STEP & AIBT SEMINAR
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Summary of Remarks
by
Sean McWeeney,
Partner, Graham Thompson & Co.

ON
THE INTERNATIONAL BUSINESS COMPANIES ACT 2000

INTRODUCTION

- Original IBC Act, 1989
- Modelled on the BVI Legislation which in turn drew heavily on the "Delaware corporation" model
- Main features of IBC : user-friendly – transactional flexibility; highly adaptable to an almost infinite variety of commercial and investment applications ; especially popular as underlying asset-holding and asset investment vehicles in trust structures, mutual funds, and personal or family estate-planning structures;
- Main advantages to IBCs : easy to form; quick to form (aided by computerized advances in the Registry permitting a 24 hour turnaround); cheap to form and maintain (fees exceptionally low); anonymity was maximized; filing requirements were minimal; "one-shareholder/one director companies possible; exchange control exempt; and stamp duty exempt as well.

- **Highly successful for The Bahamas, producing as many as 100,000 companies.**

- **Recent reforms driven by external forces – OECD, FATF, et al.**

- **New Act brought into force on December 29th, 2000.**

PART 1 : TRANSITIONAL ISSUES AFFECTING COMPANIES INCORPORATED UNDER THE OLD IBC ACT

Q. What is the status of pre-existing IBCs pending compliance with the requirements of the new Act ?

1. **Section 194 of the new IBC Act (which commenced Dec. 29th, 2000) has repealed the IBC Act, 1989 ("the Old Act") except for Part X which relates to Government fees and is Intended to remain in place until 2002.**

2. **Section 195 (1) says that all companies formed under the old Act *"shall continue in existence and shall satisfy the requirements of this (the new) Act within one hundred and eighty days from the commencement of this Act and shall thereafter be continued as an International Business Company registered under this Act."***

3. **The next sub-section (S.195(2)) says that any company that does not so comply "shall" be struck off "the Register".**

4. **Although not as clearly drafted as it might have been, Section 195 appears to be reducible to the following propositions :**

(1) all pre-existing IBCs ("old IBCs") were automatically registered under the <u>new</u> Act when the new Act came into force on December 29th, 2000;

(2) Old IBCs must, however, bring themselves into compliance with the requirements of the new Act within 180 days (i.e. by June 27th, 2001);

(3) As and when old IBCs meet the new requirements within the 180 day grace-period, their registration as IBCs under the new Act is "continued";

(4) If, on the other hand, old IBCs do not meet the new requirements by the end of the 180 day period, they will be struck from "the Register".

5. what fortifies the argument that pre-existing companies were automatically registered under the new Act is that "the Register" from which a defaulting company is struck under Section 195 (2) is defined by Section 2 of the Act as the Register under the <u>new</u> Act. A company can only be struck off "the Register" under the new Act if it was on <u>that</u> Register to begin with. Thus, the Section assumes that the defaulting company is already registered under the new Act, albeit provisionally, but that having failed to comply with the new requirements within the 180 day grace-period, it must be struck from the Register under the new Act. Conversely, when Section 195 (1) speaks of an existing company which has complied with the requirements of the new Act being "<u>continued</u> as an International Business Company registered under this Act", it means that the company, having already been registered as from December 29th, 2000 under

the new Act, can continue to be so registered (as opposed to being struck off under subs.2).

Q : Are Companies which commenced winding up under the old Act subject to striking-off under Section 195 (2) if they do not meet the new requirements within 180 days?

In my view, no. Companies in liquidation are not within the mischief of Section 195 which is clearly directed to companies which are going concerns. The Section is saying that if an IBC wants to continue as a going concern it must conform to the new requirements. A company in liquidation, by contrast, continues in existence only for the purpose of allowing its affairs to be properly wound up whereupon it will be formally dissolved and struck from the register.

Thus, it is an altogether different striking-off scenario than that to which S.195 relates and in respect of which different striking-off provisions of the Act are intended to apply.

