

Bermuda Incorporated Segregated Accounts Companies

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1 Introduction

In November 2019, Bermuda enacted the Incorporated Segregated Accounts Companies Act 2019 (the ISAC Act), a testament to the jurisdiction's commitment to providing pragmatic solutions to address industry's evolving needs.

The ISAC Act provides an alternative model for corporate structures, offering promoters of, and investors, in Bermuda entities an even greater choice in individualized corporate structuring.

The ISAC Act brings together the benefits of separate legal personality of a traditional limited company with the efficiencies of a segregated accounts company, merging the two concepts to produce a company (an ISAC) that can create an unlimited number of incorporated segregated accounts (each an ISA), each with its own separate legal personality.

2 Background

Bermuda was a pioneer in developing ring-fenced cell or "segregated account" structures, which were initially created by means of private acts in the 1990s and later, given increased demand, by registration pursuant to the Segregated Accounts Companies Act 2000 (the SAC Act).

The SAC Act has served industry well and the robustness of the statutory ring-fencing of assets and liabilities linked to a segregated account (SA) of an SAC has been upheld by the Bermuda courts. However, despite favourable decisions of the Bermuda courts and the growing familiarity with cellular structures in many jurisdictions outside Bermuda, the cellular concept still remains untested in some jurisdictions and unknown in others.

While the ISAC Act was enacted primarily for companies in the insurance/reinsurance and investment fund industries, companies in other industries can also be registered as an ISAC with the approval of the Minister of Finance (Minister). It is expected that ISAC structures will be used by insurance and reinsurance companies, investment funds, private equity funds, hedge funds, mutual funds (in particular, umbrella, multi-class funds, multi-strategy and master feeder fund structures), investment holding companies, asset holding companies (where assets, such as aircraft and ships, can be held by different in ISAs), pension trustees and family offices.

3 Benefits of incorporated status of an ISA over an SA

SACs and ISACs share a similar structural framework. Both may create an unlimited number of segregated accounts to which assets and liabilities of the SAC or the ISAC may be linked, with the result that the assets and liabilities linked to an SA or ISA are statutorily segregated from the assets and liabilities of every other SA or ISA of the respective SAC or ISAC and of the SAC or ISAC itself.

Although they may look very similar, the key distinction between the two is that an ISA has separate legal personality with, unless its memorandum states otherwise, the capacity, rights, powers and privileges of a natural person. From this fact alone derives the fundamental difference between an SA and an ISA.

As a separate legal person, an ISA can own property in its own right and sue and be sued in its own name. An ISA can enter into contracts, issue securities to raise capital, grant and register charges over its assets and obtain a tax election and hold licenses in its own name. An ISA has its own memorandum of association, bye-laws and its own Board of Directors. An SA, not being a separate legal person, has none of the foregoing powers or attributes. Some of the advantages offered by an ISA's separate legal personality are addressed in greater detail below.

3.1 Certainty of separation of assets

Any uncertainty as to how a foreign court would interpret the statutory segregation of assets of an SAC is substantially diminished when using an ISA as an ISA is a body corporate with separate legal personality. As the separate legal personality of a body corporate has been recognized since the early 1800s, an ISA can minimise any risk (that might otherwise have arisen) of failure of the segregation of assets and liabilities, in particular, in insolvent situations where assets are located in jurisdictions lacking familiarity with, or recognition of, an unincorporated segregated account regime. Employing an ISAC structure is, thus, likely to increase investors' confidence in holding assets outside of Bermuda, thereby increasing available investment opportunities.

3.2 Contracts generally and internal transactions

As an SA cannot enter into contracts in right of itself, an SAC must enter into contracts and then link them to its SAs to achieve statutory segregation. While it is imperative that contracts involving an SA clearly evidence on their face that the SAC is executing on behalf of the relevant SA, such formalities are not necessary with an ISA as a counterparty. Any risks (that might otherwise have arisen) in the event of failure to observe such a technicality are eliminated when the counter party is an ISA.

While there is specific statutory provision in the SAC Act that "internal transactions" are valid, notwithstanding that they technically involve the SAC contracting with itself, such transactions may cause confusion, particularly in jurisdictions that are not familiar with cellular structures. The concept of two ISAs of an ISAC, each party being an entity with separate legal personality, contracting with each other may be more readily understood across a wider range of jurisdictions.

