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# Investment Funds

Bahamas: Law & Practice  
Graham Thompson

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## Law and Practice

*Contributed by Graham Thompson*

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**Graham Thompson** has been one of the pre-eminent law firms in the Bahamas since 1950. The firm operates four offices located throughout the Bahamas and the Turks and Caicos Islands. The firm is well-regarded for its work with high net worth private clients, providing tailored advice, with internationally recognised expertise in trusts, foundations, private trust companies, wills and estates; this underpins the firm's successful practices in family law, offshore financial centres, banking and capital markets. Graham Thompson's key practice areas include: private clients, trusts and estates (estate and trust structuring, foundations, trust company licensing private trust companies); banking and finance (real estate financing, asset leasing and financing,

corporate finance, restructuring, financial services law and regulation, loans, debentures and mortgages, receivership); corporate, commercial and securities (capital markets, joint ventures, restructuring, liquidation and insolvency, mergers and acquisitions, pension schemes, private equity funds, unit trusts, investment funds, IPOs); property and development (hotels, resorts and mixed-use developments, condominiums and time shares, government approvals and exchange control, private and commercial mortgages, real property taxes, subdivision planning and structuring, second home acquisitions and sales, title insurance and opinions); and insurance (captive insurance, domestic and external insurance).

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## 1. Fund Formation

### 1.1 Formation of Investment Funds

The Bahamas is frequently used by advisers and managers for the formation of investment funds. Presently there are over 800 licensed and regulated investment funds, with numbers steadily increasing year after year.

The Bahamas' regulatory framework is flexible and accommodates a wide variety of strategies including pure hedge funds, money market, private equity, real estate and distressed debt. A large majority of investment funds on the register in The Bahamas are private funds for a small number of investors, typically employed by family offices and related investors. Of these private funds, management of family wealth tends to be the primary reason for establishment. There are, of course, a number of institutional funds with a long-term commitment to The Bahamas. The new Investment Funds Bill (the Bill), which is expected to be tabled in Parliament in Q1 of 2019, is set to attract more institutional clients with a focus on investment management and custody.

### 1.2 Raising Capital from Investors

Due to exchange controls in The Bahamas, established investment funds typically raise capital from international investors outside of The Bahamas. Investment funds can be organised to raise capital domestically, subject to the approval of the Exchange Control Department of the Central Bank of The Bahamas (the Central Bank). Whether this approval is necessary will depend on the currency of the investment fund.

### 1.3 Common Process for Setting Up Investment Funds

An investment fund can be licensed by the Securities Commission of The Bahamas (the Commission) or, save for a standard fund, by an unrestricted investment fund administrator in The Bahamas.

While The Bahamas has several different types of investment funds (which are discussed in further detail below), there are common documents required for all registration types, these include:

- an application form;
- an offering memorandum (or term sheet) which complies with the disclosure requirements in Schedule 1 to the Investment Funds Regulations;
- a subscription agreement which complies with the requirements in the Investment Funds Act;
- directors authorising resolutions;
- constitutive documents;
- due diligence on directors, senior officers, substantial shareholders, promoters, investment managers or investment advisers;

- certificate of compliance, issued by Bahamian counsel; and
- the prescribed application fee.

The Commission, in their discretion, may also request any other documents they feel are necessary to license or register an investment fund.

### 1.4 Regulation of Fund Structures

Under the current Investment Funds Act, 2003 (IFA), investment fund managers need not be licensed or registered in The Bahamas. However, once enacted, the Bill will require that all investment fund managers be licensed or registered in The Bahamas.

Licensing will be required for investment fund managers of standard funds or non-Bahamas based investment funds (NBBF) whose sole nexus to The Bahamas is the investment management of the NBBF.

Prior to the promulgation of the Commercial Entities (Substance Requirement) Act, 2018 (CESA), it was not common to have a fund manager carrying out significant activities in The Bahamas. This was due to a carve out in the Securities Industry Act, 2011 (SIA) which exempts fund managers from requiring to be licensed as a registered firm if the fund manager was incorporated under the laws of The Bahamas and solely managed investment funds established under the IFA.

