

FORMING A BUSINESS CORPORATION: ISSUES TO CONSIDER

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I. INTRODUCTION

Since a similar article, *Incorporation Planning in Liberia: Organizing Business Corporations in Liberia*, was published in 1984,¹ various provisions of the Business Corporation Act (hereinafter, “BCA”) were amended, in 1999 and in 2002, warranting another review of the legal framework under which a business corporation is established in Liberia.

The evolution of the laws of corporation in Liberia has witnessed a Liberian corporation coming into existence only by an act of legislature,² to the enactment of the Liberian Corporation Law of 1948,³ which not only allowed any person to organize a corporation by complying with prescribed conditions under a general law, but also enabled the formation of Liberian corporations that would be resident in other jurisdictions. This was the introduction of the idea of the non-resident domestic corporation.⁴ A Liberian corporation may, therefore, be either a resident domestic corporation—a domestic corporation doing business in Liberia, or a non-resident domestic corporation—a domestic corporation not doing business in Liberia. The two kinds of corporations are treated differently for tax and other purposes.⁵

The Liberian Corporation Law of 1956 was enacted, as successor to the 1948 Act, but the most expansive changes to the corporation law were made in the BCA, as part of the New Associations Law of 1976, as amended in 1977. The revisions of the BCA in 1999 and 2002 continued the liberalizing trend of the laws of corporation that mirrors other jurisdictions, making the BCA ‘enabling,’ ‘permissive,’ and ‘liberal,’ as distinguished from ‘regulatory’ and ‘paternalistic’.⁶

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¹ Liberia Law Journal (1984)

² To incorporate by special act, a private bill had to be introduced in the legislature, passed by both houses, and signed into law by the President.

³ The 1948 Corporation Law was a result of the “Statement of Understanding” between the Government of Liberia and Stettinius Associates Liberia Inc., a Delaware corporation. See, Truslow, Francis Adams, “The Liberian corporation law of 1948: Incorporating the recommendations for amendment contained in the report dated February 22, 1949, to His Excellency, William V.S. Tubman, President of the Republic of Liberia.” See, <http://orllabs.oclc.org/ifronties/lccn-no94-30000/>; and, www.worldcat.org/title/liberian-corporation-law-of-1948-incorporating.

⁴ See, Sec. 44, Liberian Corporation Law of 1948.

⁵ See, BCA, Sec. 3.1 & Sec. 800, Revenue Code of Liberia, as amended, Nov. 1, 2011.

⁶ See, Henn, Harry, G., *Handbook of the Law of Corporation and other Business Enterprises*, 2d ed. (1970)

Prior to the latest sets of amendments of the BCA in 2002, if the shareholders of a corporation decided that they no longer wanted to conduct the business affairs of their corporation in Liberia, their options were either to sell their shares or dissolve their corporation. Due to the advancement of the laws of business associations, the corporation is no longer restricted to attracting cross-border investments; the corporation may itself cross borders, moving from one jurisdiction to another.

Today, the shareholders may elect to re-domicile out of Liberia to a foreign jurisdiction, or engage in a variation of fundamental changes, which were heretofore not allowed by law.⁷

And, as a result of the amendments, one may also incorporate a non-share corporation or a hybrid corporation.⁸ But the provisions of the BCA generally apply *mutatis mutandis* to a non-share corporation, having members instead of shareholders, and a hybrid corporation, having both members and shareholders, as such provisions apply to shareholders of a conventional corporation.⁹

This Paper, however, examines the process of forming a business corporation by discussing issues that should be considered by the attorney, procedures that should be followed by the attorney and the promoters or organizers of the corporation, and subsequent actions to be taken by the newly formed corporation, ensuring that the corporation is not simply incorporated, but also duly organized. The corporate name and other mandatory provisions of the articles of incorporation (the “Articles”); items that may be included in the Articles, but which may be burdensome as well as unnecessary inclusions; and, the organization meeting, are all issues discussed in the context of the documents to be drafted by the attorney.

There are other forms of businesses that the attorney may want to consider as a vehicle for her client’s proposed economic activities—the general partnership or limited partnership, including the joint venture, the limited liability company, the registered business company, or the private foundation. But the issues discussed herein relate to the formation of the business corporation.¹⁰

Promoters and attorneys alike tend to gravitate to the corporation, as opposed to other forms of businesses, mainly because of the principle of limited liability. That is, the maximum loss to shareholders due to the corporation’s debts and/or torts, with rare exceptions,¹¹ will not exceed

⁷ Corporate re-domiciliation is the process by which a company moves its domicile from one jurisdiction to another by changing the country under whose laws it is registered or incorporated, while maintaining the same legal identity. Corporations re-domicile for a variety of reasons including to take advantage of more favorable tax laws or less stringent regulatory provisions; to align their place of registration with their shareholder base; or to access specialist capital markets. See, <http://www.companies-home.com/solutions/structures/redomiciliation/>

⁸ BCA, Sec. 1.3.4

⁹ *Ibid.*

¹⁰ For an in-depth review of the advantages and disadvantages of the various business forms, see, Palmiter, Alan R., *Examples & Explanations: Corporations*, 6th ed., Aspen Publishers 2009, pp. 25-39.

¹¹ The exception to the general rule of limitation of liability is expressed in terms of “piercing the corporate veil,” by which the corporate fiction is disregarded and the substance of corporate transactions takes precedence over form. The various approaches used to disregard the corporate entity include, “lack of formality and confusion of affairs,” “dominating the corporation’s affairs,” and “inadequate capitalization,” among others. See, Cox, James, D., et al, *Corporations*, Aspen Law & Business (1997) Sec’s.7.3 to 7.9.

the amount that they have invested in the enterprise. Of course, there are other advantages of incorporating one's business such as continuity of the entity's existence despite change of equity ownership, centralized management by a board of directors, free transferability of equity interests, among others.

But the decision to incorporate is often made without adequate consideration of the tax consequences, which may be a reason not to incorporate, at least not at the onset of the business. Generally, corporate income is subject to a double tax burden: first, at the entity level and, second, when distributed to the shareholders, as dividend. Other types of businesses, for example, the limited liability company, would also protect the client from exposure to unlimited liability, while avoiding the double taxation that afflicts the corporate entity. The attorney may want to consider the financial projection of the client to determine whether the proposed business entity is likely to suffer a loss in the first year of its existence, which is not unusual. With a corporate entity, a business loss may not be used by the shareholder to reduce her tax burden in other ventures. But in the case of another entity, for example, the partnership, a partner may apply her pro rata share of the business loss of the partnership, as a flow-through, to offset profits from other ventures in which she may be engaged, thereby reducing her tax liability from a completely unrelated venture.

An innovation in the BCA, as a result of the 2002 amendments, is that the investor may begin her business operation as a limited liability company, for example, and thereafter deregister as a limited liability company and then re-register as a corporation.¹²

These are just few of the issues, which the attorney should discuss with her client in deciding the most suitable type of business entity to be established. These issues go beyond the scope of this Paper and are therefore not discussed in any detail.

The drafting of the Articles is usually the first essential step in the incorporation process. There may, however, be occasions when it would be advisable for the attorney to first set forth the understandings of the organizers in a pre-incorporation agreement. The attorney should carefully review the BCA, understand the needs of the proposed business, the wishes of the organizers—special attention should be given to their plans for controlling, capitalizing, and financing of the particular enterprise. The Articles should set forth all the provisions required by the BCA, expressing them as nearly as possible in the order and in statutory language. That should at least make the review of the Articles by the Registrar easier and help expedite the processing of the document.

II. CONTENTS OF ARTICLES OF INCORPORATION

The BCA contains a list of things that the Articles may or may not include.

