



Redomiciliation of insurers under Bermuda law

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1 Introduction

This paper describes the process under Bermuda law by which an insurance company may transfer its corporate domicile to or from Bermuda.

The transfer of a company's corporate domicile is often referred to informally as 'redomestication' or 'redomiciliation'. Under Bermuda law, the process by which a body corporate may redomicile to Bermuda is called 'continuance' and the process by which it may redomcile from Bermuda is called 'discontinuance'.

The procedures for continuance and discontinuance of a company under Bermuda law are set out in the Companies Act 1981 of Bermuda (Companies Act). If the company is, or will on continuance in Bermuda be, licensed as an insurer in Bermuda, there is, in addition, a number of legal and regulatory requirements to comply with set out in the Insurance Act 1978 (Insurance Act) and related rules and regulations.

2 Preliminary steps - feasibility study and foreign legal advice

In the case of both continuance and discontinuance, particular attention must be paid to the legal procedure by which the company will discontinue or be continued in the foreign jurisdiction from or to which it is redomiciling.

It will be necessary to consider whether the procedure in that jurisdiction is complementary to the procedure that must be followed in Bermuda. Furthermore, it is essential that the two procedures can and will be implemented roughly at the same time in order to ensure the unbroken continuity of the legal existence of the body corporate. Investigating these matters will require the taking of legal advice in the jurisdiction outside Bermuda in which the company will discontinue or be continued.

The steps to be taken in the applicable foreign jurisdiction have not been included in this paper, which provides a summary only of the Bermuda legal and regulatory requirements.

3 Continuance in Bermuda

A body incorporated outside Bermuda (in what follows, a 'foreign corporation') may be continued in Bermuda as an exempted company to which the Companies Act and other relevant laws of Bermuda apply. An exempted company is a company that does not have to comply with the provisions of the Companies Act applicable to 'local companies', such as the requirement that the company be controlled by Bermudians.

There are three parts to the procedure for the continuance in Bermuda of a foreign corporation licensed as an insurance company:

- Obtaining the approval of the Controller of Exchange to the beneficial ownership and control of the entity (Exchange Control Application)
- Obtaining the approval of the Bermuda Monetary Authority (BMA) to the registration of the foreign corporation as an insurer under the Insurance Act (Insurance Licensing Application)
- Application to register the continuance with the Bermuda Registrar of Companies.

3.1 Exchange Control Application

The continuance of a foreign corporation as an exempted company in Bermuda is deemed to be the issue of shares to each of the shareholders of the foreign corporation who will, as a result of the continuance, hold shares in a Bermuda exempted company. Such issue of shares must be approved by the BMA acting as Controller of Exchange pursuant to an Exchange Control Application. An Exchange Control Application can only be made online and should be supported by the following information and documents:

- Organisational chart showing the ownership structure of the foreign corporation up to its ultimate beneficial owners including its direct and intermediate owners.
- KYC/compliance documents on the foreign corporation's ultimate beneficial owners and direct and intermediate owners (or details of its listing on any appointed stock exchange).
- Legal opinion of counsel qualified in the foreign corporation's original jurisdiction of incorporation confirming that all necessary authorisations under the laws of that jurisdiction have been obtained to enable the foreign corporation to continue in Bermuda (a certificate of good standing of the Insurer and copy of the relevant statute should also be provided).
- Financial statements of the foreign corporation prepared for a period ending within 12 months of the proposed date of continuance.
- Relevant application fee.

3.2 Insurance Licensing Application

The foreign corporation must submit an application to the BMA for review by the Assessment and Licensing Committee.

The procedure to be followed and the information and documents to be provided in support of the Insurance Licensing Application are similar to those that apply in the case of an insurance license application made by a company initially incorporated in Bermuda.¹

Particular care should be taken to identify which class of insurer under the Insurance Act best fits the insurance business expected to be carried on by the foreign corporation upon its continuance in Bermuda.