The CESA requires that an investment fund manager that is incorporated or registered in The Bahamas under the International Business Companies Act, 2000 (IBC Act) demonstrate economic substance in The Bahamas. Economic substance is comprised of a two-pronged test, namely that (i) core income generating activities (CIGA) are carried out in The Bahamas, and (ii) that the investment manager is directed and managed in The Bahamas.

CIGA includes:

- the taking of business decisions on the holding and selling of investments;
- calculating risks and reserves;
- taking decisions on currency or interest fluctuations and hedging positions; and
- preparing relevant regulatory or other reports for government authorities and investors.

Given that a fund manager need not be incorporated in The Bahamas to manage a Bahamas fund, the CESA will not affect all fund managers who manage Bahamas funds. However, the CESA will impact the significant number of fund managers established as international business companies (IBCs) for private funds utilised for wealth management purposes.

### 1.5 Limited Liability

Investors in The Bahamas may benefit from limited liability depending on the underlying structure of the investment fund. There are six different types of underlying vehicles which may be used to establish an investment fund. These include IBCs, domestic companies, exempted limited partnerships, unit trusts, segregated accounts companies and investment condominiums. Liability may be limited either statutorily or contractually. Most vehicles established in The Bahamas do accord limited liability to investors; however, it is possible to incorporate or register a vehicle where the investors have unlimited liability. In practice, legal opinions on limited liability are not given, indeed they are rarely requested due to the clear statutory wording of the applicable legislation.

### 1.6 Common Tax Regimes

Generally speaking there is no direct taxation applicable to investment funds under the laws of The Bahamas, unless the fund holds real estate situated in The Bahamas. Taxes associated with Bahamas real estate holdings are borne by the fund, not the investor. There is no corporate income tax, capital gains tax or withholding tax in The Bahamas.

### 1.7 Investment Sponsors

The Bahamas is a popular jurisdiction for Brazilian clients. It is estimated that 60% of the funds currently licensed in The Bahamas are sponsored by Brazilian managers. The SMART Fund has driven this overwhelming interest due to the flexibility of the templates and cost effectiveness achieved through the ability of the investors to waive the audit. The Bahamas has capitalised on this interest by developing first a Brazilian-focused SMART Fund template called the SMART Fund 007 and most recently the ICON (as discussed in more detail below).

Bahamas investment funds are also favourably viewed by sponsors from Latin America, specifically Peru and Mexico. There are some very important US institutional funds which were attracted to the jurisdiction many years ago and remain here.

### 1.8 Disclosure Requirements

The IFA and the Investment Funds Regulations, 2003 (IFR) set out the disclosures to investors which must be contained in either an offering memorandum or a term sheet.

An offering memorandum is required for both standard funds and professional funds. A SMART Fund may elect to adopt a term sheet rather than a full-scale offering document which includes the pertinent details of the offering. The following are mandatory disclosures for an offering memorandum:

- basic details (address of fund, place and date of formation);

- investment objectives and restrictions;
- risks;
- names and addresses of all service providers (including directors/general partners) to the fund;
- characteristics of equity interests;
- application and redemption procedure;
- valuation of property and pricing;
- distribution policy;
- fees and charges;
- reports and accounts;
- warnings (as prescribed in the schedules to the IFR); and
- other general information.

Although not a challenge in some jurisdictions, in order to substantiate that the investment fund is operating in accordance with best practices, there are some SMART Funds that are choosing to adopt full-scale offering memoranda. This may be advisable if the parties are not related and the sponsors want to ensure that there is adequate disclosure of all material risks.

It should be noted that any amendments post launch must be filed with the Commission (as applicable) within 21 days.

### 1.9 Legal Forms

There are several types of entities that may be used to structure an investment fund in The Bahamas prior to licensing.

An IBC is the most commonly used underlying legal entity and is typically structured as a limited liability company. The IBC is flexible, easy to incorporate and requires no local directors. Unlike a unit trust, it has a legal personality and is able to sue and be sued in its own name.

