

CORPORATE MATTERS: DOMESTICATION OF NON-U.S. ENTITIES

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Tags
Corporate Law
Delaware
Domestication

Domestication – sometimes known as re-domiciliation, transfer, continuance, or company migration – is a process by which a non-U.S. entity transfers its domicile from a foreign jurisdiction to the U.S. while continuing the existence of the entity in its place of organization.¹

“Foreign jurisdiction” is defined in the Delaware General Corporation Law (the “Act”) as “any foreign country or other foreign jurisdiction (other than the United States, any state, the District of Columbia, or any possession or territory of the United States).”²

Domestication is commonly allowed in offshore financial centers, such as the British Virgin Islands and the Cayman Islands. It is also permitted by law in Delaware and many other states in the U.S. – a notable exception being New York – and the rules and procedures are somewhat similar between states. This article will focus on the laws of Delaware.

The domestication provisions of the Act would be used when, for example, a company incorporated in the British Virgin Islands wishes to become a Delaware company without having to dissolve the B.V.I. entity.

Section 388 of the Act and Section 18-212 of the Delaware Limited Liability Company Act deal with non-U.S. entities that wish to domesticate into Delaware. Non-U.S. entities looking to domesticate into Delaware should file a certificate of domestication, accompanied by a certificate of incorporation (or formation, in the case of a limited liability company), with the Delaware Secretary of State. The domestication should first be approved in the manner provided by the governing documents of the entity and by any applicable laws of the foreign jurisdiction. For a company to domesticate, it must be permitted in both in its originating jurisdiction and in the destination jurisdiction.

The certificate of domestication is quite simple, laying out the original name of the company and what the name of the company will be following the domestication (as written in the accompanying certificate of incorporation or formation), the date of formation, place of domicile immediately prior to the filing the certificate of domestication, a future effective date (if any), and the manner of approval.

¹ Domestication is also available between states within the U.S. See, for example, Delaware Code §390.

² “Non-U.S. entity” means a corporation, limited liability company, statutory trust, business trust or association, real estate investment trust, common-law trust, or any other unincorporated business or entity, including a partnership whether general (including a limited liability partnership) or limited (including a limited liability limited partnership), formed, incorporated, created, or that otherwise came into being under the laws of any foreign jurisdiction.

Once the certificate of domestication is effective, the non-U.S. entity is subject to all of the provisions of the Act and the existence of the corporation is deemed to have commenced on the date the non-U.S. entity commenced its existence in the jurisdiction in which it was first formed or incorporated.³

Following domestication, the existence of the non-U.S. entity remains intact and it is not required to wind up its affairs or pay its liabilities and distribute its assets, and the domestication does not cause or constitute a dissolution of the non-U.S. entity. If, following domestication, a non-U.S. entity that has become domesticated continues its existence in the foreign jurisdiction in which it was existing immediately prior to domestication, the corporation and the non-U.S. entity shall, for all purposes of the Act, constitute a single entity incorporated and existing under the laws of the State of Delaware and the laws of the foreign jurisdiction.⁴

CONTINUATION

According to the Act, domestication “shall constitute a continuation of the existence of the domesticating non-U.S. entity in the form of a corporation of this State.”⁵ Further, all of the rights, privileges, and powers of the non-U.S. entity that has been domesticated, as well as all of its property (real, personal, and mixed) and all debts due to it, shall remain vested in and be the property of the corporation to which the non-U.S. entity has been domesticated (and also in the non-U.S. entity, if and for so long as the non-U.S. entity continues its existence in the foreign jurisdiction).

CREDITORS’ RIGHTS

Following domestication, the rights of creditors and all liens on property of the non-U.S. entity are preserved unimpaired. In addition, all of the non-U.S. entity’s debts and liabilities will be attached to the corporation to which it has been domesticated, and may be enforced against the domesticated corporation to the same extent as if the domesticated corporation had originally incurred or contracted such debts and liabilities in its own capacity. However, the rights, privileges, powers, and interests in property of the non-U.S. entity, as well as its debts, liabilities, and duties, shall not be deemed, as a consequence of the domestication, to have been transferred to the domesticated corporation. Such duties will also remain attached to the non-U.S. entity for so long as it continues its existence.

WHY DOMESTICATE?

There are a variety of reasons why the shareholders of an entity may choose to domesticate to the U.S., including dealing with shareholders who are no longer outside of the U.S. and individuals concerned about disclosure rules of certain foreign jurisdictions. Also, the laws of the U.S. or another jurisdiction, if a Delaware entity is considering domesticating out of Delaware, might be better suited for the objectives

³ Delaware Code §388(d).

⁴ Delaware Code §388(j).

⁵ *Id.*

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of the company, might give it more flexibility or better tax treatment than the laws of its current domicile, or it may be a combination of these factors.

Domestication allows the corporation to retain its original date of incorporation, its existing Federal tax identification number, corporate bank accounts, licenses, and lines of credit. In addition, retaining the age of the corporation may be useful if applying for new lines of credit and/or special government exemptions. While there may be ancillary tax consequences, a domestication is a tax-free “F-reorganization” for Federal tax purposes.⁶



⁶ Rev. Rul. 88-25, 1988-1 C.B. 116.

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