

based. A possible reading of *Telstra v APRA* is that the court was hindered in its ability to interpret a difficult statutory provision by an inability to obtain clear guidance on the relationship between that provision and the relevant Convention provisions. It may be that in proposing to implement art. 8 by the bifurcation of the exclusive right contained in it into two free standing rights, the Australian Government is creating another problem of this nature for its courts. (The European Commission's *Communication on Copyright and Related Rights in the Information Society*, does not seem to envisage such a bifurcation. See also, *WIPO Diplomatic Conference concludes its work*, 20 December 1996, <http://europa.eu.int/comm/dg15/en/intprop/intprop/1244.htm>.) The more often such problems arise, the less likely it becomes that substantive harmonisation will be achieved.

Bearing all this in mind, and also taking into account the attractiveness of communications carriers as defendants in a breach of copyright action, it seems unfortunate that the Australian Government is not, at this stage, contemplating an express legislative exemption for communications carriers. Although an exemption from liability for authorising

infringement would arguably go further than the agreed statement in relation to art. 8 of the WIPO Copyright Treaty, this might not be a very serious problem. It is common for legislation to go further than the minimum requirements laid down in international conventions such as the Berne Convention. Serious difficulties only seem to arise when it is unclear, as it was in *Telstra v APRA*, whether the provision is intended to go further than Convention provisions or the consensus represented by an agreed statement. In any case, it is to be hoped that the development of an international consensus on the complete exemption from copyright liability for communications carriers is not too far away. 

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The Bahamas

Doing business: what investors (and their lawyers) need to know

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With a skilled, literate workforce, good communications, a stable parliamentary democracy, an ancient legal system based on the common law, an ideal location less than 50 miles from the North American mainland, and excellent, salubrious weather year round, the Bahamas is the place to invest. The renovation and creation of exciting new hotel facilities at Atlantis Paradise Island by Sun International Ltd, a company operated by the developers of Sun City in South Africa, and the refurbishment of the hotels on Cable Beach by the Sandals and Breezes hotel chains have given a boost to the Nassau area. The arrival of the Hong Kong conglomerate Hutchinson-Whampoa Ltd. promises to expand the fine port facilities and improve the hotel industry of Freeport, Grand Bahama.

Under a liberal investment policy, the Bahamas Government fosters a business and investor friendly environment. As a means of cutting the red tape and facilitating the coordination among the relevant government agencies, the Bahamas Investment Authority (BIA) has been established as a 'one-stop-shop' for investors. For major investment projects, the BIA prepares the papers submitted for approval to the National Economic Council (NEC) which consists of major government ministers. To expedite an investment project, it is nevertheless wise and advisable to retain an attorney in the Bahamas.

This article touches on immigration, exchange control, the targeted sectors, investment incentives, preferential trade agreements, reserved sectors, real estate and the international financial centre, especially international business companies (IBCs), asset protection trusts (APTs) and additional areas of commercial law reform.

IMMIGRATION

The law relating to immigration is found in the *Immigration Act 1967* Ch. 179 as amended and the regulations made pursuant to s. 44 thereof. Section 5 of the Act provides for the constitution of a Board of Immigration comprised of persons holding office as Ministers and presided over by the Prime Minister. According to s. 6, the functions of the Board include the exercise of a general supervision and control over matters concerning or connected with the entry of persons into the Bahamas, and the residence and occupation in the Bahamas of persons who are not citizens of the Bahamas or permanent residents.

As a developing country, the Bahamas seeks to provide increased employment opportunities for Bahamians and to employ school and university graduates in increasingly diverse economic sectors. But the Government welcomes non-Bahamians with specialised skills and expertise which are not otherwise locally available. Normally, such persons will be involved in business enterprises which will give rise to the employment of Bahamians, for example in banking, hotels or agribusiness. Pursuant to the Government's Bahamianisation policy, an expatriate will not be given permission to work in a position for which a suitably qualified Bahamian is available.

In applying for a work permit, the prospective employer should:

- advertise for three days in the local press to ascertain the availability of any Bahamians suitable to take the post;
- apply for and obtain a certificate from the Labour Exchange stating that there is no qualified Bahamian to fill the position;
- furnish to the Immigration Department the labour certificate, a copy of the advertisement, and the results of interviews arising from it.

The applicant must complete and submit the prescribed application form I and furnish the additional documents referred to therein, including character and financial references, medical and police certificates, signed photographs and educational diplomas. It is important to note that the prospective employee should not be present in the Bahamas at the time when the application is made. Once all the paper work is in order, applications can take eight weeks to process and, in some cases, considerably more.

