

What's Up With the Companies Act Amendment?

Janet E. Morrison, Contributor



February 1, 2008 marked the third anniversary of the coming into force of the Companies Act. Its enactment marked the introduction of a modern company law regime after many years of protracted debates before Parliamentary and Senate review committees initiated by recommendations for reform contained in a report issued by a Review Committee on the Reform of Company Law chaired by the late Kenneth O. Rattray, O.J., Q.C.

It would be fair comment for me to say that at the time the Act was passed into law, it was even then recognized that the task was not done and that there were several amendments that were urgently needed to be made as soon as possible after its enactment. The task of continued review went into full gear by the Companies Office of Jamaica and a subcommittee of the Jamaican Bar Association. Not surprisingly, that review process produced voluminous submissions for amendments which were submitted to the former Minister Phillip Paulwell. Upon a review of the submissions by the Chief Parliamentary Counsel, submissions for amendments were laid before Parliament in an attempt to complete the amendment exercise before a change of government occurred mindful that upon the election of a new government, all parliamentary submissions would have to be reconsidered and resubmitted. As it transpired, the long promised amendments were not passed by former Parliament, a new government was elected in the October 3, 2007 general elections and the process of preparing Parliamentary submissions for amendments to the Act will have to be redone.

The question therefore begs itself – how much longer will amendments take this time? Three years have passed since the 2004 Act came into force and five months have passed since there has been a change in government, but, the legal fraternity and the business sector which it services have been waiting for at least one fundamental amendment to be made to the Act which is to provide a legitimate method for companies formed under the repealed 1965 Companies Act, the precursor of the 2004 Companies Act, to transition to the 2004 Act. This lacuna in the law exists because the 2004 Act does not provide a procedure by which such companies may elect to come under the operation of the new Act. Serious omission - but not seen as necessary to have sparked immediate amendments by Parliament of the day. In the meanwhile, to keep commerce rolling, the Registrar of Companies has permitted old companies to transition by a method fashioned by the Companies Office which the former Minister had promised would be ratified by Parliament. That did not happen. The question therefore arises again – how long will it take Parliament to make this important amendment to the Act?

Also in urgent need of reform are provisions actually introduced by the 2004 Act which deal with mutual funds. Investments in mutual funds are by way of subscription for shares in a mutual fund company. In the normal course of business mutual fund shares are continuously on offer. The prospectus requirements of the Companies Act, contemplate normal trading companies which may occasionally offer shares to the public for subscription but do not do so on almost every business day as mutual fund companies do.

The Act therefore exempts local mutual companies from the requirements of issuing a prospectus compliant with the Act's requirements as to content. This, for the reason that it would be impractical for mutual companies to have to issue such a prospectus on each occasion an offer is made to the public. However, that exemption does not apply to mutual fund companies incorporated outside the island even though the fund may have been approved under the Securities Act. The existing exemption to local mutual funds therefore needs to be extended so as to apply to overseas mutual funds.

More widely it may be worth considering amendments which simply exempts a mutual fund, local or overseas, which has been approved under the Securities Act from complying with prospectus requirements under the Companies Act.

More generally, in relation to the need for amendments to the 2004 Act, is a criticism which arises from the fact that the former Parliament sought to retain some part of the repealed 1965 Companies Act and fit a new company law within the framework of the repealed Act. Putting the new wine into the old wineskin of the old law proved daunting because the old regime was based on a “par value” regime and the new on a “no par value” regime – each very different methods of determining the value of the shares of the company. Simply, under the old approach the value of the share is fixed at the date of incorporation or creation, and in the new regime, the value of the shares is ‘floating’ as the fortunes of the company wax or wane. As a result of this attempt to fuse the old with the new there are many inconsistent references throughout the 2004 Act to ‘nominal value’, ‘share capital’, ‘share premium’ and ‘minimum premium’ that need rationalizing.

Finally, the insolvency provisions of the 2004 Act, adopted in whole from the earlier 1965 Act, remain unchanged. Unlike modern insolvency regime, our company insolvency regime does not provide rescue or shelter provisions for an insolvent company. There is no purgatory except the expensive and dilatory procedures of schemes of arrangement or receiverships. The former government promised that a new insolvency regime would have been introduced after the passage of the new Company Act to introduce a modern unitary personal bankruptcy and company insolvency regime. How long will it take for a change to be made to our insolvency laws to bring us into line with modern insolvency practice?

Every effort should therefore be made to restart the amendment process and, indeed, to keep the reform process to company law ongoing given that company law is a dynamic and therefore should be responsive to the commercial needs of our country in a globalized market.

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