¹² BCA, Sec. 10.13

A. Name

The name of a corporation must contain the word “corporation,” “incorporated,” “company,” or “limited” or an abbreviation of one of those words.¹³ However, if a corporation is a foreign corporation that wishes to establish a place of business in Liberia or seeks authorization to do business in Liberia, the corporation may include as part of its name such word or words, abbreviations, suffix, or prefix of like import of a foreign country or foreign jurisdiction as will clearly indicate that it is a body corporate with separate legal personality as distinguished from a natural person.¹⁴ A good example of that would be “S.A.” (*Société Anonyme*), use by civil law jurisdictions to indicate that the entity is a corporation.

The BCA, however, provides that the Registrar may waive such requirement¹⁵—the requirement of having one of the four words as part of the name of the corporation—where the Registrar is satisfied that the name is the business name of the entity denominated in accordance with the standards of the economic activity in which the entity is or will be engaged. But the Registrar may not waive the requirement if it is determined that the proposed name is, or might otherwise appear to be, that of a natural person.¹⁶ One may therefore conclude that Articles bearing a corporate name of “Cassava Farm Business” would be accepted and filed by the Corporate Registry.

Although “Cassava Farm Business” is not likely to be confused as the name of a natural person, it could very well be the name of a general partnership, sole proprietorship, or a DBA (doing business as) name or trade name of a natural person. The BCA should, therefore, not authorize the Registrar to waive the requirement of having one of the four words as part of the name of the corporation, if it is determined that the proposed name is also likely to, or might otherwise appear to be, that of an unincorporated entity such as a general partnership or a sole proprietorship.

The word “company” as part of the name of a corporation may also present a problem. For example, “John Brown Company,” which may be a corporation, may also be either a general partnership or sole proprietorship, neither of which affords its owner the attribute of limited liability. There is no law that prohibits a general partnership or sole proprietorship from also having the word, “company” as part of its name. Therefore, if one is to ensure that there is no doubt or confusion that the entity is a body corporate with a separate legal personality, as distinguished from a general partnership or sole proprietorship, attorneys may want to consider not using the word, “company” or an abbreviation thereof as a suffix in the name of a corporation, unless the word “company” is accompanied by “incorporated” or “limited.” However, the use of “company” and “corporation” in the same name would appear kind of awkward.

But Liberia is a “conclusive evidence” jurisdiction! That is, the endorsement by the Registrar on the Articles is conclusive evidence that the entity has been duly incorporated and that its

¹³ Id. Sec. 4.2.1 (a)

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

existence has begun, effective as of the date of the filing of the Articles.¹⁷ This leads many attorneys to be less concerned about the potential legal contention of third parties, who have contracted or otherwise done business with the entity, that they transacted business under the impression that they were dealing with a general partnership or sole proprietorship instead of a corporate entity.

While using the word “company,” without “incorporated” or “limited” as part of the name of the corporation, would not of itself be a sufficient reason to hold a shareholder/manager of a closely held corporation¹⁸ responsible for the liabilities of the entity, the use of any of the other three words alone or in combination with “company” would provide prima facie support for a motion to dismiss or a motion for misjoinder, if a shareholder, director, officer or employee of the corporation is named as a party to a suit because the plaintiff assumed she was transacting with an unincorporated entity.¹⁹

The BCA does not only list words, one of which must be part of the name of every corporation, but the law also outlines specifics that the name of a corporation may not contain. The name of a corporation may not contain a word, the use of which constitutes a criminal offense or may be offensive or undesirable.²⁰ For example, “Sarah’s Brothel Inc.” should not be allowed as a name for a corporation.

It is also provided that the name of a corporation should not contain the words “Chamber of Commerce,” “Building Society,” “Bank,” or “Insurance,” or words of similar connotation or a translation of those words, unless the corporation is authorized to use the words by virtue of a license granted by the Government.²¹ Notwithstanding, Articles that are presented for filing for the sole purpose of forming a bank or insurance company, may have the words “Bank” or “Insurance Company” in the name of the corporation, although the license would be obtained only after incorporation.²² However, if the Articles are being processed for the purpose of forming a financial institution or an insurance company, care should be taken to familiarize oneself with the requirements of both the Financial Institution Act (FIA) and the Insurance Law (IL).²³ Whenever a provision of the BCA conflicts with any provision of the FIA or the IL, the FIA or the IL, as the case may be, would prevail.²⁴

¹⁷ Id. Sec. 4.7

¹⁸ “Closely held corporation” as used in this article, is not synonymous to “close corporation,” because Liberia does not have a close corporation statute, as in other jurisdictions. The BCA is a general corporation law. Instead, the use of the phrase, closely held corporation, is intended to indicate a corporation whose shares are held by one shareholder or a closely knit group of shareholders, and the majority of the shareholders participate in the management, direction, and operations of the corporation.

¹⁹ Id. Sec. 2.5

²⁰ Id. Sec. 4.2.1 (c)

²¹ Id. Sec. 4.2.1 (d)

²² IL, Sec. 3.3 (b); FIA, Part II, Sec. 5 (2)

²³ As examples, unlike other business corporations, all shares of a local financial institution must be in registered form. See, FIA, Part II, Sec. 9 (1). And the IL requires that incorporators of an insurance company must be seven, three of whom must be Liberians. See, Sec. 3.3 (a)

²⁴ BCA, Sec.1.3.2

The name of a corporation may also not contain words which suggest, or are calculated to suggest, the patronage of the Government or any of its agencies.²⁵ Certainly, no corporate name should include “Government of Liberia” or the name of any ministry of the government. If the incorporator desires to have “Liberia” as part of the name of the corporation, it is advisable that the word “Liberia” be parenthesized.

Additionally, to avoid common law liability, the name should not be misleading or deceptive—suggesting that the corporation is engaged in doing something that it does not do.

The corporate name may be in another language as long as it is written in English letters or characters.²⁶

Prior to filing the Articles, the attorney or other person responsible for preparing the document would do well to verify with the Corporate Registry the availability of the name that the corporation intends to use, and whether the name would otherwise be appropriate.

The Registrar should confirm that the proposed name is not the same as the name of any existing corporation, domestic or authorized foreign corporations, or any other legal entity. The Registrar may reject the proposed name even if it is not identical to the name of an existing entity; she may reject the name if it is so similar to the name of a pre-existing entity that it tends to confuse or deceive. An exception would however be made where the existing legal entity is in the process of dissolving and gives its consent to the use of its name or a similar name.²⁷

In determining whether the proposed name is the same as that of an existing entity, the Registrar may disregard the definite article, where it is the first word of the name, and the following words and expressions where they appear at the end of a name: “Company” or “and company” or “Corporation” or “and corporation” or “Company limited” or “and company limited” or “Corporation limited” or “and corporation limited” or “Limited,” or a translation thereof, or words with an equivalent meaning in another language. Abbreviations of any of those words or expressions where they appear before or at the end of the name, and type and case of letters, accents, spaces between letters and punctuation marks; and “and” and “&” are to be taken as the same.²⁸

The mere fact that the Articles have been accepted and filed by the Corporate Registry is not an adjudication of the right to the name and does not confer an exclusive right to the name chosen as against previous rights of other corporations or other business entities. Where it is subsequently determined by the Registrar that a corporation has been incorporated with a name that is the same as, or very much like, a name of a prior existing entity, the Registrar may, within twelve months of the time of incorporation, direct the corporation to change its name.²⁹ Also, if it appears to the Registrar that misleading information has been given for the purpose of incorporation with a particular name, or undertakings or assurances have been given for that

²⁵ Id. Sec. 4.2.1 (e)

²⁶ Id. Sec. 1.4.2 (a)

²⁷ Id. Sec. 4.2.1 (b)

²⁸ Id. Sec. 4.2.1 (f)

²⁹ Id. Sec. 4.2.3

purpose and have not been fulfilled, she may, within five years of the date of its incorporation direct the corporation to change its name.³⁰ There is a vast body of law under the general heading of unfair competition, which, among other things, protects the use of a trade name.

