

ANTIGUA AND BARBUDA



THE INTERNATIONAL BUSINESS CORPORATION (AMENDMENT)

ACT, 2007

No. of 2007

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SCHEDULE 1

ANTIGUA AND BARBUDA

THE INTERNATIONAL BUSINESS CORPORATION (AMENDMENT) ACT, 2007

No. of 2007

A BILL FOR

AN ACT to amend the International Business Corporations Act, Cap. 222. and for incidental and connected purposes.

ENACTED by the Parliament of Antigua and Barbuda as follows:

1. Short title

This Act may be cited as the International Business Corporations (Amendment) Act, 2007.

2. Amendment of Section 4

Section 4(6) of the principal Act is amended by deleting paragraph (a) and substituting the following —

“(a) any activity or business that is reasonably related to interactive gaming or interactive wagering or to the operation of interactive gaming or interactive wagering, or any business that offers goods or services to persons who participate in licensed interactive gaming or interactive wagering”.

3. Amendment of Section 5 – Incorporation Cap. 222

The International Business Corporation Act, Cap. 222, in this Act referred to as the principal Act, is amended in section 5 as follows –

(a) by the repeal of subsection (1) and the substitution of the following –

“(1) Application may be made to the Administrator for the incorporation of a company by filing articles of incorporation, signed by the registered agent who acts as the incorporator and paying the prescribed fees”,

(b) by inserting after subsection (1) the following –

“(1a) An application for the incorporation of a company may be filed only by a registered agent **licensed under the Corporate Management Service Providers Act**”.

4. Repeal and substitution of Section 61 – Number of directors

Section 61 of the principal Act is repealed and substituted by the following –

“61. A corporation must have at least one director, and, in the case of a corporation licensed under this Act, all directors must be natural persons.”

5. Amendment of Section 75 – Directors meeting

Section 75 of the principal Act is amended by the repeal of subsection (1) and the substitution of the following –

“(1) Unless as otherwise provided by the articles of incorporation the directors shall hold the annual and any other meeting of the directors at such times and in such manner and places within or outside Antigua and Barbuda and via such modes as they may determine.”

6. Repeal of Section 102 – Place of meetings

Section 102 of the principal Act is repealed and substituted by the following –

“102. The annual meeting of shareholders referred to in section 104 may be held within or outside Antigua and Barbuda, as provided by the by-laws, or in the absence of such provision, at places that the directors may determine.”

7. Amendment of Section 213 – Disqualified receivers

Subsection (1) of section 213 of the principal Act is repealed and substituted by the following—

“(1) A person may not be appointed a receiver or receiver-manager of any assets of a corporation, and may not act as such a receiver or receiver-manager, if the person—

- (a) is a body corporate;
- (b) is an undischarged bankrupt;
- (c) has been convicted of an offence involving financial or other irregularity;
- (d) has been charged with a criminal offence involving dishonesty or fraud and has not been acquitted of that offence;
- (e) or his spouse or any of his parents or children has within the last three years been a director, shareholder, officer or employee of the corporation; or
- (f) has not had at least five years of relevant **qualification and** experience in accounting, auditing, business or finance.”

8. Amendment of Section 219 – Duty of care

Section 219 of the principal Act is repealed and the following substituted—

“A receiver or receiver-manager of a corporation must—

- (a) act honestly and in good faith;
- (b) act with fiduciary responsibility in respect of the creditors and depositors of the corporation;
- (c) act in a prudent and responsible manner;
- (d) carry out his responsibilities in an efficient, economic and effective matter; and
- (e) deal with any property of the corporation in his possession or control in a commercially reasonable manner.”