3.3 Board of Directors

Each ISA has its own Board of Directors, which provides certain benefits not available to SAs, which are managed by the Board of Directors of the SAC.

The Board of Directors of an ISA can be composed of the same persons appointed to the Board of Directors of its ISAC, or of other persons entirely. This enables an ISA to be directed by a Board of Directors with expertise appropriate for the business of that ISA.

Whereas the Board of Directors of an SAC is tasked with oversight of the SAC and each of its SAs, the respective Boards of Directors for the ISAs of an ISAC should result in increased management efficiencies (such as an ability to act quickly on investment opportunities) and improved oversight.

It should be noted, however, that directors serving both on the board of an ISA and its ISAC will need to be particularly mindful of their duties to the respective corporate body and must avoid conflicts of interest.

3.4 Corporate reorganizations, transfers and conversions

One of the greatest advantages of ISACs over SACs, which will make ISACs very attractive to businesses interested in the aggregation of entities, such as insurance runoff acquirers, is their versatility when it comes to corporate reorganisation, transfer and conversion.

The ISAC Act provides a statutory procedure for the transfer of an ISA to another ISAC, the conversion of a company limited by shares into an ISA or an ISAC, the amalgamation or merger of two or more ISAs of the same ISAC and the registration of an ISA as a company limited by shares. None of the foregoing procedures is available to SACs.

3.5 Restructuring and liquidation

The ISAC Act offers the best of both worlds, in terms of the law relating to companies and the law relating to SAs, when it comes to restructuring and liquidation processes that apply to ISAs in the event of insolvency or distress.

A substantial superiority of an ISA over an SA is that an ISA may be wound up in broadly the same way that a company may be wound up under the Companies Act 1981 (the Companies Act), providing a creditor with more options in the event of insolvency.

While an ISA may be wound up by the court (compulsorily) or voluntarily pursuant to the provisions of its bye-laws, or may be subject to a receivership order, the only process available to a creditor of an SA that is “not solvent” is to appoint a receiver. While receiverships give creditors a lot of control, in that they displace the authority of the Board of Directors of the SAC in respect of the SA and allow the receiver authority to run off or liquidate the affairs and/or property linked to the SA, they do not engage the type of statutory provisions that apply in a winding up relating to the reversal of fraudulent preferences and preferential floating charges, for example, and the powers of a receiver are not as wide as those of a liquidator.

A trade-off to some in using an ISAC structure may be that the winding up priorities prescribed in the Companies Act (and any other applicable statutes) will apply to an ISA, whereas the winding up priorities contractually agreed in an SA’s governing instrument will apply to the SA.

4 Benefits of an ISA compared with a company

The ISAC structure is particularly useful as an alternative to corporate groups as it permits different businesses to operate under one corporate umbrella, including such structures where a licensed entity, intellectual property, back office and employees are each in separate ISAs.

ISAC structures offer operating and cost efficiencies, including where professional services (such as actuarial, legal, and insurance and investment management services) can be pooled.

Although suitable for a corporate group structure, an ISA is not a subsidiary of its ISAC solely by virtue of its being an ISA of the ISAC (although it could be a subsidiary, as nothing prevents the ISAC from owning shares in its ISAs).

One thing that promoters and investors should be aware of, however, is that an ISAC involves a level of control over ISAs that is not present in non-cellular corporate group structures. Examples of such control include the following:

- The consent of the ISAC is required to amend an ISA’s memorandum and bye-laws (unless such documents provide otherwise)
- The consent of an ISAC’s Board of Directors and shareholders is required to transfer an ISA to another ISAC
- An ISA can be de-registered without the consent of an ISA’s account owners provided it has the consent of 75% of the members of the ISAC and counterparties and creditors of the ISA
- An ISA is required to have the same registered office as that of its ISAC
- An ISAC maintains its ISAs register of members, register of directors and officers and minute books
- An ISA wishing to convert to a company under the Companies Act must obtain the approval of the members of the ISAC by special resolution, and
- Where the ISAC is an investment fund, the register is not open for inspection without the consent of the ISAC, except in respect by an account owner in respect of its own interests.