B. Duration of Corporate Existence

The duration of the corporation should be stated in the Articles only if the corporation is not to have perpetual existence.³¹ That is, only if the organizers would like to have the corporation remain in existence for a fixed term should the duration of the corporation be stated. For many years, however, it has been the practice to state that, “The Corporation shall have perpetual existence,” although this is implied in the law. So, in order to expedite the filing of the Articles, the attorney may consider including such a provision. In any case, as is said in Liberian legal parlance, “surplusage does not vitiate.”

Whether stated in the Articles or not, it might be better for the corporation to have perpetual existence, even if the organizers intend for the entity to exist for a determined period of time. Assume the Articles provides for a corporate existence of a fixed period, say ten years, for example. At the expiration of the ten year period the corporation automatically ceases to exist. Although the organizers might have intended doing business for only ten years, it may have been subsequently determined that it was in the best interest of the shareholders and other stakeholders for the corporation to continue existing beyond the ten year period. The necessary resolutions would have to be adopted to amend the Articles extending the life of the entity, and the attorney would have to file the articles of amendment with the Registry. But sheer inadvertence on the part of the attorney or an office staff could cause the existence of the corporation to expire, as provided in the Articles, if the articles of amendment are not timely filed. All of this may be avoided by allowing the corporation to have perpetual existence, and should the shareholders subsequently decide to dissolve the corporation, they may then take the necessary actions.

C. Purpose

The Articles may provide a specific purpose or purposes for which the corporation is organized, or may simply state that the purpose of the corporation is, “to engage in any lawful act or activity for which corporations may be organized”—“all purpose” or “general purpose” clause. Alternatively, the Articles may combine both a specific purpose or purposes and the all purpose clause.³²

In advising the client whether to use an all purpose clause or to list specific purposes, the attorney should consider the potential consequences associated with each. It has been said that, “Generally, there is no need to limit the purposes to the business actually contemplated, and an ‘all purpose’ clause assures flexibility, certainty, and efficiency.”³³ But Cox et al go on to say that, “However, the occasion can well arise when a narrow purpose clause is a means for

³⁰ Id. Sec 4.2.4

³¹ Id. Sec. 4.4 (b)

³² Id. Sec. 4.4 (c)

³³ Cox, James, D., et al, *Corporations*, Aspen Law & Business (1997), Sec. 3.6, p.51

fulfilling the desires of the organizers as well as placing a check on management’s ability to change the nature of the business.”³⁴

If the corporation will be a closely held corporation, with shareholders also serving as directors, the all purpose clause would be the better option, as the shareholders who are also directors would be able to determine, on an on-going basis, the business in which the corporation should engage. But if the directors are independent of the shareholders, exercising their statutory duty to manage the business and affairs of the corporation, the board of directors, with the authority of an all-purpose clause, may cause the corporation to engage in businesses that the shareholders may not have intended. Unless there are expressed limitations, the all purpose clause confers on the board of directors wide discretionary authority as to the kinds of business operations in which the corporation may engage.

On the other hand, listing specific businesses in which the corporation may engage, limits the authority of the directors, restricting the corporation from undertaking any activity not provided for in the Articles. If the corporation subsequently decides to engage in a business activity other than those specifically listed, the Articles may be amended to so provide.

Acts or transfers of real or personal property by or to the corporation, not covered under specific purposes, or at least incidental to the attainment of any of the specific purposes, would be *ultra vires*.³⁵ If the corporation is without capacity or power to take certain actions, transfer or receive real or personal property, such action or transfer, although otherwise lawful may be enjoined in an action by a shareholder against the corporation or an action by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through shareholders in a derivative suit against the incumbent or former officers or directors of the corporation.³⁶

A challenge against such *ultra vires* acts or transfer or receipt of properties may also be asserted, “In a proceeding by the Minister of Justice, as provided in the Civil Procedure Law (CPL), to dissolve the corporation, or to enjoin it from the doing of unauthorized business.”³⁷

³⁴ Id

³⁵ BCA, Sec. 2.4

³⁶ Id.

³⁷ Id., Sec.2.4(c). There is, however, one bit of a problem with Sec.2.4(c) of the BCA—the provision under the CPL, referenced by the BCA, is the special proceeding of *quo warranto*, which does not authorize the dissolution of a *de jure* domestic corporation. Sub-section (c) of Section 16.31 of the CPL, upon which Section 2.4(c) of the BCA relies, relates only to *de facto* resident domestic corporations; and, Section 16.31(c) of the CPL would arguably not affect a *de facto domestic* corporation that non-resident.

Notwithstanding, the Minister of Justice of Liberia, without an expressed and unambiguous statutory authority, is generally believed to have the authority to institute a special proceeding to dissolve a domestic corporation that engages in an act, which may not be *per se* illegal or even *malum prohibitum*, but simply because the corporation lacks the capacity. An *ultra vires* act that is otherwise lawful generally affects the interest of only the shareholders, and the shareholders may ratify it so that third parties dealing with the corporation in good faith would be protected in reliance on such act. See, the New York Business Corporation Law (NY BCL), Note 10—Ratification of unauthorized act.

The *ultra vires* section of the BCA may have been borrowed from the NY BCL, but the NY BCL, unlike the BCA, contains clear provisions authorizing the Attorney General to “annul or dissolve” the corporation. See, NY BCL, Sec. 203(c) & Sec. 109(a) (1) & (2). And, as indicated above, the section of the CPL, which is relied upon by the BCA does not give the Minister of Justice the authority to institute a proceeding for the dissolution of a *de jure* domestic

Using both the specific and all purpose clauses may add nothing to the document and at best would make the specific purposes of no significance. There is, however, at least one jurisdiction in the United States of America that requires all Articles to include the all purpose clause, and that any other statements are permitted only to limit the corporation's purposes or powers.³⁸

However, some attorneys use both the specific and all purpose clauses in the purpose clause of the corporation for two reasons: (i) not having an opportunity to hold an informed discussion with the client, the attorney might not want to run the risk of omitting something that the client may have wanted the corporation to engage in; (ii) although the issue of (i) above may be resolved by using the one sentence all purpose clause, some attorneys tend to use a lengthy list of specific purposes as well, simply as a matter of habit.

For reasons stated later in this Paper, the powers of the corporation should not be listed as purposes of the corporation.

D. Registered Address and Registered Agent

Every domestic corporation is required to designate a registered agent in Liberia upon whom precepts against such corporation or any notice or demand, required or permitted by law to be served, may be served.³⁹ The registered agent for a resident domestic corporation shall be a resident domestic corporation⁴⁰ having a place of business in Liberia or a natural person⁴¹, resident of and having a business address in Liberia. The registered agent for a non-resident domestic corporation shall be a licensed domestic bank or trust company, which is authorized to act as registered agent for such corporation.

A common mistake that drafters of the Articles make is the listing of a post office box in the Articles as a registered address of the corporation. This is wrong and certainly not the intent of the BCA. One of the purposes that a registered address serves is to receive processes from the courts, and a court process cannot be served on a post office box. There are instances when the law provides for service of process by publication and mailing of precepts⁴², but a post office box would not fulfill the statutory requirement of a registered address.

There is probably no one better than the attorney to serve as the registered agent for a resident domestic corporation. Being aware of the period within which to respond to the precepts, demands, or notices, the attorney would, following consultation with the client, prepare, file and/or serve the necessary response on behalf of the client. From the business perspective of the

corporation. Sec. 2,4(c) of the BCA should therefore be revised, expressly authorizing the dissolution of domestic corporations for engaging in *ultra vires* acts, or Sec. 16.31 of the CPL should be amended, empowering the Minister of Justice to dissolve *de jure* domestic corporations.

³⁸ See, Cal. Corp. Code Sec. 206 (West 1990)

³⁹ BCA, Sec. 3.1.1

⁴⁰ *Id.* The Legislature might want to consider amending this provision, enabling a resident domestic LLC to also serve as a registered agent.