The cost of a work permit varies from \$250 for a farm worker to \$10,000 for a senior professional person. Work permits are usually granted for one year in the first instance but occasionally for periods of up to three years for senior personnel. Renewal of a work permit is not automatic. It requires an application form usually supported by copies of the re-advertisement, a fresh labour certificate, the employee's National Insurance number and proof that National Insurance contributions have been made by both the employer and employee. Approvals or renewals are often endorsed to the effect that the employee is expected to train or be replaced by a Bahamian understudy after a suitable period of time. Renewals after a period of five years are more difficult to obtain as it is expected that a Bahamian will have been trained to take up that position. A bond is required to be executed by each person employing a non-Bahamian to ensure the repatriation of that employee and his dependants and to discharge any public expenses, including medical expenses. Annual residence without the right to work, and permanent residence either with or without the right to work, may also be sought from the Immigration Department. Commonly, when one applies for permanent residence and the right to work, permanent residence is granted with the right to work in the investor's own business, and not in other businesses in competition with Bahamian employees.

The cost of annual residence is \$1,000, and the cost of permanent residence is a one time fee of \$5,000, with a fee of \$20 for each independent. Under the national investment policy, accelerated consideration is given to applications for annual or permanent residence for major international investors and fit and proper owners of residences valued at \$250,000 or more.

A certificate of permanent residence may be revoked by the Board if the holder:

- has so conducted himself that in the opinion of the Board it is not in the public interest that he should continue to enjoy the privilege conferred by the certificate;
- has been ordinarily resident outside the Bahamas continuously for a period of three years;
- has been imprisoned for a period of one year or more;
- being the wife of a permanent resident, becomes permanently separated or divorced;
- has obtained the certificate by means of fraud.

Section 13 of the Immigration Act provides that the discretion of the Board under this section is absolute. Investors who buy second homes in the Bahamas are now eligible for an annual Home Owners Resident Card, under s. 11 of the *International Persons Landholding Act 14/93*. The card entitles the owner, his spouse and minor children to enter and remain in the Bahamas for the duration of the validity of the card.

EXCHANGE CONTROL

The *Exchange Control Regulations Act 1952* Ch. 330 and the regulations made thereunder in 1956, provide that finance regulations may be made for the purpose of controlling, buying, selling and dealing in gold, foreign currency, foreign exchange and securities.

The regulations are administered by the Exchange Control Department of the Central Bank. The objectives are to control and maintain the country's reserves of foreign currency, and assist in supporting the value of the Bahamian dollar, which for many years has been kept at par with the US dollar.

These objectives are achieved by:

- regulating the dealings of residents and domestic Bahamian companies in foreign currencies;
- regulating the dealings of residents with non-resident companies and individuals.

When someone is doing business entirely outside the Bahamas but locates to the Bahamas for, say, tax or invoicing reasons, the vehicle of choice is the Bahamian international business company (IBC), which is exempt from exchange control regulations. An IBC requires no permission to set up a US or Canadian dollar or other foreign currency account.

For exchange control purposes, individuals and companies are divided into two distinct categories, resident or non-resident. Residents include Bahamian nationals residing in the Bahamas, companies beneficially owned by Bahamians, foreign nationals who are permanent residents with a right to work, and Bahamian or foreign companies with operations in the Bahamas. Non-residents include foreign nationals, companies beneficially owned by non-Bahamians and trading abroad and in some cases foreign nationals living in the Bahamas with a right to work in the Bahamas.

Residents are restricted in the purchase of foreign currency and may not maintain foreign currency accounts or remit foreign currency abroad without the approval of the Exchange Control Department. Residents may only invest in foreign securities through the investment premium dollar market and guarantee the performance of foreign currency obligations after having obtained the requisite approval of exchange control. Non-Bahamians who are gainfully employed in the Bahamas for a year or more are regarded as 'temporary residents'. Such individuals are eligible for certain exceptions which permit them to retain foreign currency accounts, as well as existing non-Bahamian assets, and to remit and repatriate assets on leaving the Bahamas.

Bahamian and resident companies are granted personal allowance cards or 'dollar cards' to permit them to purchase foreign currency drafts up to \$2,000 per annum for the payment of, for example, credit card purchases. A further allowance is permitted of \$1,000 per annum for personal travel purposes and permission is readily granted to pay for business travel, medical and educational purposes.

Receipts of foreign currency by Bahamian individuals or companies must be converted into Bahamian currency whether they are from the sale of merchandise or services.

TARGETED SECTORS

Under the national investment policy there are a number of areas especially targeted for overseas investors. These sectors

include, but are not limited to: touristic resorts; upscale condominium, time-share and second-home development; the international business centre; marinas; information and data processing services; assembly industries; high-tech services; ship registration, repair and other services; light manufacturing for export; agro-industries; food processing; mariculture; banking and other financial services; captive insurance; aircraft services; pharmaceutical manufacture; and off-shore medical centres.