A Segregated Accounts Company (SAC) can be an IBC or a local company and allows for the statutory segregation of assets and liabilities to individual accounts. By way of example, each account may invest in different asset classes, or different strategies. It would be possible for one account to take a long short strategy while another account may invest in real estate. The returns of each account are confined to the investors of each account and there is no cross-contamination between accounts in terms of liabilities.

An Exempted Limited Partnership (ELP) is made up of one or more general partners and one or more limited partners. The general partner is responsible for the investment and management of the assets of the ELP, and in the event that assets are inadequate, is liable for all debts and obligations of the ELP. The limited partners are not liable for debts and obligations, except as provided in the partnership agreement. At least one general partner is required to be a company incorporated under the IBC Act or a person resident in The Bahamas.

An ELP is a common structure for US master-feeder funds with a US entity (usually a Delaware corporation) acting as general partner. Limited partnership interests would be subscribed for by feeder fund investors who invest all of its assets in limited partnership interests of the ELP.

A Unit Trust (UT) is a common law trust managed by a unit trustee. A UT does not possess a legal personality. The trustee represents the fund with units distributed to investors as evidence of their participation in the fund.

An ICON was modelled after the Brazilian condominium which has formed part of the Brazilian civil code for over 90 years and was developed specifically for the Brazilian market. The ICON is a contractual arrangement between investors pooling assets for the purposes of operating as an investment fund with the fund's administrator acting for and on behalf of the fund in all matters. The ICON has no corporate personality, but is deemed to be able to hold assets in its own name when represented by its general administrator.

### 1.10 Regulatory Status

The IFA establishes four classes of investment funds: standard funds, professional funds, SMART funds, and recognised foreign funds.

The standard fund is a highly regulated investment vehicle designed to operate as a traditional collective investment scheme. No investor qualifications (eg, as net worth or minimum investment) are mandated for standard funds and for this reason they are often used for 'retail' funds. Further, there are no limits on the number of investors in a standard fund. However, because the interests in a standard fund may be so broadly offered, a standard fund may only be licensed by the Commission.

A standard fund must have a full roster of service providers, including an administrator, an investment manager, an auditor and a custodian.

Interests in a standard fund must be offered via an offering document, and there are express requirements as to its contents and the required disclosures.

A professional fund may only be offered to investors meeting eligibility requirements under the IFA and may be licensed by an unrestricted investment fund administrator (which considerably speeds up the set-up process) or by the Commission. Eligible investors are:

- a licensed bank or trust company;
- a registered or otherwise regulated broker-dealer or firm of security investment advisers;
- a licensed insurance company;
- a licensed or registered or otherwise regulated investment fund;

- a natural person with net worth (or joint net worth with spouse) in excess of USD1 million;
- a natural person with annual income in excess of USD200,000 (or joint income with spouse in excess of USD300,000) for the last two years with reasonable expectation of the same income for the current year;
- a trust with total assets in excess of USD5 million;
- any entity in which all equity owners satisfy foregoing requirements; and
- any entity with net assets in excess of USD5 million.

A SMART Fund is designed to permit innovative and flexible structuring of investment funds. The framework allows for any institution to propose a template for adoption as a SMART Fund rule, with specific features distinguishing it from other templates. There must be a valid business case presented to the Commission for the adoption of a new template. Presently there are seven templates. Each template will have been proposed by industry to address market needs. For instance, SMF006 was implemented as a result of the 2008 financial crisis to enable segregation of toxic assets. SMF007 was introduced to mirror the investment requirements of the Brazilian Multi-Mercado Fund and was considered to be more institutional-focused than other templates because of the larger number of investors and the minimum initial investment.

SMART Funds may be licensed by an unrestricted investment fund administrator or the Commission. Key features of the SMART Fund regulatory scheme common to each model include the prospect of using term sheets, rather than full-scale offering documents and the opportunity in certain instances for shareholders to waive an annual audit requirement. The different models of the SMART Fund are set out below.

