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Turks and Caicos Islands: Law & Practice
Luca Bonetto and Joanna Martinez
Griffiths & Partners

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TURKS AND CAICOS ISLANDS

Law and Practice

Contributed by:

Luca Bonetto and Joanna Martinez

Griffiths & Partners see p.13



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1. LEGAL SYSTEM

1.1 Legal System

The Turks and Caicos Islands (TCI) is a British Overseas Territory of the United Kingdom with a codified constitution, a Supreme Court (court of first instance), a Court of Appeal comprised of judges from many jurisdictions, and the Judicial Committee of the Privy Council as its court of final appeal. The legal system of the TCI is based on English common law and equity with local statutes (ordinances) and some UK statutes which have specifically been extended to apply in the TCI.

Judges and magistrates of the TCI are appointed to exercise their judicial functions independent of the legislative and executive branches of government. The Judicial Services Commission for the TCI is created by Section 86 of the Constitution of the TCI and retains jurisdiction to advise on judicial appointments, discipline and removal of judicial officers, including the Chief Justice, President of the Court of Appeal and Registrar.

The Magistrate's Court for the TCI is established pursuant to Section 3 of the Magistrate's Court Ordinance and has summary jurisdiction over criminal and civil matters. The Supreme Court is the superior court of the TCI, exercising jurisdiction conferred by the Supreme Court Ordinance CAP 2.02 and other laws vested in the High Court of Justice in England. The Court of Appeal of the TCI is established pursuant to Section 80(1) of the Constitution of the TCI. The TCI also has several administrative tribunals created by statute, such as the Labour Tribunal and the Immigration Appeal Tribunal. Final appeals from the Court of Appeal are heard by the Judicial Committee of the Privy Council.

2. RESTRICTIONS TO FOREIGN INVESTMENTS

2.1 Approval of Foreign Investments

Invest Turks and Caicos Islands Agency ("Invest TCI") is a statutory body which facilitates investment enquiries and opportunities, and provides a framework for encouraging, prioritising and incentivising domestic and foreign investment projects in the TCI.

The approval process by Invest TCI involves accommodating these projects, and is designed to be open, transparent, efficient, effective and timely. Investors must "qualify" to invest, but once that is done the purpose is to provide investors with a clear understanding through a development agreement setting out the support and concessions that the government will provide should they proceed with their project.

Invest TCI will evaluate projects based on six basic tests, namely:

- Confirming that the investors have the skills, expertise and experience to effectively build and operate the project.
- Verifying the honesty and integrity of the investors.
- Confirming that the investors have the track record and ability to adequately finance the proposed project.
- Ensuring that there is no "fatal flaw" in the project from a planning, financial, human resource, environmental, etc, perspective, which would prevent it from proceeding.
- Confirming that the project is expedient to the public interest and will provide a positive net increase to the domestic economy, including increased employment, income and tax revenue.
- Confirming that the project is consistent with the government's investment priorities. These include the tourism sector, the financial sec-

tor, manufacturing, fishing and agriculture sectors, renewable energy technologies and infrastructure development.

Approval is needed prior to completing any investment.

The TCI government supports investors/investments by, inter alia, providing a 50% import duty concession in the main financial and commercial island of Providenciales, and 75% in the outer islands. Stamp duty in the outer islands is to be assessed at 50% of the prevailing rate, and there is the opportunity to qualify for an investor permanent residency certificate, amongst other residency options.

2.2 Procedure and Sanctions in the Event of Non-compliance

Foreign investors follow the same rules and go through the same screening process and procedures as any investment in the TCI.

The process and timing for approval of a project are as follows:

- The investor submits the proposal for a development project.
- InvestTCI acknowledges receipt of the application within 48 hours.
- The applicant's proposal is reviewed to determine if it meets the six tests (see **2.1 Approval of Foreign Investments**) for a development project and a due diligence report is prepared on the ultimate project owners/investors by Invest TCI.
- The application is circulated to key ministries who must review the project for possible "fatal" flaws related to areas such as planning, the environment, human resources or international agreements. Ministries have 14 days from receipt of the application to provide responses to Invest TCI.

- If the application is deemed to be "eligible" it is referred to the Cabinet for an in-principle approval.
- If the application is deemed to be "ineligible" Invest TCI notifies the applicant of areas where deficiencies may need to be addressed.
- Once an application is deemed "eligible" Invest TCI will submit to the applicant a standard development agreement. The standard development agreement format will be derived from the dozens of development agreements already signed and will provide a common set of obligations and concessions. The applicant has the opportunity to accept or reject the standard development agreement.
- If the applicant accepts the standard development agreement, it is presented to the Cabinet for final approval and signing off.
- If the applicant rejects the Standard Development Agreement, the applicant is free to continue with the proposed project without any government concessions.

