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Bahamas
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 conveniently located throughout The Bahamas and the Turks and Caicos Islands. The firm is well regarded for its work with high net worth private clients and provides tailored advice, with internationally recognised expertise in trusts, foundations, private trust companies, wills and estates, which underpins its 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, M&A, pension schemes, private equity funds, unit trusts, investment funds, IPOs); property and development (hotels, resorts and mixed-use developments, condominiums and timeshares, 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. Legal System

1.1 Legal System and Judicial Order

As a former colony under British rule, the foundation of Bahamian law and the legal system of The Bahamas is the common law of England.

The Bahamas is a parliamentary democracy based on the Westminster system of government consisting of three branches: the executive, a bicameral Parliament and the judiciary. The relationship between each branch is governed by the principle of separation of powers and the operation of each branch is enunciated in a written constitution.

The judiciary of The Bahamas comprises the Magistrates' Court, the Supreme Court, the Court of Appeal and the Judicial Committee of Her Majesty's Privy Council.

The Magistrates' Court is presided over by stipendiary and circuit magistrates who exercise summary jurisdiction in criminal matters and civil matters involving amounts not exceeding BSD5,000.00. Currently, there are 17 Magistrates' Courts throughout The Bahamas, with most located in New Providence (the most populous island in The Bahamas).

The Supreme Court bench consists of a Chief Justice and not more than 20 additional justices. The Supreme Court has unlimited original jurisdiction in civil and criminal matters, and such appellate jurisdiction as may be conferred upon it by law.

The Court of Appeal, which is the highest resident court within The Bahamas, is made up of not more than six justices of appeal, inclusive of its president, and has jurisdiction in criminal, constitutional and civil matters.

The Judicial Committee of Her Majesty's Privy Council is the highest court for The Bahamas, which sits in England to hear appeals from the Court of Appeal.

2. Restrictions to Foreign Investments

2.1 Approval of Foreign Investments

The prior approval of the government of The Bahamas is required before a foreign investor makes an investment within The Bahamas. All non-Bahamians are required to submit a formal investment proposal to the Bahamas Investment Authority (BIA), which serves as the secretariat of the National Economic Council and The Bahamas Investments Board.

Investment in Bahamian Business

The current investment policy reserves certain sectors of the Bahamian economy for investment by Bahamians, as follows:

- wholesale and retail operations;
- commission agencies engaged in the import/export trade;
- real estate and domestic property management agencies;
- domestic newspapers and magazine publications;
- domestic advertising and public relations firms;
- security services;
- domestic distribution of building supplies;
- construction companies, except for special structures for which international expertise is required;
- personal cosmetic/beauty establishments;
- commercial fishing within the exclusive economic zone of The Bahamas;
- auto and appliance service operations;
- public transportation inclusive of locally solicited charter boat tours; and
- landscaping.

The following sectors are reserved for foreign investment; the list is non-exhaustive and investors are encouraged to communicate their intended investment activity to the BIA:

- touristic resorts;
- upscale condominium, timeshare and second home development;
- information and data processing services;
- assembly industries;
- hi-tech services;
- ship 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
- offshore medical centres.

In addition to BIA approval, the Exchange Control Regulations and policies require that all foreign investment inflows are granted approval, that entities wholly or partially owned by foreign investors are designated as 'Resident' and that 'Approved Investment Status' is granted to foreign investors with respect to their investment.

Investments in Property

Subject to any exceptions in the International Person's Landholding Act, non-Bahamians acquiring real property or an interest in real property must first apply for a permit from the Investment Board. Eligibility for a permit includes a due diligence review of the intended purchaser.

2.2 Procedure and Sanctions in Case of Non-Compliance

Steps to Obtain Approval

A foreign investor's first step to obtaining BIA approval to invest in a business within The Bahamas is to present a detailed investment proposal to the BIA. The proposal should include explicit details regarding the nature of the investment, the island on which the investment/business would take place, due diligence and financial details regarding the beneficial owners, employment projections for Bahamians and non-Bahamians, whether work permits or any concessions under relevant legislation are required, and whether the investment will include the acquisition of land.

The proposal is reviewed by the BIA and where required, based on internal administrative policies, referred to the National Economic Council for a decision. This process may take between one and six months depending on the nature and complexity of the investment.

