) the keeping of proper books of account, and an obligation to lay such accounts before the members at the annual general meeting of the company, (v) the rights of members to remove directors, and restrictions on the making of loans or payments for loss of office to directors, and (vi) the unique position as a member of the company of any clearing house and associated rights related thereto.

(h) Corporate Governance Requirements

4.052 Chapter 13 of the Listing Rules provide that all votes at general meetings should be conducted by way of a poll except where the chairman of the meeting, in good faith, decides to allow a resolution which relates purely to a procedural or administrative matter to be voted on by a show of hands. This provision is commonly included in a company's articles.[25]

4.053 In addition, the code on corporate governance practices (the "Code") is set out in Appendix 14 of the Listing Rules and sets out the principles of good corporate governance, and two levels of recommendations: (a) code provisions; and (b) recommended best practices. Issuers are expected to comply with, but may choose to deviate from, the code provisions. The recommended best practices are for guidance only. Issuers may also devise their own code on corporate governance practices on such terms as they may consider appropriate. Issuers must state whether they have complied with the code provisions set out in the Code for the relevant accounting period in their interim reports (and summary interim reports, if any) and annual reports (and summary financial reports, if any). Most Hong Kong listed companies include in

[24] Listing Rules, Appendix 3–14.
[25] *Ibid*, Chapter 13.39(4).

their articles provisions of the Code where the articles address the relevant corporate governance issue. The following are the principle provisions that are usually included:

– if a substantial shareholder or a director has a conflict of interest in a matter to be considered by the board which the board has determined to be material, the matter should be dealt with by a physical board meeting rather than a written resolution.[26]

– directors appointed to fill a casual vacancy should be subject to election by shareholders at the first general meeting after their appointment and every director, including those appointed for a specific term, should be subject to retirement by rotation at least once in every three years.[27]

– notices to shareholders to be sent in the case of annual general meetings at least 20 clear business days before the meeting and to be sent at least 10 clear business days in the case of all other general meetings.[28]

2. Post-Offering Matters

4.054 The principal register of members will be transferred to the company's share registrar in the Cayman Islands. In addition, the company will establish a branch register of members in Hong Kong.[29]

4.055 The Cayman Companies Law specifically permits an exempted company to cause to be kept in any country or territory one or more branch registers of such category or categories of members as the exempted company may determine from time to time. Any such branch register is deemed to be part of the exempted company's register of members, and is to be kept in the same manner as the main register. This permits the company, whilst a private company, to maintain registers in both Cayman and Hong Kong, and to allow transfers of any sale shares prior to IPO to be undertaken on the Cayman register, where they would usually not be subject to Hong Kong stamp duty.

4.056 Following the IPO, the Cayman Companies Law also specifically provides that title to listed shares of a company may be evidenced and transferred in accordance with the laws applicable to and the rules and regulations of the relevant approved stock exchange that are applicable to such listed shares.

4.057 Once the application lists have closed, the directors of the company (or a committee of directors) will meet to allot the shares. Typically, shares will be issued on the branch register of members in Hong Kong. However, where the public offer includes an offer for sale by one of the existing shareholders of the company, the issue of shares is likely to take place on the principal register of members of the company in the Cayman Islands. This will allow the transfer of shares pursuant to any offer for sale to take place

[26] *Ibid*, Appendix 14-A.1.7.
[27] *Ibid*, Appendix 14-A.4.2.
[28] Listing Rules, Appendix 14-E.1.3.
[29] The Cayman Companies Law does not require a Cayman company to maintain a share register in the Cayman Islands so it is possible to have the register solely maintained in Hong Kong/Singapore, though this is highly unusual.

on the principal register of members, thereby avoiding the need to pay stamp duty in Hong Kong on the transfer of shares.

4.058 A Cayman company will need to file: (i) its new memorandum and/or articles;[30] and (ii) a notice of increase in authorised share capital with the appropriate government fee.[31]

3. Schemes of Arrangement

4.059 An alternative way in which a company can list in Hong Kong is by way of a scheme of arrangement under the Hong Kong Companies Ordinance.[32] This process is commonly known as a "relocation scheme" and may involve an existing Hong Kong, Bermuda or Cayman company listed in Hong Kong. The process described below addresses a scheme involving an existing Hong Kong incorporated company. The procedures would however be substantially similar for an existing Bermuda or Cayman company for such a scheme.[33]

4.060 Further details of such scheme of arrangement are set out in Chapter 7.

4. Mergers, Relocations and Prospectus Requirements

4.061 There are a significant number of Cayman companies listed on other global stock markets, such as the New York Stock Exchange, NASDAQ and the London Stock Exchange, including the AIM market.

4.062 As mentioned in the previous chapter, an existing public company incorporated in another jurisdiction may wish to change its jurisdiction of incorporation to the Cayman Islands without terminating its corporate existence or requiring the insertion of a new holding company. Assuming it is possible under the laws of its present jurisdiction of incorporation,[34] such a company can move to the Cayman Islands by using the continuation or an amalgamation or merger process.[35]

4.063 Where a public offer is involved, the Cayman Law does not contain prospectus publication and filing requirements.

5. Anti-Takeover Provisions

4.064 The increase in the number of offshore companies listed on overseas stock exchanges has brought with it an increased concentration on the mechanisms that may be adopted to prevent a hostile takeover of the company. Mechanisms which are commonly considered are "blank cheque preferred stock", "staggered boards" and "poison pills".

30 Companies Law, section 62.
31 Companies Law, section 45(1).
32 Hong Kong Companies Ordinance (Cap.622), sections 668–670.
33 It should be noted that the process will require compliance with the relevant listing rules which may result in the group having to make a new listing application.
34 Such as Delaware and most US states.
35 See Chapter 1 of this book.

4.065 The rights, privileges and conditions attaching to the shares of a Cayman company are normally established by the company's shareholders. However, it is possible for a company's memorandum or articles to allow them to be established by the company's board in respect of a particular class of shares. Such shares can provide a company's board with greater flexibility in raising finance or deterring a hostile bidder. Where a hostile bidder had made an offer for shares of the company, the company could then issue shares carrying significantly enhanced voting rights to a third party such that in the event that the bidder were to acquire control of the existing shares, he or she still would not be able to acquire voting control over the company.[36]

4.066 Another form is the use of a staggered board. Such a provision is common for Hong Kong listed companies and establishes that only a percentage of the company's directors are to be elected each year. Since the Cayman Law also allows the articles to restrict the shareholders' ability to remove directors, these provisions can have the effect of discouraging a hostile takeover.

4.067 Similarly, the adoption of "poison pill" or shareholder rights plans is designed to encourage potential acquirers to work with a company's board. While perhaps not as common among Cayman companies as among US companies, poison pills are increasingly being considered by the boards of public companies in these jurisdictions. There are two types of poison pill, namely a "flip-in" and a "flip-over".

4.068 The "flip-in" allows existing shareholders, but not the acquirer, to purchase more shares of the company at a discounted price where an acquirer reaches a certain percentage ownership in the company or where a tender offer is made for the shares of the company. By purchasing the shares more cheaply, the shareholders dilute the shares held by competitors to make a takeover more difficult and costly.

4.069 The "flip-over" provision permits shareholders to buy the acquiring company's shares at a discount following the merger.[37] However, in order for such a plan to work, the merger must occur. Therefore, it will not prevent a shareholder from obtaining sufficient shares in a company to either appoint or remove directors of the company.

(a) Other Considerations

4.070 It is also potentially possible to include "dead hand" or "continuing director" provisions in a "poison pill" to prevent a hostile acquirer of shares in the company from taking control of a company's board in order to remove a pill. The effect of a "dead hand" is to provide the existing or incumbent directors (as opposed to the board generally) with a personal right to redeem the plan. A further "no-hand" provision precludes any board whether consisting of the incumbent directors or newly appointed directors from doing so. This prevents a hostile acquirer from completing an acquisition, even if it gains board control, until the pill elapses.

4.071 There is limited judicial authority on the legality of shareholder rights plans in common law jurisdictions.[38] The basis on which shareholder rights plans may be

36 Blank cheque preferred stock and poison pills rights plans are not commonly used for Hong Kong listed companies as a result of the listing rules.
37 "Flip overs" were previously not available in the Cayman Islands as the Cayman Companies Law did not permit mergers. However, the position has changed with the introduction of the merger regime in the Cayman Islands as a result of the Cayman Islands Companies Amendment 2009 (see Chapter 7 of this book).
38 The City Code on Takeovers and Mergers in the United Kingdom does not permit.

recognised by courts is therefore a question of examining existing company law principles and directors' duties. The board of directors of a company must take into account a number of different factors when considering the adoption of a plan. The board will need to determine that the plan is one which can be implemented by the board under the company's memorandum and articles. This may typically be found in the general power of the directors to offer, allot, grant options over or otherwise dispose of shares normally found in articles.