All investment projects are required to secure the relevant approvals from various government departments and agencies including Planning, Business Licensing, Department of Coastal and Environment Resources and the Financial Services Commission, where applicable. Not securing these approvals would result in fines and/or penalties under the related ordinance. Company agents and/or attorneys are useful in helping new companies to determine which approvals are required.

There are no consequences to investing in the Turks and Caicos without a development agreement. Neither foreign or domestic investors are required to register with Invest TCI ("the Agency"); they are however encouraged to register their investments through Invest TCI to secure government support of their investment in the

islands and facilitate a smoother integration into the business environment. The Agency is responsible for facilitating development agreements between the TCI government and developers/investors. As part of the agreement, it would describe the level of concessions available to an eligible investor and investment.

2.3 Commitments Required From Foreign Investors

Approval for a development agreement is a decision that is made in the Cabinet. Development agreements can be subject to conditionality clauses; however all agreements contain a set of developer obligations. These obligations vary by agreement and usually describe the agreed terms on construction development timelines. There are also standard developer obligations such as giving Turks and Caicos Islanders preference in employment. Although not mandatory, investors are also encouraged to be good corporate citizens in their contributions to the communities in which they exist.

Note too that development agreements are conditional on investors meeting the six tests – ie, investors are expected to demonstrate they can meet them. Also, development obligations are conditional on investors complying with Section 4(1) of the Encouragement of Development Ordinance.

2.4 Right to Appeal

InvestTCI does not authorise investments; it makes recommendations to the Cabinet. The Agency facilitates development projects by presenting details of the project to the Cabinet, with guidance from the National Investment Policy and the Encouragement of Development Ordinance. Approving a development or granting development concessions is at the discretion of the Cabinet; Cabinet approval is not guaranteed.

InvestTCI can refuse to recommend incentives/concessions to the Governor if the investment doesn't comply with the Encouragement of Development Ordinance or investment policy. The declared benefits are outlined in the Ordinance. The maximum benefits are discretionary.

3. CORPORATE VEHICLES

3.1 Most Common Forms of Legal Entities

There is a flexible, commercially minded and user-friendly corporate regime for the incorporation, management, maintenance and operation of companies in the TCI. The articles of incorporation and other constitutional documents can be tailored to the requirements of a specific transaction and/or market requirements, limiting any such changes to those specifically imposed by this.

The most common type of corporate vehicle used in the TCI is a private company limited by shares. It only requires one shareholder and one director, each of whom may be a corporate entity. No restrictions exist as to the nationality or country of incorporation of the shareholder or the director.

The company may have an authorised share capital (eg, USD1 at minimum), or an unlimited share capital is also available. A USD5,000 share capital (5,000 ordinary shares of USD1 each) is generally used for a plain vanilla company. Share capital is typically in US dollars, but may be denominated in any other currency. Bonus shares, partly paid and nil paid shares, and fractional shares, are all permitted. Redeemable or preference shares may be issued, and shares of a different class may be created. Bearer shares are not permitted in the TCI and shares may not be issued at a discount.

A company limited by shares is typically used as a holding entity or a business and operating entity, and may also own land in the TCI. It is also joint venture (JV) ready, and a director may act for the benefit of the JV party appointing him (and not in the best interests of all shareholders, to the extent necessary).

A company limited by guarantee (with or without the ability to issue shares), a protected cell company, and a non-profit company, are other types of corporate vehicles available for incorporation in the TCI.

3.2 Incorporation Process

An application to incorporate a company is made electronically to the Registrar of Companies at the Financial Services Commission (FSC) by filing an application, the company's articles of incorporation, and the written consent of the proposed registered agent. A licensed, registered agent in the TCI is required. A registered office in the TCI is also required.

If the Registrar is satisfied that the incorporation application documents package is complete, the Registrar registers the documents filed, allots a unique registration number to the company and issues a certificate of incorporation. The incorporation process typically takes up to approximately 48 hours, in practice.

3.3 Ongoing Reporting and Disclosure Obligations

The FSC oversees all regulatory aspects of the TCI financial services industry. All companies must adhere to the annual reporting and disclosure obligations. These must be filed with the FSC in order for the company to remain in good standing.

The main reporting requirement for a TCI company is to file an annual return specifying details of its shareholders, directors, other officers and

capital structure, and also compliance with economic substance legislation.

For a company to change the registered office or registered agent, notice of a director's resolution must be filed and accompanied by a notice of appointment of the new registered agent.

The articles of incorporation of a company may be amended by way of a shareholders' resolution. The notice of amendment together with the amended articles of incorporation adopted by the shareholders must be filed with the FSC.

Under TCI company law there is no requirement for a company to produce financial statements, and as such there is no requirement to file accounts with the FSC.