Joint ventures with Bahamian partners are encouraged. Such partners may be chosen by the investor in his absolute discretion.

INVESTMENT INCENTIVES

A number of concessions, such as customs duty exemptions and relief from real property tax, are made available in the investment incentive legislation. The legislation includes:

- the Free Trade Zone Act Ch. 300;
- the Investment Incentive Act 17 of 1991;
- the Spirits and Beer Manufacturers Act Ch. 337;
- the Industries Encouragement Act Ch. 301;
- the Hotels Encouragement Act Ch. 263;
- the Tariff Act Ch. 269;
- the Export Manufacturing Act 1 of 1990;
- the Hawksbill Creek Agreement Act Chs. 214 and 244.

PREFERENTIAL TRADE AGREEMENTS

By locating in the Bahamas, investors can take advantage of preferential trade agreements available in the Bahamas as a developing country. These agreements include the Lomé Convention, the Generalised System of Preferences (GSP), the Caribbean Basin Initiative (CBI), and Caribcan. Access is also available to the Overseas Private Investment Corporation (OPIC) and the Canadian Overseas Insurance Programme.

RESERVED SECTORS

A number of sectors are reserved for Bahamians. These sectors include: wholesale and retail operations; commission agencies engaged in the import/export/trade; real estate and domestic property management agencies; domestic newspaper and magazine publication; domestic advertising and public relations firms; nightclubs and restaurants except speciality, gourmet and ethnic restaurants; restaurants operating in a hotel, resort complex or tourist attraction; security services, domestic distribution of building supplies; construction companies except for special structures for which international expertise is required; personal cosmetic/beauty establishment; shallow water scale-fish, crustacea, molluscs and sponge-fishing operations; auto and appliance service operations; and public transportation.

REAL ESTATE

Investors are encouraged to buy second homes in the Bahamas. For the purpose of acquiring real estate, there are two primary categories under the *International Persons Landholding Act 14/93*, which came into force on 1 January 1994:

- the person who purchases five acres or less;
- the person who purchases in excess of five acres.

In the first category, no government approvals are required, although the property must be registered with the Investments Board. In the second category, non-residents may not acquire

real estate in the Bahamas in excess of five acres, either in their own names or through a domestic Bahamian company, without first obtaining the approval of the Investments Board.

In both cases it is wise to obtain the approval of the Exchange Control Department, commonly known as 'approved investment status'. Once this status has been obtained, it ensures that capital, profits, interest and dividends can subsequently be repatriated with the sanction of the Exchange Control Department. This does not create a binding obligation on the Exchange Control Department but rather a willingness to permit conversion subject to the availability of sufficient reserves.

Non-residents intending to acquire shares in Bahamian companies must also obtain similar permission. Investment in the Bahamas by non-Bahamians is encouraged and permissions are granted quite liberally. Evidence of conversion of the foreign currency into Bahamian currency is normally required and should be furnished at the completion of the transaction. In certain instances where these provisions are overlooked or there was some genuine reason why prior approval was not obtained, a certificate of validation can be obtained validating the transaction under the regulations, but not necessarily under any other applicable law.

Apart from the foregoing, in recent years the thrust has been in five principal areas: regular companies, IBCs, trusts, mutual funds and limited partnerships. We shall touch here on the IBC and the Asset Protection Trust (APT).

THE INTERNATIONAL BUSINESS COMPANY (IBC)

IBCs are limited to companies which do not carry on business with persons resident in the Bahamas, do not own or lease Bahamian real estate (other than for use as their offices), do not carry on banking or trust business and do not carry on insurance or reinsurance business. This is set out in s. 5(1) of the *International Business Companies Act 2/90* ('the IBC Act'). (See by the author 'Bahamas International Business Company: An Overview' (1991) 19 *International Business Lawyer*, p. 433-434; and 'Bahamas International Business Companies Act 1989', (1991) 3 *Caribbean Law and Business*, p. 43.)

An IBC may have as few as two subscribers (s. 3, 12(3) and 13(2)), must at all times have a registered agent in the Bahamas (s. 39) and need have only one director, who may be an individual or a company (s. 41). Particulars of an IBCs shareholders, officers and directors need not be filed with the Registrar of Companies in Nassau. Directors' and members' meetings may be held within or outside the Bahamas (s. 47(1) and 58(1)) and participation may be by telephone or by other electronic means (s. 47(2) and 58(3)).

An IBC may adopt pre-incorporation contracts within 90 days of its formation (s. 68(2)), and bearer shares may be issued. Companies already incorporated in the Bahamas or companies incorporated outside the Bahamas may convert to and continue as IBCs, notwithstanding any provision to the contrary in the laws of the jurisdiction under which they are incorporated (s. 82).