Following approval from the BIA, the investor will be directed to (i) comply with any other relevant legislation, (ii) make applications to the relevant ministries and departments to obtain the relevant approvals to undertake the proposed venture and (iii) apply for a business licence under the Business Licence Act. A business licence may be approved within three to five business days of receipt of an application with supporting information.

In addition to BIA approval, the investor must obtain the approval of the Central Bank of The Bahamas (the Bank), pursuant to the Exchange Control Regulations, to make the required investment for recognition of the beneficial owners of the enterprise and to be granted Approved Investment Status in relation to their foreign currency investment. The timeframe for this process is between two and eight weeks.

Consequences of Investing without Approval

In as much as the prior approval of the BIA and the Bank are respectively required before a foreign investor makes a capital investment within The Bahamas, a major consequence of investing without the requisite approvals is the inability of the investor to receive returns on capital.

The Bank, via the provisions of the Exchange Control Regulations Act and the Exchange Control Regulations, has wide powers to make orders to prevent capital transactions involving the movement of funds to and from The Bahamas. The Bank also regulates and may restrict the conversion of Bahamian dollars to a foreign currency in order to make capital returns to non-Bahamians, where the underlying transaction/investment did not receive required approvals.

Sanctions

Sanctions under the Exchange Control Regulations Act for non-compliance with the Exchange Control Regulations include (i) imprisonment for one year upon summary conviction and/or (ii) a fine ranging from BSD4,000.00 to a fine not exceeding three times the amount or value of the currency, security, payment, property, etc in question.

Where a foreign investor fails to obtain a business licence under the Business Licence Act, he or she may be liable upon summary conviction (i) to a fine of BSD5,000 and a sum of BSD100.00 for each day the offence continues subsequent to the date to which the conviction relates.

2.3 Commitments Required from Foreign Investors

Generally, the conditions attached to the approval of foreign investors are found within a Heads of Agreement executed between the government of The Bahamas and the foreign investor. In this regard, certain factors such as the sector of the economy being considered for foreign investment, the environment or infrastructure of the area or island being considered, the nature and scope of the foreign investment, the amount of jobs expected to be created and any applicable government concessions will help to determine the type of conditions for a particular foreign investment project.

For example, it is often the case that the government of The Bahamas will require within a Heads of Agreement that a certain number of jobs be filled by Bahamians, continuing education and training be made available to employees, suitable infrastructure and essential services be put in place and safety measures are implemented to protect a particular area or environment, just to name a few.

2.4 Right to Appeal

There is no specific legislative framework in place that gives investors the ability to challenge decisions if a particular investment is not authorised by the government of The Bahamas.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entities

The most common forms of legal entities within The Bahamas are companies incorporated under the Companies Act and the International Business Companies Act.

Some of the main characteristics of each type of company are outlined below.

Companies Incorporated Under the Companies Act

- Minimum number of persons required to incorporate – two.
- Minimum number of shareholders – two.
- Minimum number of directors – two for private companies; three for public companies.
- Minimum share capital – no.
- Liability of members – limited by shares, limited by guarantee, limited by both shares and guarantee or unlimited.
- Share classes – multiple classes allowed.
- Uses – local businesses, landholding, non-profits, private trust companies, etc.
- Registered office – yes.
- Registered agent – no.
- Management and governance – outlined in the constitutional documents but otherwise subject to any unanimous shareholder agreement and legislative framework.
- Filing with public registry – amongst other requirements pursuant to the legislation, an annual return that includes a list of the shareholders and a list of the directors and officers of the company is filed.

Companies Incorporated Under the International Business Companies Act

- Minimum number of persons required to incorporate – two.
- Minimum number of shareholders – one.
- Minimum number of directors – one.
- Minimum share capital – no.
- Liability of members – limited by shares, limited by guarantee, limited by both shares and guarantee or unlimited.
- Share classes – multiple classes allowed.
- Uses – local businesses, landholding, non-profits, private trust companies, etc.
- Registered office – yes.
- Registered agent – no.
- Management and governance – outlined in the constitutional documents but otherwise subject to any unanimous shareholder agreement and legislative framework.
- Filing with public registry – amongst other requirements pursuant to the legislation, a register of directors and officers is filed.

3.2 Incorporation Process

Within 48 hours from receipt of the relevant documents a company may be incorporated under the Companies Act

and the International Business Companies Act. The main steps to incorporate under both Acts are:

- reservation of the company name with the Registrar of Companies;
- filing of a memorandum of association with the Registrar of Companies;
- filing of the articles of association with the Registrar of Companies;
- filing of a statutory declaration with the Registrar of Companies; and
- payment of requisite stamp duty and incorporation fees.

