



## **HOW CAPTIVES WORK**

**UNIVERSITY COLLEGE OF THE CAYMAN ISLANDS**

**Paul Scrivener, M.A. (Cantab)**

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## INTRODUCTION

- Legal Structure of the Captive
- Incorporation
- Directors
- Shareholders
- Officers
- Registered Office



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## **INTRODUCTION (cont'd)**

- Share Capital
- Directors' Meetings
- Shareholders' Meetings
- Winding Up



## **LEGAL STRUCTURE OF THE CAPTIVE**

- Separate legal entity
- Limited liability
- Memorandum of Association
- Articles of Association (your roadmap!)



## **LEGAL STRUCTURE OF THE CAPTIVE (cont'd)**

- Shareholders Agreement (another roadmap!)
- Participation Agreement
- Subscription Agreement



## INCORPORATION

- Who incorporates ?
- Draft Memorandum of Association and Articles of Association
- Due Diligence
- Company Application Form
- CIMA Memorandum to ROC



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## INCORPORATION (cont'd)

- Filing Fees (NB Express)
- Documents to file with ROC
- Certificate of Incorporation
- Tax Exemption Certificate



## THE DIRECTORS

- Role of Directors
- Appointment of directors (CIMA and ROC)
- Resignation/removal of directors (CIMA and ROC)
- Rotation of directors
- Committees



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## DIRECTORS' COMMON LAW DUTIES

- Agent for Company
- Fiduciary
  - To act in good faith and in the best interests of the company;
  - Not to exercise powers for an improper purpose;
  - Not to misapply the assets of the company;
  - To avoid any conflict of interest; and
  - Not to make a secret profit from his or her position.
- Duty to exercise care and skill
- Owed to company (shareholders as a group)



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## **DIRECTORS' STATUTORY DUTIES (All Companies)**

- Meetings sufficient to fulfill obligations to Company
- Keep proper minutes
- Maintain registers (members, directors and officers, mortgages and charges)
- Keep proper books of account (audits not required unless regulated entity)
- ROC filings (changes, amendments, special resolutions)
- Annual returns (exempted companies only)



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## STATUTORY DUTIES (Segregated Portfolio Companies)

- Segregation of cell assets
  - Physical, not merely accounting
  - Co-mingling likely fatal to integrity
- No transfer of assets between cells except for full value
  - Not dealing at arm's length
- Proper execution of documents for a cell
  - Personal liability of director (document execution)



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## STANDARD OF CARE FOR DIRECTORS

- Applies to duty to exercise care and skill
- Subjective (tailored to director, company, circumstances)
  - No hindsight
- Objective (reasonable person test)
- Duty to participate and not abdicate responsibility
- Delegation of authority



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## BREACH OF DUTY

- Duty owed to company; not to cell, individual shareholders or policy holders
- If questionable solvency, must consider creditors, policy holders
- Directors must bring action against offending director
- Breach of Directors' duties may result in personal liability



## **BREACH OF DUTY (cont'd)**

- If insolvent, liquidators obligated to act for company
- Shareholders' right to bring action very limited



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## INDEMNITY

- Articles contain indemnity (must exclude dishonesty, willful default or willful neglect)
- Can indemnify for negligence, provided not willful neglect
- “Gross negligence” (not a defined legal concept)



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## INDEMNITY (cont'd)

- If the company does not indemnify for any negligence, must specify in detail what is to be considered to be negligence
- Directors and officers insurance should mirror Articles



## THE CAPTIVE'S SHAREHOLDERS

- Role
- Powers (majority rule)
- Duties
- Different classes
- Protection of the minority



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## THE CAPTIVE'S SHAREHOLDERS (cont'd)

- Trustee shareholders
- Death of shareholder
- Joint shareholders
- Corporate shareholders
- Register of Members



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## THE CAPTIVE'S OFFICERS

- Chairman
- President
- Secretary
- Assistant Secretary
- Treasurer



## THE REGISTERED OFFICE

- Role
- Reputational Risk
- Names to be displayed
- Registers
- Seal



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## SHARE CAPITAL

- Authorised and issued
- Nature of a share
- Nil paid/ part paid/ fully paid
- Different classes of shares
- Capital maintenance rule
- Increase of share capital



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## SHARE CAPITAL (cont'd)

- Reduction of share capital
- Share premium account
- Issuing shares
- Transferring shares
- Redeemable shares
- Repurchase of shares



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## **SHARE CAPITAL (cont'd)**

- Fractional shares
- Dividends



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## DIRECTORS' MEETINGS

- Calling a directors' meeting
- Notices
- Location
- Proxies/alternates
- Quorum



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## DIRECTORS' MEETINGS (cont'd)

- Voting
- Minutes/written resolutions



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## SHAREHOLDERS' MEETINGS

- AGMs and EGMs
- Calling a shareholders' meeting
- Notices
- Location
- Proxies



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## **SHAREHOLDERS' MEETINGS (cont'd)**

- Special resolutions/ordinary resolutions
- Minutes/written resolutions
- Class meetings



## WINDING UP

- Voluntary Winding Up (Solvent)
- Clean up Balance Sheet (commutation, release)
- More involved now after 2009 Companies Law Revisions (e.g. Declaration of Solvency)
- Liquidators ?
- Minimizing CIMA fees
- Leave it to the experts !