As noted above, an ISA may be wound up voluntarily pursuant to the provisions of its bye-laws, providing for a more flexible procedure than the Companies Act voluntary liquidation.

5 Registration of an ISAC

Any company to which the Companies Act applies (including a company registered under the SAC Act) may apply to be registered as an ISAC. Where such company is not engaged in insurance business or operating an investment fund, it must first seek ministerial approval to be registered as an ISAC. (The SAC Act similarly requires all companies, other than those engaged in insurance business, to obtain ministerial approval to register as an SAC.)

To register as an ISAC, a Bermuda company must apply to the Registrar of Companies (the Registrar) by filing a notice in prescribed form accompanied by the required fees and any other information or documentation requested by the Registrar (including, if the company is a financial institution¹, a non-objection letter from the Bermuda Monetary Authority (the BMA)).

Where a company has conducted business prior to applying to be registered as an ISAC, the company must provide a statutory declaration made by at least two directors (or by a sole director, if applicable) of the company, which confirms, among other things, the assets and liabilities of the company, the ISAs to be established and the assets to be contributed to them and either (i) the absence of any resultant prejudice to the creditors and would be account holders, (ii) all creditors have consented to registration as well as at least 75% of the putative account owners or (iii) there are no objections from the creditors or putative account holders after all known creditors and putative account holders have been provided with “adequate notice”.

The Registrar, in approving a company for registration as an ISAC, may impose conditions or requirements on its registration.

The ISAC Act provides a mechanism for those members, creditors or persons of a company who would, on registration, be members or account owners of the ISAC to apply to the Supreme Court of Bermuda for an order annulling the registration. The applicants must represent 20% in number of persons who would, on registration, be members or account owners or creditors and none of the applicants can have voted in favour of, or have given written consent to, the registration. The Supreme Court may annul or confirm the registration, adjourn the proceedings in order that an arrangement may be made for the purchase or other disposition of the interests of dissentient persons, or give directions for facilitating or carrying into effect any such arrangement.

6 Registration of an ISA

The ISAC Act provides for a convenient and straightforward process for creating an ISA. The process requires the Board of Directors of the ISAC to pass resolutions adopting the name of the proposed ISA, its memorandum of association and bye-laws, appointing its Board of Directors and allocating liabilities for any existing business to be carried on by the ISA. Such resolutions, along with the prescribed fee and any other necessary information or documents (such as a non-objection from the BMA if the ISA is to be a financial institution), are filed with the Registrar for approval for registration.

As with the registration of an ISAC, the Registrar may impose conditions or requirements on the registration of an ISA.

¹ A “financial institution” as the meaning given it in the Third Schedule of the Bermuda Monetary Authority Act 1969, and includes persons registered under the Insurance Act 1978, Investments Funds Act 2006 under the Investment Funds Act 2003.

7 Reorganisations of ISACs and ISAs

The ISAC Act provides for the following statutory procedures:

- Transfer of an ISA from one ISAC to another
- Conversion of a limited company into an ISA of an ISAC
- Amalgamation or merger of two or more ISAs of the same ISAC, and
- Registration of an ISA as a Companies Act company (i.e. an ISA may become a company).

7.1 Transfer of an ISA from one ISAC to another and conversion of a limited company into an ISA of an ISAC

The ISAC Act permits the transfer of an ISA from one ISAC to another and the conversion² of a company registered under the Companies Act into an ISA of an ISAC.

The terms of a proposed transfer of an ISA or proposed conversion of a company into an ISA must be set out in a “transfer agreement” between, in the case of the transfer of an ISA, the transferor and transferee ISACs or, in the case of the conversion of a company, between the company and the ISAC. The transfer agreement must be approved, in the case of the transfer of an ISA, by the Board of Directors of each of the ISACs and by a special resolution of the ISA and the ISAC to which it is being transferred and, in the case of the transfer of a company, by the Board of Directors and by a special resolution of both the company and the ISAC.

A special resolution is one passed by at least 75% of votes cast by the members of the ISAC, or members or account holders of the ISA, as the case may be, entitled to vote on the resolution.