Once the Insurance Licensing Application has been approved by the BMA, the foreign corporation will be registered as an insurer in Bermuda upon continuance.

3.3 Evidence that all necessary authorisations required under applicable foreign law have been obtained

The foreign corporation must obtain all necessary authorisations, if any, under the laws of the jurisdiction in which it was incorporated or is presently registered in order to enable it to continue as an exempted company registered in Bermuda.

In terms of internal corporate approvals, the laws of the jurisdiction of incorporation or current registration typically require that the continuance in Bermuda should be approved by the Board of Directors and/or shareholders of the foreign corporation.

Relevant governmental and regulatory authorisations will include any necessary authorisations of a local commercial or corporate registry and, given that the foreign corporation under discussion in this memorandum will be an insurance company, the approval or no-objection of the authority that licenses, regulates and supervises the foreign corporation in the carrying on of its insurance business.

The foreign corporation must provide evidence that all such authorisations have been obtained and that the continuance of the foreign corporation in Bermuda is permitted under applicable foreign law. The legal opinion of counsel, referred to in 3.1 (see the third bullet point), above, will need to opine on and confirm these matters.

¹ For more details, see Kennedys' Bermuda law memoranda on Commercial Insurers, Captive Insurers and Special Purpose Insurers and Collateralized Insurers, available on our website: <https://www.kennedyslaw.com/where-we-are/united-states-and-bermuda/bermuda>

In addition, for compliance with Bermuda law, the foreign corporation, acting through its Board of Directors and/or shareholders (as applicable) will need to:

- Adopt bye-laws conforming to the requirements of Bermuda law
- Appoint a Bermuda resident director, secretary or resident representative, for compliance with the Companies Act
- Appoint a provider of a registered office address in Bermuda (at which statutory registers, minutes and other books and papers must be maintained)
- Appoint a principal representative in Bermuda pursuant to the Insurance Act
- Appoint Bermuda service providers and staff and lease premises so far as necessary to demonstrate that the foreign corporation will, on being continued in Bermuda, meet and comply with the requirements under:
 - The Insurance Act to maintain a principal place of business or head office in Bermuda, and
 - The Economic Substance Act 2018 to maintain a substantial economic presence in Bermuda.
- Change the company's name (if necessary) to comply with the requirements of Bermuda law.

3.4 Registration of continuance by the Registrar of Companies

The foreign corporation will be continued in Bermuda as an exempted company upon registration by the Registrar of Companies of a memorandum of continuance prepared and filed by the foreign corporation. In terms of timing, it should be noted that:

- The application for registration of the memorandum of continuance should be coordinated with the application for registration of discontinuance in the jurisdiction of incorporation or current registration so that discontinuance and continuance occur simultaneously, and
- Exchange Control and insurance licensing approvals should be obtained prior to applying for registration to avoid any delay.

The application to register the memorandum of continuance should be filed with the Registrar of Companies with the following supporting documents:

- If already obtained at the time of the submission of the application, a copy of both Exchange Control and insurance licensing approvals
- Name reservation
- Original executed Memorandum of Continuance (Form 2d)
- Original executed Declaration of Business and Share Capital (stating the intended business of the foreign corporation and the amount of its assessable capital upon continuance (being authorised share capital and share premium account))
- Original executed Notice of Registered Office (Form 13)
- The requisite registration fee (to be confirmed at the time of the registration, comprising the application fee and registration fee), and
- The annual government fee in connection with the present year (please see below).

The annual government fee is based on assessable share capital (i.e. authorised share capital plus share premium). It must be paid at the time of making the application to the Registrar of Companies to register continuance of the foreign corporation. The continued company will, in March of each year following continuance, pay the applicable annual government fee when filing a declaration as to its principal business and assessable capital.

After review of the application and enclosed documents, if the Registrar of Companies is satisfied that the foreign corporation will be in compliance with the Companies Act, he will register the memorandum of continuance and issue a deposit of the memorandum of continuance and certificate of continuance. A copy of the certificate of continuance must be forwarded to the competent authority (typically the local commercial or company registry) in the jurisdiction from which the foreign corporation has been continued.