⁴¹ *Id.*

⁴² See, Sec. 3.40, I LCL Revised.

attorney, serving as registered agent maintains her relationship with the corporation, which she had incorporated and organized.

Some clients tend to be concerned about the appearance of permanency of the relationship with the attorney by having the attorney named in the Articles, as registered agent. This issue is not overlooked, but the same concern would apply to whoever is listed as registered agent—another individual or a legal person. Even if a shareholder is to be named as registered agent, an attorney might still be necessary to respond to the precept, demand, or notice. In any case, the corporation may change its registered agent whenever it so decides.⁴³

The registered agent shall not be held liable, directly or indirectly, for any liability of any kind with respect to its actions or omissions in the good faith conduct of the registered agent's duties or because of the acts of the legal person for which it serves as registered agent.⁴⁴

E. Capital Stock

A corporation, except a non-share corporation, may issue only the stock that is authorized in its Articles.⁴⁵ The Articles should therefore state the aggregate number of shares which the corporation shall have the authority to issue, and the par value of each of such shares, or a statement that the shares are without par value. If such shares are to be divided into classes, the number of shares of each class, and similarly, a statement of the par value of the shares of each class or that the shares are to be without par value.⁴⁶

The fee paid for incorporation may affect the decision as to whether the corporation is authorized to issue par value or no par value shares. The minimum shares fee to be paid for incorporating is

⁴³ Sec. 3.1.4 of the BCA provides that, "A designation of a registered agent under this section may be made, revoked, or changed by filing an appropriate notification (Emphasis mine) with the Registrar or the Deputy Registrar. However, Sec. 9.3.2 (b) of the BCA provides for an amendment of the articles of incorporation, approved by the board of directors, "To make, revoke or change the designation of a registered agent ..." Unless "an appropriate notification" under Sec 3.1.4 is synonymous to articles of amendment, there is a need to reconcile the two sections. If they are synonymous, the statute should so indicate. Alternatively, the BCA should be amended to provide, like NY BCL, for the designation of a registered agent either in the articles of incorporation or an application for authority. See, NY BCL, Sec. 305(2). If the registered agent is designated by an application for authority then the designation may be revoked by filing "an appropriate notification," without amending the articles of incorporation. Should the lawmakers insist on having the registered agent named in the articles, there should probably be a provision similar to that for initial directors. That is, having Sec. 4.4 (d) of the BCA read as follows: "The initial registered address of the corporation in Liberia and the name and address of its initial registered agent." With such a change, complying with Sec. 3.1.4 would be consistent with other provisions of the BCA. The corporation would then have the option of providing information about its registered agent in its articles of incorporation or an appropriate notification. Of course, the registered agent may resign by filing a written notice with the registrar in accordance with Sec. 3.1.3 of the BCA.

⁴⁴ Id. Sec. 3.1.7. The BCA was amended to include this section apparently as an attempt by the Legislature to avoid the kind of potential liability of the registered agent that resulted from the case, *Horton v. Raymond Concrete Pile*, 39 LLR 169 (1998). But a careful reading of that opinion would caution the registered agent not to become so entangled with the entity for which it serves as registered to avoid a likely imposition of liability based on an unintended business relationship, other than that of the registered agent relationship.

⁴⁵ BCA, Sec. 5.1.1

⁴⁶ Id.

US\$100.00. With this minimum amount the corporation may be authorized to issue 500 shares without par value or 50,000 shares with par value.⁴⁷ Should the organizers decide to have more shares than the minimum numbers indicated above, the BCA provides a schedule of fees to be paid for various quantities and types of share to be issued by the corporation.⁴⁸ However, a great feature of shares without par value is price flexibility. Shares without par value may be issued from time to time at different prices,⁴⁹ yet subscribers and holders of the same class and series of shares would be entitled to participate equally share-for-share in the distribution of dividends and assets.⁵⁰

The attorney should counsel the client in structuring the corporation's capital structure to accommodate the economic and control objectives of the organizers. If the shares are intended to be held by only a few shareholders, there is no reason to authorize more shares than are necessary to meet the organizers/potential shareholders' agreed-upon proportional ownership interests.

While drafting the share capital section of the Articles, the attorney should be mindful of the principle that all shares of stock authorized have identical rights, privileges, and preferences unless the Articles expressly provide otherwise.⁵¹ Therefore, if the shares are to be divided into classes, the Articles should not only designate each class, but also include a statement of the preferences, limitations and relative rights in respect of the shares of each class.

Simply identifying some shares as "Preferred" and others as "Common" or dividing common shares into different classes is without legal significance because such designations do not of themselves embody characteristics that distinguish their rights, privileges, and preferences compared to those of other common shares.⁵² Hence, if the corporation is to issue the shares of any preferred or special class in series, then the Articles should designate each series and a statement of the variations in the relative rights and preferences as between series insofar as the same are to be fixed in the Articles.⁵³ A statement of any authority to be vested in the board of directors to establish series and fix and determine the variations in the relative rights and preferences as between series may also be stated in the Articles.⁵⁴

The Articles may also provide, either absolutely or conditionally, that the holder of any designated class or series of shares shall not be entitled to vote.⁵⁵

⁴⁷ Id. Sec. 1.6

⁴⁸ Id.

⁴⁹ Id. Sec. 5.4.3

⁵⁰ See, BCA, Sec. 4.4(f)

⁵¹ Cox, James, D., et al, *Corporations*, Aspen Law & Business (1997), Sec. 3.09, P. 54

⁵² Id.

⁵³ BCA, Sec. 4.4(i)

⁵⁴ Id.

⁵⁵ Id. Sec. 7.11.8. The authority of Sec. 7.11.8 is said to be limited by Section 5.1 of the BCA. But a review of Sec. 5.1 reveals no relevant limitation on Sec. 7.11.8. A good guess is that the language of Sec. 5.1 of the BCA was borrowed from Sec. 501 of NY BCL, but the relevant portion of the NY BCL is omitted from the BCA. That is, "The certificate of incorporation may deny, limit or otherwise define the voting rights and may limit or otherwise define the dividend or liquidation rights of shares of any class, but no such denial, limitation or definition of voting rights shall be effective unless at the time one or more classes of outstanding shares or bonds, singly or in the aggregate,

The number of shares to be issued as registered shares and as bearer shares should be stated in the Articles.⁵⁶ Registered shares may be exchanged for bearer shares and bearer shares for registered shares.⁵⁷ Should the organizers prefer that such exchange not be allowed, then the Articles should so provide.⁵⁸ If bearer shares are authorized to be issued, the Articles should stipulate the manner in which any required notice shall be given to holders of bearer shares.⁵⁹ If the Articles fail to indicate the manner in which such notice shall be given, the notice shall be published in a newspaper of general circulation in Liberia or in a place where the corporation has a place of business.⁶⁰

Following incorporation of the entity, the board of directors of a corporation may provide by resolution that some or all of any or all classes or series of its shares shall be uncertificated shares.⁶¹

F. Initial Board of Directors

The Articles must state the number of directors constituting the initial board of directors⁶² (Initial Board). A definite number should be stated! The requirement of the statute is not met if the Articles states that, “The number of directors constituting the initial board of directors shall be at least one”; or that, “The number of directors constituting the initial board of directors shall not be less than three.” As a result of the 2002 amendments to the BCA, a corporation may now have a single director, regardless of the number of beneficial owners of the shares of the corporation.⁶³

Unless otherwise provided in the Articles, the number of initial directors stated in the Articles is restricted to, and governs the size of only the Initial Board, and in no way affects the size of a subsequent board (the “Board”). Initial directors are to serve until the first annual meeting of the shareholders or until their successors shall be elected and qualified.⁶⁴ But, as discussed later, there should be an election of directors at the organization meeting, during which either the initial directors are affirmed or others are elected to replace them.