3.3 Ongoing Reporting and Disclosure Obligations Companies Incorporated Under the Companies Act

Companies incorporated under the Companies Act are subject to annual reporting and disclosure requirements. The following lists must be submitted to the Registrar of Companies.

- A register of the managers and directors, and amendments thereto, along with their addresses and occupations.
- A listing of the shareholders of the company along with their names and addresses, and the number of shares held by each person must be submitted to the Registrar following the annual ordinary general meeting of the company. A separate register containing the names and addresses of each shareholder as well as the names and address of persons who hold shares in a nominee capacity must also be filed with the Registrar.
- A declaration of whether 60% of the shares of a company are beneficially owned by Bahamians must be made to the Registrar of Companies on an annual basis.
- A copy of a resolution of the members altering a company's memorandum or articles of association must be submitted to the Registrar.
- A written notice of the execution or termination of a Unanimous Shareholder Agreement must be filed with the Registrar of Companies within 15 days of the execution or termination of the agreement.

Companies Incorporated Under the International Business Companies Act

Companies incorporated under the International Business Companies Act are subject to the following reporting and disclosure requirements.

- A written notice of the execution or termination of a Unanimous Shareholder Agreement must be filed with the Registrar of Companies within 15 days of the execution or termination of the agreement.
- A copy of the register of directors and officers of the company must be filed with the Registrar and a notice of a change in the directors and officers must be filed with the Registrar within twelve months of such change.

- The requisite resolutions amending the memorandum or articles of association of an international business company must be submitted to the Registrar within 28 days after such amendment.

3.4 Management Structures

The directors of companies incorporated under the Companies Act and the International Business Companies Act are charged with the responsibility of managing the company. Generally, this rule is subject to any limitation as provided for in any unanimous shareholder agreement and the constitutional documents of the company.

Companies Act

The typical management structure of a company is based on a one-tier system and consists of a board of directors that is responsible for the appointment of officers. However, subject to any limitation contained in the company's articles of association or a unanimous shareholder agreement, the directors may delegate their powers to a single director, a committee of directors or officers and may specify its duties to manage the business and affairs of the company to them.

The officers are, however, restricted from issuing shares, declaring dividends, purchasing or redeeming shares, approving financial statements, or amending the company's articles of association.

The International Business Companies Act

The usual management structure of an international business company is also based on a one-tier system and consists of a board of directors that is responsible for the appointment of officers. Subject to any limitations in the memorandum or articles of association, or in a unanimous shareholder agreement, each officer or agent has similar powers and authority to the directors, except the power to fix emoluments of directors in respect to services provided to the company.

Directors of an international business company are also permitted to designate one or more committees, each consisting of one or more directors. The only limitations on the power of such committees are the powers to fill a vacancy in the board of directors and appoint and remove officers or agents of the company.

3.5 Directors', Officers' and Shareholders' Liability

The directors owe a fiduciary duty to their companies and should avoid situations where their duty conflicts with their personal interest. In accordance with the Companies Act and the International Business Companies Act, directors, officers and agents must act honestly and in good faith with a view to the best interest of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances in performing their functions.

Where a current or former director or officer has acted in good faith with a view to the best interest of the company and in certain cases had reasonable grounds to believe that his conduct was lawful, the company may indemnify such person.

Section 58 of the International Business Companies Act provides that subject to any limitations in its memorandum or articles of association, or in any unanimous shareholder agreement, a company may indemnify against all expenses, including legal fees, and against all judgments, fines and amounts paid in settlement and reasonably incurred in connection with legal or administrative proceedings any person who (i) is or was a party, or is threatened to be made a party, to any threatened, pending or completed proceedings, whether civil or administrative, by reason of the fact that the person is or was a director or an officer of a company; or (ii) is or was, at the request of the company, serving as a director or officer, or in any other capacity is or was acting for another company or a partnership, joint venture, trust or other enterprise, provided in either case that such person acted honestly and in good faith with a view to the best interests of the company.

Also, under the common law of The Bahamas, there is the concept of piercing the corporate veil, which is based on English common law principles.