- SMF001 – investors must be customers of the promoter and party to a discretionary management agreement with the promoter.
- SMF002 – limited to no more than ten investors who must all be qualified to invest in a professional fund, a majority of whom are afforded the right to appoint/remove the fund's operators.
- SMF003 – pre-existing exempt fund under former legislation; may have no more than 15 investors who by majority can remove operators of the fund.
- SMF004 – no more than five investors; an administrator is not required. This is the most common vehicle used for related investors and as an investment vehicle for family offices.
- SMF005 – no more than five investors who must all be qualified to invest in a professional fund.
- SMF006 – investor must be qualified to invest in a professional fund; used to 'side-pocket' toxic or illiquid assets.
- SMF007 – up to 50 investors, each making a minimum investment of USD500,000 or equivalent. SMF007 was

specifically designed to accommodate structuring for Brazilian managers.

A recognised foreign fund is an investment fund licensed or registered in a prescribed jurisdiction and not suspended from operation, which is to be offered to investors in The Bahamas. It is deemed Bahamas-based by virtue of its relationship with a local service provider. It is required to register directly with the Commission. This category of fund will be abolished when the Bill is enacted.

A non-Bahamas based fund is an investment fund whose sole nexus to The Bahamas is through its sale of interests in or from The Bahamas. An NBBF may not have any service providers (eg, investment manager, administrator, custodian) within The Bahamas. It is required to apply for the appointment of a local representative, and this representative must be approved by the Commission. When the Bill is enacted, the sale of equity interests will no longer create a nexus requiring a representative to be appointed. Instead, a representative will only be required to be appointed if the fund is administered or managed in or from The Bahamas.

An ICON is a contractual relationship between one or more participants who have pooled assets for the purposes of operating as an investment fund, and an investment condominium must be licensed as an investment fund under the Investment Funds Act. It may be formed to operate as an open-ended fund (in which participants can call for a redemption of their interests) or a closed-ended fund (in which they may not). The ICON does not possess legal personality but, when represented by its administrator, is able to hold assets in its own name, enter into agreements and sue or be sued in its own name.

### **1.11 Legal, Regulatory or Tax Legislative Changes**

There are several recent and forthcoming amendments which are applicable to investment funds and fund managers, the most important of these is that the IFA is due to be repealed and replaced in 2019 with the Investment Funds Bill, 2019. It is expected that the Bill will be passed into legislation before the end of Q2. The Bill's focus is clarifying the duties of directors and administrators; establishing standards that are AIFMD compliant to eventually allow The Bahamas to qualify for EU passporting; and to mandate the licensing and/or registration of fund managers in line with global standards.

The Removal of Preferential Exemptions Act, 2018 (RPEA) was enacted on 21 December 2018 and addresses the removal of ring-fencing provisions. The RPEA revokes preferential tax exemptions previously afforded to IBCs, executive entities, ELPs and ICONs on the Bahamas Company Register, prior to the commencement of the RPEA and which were deemed non-resident for exchange control purposes and thus previously enjoyed an exemption from all taxes from

the date of incorporation/registration, for a period of 20 years. These entities will now lose these preferential exemptions, effective three years from the date of commencement of RPEA (approximately 2021).

Newly incorporated entities will have no express statutory exemption from taxation in The Bahamas. The revocation of preferential exemptions is not expected to materially impact investment funds established in The Bahamas.

The CESA was enacted on 20 December 2018 and is expected to impact fund managers (as discussed herein). It is not expected to impact investment funds.

## **2. Fund Investment**

### **2.1 Types of Investors**

The types of investors in The Bahamas which predominantly invest in investment funds include institutional investors, high net worth individuals (HNWI), family offices and retail investors.

Institutional investors, HNWI and family offices that are non-resident for exchange control purposes may invest without restriction in any investment fund denominated in any currency other than the Bahamian dollar.

### **2.2 Legal, Regulatory and Investment Structures**

Investors in The Bahamas tend to be conservative, valuing fairly liquid investment funds which provide stable but lower returns. They tend to be agnostic about structure, unless the structure provides other benefits.