4.072 Although the board has the power to issue shares under a company's constitution, it will need to do so in what the board considers to be the best interests of the company. Such reasons may include the susceptibility of the company to a takeover and the possible effects of any takeover on the company.

4.073 Additionally, as part of their fiduciary duties, the board will need to be satisfied that the company is acting for a proper purpose. It is accepted in most cases that the proper purpose for an issue of shares is to raise capital. However, the courts have recognised that this may not be the only purpose and other purposes could be considered proper such as to secure the financial stability of the company.[39] Any issue of shares which "for the purpose of destroying an existing majority, or creating a new majority which did not previously exist" would not be considered a proper purpose.[40] An important aspect of any plan would therefore be that all shareholders be treated equally. In addition, the powers of the directors with respect to a plan must not be exercised improperly and the directors must not be motivated by personal gain or advantage or by a desire to remain in office.[41]

(b) Initial Public Offerings

4.074 There is limited judicial authority on the appropriateness of poison pills. The validity of poison pills has not been considered by the Grand Court of the Cayman Islands. However, it has been considered by the Supreme Court of Bermuda in *Stena Finance v Sea Containers*,[42] which appears to be the only decision of a Commonwealth court on this issue. In that case the Court confirmed that the adoption of such a rights plan by the board of a Bermuda company could constitute a proper and constitutional exercise of the board's powers.

4.075 Astwood J said that:

> "... if the directors ... saw or anticipated a threat to the Company from a hostile bid to take over the Company by some other entity, the members of the Company would, in my opinion, look to the directors to take such necessary but legal actions to thwart the hostile challenge. In the instant case the directors adopted the Poison Pill as one of the means to block a take-over and, provided that the directors have not exercised their power for some collateral purpose and have exercised their power fairly between shareholders and not in such a way as to favour improperly one section of the shareholders against another, then the Court cannot interfere."

[39] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 AER 1126 *per* Lord Wilberforce at pages 1133 and 1134 also citing *Punt v Symons & Co* [1903] 2 Ch 506, *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co No Liability* (1968) 121 CLR 483 and *Teck Corporation Ltd v Millar* (1973) 33 DLR (3d) 288.

[40] *Howard Smith Ltd v Ampol Petroleum Ltd* at page 1136.

[41] *Ibid*, at page 1133.

[42] (1989) 39 WIR 83.

4.076 It should be noted that in considering poison pill plans, directors will need to consider whether such plans are in the best interests of the company. Where the net effect of the plan is to cause a company significant damage, then introduction of the plan may result in directors breaching their duties.[43] Additionally, these plans are designed so that they will not take effect until such a time as a shareholder breaches the particular shareholding threshold and the board of directors of the company have not approved the acquisition of the shares. The question of whether the directors are acting in the best interests of the company and for a proper purpose is therefore more relevant at the time when the directors make their decision not to approve the acquisition as opposed to when the plan is initially adopted.

6. Special Purpose Acquisition Corporations (SPACs)

4.077 Whilst less popular in the last 2-3 years than before, SPACs remain a viable route for listings, especially in the United States capital markets and a number of them have been established in the Cayman Islands. The idea behind a SPAC is for a group of founders (managers) to form a fund raising vehicle for an initial public offering (IPO) which will be listed on the American Stock Exchange or another stock exchange.[44] The managers then go out and look for a business which the SPAC may acquire. In the event that a business is found, the shareholders from the IPO are required to approve the acquisition. If an acquisition is not approved within a set time period, the SPAC is required to liquidate and return the IPO proceeds back to the shareholders who invested in the IPO.

4.078 Managers would be issued 20 percent of the equity in the SPAC upon the IPO for a nominal price. The IPO would involve an offering of shares and warrants to subscribe for shares coupled together as units. The proceeds from the IPO would be deposited in an escrow account with a reputable trust company and a portion of the interest would be paid out to the board to fund the ongoing expenses of the SPAC. The capital structure for the SPAC will typically authorise a large number of ordinary shares and a specific number of preferred shares which can be used as consideration as part of the business combination.

4.079 The terms of the articles typically provide that the SPAC will not be able to undertake a business combination unless approved by shareholders. A "business combination" would generally mean the acquisition by the SPAC, whether by share exchange, asset or stock acquisition or other similar type of transaction, of a company which is an operating business, having its primary operations in a particular geographic region

[43] In light of the issues regarding directors' fiduciary duties, it would always be prudent for the board of directors to seek shareholder approval for rights plans. However, obtaining shareholder approval will not of itself make a plan valid. Whether a plan is eventually upheld may turn on the circumstances under which it is used rather than the terms of the plan itself.

[44] A number of SPACs are now also beginning to list on NYSE/Euronext (Amsterdam); see Liberty International Acquisition Company, raising 600mln in January 2008.

and in which the collective fair market value of the target business or businesses is at least 80 percent of the net assets of the SPAC at the time of the business combination.

4.080 Prior to completing any business combination, the SPAC is required to submit the business combination to its shareholders for approval whether or not approval for the business combination would normally be required.[45] If the requisite majority is reached, then shareholders who voted against the transaction could usually require the SPAC to redeem their shares at net asset value based on the trust fund holding the IPO proceeds.

4.081 In the event that the company does not approve and consummate a business combination by the later of: (i) 18 months after the consummation of the IPO; or (ii) 24 months after the consummation of the IPO in the event that either a letter of intent, an agreement in principle or a definitive agreement to complete the business combination was executed but was not consummated within such 18 month period[46] or if 20 percent[47] or more of the shareholders vote against the business combination and exercise their rights to redeem their shares, the SPAC is required to liquidate.[48] In the event that the SPAC is liquidated, only the holders of IPO shares and not the managers will be entitled to receive liquidating distributions from the trust fund.

4.082 The articles also provide that these provisions in the articles cannot be amended without approval from shareholders owning a significant percentage of the shares in the SPAC.[49]

4.083 The advantages of SPACs for investors are plain to see. Their investment is kept in a trust account until such a time as a business combination is found by the managers. The investors then get an opportunity for the return of their investment in the event that the proposed business combination is not acceptable to them. The disadvantage is that the investors have their money locked up for a considerable period and the success of the business combination very much depends on the expertise of the managers and their ability to find a worthwhile business.

7. Business Trusts

4.084 Business Trusts first appeared in Hong Kong in late 2011 / early 2012, with the listing on the Stock Exchange of HKT Trust and HKT Limited. Whilst Real Estate Investment Trusts (REITs), which are catered for by the Listing Rules in Hong Kong, provide a vehicle for the listing of property focused trusts, the Listing Rules do not currently cater to the listing of other, single purpose vehicles, focused on stable and regular distributions and long-term distribution growth. As a result, the Business Trust was born.

[45] Cayman Islands and BVI law would not normally require shareholder approval as the business of the company would be vested in the board of directors as part of its management powers.

[46] With some SPACs, this time period can be subject to extension with shareholder approval.

[47] In some offerings, this percentage is increased to 30 percent.

[48] When settling the articles of a SPAC, particular care will need to be taken with the winding up provisions including who is to act as liquidators.

[49] *NB*, the Cayman Law provides that articles can be amended with a 66 2/3 approval of those attending the shareholders meeting or such larger percentage as may be set out in the articles. *Cf* Paragraph 3.012.

4.085 Annexure E sets out a simplified version of the listing structure of a typical Business Trust on the Hong Kong Stock Exchange. The Business Trust consists of a Hong Kong law trust constituted by a Hong Kong law governed trust deed (Trust Deed), managed by a Trustee-Manager, the units of which are issued to the public, and a Cayman Islands incorporated company (ListCo), the ordinary shares of which are issued to the Trust, and the preference shares of which are issued to the public. Together, the units in the Trust and the ordinary and preference shares in ListCo are treated as Share Stapled Units.

(a) Share Stapled Units

4.086 The Share Stapled Units are jointly issued by the Trust and the Company. Each Share Stapled Unit comprises three components:

(a) a Unit in the Trust;

(b) a beneficial interest in a specifically identified Ordinary Share in the ListCo held by the Trustee-Manager, which is "Linked" to the Unit; and

(c) a specifically identified Preference Share in the ListCo which is "Stapled" to the Unit.

4.087 Under the Trust Deed and the Company's Articles, the number of Ordinary Shares and Preference Shares in issue must be the same at all times and must also, in each case, be equal to the number of Units of the Trust in issue.

4.088 It is a requirement of the trust deed constituting the Trust, and ListCo's memorandum and articles of association that the number of Ordinary Shares, Preference Shares and Units in issue must be the same at all times.

4.089 All of the issued Ordinary Shares of ListCo must be legally owned by, and registered in the name of, the Trustee-Manager (in its capacity as trustee and manager of the Trust). Each Unit in the Trust corresponds with a specifically identified Ordinary Share legally owned by, and registered in the name of, the Trustee-Manager and confers a beneficial interest in that specifically identified Ordinary Share (i.e. each Unit is "Linked" to a specifically identified Ordinary Share of the ListCo legally owned by, and registered in the name of, the Trustee-Manager).