4. Employment Law

4.1 Nature of Applicable Regulations

Employment relationships are governed principally by both the implied and expressed terms of the employment relationship. In The Bahamas these terms (where applicable) may be gleaned from the following sources:

- the employment contract;
- industrial agreements;
- common law (case law);
- the Employment Act and the Employment (Amendment) Act;
- the Health and Safety at Work Act;
- the Minimum Wages Act; and
- relevant provisions of the following pieces of legislation: (i) the Industrial Relations Act and (ii) the National Insurance Act.

In particular, where an employment relationship has been created by oral agreement, the terms of the employment relationship are espoused principally from English common law (as applicable), local common law and local statute (in particular, the Employment Act and the Employment (Amendment) Act).

The privileges associated with the freedom to contract exist in the Bahamas. This freedom, however, is subject to the relatively inalienable rights of the parties created under the Employment Act. These basic rights represent and dictate the minimum standard of behaviour and expectations between an employer and employee.

4.2 Characteristics of Employment Contracts

The termination of employment relations is governed by Sections 26 to 28E of Part VI (redundancy, lay-offs and short-time) of the Employment Act as amended, Sections 29 and 30 of Part VII (termination of employment with notice) and Sections 31 to 32 of Part VIII (summary dismissal) of the Employment Act.

Although there are no minimum requirements for the duration of an employment relationship, the employer's duty upon termination of a contract without cause varies depending upon the employee's tenure of service with the employer.

Generally, when terminating the employee without cause, the employer is required to give the employee reasonable notice of the termination. The Employment Act establishes the minimum notice requirements and gives the employer the power to elect whether to give notice or to give a payment in lieu of such notice. For example, an employee who has been employed at least six months but less than twelve months is entitled to one week's notice or pay in lieu thereof, and an employee who was employed for twelve months or more is entitled to two weeks' notice or pay in lieu thereof, if such employee does not hold a managerial or supervisory position, or one month's notice or pay in lieu thereof, if such employee does hold such a position.

In addition to this notice period (or payment in lieu thereof), the Employment Act places an obligation on the part of the employer to pay to the employee a sum representing the product of the dismissed employee's bi-weekly or monthly salary (depending on his role) and the number of years of such employee's service. This additional sum is usually referred to as 'severance pay'. Severance pay acknowledges the dismissed employee's years of service and is capped at six years for a non-managerial/non-supervisory employee and 12 years for a managerial/supervisory employee.

It is significant to note that the Employment Act does not confer an obligation on the part of the employer to give notice to an employee of less than six months tenure.

Notice of termination can be given verbally. However, the employer must ensure that the notice of termination was properly and unequivocally communicated to the employee and that he exercised his complete obligations upon termination. Thus the parties' conduct immediately after termination made orally may be evidence of the nature of the notice given.

Where notice is not properly given or is insufficient, an employee is entitled to claim damages for wrongful dismissal.

Where the common law or the employment contract confers a greater benefit on the employee regarding the duration of the notice period or the value of the pay in lieu of notice, then such provisions and/or benefits may apply. Where no notice period is provided for under the contract of employment, the employee may elect whether he desires for his notice to be calculated under the common law or under the Employment Act; however, where the contract of employment confers a greater benefit, that employee is entitled in law to such greater benefit without the need for an election on his part.

The calculation of the notice period for a particular employee under the common law is not a precise undertaking and the result varies depending on the employee's employment profile. Under the common law, the reasonable notice period is determined by assessing the value of certain factors that determine the length of the reasonable notice period. These factors include the employee's seniority, experience, chances of alternative employment, position, duties and chances of obtaining alternative employment.

4.3 Working Time

Under the Employment Act, the maximum number of daily work hours is eight and weekly work hours is 48, except for employees who hold managerial or supervisory positions, or work in any industrial, construction, manufacturing or transshipment enterprise, or an essential service. Employees are also entitled to 48 hours of rest, with at least 24 of such hours being consecutive.

Where the relevant employee is required or is permitted to work in excess of his daily work hours, he is entitled to overtime pay, which is calculated at 1.5 times his regular rate of wages and two times the regular rate of wages if the overtime is performed on a holiday.

4.4 Termination of Employment Contracts

Contracts of employment may be terminated by either party upon giving the other party reasonable notice of the termination, except in circumstances where the person is terminated 'for cause' for the commission of a fundamental breach of the contract such that the nature of the breach is repugnant to the interests of the employer.

An employment contract may also be terminated on the ground of redundancy. An employee's position is lawfully made redundant in the following circumstances:

- where the employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed;

- where the employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed in the place where the employee was so employed; and
- where the fact that the requirements of the business for employees to carry out work of a particular kind, whether in the same place where he was employed or at all, have ceased or diminished, or are expected to cease or diminish.

