SOME ASPECTS OF MALTESE OFFSHORE COMPANY LEGISLATION

Dr Max Ganado[1]

Introduction

Historical

Malta has been independent for only a little over 25 years and when it became independent it had very little infrastructure in place, both legal and otherwise. It had been used and treated as a fortress colony and little effort seems to have been made to develop its potential. By 1964, the year of independence, Malta just about had a company law. Its economy was limited and its tourism minimal. The potential as an offshore centre was there for all to see but priorities lay elsewhere. Between 1972 and 1987 Malta was governed by a Labour Party which was initially against the idea of turning Malta into an offshore centre, though in 1973 it did enact previously prepared legislation to encourage the registration of ships under the Malta flag[2]. At the end of its third term in Government the Labour Party had actually started considering offshore banking and granted tax exemptions to one offshore bank but continued to refute the concept of rationalising the legislation to make it competitive with other jurisdictions offering similar facilities.

On its re-election, the Nationalist Party, which rejected the idea of using discretions to exempt applicants on an *ad hoc* basis, set up a Parliamentary Secretariat for Maritime and Offshore Affairs as part of a new Ministry for the Tertiary Sector in order to promote Malta as a offshore centre. Within two years the Government enacted extensive amendments to the Merchant Shipping Act[3], a Malta International Business Activities Act 1988 (hereinafter MIBA) and a Malta

---

1 Dr Max Ganado LLM (Dal), LLD is a member of Professor J M Ganado & Associates, Advocates, 171 Old Bakery Street, Valletta VLT 09, Malta.
Tel: (356) 242096 Fax: (356) 225908
Author *Marine Cargo Delays* published by Lloyds of London and Contributor on Malta in *Comparison of Tax Haven Jurisdictions for Companies* by Lubbock Fine published by Key Haven Publications PLC, compiled by Anthony Murty and edited by Geoffrey Goodyear.

2 The Merchant Shipping Act was prepared by the previous Centre Nationalist Government which was defeated before Parliament had time to debate the Act.

3 See The Merchant Shipping Amendment Act 1988 and again The Merchant Shipping Amendment Act 1990.

Offshore Trusts Act 1988. The latter two Acts have been amended since then[4] and Regulations have been issued to supplement them[5].

Other than for Offshore Trusts, these laws have not created new vehicles for investment but have sought to amend or exclude the existing local legislation in the fields of tax, companies, banking, insurance, social security and other fiscal laws to exclude certain disincentives in our law. They have also attempted to introduce certain safeguards to avoid abuse of the system.

Categorisation of Companies

The Limited Liability Company as defined in the Commercial Partnerships Ordinance (Ch 168, Laws of Malta) is the only vehicle one can use for offshore companies. However, the objects for the company have been categorised and the applicability of the MIBA rules depends very much on this categorisation.

MIBA contemplates various types of offshore companies each having its own regulatory and fiscal regimes. The companies are broadly categorised into Non-trading and Trading companies[6]. The former includes holding, shipping and ship management companies and the latter incorporates general trading, financial services companies, banking and insurance companies.

Within the specific type of trading companies the law caters for specific sub-sectors. Thus in the insurance field we find captive insurance companies, insurance broking companies, managers of insurance companies and others. The same with banking companies.

Double Tax Arrangements

Of overall relevance and importance to the subject is the fact that Malta has concluded several Double Tax Agreements with various countries. These include practically all the Western European countries, USA, Canada, Australia, Pakistan and India. One ought to keep in mind the fact that these were all concluded before the offshore legislation and there is some expectation that some countries will wish to re-negotiate them in the future[7]. In some countries executive orders have been issued to the effect that some offshore transactions will be disregarded in tax

---

4 See Act XV of 1989, Act XIV of 1989 Legal Notice 1671, 1989 and XXXI of 1990.

5 See 79/90 LN 183 of 1990, LN 184 of 1990, LN 185 of 1990, LN 88 of 1991.

6 See s.23 MIBA.

7 Denmark has terminated the Agreement with effect from 1993; see Announcement 20th June 1992.

assessment for deduction purposes[8]. This is of course unfortunate from the point of view of the serious investor who wishes to transfer operations to Malta. In such cases the economic benefits derived by Malta are substantial and the incentives introduced in the DTAs should, as a minimum, be unaffected where local presence is actually established in Malta. It should be irrelevant whether the companies are offshore companies or not. There is a danger that when the incentives such as tax credits and tax sparing provisions are reviewed and restricted all offshore companies will be excluded as happened with Merchant Shipping Act companies in the past.

Scope of this Review

This article is not meant to be an exhaustive description of Maltese offshore legislation. It is meant to be an introduction to certain aspects which are peculiar to Maltese law and which would be of interest to lawyers in this field of practice. Topics such as the way company law rules operate, succession law variations, exceptions to fundamental procedural law principles and one or two other similar subjects are sure to interest any person faced daily with the application of domestic legislation.