The number of directors constituting the Board may be fixed by the Articles, by the bylaws, by the shareholders, or by action of the board under the specific provisions of a bylaw.⁶⁵ Therefore, the number of directors constituting the Initial Board, as stated in the Articles, may bind the corporation only until the organization meeting, at which the corporation may adopt its bylaws,

are entitled to full voting rights, and no such limitation or definition of dividend or liquidation rights shall be effective unless at the time one or more classes of outstanding shares, singly or in the aggregate, are entitled to unlimited dividend and liquidation rights.”

⁵⁶ BCA, Sec. 4.4 (g)

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id. Sec. 4.4 (h)

⁶⁰ Id. Sec. 1.9

⁶¹ Id. Sec. 5.8.5

⁶² Id. Sec. 4.4 (j)

⁶³ Id. Sec. 6.3

⁶⁴ Id. Sec. 4.4 (j)

⁶⁵ Id. Sec. 6.3.1

providing the number of directors for the Board, or include a provision in the bylaws that would allow the Board to fix the number of directors. Alternatively, the shareholders may resolve at the organization meeting or at a subsequent time to amend the Articles and insert therein the number of directors that shall constitute the Board.

If it is assumed that the number of directors constituting the Initial Board, indicated in the Articles, would bind the corporation beyond the organization meeting—after the corporate bylaws are adopted—then the statute would be contradictory, and fail the test of reasoning. The BCA provides that the number of directors may be increased or decreased by amendment of the bylaws or by action of the board under the specific provisions of a bylaw.⁶⁶ Therefore, if the number of initial directors indicated in the Articles would bind the corporation beyond the organization meeting, when the bylaws are adopted, or if the number of directors of the Board is subsequently inserted in the Articles, any change to the size of the Board would require an amendment of the Articles.

Certainly, the number of directors of the Initial Board that is stated in the Articles cannot be increased or decreased by amendment of the bylaws or by action of the board without amending the Articles. Generally, a provision of the Articles may be altered only by an amendment of the Articles;⁶⁷ and, an amendment of the Articles, with a few exceptions, may be authorized only by vote of the holders of a majority of all outstanding shares entitled to vote thereon or by written consent of all shareholders entitled to vote thereon.⁶⁸

The BCA does not require the directors constituting the Initial Board to be named in the Articles. But if the directors are named, the Articles should also specify the addresses of the persons so named.

There is no requirement under the BCA to have a corporation disclose the names of its directors, although a corporation may voluntarily file such and other corporate information with the Registry. Persons associated with the corporation may not want their names to be subjects of public records for various reasons, including a mere desire for anonymity. Unless otherwise provided in the Articles, any other statute or administrative regulation, directors may be of any nationality and need not be residents of Liberia or shareholders of the corporation; and, directors may be corporations or other legal entities.⁶⁹

Another reason for not naming initial directors in the Articles is arguably, the formalities that attend the convening of a directors' meeting—special, which may include organization, or regular. If initial directors are named in the Articles, a reasonable presumption is that the directors would convene the organization meeting. Why else would directors be named in the Articles? If the incorporator or transferee of stock subscription would convene the meeting, then

⁶⁶ Id., Sec 6.3.2

⁶⁷ Id.

⁶⁸ Id., Sec. 9.3. Exceptions are made for amending the articles of incorporation by approval of the board without the intervention of the shareholders for: changing the designation of the registered agent; by the incorporator, before the corporation has received any payment for any of its shares; and, by the holders of all outstanding subscription rights.

⁶⁹ Id. Sec. 6.2

why were initial directors named? At the organization meeting, the initial directors would, in any case, either be affirmed by the shareholders or replaced by newly elected directors. Assuming the shareholders are different from the organizers who named the initial directors, the shareholders would most likely elect directors of their choosing.

A special meeting, convened by the Initial Board should be called in the manner as provided in the bylaws, and should be held upon notice to the directors.⁷⁰ But at the convening of the organization meeting, the corporation would not have bylaws; bylaws would be adopted for the first time at the organization meeting. The bylaws would then prescribe what shall constitute notice of meeting of the Board. Of course, a way around the notice requirement is to have each director submit a signed waiver of notice either before or after the meeting. And if a director attends the meeting without protesting the lack of notice, notice becomes a non-issue.⁷¹

But here lies the strongest argument for not naming initial directors in the Articles. As discussed in Section VII below on Organization Meeting below, there can be no principal-agency relationship when a principal does not exist. Although the relationship between the directors and the shareholders or the directors and the corporation is not in the strict sense one of principal-agency, in that the directors' powers are conferred on them by statute and are original and undelegated,⁷² the directors nevertheless owe a fiduciary duty to the shareholders and the corporation. And it has been held that as to third parties, a director is merely the agent of her corporation.⁷³ Before the entity is incorporated, as there is no shareholder, there can be no director. There is no corporate power to exercise and no business to manage. There is no one to whom the duties of a director are owed. Until the entity is incorporated, there can be no director, initial or otherwise!

The BCA should follow the example of other jurisdictions, dropping the requirement of stating the number of directors, initial or otherwise, in the Articles.⁷⁴

G. Incorporator

One or more persons, natural or legal, without regard to residence, domicile, or jurisdiction may incorporate or organize the corporation.⁷⁵ The name and address of each incorporator must be included in the Articles. However, an incorporator is usually a clerk in the attorney's office or a nominee selected only to sign the Articles rather than the persons with economic or financial ties to the entity. But if an organizer or one with economic or financial ties would like to personally sign the Articles, as incorporator, she is not forbidden by the law and should be allowed to do so.

⁷⁰ Id., Sec. 6.9.2

⁷¹ Id., Sec. 6.9.3

⁷² See, NY BCL, Sec. 701, Note 2—Agents, directors as; citing, *Ripley v. Storer*, 1 Misc. 2d 281 (1955) 139 N.Y.2d 786

⁷³ See, NY BCL, Sec. 701, Note 2—Agents, directors as; citing, *Moran v. Vreeland*, 81 Misc. 664 (1913) 143 N.Y.S. 522

⁷⁴ See, NY BCL, Sec. 402

⁷⁵ Id., Sec. 4.1

An incorporator does not have to subscribe to any of the shares of the corporation in the Articles. But if she does subscribe and is without economic or financial ties to the entity, the incorporator may transfer the shares subscription to the rightful owner before or at the organization meeting.

H. Resident or Non-resident Domestic Corporation

On filing the Articles, the Registrar is required to indicate on the certificate of incorporation whether the corporation is a resident domestic corporation or a nonresident domestic corporation.⁷⁶ In order to avoid an oversight on the part of the Registrar, the attorney should type on both original and duplicate copies of the Articles the kind of corporation that is being formed. The best place for the designation would be right beneath the name of the corporation at the top of the first page of the Articles. And the designation should be parenthesized.

III. OPTIONAL PROVISIONS

For the further regulation of the affairs of the corporation, the incorporator may elect to set forth in the Articles any provision that is not inconsistent with law.⁷⁷ Optional provisions are presumably intended to meet the needs of closely held corporations and other special situations. Therefore, the amount of optional provisions included in the Articles may be a matter of personal preference, but may also be determined by the relationship among the organizers or potential shareholders. Some of these “optional provisions,” may just as well be included in the bylaws or shareholders’ agreement. An important caveat for the drafter who would like to take advantage of this “laxity” of the law, including everything or more than is necessary in the Articles: whatever goes into the Articles becomes public record, and would generally require an amendment of the Articles to change or delete it from the Article!

On the other hand, the relative difficulty of amending the Articles—offering greater permanency to such a provision—may be an inducement for including certain provisions in the Articles.