A statutory declaration must be made by each director of the ISAC transferring its ISA or, in the case of the conversion of a company to an ISAC, by each director of both the company and the ISAC. The statutory declaration confirms, among other things, the solvency of the transferring ISA or the converting company and that no creditor thereof will be prejudiced by the transfer or conversion.

On the due filing of the required documentation (which includes the transfer agreement, resolutions and statutory declaration(s)) with the Registrar, the Registrar will issue a certificate of transfer stating the effective date of transfer (or conversion).

The transfer of an ISA to a transferee ISAC and the conversion of a company into an ISA have the effect that, among other things, the property, rights, liabilities and actions of the ISA or company, as applicable, before the transfer remain the property, rights, liabilities and actions of the ISA or company, as applicable, upon transfer or conversion.

7.2 Amalgamation or merger of ISAs of the same ISAC and of ISACs

Unless otherwise provided in the bye laws:

- Two or more ISACs may amalgamate or merge with each other, and
- Two or more ISAs of an ISAC may amalgamate or merge.

The terms of the proposed amalgamation or merger must be set out in an agreement for amalgamation or merger entered into by each ISAC or ISA, as the case may be, proposing to amalgamate or merge. The agreement must be approved by the Boards of Directors of the amalgamating or merging entities. In addition, where ISACs are merging or amalgamating, a special resolution of each ISAC is required and, where ISAs are merging or amalgamating, a special resolution of the account owners of each ISA is required.

² The ISAC Act uses the terminology “transfer” but we have used “conversion” for ease of distinguishing between the transfer of an ISA to another ISAC and the transfer of a company to an ISAC to become an ISA of that ISAC.

The provisions of the Companies Act relating to the amalgamation and merger of companies apply, with necessary modifications, to the amalgamation and merger of ISACs and ISAs. For example, an officer of each ISA must make a statutory solvency declaration and the amalgamation or merger agreement must comply with requirements set out in the Companies Act. Appraisal rights may also be available to certain members or account owners, as the case may be, who did not vote in favour of the proposed amalgamation or merger.

The aforementioned transfer agreement, resolutions and other prescribed documents must be filed with the Registrar and, on the filing of a certificate of amalgamation or merger (or on a future date specified therein):

- In an amalgamation, the amalgamation of the ISACs or ISAs and their continuance as one ISAC or ISA (the amalgamated ISA or ISAC) becomes effective, as will any amendments to the bye-laws prescribed in the amalgamation agreement and the property of each amalgamating ISAC or ISA, as the case may be, shall become property of the amalgamated ISAC or ISA.
- In a merger, the merger of the merging ISACs or ISAs and the vesting of their undertaking, property and liabilities in the surviving ISAC or ISA (the surviving ISAC or ISA) shall become effective, as will any amendment to the bye-laws of the surviving ISAC or ISA as prescribed in the merger agreement.
- The amalgamated or surviving ISAC or ISA shall continue to be liable for obligations of the amalgamating or merging ISACs or ISAs, as the case may be; existing causes of action, claims and liabilities to prosecution shall be unaffected; a civil, criminal or administrative action or proceeding pending by or against a merging or amalgamating ISAC or ISA may be continued to be prosecuted by or against the amalgamated or surviving ISAC or ISA; and a conviction against, or ruling, order or judgment in favour of or against an amalgamating or merging ISAC or ISA may be enforced by or against the amalgamated or surviving ISAC or ISA.

Upon a merger of ISACs or ISAs, the Registrar shall strike off the register of ISACs and ISAs each ISAC or ISA that does not survive the merger.

7.3 Discontinuance of an ISAC

Unless otherwise provided its bye laws an ISAC may discontinue to an appointed jurisdiction³.

The provisions of the Companies Act relating to discontinuance apply, with necessary modifications, to the discontinuance of ISAC from Bermuda.

The effective date of the discontinuance of an ISAC is the date its continuance in the foreign jurisdiction is effective under such foreign jurisdiction's laws.

A discontinuance from Bermuda and continuance in a foreign jurisdiction does not create a new legal entity or prejudice or affect the continuity of the body corporate of the former ISAC.

Unlike an ISAC, an ISA cannot discontinue to an appointed jurisdiction under the ISAC Act. An ISA wanting to discontinue must first register as a company under the Companies Act.