Given the varied types of companies and the different set of rules applicable to each type, when I refer to a company I am referring to the "non-trading company". For the sake of information when I wish to contrast this to a trading company, the contrast will be to the "general trading company". This means that I am excluding banking, collective investment and trust companies as well as insurance related companies.

Furthermore this article is not meant to be an analytical study based on academic sources. It is meant to be of practical value only. To the academic it may appear somewhat superficial. Hopefully not so to the practitioner.

The Nominee Company: a Mandatory Secretary

Depending on the type of company, the law regulates the level of internal and external monitoring. In view of the then current spate of financial scandals, the minimum monitoring standards applicable to the non-trading company, the least regulated type, are substantial. The mechanism used is quite novel in that each company must have as a secretary or sole director a locally licensed "Nominee Company". These are companies regulated by the MIBA and have to be managed by at least three professionals of defined classes, two of which are local residents. The directors of nominee companies and the nominee companies themselves are made criminally and civilly responsible in the performance of their role as internal

[8] see Belgian Ministry of Finance Notice 24th August 1991 as well as Italian Ministry of Finance Decree dated 24th April 1992.

monitors of offshore companies. In the non-trading company they are given the legal and judicial representation of the company and, as will be explained below, must consent to all delegation of powers. They must also monitor all acts of the companies. They can act as nominee shareholders and must vet all prospective shareholders of offshore companies before agreeing to act for them. A company cannot be registered except through the agency of a nominee company. The information given to the nominee company is confidential and there are harsh fiscal and criminal sanctions for breaches of confidentiality.

In general trading companies their role is less radical as the information on beneficial ownership of companies must be divulged to the Malta International Business Authority and, again within a structure of confidentiality, is vetted by the Authority as well. However all other duties and obligations under the Act remain unaltered.

The nominee company requirement can be seen as quite cumbersome but it ensures that all users of the system are carefully vetted on entry as well as on a day to day basis in a manner which allows confidentiality to be retained. The extent of monitoring will vary from one nominee company to another and will depend on the type of activities the company carries out.

Nominee companies are licensed to service offshore companies by providing them with secretarial services as well as acting as nominee shareholders for the promoters of such companies. It is usual to enter into a service agreement with such companies for the mutual protection of the parties. All information has to be given to nominee companies and if a company is without a nominee company due to resignation or removal, the company will lose all its benefits and cease to be an offshore company.

When the nominee company acts as a nominee shareholder it is usual for it to issue trust agreements, although the concept of trust in the English Law sense does not form part of our law. The characterisation of the relationship between the nominee and his undisclosed principal causes certain difficulties under our law. Under English law the relationship apparently falls within the concept of a "bare trust". Not having such a concept in our law, the tendency is to go to the closest institute regulated by our Civil Code which is the "undisclosed mandate". The problem is that the undisclosed mandate is something the policy of the law discourages and consequently it tends to penalise the mandatory for so acting by placing the obligations personally on him. Furthermore there is no notion of separate estates in the law. These and other problems have not worried promoters of the system unduly; however, it is clear that our legislation may need some additional rules to cater specifically for this situation[9].

---

[9] The author has written a paper entitled *Nomineeship under Maltese Law* which was presented to the meeting of the Maltese Association of Nominee Companies in 1990 and is as yet unpublished.

Changes in Company Law Rules

Maltese company law is contained in the Commercial Partnerships Ordinance which was enacted in 1962. The Ordinance is a codification and amalgamation of the older law on commercial partnerships contained in the Commercial Code and the 1948 UK Companies Act. The limited liability company is one form of commercial partnership regulated by the law. Only this kind of partnership - in practice as in the texts of the law commonly referred to as a "company"[10] - can benefit from the provisions of the offshore legislation. As a rule the company must be a private company[11].

It is not clear why this limitation exists and in practice I have come across cases where clients require a different corporate structure to achieve the results they seek, both in terms of taxation and otherwise.

MIBA lists variations and exceptions to the Commercial Partnerships Ordinance in s.27 of the Act. This section runs into 12 sub-sections and affects various aspects of the law. I have selected three examples which I considered more interesting.

Reduction of Capital

Under the Ordinance reduction of capital takes effect after the lapse of 3 months from the publication of a notice in the Government Gazette of the decision to reduce capital. This is to enable creditors to object. In the case of non-trading offshore companies, a reduction of capital takes place immediately if certain conditions are met, namely that:

(a) the provisions of the memorandum and articles allow such reduction and formalities are followed;

(b) the company remains in a position to meet liabilities after reduction;

(c) the remaining shares retain their value as before the reduction; and

(d) the shares retain no rights after redemption; and

---

10 In practice this informal use of the term in the law creates some problems in that under some foreign laws the subject of fiscal laws are either partnerships or companies. Partnerships qualify while companies do not, or vice versa. It is hard to explain that a "limited liability company" is a "company" when under our law it is one of the commercial partnerships, the "partnership anonyme" to quote from the sub-title in the law. (See Part V, Commercial Partnerships Ordinance, Ch 168, Laws of Malta).

