



ANALYSIS

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2003, No. 5

An Act to amend the International Companies Act 1981-82

(7 May 2003)

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 2003 and shall be read together with and deemed part of the International Companies Act 1981-82 ("the principal Act").

(2) This Act comes into force on a date to be determined by the Queen's Representative by Order in Executive Council.

2. Interpretation – (1) Section 2(1) of the principal Act is amended by -

(a) inserting immediately after the definition of "Audit period", the following new definition -

““Bearer” means the owner for the time being of any bearer instrument;”

(b) repealing the definition of "Bearer debenture" and inserting the following--

““Bearer debenture” means any debenture of an international company which is either payable to or enforceable by or both payable to or enforceable by any person who for the time being is the bearer thereof;”

- (c) inserting immediately before the definition of “Board”, the following new definition -

““Bearer instrument” means any bearer share, warrant to bearer or any other membership interest transferable by delivery, and any form of bearer security issued by an international company including bearer debentures, bearer bonds and share warrants to bearer;”

- (d) inserting immediately before the definition of “Creditor”, the following new definition -

““Custodian” means any person which is, from time to time, a licensed financial institution;”

- (e) inserting immediately before the definition of “Insolvent”, the following new definition -

““Holder” in relation to any bearer instrument means the bearer thereof for the time being;”

- (f) inserting immediately before the definition of “Foreign Company”, the following new definition -

““Licensed financial institution” has the same meaning given in section 2 of the Financial Supervisory Commission Act 2003;”

- (g) inserting immediately before the definition of “Trust” the following new definition -

““Supervisory authority” has the same meaning given in section 2 of the Financial Transactions Reporting Act 2003”.

3. Registration and incorporation – Section 14 of the principal Act is amended by -

- (a) inserting in subsection (10), after paragraph (a)(iv), the following new paragraph -

“(v) includes, unless that person requests that a debenture should not be issued, the trustee company that person nominates to be the Custodian for the purposes of section 15; and”

- (b) repealing subsection (19) and substituting the following -

“(19) After incorporation any person who agrees to become a member of an international company and whose name is entered into the Register of Members or who becomes the bearer of a share certificate issued to bearer shall be a member of the company.”

4. Issue of bearer debentures – Section 15 of the principal Act is amended by -
(a) repealing subsections (1), (2) and (3), and substituting the following –

“(1) Unless a person desiring the incorporation of an international company by a trustee company under section 14(10) delivers to the trustee company together with the unsigned memorandum, a written request that a debenture should not be issued, the international company shall, as soon as is convenient after incorporation –

(a) prepare a form of bearer debenture which shall incorporate the provisions set forth in Table B; and

(b) shall cause the same to be signed by the resident director, which form of bearer debenture shall be expressed to secure to the bearer a sum equal to the fees paid to the trustee company under section 14(10)(b)(ii), expressed in dollars.

(2) A bearer debenture issued by an international company shall not take effect as a debenture, nor shall it give rise to rights against the company, until there is annexed to the debenture an acknowledgement signed by the Custodian nominated under section 14(10)(a)(v) that it holds that debenture in custody for the person who nominated that Custodian or for such other person as he directs.

(3) When the requirements in subsection (2) have been satisfied, the bearer debenture shall be entered in the records of the company and thereupon the company shall be deemed to have resolved to issue the bearer debenture and the same shall thereupon be a specialty debt due from the company to the bearer situate in the place where the bearer is.”

- (b) repealing subsection (6) and substituting the following -

“(6) Subject to subsection (10) in the event of a form of bearer debenture of the kind referred to in subsection (1) not having been issued by the expiration of 3 months from the date of incorporation of the international company, the share issued to the trustee company under section 14 and any income, rights and accruals thereto shall, from that time on –

(a) be held by that trustee company upon trust for the person or persons, if any, nominated under section 14(10); or,

(b) if there is no such nomination, for the person who made the request referred to in section 14(10),

and the trustee company shall be entitled to be indemnified out of the assets of the international company for its reasonable costs and expenses in administering the trusts upon which that share is held and in making payment of such fees and charges payable by the international company as it sees fit to make on behalf of the international company.”

- (c) inserting at the beginning of subsection (8), the words “Subject to subsection (10)”;

(d) inserting after subsection (9), the following new subsections -

“(10) Notwithstanding the provisions of subsections (6) and (8) no trustee company shall hold any share on trust for either the person or persons nominated under section 14(10), or for any person or persons who made the request referred to in section 14(10) until that trustee company has received satisfactory evidence as to the identity of that person or those persons.

(11) The evidence of identity a trustee company is required to obtain pursuant to subsection (10) shall be prescribed by regulation.”

