

Anguilla Business Companies (ABC) Act 2020

OBJECTS AND REASONS

This Bill for the Anguilla Business Companies (ABC) Act 2020 is the new companies legislation that will repeal and replace the International Business Companies (IBC) Act R.S.A. c. I20 and the Companies (COAC) Act R.S.A. c. C65. It uses the Business Companies Act 2004 of the British Virgin Islands (BVI) as a model, while adopting various provisions, vehicles and best practices from various jurisdictions. Unlike the current regime, this single statute will, from the time it enters into force, allow for the incorporation of companies that can conduct business globally, and/or domestically in Anguilla.

Transitional Provisions: The transitional period created under this Act facilitates the transition from the old to the new law. This includes the time during which both the COAC Act and the ABC Act will be in force; allows for existing companies to convert to a specific company type; and for the removal of restricted words

Increased range of corporate vehicles: After the transitional period, the ABC Act will be the primary corporate statute for the conduct of business. The ABC Act is intended to be the core legal structure for regulating the incorporation and operation of several types of companies. These include companies limited by shares; companies limited by guarantee not authorised to issue shares; companies limited by guarantee authorised to issue shares; unlimited companies authorised to issue shares; unlimited companies not authorised to issue shares; restricted purposes companies; and segregated portfolio companies (“SPCs”); private (limited) companies (“PvT”) which allows for a structure to be incorporated that is better suited to closely held operations, such as family business; and private trust companies (“PTCs”) which conduct only trust business that is “connected trust business”. Companies can also be incorporated as restricted purposes companies, which are typically companies limited by shares but with clearly restricted objects or purposes (captured in the Articles of Incorporation), where the certificate of incorporation will also set out that a company is restricted purposes company. This is of great utility as restricted purpose companies are primarily used in the structuring of finance and the securitisation of transactions. Business companies that carry on certain types of activities, such as insurance or variable capital companies (“VCCs”) fall under different laws.

Company naming conventions: Different types of companies can have different name endings. Examples include - unlimited companies must have "Unlimited" or "Unltd"; restricted purposes companies must have "(SPV) Limited" or "(SPV) Ltd" in the name; segregated portfolio companies

must have either "Segregated Portfolio Company", or its abbreviation "SPC", in the name; private trust company must have "Private Trust Company" in the name, or "PTC"; private (limited) companies must have "Private Limited" or "PvT Ltd." or "PvT Limited"; and limited companies (including companies limited by guarantee) continue to enjoy the endings permitted under prior legislation, such as Limited, Corporation, Societe Anonyme, and their respective abbreviations such as Ltd, Corp, S.A. Other innovative features of the ABC Act include the use of foreign characters in the name. The foreign characters would not be restricted to any one language, and must be supported by a notarised translation at the point of name reservation (to ensure that the spirit of the legislation regarding undesirable names is adhered to). There is also provision for the company number as a name.

Exempted companies: Proposed companies applying for registration under the ABC Act whose objects are to be carried out mainly outside the jurisdiction or according to a licence to carry on prohibited enterprise business in the jurisdiction may apply to be registered as an exempted company. A declaration signed by a subscriber to the effect that the operation of the proposed exempted company will be conducted mainly outside the jurisdiction or according to a licence to carry on prohibited enterprise business in the jurisdiction. The shares of an exempted company are non-negotiable and can be transferred only on the books of the company. They are subjected to minimal annual reporting requirements. Exempted Companies limited by shares are the most common form of entity used in establishing open ended investment funds, with an investor's liability being limited to the amount paid or agreed to be paid in respect of their shares. This type of business would allow for an Anguillan Business Company to be listed on the leading stock exchanges, and specifically Hong Kong and New York Stock Exchanges, because of the flexibility of the ABC Act which allows listing rules on those stock exchanges and ongoing requirements to be met.

Conduct of business and removal of certain restrictions: The IBC Act did not permit IBCs to carry on business with persons in Anguilla. Under the ABC Act, there is no similar provision. A company incorporated under the ABC Act will be able to concurrently operate internationally and domestically. All limitations prescribed in the law or other regulatory requirements, must be set up in the company's articles of incorporation.

Incorporation process: To incorporate a company under the ABC Act, the registered agent will file the articles of incorporation. For segregated portfolio companies, the written approval from the Financial Services Commission (FSC) must also be filed. In the case of private trust companies, a notification of intent to incorporate must be filed with the FSC, and the incorporated PTC be registered with the FSC within 7 calendar days. Only the registered agent can file an application for incorporation; the Registrar will not accept such a request from any other person. If the Registrar is satisfied that all the requirements of the ABC Act have been met, the documents will be registered, a unique number allotted to the company, and issued with a certificate of incorporation.

Corporate Capacity and ultra vires: The issue of Corporate capacity and ultra vires can be dealt with differently under the ABC Act. In cases where a company will not be established for a specific purpose (such as a PTC or other restricted purpose company), the objects of the company would not be explicitly required. Further, and similar to cases borne out in case law within other jurisdictions, no act of a company or a transfer of property is invalid solely on the basis that the company did not have the capacity, right or power to perform the act, to transfer or to receive the asset (subject to other legal provisions of the ABC Act as well as the company's own Memorandum and Articles of Association).