Examples, listed by the BCA, of matters that are not required, but may be provided for in the Articles, include the naming of initial directors, subscription to shares by the incorporators, and provisions restricting the transfer of shares or providing for greater quorum for meetings of shareholders and directors than are otherwise prescribed by law.⁷⁸ One may also include in the Articles any provision that the BCA requires or permits to be set forth in the bylaws.⁷⁹

The issue of naming initial directors in the Articles was discussed above. Although not required by the law, it really does not matter whether or not the incorporator subscribes to all the shares of the corporation or any number thereof. Upon the incorporation of the entity, if the incorporator is a nominee incorporator she would transfer the subscription to the real party in interest. On the other hand, if the incorporator intends to acquire the shares for which she had subscribed, he would have her subscription accepted at the organization meeting, and that would close the issue.

⁷⁶ Id., Sec. 4.6

⁷⁷ Id., Sec. 4.4 (l)

⁷⁸ Id.

⁷⁹ Id.

The other two issues—restricting the transfer of shares and providing for greater quorum of voting requirements with respect to shareholders or directors—are not so benign. These issues should be left to the bylaws of the corporation and not included in the Articles. Restriction on the transfer of shares and the size of quorum for shareholders’ and directors’ meetings would have the same force and effect if in the bylaws, as they would have in the Articles. The major difference is that, as indicated above, to change any provision in the Articles would require a meeting of the shareholders, a vote taken to amend the Articles, preparation of the articles of amendment, and filing same with the Registrar. Whereas, if the same provisions are provided for in the bylaws, a vote taken at a meeting of the shareholders is all that would be required to amend the bylaws, without reference to the Registrar or any other public office. Of course, if the Articles confer the power to adopt, amend, or repeal the bylaws upon the directors, the bylaws would be amended by the directors without the need of even a meeting of the shareholders.

The question usually arises as to whether shareholders should be named in the Articles! There are no shareholders at the time of the drafting of the Articles. Listing any person in the Articles as a shareholder or subscriber, including the incorporator, is simply an indication that such person or persons has entered into a pre-incorporation subscription, which is a “continuing offer” pending the incorporation of the entity. That is, the subscriber has made an offer to purchase shares of the corporation, which can only be accepted when the entity is formed. Upon coming into existence, the corporation may accept the offer, usually at the organization meeting, and only then would the subscriber become a shareholder.

Notwithstanding, even when the Articles indicate that shares of the corporation have been subscribed to, there is no need to amend the Articles in the event that, for whatever reason, the listed subscribers do not acquire the shares.

A major source of confusion has been the enumeration of corporate powers in the Articles. It is not necessary to enumerate in the Articles the corporate powers, which are generally granted by law to every Liberian corporation.⁸⁰ And it would probably be better not to list the corporate powers in the Articles. Listing the corporate powers does not enhance the capacity of the corporation and may only lead to uncertainty or disorder. However, if the drafter of the Articles, for whatever reason, would have the powers enumerated in the Articles, she should, (i) provide a section, titled “Corporate Powers”; do not intermingle the powers with the purposes of the corporation; and, (ii) if the corporate powers will be listed, all that are enumerated in Section 2.2 of the BCA should be listed; do not list some to the exclusion of others.

Every corporation has the power, as an example, “To lend money, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested.”⁸¹ However, should the attorney list that power as a purpose of the corporation, she runs the risk of the Registrar refusing to file the Articles, as the Registrar should, in the absence of compliance with provisions of the FIA. Assume the same power is listed in the Articles within the corporate powers section or, as some Articles provide, within a section captioned “Powers & Purposes,” but the drafters failed to list all of the other powers. In such a case, a reasonable

⁸⁰ See, *Id.* Sec. 2.2

⁸¹ *Id.* Sec. 2.2 (h)

conclusion would be that the incorporator intended to deprive the corporation of the powers that were not enumerated, running the risk of an *ultra vires* law suit against the corporation for exercising powers for which it has not been authorized.

Of course, there may be some powers, allowed by law, which the organizers may not wish the corporation to exercise or otherwise benefit from; or, the organizers may wish to vary one or more corporate powers. As indicated above, the organizers may not want the corporation to have perpetual existence. In that case, a fixed term for the corporate existence would be stated in the Articles.

Another example is that the organizers may not want the corporation to exercise the power to de-register and reregister as another entity or to re-domicile out of Liberia. Such prohibition would have to be stated in the Articles.⁸²

IV. SPECIAL PROVISIONS WITH RESPECT TO DIRECTORS AND SHAREHOLDERS

There are some provisions of the BCA relating to directors and shareholders, which the organizers may wish to vary. But altering such provisions of the statute would require that a statement to that effect be included in the Articles. A few examples are listed below.

- (i) Should the organizers desire to impose any special qualifications for directors, as indicated in the Section on Initial Directors above, such special qualifications would have to be defined in the Articles.⁸³ For example, if the organizers would have only Liberian directors, that would have to be provided in the Articles.
- (ii) The vote of the majority of the directors present in person or by proxy at a meeting at which a quorum is present shall be the act of the board. A provision in the Articles may, however, provide for a vote of a greater number.⁸⁴
- (iii) The board of directors has the power to authorize a mortgage or pledge of, or create a security interest in, all or any part of properties of corporation, or any interest therein, wherever situated, without the approval of the shareholders. Therefore, if the organizers would have a vote of shareholders to authorize such action by the board, a provision to that effect should be included in the Articles.⁸⁵
- (iv) If the organizers or, subsequently, the shareholders, would like for one or more directors to be elected by the holders of the shares of any particular class or series, this may be accomplished by including a provision in the Articles to that effect.⁸⁶
- (v) The Articles may provide that directors of the corporation may be divided into two or more classes, with each class of directors serving different terms.⁸⁷

⁸² Id. Sec. 4.4 (m) -- For an unexplained reason, the BCA expressly lists, as a content of the articles of incorporation, the decision of the organizers not to have the corporation de-register and reregister as another entity or to re-domicile out of Liberia.

⁸³ Id. Sec. 6.2

⁸⁴ Id. Sec. 6.8.2

⁸⁵ Id. Sec. 10.6.2

⁸⁶ Id. Sec. 6.4.1

⁸⁷ Id. Sec. 6.5.1

- (vi) Directors are elected by a plurality of the votes cast at a meeting of shareholders, by the holders of shares entitled to vote in the election. But the Articles may require a vote greater than plurality of vote.⁸⁸ The Articles may also provide that election of directors be by cumulative voting.⁸⁹ That is each shareholder shall be entitled to as many votes as shall equal the number of votes which she would be entitled to cast for the election of directors with respect to her shares multiplied by the number of directors to be elected, and that she may cast all of such votes for a single director or may distribute them among the number of directors to be voted for, or any two or more of them, as she may see fit.
- (vii) The Articles may contain additional restrictions on contracts or transactions between a corporation and its directors and may provide that contracts or transactions in violation of such restrictions shall be void or voidable by the corporation.⁹⁰
- (viii) Subject to limitations imposed by other provisions of the BCA, such as shareholders' vote approving fundamental changes of the corporation, all corporate powers are exercised by the board of directors, which is also responsible for managing the business and affairs of the corporation.⁹¹ But the organizers may restrict the board in its management of the business affairs of the corporation by including such a provision in the Articles.⁹²
- (ix) A majority of shares entitled to vote constitutes a quorum at a meeting of shareholders.⁹³ But this simple majority quorum may be varied by the Articles, except that in no event shall a quorum consists of less than one-third of the shares entitled to vote at a meeting.⁹⁴
- (x) Whenever there is a proposed corporate issuance of securities, shareholders of the corporation have the right to purchase such shares or other securities, as nearly as practicable and in such proportion, as would preserve the relative rights to current and liquidating dividends and voting rights of such holders. If this preemptive right of shareholders is to be negated, a provision of the Articles must expressly so provide.⁹⁵
- (xi) The Articles may confer upon holders of any class or series of shares the right to elect one or more directors who shall serve for such term, and have such voting powers as shall be stated in the Articles.⁹⁶
- (xii) Generally, any action that may be taken by shareholders at a meeting, annual or special, including the election of directors, may be taken without a meeting⁹⁷. The Articles may, however, prohibit shareholders from electing directors by written consent.⁹⁸
- (xiii) The Articles may provide that the proportion of shares required to constitute a quorum, or the proportion of votes required, for the transaction of business at any