4.090 Each Unit in the Trust issued by the Trustee-Manager must be attached to a specifically identified Preference Share. Each Preference Share is held by the Unitholder (along with the Unit) as full legal and beneficial owner so that one cannot be traded without the other (i.e. each Unit is "Stapled" to a specifically identified Preference Share).

4.091 The Share Stapled Units are listed on the Hong Kong Stock Exchange and trade as a single security. In normal circumstances, in is not possible to trade the individual components (Unit, beneficial interest in an Ordinary Share and Preference Share) of a Share Stapled Unit, and Investors are not permitted to deal in the individual components of the Share Stapled Units.

4.092 As both the Trust and the ListCo are listed on the Hong Kong Stock Exchange, they are both "listed issuers" under the Stock Exchange Listing Rules and, therefore, the Trust (including the Trustee-Manager) and the ListCo are subject to the provisions of the Listing Rules. In addition, the Share Stapled Units, the Trust, the Trustee-Manager

and the ListCo will be subject to the provisions of the Securities and Futures Ordinance and the Takeovers Code.

4.093 The trust deed constituting the Trust, and ListCo's memorandum and articles of association, each contain a right (known as the Exchange Right), which is exercisable following approval of an extraordinary resolution of registered holders of units. By passing such an extraordinary resolution, the holders of Share Stapled Units can terminate the Trust, have their Preference Shares redeemed at par, and exchange their Units in the Trust for the underlying Ordinary Shares in ListCo on a one for one basis.

(b) Reasons for Adopting the Share Stapled Units Structure

4.094 The Share Stapled Units structure allows the Trust to maximise the distributions that may be made to holders of Units, allowing the business and operations of the ListCo to focus on maximising dividends, not capital appreciation. The Share Stapled Structure provides an ideal model for businesses with mature assets that will generate stable long term revenues to package themselves in ways that appeal to long term, yield seeking investors. It is notable that, of the four Business Trusts currently listed on the Hong Kong Stock Exchange, the majority are in industries (telecommunications, power generation, hotels / real estate) that fit squarely into this profile.

4.095 The Ordinary Shares are the means by which the Trust owns the equity in the ListCo in trust for the holders of Units, and provide the Trust the right to dividends and distributions of ListCo (as generated by tits underlying business and operations). By having each Ordinary Share "Linked" to a Unit, the Securities and Futures Ordinance (including, of particular note for the holders of Units, the provisions on protection of investors) is made to apply to the Units, thereby giving holders of Units equivalent rights and remedies as if they held shares in a listed company, rather than Units in the Trust.

4.096 By having each Preference Share "Stapled" to each Unit, the Share Stapled Units (and, thereby, the Trust, including the Trustee-Manager, and the Company) are made subject to all the provisions of the Securities and Futures Ordinance (including, of particular note for the holders of Units, the provisions on protection of investors). In addition, the incorporation of the Exchange Right permits the termination of the trust, and results in the holders of Share Stapled Units becoming holders of the Ordinary Shares in a standard listed company.

4.097 The Trustee-Manager has a specific and limited role, which is to administer the Trust. It is not actively engaged in running the business and operations of ListCo, which is left to the experienced professionals employed by ListCo and its operating subsidiaries.

8. Dual Class Structures

4.098 During the last 4 or so years, there has been a great deal of (often heated) debate regarding dual class share structures and the suitability, or not, of their adoption for listed companies (many of which will be Cayman Islands incorporated) on the Hong Kong Stock Exchange.[50] Much of this debate came to a head in the run up to and

[50] Structure which has been adopted in particular by a number of high growth internet and technology stocks such as: Google Inc., Facebook, and LinkedIn.

following the decision in September 2014 by, Alibaba (a Cayman Islands company) to list on the New York Stock Exchange in preference to the Hong Kong Stock Exchange. Whilst the structure proposed by Alibaba was not, technically, a dual class structure (Alibaba has one class of shares but its partnership, a self-selecting group of executives, has the power to nominate the majority of the board), the loss of the listing of Alibaba to the New York Stock Exchange prompted the authorities in Hong Kong to look again at whether or not to permit dual class share structures (or their equivalent) for companies listing in Hong Kong.

4.099 In essence, a dual class share structure, or weighted voting right (WVR) structure, give certain persons voting power or other related rights disproportionate to their shareholding in the company being listed. This is usually achieved by the creation of two classes of shares – one class for issue to the public, with one vote per share, and a second class for issue to the founders, with enhanced voting rights (say, 10 votes per share). In this manner, the founders can retain voting control over the company at the shareholder level (and, through the exercise of such voting rights to appoint the directors of the company, at board level) despite owning less than fifty percent. of the listed company's outstanding issued shares.

4.100 Historically, the Hong Kong Stock Exchange has taken the fair and equal treatment of shareholders as one of the core general principles of the Stock Exchange Listing Rules. Such fair and equal treatment has always been predicated on the "one share one vote" concept, as enshrined in Rule 8.11 of the Stock Exchange Listing Rules, which requires that:

> "the share capital of a new applicant must not include shares of which the proposed voting power does not bear a reasonable relationship to the equity interest of such shares when fully paid"

4.101 In light of the debate surrounding Alibaba, the Hong Kong Stock Exchange published its Concept Paper on Weighted Voting Rights in August 2014, prompting a public consultation exercise on the matter. Arguments put forward for permitting dual class share structures included: (i) that permitting such structures would bolster Hong Kong's competitiveness as a world class global financial centre (especially in comparism to London and New York) and enhance its ability to attract a broad spectrum of issuers from all business environments; (ii) such structures could be limited to those industries where it was perceived that the founders played a more integral role in the company being listed, such as information technology or other types of innovative companies; and (iii) investors could be protected by requiring restrictions on the weighted voting rights created by the dual class share structures (for example, requiring the dual class structure to automatically lapse after a set period of time (a "sunset provision"), the automatic conversion of the weighted voting shares to ordinary voting shares on any transfer of the weighted voting shares by the founder to a person not associated with them (a "third party transfer"), or the automatic conversion of the weighted voting shares to ordinary voting shares where the founders interest in the company falls below a stated threshold.

4.102 Critics of the implementation of dual class share structures argued that: (i) in the United States, for example, director excesses were kept in check through the threat or implementation of class action law suits by disgruntled investors, an option not

available in Hong Kong, where such class actions are not permitted; (ii) the structures ran contrary to the long held principle of "one share one vote", which underpinned much of the regulatory environment in Hong Kong; and (iii) that smart founders already maintained control of listed vehicles by a "waterfall", owning 51% of a listed company (ParentCo) which, by owning 51% of a listed subsidiary (SubsidiaryCo), gave the founders effective control of SubsidiaryCo despite only owning an attributable 26% interest in its issued shares, and giving them the ability to further entrench their positions was likely to be detrimental to investors in listed companies.[51]

4.103 As recently as June 2015, the Hong Kong Stock Exchange, in its Consultation Conclusions on Weighted Voting Rights, outlined some of the relevant features of the draft proposal for a second stage consultation on weighted voting rights, indicating a desire to take the matter forward. However, a subsequent statement by the Securities and Futures Commission, the ultimate regulator in Hong Kong, that "the Board of the Securities and Futures Commission has unanimously concluded that it does not support the draft proposal for primary listings with Weighted Voting Rights structures" made it appear that dual class share structures and weighted voting rights were not going to be available to companies listing in Hong Kong for the time being.

4.104 However, since the publication of the first edition of this book, the tide has turned. Amendments to the Listing Rules were introduced in early 2018 permitting companies to deviate from the "one-share, one-vote" principle and adopt WVR structures, subject to the conditions and safeguards set out in the newly promulgated Chapter 8A of the Listing Rules.

4.105 To be considered eligible and suitable for listing with a WVR structure, the Listing Rules require that any company wishing to be listed with a WVR Structure must be able to demonstrate the necessary characteristics of innovation and growth and demonstrate the contribution of their proposed beneficiaries of weighted voting rights.

4.106 The guiding principle for companies with WVR Structures is that all holders of listed securities are treated fairly and all holders of listed securities of the same class are treated equally. Only new applicants can have such WVR structures (so existing issuers are not able to amend their share capital to adopt WVR structures, though there is presumably no prohibition on an existing listed company undertaking a restructuring and listing a new company with a WVR structure by way of spin off or similar), and any new applicant seeking a listing with a WVR structure must have either (i) a market capitalisation of at least HK$40,000,000,000 at the time of listing; or (ii) a market capitalisation of at least HK$10,000,000,000 at the time of listing and revenue of at least HK$1,000,000,000 for the most recent audited financial year. As such, WVR structures will only be available to be adopted by the most sizeable companies.

