



Bermuda Corporate Update
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BERMUDA SEGREGATED ACCOUNT OR “CELL” COMPANIES

The Segregated Accounts Companies Act 2000

Companies established in Bermuda with segregated account facilities have been a feature of Bermuda international business for many years. Prior to the passing of The Segregated Accounts Companies Act 2000 (“the Public Act”), companies wishing to take advantage of segregated account facilities had to be incorporated by Private Act. Since November 1st, 2000 any company (whether conducting insurance business or non-insurance business) may apply to the Minister of Finance for this facility by registering under the Public Act.

Private Act vs. Public Act

Prior to the Public Act, a Private Act was the only method available in Bermuda to legally establish segregated accounts within a company. Today, the Public Act provides for the registration of segregated accounts companies and the rules governing the operation of segregated accounts by companies registered under the Public Act.

A company which operates segregated accounts under the authority of a Private Act is not required (i.e. not mandatory) to register under the Public Act. However, such a company is required to give Notice to the Registrar of Companies on or

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before 31 April 2001. This Notice of the company's right to operate segregated accounts must have attached a copy of the Private Act conferring the right and a copy of the company's most recent audited financial statements.

A company which operates segregated accounts under the authority of a Private Act may register under section 8 of the Public Act. Where such a company has registered, the Registrar of Companies may impose such conditions on the registration of the company as he considers necessary to ensure compliance with the Public Act, the sufficiency of the vetting procedures for the beneficial owners of segregated accounts and the reputation of Bermuda.

It must be noted that contracts to which the company was a party on the date of registration, will continue to be construed in accordance with the relevant Private Act, but contracts renewed or entered into after the date of registration will be construed in accordance with the Public Act.

Further, if inconsistencies arise between the provisions of the Public Act and those of the relevant Private Act, the provisions of the Public Act will prevail.

Segregated Accounts or "Cells"

The segregated account or "cell" established on behalf of each participant is protected under Bermuda law against claims asserted against the company and participants in other cells. This means that a participant in the company will only be responsible to pay for claims arising from its own losses, not those of other participants. However, if the cell is owned by more than one participant, then the participants will share pro rata in each other participant's losses or on some other agreed upon basis. If the segregated accounts company is properly structured and registered, in no circumstances will a general creditor of the company be able to attach any participant's account.

Rent-a-Captives

A Bermuda licensed insurance company may be established to offer "Rent-a-Captive" services. This can be achieved by

Reasons For Incorporating In Bermuda

- § Respected International Business jurisdiction (built on the principle of “know your customer”);
- § Tax Neutral Business Environment (no income, capital gains, transfer or withholding taxes);
- § Business sensitive and well established Legal System (based upon English common law);
- § Minimal Government Annual Reporting except for Restricted Businesses;
- § Access to Capital Markets (through Bermuda Stock Exchange listings);
- § Access to one of the most successful Insurance/Reinsurance Markets in the world;
- § Reliable Banking System;
- § Efficient Support Services (legal, accounting, management, corporate and trust services);
- § State-of-the-Art Global Internet Services and Telecommunications (connecting Bermuda to the world); and
- § Friendly yet efficient business environment for holding Company Meetings.

Private Act or registering the insurer under the Public Act.

In either case, whether established under a Private Act or registered under the Public Act, an insurer may legally establish segregated accounts for contracts of insurance which will, amongst other things, protect the premium and related income from claims of general creditors of the company or other insureds. Absent such powers, the premiums received by the company are generally commingled and would be available to meet all claims against the company without matching a claim to a particular premium payment or contract of insurance. The separate account feature will offer the insureds the security that the premium and subsequent investment income attributable to their program will not be utilized to meet claims arising on other programs. In the context of Rent-a-Captive companies this special feature is important because it will provide the company and the insureds with a structure that would help meet each Insured’s specific needs and at the same time provide the desired protection.

Other Companies

The formation of other types of companies (i.e. non-insurance) with segregated accounts is permitted under the Public Act with the consent of the Minister of Finance. The additional feature of this approach is that it provides not only for the issuance of securities (e.g. preferred shares) in order to confer rights with respect to a Separate Account for purposes such as returning profits from that account but enables it to be done also through contractual agreements such as Participation, Accountholder and Contingent Agency Commission Agreements.

In recent years, eCommerce companies have been established in Bermuda under the Public Act to offer the facility of segregated accounts to users.