11 This is stipulated in s.22(2)(a) of the MIBA but there is discretion to waive this requirement under such conditions as may be imposed in s.22(10).

(e) the shares must be fully paid up.

This provision carries with it certain flexibility which may be of interest to promoters for various reasons, be they financial, such as recouping bridging loans, or fiscal, involving the conversion of funds from one form to another. This allows promoters to receive funds as "capital" rather than as "dividends" and hence enjoy different fiscal treatment in certain cases. There being no delay in the payment of funds by the company it becomes irrelevant in practical terms whether the sums are received by way of dividend or by way of reduction of capital.

The wording in the provision is somewhat anomalous for our law and may have been imported from overseas legislation; unless it carries a meaning more subtle than appears at face value. Under our law the term used is "reduction of capital" and although it implies, in practice, the redemption of shares, the latter terminology is only used in relation to fully paid up preference shares. It has been considered the rule that ordinary shares are not redeemable. The MIBA section does not refer to preference shares but to "shares" (which, in the absence of specification, is reasonably interpreted as referring to ordinary shares) and still uses the term "redemption". It is not clear whether the intention of the legislator was to allow redemption of ordinary shares in non-trading companies and then proceeded to impose the conditions under which this can be done, or never meant to do so. The technical consideration is that redemption of preference shares can only be done from profits which would otherwise be available for dividends. In other words "redemption" does not imply a reduction of capital but a distribution of profits or the proceeds of a new issue. In practice this section is being applied to ordinary shares in the normal course of events as though redemption means reduction given that it is posed as an exception to the rule on reduction of capital. Hence the restrictions on redemption of preference shares do not apply[12].

The second anomaly arises from condition (d) above mentioned, in that once shares are redeemed through a reduction of capital how can they possibly carry any rights? The words "until they are re-issued" confuses the matter as it is not at all clear how shares which have been redeemed following a reduction of capital can be re-issued. If shares are issued they will be different shares altogether.

Publicity of Shareholders and Directors

The normal rule is that directors' names and surnames must appear in the memorandum[13], invoices and trade circulars[14] of the company, and any changes

---

[12] See s.100 Commercial Partnerships Ordinance.

[13] see s.69(f) CPO.

[14] See s.6, CPO.

must be notified at the company registry[15]. The names of shareholders have to be registered and declared annually in the annual return for the company which is filed at the company registry[16]. MIBA creates specific exceptions to these rules in that the details of directors need not be carried on business letters[17], the shares can be held by nominee companies on behalf of shareholders[18] and the annual return need not be filed[19] in the case of a non-trading company. Furthermore, the memorandum need not state the names of all the directors. In fact, it is enough if it states the name of one director.

This concept of "undisclosed directors" may again be attractive, though in practice if the company deals with third parties it is difficult to see how the provision can operate effectively. In order to overcome the doubts as to authority, great reliance must be made on the secretary who is normally a locally licensed nominee company. The nominee company is the only authority which can issue such information and certify the facts relating to the directorships and share transfers subsequent to the initial incorporation of the company. Under Maltese law share transfers are not registered and information is gathered only from the annual returns. Given that no annual returns are due in cases of non-trading companies there is little one can do but rely on the secretary. In practice it will be in the interest of a purchaser of shares to ensure that notice of the share transfer is given and hence the secretary may very well be asked to issue a notice on the shareholding after the transfers and this will be filed at the company registry, or alternatively the secretary may be asked to file an annual return and pay the filing fee. The latter option is safe in that an annual return, as opposed to a letter, is an officially registrable document and is officially filed and logged. This may be very relevant to avoid fraudulent transfers to unknowing third parties who may be unaware of these sorts of rules and practices existing in Malta.

---

15 See s.129, CPO.

16 See s.144, CPO.

17 See s.27(2), MIBA.

18 See s.27(3)(a), MIBA.

19 See s.27(9), MIBA.

Representation of the Company

When the law was being prepared, one of the main concerns was to ensure that the local licensed monitor, the nominee company, would effectively control what was happening within the company. The legislator was not happy with just imposing extensive liability on these companies and went a step further by vesting the legal and judicial representation of non-trading companies in the nominee company itself. This upset the applicability of the normal rule which states that legal representation is vested in the person specified by the memorandum, or if nothing is specified, in two directors.

The law initially went so far as to imply that no delegation of this role could take place. This was unworkable and s.46(2) was amended to allow delegation in particular cases or classes of cases with the specific consent of the nominee company. Hence the Board requires the consent of the nominee company and the nominee company cannot consent to a general delegation.

In practice what happens in non-trading companies often happens in trading companies as well, though this is the result of cautious nominee companies concerned at their legal liabilities. It is not imposed in the law for general trading companies.

In practice this position is rather cumbersome and is rather surprising to promoters of offshore companies who expect to be able to take day to day decisions relating to their company. One has to be careful at the incorporation stage to agree with the nominee company what classes of cases will be delegated and which will still require specific resolution and consent. This is not difficult to agree to provided there is full disclosure to the nominee company. It ought to be expected however that any delegation will carry conditions meant to protect the nominee company from allegations of not carrying out its duties properly.