4.107 As outlined above, Chapter 8A of the Listing Rules sets out various conditions and safeguards to be followed by a company with a WVR structure to ensure that shareholders are adequately protected, and Rule 8A.44 requires such conditions and safeguards to be given force to by the company by incorporating them into their articles of association. None of the current conditions and safeguards contained in Chapter 8A are problematic for inclusion in the articles of association of a Cayman incorporated

[51] It being noted that in a very large majority of cases, companies listed on the Hong Kong Stock Exchange make only 25% of their shares available to the public with 75% remaining in the hands of the founders.

company and in many case reflect the approach which has been adopted for Cayman companies with WVR structures listed on other global stock exchanges, such as New York and Nasdaq.

9. Biotech Companies

4.108 At the same time as the amendments to the Listing Rules permitting WVR structures were introduced, the Hong Kong Stock Exchange also introduced rules specifically targeted at Biotech Companies.

4.109 18A of the Listing Rules sets out the additional listing conditions, disclosure requirements and continuing obligations for Biotech Companies seeking to list. None of these have any particular Cayman Islands law implications and, as such, a listing of a Biotech Company would proceed with little difference to a standard listing of any other Cayman Islands company, as outlined above.

his powers, though he can apply to Court to determine any question that arises during the winding-up process.

16.006 The grounds for winding-up of a company voluntarily are found in section 116 of the Companies Law (2018 Revision). A company may be wound-up voluntarily:

(a) when the period fixed for the duration of the company by its memorandum or articles expires (fixed duration winding up);

(b) if the event (if any) occurs, on the occurrence of which the memorandum or articles provide that the company be wound-up (event winding-up);

(c) if the company resolves by special resolution that it be wound-up voluntarily; or

(d) if the company resolves by ordinary resolution that it be wound-up voluntarily because it is unable to pay its debts as they fall due.[2]

16.007 Where the memorandum or articles of a company contain provisions requiring the company to be wound-up at the end of a fixed period or on the happening of an event, no further shareholder approval is required to put the company into voluntary liquidation.[3]

16.008 A voluntary winding-up is deemed to commence at either the time of the passing of the resolution for winding-up or on the expiry of the period or the occurrence of the event specified in the memorandum or articles.[4] On the occurrence of a voluntary winding-up, a company is required to cease carrying on its business except so far as it may be beneficial for its winding-up.[5] It should however be noted that notwithstanding anything to the contrary contained with the company's articles, the company's corporate state and powers continue until the company is formally dissolved.[6]

16.009 One or more liquidators are required to be appointed for the purposes of the winding-up of the company's affairs and distributing its assets.[7] In a fixed duration winding-up or an event winding-up, the persons designated as liquidators in the memorandum or articles automatically become liquidators from the commencement of the winding up.[8] If no person is designated in the memorandum or articles or the person designated is unable to act, the directors are required to convene a shareholders' meeting to approve the appointment of a liquidator. The Companies Law does not expressly provide how a liquidator is selected in a voluntary winding-up which is not as a result of a fixed duration winding-up or an event winding up. Ordinarily, this will be provided for in the resolution winding-up the company.

16.010 The appointment of a liquidator in a fixed duration winding-up or event winding-up is effective upon the voluntary winding-up commencing. In other cases the appointment takes place upon the filing of the liquidator's consent with the Registrar of Companies.[9]

2 Companies Law, section 116.
3 *Ibid*, section 116(a).
4 *Ibid*, section 117(1).
5 *Ibid*, section 118(1).
6 *Ibid*, section 118(2).
7 *Ibid*, section 119(1).
8 *Ibid*, section 119(2).
9 *Ibid*. section 119(3).

16.011 In the event that a vacancy occurs by death, resignation or otherwise in the office of liquidator, the company in general meeting has power to fill the vacancy or the Grand Court may do so on the application of any contributory or creditor.[10] On the appointment of a liquidator, all the powers of the company in general meeting cease except so far as the company in general meeting or the liquidator sanction their continuance.[11]

16.012 A company may appoint any person, including a director or officer of a company, as a liquidator in a voluntary winding-up.[12] In circumstances where two or more persons are appointed as voluntary liquidators jointly, those persons are authorised to act jointly and severally unless their powers are expressly limited by the resolution pursuant to which they are appointed or the articles.[13] Upon appointing a voluntary liquidator, the directors' powers cease, except to the extent the company (through a general meeting) or the liquidator sanctions the continuance of those powers.

16.013 The remuneration of a liquidator is required to be approved by the company in general meeting[14] and the expenses, including the liquidator's remuneration, are payable out of the company's assets in priority to any other claims.[15] In order to assist the members of a company in making a determination as to what expenses have been properly incurred and what remuneration is properly payable to a liquidator, each report and account prepared by a liquidator and laid before the company in general meetings shall contain information relating to the particulars of the work done by the liquidator together with the rate that remuneration is calculated.[16]

16.014 A voluntary liquidator may be removed from office by an ordinary resolution passed by a general meeting convened especially for that purpose.[17] A general meeting may be convened by any shareholder or shareholders holding not less than one fifth of the company's issued share capital.[18] In addition, any contributory may apply to the Grand Court for an order that a liquidator be removed on the grounds that he or she is not a fit or proper person.[19]

16.015 Where two or more persons are appointed as the company's joint liquidators, they may resign by filing a notice in writing to the Registrar so long as one of them continues in office.[20]

16.016 Where a voluntary liquidator wishes to resign, he or she is required to prepare a report and accounts and convene a meeting to accept his or her resignation and release

10 Companies Law, section 119(4).
11 *Ibid*, section 119(5). It would appear that directors have no residual powers to convene shareholders meetings. This would mean that in the event that a liquidator died or did not convene a shareholders' meeting before her or his resignation, the only way in which a new liquidator could be appointed would be by application to the Grand Court.
12 Companies Law, section 120.
13 *Ibid*, section 119(6).
14 *Ibid*, section 130(2). Where a company fails to approve a liquidator's remuneration or the liquidator is dissatisfied with the decision of the company, he or she may apply to the Grand Court to fix the rate and amount of her or his remuneration and expenses; see also section 130(4) of the Companies Law.
15 *Ibid*, section 130(1).
16 *Ibid*, section 130(3).
17 *Ibid*, section 121(1).
18 Companies Law, section 121(2). There is no procedure set out in the Companies Law as to the manner in which such meeting can be convened and presumably the meeting would therefore need only to comply with the terms of the company's articles as to the convening of meetings.
19 *Ibid*, section 121(3).
20 *Ibid*, section 122(1).

him or her from the performance of any further duties.[21] In the event that a resolution is not passed, the liquidator may apply to the Grand Court for an order that he or she be released from the performance of any further duties.[22]

16.017 Within twenty-eight days of the commencement of a voluntary winding-up, the liquidator or, in his or her absence, the directors, are required to:

- file notice of the winding-up with the Registrar of Companies;
- file the liquidator's consent to act with the Registrar of Companies;
- file a declaration of solvency with the Registrar of Companies unless the winding-up is to be under the supervision of the Grand Court;
- serve notice on the Cayman Islands Monetary Authority if the company is a regulated entity; and
- publish notice of the winding-up in the Cayman Islands Gazette.[23]

16.018 The declaration of solvency must be sworn on behalf of the directors and confirm that a full enquiry of the company's affairs has been made and to the best of the directors' knowledge and belief, the company will be able to pay its debts in full, together with interest at the prescribed rate within such period, not exceeding twelve months as is prescribed in the declaration.[24] In the event that the directors are unable to make such declaration, the liquidator is required to apply to the Grand Court that the liquidation should continue under its supervision, in which case the company will be treated as if it is being wound-up by the Grand Court.[25] Even in circumstances where the declaration of solvency is provided, the liquidator or any creditor or contributory may make an application for the liquidation to continue under the supervision of the Court, on the ground that the company is or is likely to become insolvent or that the supervision of the Court would facilitate a more effective, economic or expeditious liquidation.[26]

16.019 Any transfer of shares of a company or any other alteration in the status of the members in voluntary liquidation is void without the sanction of the liquidator.[27] However, unlike an official liquidation, there is nothing to suggest that there is any automatic stay of execution available to a company affording protection from its creditors during a voluntary liquidation.

