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.....News Update.....

AMENDMENTS TO CAYMAN ISLANDS COMPANIES LAW

The Companies (Amendment) Law 2011 (the “Amendment Law”) is likely to be enacted imminently. The Amendment Law makes various changes to the Companies Law (2010 Revision) and is the first stage in the ongoing modernisation of the Companies Law to further enhance the attractiveness of the jurisdiction.

The purpose of this update is to provide a brief overview of the principal amendments. For a more detailed description of the amendments, please contact your usual Solomon Harris lawyer.

Mergers and Consolidations

The shareholder approval process for mergers and consolidations was previously open to interpretation leading to a level of uncertainty. This has been clarified by providing that, except in the case of intra-group mergers, a merger or consolidation needs to be approved by a special resolution of the shareholders of each constituent company. A special resolution is a two third majority of the voting shareholders present in person or by proxy at a shareholders meeting or a unanimous written resolution of all voting shareholders.

A further amendment allows the surviving company or the consolidated company in a merger to be a foreign company. Previously, the surviving company or consolidated company had to be a Cayman company which limited the scope of transactions for which the merger and consolidation provisions could be used.

Treasury Shares

The Amendment Law allows shares of a Cayman company which are repurchased or redeemed to be held by the company in treasury pending cancellation, transfer or sale. Previously, all shares repurchased or redeemed by a Cayman company had to be cancelled. The use of treasury shares has been adopted by a number of onshore jurisdictions to give companies greater flexibility over their share capital.

Paperless Share Transfers

It is increasingly common these days for listed shares to be transferred electronically without the use of physical share transfer forms. To facilitate the listing of shares of Cayman companies on foreign stock exchanges, the Amendment Law permits paperless share transfers and electronic share registers.

Redemption and Repurchase of Shares

Various improvements have been made to the provisions of the Companies Law dealing with the redemption and repurchase of shares. The principal amendments are as follows:-

1. A new definition of “paid up” makes it clear that paid up means as to par value and any share premium payable does not need to be taken into account.
2. It is now clear that shares which were originally issued as non-redeemable can be altered so as to make them redeemable.
3. Shares may be repurchased or redeemed for nil consideration. Previously, it was felt that some consideration, even if only nominal, had to be paid.
4. The directors of the company may be given the authority by the articles of association or by the shareholders to determine the manner or terms upon which any redemption or repurchase will be made.
5. It is now clear that the premium payable on any repurchase or redemption of shares can be paid out of a combination of profits and share premium and not out of one or the other.
6. Share premium can be used to satisfy the par value element of the redemption or repurchase price.
7. A payment out of share premium is treated as akin to a payment out of profits and is definitely not regarded as a payment out of capital.

Document Execution

There is now complete certainty as to when a deed governed by Cayman Islands law will be validly executed by a foreign company. The execution will be valid if:-

1. the foreign company executes either under seal or, if not under seal, the execution is by a person with express or implied authority and, in the latter case, it is clear that the document is intended to be a deed or instrument under seal; and
2. the execution is in accordance with the laws of the jurisdiction of the foreign company and in conformity with the constitutional documents of the foreign company.

To address the *Mercury* case, an English case which would be of persuasive authority in the Cayman Islands, specific provisions have been added to address “virtual closings” of transactions. The *Mercury* case disapproved of pre-signed signature pages signed by parties not present at the closing meeting being attached to final agreed documents, a common practice in international transactions. The new provisions expressly permit pre-signed signature pages to be added to the final version of any contract, deed or instrument under seal without undermining the validity of the execution. They also validate any execution by this method that pre-dates the passing of the Amendment Law.

A further amendment empowers a company to appoint a person to execute a document as a deed or under seal on behalf of the company without the instrument appointing the person having to be executed as a deed or under seal.