7.4 Registration of an ISA as a Companies Act company (i.e. an ISA may become a company)

An ISA may be deregistered under the ISAC Act and become registered as a company under the Companies Act. This may happen if it is in the interests of the ISA to withdraw from the overall administrative controls of the ISAC, perhaps because the ISA has outlived that business model and the benefits of full limited company status outweigh the additional costs.

The proposal to register an ISA as a company under the Companies Act must be approved by special resolutions of the account owners of the ISA and of the members of the ISAC. Additionally, any necessary amendments to the ISA's memorandum of association must be approved by the special resolution of the members of the ISAC.

³ An "appointed jurisdiction" is a jurisdiction appointed by the Minister pursuant to s.2(10) of the Companies Act.

To register as a company, an ISA must file a notice in prescribed form with the Registrar. Such notice must contain, among other things, a copy of the proposed memorandum of association and a statement that the proposed company will meet the requirements of, and operate in accordance with, the Companies Act. An ISA that has conducted business prior to registration as a company (which will probably be the case in most instances) must, additionally, file a statutory declaration of at least two of its directors confirming the assets and liabilities of the ISA and that, on registration, the ISA and proposed company will be solvent and that either no known creditor will be prejudiced thereby and they have consented, in writing, to the registration or that notice has been given to all known creditors and none have objected (other than on frivolous or vexatious grounds) to the registration.

Upon the ISA becoming a company under the Companies Act:

- The property of the ISA continues to be the property of the company
- The company continues to be liable for the obligations of the ISA
- Any existing cause of action, claim or liability to prosecution in respect of the ISA is unaffected
- All civil, criminal or administrative action or proceeding pending by or against the ISA may be continued by or against the company, and
- Any conviction against, or any ruling, order or judgment in favour of or against the ISA may be enforced by or against the company.

8 Winding up of an ISA; receivership

An ISA may be wound up without winding-up its ISAC or any of the ISAC's remaining ISAs. Similarly, the winding-up of an ISAC does not necessitate the winding up of its ISAs, although, before an ISAC can be dissolved, each of its ISAs must cease to exist as an ISA of that ISAC, by becoming a non-registered company, being transferred to another ISAC, being amalgamated or merged out of the ISAC, being registered as a company under the Companies Act or continuing in another jurisdiction⁴ or being wound up.

So far as possible, the winding up of an ISAC is to be carried out in such a way as not to prejudice the affairs, business and property of any ISAs, and the ISAC may continue to carry on business to the extent necessary for the continuance of the business of its ISAs.

ISACs may be wound up pursuant to the provisions of the Companies Act, but certain restrictions apply to the circumstances in which they may be wound up.

Where an application is made to the court under Section 161(1)(e) of the Companies Act for the winding up of the company on the grounds that it is unable to pay its debts, the test of insolvency of the ISAC must disregard the assets and liabilities of its ISAs. Furthermore, where an ISAC is "solvent" under the ISAC Act, in other words, its general account is able to pay its liabilities as they become due, on an application to the court to wind up the ISAC, the court may not order the winding up of the ISAC save on the basis that it is just and equitable to do so or that the Minister has consented to the winding up on the basis that a material misstatement was made in the application for consent to the carrying of or restricted business activities under Section 4A of the Companies Act.

Neither an SAC nor an ISAC can be voluntarily wound up without consent of the Minister.

A liquidator of an ISAC is required to deal with the assets and liabilities of each ISA only in accordance with the ISAC Act and to ensure that the assets of one ISA are not applied to the liabilities of any other, or the general account or, where the asset or liability belongs to more than one ISA, only in accordance with the terms of the relevant instrument or contract or (in the absence of any such instrument or contract) as the court directs.

⁴ Notwithstanding that the ISAC Act speaks to the discontinuance of an ISA in s. 53(e) (No dissolution of ISAC until position of ISAs resolved), there is no statutory provision enabling an ISA to discontinue.

9 On-going requirements

9.1 Informing counterparties

As with an SAC, both ISACs and ISAs must inform persons with whom they are entering into transactions or otherwise conducting business that they are dealing with an ISAC or an ISA, as applicable.