5. New section 35A – The principal Act is amended by inserting after section 35, the following new section –

“35A. Transfer and custody of bearer instruments – (1) Notwithstanding any other provision in this Act -

(a) an international company shall not deliver bearer instruments to any person other than a Custodian and no Custodian shall hold any bearer instrument unless the Custodian has first received satisfactory evidence as to the identity of the bearer of the bearer instrument;

(b) a Custodian shall not deliver a bearer instrument to any person other than another Custodian or to the international company which issued the bearer instrument for the purpose of surrendering that instrument;

(c) subject to the provisions of this section, a Custodian shall hold any bearer instrument for and subject to the directions of the bearer thereof.

(2) Where the bearer of a bearer instrument requests that –

(a) a bearer instrument be redeemed or converted to any other type of bearer instrument; or

(b) a bearer instrument be converted to a registered share; or

(c) a bearer instrument be converted to an ordinary debenture; or

(d) the ownership or beneficial ownership of the bearer instrument be transferred,

any such request shall be given to the Custodian holding the said instrument who shall take such steps as may be required of the Custodian to meet the request upon receipt of satisfactory evidence as to the identity of every person who as a result of the request, will –

(e) be paid the redemption proceeds by the international company; or

(f) become a registered shareholder or ordinary debenture holder; or

(g) become the bearer or otherwise a holder of an interest in the bearer instrument or another bearer instrument where the original bearer instrument is converted.

(3) Where a bearer instrument is delivered to a Custodian that is not the trustee company providing the registered office for the international company that issued the bearer instrument, then that Custodian shall provide written notice to the international company at its registered office identifying the bearer instrument in respect of which it is acting as a Custodian.

(4) The evidence of identity a Custodian is required to obtain from the bearer of any bearer instrument, and manner and form of records, shall be prescribed by regulation.”

6. Issue and effect of share warrants to bearer – Section 36 of the principal Act is amended by –

(a) repealing subsection (1) and substituting the following -

“(1) An international company may, unless its articles otherwise provide, upon the request of a holder of any fully paid up registered share, or the Custodian of a bearer share acting on the instructions of the bearer thereof, exchange a share certificate in respect of that registered or bearer share for a share warrant to bearer. Upon the surrender of the certificate of the registered or bearer share, the international company shall issue a share warrant bearing the same number (if any) as the certificate so surrendered.”;

(b) inserting at the end of subsection (7) the words “in accordance with the provisions of section 35A.”

7. Power to issue debentures – Section 57 of the principal Act is amended by -

(a) repealing paragraph (d) of subsection (4) and substituting the following -

“(d) a statement of the name of the debenture holder except or where the debenture is a bearer debenture, the name of the Custodian of that bearer debenture;”

(b) inserting in subsection (6) after the words “Subject to the provisions of section 58(17),” the words “and section 35A,”.

8. Instrument of transfer – Section 66 of the principal Act is amended by -

(a) deleting in subsection (3), the words “sections 35 and 36” and substituting the words “sections 35, 35A and 36”;

(b) repealing subsection (4) and substituting the following -

“(4) Bearer debentures shall be transferable in accordance with the provisions in section 35A and any provision in any trust deed or terms of issue relating thereto.”

9. Official Register – Section 67 of the Principal Act is amended by deleting from subsection (6), the words “or bearer”.

10. Schedule 2 - Table A – Schedule 2 of the Principal Act is amended by –

(a) deleting Article 9 and substituting the following -

“9. Coupons shall be issued payable to bearer, of such number as the directors shall think fit, providing for the payment of the dividends upon and in respect of the shares or stock provided for share warrants, and the directors shall provide, as they from time to time think fit, for the issue of fresh coupons to the bearers for the time being of share warrants when the coupons attached thereto shall be exhausted.”;

(b) deleting Articles 16, 17, 18, 19 and 20 and substituting the following -

“16. No person shall as bearer of a share warrant be entitled to attend or vote, or exercise in respect thereof any of the rights of a member, at any general meeting of the company, or sign any requisition for or aid in calling any general meeting, unless 7 days at least before the day appointed for the meeting, in the first case, and unless before the requisition is left at the office, in the second case, the Custodian of the share warrant shall have confirmed to the company in writing that that person is the bearer thereof entitled to the rights contained therein. The names of more than one as joint holders of a share warrant shall not be received.

17. There shall be delivered to the person confirmed by the Custodian to be the bearer a certificate stating the bearer’s name and address and the number of shares or the amount of stock represented by the bearer’s share warrant and a voting card specifying the number of votes which the warrant entitles him to cast at a specified general meeting. The production of such a voting card at that specified general meeting shall entitle the bearer thereof to attend and vote at that general meeting in the same way as if he were a registered member of the company in respect of the shares or stocks specified in the said certificate. The certificate may be as follows -

..... International Company

No.