Except where an employee is terminated for cause, the employer is required to either give notice or pay in lieu of notice (see comments above).

Before the employer can lawfully terminate an employee or employees on the ground of redundancy, the employer must:

- inform the relevant trade union, if applicable, or the employees' representative of the grounds for the redundancy and provide a written statement containing the reasons for the dismissal, the number and category of persons likely to be affected and the period over which such dismissals are likely to be carried out;
- consult with the trade union, if applicable, or the employees' representative on the prescribed matters concerning the dismissal and the particulars of the grounds for the redundancy; and
- consult with the Minister of Labour in writing and provide the Minister with the information contained in the said written statement.

4.5 Employee Representations

Generally speaking, the role of an employee representative is not required by law.

Where the workforce is unionised, industrial agreements provide for the appointment of a representative, which would include, at a minimum, the purpose and functions as prescribed in the Industrial Relations Act. However, the extent of the rules and practices regarding employee representation depend on the terms negotiated between the relevant parties and thus may vary.

For those employment relationships to which an industrial agreement applies, a workplace representative is appointed who shall generally safeguard the interests of the employees and hear the collective views of the staff with a view of forwarding the same to the employer for his/its attention.

Trade unions are required by law to co-operate in ensuring effective communication and consultation with the employer regarding the employees' views and the problems they face in meeting the employer's objectives. The trade union is also obligated to keep all employees adequately informed of the main terms and conditions of the employment, job requirements, reporting requirements, disciplinary and

grievance procedures, safety and health rules, and the conclusions reached through negotiations and consultation with the employer.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Contributions to the National Insurance Board (the Bahamian equivalent to social security) are the only taxes that must be paid on behalf of employees. Employees contribute the equivalent of 3.9% and employers contribute the equivalent of 5.95% of an employee's salary up to the employable wage ceiling. The employable wage ceiling is currently BSD670 per week.

5.2 Taxes Applicable to Businesses

Business Licence Tax

All persons (inclusive of companies) conducting business within The Bahamas must be granted a business licence. Although certain activities are exempt from the licence requirements under the Business Licence Act, generally there is a modest business licence tax (calculated based on a percentage of the turnover for the preceding year) for companies conducting business within The Bahamas.

Value-added Tax (VAT)

All goods and most services supplied by a VAT-registered business in The Bahamas that are neither subject to the zero rate nor exempt from VAT are subject to VAT at the standard rate (presently 12%) or such other rate as prescribed by law for certain goods and services (eg, real estate transactions). VAT is also charged on goods and some services that are imported from outside The Bahamas.

Stamp Duty

Stamp duty is payable on some transfers of personal property whereby funds in The Bahamas are remitted or transferred out of The Bahamas.

5.3 Available Tax Credits/Incentives

The following is a non-exhaustive list of various pieces of legislation that provide tax concessions to persons who engage in business in The Bahamas.

The Hotels Encouragement Act

The Hotels Encouragement Act allows duty-free entry within The Bahamas of approved materials for, inter alia, the construction, rehabilitation, remodelling, equipping and furnishing of a new or existing hotel or resort (taking into account both large and small-scale projects) together with a concession from real property taxes for a prescribed period.

Moreover, any entertainment facility, nightclub, restaurant and shop within a designated area (described by an order of

the responsible minister) are also afforded the same concessions.

The concessions under the Hotel Encouragement Act are geared towards any person or company or any group of persons or companies who are (acting in conjunction) prepared to undertake the construction or remodelling of a new or existing hotel or resort.

The Family Island Development Encouragement Act

The Family Island Development Encouragement Act allows persons to receive duty concessions on the importation of building materials (inclusive of plumbing, electrical, mechanical and construction materials of all kinds) for residential and/or commercial development on certain islands within The Bahamas.

The Industries Encouragement Act

The Industries Encouragement Act allows for duty-free concessions for the importation of machinery, building and other materials or appliances for an approved manufacturer who is manufacturing an approved product together with an exemption from real property tax for a 15-year period concerning any relevant factory premises.

The concessions under the Industries Encouragement Act are geared towards such manufacturers and products that are approved by the responsible minister in order to encourage the establishment and development of certain industries within The Bahamas.

Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) Act

The Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) Act allows for the Port Area known as Freeport, which is a free trade zone, to be free from certain taxes (eg, excise tax, stamp duties and most custom duties) until 2054.

The City Of Nassau Revitalisation Act

The City Of Nassau Revitalisation Act allows incentives and duty concessions for owners of property situated in the city of Nassau (located on the island of New Providence) who are desirous of restoring, repairing and upgrading the buildings, both commercial and residential.

The Bahamas Vacation Plan and Time-sharing Act

The Bahamas Vacation Plan and Time-sharing Act allows duty-free concessions for persons who have been granted a developing owner's licence with respect to building supplies for the construction of timeshare facilities.

5.4 Tax Consolidation

Not applicable in The Bahamas as it has no laws governing the same.

5.5 Thin Capitalisation Rules and Other Limitations

Not applicable in The Bahamas as it has no laws governing the same.

5.6 Transfer Pricing

Not applicable in The Bahamas as it has no laws governing the same.

5.7 Anti-evasion & Anti-avoidance Rules

Not applicable in The Bahamas as it has no laws governing the same.

6. Competition Law

6.1 Merger Control Notification

Not applicable in The Bahamas as it has no laws governing the same.

6.2 Merger Control Procedure

Not applicable in The Bahamas as it has no laws governing the same.

6.3 Cartels

Not applicable in The Bahamas as it has no laws governing the same.

6.4 Abuse of Dominant Position

Not applicable in The Bahamas as it has no laws governing the same.

7. Intellectual Property

7.1 Patents

For the most part, the legal regime applicable to IP rights as outlined below includes (i) the Industrial Property Act and related rules, (ii) the Trade Marks Act and related regulations, and (iii) the Copyright Act and related amendments/regulations.

A patent for an invention is the title granted by the government to protect an invention. The right conferred by a patent excludes others from making, using or selling the invention.

A patent is granted by the Bahamian government through the Intellectual Properties Section of the Registrar General's Department through the following process:

- complete the relevant forms, with the necessary supporting documents;
- file the completed forms at the Intellectual Properties Section of the Registrar General's Department; and
- pay the applicable fees.

The entire process from the date of submission to obtaining the Letters of Patent could take up to one year.

Generally, the term of every patent shall be 16 years from the date of the patent as entered on the register of patents except as otherwise provided within the Industrial Property Act. However, renewals are possible under the Industrial Property Act.

Unless provided for to the contrary, a holder of an exclusive licence under a patent (as similarly a patentee; ie, a person entered on the register of patents) has a right to take proceedings in respect of any infringement of the patent committed after the date of the licence and in awarding damages or granting any other relief in such proceedings, the Supreme Court shall take into consideration any loss suffered or likely to be suffered by the exclusive licensee as such or, as the case may be, the profits earned by means of the infringement so far as it constitutes an infringement of the rights of the exclusive licensee as such.

7.2 Trade Marks

A trade mark is a mark, symbol or picture, or a combination used to distinguish goods for the purpose of indicating that they are goods of the proprietor separate from the goods of others in the marketplace. A registered trade mark gives a proprietor exclusive rights to use the mark for the designated services of the mark.

The registration of the trade mark is governed by the Trade Mark Regulations and the policies set by the Registrar General's Department.

To register a trade mark, the process is as follows:

- complete the relevant forms, with the necessary supporting documents;
- file the completed forms at the Intellectual Properties Section of the Registrar General's Department; and
- pay the applicable fees.

The entire application process – inclusive of the publishing of the mark in the official gazette, the final approval and registration of the mark – can take up to 18 months.

The registration of a trade mark is for a period of 14 years, but may be renewed from time to time in accordance with the provisions of the Trade Marks Act.

Under the Trade Marks Act, persons shall only be entitled to institute proceedings to prevent or to recover damages for the infringement of a registered trade mark.

In any legal proceeding in which the validity of the registration of a registered trade mark comes into question and is decided in favour of the proprietor of such trade mark,

the Supreme Court may certify the same, and if it so certifies then in any subsequent legal proceeding in which such validity comes into question, the proprietor of the said trade mark, on obtaining a final order or judgment in his favour, shall have his full costs, charges and expenses as between attorney and client, unless in such subsequent proceedings the court certifies that he ought not to have the same.

Similarly, in addition to the statutory penalties of a monetary fine or the forfeiture of all goods in respect of which an offence was committed, the Supreme Court can make such order as it sees fit with respect to suitable remedies.

