



ANALYSIS

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1989, No. 22

An Act to amend the International Companies Act 1981-82

(8 September 1989)

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled, and by the authority of the same, as follows:

1. Short Title and commencement - (1) This Act may be cited as the International Companies Amendment Act 1989 and shall be read together with and deemed part of the International Companies Act 1981-82 (herein referred to as "the principal Act").

(2) Sections 6, 9, 11, 16, 17, 21, 26 and 27 of this Act shall be deemed to have come into force on the same day as the principal Act came into force.

2. Interpretation - Section 2 of the principal Act is amended by repealing the definition of "Resident secretary" and substituting the following new definition -

"Resident Secretary" means a trustee company or officer of a trustee company appointed to be such under section 90.

3. Registrar of Companies - Section 8 of the principal Act is amended by repealing subsection (5) and substituting the following new subsection -

"(5) Any person appointed under the terms of subsection (1) who except for the purposes of this Act or except in the course of criminal proceedings makes a record of, divulges or communicates to any other person any information which he possesses or has acquired:

(a) by reason of his carrying out the duties and functions of his office or;

(b) by reason of access afforded or obtained by him to any document or register kept by the Registrar or book minute book register or record kept by any company;

shall be guilty of an offence against this Act and shall be liable on conviction to a fine not exceeding \$10,000.00 or to a term of imprisonment not exceeding two years in respect of each such offence."

4. Registers - Section 12 of the principal Act is amended by adding after the existing subsection (7) the following new subsection -

"(8) Any person who inspects, copies or permits to be inspected or copied any document filed or kept by the Registrar in respect of any company otherwise than as entitled or authorised in terms of subsection (2) (or, in the case of the Registrar and officers appointed pursuant to section 8, otherwise than for the purposes of this Act) shall be guilty of an offence against this Act and shall be liable on conviction to a fine not exceeding \$10,000 or to a term of imprisonment not exceeding 2 years in respect of each such offence."

5. Registration and Incorporation - Section 14 of the principal Act is amended by repealing subsection (6) and substituting the following new subsection -

"Any director or officer of an international company who after the expiry of the certificate of incorporation of that company and before the issue of a current certificate of incorporation of that company does any act that causes that company to

carry on business after the expiry of its certificate of incorporation and before the issue of a current certificate of incorporation shall be guilty of an offence against this Act and shall be liable upon conviction to a fine not exceeding \$10,000.00"

6. Powers of companies - Section 20 of the principal Act is repealed and the following section substituted -

"20. Powers of companies - (1) The powers of an international company shall include, unless expressly excluded or modified by the memorandum or the articles, the powers set forth in Schedule 1 and such other powers as are set out in its memorandum or articles or granted to it generally or specially by regulations made under this Act.

(2) Without limiting the generality of subsection (1) an international company in excluding or modifying the powers set forth in Schedule I may provide that the company has the powers of a natural person (as if that person were a body corporate) and, without limiting the generality of the foregoing, has power to -

- (a) Issue and allot fully or partly paid shares in the company;
- (b) Issue debentures of the company;
- (c) Distribute any of the property of the company among the members, in kind or otherwise;
- (d) Give security by charging uncalled capital;
- (e) Grant a floating charge on the undertaking or property of the company;
- (f) Procure the company to be registered or recognised as a body corporate in any place outside the Cook Islands.
- (g) Make provision in connection with the cessation of the whole or a part of the business of the company, or of any subsidiary of the company, for the benefit of any subsidiary of the company, for the benefit of employees or former employees of the company or of a subsidiary of the company or for the dependants of such employees or former employees; and
- (h) Do any other act that it is authorised to do by any other enactment or rule of law in the Cook Islands or (except where such act is expressly prohibited by any act regulation by-law or rule of the Cook Islands having application to international companies) elsewhere.

(3) The powers of an international company shall subject to the terms of the memorandum and articles be exercisable in the Cook Islands and elsewhere.

(4) The powers of an international company may be exercised whether or not such exercise -

- (i) may advance its business;
- (ii) is in the best or commercial interests of the company;
- (iii) may advance or assist the business of some other person at the expense or to the detriment of the company.