16.020 Where a voluntary liquidation continues for more than one year, the liquidator is required to convene annually a general meeting of shareholders within three months of the anniversary of the commencement of the winding-up and at the end of each

21 Companies Law, section 122(2).
22 *Ibid*, section 122(3).
23 *Ibid*, section 123(1). A director or liquidator who fails to comply with these requirements commits an offence and is liable to a fine of CI$10,000.
24 Companies Law, section 124(2). Any person who knowingly makes a declaration without having reasonable grounds for the opinion that the company cannot pay its debts with interest commits an offence and is liable to a fine of CI$10,000 and/or two years imprisonment; see also section 124(3) of the Companies Law.
25 *Ibid*, section 124(1).
26 *Ibid*, section 131.
27 *Ibid*, section 125.

succeeding year.[28] At the general meeting, the liquidator is required to provide a report of the conduct of the winding-up during the previous year.[29]

16.021 As soon as the company's affairs have been wound-up, the liquidator is required to make a report and an account of the winding-up showing how it has been conducted and how the company's property has been disposed of and to subsequently call a general meeting of the company for the purpose of presenting the liquidator's account and providing an explanation for it.[30] At least twenty-one days before the meeting is to be held, the liquidator shall send a notice specifying the time, venue and object of the meeting to each contributory in any manner authorised by the company's articles. Such notice will also be published in the Cayman Islands Gazette.[31]

16.022 Within seven days of the final meeting of shareholders, the liquidator is required to make a return to the Registrar of Companies detailing the date of the meeting and, if a quorum was present, particulars of the resolutions passed at the meeting.[32] The Registrar of Companies is required to register such return within three days of receipt[33] and upon expiration of the three month period immediately following this registration, the company is deemed to be dissolved.[34]

16.023 The Grand Court may however, on the application of the liquidator or any other interested person, make an order deferring the date at which the dissolution of the company is to take effect to such date that the Court deems fit.[35]

4. Winding-Up by the Court

16.024 The objective of compulsory liquidation (or official liquidation or winding-up by the Court as it is interchangeably known) is to wind-up the company and distribute its assets to its creditors and shareholders.

16.025 The Grand Court has power to make winding-up orders over existing Cayman Islands companies, a body incorporated under any other law and a foreign company which either has property located in the Cayman Islands, is carrying on business in the Cayman Islands, is a general partner of a limited partnership or is registered under Part IX of the Companies Law as a foreign company doing business in the Cayman Islands.[36]

16.026 A company may be wound-up by the Grand Court in circumstances where:

- the company has passed a special resolution requiring the company to be wound-up by the Grand Court;

28 Companies Law, section 126(1).
29 *Ibid*, section 126(2). A liquidator who fails to convene a meeting or provide such a report commits an offence and is liable to a fine of CI$10,000, section 126(3), Companies Law. Each report and account of the liquidator is required to include the rate of the liquidator's remuneration and particulars of the work done to give sufficient information to enable members to ascertain what expenses have been properly incurred; see also section 130(3) of the Companies Law, as discussed above.
30 *Ibid*, section 127(1).
31 *Ibid*, section 127(2).
32 Companies Law, section 127(3). Any liquidator who fails to convene a meeting or make a report commits an offence and is liable to a fine of CI$10,000; see also section 127(4) of the Companies Law.
33 *Ibid*, section 151(1).
34 *Ibid*, section 151(2).
35 *Ibid*, section 151(3).
36 *Ibid*, section 91.

- the company does not commence its business within a year from its incorporation or suspends its business for a whole year;
- the articles provide for a fixed duration winding-up or an event winding-up and the period has expired or the stipulated event has occurred;
- the company is unable to pay its debts; or
- the Grand Court is of the view that it is just and equitable for the company to be wound-up.[37]

16.027 A company will be deemed to be unable to pay its debts if a creditor who is owed over CI$100.00 serves a statutory demand on the company and the company has failed to pay the amount due or otherwise settled with the creditor, execution of a judgment instituted by a creditor is returned unsatisfied or it is proved to the satisfaction of the Grand Court that the company is unable to pay its debts.[38]

16.028 Any statutory demand served on a debtor company must follow certain prescribed rules.[39] Any statutory demand must:

(i) be in the standard form, as is appended to the Rules;

(ii) be signed by the creditor, or an authorised signatory of the creditor;

(iii) state the amount of the debt, the date it fell due, the currency of the debt and the consideration provided by the creditor;

(iv) include details of any interest and charges (and the grounds upon which these are payable), if applicable;

(v) contain the creditor's address;

(vi) include a statement that if payment is not made within twenty-one days then the company will be deemed insolvent and that the creditor may present a petition to wind-up the company; and

(vii) provide details as to how the debt can be paid.

16.029 The original hard copy of the statutory demand must be delivered by hand to the company's registered office.[40] Service of a statutory demand by either fax or email will not amount to good service.[41] There is no requirement that a statutory demand need to be drawn to the attention of the company's directors[42] nor will a statutory demand be invalidated due to the fact that a company's registered office provider has failed to bring it to the attention to the director of a company or taken any other steps in respect of the statutory demand.[43] In practice, a creditor will show good service by

37 Companies Law, section 92.
38 Companies Law, section 93.
39 Order 2, Rule 2, Companies Winding-Up Rules 2018.
40 Order 2, Rule 3(1), Companies Winding-Up Rules 2018.
41 Order 2, Rule 3(2), Companies Winding-Up Rules 2018.
42 Order 2, Rule 3(3), Companies Winding-Up Rules 2018.
43 Order 2, Rule 3(4), Companies Winding-Up Rules 2018.

swearing an affidavit of service in respect of the same. A statutory demand must have been validly served twenty-one days prior to any winding-up petition being brought in respect of it.

16.030 There is no statutory provision in the Cayman Islands to enable a company to set aside a statutory demand presented against it. However, a company can make an application for an injunction restraining the creditor from presenting a winding-up petition on the grounds that the debt is disputed bona fide and on substantial grounds.

16.031 The Cayman Islands Court of Appeal has confirmed that the test of whether a company is unable to pay its debts is a cash flow test as opposed to a balance sheet test. Where a company was balance sheet insolvent, it still may be open for a petition to be filed on the just and equitable ground.[44] If the debt claimed is disputed by the company in good faith and on substantial grounds then it cannot form the basis of a winding-up petition. If, however, the debt claimed is a judgment debt then the company cannot legitimately dispute it unless execution of the judgment has been stayed by the Court.

16.032 An application for winding-up may be presented by the company, any creditor,[45] any contributory or in certain circumstances by CIMA (see below).[46] Where the articles expressly provide that the directors have authority to do so, they may present a winding up petition without the sanction of the company in general meeting.[47] Whilst there is no statutory obligation placed upon a company or its directors to commence liquidation proceedings, directors do owe fiduciary duties to creditors if the company becomes insolvent.

16.033 The Companies Law provides that a contributory is not entitled to present a petition unless at least some of the shares held are partly paid or he or she has held such shares for a period of at least six months[48] or the shares have devolved on the holder through the death of a former holder.[49]

16.034 CIMA is entitled to present a petition in respect of any company which is carrying on regulated business on the grounds that it is not duly licenced or registered under such regulatory laws or for any other reason provided in the regulatory laws or other laws.[50]

44 *In the Matter of Strategic Turnaround Master Partnership Ltd* (unrep., Cause No. 276 of 2008, Civil Appeal No. 13 of 2008) and confirmed recently in *re Weavering Macro Fun* [2016] 2 CILR 514. See also *Re Australian Joint Stock Bank* (1897) WN 48 and *European Life Assurance Company* (1869) LR 9 Eq 122.
45 "Creditor" for this purpose includes any contingent or prospective creditor. The scope of this section would therefore seem to include any beneficiaries of guarantees, even though a formal claim under a guarantee has yet to be made. The Cayman Islands Court of Appeal however has ruled that a shareholder that has submitted a redemption request in circumstances where the company has validly suspended redemptions would be unable to petition on the "unable to pay its debts" ground as a creditor with a future debt. However, the shareholder may have locus standi for a petition on the "just and equitable ground". *In the Matter of Strategic Turnaround Master Partnership Ltd.* op. cit.
46 Companies Law, section 94(1).
47 Companies Law, section 94(2). Following the decision of Mangatal J in *In the Matter of China Shanshui Cement Group Ltd.* [2015] (2) CILR 255 it would appear that there is some doubt as to whether the directors of a company which is unable to pay its debts would be able to petition the court for the winding up of the company without further approval from the shareholders or express permission in the articles.
48 This limitation would appear to be an attempt to restrict "vulture funds" or other investors in distressed assets from using the threat of winding-up as a negotiating tool with the company.
49 Companies Law, section 94(3).
50 *Ibid*, section 94(4).