9. Amendment of Section 221 – Duty of receivers

Section 221 of the principal Act is repealed and the following substituted—

“(1) A receiver or receiver manager of a corporation must—

- (a) immediately give notice of his appointment and of his discharge to the Administrator and the appropriate official;
- (b) take into his custody and control the property of the corporation in accordance with the court order or instrument under which he is appointed;
- (c) open and maintain a bank account in his name as receiver or receiver-manager of the corporation for the moneys of the corporation coming under his control;
- (d) keep detailed accounts of all transactions carried out by him as receiver or receiver-manager;
- (e) keep accounts of his administration, which must be available during usual business hours for inspection by the appropriate official or by the Administrator or by any law enforcement agency so authorised in Antigua and Barbuda or by the directors of the corporation;
- (f) prepare every month or at such intervals as the appropriate official may determine, a financial statement and a written report of the progress of his administration in such form as are prescribed by the appropriate official, or by the court;
- (g) upon completion of his duties, render a final account of his administration in the form adopted for interim accounts under paragraph (f) or such other form as may be prescribed by the appropriate official, by the Administrator or by the court; and
- (h) file with the appropriate official or the Administrator, as the case may be, a copy of any financial statement mentioned in paragraph (f) and any final account mentioned in paragraph (g) within fifteen days of the preparation of the financial statement or rendering of the final account, as the circumstances require and in case of a corporation licensed under this Act submit to the examination procedure prescribed under Division E of this Part.

(2) Any person who fails to perform the duties of a receiver or receiver-manager prescribed under this section commits an offence and is liable on conviction on indictment to a fine of EC\$200,000 or imprisonment up to five years or both.”

10. Amendment of Section 222 – Liability of receivers

Section 222 of the principal Act is amended as follows—

- (a) in subsection (1), by deleting all the words after the word “authority” in line 11 and substituting the following—

“or in bad faith or for committing or facilitating the commission of any unlawful act.”

- (b) in subsection (2), by deleting paragraph (b) and substituting the following—

“(b) order that the persons by whom the purported appointment was made be personally liable to the extent to which that relief has been granted, but no such relief shall be available in respect of liability on contracts entered into without authority, or in bad faith, or for committing or facilitating the commission of any unlawful act.

11. Amendment of Section 224 – Statement of affairs

Section 224 of the principal Act is amended by deleting the word “Director” wherever these occur and substituting the words “Administrator and the appropriate official”.

12. Amendment of Section 225 – Contents of statement

The principal Act is amended in section 225(2) by deleting the word “Director” and substituting the word “appropriate official”.

13. Amendment of Section 226

Section 226 of the principal Act is amended as follows —

- (a) by renumbering paragraph (b) (iii) as paragraph (iv);
- (b) by inserting after paragraph (b) (ii) the following—
“(iii) in relation to gaming, betting, interactive gaming and wagering, the Director”; and
- (c) by inserting after paragraph (e) the following —
“Director” refers to the Director of Gaming”.

14. Amendment of Section 228

Section 228 of the principal Act is repealed and replaced by the following—

(1) A person who intends to incorporate or continue a corporation under this Act to carry on an international banking, trust, insurance, or any other licensed business under this Act may, on behalf of the intended corporation, submit to the appropriate official an application in the prescribed form, along with the articles of incorporation or articles of continuance, as the circumstance require, and the annual fee prescribed in the regulations, which fee shall be non-refundable.

15. Amendment of Section 229

Section 229 of the principal Act is repealed and replaced by the following—

“The appropriate official, upon the filing of an application for a licence with the commission in accordance with section 228, and after such investigation and inquiry as is required pursuant to this Part, and upon approval of the Board, must issue such licence if he has no reason to believe that it would be contrary to the public interest to do so”.

16. Amendment of Section 259 – Examination of affairs of licence financial institutions

The principal Act is amended by the repeal of section 259 and the substitution of the following—

“(1) The appropriate official or an examiner appointed by the Board shall examine or cause to be examine the affairs of any bank, trust, insurance corporation or any other licenced financial institution from time to time or whenever in its opinion such examination is necessary or expedient in order to determine that such financial institution is in a sound financial condition and that the requirements of this Act have been complied with in the conduct of its business.

(2) For the purpose of determining the condition of a financial institution and its compliance with this Act, the Central Bank may at any time examine or cause an examination to be made of any affiliate of the financial institution, in Antigua and Barbuda or abroad or any of its overseas offices to the same extent that an examination may be made of the financial institution.