3.5 Effect of registration of continuance

Upon registration of the memorandum of continuance by the Registrar of Companies:

- The foreign corporation will become an exempted company to which the Companies Act, the Insurance Act and any other laws in Bermuda apply as if it had originally been incorporated in Bermuda on the date of the registration.
- The memorandum of continuance will be regarded as the memorandum of association of the foreign corporation, as continued as a Bermuda company, in lieu of its original memorandum of association (or any other equivalent document).
- The certificate of continuance will be regarded as the certificate of incorporation of the foreign corporation.
- The continued company shall, as soon as practicable after the date of continuance, ensure that it has adopted bye-laws complying with the Companies Act and other provisions of Bermuda law.

3.6 Consequences of continuance

Upon continuance of the foreign corporation as a company under the Companies Act:

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

The registration of the continuance of the foreign corporation shall not be deemed to:

- Create a new legal entity, or
- Prejudice or affect the continuity of the body corporate which was formerly a foreign corporation, now a company continued in Bermuda.

The Companies Act provides that Bermuda courts are to apply the laws of evidence and the rules of procedure with the intent that no claimant against the continued company shall be prejudiced in pursuing in or under the laws of Bermuda a bona fide claim that existed prior to the date of continuance and which could have been pursued under the laws then governing the foreign corporation.

4 Discontinuance

The Companies Act permits an exempted company to discontinue under the laws of Bermuda and be continued in a jurisdiction outside Bermuda as if it had been incorporated under the laws of that other jurisdiction. The procedure is set out in the Companies Act. Discontinuance is permitted for exempted companies registered as insurers under the Insurance Act provided that, in addition to following the procedure set out in the Companies Act, they also obtain the 'non-objection' of the BMA.

The requirements of discontinuance under the Companies Act are:

- That discontinuance has been approved by the company in accordance with the Companies Act.
- The jurisdiction in which the company is to be continued is:
 - An appointed jurisdiction, or
 - Approved by the Minister of Finance (Minister) upon application by the company for the purposes of the discontinuance of the company out of Bermuda.
- A statutory declaration must be sworn by a director of the company stating that the company is solvent and can meet all of its liabilities and that discontinuance will not affect the interests or rights of creditors and shareholders of the company.
- An irrevocable deed poll must be executed on behalf of the company and by all of its directors pursuant to which:
 - The company and each of its directors may be served with legal process in Bermuda in any proceeding arising out of actions or omissions of such company prior to the discontinuance and provision is made for the appointment of a person within Bermuda as agent for such company for the service of process for a period of not less than three years from the date of discontinuance and for a signed acceptance of the appointment, or
 - The company and each of its directors may be served with legal process at a specified address in the United Kingdom, the United States of America or any appointed jurisdiction, and whereby the company and such directors submit to the non-exclusive jurisdiction of the courts of that country or jurisdiction.
- At least fourteen days prior to the effective date of discontinuance, the company must advertise its intention to discontinue in Bermuda and continue in the foreign jurisdiction in an appointed newspaper in Bermuda and in a national newspaper in each jurisdiction in which it carried on a substantial part of its trade or business activities.

As noted above, companies registered as insurers under the Insurance Act need to obtain the 'non-objection' of the BMA in addition to following the procedure under the Companies Act.

4.1 Corporate approval of discontinuance

The power of a company to discontinue under the laws of Bermuda may be exercised by:

- A resolution of the members or each class of members passed in general meeting approving the discontinuance, provided that at any such meeting each share of the company shall carry the right to vote in respect of the discontinuance whether or not it otherwise carries the right to vote, and
- Such manner as may be authorised by the bye-laws of the company.

The bye-laws of Bermuda exempted companies frequently provide that the power to discontinue may be exercised by resolution of the Board of Directors approving the discontinuance.