An IBC is exempted for 20 years of the date of incorporation from any business licence fee, tax on income and distributions, corporation, capital gains, estate, inheritance, succession, or gift, tax, rate, duty, levy or other charge, stamp duty and

exchange control regulations (s. 109). Exemption from exchange control regulations means that IBCs may be incorporated, their shares may be issued and transferred and they may open and operate foreign currency bank accounts without first obtaining exchange control permission from the Central Bank of the Bahamas.

The IBC Act described as 'the jewel in the crown of the current legislative programme for the financial services sector', should be looked at in the broader commercial and legislative context.

With advantages of low pricing, innovative financial products (including IBCs), political stability, excellent communications and a qualified corps of lawyers, accountants and other professionals, the Bahamas has enacted an IBC Act which, from all appearances, has very significantly increased its competitiveness as an offshore jurisdiction.

THE ASSET PROTECTION TRUST (APT)

Trusts are increasingly used to cover a professional's exposure to malpractice suits. Trusts are a superior choice to high insurance premiums which cut substantially into a professional's income. While a transfer to a trust may be subject to gift taxes, and a trust in favour of a spouse is subject to the risk of divorce, the other risks associated with a trust have now been substantially reduced by virtue of the *Fraudulent Dispositions Act 1/91* of the Bahamas, assented to by the Governor-General on 5 March 1991 and whose long title is *An Act to Amend the Law Relating to Dispositions made with an Intent to Defraud*. (A full treatment can be found in Peter D Maynard, 'Bahamas' Asset Protection Trust' (1992) 23 *Inter-American Law Review*, p. 837 See also, by the same author, 'Bahamas' Fraudulent Dispositions Act' (1993) 4 *Caribbean Law and Business*, p. 47).

A trust may be set aside if it is made to defraud creditors. Such persons may claim that the transfer of assets to the trustee was void as a fraudulent conveyance.

The Act facilitates the formation of asset protection trusts in the following ways:

- the burden of proof under Bahamian law rests with the creditors;
- the assets of the trust are safe as long as the cause of action against the trust arose after the trust was formed;
- a judgment in a US or other foreign court against the settlor is not enforceable against a Bahamian trustee;
- the creditor must institute independent proceedings in the Supreme Courts of the Bahamas;
- the settlor is not protected against contingent creditors of which he was aware, but from future claimants.

While the Act clearly invalidates a trust which was set up with the intent to defraud, it also designates a period of two years in which a creditor can challenge the trust. After that period the assets are safe.

The question of forced heirship encountered in respect of civil law countries is dealt with by the *Trusts (Choice of Governing Law) Act 33/89*.

ADDITIONAL COMMERCIAL LAW REFORM

While IBCs cannot conduct business in the Bahamas, the investor can avoid that limitation by forming, at a slightly higher cost, a regular company under the *Companies Act 18/92*. Such a company may carry on business anywhere in the world,

including the Bahamas. (For a comment on companies in a regional context, see by this author 'Harmonisation of Companies Laws in the Caribbean' (1982) *Journal of Business Law*, p. 421-425.)

Two additional important planks in the programme of financial products are the *Mutual Funds Act 6/95* and the *Limited Partnerships Act 1 15/95*. Steps are presently being taken to establish a stock exchange in the near future. Already the *Securities Board Act 5/95* has been passed.

In keeping with the government's war on drugs and the banking and financial sector's commitment to accept only clean money, the *Money Laundering Act 8/96*, modelled on the British legislation, establishes offences for money laundering. Furthermore, the *Bahamas Maritime Authority Act 25/95* attempts

ACTIVE REFORM AGENDA

In recent years, the commercial law reform agenda has been very active. The reform is directed at enhancing the products offered by the Bahamas as an international financial centre.

to upgrade the administrative machinery of the Bahamas as a leading ship registration centre.

A recent legislative thrust in insurance law reform has begun. The Bahamas government has promised a new insurance act. The first draft was returned for redrafting⁸ after extensive criticism by the insurance sector and interested professionals, including this author. Subsequently, it is anticipated that legislation will be drafted governing insurance intermediaries, such as brokers and agents. ('A New Legislative Framework for Insurance in the Caribbean' (1993) 8 *Journal of the Society of Fellows 1* Chartered Insurance Institute; and 'Multinational Insurance Companies in The Bahamas: Their Structure and Economic Impact' (1988) 9 *Company Lawyer*, p. 32-33.)

CONCLUSION

While the investor may come into contact with a number of requirements, ranging from immigration to the formation of a company, the requirements appear to be a seamless web expeditiously handled by attorneys.

A time tested slogan used in connection with tourism to the Bahamas is 'It's better in the Bahamas'. Having regard to the foregoing, one can paraphrase that by saying, 'It's better to do business in the Bahamas'. 🇧🇸

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