The disclosure of beneficial ownership of more than 25% and/or all persons with significant control over a company (but not a trust) is made by all companies to a central private register maintained at the Companies Registry. The register is air-gapped (ie, not connected to the internet), and only searchable at the request of a senior UK police officer, made via one of three designated senior officers of the Royal Turks and Caicos Police Force. Only three senior members of the Registry have access to the register. This register is not otherwise available for inspection or search to third parties.

3.4 Management Structures

Directors are responsible for the day-to-day management of a company, whilst the shareholders are the owners of the company. Shareholders can also be appointed as directors. TCI company law gives a high degree of freedom to contractual agreements, and enshrines in the articles of incorporation the governance and shareholder arrangements which the parties are required to have in place going forward. Share-

holder agreements are also common where there are multiple shareholders in the company.

The management structure typically comprises the directors and any other applicable officers as needed. Whilst a company secretary is not required under TCI company law, it is generally advisable to appoint one as the gatekeeper of good corporate governance.

3.5 Directors', Officers' and Shareholders' Liability

The duties of a director of a TCI company arise under the common law, TCI company law and the company's articles of incorporation. Directors have both fiduciary obligations and obligations of care, diligence and skill to the company. A director owes the following fiduciary duties to the company:

- to act honestly, in good faith and in what the director believes to be in the best interests of the company;
- to exercise the powers for a proper purpose; and
- to avoid conflicts of interest.

The duty to exercise care, diligence and skill requires a director to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account the nature of the company, the nature of the decision, the director's position and the nature of the responsibilities undertaken by the director.

TCI company law gives statutory footing to the fiduciary and common law duties owed by the director of a TCI company to that company.

Generally, no director of a TCI company may be liable for any debt, obligation or default of the company, unless such a liability is specifically provided for pursuant to the company's legisla-

tion or except to the extent that the director is liable for his own acts or conduct.

A TCI company (subject to its articles of incorporation) may indemnify current directors, former directors or other persons who acted in such a capacity of the company or who, at the request of the company, served in a similar capacity for another company or a partnership, joint venture, trust or other enterprise, against all expenses (including legal fees and all judgments, fines and amounts incurred). None of the persons may be indemnified by the company unless they acted honestly and in good faith and in what they believed to be in the best interests of the company (in the case of criminal proceedings, where the director had no reasonable cause to believe that his conduct was unlawful). A purported indemnity in breach of the honesty and good faith requirement is void.

Furthermore, such a person must be indemnified by the company if he has been successful in the defence of any proceedings. Additionally, the company may advance expenses (including legal fees) incurred by a director or former director in defence proceedings prior to the final determination of proceedings, provided that the director or former director provides an undertaking to repay the company if it is determined that he is not entitled to be indemnified.

Most companies maintain directors' and officers' liability insurance cover.

A TCI company has a separate legal personality from its shareholders. A shareholder's liability is therefore generally limited to the amount, if any, unpaid on their shares. There may be limited circumstances in which a TCI court would be prepared to "pierce the corporate veil" if a company's separate legal personality is abused (typically when fraud has occurred).

4. EMPLOYMENT LAW

4.1 Nature of Applicable Regulations

The statutory framework for employment relations in the TCI is the Employment Ordinance, which is *an ordinance to regulate the terms of employment and for connected purposes*. At the same time, the general principles of contract law inform and guide the employment agreements and relationships. The Employment Order (the “Order”) deals with remuneration including wages and hours of work and vacation/sick/compassionate leave.

Employment disputes between an employer and employee may be resolved internally, but are also statutorily regulated by the Labour Board (the “Board”) in the first instance of an employee complaint. The Board has the jurisdiction to conduct investigations into an employer’s compliance with the Employment Ordinance but does not have the ability to penalise an employer for breaches of the legislation. The Labour Tribunal (the “Tribunal”) has the jurisdiction to hear and determine any employment disputes or complaints. The Tribunal has the jurisdiction to impose penalties and penalise employers for breaches of the Employment Ordinance and Order. The Tribunal acts as a three-member panel hearing claims for unfair dismissal, unpaid wages, discrimination and sexual harassment.

Collective bargaining and other forms of negotiation and arbitration with respect to employment agreements and employee/employer relations are permitted under the Employment Ordinance and the Order. However, collective bargaining, unions and collective agreements are uncommon in the TCI and are very rarely concluded.

4.2 Characteristics of Employment Contracts

The Employment Ordinance and the Order provide the regulatory framework for employment

law within the TCI. Whilst general principles of contract law are often referred to in drafting employment contracts, each employment agreement must comply with the Employment Ordinance and the Order.

The Employment Ordinance provides the essential framework for employment contracts, including prescribing parameters for terms of employment, remuneration, protection from unlawful discrimination, termination and unfair dismissal. The Order further legislates a framework for employee wages and hours of work, as well as vacation, sick leave and compassionate leave.

