

BUSINESS RESTRUCTURING SIMPLIFIED

by Andrew Kuzma

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Bermuda offers a number of unique legal entities through which businesses can operate. The most common entities include companies, limited partnerships that have elected to have legal personality (LP) and most recently, limited liability companies (LLC). Each vehicle has its own distinct characteristics that may make it preferable to another in a given situation.

For example, while the owners of a company or an LLC and the limited partners of an LP each enjoy limited liability, limited partners of an LP may lose their limited liability status if they actively participate in the management of the LP, thereby incurring unlimited liability. In contrast, owners of a company or an LLC are permitted to participate in the management of the business of the company or the LLC, as applicable, without fear of losing their respective limited liability protection as investors in these entities.

As another example, a company may be preferable to both an LP and an LLC structure, given certain of its attributes such as unlimited duration, less cumbersome ownership transfer mechanics and simpler procedures for raising capital investment.

When making the decision to form a new vehicle, most business owners choose a form that best suits the needs of their business at that point in time.

However, over time, the business or the commercial environment can change dramatically. New laws or regulations can be introduced that affect important aspects of a business such as tax liability, risk exposure or disclosure requirements. The nature of a business can also change, which may necessitate a change to an entity's legal form. Accordingly, such changes may mean that a particular commercial form may no longer serve its original purpose and objectives.

Fortunately, Bermuda has recently made legislative amendments that afford certain business owners more choices – including the flexibility to convert an existing entity into another type of entity through a simplified and streamlined process without having to dissolve and create a completely new entity. These amendments serve to further enhance Bermuda’s attractiveness to international businesses as a flexible commercial jurisdiction able to meet its needs, even as they evolve.

Between 2015 and 2017, such conversion amendments were made to the Limited Partnership Act 1883, the Partnership Act 1902, the Exempted Partnerships Act 1992, and the Companies Act 1981. In 2016, the Limited Liability Company Act 2016 came into force, which has built-in provisions for conversions. Such amendments provide for the conversion of:

- an exempted company to an exempted LP;
- an exempted LP to an exempted company;
- a company to an LLC;
- an LLC to a company;
- an exempted LLC to an exempted LP; and
- an exempted LP to an exempted LLC.

The ability to convert provides several advantages. First, it is a convenient restructuring method that provides continuity of the business and its assets and liabilities. For example, the conversion of an exempted company to an exempted LP does not constitute a dissolution of the exempted company and the rights, privileges, powers and interest in the property of the exempted company that has converted are not deemed, by virtue of the conversion, to have been transferred to the exempted LP.

In other words, the conversion does not create a new legal entity and therefore does away with any legal requirements related to the winding up of the former exempted company’s affairs and the costs and legal implications of a transfer of assets. Further, the conversion does not prejudice any existing members, creditors, proceedings or liabilities – the courts are required to apply the law of evidence and rules of procedure with the intent that no pre-existing claim shall be prejudiced by the conversion.

Second, a conversion does not disrupt the day-to-day operations of a business. Before the availability of statutory conversions in Bermuda, an entity desiring to avail itself of a different form would likely need to go through all of the motions of winding down and creating a new entity, and then undertake the necessary steps to transfer all of its assets to the newly formed entity. Such a process is time consuming, highly administrative and resource-intensive. Conversion can achieve the same result in significantly less time and with less of an administrative stress on the business of the entity.

Finally, converting an existing entity into a different form can be cost effective compared to other restructuring methods. The government fees for converting an entity are currently a fraction of the cost of applying for, and registering, a new entity.

In sum, these amendments simplify the legal restructuring process in Bermuda by making it easier to facilitate substantial changes to corporate governance while offering businesses increased versatility in an ever-changing commercial environment. The ability to convert an existing entity to a new form will undoubtedly bolster Bermuda’s appeal as a choice jurisdiction from which to conduct business.

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