16.035 The Grand Court is statutorily bound to honour any contractual agreement by any person not to present a petition against a company.[51]

16.036 Where shareholders have passed a special resolution to voluntarily wind up the company or the company is subject to a fixed duration winding up or an event winding up, the winding up is deemed to have commenced on the passing of the resolution or the expiry of the relevant period or the happening of the event. In any other case, the winding up is deemed to commence on presentation of the winding up petition.[52]

5. Procedure on Winding-Up

16.037 The Rules dictate the procedure that is required to be followed when presenting a winding up petition. A winding up petition must be in the form of CWR Form No. 2[53] and must contain the following information:

(i) Particulars of the company's incorporation;

(ii) A description of the company's business, including a statement about the countries in which it carries on business;

(iii) If the company is a foreign company, particulars of the matters contained in section 91(d) of the Companies Law;

(iv) A concise statement of the grounds upon which the winding-up order is sought; and

(v) The name and address of the qualified insolvency practitioner (and any foreign practitioner) whom the petitioner nominates for appointment as official liquidator.[54]

16.038 The petition must be verified by an affidavit stating that the statements made in the petition are true, or are true to the best of the deponent's knowledge, information and belief.[55] The affidavit must be sworn by either the petitioner, or a director, officer or agent of the petitioner who has been concerned in and has personal knowledge of the matters giving rise to the petition.[56]

16.039 The liquidator's consent must also contain specified information as provided for by the Rules.[57] The affidavit must include statements confirming that the liquidator is a qualified insolvency practitioner and is resident in the Cayman Islands, he and his firm are independent, he has the requisite insurance in place and that he is willing to act as official liquidator.[58]

[51] Companies Law, section 95(2).
[52] Companies Law, section 100.
[53] Order 3, Rule 2(1), Companies Winding-Up Rules.
[54] Order 3, Rule 2(2), Companies Winding-Up Rules.
[55] Order 3, Rule 3(1), Companies Winding-Up Rules.
[56] Order 3, Rule 2(3), Companies Winding-Up Rules.
[57] Order 3, Rule 4, Companies Winding-Up Rules.
[58] Order 3, Rule 4(1), Companies Winding-Up Rules.

16.040 If the petitioner seeks an order for the appointment of a foreign practitioner, he too is required to swear an affidavit which must include statements regarding his qualifications, the country that he is qualified in, his professional experience, that he holds professional indemnity insurance, whether he has been appointed in any role by any foreign court in respect of the company, and that he is independent.[59]

16.041 Winding-up petitions must not be filed until after the matter has been assigned to a judge.[60] In practice this means that a petition (together with supporting affidavits) are first sent to the Registrar of the Financial Services Division to be assigned to a judge and to be provided with a hearing date, Only then can a petition be filed with the Registry and served immediately upon the company.[61] In the case of a petition brought by a creditor or the Authority, the petitioner shall file an affidavit of service with the Court within seven days of service of the petition.

16.042 In the case of a creditor's petition, unless the Court orders otherwise, the petition shall be advertised in the Cayman Islands and any other place that the company carries on business no earlier than seven days after service of the petition, and no later than seven days prior to the hearing of the petition.[62]

16.043 Any person wishing to appear and be heard on the hearing of a creditor's petition on shall give the creditor's attorney three days' notice in the form of CWR Form No.4.[63]

16.044 A company wishing to oppose a creditor's petition brought against it must file and serve its affidavit evidence on the petitioner within fourteen days of being served by the petitioner.[64]

6. Alternative Orders to a Winding-Up

16.045 The Companies Law permits the Grand Court to make an alternative order to a winding-up where a petition has been presented by members or contributories on the just and equitable ground that the company should be wound-up.[65] The Grand Court can make orders:

- to regulate the company's affairs in the future;
- requiring the company to refrain from doing or continuing an act complained of by the petitioner or doing an act which the petitioner has complained the company has omitted to do;
- authorising initiation of civil proceedings in the company's name by the petitioner on such terms as the court may order; or

[59] Order 3, Rule 4(2), Companies Winding-Up Rules.
[60] Practice Direction No. 3 2013.
[61] A petition is served on the company when the petition is brought by a creditor (Order 3, Rule 5(3) Companies Winding-Up Rules) or the Authority (Order 3, Rule 14(2) Companies Winding-Up Rules). In the event that the petition is brought by a contributory, the petitioner is required to serve both the company and every member the petitioner intends to name (Order 3, Rule 11(3) Companies Winding-Up Rules).
[62] Order 3, Rule 6, Companies Winding-Up Rules.
[63] Order 3, Rule 8, Companies Winding-Up Rules.
[64] Order 3, Rule 9, Companies Winding-Up Rules.
[65] Companies Law, section 95(3).

company.[89] In the event that the liquidator determines the company to be of doubtful solvency the liquidation committee shall consist of between three and six members of whom a majority shall be creditors and at least one shall be a contributory.[90]

16.057 If, during the course of the liquidation, a liquidator changes his determination as to the solvency of the company, he shall take steps to reconstitute the liquidation committee. If the liquidator deems the company to be solvent, any creditor members of the liquidation committee shall automatically cease to be members and the liquidator shall convene a meeting of contributories to elect new members.[91] If the liquidator determines that a company is insolvent, then any contributory members of the liquidation committee shall automatically cease to be members and the liquidator shall convene a meeting of creditors to elect new members.[92]

16.058 Following the establishment of the liquidation committee the liquidator may, with the consent of a majority of the remaining members of the committee, appoint a creditor or contributory (as the case may be) to fill any vacancy in the committee.[93]

16.059 A liquidator is required to report to the members of a liquidation committee all such matters as appear to him to be, or as the members have indicated to him as being of concern to them with respect to a winding up and provide written reports and accounts.[94]

16.060 Where two or more persons are appointed to the office of liquidator, they are authorised to act jointly and severally unless their powers are expressly limited by an order of the Grand Court.[95] An official liquidator may be removed from office by order of the Grand Court made on application by any creditor or contributory.[96]

16.061 A liquidator must be an independent, qualified and licensed person who is resident in the Cayman Islands.[97] Foreign practitioners may be appointed to act jointly with a qualified insolvency practitioner in connection with a winding-up.[98] In circumstances in which a company's assets or usual place of business is in another jurisdiction (which is often the case in a Cayman liquidation) a practitioner from that jurisdiction is often appointed as joint liquidator. A "foreign practitioner" for this purpose is defined as a person who is qualified under the law of a foreign country to perform functions equivalent to those performed by official liquidators under the Companies Law.[99] In addition, a qualified insolvency practitioner is required to have the qualifications provided for in the Insolvency Practitioners' Regulations 2018 or such other qualifications as the Grand Court considers appropriate for the winding-up of the company.

16.062 The expenses properly incurred in the winding-up, including the remuneration of the liquidator, are payable out of the assets of the company in priority to most other claims.[100]

89 Order 9, Rule 1(5), Companies Winding-Up Rules 2018.
90 Order 9, Rule 1(6), Companies Winding-Up Rules 2018.
91 Order 9, Rule 3(2), Companies Winding-Up Rules 2018.
92 Order 9, Rule 3(3), Companies Winding-Up Rules 2018.
93 Order 9, Rule 7, Companies Winding-Up Rules 2018.
94 Order 9 Rule 3, Companies Winding-Up Rules 2018.
95 Companies Law, section 106.
96 *Ibid*, section 107.
97 Rules 4, 5 & 6 of the Insolvency Practitioners' Regulations 2018.
98 Companies Law, section 108(1).
99 *Ibid*, section 89.
100 *Ibid*, section 109(1) and CWR Rule 20.

16.063 The remuneration of the liquidator is required to be determined by the Grand Court in accordance with the Insolvency Practitioners' Regulations 2018.

16.064 The function of the official liquidator is to collect or realise and distribute the assets of the company to its creditors and if there is a surplus, to the persons entitled to it.[101]

16.065 The official liquidator is also required to make a report to the company's creditors and contributories with respect to the affairs of the company and the winding-up.[102]

16.066 The liquidator is entitled to exercise the powers set out in Part I of the Third Schedule to the Companies Law with the sanction of the Grand Court and the powers set out in Part II of the Third Schedule with or without the sanction of the Grand Court.[103] The relevant powers are set out in the Annexure to this Chapter. The exercise of such powers is subject to the control of the Grand Court and any creditor in the case of an insolvent winding-up and a contributory in the case of a solvent winding-up. Where solvency is doubtful, both creditors and contributories may be heard.[104]

16.067 The liquidator is required to settle a list of contributories and has power to adjust the rights of contributories among themselves.[105] In the case of a solvent liquidation where a company has issued redeemable shares at prices based on net asset value from time to time, the liquidator has power to settle and if necessary, rectify the company's register of members thereby adjusting the rights of members among themselves.[106] A contributory who is dissatisfied with any determination made by the liquidator may appeal to the Grand Court against such determination.[107]

16.068 Where a winding-up order has been made or a provisional liquidator appointed, the liquidator may require directors or officers of the company, professional service providers[108] and employees to prepare and submit a statement in relation to the affairs of the company.[109] The statement is required to be in the form of an affidavit and show the particulars of the company's assets and liabilities (to include both contingent and prospective liabilities), names and addresses of the persons who have possession of the company's assets, the names and addresses of the company's creditors and details of any securities given to the creditors as well as such other information that the liquidator may require.[110]

16.069 The Grand Court may upon the application of the liquidator, at any time after making a winding-up order and either before or after it has ascertained the sufficiency of assets, make calls on contributories to the extent that they are liable to satisfy the debts and liabilities of the company and in the adjustment of the rights of contributories among themselves.[111] In making a call, the Grand Court is entitled to take into account the probability that some of the contributories may partly or wholly fail to pay the call.[112]

101 Companies Law, section 110(1).
102 *Ibid*, section 110(1).
103 *Ibid*, section 110(2).
104 *Ibid*, section 110(5).
105 *Ibid*, section 112(1).
106 *Ibid*, section 112(2).
107 *Ibid*, section 112(3).
108 "Professional service provider" is defined as "a person who contracts to provide general managerial or administrative services to a company on an annual or continuing basis." See also section 89 of the Companies Law. It does not include an auditor.
109 Companies Law, sections 101(1) and 101(3).
110 *Ibid*, section 101(2).
111 *Ibid*, section 113(1).
112 *Ibid*, section 113(2).