(5) Any international company may restrict its powers by making express provision for the period during which those powers may be exercised or during which it may carry on business. In any such case unless -

- (a) The memorandum or the articles otherwise provide; or
- (b) The winding up of the company has previously been commenced or deemed to have been commenced in accordance with the provisions of Part IX, then

upon the date or upon the happening of the event or termination of the period by which the period of exercise of the powers is so restricted the directors shall immediately take all steps as may be necessary to effect the winding up of that company in accordance with the provisions of Part IX of the Act.

7. Pre-incorporation contracts - The principal Act is amended by adding after the existing section 20 (as substituted by section 3 of this Act) the following new section -

"21A. Pre-incorporation contracts - (1) This section applies to -

- (a) Any contract purporting to be made by an international company before its incorporation; and to
- (b) Any contract made by a person on behalf of an international company before and in contemplation of its incorporation.

(2) Notwithstanding any enactment or rule of law, any contract to which this section applies may be ratified within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the incorporation of the company in the name of which, or on behalf of which, it has been made. A contract so ratified shall, upon ratification, be valid and enforceable as if the company had been a party to the contract when it was made.

(3) For the purposes of this section, a contract to which this section applies may be ratified by a company in the same manner as a contract may be made by a company under section 29 of this Act, and the provisions of section 29 of this Act shall have effect as if references in that section to making a contract were references to ratifying a contract.

(4) Notwithstanding any enactment or rule of law, in a contract to which this section applies, unless a contrary intention is expressed in the contract, there is an implied warranty by the person who purports to make the contract in the name of, or on behalf of, the company -

(a) That the company will be incorporated within such period as may be specified in the contract, or if no period specified, then within a reasonable time after the making of the contract; and

(b) That the company will ratify the contract within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the incorporation of the company.

(5) The amount of any damages recoverable in an action for breach of warranty implied in any such contract shall be the same as the amount of damages that would be recoverable in an action against the company for damages for breach by the company of the unperformed obligations under the contract as if the contract had been ratified and cancelled.

(6) Where a company after its incorporation does not ratify a contract to which this section applies, any party to that contract may apply to the Court for an order directing the company to return any property, whether real or personal, acquired pursuant to the contract to that party, or for any other relief in favour of that party respecting any such property, and the Court may, if it considers it just and equitable to do so, make any order or grant such relief as it thinks fit and whether or not an order has been made under subsection (5) of this section.

(7) In any proceedings against a company for breach of a contract to which this section applies and which has been ratified by the company, the Court may, on the application of the company, any other party to the proceedings, or of its own motion, make such order for the payment of damages or other relief, in addition to or in substitution for any order which may be made against the company, against any person by whom that contract was made in the name of, or on behalf of the company, as the Court considers just and equitable.

(8) Where a company, after its incorporation, enters into a contract in the same terms as, or in substitution for, a contract to which this section applies (not being a contract ratified by the company under this section), the liability of any person under subsection (4) of this section (including any liability under an order made by the Court thereunder for the payment of damages) shall be discharged.

(9) Subsections (2) and (3) of this section shall apply to a contract to which this section applies entered into before the commencement of this section.

(10) In this section -

"contract" means any legally binding transaction.

8. Names of companies - Subsections (2) and (3) of section 22 of the principal Act are repealed and the following subsections substituted -

"(2) An international company shall have as part of, and at the end of, its name such words or abbreviations as are prescribed by regulations and until regulations relating to the names of international companies have been made an international company shall have as a part of, and at the end of its name either -

- (a) the word "Corporation" or the abbreviation "Corp."; or
- (b) the word "Incorporated" or the abbreviation "Inc."; or
- (c) the word "Limited" or the abbreviation "Ltd."

(3) No description of an international company shall be deemed inadequate or incorrect by reason of the use of -

- (a) any word which being prescribed either by subsection (2) or by regulations is used in lieu of its prescribed abbreviation;
- (b) any abbreviation which being prescribed either by subsection (2) or by regulations is used in lieu of that word in its prescribed unabbreviated form; or
- (c) the symbol "&" in lieu of the word "and" contained in the name of the company or the word "and" in lieu of the symbol "&" in the name of the company."