Transfer of interest in Segregated Cell

Under the terms of the Accountholder Agreement, an accountholder is prohibited from selling, transferring or otherwise encumbering its interest in the account.

Termination of interest in Segregated Cell

Termination of the account may only occur at a time when all liabilities under the contract have been satisfied, run-off or commuted. The Accountholder Agreement identifies this time as the "Repurchase Date" i.e. the date upon which the company will make final distribution to the accountholder of the original amount contributed as the Certificate purchase price and any underwriting profit.

Losses

If a participant's liability for losses exceeds the premiums or amounts received (net of expenses), it is possible that the participant would lose its initial contribution, i.e. pay more than the standard premium for the policy, as well as the contingent funds provided. The company makes no representation that an account will be profitable, nor does it guarantee the participant's initial contribution or any returns thereon.

Segregated Account Representative

A segregated account company shall appoint and maintain a Segregated Account Representative in Bermuda. Such representative shall be included in the register of directors and officers of the company maintained under the Companies Act, 1981.

It is the duty of the Segregated Account Representative to make a written report to the Registrar setting out any particulars related to the insolvency, failure or involvement of the company in complying with the Public Act or any other non-compliance under Bermuda law.

For further information on the procedures for registering under the Public Act – please contact lmw@milligan.bm.

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ENFORCEMENT OF FOREIGN JUDGMENTS IN BERMUDA

In general, Bermuda law provides two methods of enforcing a judgment obtained outside of Bermuda (a “foreign judgment”). The choice of method employed will depend upon the Court and Jurisdiction where the foreign judgment was obtained. This article deals with enforcement of judgments obtained in countries which are not included in Bermuda’s Judgments (Reciprocal Enforcement) Act, 1958.

Common Law Position

The position at common law is that a person wishing to enforce a foreign judgment in Bermuda cannot do so by direct execution of that judgment; he must bring an action on the foreign judgment, as if it were a debt. That is not to say that there must be a trial in Bermuda which repeats the proceedings which have already taken place elsewhere. The judgment creditor in Bermuda can seek final judgment in Bermuda by way of Bermuda’s summary judgment procedure. The plaintiff (as the foreign judgment creditor is in Bermuda) simply sues on the foreign judgment in the usual way and then seeks judgment in Bermuda by the summary procedure, alleging that there is no real defence to the action being brought in Bermuda. The foreign judgment is very strong evidence that the debt is truly owed by the defendant to the plaintiff.

A final judgment against a person (including a company, partnership, association or other like body) given by a court of a foreign country with jurisdiction to give it will usually be enforced in Bermuda as a debt (so long as the foreign judgment sum is not a sum payable in respect of taxes or in respect of a fine or other penalty).

The only grounds for resisting the enforcement of such a judgment at common law are generally said to be (i) lack of jurisdiction in the foreign court; (ii) that the judgment was obtained by fraud; (iii) that enforcement of the foreign judgment would be contrary to public policy; and (iv) that the proceedings in which the judgment was obtained were contrary to natural justice, as those principals are understood

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RICHMOND GROUP LIMITED AND ITS AFFILIATES

Richmond Corporate Services Ltd. - provides corporate administration and compliance services to Bermuda companies, partnerships and trusts.

Richmond Financial Managers Ltd. - provides a wide range of management services to its clients. It can also assist in advising insurance professionals on the Bermuda regulatory environment, particularly the capital requirements, solvency margins and liquidity ratios.

Richmond Investments (Bda) Limited - provides investment advisory services to clients of the Richmond Group of Companies who are institutional and high net worth clients.

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Unless the foreign judgment can be impeached on one of these four grounds, the Supreme Court of Bermuda when asked to enforce a foreign judgment will likely do so. The Supreme Court of Bermuda will not conduct a re-hearing of that foreign judgment or look behind it in any way. It has been said authoritatively that a foreign judgment which is final and conclusive on the merits and not impeachable under any of the four heads set out above is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either of fact or law.

It should also be noted that the Supreme Court of Bermuda is frequently asked to enforce foreign judgments, and it is a rare occasion, and on good and substantial grounds, that the Supreme Court of Bermuda refuses to do so.

