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LAWYERS

Streamlining & Simplification headlines from the Companies Act 2014

Introduction

The new Gibraltar Companies Act 2014 (the "2014 Act") came into force on 1st November 2014 and contains a number of provisions that will directly impact on all Gibraltar companies and their directors and officers. This important new legislation is designed to modernise the regulation of companies in Gibraltar by re-enacting, with significant amendments the previous companies' legislation in Gibraltar and dovetails with a new insolvency regime under the Insolvency Act 2011, which also came into force on the same day. This note therefore provides a summary of the headline terms of the 2014 Act which Gibraltar companies and their directors and officers should be aware of.

Financial Assistance – New "Whitewash Procedure"

The previous legislation contained an absolute prohibition on Gibraltar companies giving financial assistance for the purpose of the acquisition of their shares. Gibraltar has not followed the UK's lead in abolishing this restriction entirely and, rather, has adopted a procedure utilised under the UK's 1985 Companies Act and commonly known as the "Whitewash Procedure". The introduction of this procedure permits a private company to provide financial assistance for the purchase its own shares (or the shares of its holding company), strictly subject to the following conditions:

(a) the procedures laid down in sections 101 to 104 of the 2014 Act being complied with;

(b) the company having net assets which are not reduced or, to the extent that they are reduced, the assistance being provided out of distributable profits;

(c) each of the directors of the company giving financial assistance making a statutory declaration of solvency in the prescribed form (and accompanied by a report from the company's auditors); and

(d) subject to certain exceptions, the giving of the financial assistance being approved by special resolution of the company's shareholders.

The directors of the relevant company must also be satisfied that the giving of the financial assistance is in the best interests of the company and there are criminal sanctions for the provision of financial assistance other than in accordance with the above provisions.

Company's Memorandum

New companies will no longer have a traditional memorandum containing a list of objects. For new companies, it will be replaced by a short, prescribed form simply containing a statement by the subscriber(s) of their intention to form a company and become members and, in the case of a company limited by shares, that they will take up at least one share each. Whilst this constitutional document will still be called a "Memorandum of Association", it will primarily be a historical record of the facts at incorporation and will no longer affect the ongoing operation of the company. As a consequence, the scope of the company's activities will be unrestricted (unless the company's articles actively restrict them). For existing companies, this will mean that any provisions contained in their Memorandum which go beyond the limited information required in the new form of Memorandum will, from 1st November 2014, be regarded as provisions of their Articles of Association. The ultra vires rule has also been abolished by the 2014 Act and an act of a company cannot be called into question by reason of lack of capacity. Unfortunately, however, the entrenchment provisions included in the UK's Companies Act 2006 have not been replicated in Gibraltar.

Derivative Actions and Unfair Prejudice

Prior to 1 November 2014, derivative actions existed under common law only. The general rule established in Foss v Harbottle provides that the company is the only party that could bring a claim where a wrong had been committed against it. A derivative action could, however, be brought by the shareholders of a company provided that the wrong carried out was: (1) considered a fraud on the minority; (2) unable to be ratified, and (3) committed by the persons in control of the company. The 2014 Act introduces a new statutory derivative action procedure which extends the

circumstances under which derivative claims can be brought. A director (or, in exceptional circumstances, a third party) may now be sued for an actual or proposed act or omission in respect of negligence, default, breach of a duty or breach of trust. Furthermore, in considering whether the actual or proposed act or omission is likely to be approved or ratified by the company, the votes of those members personally interested in the ratification must be disregarded and, as such, locus standi should be easier to attain.

However, before a substantive action commences under the new statutory regime, the claimant must first establish a prima facie case and obtain permission from the Court to continue the action. Accordingly, while the new derivate action procedures provide wider and more accessible criteria for determining whether a shareholder can pursue an action, the Court should prevent weak or vexatious cases getting beyond this preliminary hurdle.

It has long been considered a material disadvantage for shareholders in Gibraltar companies that the local companies' legislation did not provide a statutory remedy for a shareholder who considered that the affairs of the company were being run in a manner that was unfairly prejudicial to its members. However, the 2014 Act rectifies this by replicating the provisions of the English Companies Act 2006 and introducing a new 'unfair prejudice' remedy for a company's shareholders. A shareholder may now apply to the Court by a petition for an order on the ground that (1) the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally or of some part of its members (which must include himself), or (2) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. The court has wide discretion to make such order as it thinks fit to remedy any unfair prejudice that a petitioner is able to establish.

Execution Requirements

Under the previous companies' legislation two directors or a director and secretary of the company were required to execute deeds on behalf of a company but there was no express provision permitting execution by a director in the presence of a witness. In addition, while the previous legislation did provide for companies having powers of attorney for activities outside of Gibraltar, a company was not expressly permitted by statute to execute documents under a power of attorney within Gibraltar. The applicable sections of the previous legislation have therefore been rewritten in their entirety and to clarify these apparent anomalies. Under the 2014 Act, a director is permitted to sign deeds on behalf of the company in the presence of a witness. Similarly, a person empowered by the company (i.e. by way of power of attorney) may execute deeds or other documents on its behalf anywhere in the world (including Gibraltar).

Time Limit for Registration of Security

Under the previous legislation, security created inside Gibraltar was required to be registered at Companies House within 21 days from the date of creation of that security (usually the date of the document). A similar time frame was imposed in relation to charges created outside of Gibraltar which were required to be registered within 21 days following the date of creation plus a "reasonable time" for delivery. There was, however, no definition of "reasonable time" and, in practice, this tended to create some uncertainty as to the actual time limit within which such "overseas" security should be registered. Accordingly, the 2014 Act now imposes a strict 30 day limit regardless of where the charge is created.

Officers' Indemnity

The 2014 Act modifies the general prohibition under the previous legislation that directors could not be indemnified against personal liability arising as a consequence of their negligence, default, breach of duty or breach of trust. Provided that the company does not provide the indemnity, any other person is now permitted to provide such an indemnity to any director and/or the auditor(s) of a company. In addition, the company is now permitted to purchase and maintain for any director, manager, officer or employee of the company insurance to protect that person against such liability. These new provisions will be welcome news to the company management industry in Gibraltar.

Accounts

In relation to company accounts, the relevant sections of the 2014 Act represent a significant expansion of the accounting provisions by incorporating, in the 2014 Act, the Companies (Accounts) Act 1999 and the Companies (Consolidated Accounts) Act 1999 in an attempt to simplify the legislation governing this area of the law and in the hope that only one piece of legislation is required to be referred to in most instances.

Insolvency Provisions

As mentioned above, It should be noted that the Insolvency Act 2011 has also come into effect from 1 November 2014 governing both personal and corporate insolvency. As a consequence, a number of provisions relating to insolvency events and circumstances have been removed from the Companies Act and are now be detailed in the Insolvency Act 2011. The only provisions that have survived and remain in the 2014 Act relate to the appointment of voluntary liquidators, the provisions governing the voluntary liquidation itself and the dissolution of companies. The statutory provisions governing receiverships and liquidations (other than voluntary liquidations) are now found within the Insolvency Act 2011, together with new provisions concerning administrations, administrative receiverships, company voluntary arrangements and an expanded reviewable transactions jurisdiction.

Summary

As stated, this note simply outlines the "front page news" following the introduction of the 2014 Act. There are countless amendments that might also directly impact upon the operation of your business in Gibraltar. Overall, the 2014 Act should be well received by existing businesses in Gibraltar and those looking to set up a business on Gibraltar's shores as the overriding effect of the same should be to streamline and simplify the regulation of companies.

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