Non-Bahamian institutional investors tend to invest in more complex strategies, such as private equity funds and hedge funds. Here we see a combination of structures such as master-feeder involving a US master fund and a Bahamas feeder fund. Another popular vehicle is the SAC which allows multiple strategies to be run in a single fund, with statutory protection from cross-class liability and contamination. An SAC is also highly attractive for achieving economies of scale with the potential for shared costs and expenses.

For private equity funds in particular, the SMART Fund models provide particular advantages. The ability to waive the requirement to perform an annual audit allows the audit to be delayed until the occurrence of a liquidity event, which is highly advantageous from a cost and administrative perspective.

### **2.3 Legal, Regulatory or Tax Themes/Issues**

There are no significant legal, regulatory or tax issues faced by investors under the laws of The Bahamas. Note that as the majority of funds in The Bahamas are organised to raise

funds outside The Bahamas, there may very well be tax issues associated with an investor's home jurisdiction.

## 2.4 Restrictions on Investors

There are few restrictions on investors investing in funds in The Bahamas. Fund-specific investor qualifications are described under **1 Fund Formation**.

The Bahamas has an exchange control regime which restricts and regulates the conversion of Bahamian currency and is applicable to those deemed or designated resident for exchange control purposes. A resident in this context does not necessarily indicate a physical presence in The Bahamas, as there are a number of individuals and entities deemed or designated non-resident, even though they are physically present in The Bahamas. Citizens and permanent residents with an unrestricted right to work in The Bahamas are considered residents for exchange control purposes.

Should a resident investor wish to invest in an investment fund whose base currency is a currency other than Bahamian dollars, the investor must seek the prior approval of the Exchange Control Department of the Central Bank.

It should be noted that there have been recent relaxations to these policies issued by the Central Bank which now enable resident investors to invest in certain approved US dollar-denominated funds sponsored by regulated financial institutions in The Bahamas, without the investor seeking any approval.

## 2.5 Marketing Restrictions

With respect to marketing restrictions, the IFA explicitly states that an investment fund that wishes to sell its equity interests in or from The Bahamas must appoint a representative. The Bill contains no such restrictions; the Commission may issue policies or guidance in the future which address restrictions on marketing.

## 3. Regulatory Environment

### 3.1 Regulatory Regime

As mentioned previously, a fund manager or adviser incorporated in The Bahamas and managing and/or advising only Bahamas licensed investment funds is not required to be licensed or registered under the SIA. There is also no licensing or registration requirement under the IFA.

A fund manager incorporated in The Bahamas which intends to manage Bahamas funds and funds incorporated in other jurisdictions is required to be licensed. An application is made to the Commission consisting of an application form, due diligence, business plan containing three-year projections and all requisite policy and procedure manuals. Fund managers and advisers are required to have written policies

and procedures addressing AML/CFT, conflicts of interest, client classification/suitability, business continuity and general trading policies. A straightforward application typically takes up to 90 days; applications may become prolonged if the intended operations are complex or if there are even minor regulatory breaches (or investigations) uncovered by the Commission in the course of their due diligence which need to be responded to and addressed. As a point of practice, if there are any known regulatory issues, these should be fully disclosed at the outset with supporting documentation which evidences adequate resolution. The Commission is a conservative regulator and has demonstrated a preference for licensing and registering firms which have a regulated presence in an IOSCO A jurisdiction.

### 3.2 Territorial Reach of Regulators

Presently there are no restrictions for a fund manager registered in another jurisdiction to provide services to a fund in The Bahamas. As discussed herein, the Bill will mandate that a fund manager, whether incorporated in The Bahamas or elsewhere, shall be required to be licensed or registered in The Bahamas.

Under the Bill, if a fund manager is licensed or registered in a prescribed jurisdiction, they are only required to register with the Commission. This registration process is intended to be light touch. Licensing on the other hand contemplates a full-scale application process. It is expected that the provisions will follow those contained in the SIA; however, this firm does not have clarity on this process at this time.

### 3.3 Regulatory Approval

There is no restriction on the marketing of funds licensed or registered with the Commission.

