

RE-THINKING OUR COMPANY LAW

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1. Contributions to Equity Reserves
2. Lawful Distributions
3. Reduction of Share Capital
4. Share Buy-Backs
5. Financial Assistance
6. Private Exempt Companies
7. Act LX of 2021
8. Abandonment of companies / OCs
9. Consolidated accounts
10. Liability of Officers for penalties
11. Liquidator updates on liquidation

CONTRIBUTIONS TO EQUITY RESERVES

- Article 1740B of the Civil Code
- A gratuitous assignment, transfer or contribution of capital, cash or any other assets
- Gratuitous contribution in Article 1737 of the Civil Code
- **Amendment to CA** to recognise Capital Contributions which are increasingly an important part of the traditional “Equity” of a company

LAWFUL DISTRIBUTIONS

- Article 192 CA : No “distribution” except out of “profits available for the purpose”
- Accumulated, realized profits LESS accumulated, realized losses
- CA does not elaborate on what constitutes realised profits
- Section 853(4) of the UK Act : such profits of the company as fall to be treated as “realized” in accordance with generally accepted accounting principles

LAWFUL DISTRIBUTIONS

- ICAEW Technical Release : “Guidance on Realised and Distributable Profits under the UK Companies Act 2006”
- Only when realised in the form of cash or of other assets the ultimate cash realisation of which can be assessed with reasonable certainty
- A profit is, inter alia, realised in a transaction where the consideration received by the company is “Qualifying Consideration”

REDUCTION OF SHARE CAPITAL

- **Amendment to article 83 CA** : a reduction of capital notified by means of a new statutory form rather than through the submission of an updated Memorandum of Association
- **Amendment to Article 83 CA** to also cater for reduction of an Undistributable Reserve
- Eliminate 2 step process to first convert reserve into shares

REDUCTION OF SHARE CAPITAL

- **Amendment to article 83 CA** to mirror Section 3 of the UK Companies (Reduction of Share Capital) Order 2008
- A reserve arising from a reduction of capital is generally treated as a realised profit, and therefore capable of being distributed to shareholders

SHARE BUY-BACKS

- Section 729 of the UK CA : where shares are held as treasury shares, company may at any time cancel the shares without complying with the provisions on reduction of share capital in UK CA
- **Amendment to Article 106 CA** : Cancellation of shares following an Art 106 buy-back can be effected immediately and without the cooling-off period under article 83 CA

FINANCIAL ASSISTANCE

- UK repealed financial assistance rules for private companies in 2008
- Limited financial assistance provisions for public companies as required by Second Company Law Directive (77/91/EC)
- Section 678 UK CA : Where a person is acquiring or proposing to acquire shares in a public company, it is not lawful for that company, or a company that is a subsidiary of that company, to give financial assistance directly or indirectly for the purpose of the acquisition before or at the same time as the acquisition takes place

FINANCIAL ASSISTANCE

- **Amendment to Art 110 CA** : remove whitewash, and eliminate doubts about possible nullity of totally innocuous transactions
- Justification due to directors' fiduciary duties, including duty to ensure that company remains solvent
- **Amendment to Art 110 CA** : No prohibition for Financial Assistance by a foreign subsidiary to acquire shares in parent (to reflect *Arab Bank* judgement [1994])

PRIVATE EXEMPT COMPANIES

- No need of any further distinction between “private” and “private exempt” companies
- But ensure that articles 138(7), 144(1)(a) and proviso to 183(2) are disapplied for all private companies
- **Amendment to Art 68 CA:** Two shareholder default position to be removed
- **Amendment to Art 212(1) CA :** remove artificiality of need of a “Main Object” for single member companies

ACT LX OF 2021

- Not yet fully implemented
- **Amendment to Art 2(5) CA** to remove requirement to indicate date of birth for individuals
- **Amendment to Art 69(1)(b) and (h) CA** to remove reference to any addresses of shareholders and secretary
- Residential data to be retained solely by MBR for compliance purposes

ABANDONMENT OF COMPANIES

- Requirement for a Registered Office in Malta
- CSP might not want to continue offering service :
 - Lost contact / no payment of fees
 - Change in risk appetite
- Art 325(2) CA : assets of the company shall devolve upon GOM
- **New Legal Notice** to reflect procedure in UK Companies (Address of Registered Office) Regulations 2016
- Concept of “default” registered office at MBR

OVERSEAS COMPANIES

- Incorporation theory and substantive law for OCs
- Art 399 CA : Maltese Courts may wind up affairs in Malta of an overseas company even where the company has been dissolved or ceased to exist
- Practical difficulties faced by local representative : No equivalent provision to Art 214(2)(b) CA which allows for resignation of a sole director
- Unnecessary requests to Court for striking off
- **Amendment to CA** to provide for automatic cessation of OC on dissolution abroad

CONSOLIDATED ACCOUNTS

- Art 170 CA : Requirement to prepare Consolidated accounts
- Art 173 CA : Size Exemption
- Art 174 CA : Exemptions where there is an EU / EEA parent
- Practical issues with UK and US and other developed countries
- **Amendment** to remove filing requirement for all parent companies

LIABILITY OF OFFICERS FOR PENALTIES

- Various provisions in CA refer to joint and several liability of officers for penalties
- A Company Secretary does not have same duties and powers as directors
- **Amendment to CA** to relieve Company Secretaries from any liability where they do not have control over actions of directors

LIQUIDATOR UPDATES ON LIQUIDATION

- Art 274(1) CA : obligation of liquidator to **prepare** audited winding up accounts and a scheme of distribution “as soon as the affairs of the company are fully wound up”
- Art 274(2) : Obligation of liquidator to **file** liquidation accounts and Scheme of Distribution once approved
- Art 322(1) CA requires Statement (form L4) to be filed where the “winding up is not concluded within 12 months after dissolution”, and subsequently every 6 months until winding up is “concluded”

LIQUIDATOR UPDATES ON LIQUIDATION

- For winding up to be “concluded” (rather than just having the affairs of the company fully wound up) the whole winding up process, and not just the liquidator’s part, should be concluded
- **Amendment to Art 322(1) CA and form L4** : The liquidator to send Statement until such date as all the documents referred to in Article 274(2) have been delivered to MBR

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Thank You

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