16.070 The Grand Court may make further orders as it thinks fit for the inspection of the company's documents by creditors and contributories and the preparation and provision of reports by the liquidator to creditors and contributories.[113] A contributory retains the ability to make an application to inspect documents notwithstanding a determination that a company is or may be insolvent.[114]

16.071 In relation to all matters relating to the winding-up, the Grand Court is required to have regard to the wishes of creditors or contributories and may require reports to be provided to them or for meetings to be held.[115] Meetings may be requisitioned by creditors where a company is insolvent or alternatively by contributories where a company is solvent.[116] The votes of creditors are required to be counted by reference to the value of the debts of the creditors.[117] The votes of contributories are required to be counted by the number of votes of shares carrying voting rights under the articles and by the par value of the shares where such shares do not carry voting rights.[118]

8. Liability of Officers and Service Providers

16.072 In the case where an order is to be made to wind a company up or a company is subject to a voluntary winding-up under the supervision of the Grand Court, any officer, professional service provider, voluntary liquidator or controller[119] of the company who with intent to defraud the company's creditors or contributories:

- concealed any part of the company's property to the value of CI$10,000 or more or concealed any debt due to or from the company;
- removed any part of the company's property to the value of CI$10,000 or more;
- concealed, destroyed, mutilated or falsified any documents affecting or relating to the company's property or affairs;
- made any false entry in any documents affecting or relating to the company's property or affairs;
- parted with, altered or made any omission in any document affecting or relating to the company's property or affairs; or
- pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the company's business):

commits an offence and is liable on conviction to a fine and to imprisonment for a term of five years or both.[120] The Companies Law has introduced into Cayman Islands' law the concept of a shadow director who is considered an officer of the company for this purpose.[121] A "shadow director" is defined as any person in accordance with whose directions or instructions the directors of the company are accustomed to act, but a person is not deemed to be a shadow director by reason only that the directors act on advice given by her or him in a professional capacity.[122]

16.073 In addition, any officer or professional service provider who has made or caused to be made any gift or transfer of or charge on or caused or connived at the levying of any execution against the company's property or concealed or removed any part of the company's property with intent to defraud the company's creditors or contributories commits an offence and is liable on conviction to a fine and to imprisonment for a term of five years or both.[123]

16.074 A director, officer (including a shadow director) or professional service provider who does not, to the best of her or his knowledge and belief disclose to the liquidator details of the company's property and the disposals of such property made by the company or deliver to the liquidator the company's property and documents which are in her or his control or who fails to inform the liquidator that a false debt has been proved or prevents the production of documents relating to the company's property and affairs or destroys or makes false or fraudulent entries in any register, books of account or document belong to the company is also liable on conviction to a fine and to imprisonment for a term of five years or both.[124]

9. Fiduciary Duties of Directors in Insolvency

16.075 The common law and statute impose various duties and responsibilities on directors of Cayman companies. Directors should be mindful of these duties and responsibilities when charting a course of conduct with respect to the company and the interests of its various stakeholders.

16.076 At common law a director will owe two types of duty to the company; a fiduciary duty and a duty of skill and care. Within the confines of a fiduciary duty, a director must act in good faith in his or her dealings with or on behalf of the company and exercise the powers and fulfil the duties of the office honestly. The fiduciary duty owed by a director includes the following aspects:

(i) *A duty to act in good faith* – a director has an obligation to act in good faith in what he or she considers is in the best interests of the company and not for any collateral purpose;

---

113 Companies Law, section 114(1).
114 *Ibid*, section 114(2).
115 *Ibid*, section 115(1).
116 *Ibid*, section 115(3).
117 *Ibid*, section 115(4).
118 *Ibid*, section 115(4).
119 "Controller" is defined as a person appointed by CIMA pursuant to regulatory laws to take control of the company; see also section 89 of the Cayman Companies Law.

120 Companies Law, section 134(1).
121 *Ibid*, section 134(2).
122 *Ibid*, section 89.
123 *Ibid*, section 135.
124 *Ibid*, section 136(1).

(ii) *A duty to exercise powers in the company's interests* – directors must exercise their powers in the company's interests and only for the purposes for which they are given;

(iii) *Conflicts of interest* – a director must not put himself or herself in a position where there is an actual or potential conflict between a personal interest or the duties owed to third parties and his or her duty to the company; and

(iv) *Secret profits* – a director's fiduciary position precludes him or her from taking a personal profit from any opportunities that result from the directorship, even if the director is acting honestly and for the good of the company, unless the articles provide otherwise and subject to any such articles any profit must be paid to the company.

16.077 A director's fiduciary duty imposes a largely negative obligation not to do anything which would conflict with the company's interests. The duties of directors do go further, and when acting in the company's interests he or she is expected to exercise whatever skill he or she possesses with reasonable care. This duty includes the following aspects:

(i) *Degree of skill* – a director need not exhibit a greater degree or skill than may reasonably be expected from a person of like knowledge and experience. A director is not expected to exercise a degree of skill that he or she does not have;

(ii) *Attention to business* – a director must diligently attend to the affairs of the company and in performing directors' duties, they must display the 'reasonable care…that an ordinary man may be expected to take in the same circumstances on his own behalf'; and

(iii) *Reliance on others* – a director is not liable for the acts of co-directors or other company officers solely by virtue of the position. A director is entitled to rely on his or her co-directors or company officers as well as subordinates who are expressly put in charge of attending to the detail of management, provided such reliance is honest and reasonable. As a general rule, before delegating responsibility to others, the directors in question should satisfy themselves that the delegates have the requisite skills to discharge the functions delegated to them.

16.078 The fiduciary duties of directors are owed to the company itself. The duty translates into the directors having regard to the collective interests of the company as long as the company remains as a going concern. The usual justification for this is the fact that the members of a company are the residual beneficiaries of the assets of the company once all of the claims of the creditors have been satisfied. It has however been held that when a company becomes insolvent (or is approaching insolvency) the interests to which the directors must have regard when acting in the interests of the company will include the interests of the creditors. Indeed, where the company is insolvent the collective interests of the creditors will supersede the collective interests of the members because there will be no residual assets to return to the members once all of the creditors have been paid.

16.079 Applying the above obligations to an insolvency situation, a company should be placed into insolvency as soon as possible after the directors realize that there is no reasonable prospect that the company will avoid going into insolvent liquidation. If, on the advice of professional advisers, the directors are of the view that there is a reasonable prospect if turning the company around within a reasonable period of time and of avoiding an insolvent liquidation, the directions may take whatever action is necessary to avoid or reverse the insolvency or at the very least, to minimise loss to the company's creditors. In any event, the directors should review the company's position on a regular basis and if they come to the view or are advised that there is no realistic prospect of lifting the company from its financial difficulties, the company should be placed into liquidation so as to avoid the risk of breaching their fiduciary obligations.

10. Order of Distribution on a Winding-Up

16.080 In a winding-up, the property of the company must be applied in satisfaction of its liabilities *pari passu* and thereafter will be distributed to the members according to their rights and interests in the company.[125] Any such distribution will however, take into account the rights of preferred and secured creditors and to any agreement between the company and any creditors that the claims of such creditors will be subordinated or deferred to the claims of any other creditors and to any contractual rights of set off or netting of claims.[126] In the case of an insolvent company, the Companies Law provides for certain preferential debts to be paid in priority to all other debts.[127] Such preferential debts include certain salaries due to employees, payments in respect of medical health insurance premiums, severance pay and workman compensation.[128]

16.081 A creditor who has security over the whole or part of the assets of the company is entitled without leave of the Grand Court or the sanction of a liquidator to enforce her or his security.[129]

11. Fraudulent Preference, Transactions at an Undervalue and Fraudulent Trading

16.082 Every conveyance or transfer of property or charge thereon and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of a creditor at a time when the company is unable to pay its debts with a view to giving the creditor a preference over other creditors is invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a winding-up.[130]

---

[125] Companies Law, section 140(1).
[126] *Ibid*, section 140(2).
[127] *Ibid*, section 141(1).
[128] *Ibid*, Schedule 2.
[129] *Ibid*, section 142(1).
[130] Companies Law, section 145(1).