These include all or any of the following:

(a) making the delegation one for a fixed term, expiring automatically by its very terms;

(b) making use of the powers subject to an obligation by the mandatory to inform the nominee company of each exercise of powers under the mandate together with the supply of documents;

(c) requiring a **third party**, e.g., a bank, to keep the nominee company directly informed on the use of the mandate. Thus a bank will be asked to send copies of all statements to the nominee company directly;

(d) inserting a specific right to revoke at any time.

The clausing tends to be more demanding when the transactions being authorised involve bank accounts and other financial transactions. This is in the light of the international concerns about money laundering.

These may appear limiting to promoters used to setting up offshore companies; however, they will not deter the serious investor who takes time to appreciate the important role the nominee company fulfils both in the national interest and in the interest of users of our system as a whole.

In this regard the point to be made is that a client is well advised to discuss this aspect carefully and to ensure proper agreements and delegations are drawn up so that the purposes for which the company are set up are achieved smoothly.

Third parties

On a more technical level one has to appreciate that this rule is binding on companies and cannot be circumvented by anything in the memorandum or articles of companies. Where there exist clauses in the statutes of companies these are usually in accordance with the law and make it quite clear that the consent of the nominee company is required for delegation. The International Business Authority will not allow any company to be formed if the clausing is not correct and appears to give the Board more powers than allowed by law. The real problem arises if the statute is silent on the point. A third party dealing with the company may very easily be caught unawares upon being presented with a board resolution signed by all the directors but not the secretary, or by a secretary who is not the nominee company. It is unlikely that third parties, even lawyers, would know of this technical limitation on the powers of non-trading companies and the special role of the local nominee company. Under Maltese company law the post of secretary is not one of the registered mandatory posts and the secretary can be changed from meeting to meeting. Not so with offshore companies, where the secretary is a registered post and any changes thereof are also registered, as are changes of directors[20].

If nothing is stated on representation in the memorandum or articles, then the situation differs depending on whether it is a non-trading (which includes shipping) or a general trading company. In the non-trading company, the nominee company has the sole representation and the board of directors cannot act in terms of signing contracts with third parties without its consent. In the general trading company, representation lies with two directors unless the memorandum or articles state otherwise. Private agreements between the nominee company and the directors on prior authorisation of acts which conflict with the memorandum or articles do not affect third parties.

---

[20] See s.27(8), MIBA.

Delegation

The question has arisen as to whether the normal rule that the board of directors can delegate its powers to third parties still applies in the case of non-trading companies where the power of delegation is not specified. If the normal rule applies then the board, with the nominee company in attendance, can resolve to appoint an attorney. If the power to delegate is not specified then the issue arises as to whether the nominee company must act itself on behalf of the company without the power, even with the consent of the board, to authorise a third party to act on behalf of the company. In other words, is the legal representation vested by the law in the nominee company non-delegable unless stated to be delegable? The law seems to imply that, provided there is the consent of the nominee company, delegation by the company can take place; however, there have been continuing debates as to whether the board of directors itself can delegate its powers or not in the absence of specific authority to delegate, and this new provision in the law has only compounded the arguments.

It is clear that if the board of directors and the nominee company in a non-trading company could not delegate their powers then it would be highly inconvenient not to insert a clause in the memorandum on delegation. As before, a clear note of advice is due: when dealing with a Maltese offshore company a client should be advised to check the authorities very carefully.

Cancellation of Offshore Companies

One occasionally reads, in the local newspapers, of the cancellation of offshore companies. Under MIBA the Authority is bound to publish in a local newspaper the names of all the companies registered and struck off in the previous three months. The ability to cancel offshore companies was considered vital for the Authority to be able to protect the national interests. To the legal practitioner this is an area usually raising concerns. One ought to consider the circumstances under which a client's company can be cancelled, the remedies available and the status of the company after cancellation. The latter issue affects not only the client's company but also third parties such as contracting partners or creditors.

When Can an Offshore Company be Cancelled?

The answer to this question can be found in s.26(3) of the MIBA which basically states that a company can be cancelled if:

(i) the Authority, having carried out such investigations it deems necessary but always in accordance with the MIBA, is satisfied that circumstances exist or have become known to it which, had they been known before, would have resulted in the company not having been registered in the first place. This is a rather wide discretion and has no particular link to any

specific fact or violation. MIBA however have interpreted this as referring to identity of the promoter though the law does not make this limitation. Coupled with s.24(9) of MIBA which exempts MIBA from the obligation to give any reasons for any refusal to register a company or for any conditions it may require to be met prior to registration, this ground can appear totally arbitrary. This is, however, subject to what is stated hereunder.