9. Transactions and branches - Section 29 of the principal Act is amended by repealing subsection (3) and substituting the following new subsection -

"(3) An international company may by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its agent or attorney to execute instruments on its behalf and any instrument executed by such an agent or attorney on behalf of the company, if executed as a deed, shall have the same effect as if it were under the common seal, or, subject to subsection (5) under the appropriate seal of the company. The provisions of this subsection shall not preclude the company constituting a person as its agent or attorney in any other manner."

10. Prohibition against carrying on business with no members - Section 30 of the principal Act is amended by omitting the words "section 57(12)" and substituting the words "section 57(3)". This amendment shall be deemed to have come into force on 15 April 1987.

11. Premiums received on issue of shares to be share capital and limitations on application thereof - Section 40 of the principal Act is amended -

- (a) by omitting from subsection (1) the words "premiums on those shares shall" and substituting the words "premiums on those shares may";
- (b) by omitting from subsection (2) the words "assets so acquired shall" and substituting the words "assets so acquired may".

12. Currency of Shares - Section 43 of the principal Act is amended by omitting from subsection (1) the words "prescribed by the regulations".

13. Cancellation of re-acquired shares by an international company - Section 47 of the principal Act is amended by adding after the words "in accordance with the regulations." the words "If an international company having re-acquired its shares does not cancel those shares it shall enter in the appropriate register its own name as the transferee of those shares and shall thereupon be deemed for all purposes (other than for the purposes of section 30) to be a member of the company."

14. Distribution from capital surplus of international company - Section 48 of the principal Act is repealed.

15. Secretary - Section 90 of the principal Act is amended -

- (a) by repealing subsection (1) and substituting the following new subsection:
"(1) When requested in writing by an international company to make available a resident secretary a trustee company shall either accept appointment as resident secretary of that company or make available for appointment an officer of the trustee company".
- (b) by amending subsection (2) by adding after the words "other than" the words "a trustee company or";
- (c) by amending subsection (6) by omitting the words "The resident secretary" and substituting the words "An officer of a trustee company appointed pursuant to subsection (1)".
- (d) by repealing subsection (8) and substituting the following new subsection -

"(8) The remuneration of a resident secretary of an international company shall be fixed by agreement between the company and the trustee company which is, or has provided the officer who is, the resident secretary. That remuneration shall be paid in the Cook Islands in such manner and at such time as shall be agreed between the trustee company and the company and such remuneration shall be a charge upon the assets of the company ranking in priority next after the fees owing by the company to the Registrar."

16. Calling of Meetings - Section 94 of the principal Act is amended by adding after subsection (5) the following new subsection:

"(6) Anything that may be done by an international company by resolution or special resolution passed at a meeting of that company may, subject to any special provisions in that behalf in the articles of the company be done without a meeting and without any previous notice of the resolution being required, by means of a resolution in writing signed

(a) in the case of an international company which has made an allotment of its shares offered to the public, by all such members as are entitled to vote thereon;

(b) in any other case, by not less than three fourths of such members as are entitled to vote thereon;

and such resolution shall be deemed as valid as if passed at a meeting duly held in accordance with the Act and with the Articles of that company. Any such resolution may be contained in the one instrument or in several instruments in like form."

17. Special resolutions - Section 99 of the principal Act is amended -

(a) by repealing subsection (1) and substituting the following subsection:

"(1) A resolution shall be a special resolution when it is passed by such of the members having the right to vote (either in person or where proxies are allowed by proxy) as together hold in aggregate not less than 75 per centum of the total votes of the members present (either in person or by proxy) and entitled to vote on that resolution at a meeting of which not less than 21 days notice specifying the intention to propose the resolution as a special resolution has been duly given."

(b) by repealing subsection (7).

18. Inspection and closing of Register - Section 107 of the principal Act is amended -

- (a) by repealing subsection (2) and substituting the following new subsection -

"(2) The register shall be open to the inspection of any member for the purposes of inspection of the particulars of that member and of that member's shareholding contained therein but no member shall be entitled to inspect the particulars of any other member or of the shareholding of that other member without the consent in writing of that other member first had and obtained. Any inspection by a member shall be without charge."