⁸⁸ Id. Sec. 7.8.1

⁸⁹ Id. Sec. 7.8.2

⁹⁰ Id. Sec. 6.11.3

⁹¹ Id. Sec. 6.1

⁹² Id. The NY BCL expressly provides how that may be done. See, Sec. 620 (b)

⁹³ BCA, Sec. 7.7.1

⁹⁴ Id

⁹⁵ Id. Sec. 7.15

⁹⁶ Id. Sec. 6.5.2

⁹⁷ Id. Sec. 7.4

⁹⁸ Id. Sec. 7.1.2

meeting of shareholders, including amendments to the Articles, may be greater than otherwise prescribed by the BCA.⁹⁹

- (xiv) The power to adopt, amend, or repeal bylaws is reposed in the shareholders who are entitled to vote. But by inserting the appropriate provision in the Articles, a corporation may, confer the power to adopt, amend or repeal bylaws also upon the directors. However, the fact that such power has been conferred upon the directors shall not divest the shareholders of the power, or limit their power, to adopt, amend, or repeal the bylaws.

V. HABIT vs. LEGAL REQUIREMENT

Although not required to be stated in the Articles, most Articles continue to unnecessarily include, because the Registry seems to require, the following three provisions:

- a. The corporation shall have perpetual existence;
- b. The incorporator subscribes to a certain number of shares of the corporation; and,
- c. The corporate existence begins upon filing the Articles, effective as of the filing date stated thereon.

VI. FILING THE ARTICLES OF INCORPORATION¹⁰⁰

“Inter-Ministerial Regulation Number 1,”¹⁰¹ issued jointly by the Ministries of Foreign Affairs, Commerce and Industry, and Finance, and the National Social Security & Welfare Corporation (NSSWC), created the Liberia Business Registry (LBR). The LBR establishes a unified business registration system—an entity is incorporated or otherwise formed at the LBR, registered to engage in commerce, obtaining a business registration certificate; registered as a taxpayer, obtaining a TIN (tax identification number) and, registered as an employer with the NSSWC.

As a result of the Inter-Ministerial Regulation, Articles of resident domestic corporations are now filed at the LBR instead of at the Ministry of Foreign Affairs. The Registrar files the document and returns a filed copy, with the Certificate of Incorporation, to the attorney along with the fee receipts and the Business Registration Certificate.

VII. ORGANIZATION MEETING

Upon receipt of the Certificate of Incorporation attached to a copy of the Articles, evidencing that the entity has been incorporated, an organization meeting of the corporation should be convened.¹⁰² The corporation, although incorporated, is not duly organized until the other statutory requirements, such as the holding of the organization meeting, are accomplished. The

⁹⁹ Id. Sec. 7.9.1

¹⁰⁰ This Section of the Paper relates only to resident domestic corporations.

¹⁰¹ See, Liberia Business Registry Regulation

¹⁰² Id. Sec. 4.8.1

organization meeting may be called by any of the following persons: the initial directors, if named in the Articles; the incorporator, whether or not she is a subscriber to the shares of the corporation; subscribers who are named in the Articles; or, transferees of subscription rights.¹⁰³ All of these persons may be in attendance at the meeting.¹⁰⁴ Of course, if the incorporator, who may be present in person or by proxy,¹⁰⁵ has, since incorporation, severed her relationship with the corporation, she need not be at the meeting; and, if the Articles did not name initial directors none will be present at the meeting. It is, therefore, likely that attendees at the meeting would be only subscribers or transferees of subscription rights.

The organization meeting, which may be held within or without Liberia,¹⁰⁶ is called for the purpose of electing directors, appointing officers, adopting bylaws and doing such acts to perfect the organization of the corporation as are deemed appropriate and transacting such other business as may come before the meeting.¹⁰⁷ Other acts that are required to perfect the organization of the corporation, which should be taken at the organization meeting may include the acceptance of subscriptions and issuance of shares by the corporation; approving form of share certificates and the corporate seal, if any; resolving as to the bank that will serve as depository of the corporation and retaining the corporate attorney and accountants; deciding on its fiscal year; and, adopting the record book of the corporation.

Every domestic corporation is required to keep correct and complete records of all minutes of all meetings of shareholders, of actions taken on consent by shareholders, of all meetings of the board of directors, of actions taken on consent by directors.¹⁰⁸ A resident domestic corporation shall keep its record book in Liberia.¹⁰⁹

The corporation is to have officers with titles and duties as are provided in the Articles or the bylaws or in a resolution of the board of directors, provided that the resolution of the board of directors is not inconsistent with the bylaws¹¹⁰ or the Articles,¹¹¹ as may be necessary to enable the corporation to sign instruments and share certificates. One of the officers shall act as the secretary of the corporation, having the duty to record the proceedings of the meetings of the shareholders and directors in a book to be kept for that purpose.¹¹² And any two or more offices may be held by the same person.¹¹³ Like directors, unless otherwise provided by another statute or administrative regulation, or by the Articles, officers may be persons, individual or legal, of any nationality and need not be residents of Liberia.¹¹⁴

¹⁰³ Id. Sec. 4.8.2

¹⁰⁴ Id.

¹⁰⁵ Id. Sec. 4.8.2

¹⁰⁶ Id. Sec. 4.8.1

¹⁰⁷ Id.

¹⁰⁸ Id. Sec. 8.1.1

¹⁰⁹ Id.

¹¹⁰ Id. Sec. 6.15.1

¹¹¹ Although the BCA does not expressly provide that the resolution of the board of directors should also not be inconsistent with the articles of incorporation, it is worth noting.

¹¹² BCA, Sec. 6.15.1

¹¹³ Id. Sec. 6.15.5

¹¹⁴ Id. Sec. 6.15.8

The corporation's bylaws are its operational blueprint. The bylaws may contain any provision, not inconsistent with the law or the Articles, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its shareholders, members, directors, officers or employees.¹¹⁵

At the start of the organization meeting a presiding officer (chairman) and a secretary should be appointed for the meeting. The Articles should be accepted and ordered inserted in the corporation's book of records. The bylaws, if already prepared, should be adopted and ordered recorded in the corporation's book of records. Share subscriptions should be accepted and shares issued to the subscribers. The consideration for the issuance of shares should consist of money or other property, tangible or intangible, or labor or services actually received by or performed for the corporation.¹¹⁶ In order for the money, property, or services to be valid consideration, they must have been received or rendered prior to the issuance of the shares; a promise or an act (labor or other service) *in futuro* would not qualify as consideration for payment of the shares.

Previously, the entire amount of the consideration had to be received by the corporation in the form determined, before shares could be issued as fully paid and non-assessable.¹¹⁷ However, as a result of the 2002 amendments of the BCA, shares are also deemed to be fully paid and non-assessable if not less than the amount of the consideration determined to be stated capital has been received by the corporation,¹¹⁸ and the corporation has also received a binding obligation of the subscriber or purchaser to pay the balance of the subscription or purchase price.¹¹⁹ Arguably, a "binding obligation" may consist of only a promise to pay money, and not a promise to transfer property or render labor or other service.¹²⁰

With regard to this new category of "fully paid and non-assessable shares," if par value shares are issued, the aggregate par value of the shares, which shall constitute stated capital, must be paid in full in order for the shares to be deemed fully paid and non-assessable. Should the board of directors resolve to have par value shares issued for consideration in excess of par value, the subscriber or shareholder would only have to give a binding obligation, promising to pay the amount that is in excess of par value. That is, the subscriber or shareholder becomes the debtor of the corporation for the unpaid excess amount, which would be allocated to surplus.¹²¹

The BCA, as amended, does not define "binding obligation," but a reasonable presumption is that a "binding obligation" would be a higher specie of obligation, less susceptible to default than the future obligations for the payment of money, transfer of other property, tangible or intangible, or rendering of labor or services,¹²² which are rejected by Section 5.4.1 of the BCA, as valid consideration for the payment of shares.