Although S. 195 does not, in terms, admit of any exceptions, the courts will doubtless apply the mischief rule so as to effectively exempt companies in liquidation from the striking-off provisions of S.195. To do otherwise would short-circuit or prematurely terminate windings-up that were properly instituted under the old Act in a way that could hardly have been intended by S. 195 having regard to its underlying mischief.

(It is, however, by no means clear what view of the matter the Registrar may take. Barring a clarifying amendment, It may therefore be necessary to have the question determined by the Court under S. 191 of the Act).

PART II
THE MORE NOTEWORTHY CHANGES UNDER THE NEW ACT

NOTE : THIS IS NOT AN EXHAUSTIVE CATALOGUE OF ALL THE CHANGES; ONLY THOSE WHICH, IN MY VIEW, THE MOST SIGNIFICANT OR NOTEWORTHY OF THE LOT.

- **IBCs NOW HAVE THE ABILITY :**

  (a) **TO OWN LAND IN THE BAHAMAS;**

  (b) **TO TRANSACT BUSINESS WITH RESIDENTS**

  S. 4 : ANTI-RING FENCING-DRIVEN : THE OLD PROHIBITIONS IN THE FOREGOING RESPECTS HAVE NOT BEEN REPLICATED IN THE NEW ACT.

  NOTE : IBC'S PROPOSING TO ACQUIRE LAND IN THE BAHAMAS OR TO DO BUSINESS WITH BAHAMIAN RESIDENTS WILL NEED EXCHANGE CONTROL PERMISSION : S. 186 (2). [*EXCHANGE CONTROL ISSUES DEALT WITH LATER*];

- **NEW PROHIBITION : DEALING OR TRADING IN SECURITIES OR GIVING SECURITIES INVESTMENT ADVICE WITHIN MEANING OF THE SECURITIES INDUSTRY ACT : S. 4 (1) (D).**

  THIS PROHIBITION IS LIKELY TO BE SHORT-LIVED, AT LEAST IN RELATION TO OLD IBCS THAT WERE ACTING AS SECURITIES INVESTMENT ADVISERS BEFORE THE NEW ACT CAME INTO FORCE. IN THIS REGARD, THE SECURITIES COMMISSION HAS RECENTLY ADVISED THE INDUSTRY BY CIRCULAR LETTER THAT THE MINISTER OF FINANCE PROPOSES TO MOVE AN AMENDMENT TO THE NEW ACT TO MITIGATE THE DIFFICULTIES WHICH THE NEW PROHIBITION HAS CREATED FOR THE MUTUAL FUNDS INDUSTRY. PRESUMABLY, THE PROHIBITION WILL BE REMOVED ENTIRELY IN RELATION TO OLD IBCS WHICH WERE LAWFULLY OPERATING AS SECURITIES INVESTMENT ADVISERS AND THAT THE

amendment in this regard will be made retroactive to December 29th , 2000.

- Only (a) licensed banks and trust companies and (b) licensees under the Financial and Corporate Service Providers Act "can incorporate" companies : S. 4 (2) .

  Not exactly clear what this means because under S. 3, any two persons may "incorporate" a company. Presumably, what the draftsman intended to say is that only licensed banks and trust companies and licensees under the FCSP Act can provide corporate formation services. In this regard, it bears remembering that "incorporation" is the act of the subscribers in executing a Memorandum of Association. Section 3 says as much. "Incorporation" is not the preparation of the constitutional documents of the company and/or the submission of those documents for registration of the company. (Incorporation is not the same as registration).

  In any case, one by-product of these new limitations on who can form companies is that the *EX OFFICIO* right which lawyers have long had to form companies under the Legal Profession Act (and the Bar Acts which preceded it) appears now to have been impliedly repealed.

- A certificate of compliance must be submitted to the Registrar-General by a counsel and attorney or the registered agent certifying that the company seeking registration has complied with the requirements of the Act: S.15(7).

This is a pre-condition for registration.