(ii) the company fails to observe, in any material respect, a condition or requirement attached to its certificate of its registration. It all depends on what one means by "condition or requirement attached". Does this mean specific typed clauses or does it mean all that is implied by the nature of the company licensed to act? Take for example a holding company which is issue a licence "as a non-trading company". This type of company cannot trade by virtue of the definition of non-trading companies in the offshore law, but as a commercial partnership with its own personality it is certainly empowered to do so at law. Let us say it carries out a trading transaction. Is that a failure to observe a condition attached to the licence? This is not clear and may lead to difficulties in the future. The Authority has expressed the view that "conditions" there are specifically imposed conditions and not those arising from the law.

One ought to mention here that it is the specific duty of all nominee companies to notify the Authority of:

- any violations of MIBA[21];
- any act which is a criminal offence[22];
- any circumstances which would render the exemptions inapplicable and any tax or duty payable[23];

and each nominee company must declare annually that it has ascertained to the best of its ability that:

- the offshore company has satisfied all the conditions required by the Act to remain an offshore company; and that
- no circumstances exist which would render the exemptions inapplicable.

---

21 See s.47(2).

22 See s.47(2).

23 See s.47(3).

It would be futile to consider that the power of cancellation applies only to breaches of specific conditions imposed on an offshore company when the nominee companies have such wide reporting duties on such a spectrum of violations. Surely the same remedy is available to the Authority in the other cases? Alternatively is it possible that the conditions mentioned in 26(2) are only specific conditions imposed in a licence and for all other breaches there is another general power of cancellation which can be used at discretion?

(iii) if the company fails to insure itself when there exists such obligation. This is a very specific case of a class of offshore insurance companies.

Although these are the three cases mentioned in the law there are other sections in the Act which lead to the same result in that the Act itself declares that in specific events the company "shall cease to be an offshore company". This is problematic as there appears to be no need of any procedure at all. I can give some examples:

(a) the same section quoted above, namely s.26(1), states that a company ceases to be an offshore company if it has income accruing to it or derived by it which originates from a criminal offence;

(b) s.25(2) states that a company shall cease to be an offshore company if the annual fee appropriate to that company is not paid within one month from when it is due. The law then grants a cure period provided a penalty is paid;

(c) if the nominee company acting as secretary or sole director of an offshore company resigns and is not simultaneously replaced by another nominee company, then the company ceases to be an offshore company.

The question which arises is: what happens in the latter three cases? It seems the law establishes as a fact that a company "ceases to be an offshore company" and this happens by virtue of the law without any other formality. This is difficult to conceive and clearly there is some mistake in the Act which should be corrected forthwith in the interests of all parties.

In conclusion, it therefore appears possible that the cancellation of an offshore company can probably happen in three different situations :

First, in terms of s.26(3) for the specific cases mentioned in that section;

Secondly, in terms of the law when the law states so; and

Thirdly, when the Authority finds out that a breach has taken place or is taking place and the violation does not fall under the first or the second fact situations.

How is the Authority to Proceed?

With these three groups of cases the Authority does have a problem on the procedure to adopt. The real problem, though, really lies with the offshore company which does not know its rights in these cases.

With reference to the first group of cases under s.26(3), the provision of law continues by defining the rights of the offshore company quite adequately. It states that the Authority shall not cancel the company unless it has first given the company the opportunity of explaining the circumstances and making other representations. This kind of wording has been interpreted by our Courts as meaning that a real opportunity has to be given in fact[24]. The law also allows the company to take remedial action when the circumstances complained of are capable of remedy. The Authority is, in that case, required to impose the time and other conditions under which the remedy must be undertaken. If following representations and attempts at remedying the situation, the situation appears to the Authority to justify cancellation then it will so proceed and strike off the company from the register. Maltese law then grants some remedies for review of administrative discretion but that is an area for separate study.

This system is perfectly acceptable and should be the system adopted in all cases. Unfortunately it is not.

With reference to the second group of cases, where the law states that the company simply ceases to be an offshore company, MIBA is given no role other than to strike off the company and attend to the liquidation of the company and all exemptions and privileges cease to have effect immediately[25].

To what extent the remedies for review exist when the law itself declares the cessation it not clear.

---

[24] See *A. Ellul Sullivan v L. Vassallo*, Commercial Court, 2nd June 1983 where the Court interpreted a similar provision in the Merchant Shipping Act 1973 relating to the cancellation of a ship from the Register.

[25] See s.24(7), MIBA.

With reference to the third group of cases, that is where there are reports of violations or abuses, the Authority may or may not have the power to cancel the companies. The Authority argues for a general power in these cases and reference may be made to Article 12 of MIBA where it is stated that the Authority, in the fulfilment of its functions, shall have power "to do all such things ... as is necessary for the purposes of its functions." The principle function is to promote Malta as a centre for offshore activities and to ensure that they are carried out according to law and not in a manner which is detrimental to the interest of Malta[26].

This may be so; however, it is extremely dangerous to give such a wide interpretation of powers only to be protected by the limited judicial developments relating to review of administrative discretion which in recent years have been subjected to specific legislative limits[27].