16.083 This provision has been construed narrowly by the judiciary[131] which has followed the old English test set out in *In re M Kushler*[132] and determined that in order for a payment to be considered as a preference payment then the dominant motive of a payment must be to prefer a particular creditor and that the burden of proof of showing such motive will be upon the person alleging the intention to prefer.

16.084 Every disposition of property made at undervalues by or on behalf of a company with intent to defraud creditors is voidable at the instance of the liquidator.[133] An "intent to defraud" for this purpose means an intention to wilfully defeat an obligation owed to a creditor and "undervalue" is defined as the provision of no consideration for such disposition or a consideration; the value of which in money or monies worth is significantly less than the value of the property which is the subject to the disposition.[134]

16.085 The burden for establishing such intent will be on the liquidator[135] and a liquidator may not commence any proceedings where more than six years have elapsed since the date of the disposition.[136]

16.086 In the event that any disposition is set aside, but the Grand Court is satisfied that the transferee has not acted in bad faith, the transferee is entitled to a first charge over the property subject to the disposition of an amount equal to the entire costs properly incurred by the transferee in the defence of the action or proceedings.[137]

16.087 If in the course of the winding-up, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the liquidator may apply for a direction from the Grand Court. Such direction may declare that any persons who were knowingly parties to the carrying on of the business are liable to be made contributories to the company's assets as the Grand Court thinks appropriate.[138]

16.088 By virtue of the Fraudulent Dispositions Law, a creditor may seek to set aside a disposition of property at undervalue if that disposition was made in circumstances where the transferor's intention was wilfully to defeat an obligation owed to a creditor. However, such a claim can only be made in respect of an obligation, which means an obligation or liability (which includes a contingent liability) which existed on or prior to the date of a relevant disposition and of which the transferor had notice. The burden of establishing intent to defraud is on the creditor seeking to set aside the disposition. No action or proceedings may be commenced more than six years after the date of the relevant disposition.[139]

[131] See, for example, *RMF Market Neutral Strategies (Master) Ltd v DD Growth Premium 2X Fund (In Official Liquidation)* 2014 (2) CILR 316.
[132] [1943] 1 Ch 248.
[133] Companies Law, section 146(2).
[134] *Ibid*, section 146(1).
[135] *Ibid*, section 146(3).
[136] *Ibid*, section 146(4).
[137] *Ibid*, section 146(5).
[138] *Ibid*, section 147(2).
[139] Section 4 of the Fraudulent Dispositions Law (1996 Revision).

12. Dissolution

16.089 When the affairs of the company have been properly wound-up, the Grand Court will make an order that the company be dissolved with effect from the date of the order or such other date as the Grand Court thinks fit.[140] The official liquidator is required to file the order with the Registrar of Companies[141] and if he or she does not do so within fourteen days, he or she commits an offence and is liable on summary conviction to a penalty for every day in which he or she is in default.[142]

13. Provisional Liquidation

16.090 A company may apply for the appointment of a provisional liquidator where it is, or is likely to become, unable to pay its debts and intends to present a compromise or arrangement to its creditors.[143] A creditor or shareholder can also make an application seeking the appointment to make an application on the ground that there is a *prima facie* case for the making of a winding-up order and that the appointment of a provisional liquidator is necessary to prevent:

(1) the dissipation or misuse of the company's assets;

(2) the oppression if minority shareholders; or

(3) mismanagement or misconduct on the part of the company's directors.[144]

16.091 The objective of such an application is ordinarily to preserve and protect the company's assets until the substantive hearing of a winding-up petition and the appointment of official liquidators. Given the nature of the allegations a creditor or contributory would ordinarily make its application *ex parte*. As noted however, a company may also make the application and the motivating factor for this would ordinarily be to seek protection from a company's creditors to allow time restructure a business. The appointment of a provisional liquidator in assisting the rescue of a solvent company may be beneficial in circumstances where refinancing or sale as a going concern of a business is a real possibility and is likely to be more advantageous to creditors than realising and distributing the assets in a compulsory liquidation.

16.092 An application to appoint a provisional liquidator can only be made following the presentation of a winding up petition.[145] Provisional liquidators are subject to the

[140] Companies Law, section 152(1).
[141] *Ibid*, section 152(3).
[142] *Ibid*, section 152(4).
[143] *Ibid*, section 140(3).
[144] *Ibid*, section 104(2).
[145] Companies Law, section 104(1).

Court's supervision and only carry out the functions that the Court orders.[146] The order appointing a provisional liquidator may limit the scope of their powers depending upon the reason for their appointment.[147] Existing management may be allowed to remain in control of the company subject to the supervision of the Court and provisional liquidators in circumstances where a company restructuring has been proposed. The remuneration of a provisional liquidator is fixed by the Court upon application by the provisional liquidator.[148]

16.093 No suit, action or other proceeding can be commenced or proceeded with against the company without the Court's leave once a provisional liquidator has been appointed. However this automatic stay does not prevent a secured creditor from enforcing its security.

16.094 A provisional liquidation will be brought to an end by Court Order. This is usually as a result of either the winding-up order being made or the Court dismissing or withdrawing the winding-up petition. The Court may also order an earlier termination of the appointment of the provisional liquidator upon either an application by the provisional liquidator, petitioner, company, creditor or shareholder[149] or if an appeal against the appointment succeeds.

14. International Co-Operation in the Cayman Islands

16.095 Whilst the Cayman Islands has not adopted the UNCITRAL Model Law on Cross Boarder Insolvency, the Companies Law contains provisions dealing with co-operation in international bankruptcy and insolvency proceedings. 'Foreign bankruptcy proceedings' are defined as including proceedings for the purpose of reorganizing or rehabilitating an insolvent debtor.[150] 'Foreign representative' is defined as a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding.[151]

16.096 Pursuant to the Companies Law a foreign representative is empowered to apply to the court for the purpose of:

1) recognizing the right of the foreign representative to act on behalf of or in the name of the debtor locally;
2) enjoining the commencement or staying the continuation of local proceedings against a debtor;
3) staying the enforcement of any judgment against a debtor;
4) requiring a person in possession of information about the business of the debtor to be examined by and produce documents to the foreign representative; and

[146] *Ibid*, section 104(4).
[147] Order 4, Rule 4(3), Companies Winding-Up Rules 2018.
[148] Companies Law, section 104(5).
[149] Order 4, Rule 5, Companies Winding-Up Rules 2018.
[150] Companies Law, section 240.
[151] *Ibid*, section 240.

5) ordering the turnover to a foreign representative of any property belonging to a debtor.[152]

16.097 In exercising its discretion the court is to be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with:

1) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
2) the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
3) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;
4) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V of the Companies Law;
5) the recognition and enforcement of security interests created by the debtor;
6) the non-enforcement of foreign taxes, fines and penalties; and
7) comity.[153]

16.098 In circumstances in which a Cayman Islands registered company is the subject of foreign bankruptcy proceedings, notice of this fact is required to be filed by the company's liquidator (or where there is none, its directors) with the Registrar of Companies, and also published in the Gazette.[154] Note that in the case of *Picard v Primeo Fund* [2014] 1 CILR 379, the Cayman Islands Court of Appeal held that the Court indeed does have jurisdiction under section 241(1)(e) of the Cayman Companies Law to make a Transaction Avoidance Order, *but* could only apply this under Cayman Companies law *and* not foreign insolvency law.

[152] Companies Law, section 241(1).
[153] *Ibid*, section 242(1).
[154] *Ibid*, section 243.

ANNEXURE A

THIRD SCHEDULE POWERS OF LIQUIDATORS

Part I

Powers exercisable with sanction

1. Power to bring or defend any action or other legal proceeding in the name and on behalf of the company.
2. Power to carry on the business of the company so far as may be necessary for its beneficial winding-up.
3. Power to dispose of any property of the company to a person who is or was related to the company.
4. Power to pay any class of creditors in full.
5. Power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable.
6. Power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company.
7. Power to deal with all questions in any way relating to or affecting the assets or the winding-up of the company to take any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it.
8. The power to sell any of the company's property by public auction or private contact with power to transfer the whole of it to any person or to sell the same in parcels.
9. The power to raise or borrow money and grant securities therefore over the property of the company.
10. The power to engage staff (whether or not as employees of the company) to assist her or him in the performance of her or his functions.
11. The power to engage attorneys and other professionally qualified persons to assist her or him in the performance of her or his functions.

Part II

Powers exercisable without sanction

1. The power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as he or she considers necessary.
2. The power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal.
3. The power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against her or his estate and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and ratably with the other separate creditors.
4. The power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with the respect of the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business.
5. The power to promote a scheme of arrangement pursuant to section 86 of the Company Law.
6. The power to convene meetings of creditors and contributories.
7. The power to do all other things incidental to the exercise of her or his powers.