Against this background one must consider the nature of the foreign judgment sought to be enforced in Bermuda. By way of example, that portion of any judgment under the Racketeer Influenced and Corrupt Organizations law (RICO) of the United States which provides for damages beyond the purely compensatory will not be enforceable in Bermuda to the extent that the judgment exceeds the actual loss. The securities laws in various jurisdictions must also be looked at carefully, as they may impose strict liability on directors or companies which offend our notions of natural justice. Similarly, procedural law must be investigated. If the procedural law under which judgment was given effectively prevented the defendant from defending then that will almost certainly offend our principals of natural justice.

By way of example, where a plaintiff obtained a foreign judgment in default because the defendant was unable (as opposed to unwilling) to post pre-answer security for costs in the foreign court, the Supreme Court of Bermuda refused to enforce that foreign judgment, notwithstanding that it was final and conclusive, on the basis that the defendant was shut out of defending by reason of not having sufficient assets, even though it was accepted that the Defence filed had merit.

While Bermuda generally stands willing to assist a party in enforcing a foreign judgement, depending upon the underlying cause it may not be safe to assume that Bermuda will assist in enforcement without question.

Note:

Judgments obtained in the Supreme Court (or on appeal therefrom) in England, Scotland, Northern Ireland, the Bahamas, Barbados, British Guyana,, Gibraltar, Granada, Hong Kong, Leeward Islands, St. Vincent, Jamaica, Nigeria, Dominica, St. Lucia, and most of the States and territories of Australia maybe enforced by registration pursuant to the Judgments (Reciprocal Enforcement) Act,1958.

The information contained in this article represents general principles and is not intended to be exhaustive. Legal advice should be obtained in respect of any particular foreign judgment sought to be enforced in Bermuda.

For further information on the enforcement of foreign judgments in Bermuda please contact Paul A. Harshaw, Senior Associate at paharshaw@milligan.bm.

BERMUDA LIMITED PARTNERSHIPS

A Bermuda-based exempted partnership may be registered as a limited partnership under The Limited Partnerships Act. Limited partnerships serve a very useful purpose when limitation upon personal liability is desirable since a limited partner is not liable for the debts of the partnership beyond the amounts contributed by him to the capital.

The limited partnership form of business association can be utilized for a broad range of commercial purposes. Recently in this jurisdiction, limited partnerships have been formed in Bermuda for joint ventures in the securities field involving investment syndicates that accumulate pools of capital from multiple jurisdictions to facilitate acquisitions of securities in the major financial markets. For these and other types of businesses, especially the high-risk or speculative operations like oil exploration, research and development or venture capital schemes, Bermuda-based limited partnerships offer significant advantages.

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A major factor to be considered is that a Bermuda limited partnership unit can now be listed and traded on the Bermuda Stock Exchange or an approved Stock Exchange, upon meeting the requirements of the particular Exchange chosen for listing, which can be any one of the appointed Stock Exchanges approved by the Minister of Finance in Bermuda.

A Bermuda limited partnership does permit the limited partners to contribute both cash and other assets to the partnership and make distributions to the limited partners without triggering the disillusionment of the partnership provided the solvency of the partnership has not been impaired.

The general partner is the only partner that can take part in the management of the business. If more than one general partner, they are jointly and severally responsible for the partnership's liabilities and to account to the other partners and there is no restriction in Bermuda on forming a company to act as a general partner.

A limited partner may advise on matters related to the partnership but such advisory functions should be carefully considered so that the limited partner acting as an advisor will not become liable as a general partner if, in addition to such advice, he/ she takes part in the management of the business.

A limited partnership may be formed by non-residents consisting of one or more general partners and one or more limited partners. Only the general partner needs to be approved by the Bermuda Monetary Authority. If the general partner is a corporation, the Bermuda Monetary Authority will require a Personal Declaration from each of the shareholders of the said corporation or an Annual Report (if such corporation is widely held or listed).

Under Bermuda law, in order for a limited partnership to commence business, it must enter into an agreement in writing between the partners and file the said agreement with the Registrar of Companies in Bermuda in order to obtain certificates under the Exempted Partnership Act and the Limited Partnership Act.

Recent amendments to the Limited Partnership Act of Bermuda require a local *Register of Limited Partners* to be maintained in Bermuda at the registered office of the

partnership and also permits *Branch Registers* to be kept outside Bermuda. Limited partners can now assign their share in the partnership and provision is made to ensure the protection of creditors by clearly establishing partners' liability.

For more information on Limited Partnerships please contact Kevin G. Bean, Senior Associate at kbean@milligan.bm.

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