There is a general prohibition on the marketing of funds (which would include cold-calling, circulation of materials which intend to induce a person to purchase equity interests in a fund, even on a reverse solicitation basis) which are not licensed or registered with the Commission. Under the IFA, an investment fund which intends to sell its equity interests in or from The Bahamas shall not offer its equity interests for sale, unless it has appointed a representative approved by the Commission.

However, there is a tolerated market practice which has been informally accepted by the Commission as constituting regulatory policy and this is demonstrated by the provisions in the Bill. The Bill removes the nexus created by the selling of equity interests in or from The Bahamas which previously existed under the IFA. An investment will no longer be required to appoint a representative solely by virtue of offering to sell equity interests in The Bahamas. In the interim, the tolerated market practice is that equity interests in investment funds which are not licensed or registered in

The Bahamas may be offered to a limited number of investors who are non-resident for exchange control purposes.

It should be noted that there are presently no formal policies or guidelines on the marketing of investment funds.

### **3.4 Authorisation of Marketing Activities**

See 3.3 Regulatory Approval.

### **3.5 Investor-Protection Rules**

See 3.3 Regulatory Approval.

### **3.6 Approach of the Regulator**

Generally speaking, the Commission is co-operative in its approach to regulatory questions. There have been challenges in receiving published guidance on regulatory matters, although they are inclined to respond to questions on a case-by-case basis. Although this may create issues from a regulatory interpretation and consistency standpoint, the Commission tends to be flexible and pragmatic in its approach. Licensing applications are typically dealt with punctually, although complex matters can lengthen timelines significantly.

With respect to enforcement actions, the Commission recently published its Examination Priorities for 2019, with a focus on sufficiency of a registered firm's anti-money laundering and counter terrorist financing (AML/CTF) processes and the business conduct and risk profile of systemically important entities. Historically, the Commission's enforcement powers have focused on business conduct and consumer protection. It is expected that the Commission will be more aggressive on AML/CTF breaches which is highlighted in their recent published policy on the Assessment of Administrative Penalties for Anti-Money Laundering and Counter-Terrorist Financing Infractions.

## **4. Fund Finance**

### **4.1 Access to Fund Finance**

While there is no restriction on investment funds established in The Bahamas accessing fund financing or leverage within The Bahamas, the banks and financial institutions do not commonly engage in providing this financing or leverage.

### **4.2 Borrowing Restrictions/Requirements**

An investment fund may borrow as part of its overall strategy, subject to full disclosure of its ability to borrow (including any restrictions and/or thresholds) being made in its offering document or term sheet.

### **4.3 Securing Finance**

See 4.2 Borrowing Restrictions/Requirements.

### **4.4 Common Issues in Relation to Fund Finance**

See 4.2 Borrowing Restrictions/Requirements.

## **5. Tax Environment**

### **5.1 Tax Framework**

As discussed herein, there are no applicable taxes to investment funds or, for that matter, to investors under the laws of The Bahamas at this time.

### **5.2 Tax Treaty Network**

Due to the absence of any direct taxation, The Bahamas has no double taxation treaties. Investment funds are therefore organised using a tax neutral platform, typically avoiding double taxation in any event.

The Bahamas is party to tax information exchange agreements and has adopted FATCA and the multilateral Convention on Mutual Administrative Assistance in Tax Matters which implements the common reporting standard.

### **5.3 FATCA and CRS Regimes**

For the purposes of this following section, capitalised terms used herein shall have the meaning ascribed in the relevant FATCA and CRS guidance notes.

Under the FATCA and CRS regime, a foreign financial institution (FFI) includes any entity which is regarded as an investment entity. An investment entity is any entity that primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer:

- trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc);
- foreign exchange;
- exchange, interest rate and index instruments;
- transferable securities;
- commodity futures trading;
- individual and collective portfolio management;
- otherwise investing, administering, or managing funds or money on behalf of other persons; or
- the gross income of which is primarily attributable to investing, reinvesting, or trading in financial assets, if the entity is managed by another entity that is a depository institution, a custodial institution, a specified insurance company, or an investment entity.