(3) When the Board has reasonable grounds for believing that a bank, trust or insurance corporation or any other financial institution is not in a sound financial condition, or is not operating in a reasonable and prudent manner, or is otherwise not operating in compliance with this Act, it shall immediately appoint one or more examiners from within our outside the Authority to examine the affairs of the corporation, and notify the corporation in writing of the examination, the purpose of the examination, the reasonable grounds for the examination and the names of the examiners appointed.

(4) The Board shall submit a report to the Minister on the examination made under subsection (3), which shall include the report made by the examiner and copies of valance sheets statements and other relevant documents”.

17. Amendment of Section 260 – Powers of examiners

Section 260 of the principal Act is amended as follows—

(a) by the repeal of subsection (2) and the substitution of the following—

“(2) An examiner may ask any questions relevant to the business and activities of a corporation or its affiliates and make any notes or take any copies of the whole or any part of any record of such business but may not copy or otherwise record information relating to the name or the account of any depositor or the name of any settler or beneficiary of a trust, if the deposit agreement or instrument establishing the account or trust, as the case may be, directs that it be kept secret, unless the examiner has reasonable grounds for believing that the information is relevant to **the** examination or the investigation of a criminal activity”.

(b) the repeal of subsections (5) and (6) and the substitution of the following—

“(5) Where an examiner is not being granted access to all records, documentation and information he requires, the appropriate official or the Administrator may direct the corporation in writing to produce the information necessary for a successful examination.

(6) Where a corporation fails to comply with the written direction of the appropriate official or the Administrator the Commission shall in accordance with section 359A assess a penalty against the corporation.”

18. Amendment of Section 287 – Appointment of receiver manager etc.

Section 287 of the principal Act is amended by the repeal of subsection (1) and the substitution of the following—

“287(1) Where the appropriate official is of the opinion that—

- (a) the realisable value of the corporation’s assets is less than the aggregate of its liabilities and capital accounts or the corporation’s financial condition suggests that it will shortly be in that circumstance;
- (b) the corporation is carrying on business in a manner detrimental to the public interest, the interest of its depositors or shareholders or the beneficiary of any trust, or insurance corporation or other creditors;
- (c) the business of the corporation is not being conducted in accordance with this Act, the Money Laundering (Prevention) Act, any other statute or the regulations issued hereunder, or, in the case of an international banking, trust, insurance corporation or any other corporation licensed under this Act, its business is being conducted in an imprudent manner;
- (d) the corporation is obstructing or refusing to assist the examiners in the examination or investigation of its records or operations as required by this Act, the Money Laundering (Prevention) Act or any other statute or regulations made hereunder; or
- (e) a person holding a position as a director, manager or officer of a corporation licensed under this Act is not a fit and proper person to hold the respective position; or
- (f) a person acquiring control or ownership of the licensed corporation is not a fit and proper person to have such control or ownership,

the appropriate official may forthwith do any of the following –

- (i) suspend or revoke the licence;
- (ii) impose conditions, or further conditions as the case may be upon the corporation;
- (ii) require the substitution of any director or officer of the licensed corporation;
- (iv) at the expense of the licensed corporation, appoint a person to advise the corporation on the proper conduct of its affairs and to report to the appropriate official within three months of the date of its appointment;
- (v) at the expense of the corporation, appoint a receiver manager under Part II to assume control of the corporation’s affairs.”

19. Repeal and substitution of Section 288 – Duties of receiver manager after seizure

Section 288 of the principal Act is repealed and the following substituted—

“288(1) A person appointed under section 287 or whose appointment has been extended under subsection (2) shall in accordance with section 221(f) and, in any case, within three months of the date of his appointment or the extension of his appointment, as the case may be, prepare and furnish a report to the appropriate official of the affairs of the corporation and of his recommendations thereon.

(2) On receipt of a report under subsection (1), **or where no report is furnished within the time specified**, the appropriate official may –

- (a) revoke the appointment of the person appointed under section 287;
- (b) extend the period of his appointment;
- (c) subject to such conditions as the appropriate official may impose, allow the corporation to reorganise its affairs in a manner approved by the Board; or
- (d) revoke the licence and apply to the court for an order that the corporation be forthwith dissolved or liquidated by the court in which case the court shall apply the powers under section 304.”