9.2 Resident account representative

The ISAC Act requires the appointment of an individual approved by the Minister to act as an account representative in Bermuda of every ISA. The particulars of the account representative are to be entered into the register of directors and officers. The representative is responsible for reporting to the Registrar upon becoming aware of certain matters, namely failure to register an ISAC or ISA, failure to inform certain persons that they are conducting business with an ISAC or ISA, failure to appoint auditors, failure to comply with directions of the court or failure to comply with any regulations made by the Minister under Section 56 of the ISAC Act and the fact that the ISAC or ISA has become involved in criminal proceedings whether in or outside of Bermuda.

Where the ISAC or ISA is a financial institution, the account representative must, additionally, inform the BMA if he is of the view that there is a likelihood of the ISAC or one of its ISAs becoming insolvent. In contrast, the obligation to inform the BMA of a likely insolvency situation applies to the account representative of an SAC regardless if it is a financial institution or not.

The SAC Act imposes similar duties on the representative, however, the ISAC Act goes further by empowering the representative to compel the ISAC to provide him or her with information and documentation necessary for the representative to perform his or her duties.

9.3 Statutory registers

An ISAC must maintain a register of account owners setting out the particulars of each account owner's interest in an ISA. The register is not open for public inspection and, in respect of an ISA that is an investment fund, is not open for inspection by any person without the consent of the ISAC provided that each account owner may obtain a copy of the information on the register pertaining to his interest in an ISA.

An ISAC is responsible for maintaining the register of members of the ISAC and ISAs. Register of members are prima facie evidence of all matters required or authorized to be inserted therein and, unlike registers of account owners, they are open for inspection by the public in accordance with the Companies Act.

An ISAC is responsible for maintaining a separate register of directors and officers in respect of itself and each of its ISAs.

9.4 Minute book

As with a company limited by shares, minutes of all proceedings in meetings of account owners and of directors of an ISA must be maintained. However, the responsibility to maintain the minute book rests with the ISAC, not the ISA.

9.5 Financial statements and appointment of auditors

Unless an ISA has elected otherwise in its memorandum or bye-laws or by special resolution, the directors of an ISA must both lay audited financial statements of the ISA before its account owners and appoint auditors in general meeting and in accordance with the same requirements therefor as set out in the Companies Act.

9.6 AGMs

An ISA is not required to hold an annual general meeting, unless so required by its memorandum, bye-laws, a special resolution or a court order made pursuant to Section 76 of the Companies Act.

9.7 Records of account

Both an ISAC and an ISA are responsible for maintaining their own records of account.

An ISAC must maintain a general account which records the assets and liabilities of the ISAC which are not those of an ISA and which discloses any assets intended to be applied to a risk of any nature, and which therefore exposes such assets to liability or loss.

Such records shall be separately maintained and the records of the ISAC shall be available for inspection by the members of the ISAC only and the records of an ISA shall be available for inspection by the account owners of that ISA only.

9.8 Companies Act and other legislation

The Companies Act is of general application to ISACs and ISAs, subject to necessary modifications.

ISACs must also comply with the requirements of the Companies Act, including as to declaring dividends and distributions, redemptions, repurchases, reductions in capital, filing of annual declarations, payment of annual government fees, preparing financial statements, appointing auditors, holding of annual general meetings, laying before general meeting of audited financial statements and the gathering of beneficial ownership data.

Where the ISAC carries on “relevant activities” under the Economic Substance Act 2018, it must also maintain a substantial economic presence in Bermuda and comply with annual declaration requirements pursuant to that act.

An ISAC and an ISA must comply with the Registrar (Compliance Measures) Act 2017, which provides the Registrar with enhanced powers to inspect, monitor and regulate entities operating in or from Bermuda to ensure their compliance with those applicable laws pursuant to which the Registrar performs regulatory, administrative or other functions.

Another consequence of the general application of the Companies Act to ISAs, is that ISAs, like companies, are prohibited from carrying on business in Bermuda unless they meet requirements as to control and beneficial ownership by Bermudians, are licensed to do so by the Minister, are a licensed bank, are listed on the Bermuda Stock Exchange and engaged in a prescribed industry or have been registered by the Registrar as “exempted” from compliance with the foregoing requirements. If they are exempted, they are prohibited from carrying on business in Bermuda except in relation to a limited number of permitted activities set out in Part X of the Companies Act.