The FFI is required to report on its equity interest holders.

In the context of investment funds, the fund will likely satisfy one of the above investment entity tests, and therefore be an FFI. As an FFI, the investment fund reports on itself for the purposes of FATCA and CRS, reporting on its equity interest holders.

## 5.4 Tax Structuring Preferences of Investors

There are no applicable taxes to be paid in The Bahamas on allocations to and receipt of distributions by investors. Of course, as the majority of investors in Bahamian funds are not tax-resident in The Bahamas, an investor's home jurisdiction's tax rules must always be considered.

## 6. Miscellaneous

### 6.1 Asset Management Industry Bodies

The Bahamas Financial Services Board (BFSB) is a multi-disciplinary body which was established in 1998 as a PPP between the Government of The Bahamas and the financial services industry. BFSB is the main advocacy group for non-bank affiliated fund managers and advisers. The Association of Bank and Trust Companies (AIBT) represents the local branches and subsidiaries of international banks in The Bahamas and also is considered to be a strong lobbyist group for banks which are engaged in asset management activities (unlike the USA and other jurisdictions, banks are not required to spin off asset management activities via a dedicated entity which is licensed separately).

Both BFSB and AIBT are focused on promoting the sustainability of the financial services industry in The Bahamas with BFSB also having a dual mandate to market The Bahamas as an international financial centre globally.

### 6.2 Preference for Courts or Arbitration

Investment fund documents are generally drafted with clauses which submit disputes to the jurisdiction of the Bahamian courts. While this is the preference for many funds, The Bahamas is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and has a strong arbitral framework through the Arbitration Act. In practice, if arbitration clauses are incorporated into the fund documents, The Bahamas is not often the venue of arbitration, although it remains a seat of arbitration.

### 6.3 Level of Litigation/Arbitration

There are few cases which have been heard in the courts of The Bahamas relating to investment funds and investment fund managers. This tends to be an incident of the

funds industry in The Bahamas largely being comprised of private funds. To date, the most comprehensive analysis of administrators and directors of investment funds in The Bahamas is to be found in the decision of Justice Lyons in *Oceanic Bank & Trust Limited v MJ Select Global Limited*. Although the applicable legislation during this case was the predecessor to the IFA, the Mutual Funds Act, the decision is considered to be applicable to the current duties and obligations of administrators and directors under the IFA. The case established the applicable standard of care for directors of investment funds. Of course, the Bill rebalances the responsibilities between fund administrators, directors and fund managers; the IFA was generally considered to place too onerous a burden on administrators.

It should be noted that The Bahamas is a common law jurisdiction and courts lean heavily on precedents from other common law jurisdictions which, while not binding, are persuasive in their use. Therefore, despite the dearth of case law, practitioners are comfortable that courts in The Bahamas would generally follow cases in other major common law fund centres, to the extent that there are similarities in our statutes.

### 6.4 Periodic Reporting Requirements

An investment fund established in The Bahamas must comply with the annual reporting requirements set out in the IFR. These include making its annual audited financial statements available to investors within six months of the end of the investment fund's financial year and producing at least one report to the Commission containing an analysis of the fund's performance. If investors have waived the fund's annual audit, a feature available to SMART Funds only, the investment fund must give semi-annual performance reports to investors and to the Commission in lieu thereof.

### 6.5 Powers of Attorney

There are no limitations on an investor providing a power of attorney in favour of a fund manager; however, this firm is not aware that this is common practice in The Bahamas given the composition of its funds industry. To the extent that an investor has given an investment manager a power of attorney which allows the manager to exercise discretion and vote without consulting, this might be restricted by the IFA if the decision to be taken is potentially prejudicial to the interests of the investor. It is typical in most fund structures in The Bahamas for there to be a class of management shares which carry voting rights and investor shares which typically do not. It is also fairly typical for the investment manager to hold all of the management shares to enable them to make key, strategic decisions along with the directors. This level of control is disclosed in the offering memorandum, such that an investor has no expectation of participating in the management of the fund.

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