¹¹⁵ Id. Sec. 4.9.2

¹¹⁶ Id. Sec. 5.4.1

¹¹⁷ See, Sec. 5.5.3, BCA (1976)

¹¹⁸ Id. Sec. 5.5.1(b)

¹¹⁹ Id.

¹²⁰ Id.—"... received a binding obligation of the subscriber or purchaser **to pay** (emphasis mine) the balance of the subscription or purchase price."

¹²¹ Id. Sec. 5.7.1

¹²² One of the drafters of the Revised Model Business Corporation Act, Bayless Manning, said of the promissory note and contracts for future services, as consideration for the issuance of shares, "...these two hangovers from

If shares without par value are issued, in order for the shares to be deemed fully paid and non-assessable, the entire consideration that is fixed by the board or the shareholders, as the case may be, would have to be paid, as the entire consideration received for shares without par value constitutes stated capital. The board of directors may within a period of sixty days after issuance, allocate to surplus a portion, but not all, of the consideration received for such shares.¹²³ Therefore, if shares without par value are to be issued in this new category of “fully paid and non-assessable shares,” the board of directors or the shareholders, as the case may be, would have to fix the amount of the consideration and determine what portion would be allocated to stated capital and what portion would be allocated to capital surplus prior to the issuance of the shares.

Notwithstanding, another section of the BCA, also enacted as part of the 2002 amendments, provides that a corporation may issue shares that are partly paid for, with the remainder of the consideration to be paid at a later date.¹²⁴ Consideration for the issuance of shares, money, property, or labor or services, may now be paid, transferred, or performed in three different ways: in full, without any portion being deferred to a future date—Section 5.5.1(a) shares; in full, to the extent of the amount that shall constitute stated capital, with payment of the balance consideration made in the future pursuant to a binding obligation—Section 5.5.1(b) shares; or, in part, without reference to a “binding obligation”—Section 5.5.2 shares.

With the BCA providing for Section 5.5.1(b) and Section 5.5.2 shares, Section 5.5.1(a) shares may have lost their significance. But most importantly, the Corporate Registry should now cause a bill to be submitted to the Legislature, revising Sections 5.4.1, 5.5.1, and 5.5.2 of the BCA, eliminating the issue of the difference between consideration “received” and consideration “actually received” and removing the need to determine what is a “binding obligation,”¹²⁵ adopting the principle that, “... the corporation receives the consideration for the shares at the time it receives the contract for services—not when the services are later performed. Similarly, the corporation receives the consideration for shares at the time it receives the promissory note—not upon payment of the promissory note.”¹²⁶

Howbeit, except as to uncertificated shares, the shares of a corporation are to be represented by certificates signed by two officers of the corporation. Of course, if only one person is appointed

the nineteenth century have been an impediment to sensible business transactions. As a matter of business economics, a promissory note of the Morgan Bank is indeed a valuable piece of property, and a contract for the future services of Barbara Streisand or Doug Flutie is a much prized commodity.” See, Tex. L. Rev. 1527 (1985). The BCA has not completely dropped the prohibition against the “two hangovers from the nineteenth century,” but Prof. Manning’s examples shed some light on what may constitute a binding obligation.

¹²³ Id. Sec. 5.7.2

¹²⁴ Id. Sec. 5.5.2

¹²⁵ Sec. 5.5 of the BCA was amended in 2002, deleting the provision that, “Neither obligations of the subscriber for future payments nor future services shall constitute payment or part payment for shares of a corporation,” in an attempt to accommodate Section 5.5.1(b) and Section 5.5.2 shares. Again the BCA followed the lead of the NY BCL, which was also amended, repealing then section 504(b) that contained the exact wordings of the now repealed Sec. 5.5.1 of the BCA.

¹²⁶ See, Tex. L. Rev. 1527 (1985).

as an officer or the same person is appointed to hold each office of the corporation, that one person may sign the certificates and place the seal of the corporation thereon.¹²⁷

The share certificate shall indicate: that the corporation is formed under the laws of Liberia; the name of the person to whom the shares are issued, if a registered share; the number and class of shares, and the designation of the series, if any; the par value of each share represented by such certificate, or a statement that the shares are without par value; and, if the shares do not entitle the holder to vote, that it is non-voting, or if the right to vote exists only under certain circumstances, that the right to vote is limited.¹²⁸

If the corporation is authorized to issue shares of more than one class, a statement to that effect should be indicated on the face or back of the certificate. Alternatively, the certificate should state that the corporation will furnish to any shareholder upon request and without charge, a full statement of the designation, relative rights, preferences and limitations of the shares of each class.¹²⁹

The share certificate should also bear a statement that shares are fully paid and non-assessable, unless the certificate represents partly paid shares. Certificates representing partly paid shares should contain a statement, either on the face or back of the certificates, indicating the total amount of the consideration that has been paid and the outstanding amount.¹³⁰

If a restriction on the transfer of shares is imposed by the Articles, the bylaws, or a shareholders' agreement, such restriction should be conspicuously noted on the face or the back of the stock certificate.¹³¹

The organization meeting may also authorize the borrowing of money by the corporation, leasing or buying properties for the operation of the corporation, and approve employment contracts and/or fix compensation for corporate officers. The organization meeting should certainly cause the corporation to adopt pre-incorporation contracts and expenses. In most instances no problem develops out of contracts entered by the promoter on behalf of the corporation to be formed, because in most cases the promoter ends up being one of those controlling the entity. But it is worth noting that contracts entered into by the promoter with third parties on behalf of the corporation, even if the corporation is named as a party to the contract, would not bind the corporation.

It is a well established principle of law that an agency relationship cannot be recognized without an existing principal.¹³² Therefore, a promoter cannot be considered an agent of a corporation not yet formed. And the incorporation of the entity will not of itself render the corporation liable on pre-incorporation contracts. There are several theories as to how liability of the corporation can arise under the promoter's pre-incorporation contract—ratification, adoption, acceptance of a

¹²⁷ Id. Sec. 5.8.1

¹²⁸ Id. Sec. 5.8.4

¹²⁹ Id. Sec. 5.8.3

¹³⁰ Id. Sec. 5.5.2

¹³¹ Id. Sec. 5.2.3

¹³² See, *Perry v. Nevin Hotel*, 109 N.E. 2d 810 (Ill. App. Ct. 1952)

continuing offer, formation of a new contract, and novation. Whatever theory is advanced at the organization meeting, the promoter avoids potential personal liability by ensuring that the corporation formally takes over all pre-incorporation contracts.

VIII. ACTION WITHOUT A MEETING

If the incorporator and/or other stakeholders prefer, any action that may be taken at the organization meeting may be taken without a meeting if each initial director, if named in the Articles, the incorporator, each subscriber or transferee consents to and signs an instrument setting forth the decisions so taken.

IX. CONCLUSION

Drafting of the Articles can be as simple or as complex as an organizer desires. While only those things that are necessary should be included in the Articles, the attorney should be careful to consider the less common provisions that may be included in the Articles for the benefit of the corporation and its shareholders.

As the result of the organization meeting or actions taken without a meeting, but by the consent of all the stakeholders, the Liberian business corporation should be duly organized. If one were to compare the corporation to the human body, the Articles would be the equivalent of the skeleton, which can hardly be said to be a viable person. The organization meeting should take care of the various matters of business, necessary to duly organize the entity. Regrettably, owners of most Liberian resident domestic corporations never experience the benefit of due organization.

It is hoped that by addressing some of the issues associated with forming a business corporation in Liberia, even from the limited perspective hereof, this Paper will prove to be a practical guide for attorneys incorporating their clients' business ventures and will be helpful to students of corporation law.