Notwithstanding the above it is clear that the Authority should proceed with utmost caution before exercising such assumedly vast powers in relation to offshore companies, and this in the interest of Malta.

What Happens on Cancellation?

Once a company ceases to be an offshore company the Authority is bound to strike it off the register. According to s.27(12) of MIBA, once a company ceases to be an offshore company it shall be dissolved and all the powers of the company, in general meeting and at board level shall vest and be exercisable by the Authority itself. The Authority also has the power to appoint and remove the liquidator. In principle, the last acting nominee company will be appointed as liquidator[28].

Again this is a very high-handed approach but is based on the assumption that here we are dealing with a violation of the law or failure to observe the law in cases of non-payment of fees, etc.

How a company can by virtue of the law alone cease to be an offshore company is difficult to conceive. How it then is "immediately dissolved", again without formality, raises even more questions. When one considers that all this can happen without anyone knowing, without the nominee company realising, without the Directors appreciating it or without the Authority sanctioning and enforcing it, reveals the weakness of the law in this regard. Were it not for my absolute conviction that the Authority is really doing its very best to apply the law fairly and correctly I would be rather worried.

---

[26] See s.4(1) (a) and (d), MIBA.

[27] See s.743 of the Code of Organisation and Civil Procedure.

[28] See s.27(10) (a), MIBA.

What About the Rights of Third Parties?

In these situations the shareholders have a right to the liquidation proceeds and creditors and third parties have the normal rights creditors have when a company is voluntarily or compulsorily dissolved and placed in liquidation. The factual situations may not be that easy to address. Usually a liquidator is handed all the property of the company to administer and liquidate. In these cases all the assets would probably be overseas. The Authority or the liquidator appointed by it would have to take actions overseas and I am not at all convinced that a foreign Court would look too kindly on the attempt at the exercise of these powers unless proper and correct procedures have been followed. These should minimally include due notification of the violation alleged to have taken place and respect to the principle of *audi alteram partem.*

In cases where the company has income or property deriving from a criminal offence then that property is liable to seizure and shall be forfeited to the Government in terms of s.26(2). Again, how this can happen to the prejudice of the company and third parties without any formality or hearing or even a remedy is difficult to conceive.

Rather interestingly the only right that is not affected is that relating to confidentiality. Section 38(1) states that confidentiality shall be retained and shall continue to be sanctioned by the law "even after the company has ceased to be an offshore company or has been struck off the register".

This rather harsh attitude of the legislator appears unconvincing when one considers that the violations which can give rise to these effects may not be all that serious. The one which always comes to mind is the resignation of a nominee company from the post of secretary following a disagreement with the Board. The secretary can resign without the Board being informed immediately and hence being able to nominate another nominee company, which accepts, simultaneously. I understand that this is about to be changed by the introduction of a cure period, however, the argument applies equally to other cases.

In my view the violation of some law should lead only to the loss of exemptions and the company then loses the benefits of the MIBA and is treated as a normal taxable and fiscally regulated onshore company without prejudice to its very corporate existence. Possibly there could be a system of fines. If the Authority wishes to stop it from continuing so to act then it should be bound to take certain proceedings to stop the company from operating. But the situation today leaves no space for this to happen and if there are major contracts which are being performed the radical effects of cessation and dissolution can be problematic. Liquidators under Maltese law are not entitled to continue operating a company but must seek to terminate existing operations, not commence new ones, and proceed to distribute assets. It should also be noted that once a company is placed into liquidation the position is irreversible.

Variation in the Laws of Contract and Succession

In virtue of another amendment to the Commercial Partnerships Ordinance it is possible to provide for the transfer of shares in any manner stated in the Articles and may also provide for transfer of shares in the company after, or having effect after, the death of a share or debenture holder. This is an exceptional variation to the law of contract and the law of succession but achieves a rather interesting scope of facilitating the shareholder to transfer or bequeath his holdings in a company without the formality of a sale contract or will. It also avoids certain rules such as the one which stipulates that all mandates terminate on the death of the mandator[29]. In these cases the company, and presumably anyone else for that purpose, is specifically bound by the provision to act upon such regulations.

It is difficult to contemplate the transfer of shares in a manner different from the usual, namely the execution of a share transfer agreement by a transferor in favour of a transferee, though one may appreciate the doors which have been opened by this amendment particularly for creditors and joint venture participants. The pledge of shares within Maltese companies, for instance, has been a particularly difficult institute to deal with when creditors, used to taking over shares in cases of default, find that under Maltese law the creditor can only apply to the Court for sale of the assets pledged[30]. This new provision in MIBA seems to allow for the regulation of a "take-over option" in favour of a creditor by means of a very simple Article in the company statute. No problems of validity can possibly arise because the law is very specific in that it states that "any such transfer shall be valid and effective and shall be acted upon by the company notwithstanding the provisions of any other law of Malta". Consequently in the case of pledge, for instance, the rule in the Civil Code prohibiting the appropriation or sale of the pledged asset, other than through the Courts, does not apply.