Members, their rights and liabilities: The ABC Act provides for three types of members - shareholders, guarantee members, and members of an unlimited company who are not shareholders. A member is a person whose name is entered as such on the register of members. In general, members will have the rights conferred on them in the Articles and by-laws. A feature of the ABC Act is that it specifies the rights that a shareholder has, namely, the right to one vote, the right to an equal share of any dividend, and the right to an equal share in the distribution of surplus assets. These rights can of course be negated, modified or added to if expressly authorised by the Memorandum. Provision is also made for the liability of members for the debts and obligations of the company. In the case of limited liability companies, i.e. companies limited by shares and companies limited by guarantee whether or not authorised to issue shares, members are not liable for the debts and obligations of the company. The shareholders of a limited liability company are only liable for the amount unpaid on their shares and as may be specified in the articles. Members of a company limited by guarantee are only liable to contribute to the assets of the company on liquidation in the amount stated in the articles/by laws, and for any other amount provided in the Articles. Unlimited members have unlimited liability for the debts and obligations of the company.

Class rights and pre-emptive rights: The ABC Act allows for the creation of classes of shares, but the rights, privileges, restrictions and conditions attaching to each class must be specified in the Memorandum, which ensure that they are set out in one document that is publicly available. In contrast, the IBC Act allows directors to specify these matters if specifically authorised, i.e. they are not required to be stated in the Memorandum and could be set out in a resolution of directors.

Directors: A company must have at least one director, for which and at the time of incorporation, must include the appointment of the first director. The company must keep a register of directors. The ABC Act sets out the obligations, which include: (i) Powers to be exercised for proper purpose; (ii) Standard of care; (iii) Reliance on records and reports; (iv) Disclosure of interest; and (v) Avoidance by company of transactions in which a director is interested. These obligations encompass the requirement for directors to exercise a duty of care in carrying out their role. Where directors are acting in relation to a regulated company, they are subject to additional statutory requirements and are placed under greater scrutiny to ensure that they are carrying out their duties with due care. As such, a director's equitable duties of acting honestly, in good faith and in what he believes to be in the best interests of the company are given a statutory footing, as is his common law duty of care and skill. The ABC Act also allows a director of a subsidiary to act in the best interests of its holding company even though it may not be in the best interests of the company, provided he is expressly permitted to do so by the Memorandum or Articles, and has the prior

agreement of all shareholders where the company is not a wholly owned subsidiary. He is also under a statutory duty to exercise his powers as a director for a proper purpose and he must not act in a manner that contravenes the Act or the Memorandum or Articles.

The ABC Act also requires a director to disclose to the board his interest in any transaction to be entered into by the company, and failure to do so renders the transaction voidable by the company unless the material facts of the director's interest in the transaction are known by the members and the transaction is approved by them, or if the company received fair value for the transaction. Nevertheless, the director may vote on the transaction or attend a meeting relating to it and be counted for the purposes of a quorum.

Appointment and Removal of Directors: The registered agent must appoint the first director(s) within six months after incorporation. Subsequent directors can be appointed by resolution of members (unless the articles and by-laws provide otherwise), or by the directors if permitted by the articles or by-laws, for such term as may be specified. The directors may also fill a vacancy on the board unless the articles or by-laws provide otherwise. However, unlike the IBC Act a person cannot be appointed a director unless he has consented in writing to be a director. A director may resign by giving written notice of his resignation. Further, a director may be removed by a resolution of members that may only be passed either at a meeting of members whose purpose includes the removal of the director, or by a written resolution passed by at least 75% of the members entitled to vote. A director may also be removed by the directors where expressly permitted by the articles or by-laws.

Other legislative provisions -

Shares: Companies that are authorised to issue shares, i.e. companies limited by shares, companies limited by guarantee authorised to issue shares, and unlimited companies authorised to issue shares, are not required to state in their memorandum an authorised share capital, or the par value of shares with par value or the aggregate of such shares, or the amount to be represented by shares without par value, or the currency of shares that the company is authorised to issue. Instead, the memorandum of such companies must state the maximum number of shares they are authorised to issue. One consequence of not having an authorised share capital is that the new Act does not contain any specific provisions relating to capital. Instead, these matters are now part of the provisions relating to the alteration of the memorandum and the purchase by the company of its own shares.

Acquisition of a company's own shares: The provisions relating to the acquisition of its own shares is a key and necessary flexibility of the proposed ABC Act. This would allow a company to purchase, redeem or otherwise acquire its own shares in accordance with two distinct regimes. Provisions for such powers can also be set out in the company's own Memorandum or Articles. The ability to allow in the Memorandum for a company to acquire its own shares, to the exclusion of the law, would also be of material benefit to companies, particularly mutual funds. The acquisition of the company's own shares, whether under the law or in accordance with its own Memorandum or Articles, will be treated as a distribution to members which places an important

restriction on the company - the directors must be satisfied on reasonable grounds that the company will satisfy the solvency test for distributions immediately after the acquisition.

Distribution and Dividends: The lack of flexibility under the current IBC Act presented challenges in this area. Under the ABC Act, there are two changes. First, the concept of surplus is no longer retained. Instead, distributions of the company's money or assets can only be made if the directors are satisfied on reasonable grounds that the company will, immediately after the distribution, satisfy the solvency test, i.e. that the value of its assets exceeds its liabilities and it is able to pay its debts as they fall due. Second, the provisions are not confined to dividends but relate to any "distribution" to a member. The definition of distribution is wide, encompassing the direct or indirect transfer of an asset to or for the benefit of a member, and includes the purchase of an asset, the redemption or other acquisition of shares, and dividends.