10 Removal from the register and strike-off

Both an ISAC and an ISA may be removed from the register voluntary or involuntarily.

10.1 Voluntary removal

An ISAC or ISA may be removed from the registry in the Registrar’s discretion on the filing of a request to deregister by the ISAC or ISA, along with the necessary consents and statutory declaration.

The voluntary removal of an ISAC or an ISA requires the written consent of 75% of the ISAC’s members and 75% of counterparties who are creditors and, additionally in the case of an ISA only, the written consent of 75% of

the ISA's account owners⁵. In the case of an ISAC or an ISA⁶ wishing to deregister, a statutory declaration of at least two directors of the ISAC, as the case may be, is required. The statutory declaration shall confirm no creditors will be prejudiced by the deregistration or that all creditors have consented in writing and shall attach a statement of assets and liabilities as well as of transactions or events which are expected to occur before deregistration or which have occurred and resulted in significant changes to the stated assets and liabilities and, if an ISAC, a statement of the ISAs it operated and their assets and liabilities. If, after filing the statutory declaration there is a material alteration to the matters therein, notice must be given to the Registrar of the same. In the case of an ISAC or ISA that is a financial institution, a notice must also be filed with the BMA seeking its non-objection to deregistration.

The ISAC or ISA seeking to be deregistered must, contemporaneously with filing a request with the Registrar to be deregistered, send notice of such request to all its creditors and, in the case of an ISAC, its members or, in the case of an ISA, its account owners, as the case may be. Within 21 days of receipt of such notice, any member, account owner or creditor of the ISAC or ISA may apply to the Registrar to request him not remove the ISAC or ISA from the register or, if already removed, that it be reinstated. A right of appeal to the Supreme Court of Bermuda is available for any person aggrieved by the Registrar's decision on the foregoing, provided the appeal is made within 21 days of such decision.

On voluntary removal from the register, the ISAC Act ceases to apply to the ISAC or the ISA and the rights and obligations of members and creditors are unaffected. The powers of the ISAC or ISA continue solely for the purpose of discharging the accrued rights and obligations of the members and creditors of the ISAC or ISA.

10.2 Involuntary removal and strike-off

In the event of material breach of the provisions of the ISAC Act or of a condition of registration or of the terms of any direction by the court (pursuant to Section 59 of the ISAC Act) or of any regulations of the Minister (pursuant to Section 72 of the ISAC Act), the Registrar may remove an ISAC or an ISA from the register upon his own initiative or on the application by a member of an ISAC or an account owner or a counterparty of an ISA.

Unlike the striking off of a company from the register of companies maintained under the Companies Act, the removal of an ISA from the register does not bring about its dissolution. The corporate status of the ISA continues as do its powers save that the purpose for which those powers may be exercised is limited to the discharge of the liabilities of the ISA to its creditors and account owners. As a result, removal of an ISA from the register is more like the winding up of a company (which does not affect corporate status or powers) than its striking off (which brings about the automatic dissolution of the company).

The ISAC Act restricts the ability of the Registrar to strike an ISAC off the register of companies (which would bring about its dissolution). A company that is registered as an ISAC may only be struck off the register of companies if each of its ISAs has been removed from the register of ISACs and ISAs, transferred to another ISAC, become a company under the Companies Act or has been discontinued to another jurisdiction.⁷

⁵ While s.16(1) speaks to the voluntary removal of an ISAC from the register and s.16(2) speaks to the voluntary removal of an ISA from the register, s.16(1) references ISAs and s.16(2) references ISACs, which appear to be in the nature of typographical errors.

⁶ While s.16(5) only speaks to the requirement of a statutory declaration to accompany a request under s.16(1), being a request for the voluntary de-registration of an ISAC, we believe the intent was to also require a statutory declaration accompany a request by an ISA to deregister. Such intent is evidenced by the multiple references to ISAs in s.16(5).

⁷ Notwithstanding that the ISAC Act speaks to the discontinuance of an ISA in s.61(1)(d) (Striking off ISAC), there is no statutory provision enabling an ISA to discontinue.

Further information

To find out more about our services and expertise, and key contacts, go to: kennedyslaw.com/bermuda

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