This is to certify that of is entitled to attend the general meeting of the company to be held at on the day of 20....

DATED this day of20....

.....

Secretary

18. In respect of general meetings no person as bearer of any warrant shall be entitled to exercise any of the rights of a member, save as hereinbefore expressly provided.

19. If the bearer of a share warrant wishes to have it surrendered he shall notify the company and the Custodian thereof. When the Custodian lodges the share warrant together with the name and address of the bearer thereof the bearer shall be entitled to have his name entered as a member in the register of members of the company in respect of the shares specified in the share warrant so surrendered.

20. Every share warrant shall be transferable in accordance with these articles and the provisions of the Act.”

11. Transitional – (1) Where at any time later than 12 months after the commencement date of this Act, a bearer instrument is not delivered to a Custodian then all rights held by the bearer thereof pursuant to that instrument and the shares, warrants or debenture referred to in the bearer instrument shall be suspended until such time as the bearer instrument is delivered to a Custodian and notice of the same has been received by the international company at its registered office in the Cook Islands.

(2) Nothing in subsection (1) shall affect the obligations or liabilities of the bearer to the international company or the rights of third parties against the bearer thereof or the international company or of the international company against the bearer thereof or any third parties pursuant to or arising from that instrument and the shares, warrants or debenture referred to in the bearer instrument.

(3) During any period in which the rights pertaining to a bearer instrument are suspended in accordance with the provisions of this subsection (1) then for all purposes including but without limitation –

- (a) the declaration of dividends,
- (b) the redemption of shares,
- (c) the passing of resolutions including resolutions of a class of members,
- (d) distributions on a liquidation or otherwise,

the directors, liquidator, officers and members of the international company shall, subject to subsection (4), proceed on the basis that the bearer instrument and any shares, warrants or debentures referred to in the bearer instrument are not on issue and in the event that at a later time the rights attaching to the bearer instrument are no longer suspended the validity of any resolution or other action of the international company during the period of suspension shall not be affected and no adjustments or compensation shall be made or paid in respect of any sum or benefit that would otherwise have accrued in respect of the bearer instrument during the period of suspension.

(4) During any period in which the rights pertaining to a bearer instrument are suspended in accordance with the provisions of this section the Court may, on the application of a trustee company, Registrar, any director, liquidator or member of the international company, order on such terms as it sees fit that a Custodian be appointed to exercise such rights as the Court may specify as would be exercisable if the Custodian owned that bearer instrument and the Court may further order that the Custodian shall hold any property to which the holder of that bearer instrument is entitled on such trusts as the Court may direct provided that no property held pursuant to any such trust shall be distributable until such time as the bearer instrument has been surrendered to a Custodian and that Custodian has satisfactory evidence of the identity of the owner of the bearer instrument.

(5) Any party making an application under subsection (4) of this section shall be entitled to be indemnified out of the assets of the international company for its reasonable costs and expenses in connection with proceeding in accordance with this section or in accordance with any Court order made pursuant to this section.

(6) In respect to any share a trustee company is at the date of commencement of this Act a trustee of pursuant to subsection (6) or (8) of section 15 of the principal Act, if that trustee company has not received within 12 months of the date of commencement of this Act for the person or persons nominated under section 14(10), or for any person or persons who made the request referred to in section 14(10) of the principal Act the same evidence as the trustee company is required to obtain on becoming trustee under that section, the trusteeship shall end and the trustee shall, until such evidence is obtained, hold such share or shares as if the three month period referred to in subsection (6) and (8) of section 15 of the principal Act had not elapsed.

(7) Any Custodian, trustee company, international company, any officer, director, agent or employee thereof, that does any act or is responsible for any omission which contravenes any provision in this section shall be guilty of an offence and liable to a fine not exceeding USD5,000.

(8) Any person who pursuant to this section gives to an international company or to a Custodian, or to any officer, director, agent or employee thereof, any information which is in a material respect misleading or untrue shall be guilty of an offence and liable to a fine not exceeding USD50,000.

12. Application - (1) Except where expressly provided to the contrary in this Act the provisions of this Act shall apply to every international company, whether incorporated or registered before or after the commencement of this Act, and to all matters relating to or concerning every such international trust, or the interested parties to every such international trust.

(2) Nothing in this Act shall apply to or affect any proceedings commenced in the Court before the coming into force of this Act.

This Act is administered by the Office of the Commissioner of Offshore Financial Services