7.3 Industrial Design

The definition of 'design' for the purposes of the Industrial Property Act means features of shape, configuration, pattern or ornament of an article or features of pattern or ornament applicable to articles in so far as such features appeal to and are judged solely by the eye.

Generally, design copyright in a design subsists for a period of five years from the date of deposit. However, applications for extensions can be made under the Industrial Property Act.

Every claim for design copyright in a design must be accompanied by a representation or, at the Registrar General's option, a specimen of the design and must include certain information as specified by the Industrial Property Act.

Similarly, there are various remedies available through the Supreme Court as well as those remedies that are applicable to patents under the legislation.

7.4 Copyright

A copyright is a property right that, unless specifically excluded by the Copyright Act, may subsist in the following categories of work of authorship: (i) literary works, (ii) musical works inclusive of any accompanying words, (iii) dramatic works inclusive of any accompanying music, (iv) artistic works, (v) motion pictures and other audio-visual works, (vi) choreographic works and (vii) sound recordings.

Generally, copyright in any work expires at the end of a period of 70 years from the end of the calendar year in which the author dies save for those limited exceptions outlined in the Copyright Act when the period varies.

Although there is no formal system for copyright registration, copyright registration is usually made by the owner of the copyright or of any exclusive right in the work together with the application and the applicable fee for examination and consideration.

An infringement of copyright shall be actionable at the suit of the copyright owner; and subject to the Copyright Act,

any action for such infringement includes all such relief by way of damages, injunctions, accounts or otherwise.

7.5 Others

Although not yet fully brought into force to date, the government of The Bahamas has introduced the following pieces of legislation via Parliament whereby it intends to ultimately provide a better legal framework to protect IP rights: (i) the Copyright (Amendment) Act 2015, (ii) the False Trade Descriptions Act 2015, (iii) the Geographic Indications Act 2015, (iv) the Integrated Circuits Act 2015, (v) the Patents Act 2015 and (vi) the Trade Marks Act 2015.

8. Data Protection

8.1 Applicable Regulations

The Data Protection (Privacy of Personal Information) Act (DPA) governs the protection of a living individual's personal data in The Bahamas.

The Act applies to data controllers, who are defined as persons that determine the purpose for which and the manner in which any personal data is used or is to be used.

The Minister with responsibility for Information Privacy and Data Protection may make regulations to (i) provide additional safeguards to protect sensitive personal data, (ii) prescribe offences or penalties with respect to contravention or non-compliance with the DPA, (iii) modify the application of an individual's right of access to personal data and (iv) prescribe circumstances in which prohibition, restriction or authorisation ought to prevail over listed exceptions to the right of access to personal data.

8.2 Geographical Scope

A foreign company targeting customers within The Bahamas will be governed by the provisions of the DPA where it is deemed a data controller and establishes a legal presence within The Bahamas for the purpose of processing personal data in the context of that establishment, or where no legal presence is established within The Bahamas, such data controller uses equipment in The Bahamas for processing data otherwise for the purpose of transit through The Bahamas.

8.3 Role and Authority of the Data Protection Agency

The office of the Data Protection Commissioner (DPC) is established by the DPA as a corporation sole to enforce data protection rules as enacted by the DPA. Its function is to regulate data controllers and data processors, and provide internationally accepted rules to ensure that the personal information of citizens is collected, kept up to date, stored, used, disclosed and disposed of lawfully.

The DPC is also empowered to encourage trade associations and other bodies to prepare codes of practice for dealing with personal data and to approve such codes of practice.

Under the DPA, the DPC has the authority to do the following:

- Receive complaints of possible contraventions to the Act.
- Investigate contraventions to the Act.
- Issue enforcement notices to data controllers.
- Issue prohibition notices to prevent the transfer of personal data from The Bahamas to a place outside The Bahamas.
- Issue notices to third parties to provide information to it that would assist it in performing its functions.
- Upon receipt of a warrant from the Magistrates' Court, empower authorised persons to:
 - (a) enter the premises of data controllers and data processors to inspect the premises and any data therein, and to inspect, examine, operate and test any data equipment therein;
 - (b) require any person on the premises of a data controller or a data processor to disclose and produce data or data material under their control;
 - (c) inspect and copy or extract information from data, or inspect and copy or take extracts from data material; and
 - (d) require persons to give any of its authorised officers information to the procedures employed for complying with the provisions of the Act.
- Prosecute summary offences committed under the DPA.

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