20. Amendment of Section 300 – Court of dissolution

Section 300 of the principal Act is amended by the repeal of subsection (2) and the substitution of the following—

“(2) An applicant under this section other than the Administrator must give the Administrator notice of the application and the Administrator may appear and be heard in person by counsel.”

21. Amendment of Section 303 – Dissolution reasons

Section 303 of the principal Act is amended by the repeal of paragraph (b) of subsection (4) and the substitution of the following –

“(b) be served upon the Administrator and the appropriate official and each person named in the order.”

22. Amendment of Section 304 – Court powers

Section 304 of the principal Act is amended by the repeal of paragraph (n) and by the substitution of the following—

“(n) upon the application of the Administrator, the appropriate official, any director, officer, shareholder, or debenture holder, creditor or liquidator –

- (i) an order staying the liquidation on such terms and conditions as the court thinks fit;
- (ii) an order continuing or discontinuing the liquidation proceedings; or
- (iii) an order to the liquidator to restore to the corporation all its remaining property;
- (iv) an order to remove the liquidator.”

23. Amendment of Section 307 – Duties of liquidator

Section 307 of the principal Act is amended as follows—

- (a) by inserting “(1)” immediately after the section 307;
- (b) by deleting the word “Director” wherever these occur and substituting the words “appropriate official;”
- (c) by deleting paragraph (h) and substituting the following—
 - “(h) deliver to the court, the Administrator and to the appropriate official, at least once in every four month period after his appointment or more often as the court may order on an application by an interested party, financial statements of the corporation in the form required by section 142 or in such other form as the Administrator or the appropriate official may think proper or as the court may require; and”
- (d) by adding the following new subsections—
 - “(2) If on the examination of the financial statements mentioned in paragraph (h) of subsection (1), the Administrator or the appropriate official suspect or have reasons to suspect that the liquidator is not performing his duties in a prudent manner or in a manner prescribed by the court or is performing his duties in an irregular or dishonest manner, the Administrator or the appropriate official may examine or cause to be examined the affairs of the liquidator and submit a report to the court.”
 - (3) If on the basis of an examination report mentioned in subsection (2), the court determines that the liquidator is not performing his duties in a prudent manner or in a manner prescribed by the court or is performing his duties in an irregular and dishonest manner, the court may order the removal of the liquidator and order him to pay to the corporation such sums as the court may assess against him.”

24. Amendment of Section 309 – Final accounts

Section 309 of the principal Act is amended as follows—

- (a) by repealing subsection (2) and substituting the following—
 - “(2) If a liquidator fails to make the application required by subsection (1), the appropriate official, a shareholder or a director of the corporation may apply to the court for an order for the liquidator to show cause why a final accounting and distribution should not be made.”
- (b) in subsection (4) by deleting all the words in lines 1 and 2 and substituting the following—
 - “(4) If, after hearing and taking into account the views of the appropriate official, the court approves the final accounts rendered by a liquidator, the court must make an order.”

25. Amendment of Section 351

Section 351 of the principal Act is amended by the deletion of paragraph (6) and (d) and subsection (2) and the substitution of the following—

- “(c) for the proper management, control, monitoring and supervision of interactive gaming and interactive wagering activities.
- (d) prescribing the contents and formats of returns, notices, retention of records, documents and information relating to accounts and transactions of corporations governed by this Act”;

26. Amendment of Section 370

Section 370 of the principal Act is amended as follows –

- (a) by inserting “(1)” immediately after section 370;
- (b) by inserting after subsection (1) the following –
 - “(2) In determining for purposes of this Act whether a person is a fit and proper person, to hold any position in a corporation licensed under this Act, regard shall be had to all circumstances, including that person’s –

- (a) **honesty integrity and reputation;**
- (b) **financial soundness;**
- (c) **competence and soundness of judgment for fulfilling the responsibilities of that position;**
- (d) **the diligence with which that persons is fulfilling or likely to fulfil the responsibilities of that position.”**

Passed the House of Representatives on
the , 2007.