Registration of Foreign Companies carrying on business in the Cayman Islands

There is modernisation of the requirements in relation to the documents that a foreign company registered in the Cayman Islands must provide to the Cayman Islands Registrar of Companies following its registration. There are also amended provisions dealing with, amongst other things, the filing by a foreign company of revised documents with the Cayman Islands Registrar of Companies. It is also now clear that certain overseas entities that may not necessarily be regarded as a company in the eyes of Cayman Islands law (eg a US limited liability company) will still be permitted to register as a foreign company in the Cayman Islands.

Special Resolutions

The definition of Special Resolution has been amended so that the articles of association of a company may provide that different items of business which must be approved by Special Resolution may have different voting thresholds. This is subject to the overriding requirement that the minimum voting threshold is always two thirds of those present in person or by proxy at a shareholders meeting. Previously, the better view was that the same voting threshold, whether two thirds or greater than two thirds, had to apply to all items of business. The new definition will give greater flexibility to companies that wish to have differing voting thresholds for different decisions.

Companies may have foreign script names

It is permissible for an exempted company to have two names ie a name in English and a name in a foreign script (eg Chinese, Japanese, Cyrillic or Arabic script). The foreign name may precede or follow the English name in the presentation of the company's name and need not be a translation or transliteration of the company's English name. An official English translation or transliteration of the foreign name must be provided. The company will not be registered if the translation or transliteration is the same as or deceptively similar to the name of another existing company registered in the Cayman Islands. Previously, the Registrar of Companies would, as a matter of practice, allow a foreign script to appear on the certificate of incorporation but the foreign script was not part of the company's name. Cayman's regulatory laws (ie laws which regulate banks, mutual funds, insurance companies and other regulated entities) will apply to the translated name of a company as if it were the name of the company. The fact that the two names do not need to be a direct translation of each other is a definite advantage and should prove attractive in the Chinese and Hong Kong markets.

Segregated Portfolio Companies

Originally, each segregated portfolio of a segregated portfolio company was required to include the words "Segregated Portfolio" in full in its name. It is now permissible to use the abbreviation "SP" or "S.P."

Previously, directors of a segregated portfolio company could incur personal liability as a result of failing to identify which segregated portfolio the segregated portfolio company was contracting or transacting for. The Amendment Law removes such personal liability and provides for a practical procedure where such a failure does arise. The directors must make any necessary enquiries to determine to which segregated portfolio the contract or transaction should be attributed, make the correct attribution and notify in writing all relevant counterparties and others who may be adversely affected by the attribution and their rights. Any party notified, or any party who should have been notified, has the right to object

to the court about the attribution and the court has the power to order the correct attribution between segregated portfolios and/or the general assets.

It is now permissible for assets to be transferred between a segregated portfolio and the general assets provided that the transfer is at full value. Previously, such a transfer was only possible between segregated portfolios.

An amendment is made to make it clear that in addition to creditors of a segregated portfolio, assets of a segregated portfolio are available to meet liabilities to holders of segregated portfolio shares in respect of that segregated portfolio. In addition, provision is made for holders of segregated portfolio shares to be prospective claimants in the winding up of a segregated portfolio company.

Specific provisions are now included for the termination of a redundant segregated portfolio which has no assets or liabilities and for the re-instatement of any segregated portfolio that has been terminated. Subject to any other authority required under the articles of a segregated portfolio company, a segregated portfolio may be terminated or re-instated by directors resolution.

Schedules – Fees and Approved Stock Exchanges

For ease of reference, various fees payable under the Companies Law will now be set out in one convenient place in a Schedule at the end of the Law. Similarly, a Schedule will be included which lists approved stock exchanges for the purposes of the Companies Law.

Conclusion

As mentioned in the introduction, the Amendment Law is the first stage of an ongoing updating of the Companies Law. Further stages are anticipated in the relatively near future reflecting a strong, long-standing joint effort between the Government and the private sector. This initiative is very much welcomed and will certainly assist in ensuring that the Cayman Islands remains one of the premier offshore financial centres.

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