It is ironic that while Parliament is no longer prepared to trust lawyers to form companies (unless they are licensed under the new F&CSP Act), Parliament is quite content to place complete reliance on the integrity of any lawyer, be he licensed or not, to certify that a proposed new company has met all the requirements of the Act and is therefore qualified to be registered.

Note : criminal penalties for falsely certifying : S. 180.

- Articles of Association must now be filed with the Memorandum (formerly, the filing of the Arts. could be deferred for 30 days) : *S.14 (1)*.

- Only licensed Banks and Trust Companies and licensees under the FCSP Act can act as Registered Agents.

  Existing Registered Agents can continue to so act for 90 days (i.e. until March 29th) whereupon they will need a licence to continue: S.38

- Two shareholder requirement ???

  Firstly, under S.95, it is a ground for winding-up if there are at any time less than 2 members of an IBC : (a provision lifted from the (domestic) Companies legislation which historically has always required a minimum of two members).

  Secondly, Section 51A of the old IBC Act which expressly provided for a "single shareholder" of an IBC has not been replicated in the new Act.

This combination suggests an intention to assimilate IBCs to the two shareholder requirement which has always obtained under the domestic Companies legislation.

Certainly, in the absence of any positive statement in the Act that one shareholder suffices (and there is no such statement), the "Two shareholder" rule would, on a strict reading of the Act, have to be observed notwithstanding the difficulties this would create difficulties for the "one-man" companies formed under the old Act.

There are indications from official quarters, however, that if the IBC ACT does indeed require two shareholders, this was unintended. An amendment re-instating the "single shareholder" principle may therefore be soon forthcoming.

- <u>A Minimum of 2 directors now required</u> : : S.43 (formerly 1 sufficed) .

  Note: no nationality restrictions; removed from the bill that passed in Parliament.

- <u>Register of directors & Officers to be on public file</u>

  practically speaking, this is probably the one change has generated the most noise in the market and, from anectodal evidence, the one change that will likely cause a great many IBC's to "lapse"(and be struck off in consequence).

  Curiously, the Act seems to require that the original register be kept at the public registry and "*A COPY*" at the Registered Office : S.44 (3) & (4). Administratively, however, the Registrar has indicated that he does intend to make heavy weather of this point.

Bears noting that there continues to be no requirement that the shareholders of an IBC be disclosed on any public register.

Q. Must the register include directors & Officers who ceased to be directors & Officers under the old Act (i.e pre-December 29th, 2000)?

No. Section 44 does not operate retroactively. Instead, the register of directors commences *"from the date of registration of the company"* (see S.44(3)). Registration refers to "the Register" which is defined by Section 2 as the Register under the new Act, not the old one. Indeed, the register under the old Act no longer exists since the Act which established and sustained that register has been repealed (and the Register along with it). There is now only one Register : the Register created by the new Act. Thus when S.44 speaks of "registration" it means the registration of the company under the new Act not the old one. The date of registration under the new Act is December 29th, 2000. Thus, persons who ceased to be directors before that date are not required to be shown in the Register of directors. to require otherwise would be to require the Register of Directors to commence prior to the registration of the company under the new Act when, in fact, Section 44 says exactly the opposite.

- Annual General Meeting is now required : S.59

This new requirement represents the fossilized remains of certain provisions which appeared in the draft legislation under which an AGM requirement was put in place so that certain new financial requirements (approval of mandatory

audited financial statements, etc.) could be dealt with in the context of an AGM. That explained, at least in a functional sense, why provision was made for a mandatory AGM. These new financial requirements, however, were eliminated in the final version of the Bill that passed in Parliament, thereby eliminating the need for the AGM. Someone forgot, however, to eliminate the AGM requirement at the same time and thus it remains, floating, as it were, in a vacuum.

That the retention of the AGM requirement in the final version of the bill was indeed a mistake is reinforced by the fact there is absolutely nothing in the new Act which indicates what, if anything at all, is supposed to happen at an AGM. Certainly, the Act does not, in point of law, require that anything be done at the meeting. Thus, it would seem perfectly permissible to convene an AGM solely for the purpose of entertaining a motion for adjournment!