The option goes further and allows transfers to take effect after the death of the transferor. The manner and conditions of such a transfer have to be stated in the Articles. Coupled with the role of the nominee companies as nominee shareholders this provision gives wide opportunities in the estate planning field for promoters to regulate the distribution of their estate placed within the company to whomever and however they wish. The nominee company would presumably be vested with the authority to implement the wishes of the transferor, though this is not necessarily so, and provided the Articles state so the system adopted can involve any other person of trust selected by the transferor. Once again issues of invalidity are avoided by a specific wording of the law which saves such arrangements from any other law of Malta "or any other personal law otherwise applicable". Thus issues of reserved portions and the like will not be entertained.

---

29 See S. 1886 Civil Code.

30 See S. 1970, Civil Code.

The pity is that these options exist only in the case of non-trading companies. Why this is so is not clear at all. In fact the probability is that in so far as creditor rights are concerned the facility would be far more useful in the case of trading companies and, barring an amendment to the law, in order to avail oneself of this option one would have to create a Maltese non-trading company to hold the shares in the trading company and insert the option in that holding company. For estate planning the facility would be more relevant in non-trading companies, though one does not exclude its value even in the trading context.

Confidentiality and its Limitations

Confidentiality in the offshore world has always been a double-edged knife. It is a lure to those who wish to keep their affairs hidden from others but places the whole system under suspicion. Maltese law has sought to balance the interests of users with the state's rights and obligations to control illegality.

The law basically gives the user of a non-trading company the fullest rights of confidentiality he wishes, provided the identity of the beneficial interests is declared to the locally licensed nominee company, who must also verify the credit-worthiness of the promoter.

The promoter can use the nominee company as a nominee shareholder and can use directors totally unconnected to himself. The transactions of the offshore company are totally confidential and shall remain confidential even after the company is struck off. All persons in general are bound to respect this confidentiality and no person may be required by any Court to divulge any information on an offshore company. A violation of this obligation of secrecy will involve the contravenor in substantial criminal and civil liability[31].

The MIBA has very limited powers in regard to non-trading companies. It is ordered by s.11(1) of the Act not to "seek to identify the individuals or other persons having an interest" in the activities of offshore companies. Basically the responsibility is left to the nominee company alone.

These limitations do not apply to trading companies where the identity of beneficial interests must be declared to MIBA who must satisfy itself of the propriety of the investor.

There are however overall assumptions and limitations. These extensive facilities are granted only in connection with lawful activities and the veil of confidentiality will not protect any abuser of the law. The Act clearly defines the procedures of investigation in these matters. It is careful not to allow a prying authority any

---

[31] See s.38, MIBA.

"fishing" possibilities. The investigative powers of the Authority are wide; however, the promoter can refuse to give certain information. If the Authority feels that the specific information is important to its investigations then it can ask the Court of Appeal to carry out the investigations. The Court will do so *in camera* and the Court shall make its report to the Authority but shall divulge only such facts, the names of such persons and other matters as its findings show to be in contravention of the law. The Court will also divulge all material to enable the Authority to prosecute the offence. It will otherwise not divulge anything at all[32].

Fiscal Exemptions and their Waiver

MIBA grants companies wide fiscal exemptions ranging from taxation to succession duty, and from document duty to exchange controls. This was to be expected as the Act had to be competitive. The exemptions and privileges are guaranteed for 10 years from the registration of the company under the law[33]. The registration of the company constitutes a contract between the company and the Government relating to those exemptions and privileges and this is interpreted as implying the inability of the Government to change the law with retrospective effect, at least without exposing itself to liability for damages.

An interesting aspect of the matter is that under s.41 of the MIBA, the exemptions and privileges are given to the company subject to the option of the person to whom they are granted not to benefit from the exemption or privilege, or to benefit to such extent only as may be acceptable to the Authority. Thus an exemption from tax can be waived in part and this would allow a promoter to render a non-taxable non-trading company taxable. This would be done up to say, 1% or 2%, but would be enough to render the company a "taxpayer", a qualification which is important for certain laws and international agreements.

Another area in which the possibility of a partial waiver of an exemption has proved useful has been relating to the exemption from certain precautionary acts[34]. Under the law, no property of any kind belonging to offshore companies can be seized unless it is in the enforcement of a judgment or to recoup property obtained unlawfully. Hence a precautionary warrant of impediment of departure of a ship or the precautionary warrant of seizure of an aircraft is not possible, for instance. This is not acceptable to financing banks and so a partial waiver of this specific exemption is granted in favour of the bank by the shipowning company.

---

32 See s.12, MIBA.

33 See s.53, MIBA.

34 See s.36, MIBA.

Procedurally the waiver is effected through a notice in writing sent to the Authority indicating the exemptions being waived. The law states that such a waiver shall be "indefinite and irrevocable". It is not clear why this is so. In the second example above the indefiniteness and irrevocability is inconvenient because once the loan to the company is repaid one would expect that the waiver be revoked. The lending bank will certainly not object. In the circumstances we have resorted to submitting a waiver to the banks in escrow leaving it to the banks to file the waiver with MIBA should it become necessary and only after a default under the loan agreements.