4.2 Jurisdiction of continuance

As noted above, the jurisdiction in which the company will be continued must be an appointed jurisdiction or a jurisdiction approved by the Minister. A list of appointed jurisdictions is maintained on the website of the Bermuda Registrar of Companies (www.roc.gov.bm).

Ministerial approval of the non-appointed foreign jurisdiction may be sought by application and may be granted if the foreign jurisdiction satisfies certain criteria. The application should be supported by a legal opinion providing that upon its continuance in the jurisdiction:

- The property of the company will continue to be the property of the company as continued in the jurisdiction.

- The company as continued in the jurisdiction will remain liable for the obligations of the company while domiciled in Bermuda.
- Continuance in the jurisdiction will not affect any cause of action, claim or proceeding by or pending against the company while domiciled in Bermuda.
- Any civil, criminal or administrative action or proceeding by or pending against the company may be continued by or against the company as continued in the jurisdiction.
- Any conviction against, or any ruling, order or judgment in favour of or against the company may be enforced by or against the company as continued in the jurisdiction.

In addition, the legal opinion should confirm that:

- The jurisdiction has reciprocal legislation to permit the company to continue back to Bermuda, and
- The jurisdiction is a member of a recognised international standard-setting body such as the International Association of Insurance Supervisors, International Organisation of Securities Commissions, Group of International Insurance Centre Supervisors or Group of International Financial Centre Supervisors.

The Minister will liaise with the BMA to ensure that the company has obtained the necessary non-objection to the discontinuance.

4.3 BMA non-objection

As noted above, companies registered as insurers under the Insurance Act must obtain the non-objection of the BMA to the discontinuance.

An insurer applies to the BMA for its non-objection by bespoke letter. The letter should contain an overview of the insurer (e.g. class of insurer, the type of insurance business written and the identity of its beneficial owners), the reason for discontinuing, the name of a person at the insurance regulator of the foreign jurisdiction that the BMA can contact and a statement that no creditor or policyholder will be adversely affected. Such statement should be documented with examples of the communications sent to the creditors and policyholders of the company to inform them of the proposed discontinuance and sample replies evidencing non-objection and/or consent to the discontinuance.

4.4 Application to Registrar of Companies to register discontinuance

The discontinuance of a company under the laws of Bermuda is effective upon registration of the discontinuance by the Registrar of Companies. The application to register the discontinuance is made in two stages.

First, the company must file a notice of discontinuance with the Registrar of Companies on or before the intended effective date of discontinuance including the following information:

- a) The effective date of discontinuance
- b) The name of the jurisdiction in which the company will be continued, and
- c) The address of the registered office or principal business of the company in the jurisdiction of continuance.

Copies of the statutory declaration, irrevocable deed poll, legal notice published in Bermuda and other relevant jurisdictions (see above) and BMA non-objection must be enclosed with the notice of discontinuance and the company must pay the appropriate registration fee. The registration fee is the same as the annual government fee applicable to the company, which varies depending on its assessable capital.

Second, once the company has been continued in the foreign jurisdiction by registration by the appropriate authority in that jurisdiction or by other means, an instrument of continuance or other relevant document issued by the authority evidencing continuance must be filed with the Registrar of Companies. The instrument of continuance or other document must be filed within 30 days of the date of issue. On receipt of the instrument or document, the Registrar of Companies will issue a certificate of discontinuance at which point the company will cease to be registered in Bermuda.

4.5 Effective date and effect of discontinuance

The effective date of discontinuance is the date on which the company's continuance in the foreign jurisdiction is effective pursuant to the laws of the foreign jurisdiction.

The Companies Act provides that the discontinuance and continuance shall not be deemed to create a new legal entity or affect the continuity of the company which was formally the company subject to the Companies Act. The Companies Act ceases to apply to the company (except as required by the provisions of that act) on the effective date of discontinuance.

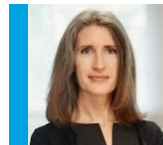
Further information

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

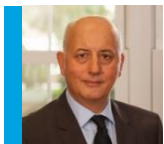
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