There are recent indications that the AGM requirement will either be repealed or fleshed out so as to require the matters that are normally associated with AGMs to be dealt with to the extent that they may be relevant to a given IBC's circumstances.

Note : virtually all pre-existing companies are already in breach of the new AGM requirement because the Act says that a general meeting of shareholders must be held at least once in every year (including the year 2000 in which the Act came into force). Unbeknownst to anybody until the new year had already dawned, the new Act came into force on December 27th thus not really giving any time to hold an AGM in and for the year 2000!

- No bearer shares - S.194 (4)

  Outstanding bearer shares must be recalled within 6 months (from commencement of Act) for cancellation and replacement with registered shares. If the bearer shares are not recalled or cancelled within that period, they will be of no effect.

  It is unfortunate that so much play has been given to the issue of bearer shares by the OECD and FATF because, in reality, bearer shares were only very seldom encountered under the old Act. Indeed, the ability to use nominee shareholders coupled with the absence of any requirement to publicly disclose even nominee shareholders meant that there was really little need to resort to bearer shares as a means of maximizing anonymity.

- New fees - deferred to 2002 (Part X of the old Act preserved). Note : Registration fee increase from $250 to $350.

- Exchange Control : S. 186

  The position is now as follows :

  (1) IBCs formed under the old Act, including those with Bahamian resident owners, will continue to enjoy the exemption from Exchange Control Regulations they had under the old Act;

  (2) New IBCs, if they are (a) non-resident owned and (b) operating "exclusively overseas" will be Exchange Control exempt;

(3) Conversely, If a new IBC has resident ownership or is operating wholly or partly in The Bahamas it will be subject to Exchange Control Regulations;

(4) If residents want to acquire shares or other securities in an IBC, Exchange Control permission will be needed.

- **Fiscal Exemptions**

Under S. 109 of the old Act, IBCs were exempted from business licence fees and income, corporate and capital gains tax (none of which, with the exception of business licence fees, has ever applied in The Bahamas in any case) and from all manner of taxes, levies and duties in relation to the *"shares, debt obligations and other securities"* of IBCs. Further, in specific relation to stamp duty, all transactions relating to IBCs or shares in IBCs were exempt from stamp duty. These exemptions were "statutorily guaranteed", as it were, for a period of 20 years (calculated from "the date of incorporation" of the relevant IBC).

The New Act, by S.195, has perpetuated the exemptions for IBCs formed under the old Act but with this exception the exemptions have fallen away.

(Note – the removal of these exemptions consistent with "anti - ring fencing : not extending to "offshore companies" a panoply of concessions and fiscal exemptions not available to "domestic" companies.)

STAMP DUTY

Dealt with obliquely by a proviso to Section 186 (3). It is, in context, a *non sequitur* because 186 (3) deals with Exchange Control not taxes and duties.

Be that as it may, the proviso says that stamp duty shall "continue to be payable" by an IBC that "holds a lease of real property or holds shares in any company which owns real property or holds shares

in any company which owns real estate in The Bahamas.

The words " continue to be payable" suggest that Parliament was proceeding on the premise that these IBC transactions had already been brought under the Stamp Act by some prior enactment and that it was therefore only necessary to affirm that these stamp duty obligations (under such prior enactment) would continue to apply by reference to the new Act.

In fact, there was such a prior enactment (The IBC (Amendment) Act, 1999 (no.26 of 1999) but it was rather ineffectually expressed to apply only to "an International Business Company incorporated outside The Bahamas". Thus, by a drafting blunder the amending Act (now repealed) did not apply to any IBC incorporated under the Act at all (except possibly IBCs that were originally incorporated elsewhere but "continued" under the Act but even this is highly doubtful). By extension, the provisions of the 1999 Amendment subjecting IBCs to stamp duty in certain respects did not apply to an IBC incorporated in The Bahamas.