- (b) by omitting from subsection (2) the words "Any member" and substituting the words "Subject to the provisions of subsection (2) any member".

19. Annual return - Section 112 of the principal Act is amended by adding after subsection (6) the following new subsection -

"(6A) Where in any case the Registrar is satisfied that it is not practical (having regard to the accounting period of an international company) for an international company to comply with the provisions of subsection (5) or (6) at the time of filing an annual return he may on the application of that company order that the time for compliance with those provisions be extended and pending compliance accept the annual return and the prescribed fee payable therefor without the accompanying certificates required by that subsection."

20. Accounts to be kept - Section 113 of the principal Act is amended by adding after subsection (4) the following new subsection:

"(5) Notwithstanding the provisions of subsection (2) an international company may with the prior written approval of the Registrar keep its accounts at such place outside the Cook Islands as its directors think fit. Any approval of the Registrar may be given (subject to the terms of any regulations governing the keeping of accounts outside the Cook Islands) upon such terms and conditions as may from time to time imposed by him."

21. Auditor need not be appointed in certain circumstances - Section 117 of the principal Act is amended by adding after the words "should not be made." the following words "In the case of the appointment of an auditor in respect of the first audit period of any company it shall be sufficient for the resolution to be made at the first annual general meeting of that company."

22. Inspection - The principal Act is amended by adding after section 126 the following new section -

"126A. Investigation - (1) An international company may provide in its memorandum to have its affairs and the affairs of its subsidiaries subject to investigation in accordance with the regulations prescribed pursuant to subsection (4).

(2) Any such provision by a company in its memorandum made pursuant to this section shall be irrevocable and incapable of alteration or repeal except as may be permitted by the Minister.

(3) No company other than an international company subject to this section may be the subject of any such investigation; save that any such investigation may extend to the subsidiaries of any such company subject to this section.

(4) Regulations may be made establishing a regime for the investigation of the affairs of any company (and its subsidiaries) at the request of certain persons and such regulations may allow for:

- (a) the appointment and empowering of inspectors by the Registrar to conduct such investigations;
- (b) the nature of the affairs of such companies to be investigated (including dealings by directors, shareholders and other persons);
- (c) the special obligations of record keeping by companies pursuant to this section;
- (d) the search and seizure of records, information and documents;
- (e) the production of documents evidence and information;
- (f) the publication and production of reports by inspectors;
- (g) the expenses of any such investigation;
- (h) the extent of cooperation with foreign regulatory authorities and other governments (including allowing the Registrar to enter into treaties or letters of understanding with such persons as he sees fit);
- (i) the production of information by certain persons;
- (j) such restraints as may be necessary to ensure civil liberties and the maintenance of confidentiality in the jurisdiction;
- (k) prescribing penalties for the breach of such regulations;
- (l) such other matters as may be considered necessary to give full effect to any investigation or to this section."

23. Payment of certain debts out of assets subject to floating charges in priority to claims under charge - Section 138 of the principal Act is amended by adding after the words "in the course of winding up" the words "and if the appointment or taking possession affects all or substantially all of the assets of the company (whether alone or in conjunction with any fixed charge held by those debenture holders)."

24. Circumstances in which company may be wound-up voluntarily - (1) Subsection (1) of section 169 of the principal Act is amended -

- (a) by adding after the words "An international company" the words "which is able to pay or provide for the payment of its debts in full or if not in full to the satisfaction of its creditors," and
 - (b) by omitting the words "if the holders of more than 50 per centum in number or par value of the issued shares, whether bearer shares or registered shares and whether held by the company itself or not, lodge with the Registrar in the prescribed manner notice of their request that the company be wound up voluntarily" and substituting the words "if the company has by special resolution resolved that it be wound up voluntarily and has lodged notice thereof with the Registrar."
- (2) Subsection (2) of section 169 of the principal Act is amended by omitting the words "the notice of the request of the holders of more than 50 per centum in number or par value of the issued shares of an international company" and substituting the words "the notice of the resolution for the winding-up of the company."