Passed the Senate on the , 2007.

Speaker.

President.

Clerk to the House of Representatives.

Clerk to the Senate.

Explanatory Memorandum

The Financial Services sector is global and dynamic. Hence, the continuing revision and updating of the laws and regulations.

2 This Bill accordingly attempts to update certain sections of the IBC Act to improve its regulatory regime, maintain its integrity and provide a more friendly climate for conducting business within the legislative framework of Antigua and Barbuda.

3. Clause 2 would expand the services that constitute international trade by adding to the services interactive gaming and interactive wagering activity as well as business providing services to persons participating in such activities.

4. Clauses 3 and 4 remove the restriction on the incorporation of international business. Under section 5, a corporation cannot be incorporated unless two of the incorporators are Antigua and Barbuda citizens and of which one of them must be a solicitor or barrister. Clause 3 would amend sections authorising only a registered agent who is licensed under the Corporate Management Service Providers Act to incorporate a corporation under the IBC Act.

5. In clause 5, the restriction to hold annual meetings of an IBC in Antigua and Barbuda is removed and provision is made for the annual and other meetings of the directors and shareholders to be held in either Antigua and Barbuda or at other places determined by the directors.

6. Clause 7 expands the circumstances that may disqualify a person from appointment as a receiver manager. In this regard, conviction for an offence involving financial fraud, dishonesty or other financial irregularity and a lack of experience in accounting, auditing, business or finance, are included as additional circumstances that may disqualify a person from appointment as receiver manager.

7. The duty of care which the law imposes upon a receiver manager in section 219 has been strengthened by adding three more requirements which includes the exercise of prudence and fiduciary responsibility and the need for a receiver manager to have due regard to the reputation of Antigua and Barbuda when performing his functions and duties of a receiver manager under the IBC Act.

8. The existing law does not provide the appropriate official, who is the chief regulator of licensed institutions, with any supervisory role over receiver managers of licensed institutions. The amendment in clause 9 seeks to correct this omission. The amendment gives the appropriate official authority to exercise its powers of examination of a corporation in receivership and to supervise the manner in which a receiver manager performs his functions.

9. Clause 13 would amend section 226 to expand the definition of appropriate official to include the Director of Gaming.

10. Clauses 14 and 15 would amend sections 228 and 229 to include other licensed business not named in the section.

11. Clause 16 provides the Commission with flexibility in the examination of financial institution. Financial institutions would no longer be examined annually, but all examinations would be conducted as often as is necessary, and depending on the financial condition of the particular institution. More attention would be placed on offsite examination, which will determine the affairs of the financial institution.

12. Sections 287 and 288 are amended to require the receiver manager to submit periodic financial statements and report of the affairs of the corporation to the appropriate official to enable the appropriate official to determine whether or not the corporation must be dissolved or liquidated and to empower the appropriate official to make application to the court for dissolution or liquidation if the appropriate official so decides.

13. Clause 23 amends section 307 which specifies the duties of the person appointed as liquidator. The existing law is not clear as to the role of the appropriate official over corporations in liquidation. The amendment to section 307 is intended to authorise the appropriate official to continue to exercise its powers of examination and supervision over the corporation in liquidation. The appropriate official is further authorised to apply to the Court to have the liquidator removed if in his opinion the liquidator is not performing his duties prudently or in a manner prescribed by the court or is performing his duties in irregular and dishonest manner.

14. Section 309 provides that the liquidator must submit final account to the court for approval within one year of his appointment. Clause 24 which amended section 309 does two things, namely by including the appropriate official as one of the specified persons who may apply to the court for an order to require a liquidator to show cause why a final accounting and distribution should not be made, and for the court to take the views of the appropriate official into account before approving the final account.

15. Clause 25 would amend section 351 to authorise the Minister to make regulations for the proper management, proper management, control, monitoring and supervision of interactive gaming and interactive wagering activities.

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Hon. Justin L. Simon QC.

Attorney General and

Minister of Legal Affairs