Since the 1999 amendment to the IBC Act did not apply to an IBC incorporated in The Bahamas it is unclear what, if any, effect the proviso to S.186 (3) really has since it is specifically predicated on the 1999 amendment which only applied to IBCs formed outside The Bahamas.

Thus it it is at least arguable that S. 186 (3) speaks of IBCs being subject to stamp duty it is speaking only of IBCs which were caught by the 1999 Amendment, viz. IBCs "incorporated outside The Bahamas" since these would be the only IBCs in relation to

whom the pre-existing stamp duty obligation could be "continued".

Subject to resolving that issue, the position on stamp duty would appear now to be as follows :

(1) Old IBCs continue to enjoy the same exemption from stamp duty they had under the old Act. Clearly, this was one of the "benefits" enjoyed by IBCs under the old Act and S.195 (3) preserves all benefits enjoyed by old IBCs under the old Act (except to the extent that the stamp duty exemption may have been whittled down by the 1999 Amendment to the IBC Act which the new Act has sought to re-enact under 186 (3) ;

(2) Even where an old IBC <u>directly</u> buys land in The Bahamas (which is now permitted) , the acquisition would appear to be stamp duty-exempt (and note that in any case a <u>direct</u> acquisition of real estate by an IBC was not one of the matters subjected to stamp duty under the 1999 Amendment presumably because it was unlawful under the old Act for an IBC to directly acquire real estate in The Bahamas in the first place.

(3) In the case of <u>new</u> IBCs which directly acquire or sell real estate in The Bahamas, stamp duty would apply much as it applies to a domestic company. There is no exemption under the new Act for new IBCs.

(4) New IBCs will also have to pay the same stamp duty that a domestic company would have to pay in respect of other "stampable" transactions in The Bahamas. There is no exemption for new IBCs under the new Act.

(5) Where a (new) IBC owns another (new) IBC which in turn owns Bahamian real estate, a sale of shares in the parent company (unless effected by deed) would technically not attract stamp duty under the Stamp Act (stamp duty only being payable if the sale of shares is at "the first level)".

CONCLUSION

Looking forward ?

- Attrition rate will be high for old IBCs – the number of IBCs that will end up being struck off is likely, by most informed predictions, to be in the thousands.

- the number of new IBCs will likely remain small, at least in the short term (recent figures from the Registrar-general's office bear this out) – global slowdown coupled with continuing uncertainty over the ultimate outcome of the OECD insurgence coupled with dissatisfaction, in some instances, with certain of the new disclosure/reporting/KYC norms that apply under the new legislation – all these factors will have a depressant effect on IBC formation, at least in the short term.

- In the longer term, assuming that there are no more hidden land-mines the OECD, FATF et al have lined up for us, some normalcy should return. Personally doubt, however, that we will ever return to the "high volume" days of IBC formation but that, in my view, would not necessarily be a bad thing. Good for the jurisdiction to eliminate the flim-flam fly-by-nighters who sought to use the IBC as a cloak for crookedness or the "one-off transaction IBCs – here today, gone tomorrow.

- But as long as there is a continuing demand for long-term mutual fund structures, trust structures, personal or family asset-holding or investment structures in The Bahamas, there will be a commensurate demand for IBCs.

- Although the new Act retains, with some exceptions, the same features that made IBCs attractive in the first place, fine-tuning is needed to correct the deficiencies and ambiguities to which I have referred in the course of this address (and there are others as well, albeit of lesser significance). Many of these problems resulted from the haste with which the legislation was prepared and from insufficiently diverse consultation within the industry and the professions. Now that amendments to the Act have been foreshadowed, however, it is hoped that there will be far wider consultation within the industry and within the legal and accounting professions than there was the first time around.

- Subject to the forgoing caveats I, for one, am optimistic about the future of the industry as a whole and the IBC legislation in particular.

March 14th, 2001
SMcW