25. Declaration of solvency - Section 170 of the principal Act is amended -

- (a) by omitting from subsection (1) the words " or the notice under section 169 is lodged."
- (b) by repealing subsection (3) and substituting the following subsection:

"(3) A declaration in relation to an international company so made shall have no effect for the purposes of this Act unless it is -

 - (a) made within 5 weeks immediately preceeding the passing of the resolution for voluntary winding up; and
 - (b) lodged with the Registrar before the date on which the resolution for the winding up of the company is passed.

26. Foreign companies - Section 200 of the principal Act is amended by adding after paragraph (b) of subsection (3) the following new paragraph -

"(c) enters into transactions or dealings with one or more international companies or foreign companies of a nature which do not entail the physical establishment of a place of business in the Cook Islands".

27. Dividends payable from profits only - Section 217 of the principal Act is repealed and the following section substituted -

"217. Capital Maintenance - (1) Except insofar as this section otherwise provides any capital return effected by any international company shall be a valid act of that company and shall be binding and enforceable against it if at the time of effecting the capital return its directors have a reasonable belief that neither the effecting of that capital return nor (in the case of any capital return the performance of which is deferred) its performance will result in the company being incapable of meeting its existing obligations to its existing creditors as they fall due.

(2) Any capital return, if it has the effect of returning assets to some but not all of the shareholders of the company (or to some but not all of the holders of any class of shares in the company) shall except insofar as it is effected in accordance with the rights of the members as stated or provided for in the articles of the company, be deemed to be a variation of those rights to which the shareholders may object and the provisions of section 55 shall apply mutatis mutandis to such deemed variation. To facilitate the lodging of applications pursuant to section 55(1) the company shall serve a copy of the return notice on every shareholder and any application under section 55 shall be lodged within 28 days after the date on which that notice was served or such further time as the Registrar allows.

(3) Where any capital return is effected otherwise than in accordance with the provisions of subsection (1) that capital return shall be void against a liquidator and any creditor of the company.

(4) Where an international company effects a capital return there shall be lodged with the Registrar for filing within 42 days of its having effected the capital return a return notice and if this section is not complied with in relation to the lodging of the return notice the capital return insofar as it effects a return of the capital of the company to any shareholder shall be void against any creditor of the company where:

- (a) that creditor can demonstrate that it has searched the register of the company and acted to its detriment in reliance on the particulars of the paid up capital of the company; and
- (b) the register contains no other document which might reasonably be supposed to have given notice of the fact that the assets of the company had been returned to or committed for return to any shareholder;

and such capital shall be paid by that shareholder (and if more than one by each pro rata) to the Registrar to such extent as shall be required to settle the liability of the company to that creditor and the Registrar shall forthwith pay that creditor notwithstanding the liquidation or insolvency of that company.

(5) Any capital return effected by an international company unable to pay its debts as they become due from its own money, if the company is wound up on a petition presented or of a notice lodged under section 169 (1) within 3 months after its effecting the capital return shall be deemed fraudulent and void as against the liquidator of the company.

(6) Nothing in this section shall invalidate any transaction arrangement or dealing entered into and performed in accordance with the provisions of sections 40, 48, 49, 50 or 51 nor any redemption of redeemable shares where the provisions of section 44 have been complied with nor any arrangement whereby at the time of subscription or purchase of shares assets are set aside in order to defease a future capital liability.

(7) Nothing in this section shall invalidate any transaction arrangement or dealing entered into or performed by a company for the purposes or in connection with the purchase or subscription of its shares notwithstanding that the transaction arrangement or dealing has or may have the consequence directly or otherwise of returning to its shareholders (or to any of them) a portion of its assets.

(8) Nothing in this section shall restrict the payment of dividends to any shareholder of an international company out of profits (including capital profits).

(9) In this section, -

"Capital Return" means, -

- (a) any transaction dealing or arrangement which has or may have the consequence directly or otherwise of returning to the shareholders of an international company (or to any of them) a portion of its assets without effecting a reduction of its share capital in accordance with section 54.

