

INNOVATIVE PARTNERSHIP LAW AMENDMENTS ENHANCE BERMUDA'S APPEAL AS A DOMICILE OF CHOICE

Bermuda exempted partnerships are widely used as private equity and investment fund vehicles as well as in international holdings structures. They are regarded as fiscally transparent and offer flexibility through the ability of a Bermuda exempted partnership to elect whether or not to have separate legal personality.

As a result of amendments to Bermuda's partnership legislation (the "Partnership Amendments"), implemented by the Bermuda Government as a package in response to demand by industry stakeholders, Bermuda's partnership product now offers significantly greater flexibility in terms of management and structure. This in turn makes a Bermuda partnership more attractive to private equity investors, investment funds and financiers.

Statutory framework

The principal statutes governing Bermuda partnerships are: the Partnership Act 1902, the Limited Partnership Act 1883 and the Exempted Partnerships Act 1992 (collectively referred to as the "Partnership Acts"). Amendments have been made to the Partnership Acts, as well as to the Companies Act 1981.

The key changes as a result of the Partnership Amendments are discussed below.

Conversion of exempted limited partnerships into exempted companies

An exempted limited partnership that has elected to have separate legal personality may now convert into an exempted company. This change offers flexibility to those looking to undertake a restructuring, or to have the option to restructure at a later date.

Conversion will require the consent of the Bermuda Monetary Authority (the "BMA") and must be authorised by the partnership agreement. The partnership is required to advertise the intention to convert in a newspaper in Bermuda at least 14 days in advance, as well as in all jurisdictions in which the partnership carries on a substantial part of its business. The general partners must swear a statutory declaration confirming the solvency of the partnership and that the interests or rights of bona fide creditors and partners of the partnership will not thereby be materially prejudiced. The conversion is effected by making the necessary filings with the Registrar of Companies within 6 months of the BMA's consent.

Conversion of a partnership into an exempted company does not (i) create a legal entity (ii) require the winding up of the partnership nor constitute a dissolution thereof or (iii) otherwise prejudice or affect the continuity of the partnership that has now converted.

Upon conversion of a partnership into an exempted company, the property of the partnership continues to be the property of the exempted company and the exempted company continues to be liable for the obligations of the partnership. Pending civil or criminal proceedings and administrative actions are unaffected. The rights, privileges, powers and interests in the property of the former partnership are not transferred to the exempted company upon conversion.

Conversion of exempted companies into exempted limited partnerships

The Partnership Amendments also enable conversion of exempted companies into exempted limited partnerships, where such conversion is authorised by the board and shareholders of the converting company.

The company is required to advertise the intention to convert in a newspaper in Bermuda at least 14 days in advance, as well as in all jurisdictions in which the company carries on a substantial part of its business. A director of the company must swear a statutory declaration confirming the solvency of the company and that the interests or rights of bona fide creditors of the company will not thereby be materially prejudiced. Once the BMA's consent has been obtained, the conversion is effected by making the necessary filings with the Registrar of Companies.

Conversion of an exempted company into an exempted limited partnership does not (i) create a legal entity (ii) constitute a dissolution of the company or (iii) otherwise prejudice or affect the continuity of the company that has now converted.

Upon conversion of an exempted company into an exempted limited partnership, the property of the company continues to be the property of the exempted limited partnership and the exempted limited partnership continues to be liable for the obligations of the exempted company. Pending civil or criminal proceedings and administrative actions are unaffected. The rights, privileges, powers and interests in the property of the former company are not transferred to the exempted limited partnership upon conversion.

Continuation of foreign partnerships into Bermuda

The process involves an application to the BMA for consent for the partnership to continue as an exempted limited partnership in Bermuda (and thereby be required to comply with the provisions of the Limited Partnership Act 1883). The BMA will require information concerning the general partner(s) and details of the proposed business of the partnership. Once the BMA's consent is obtained, an application to register the foreign partnership as an exempted limited partnership is made to the Registrar of Companies which (among other things) will require a legal opinion from counsel in the foreign jurisdiction confirming that all necessary authorisations under the laws of the foreign jurisdiction to allow the foreign partnership to continue into

Bermuda. The continuation is effective upon the date indicated on the certificate of registration issued by the Registrar of Companies.

Upon continuance of a foreign partnership as a Bermuda exempted limited partnership, the property of the foreign partnership continues to be the property of the exempted limited partnership and the exempted limited partnership continues to be liable for the obligations of the partnership. Pending civil or criminal proceedings and administrative actions are unaffected. The rights, privileges, powers and interests in the property of the foreign partnership are not transferred to the exempted limited partnership upon continuance.

De-registration by way of continuance

Under the Partnership Amendments, an existing Bermuda exempted partnership may de-register from Bermuda and continue as a foreign partnership under the laws of the relevant foreign jurisdiction. The foreign jurisdiction must be an “appointed jurisdiction” for the purposes of the Partnership Acts.

The Bermuda exempted partnership must be in good standing at the time of de-registration and all outstanding annual fees due to the Registrar of Companies must be paid. The Bermuda exempted partnership must advertise the intention to de-register in a newspaper in Bermuda at least 14 days in advance, as well as in all jurisdictions in which the partnership carries on a substantial part of its business. A partner must sign a solvency declaration and provide an irrevocable deed poll as to service of legal process in any proceedings arising out of any actions or omissions of the Bermuda exempted partnership prior to its de-registration.

Expansion of the “safe harbour” provisions

The Partnership Amendments further clarify the so called “safe harbour” provisions, namely the circumstances in which a limited partner in a Bermuda limited partnership shall not be deemed to take part in the management of the limited partnership and thereby lose the benefit of its limited liability status.

In particular, in recognition of the common commercial requirement for a partnership to be managed by a board or committee, the Partnership Amendments now confirm that a limited partner will not be deemed to be taking part in the management of a limited partnership by virtue of such limited partner (or its representative) serving on the board or committee of (among others): (i) the limited partnership (ii) a general partner (iii) a limited partner or (iv) any person in which the limited partner has an interest or by virtue of such limited partner appointing, electing or otherwise participating in the choice of a representative or any other person to serve on any such board or committee.

Subject to any express provision in the partnership agreement, a limited partner that acts in this capacity or any member of any such board or committee does not owe any fiduciary duty to the limited partnership or any other partner.

A general partner of a Bermuda limited partnership is required to act at all times in good faith and subject to any express provisions of the partnership agreement to the contrary, in the interests of the limited partnership.

Register of limited partners

The Partnership Amendments now provide that the register of limited partners of a Bermuda limited partnership may be closed for inspection by express agreement between partners.

Registration of charges

Bermuda partnerships that have elected to have separate legal personality may hold assets and grant security in their own name. The Partnership Amendments now make the Bermuda partnership product even more appealing in secured financing transactions by implementing a registration process in respect of charges over the assets of such a partnership. Any person interested in such a charge may apply to have the charge registered in the register of charges maintained by the Registrar of Companies in Bermuda in a similar manner to the existing registration process in respect of charges over the assets of Bermuda companies.

On registration, to the extent that Bermuda law governs the priority of the relevant charge, such charge will have priority over any unregistered charges and over any subsequently registered charges in respect of the assets that are subject to the relevant charge.

Conclusion

The Partnership Amendments consolidate a number of desirable changes to Bermuda's partnership product which will broaden the appeal of such product for a wide range of purposes but particularly in relation to private equity vehicles, investment funds and financiers looking for certainty with respect to security over assets situated in an offshore jurisdiction.

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