The final comment on this aspect is that if there is a waiver of one exemption or privilege, e.g., taxation, there will be an implied waiver of other exemptions, e.g., not filing audited accounts and a tax return.

Civil Actions and Variations to Law of Procedure

Obtaining precautionary warrants against offshore companies

I have already referred to the limitation on precautionary remedies which can be used against offshore companies. This is a rather important privilege because of the relative ease with which these precautionary warrants are issued. They are issued on the basis of an ex parte application confirmed on oath, without a hearing or the necessity of supporting documentation. It is extremely difficult to have them removed, reduced or to obtain counter security. The legislator wished to avoid involving offshore companies in these legal issues unless certain pre-conditions exist.

The first condition is that the action must relate to the enforcement of an obligation or other liability of the company. In other words, the action cannot be in the form of a claim yet to be quantified by the Court. The second case where these precautionary acts are available is when the action they are meant to secure is one for the recovery of any property held by the company originating from an illegal transaction as defined in the Act.

Illegal transactions are those which are a criminal offence against the laws of Malta or would be such an offence if carried out in Malta, and include possession of goods or money the receipt of which would be such an offence.[35]

---

[35] Reference is made to s.36(3)(b) of MIBA which refers to s.26(1) of the Act. One should however refer also to s.2(5) ("interpretation") of the Act where it is stated:

> "Any reference in this Act to a criminal offence committed abroad, or against the law of a country other than Malta, or to an act which if committed in Malta would be a criminal offence against the law of Malta, shall be construed as limited to offences which are extraditable for the purposes of s.5 of the Extradition Act, 1978".

The practical problem that has arisen is that although the law states clearly that no warrant shall be issued by the Court unless the applicant satisfies the Court that the case falls within one of the two categories above mentioned, the Court officers and judges are in no position to notice that the defendant company is an offshore company. There is no obligation under the domestic law to declare positively that the defendant company is **not** an offshore company. The remedy would be for a defendant to apply to the Court to remove the order just issued unlawfully against it. Unfortunately the defendant is then faced with having to file a writ of summons and obtain a judgment which can take months to obtain.

One word of warning on this: it is usual for a defendant faced with a seizure of assets to post security to obtain a release of the warrant. In a recent case we advised clients who had filed a writ of summons for the renovation of an allegedly illegally obtained warrant, that in order to minimise damages they could post security pending the judgment for revocation of the warrant. To our amazement, on being told that the warrant was removed by the posting of security, the Court refused to issue judgment because now there was no warrant to be removed, it having been previously removed by the action of the defendant[36]. A year later we are still fighting to have the warrant declared illegal so that we can obtain the return or reduction of the security posted.

Filing Action on Behalf of Undisclosed Shareholders

An innovation in the field of proceedings concerning offshore companies is the facility granted to undisclosed shareholders and directors in non-trading offshore companies to file actions in the name of an advocate without disclosing their own name. This facility strengthens the confidentiality provisions in that it allows an undisclosed shareholder a judicial remedy without the loss of the benefit of confidentiality. This is useful in the purely personal capacity of a shareholder wishing to protect his interests in the company against the company or other shareholders. It is also beneficial to groups of shareholders or directors constituting required majorities wishing to obtain Court Orders. The Court is bound to hear known shareholders and the nominee company and it can then give any orders it deems fit. Any orders of the Court given under this section are treated as the equivalent to a general meeting or board resolution and are irrevocable without the Court's consent.

The proceedings and their records are strictly confidential.

I have not come across any use of this provision so far though I do expect it will come in handy once the number of companies, now standing at close to 1000, grows. There is a minor procedural difficulty which has not been regulated: who does one sue when the other shareholders or directors are also not disclosed? In

---

[36] See *Falzon v Vella*, Commercial Court Decree dated 16th July 1991 per Mr Justice J Filletti.

the absence of a specific provision one is to assume that the advocate acting on behalf of plaintiff sues the nominee company acting as a nominee shareholder on behalf of "undisclosed persons having an interest in the company". The nominee company would be duty bound to notify the beneficial shareholders or undisclosed directors of the action and they would in turn, presumably, be able to ask another advocate to take over the defence in his own name on behalf of the defending undisclosed persons.

It is to be noted that in these cases advocates are personally responsible for all court expenses and so it should not surprise anyone if a deposit is demanded in advance to cover against this liability.

Conclusion

The law in Malta is only four years old and yet much practice has grown around it. The provisions of the law often limit benefits such as those described above to non-trading companies. The reality is that the use of nomineeship agreements extends to general trading companies and therefore it is clear that the benefits granted to non-trading companies need to be extended to general trading companies as well. This ought to be done as soon as possible so that the law can develop consistently and so as to avoid wrong impressions being created in the minds of users of the system as to what can and what cannot be done. The distinction between trading and non-trading is too minor in practical terms to be appreciated by most users of the system.