- (b) any dividend paid by an international company otherwise than out of profits (including capital profits).
- (c) any sum of money, bonus issue, asset or property in specie of an international company paid distributed or allocated, otherwise than out of profits (including capital profits), to a shareholder in respect of that shareholder's shares;
- (d) any gift donation or wager made by an international company to or with its shareholders (or to or with any of them) and a capital return shall be deemed to be effected upon the passing of the directors' resolution to effect that capital return notwithstanding that performance thereof may be deferred.

"Assets" includes all the assets of a company except its profits (including capital profits);

"Existing creditor" means

- (a) any person in favour of whom at the time the capital return was effected a charge was registered against the international company under Part IV of the Act;
- (b) any person engaged in trade commercial to whom the international company in the ordinary course of its business owes any debt or similar obligation but does not include any person who may become a creditor after the effecting of the capital return.

"Return notice" means a statutory declaration made by a director of the company and stating with reasonable accuracy the amounts by which the issued capital of the company has been or may be reduced as a result of the capital return."

28. Use of word "corporation", etc - Section 218 of the principal Act is repealed and the following section substituted:

"218. Use of word "Corporation" etc - Any person who carries on business under any name or title of which any word or abbreviation prescribed by section 22 or by regulation is the final word unless it is an international company incorporated or foreign company registered under this Act (or a domestic company or an overseas company registered under the Companies Act 1970-71) shall be guilty of an offence against this Act".

29. Indemnity - The principal Act is amended by adding after section 226 the following new section -

"226A. Enforcement of Indemnity - Where an international company provides in its memorandum or articles that any director secretary or other officer or servant shall have a right of indemnity in respect of costs charges losses damages or expenses incurred that indemnity (if otherwise enforceable) may be sued upon by any person to whom that indemnity is expressed as extending notwithstanding that such person may not be a signatory to the memorandum or articles (as the case may be) and shall be as binding and enforceable as if contained in a deed executed by the company for the benefit of that person."

30. Application of other Acts to international companies - Section 249 of the principal Act is amended by repealing subsection (4) (as substituted by section 3 of the International Companies Amendment Act 1988) and substituting the following new subsection -

"(4) Except where onshore business is transacted by way of an isolated transaction that is completed within a period of 31 days, (not being one of a number of similar transactions repeated more than once) subsection (2) shall not apply to a foreign company which transacts onshore business (as defined in section 249A) in its transaction of that onshore business whether it be by way of isolated transaction or of a continuing nature."

31. Articles - Table A of Schedule 2 of the principal Act is amended -

(a) by omitting from Article 75 the words "A resolution" and substituting the following words -

"A resolution or special resolution may be in writing passed in accordance with the provisions of section 94(6) of the Act and any resolution".

(b) by omitting from Article 105 the words "shall" and substituting the word "may".

(c) by repealing Article 125 and substituting the following article -

"125. The Directors, Secretary and other officers or servants for the time being of the company, for the time being acting in relation to any of the affairs of the company and each of them, and each of their heirs, administrators and executors, shall be indemnified and secured harmless out of the assets and profits of the company from and against all actions, costs, charges, losses, damages and expenses, which they or any of

them, their or any of their heirs, administrators or executors shall or may incur or sustain by reason of any contract entered into or any act done, concurred in, or omitted in or about the execution of their duty or supposed duty in their respective offices or trusts, except such (if any) as they shall incur or sustain by or through their own wilful act, neglect or default respectively, and the amount for which such indemnity is provided shall immediately attach as a lien on the property of the company and have priority as against the members over all other claims. None of the foregoing shall be answerable for the acts, neglects, or defaults of the other or others of them, or for any bankers, brokers, or other persons into whose hands any money or assets of the company may come, or for any defects of title of the company to any property purchased, or for insufficiency or deficiency of or defect of title of the company to any security upon which any moneys of or belonging to the company shall be placed out or invested, or for any loss, misfortune or damage resulting from any such cause as aforesaid, or which may happen in the execution of their respective offices or trust, or in relation thereto, unless the same shall happen by or through their own wilful act, neglect or default respectively."

32. Share expressed in other currencies - The International Companies (Shares Expressed in other Currencies) Regulations 1982 are hereby revoked.

This Act is administered by the Cook Islands Monetary Board.