The Employment Ordinance prescribes four types of employment contracts, including a contract without reference to time limits, a contract with a specified period of time, a contract for a specific task, and a contract for a probationary period of not more than three months.

Whilst parties are otherwise free to agree to terms of employment without regulatory interference, the Employment Ordinance requires contracts to properly identify the parties and commencement dates. An employment contract must also contain particulars of the employment, including:

- the scale or rate of remuneration;
- intervals at which remuneration is paid;
- terms and conditions relating to hours of work;
- holiday entitlements;
- terms as to incapacity for work because of sickness or injury;
- pensions and pension schemes;
- length of notice an employee is required to give;
- duties to be performed; and
- any disciplinary rules.

Where a person is not a TCI islander, a British Overseas Territories citizen or a spouse holding a residence permit, there are restrictions on engaging in “gainful occupation” in the TCI unless a person holds a valid work permit or a Permanent Residence Certificate (PRC) with the right to work in the TCI. The holder of a work permit is restricted from engaging in any gainful occupation other than that endorsed on the permit and from changing employer (where applicable).

Where a work permit is required, the responsibility for paying the work permit fee for an employed person falls on the employer. Any term in a contract of employment that purports to make the employee responsible for the work permit fee payable is unlawful.

4.3 Working Time

A contract of employment must specify the employee’s normal hours of work. The Order specifies that a normal working week must not exceed 44 hours. Hours of work in excess of 44 hours a week must be paid on an overtime basis. Even though an employee may volunteer to work additional hours, they cannot volunteer to work seven days per week because the Order states that an employer shall give an employee a period of rest of 24 consecutive hours in each period of seven working days. Rates of overtime are prescribed as: (a) one-and-a-half times an employee’s basic wage generally; and (b) two times basic wage on public holidays.

Minimum wage is currently USD6.25 an hour. However, the minimum wage does not apply to employees employed in the domestic service of their employer in a private household. Minimum wage also does not apply to employees who are paid on a task-by-task basis and not subject to continuous supervision.

4.4 Termination of Employment Contracts

Pursuant to Section 58 of the Employment Ordinance, an employee with an employment contract for a specified or unspecified period of time may not be terminated by the employer unless there is a valid reason for such termination in connection with the capacity or conduct of the employee.

Pursuant to Section 60 of the Employment Ordinance, an employer is entitled to summarily dismiss an employee without notice or payment of any redundancy or severance payment or terminal benefits in cases where the employee has committed serious misconduct.

Pursuant to Section 61 of the Employment Ordinance, an employee may terminate the contract of employment without notice or with less notice than an employer is entitled to under statute or contract, where the employer has made it unreasonable to expect the employee to continue with employment.

4.5 Employee Representations

Pursuant to Section 71 of the Employment Ordinance, an employer may terminate the employment of an employee for redundancy where the termination is part of a reduction in the workforce. Prior to any such termination for redundancy, an employer must provide notice to any union or trade representative of the employee, should one exist, and engage in consultation on those redundancies.

5. TAX LAW

5.1 Taxes Applicable to Employees/Employers

There is currently no income tax in the TCI.

The only forms of direct taxation for employees are mandatory contributions to the National Insurance Board (NIB) and the National Health Insurance Plan (NHIP). NIB contributions are based on an employee's wages, including certain other benefits included with a job (such as housing allowance), at a rate of 10% in the private sector, of which the employer pays 5.5% and the employee pays 4.5%. NHIP contributions for employed persons are calculated at a rate of 6% of earnings and are split equally between employer and employee.

5.2 Taxes Applicable to Businesses

The TCI is a tax-neutral jurisdiction with no direct taxes – there is currently no income, corporate, capital gains, personal or inheritance tax.

There is, however, stamp duty payable on transfers of land, duties on imports ranging (mainly) from 5% to 45%, consumption tax and other forms of indirect taxes for those who live and work in the TCI.

In addition, a business operating in the TCI is liable for:

- annual company registration fees;
- business licence fees (ranging from USD150 to USD10,000 depending on the type of business); and
- annual work permit fees on its non-TCI personnel (ranging from USD100 to USD10,000).

The TCI has adopted the Model 1 IGA UK and US FATCA, and is an early adopter of the CRS. Whilst there are no double tax treaties with the TCI, the TCI is party to a network of tax information exchange agreements with several jurisdictions by which the government may commit to tax information exchange.

5.3 Available Tax Credits/Incentives

No tax credits or incentives are applicable.

5.4 Tax Consolidation

This is not applicable.

5.5 Thin Capitalisation Rules and Other Limitations

No thin capitalisation rules or capital maintenance requirements apply to a TCI company.

5.6 Transfer Pricing

There are no transfer pricing rules in the TCI.

5.7 Anti-evasion Rules

The TCI does not impose any special anti-avoidance rules.

6. COMPETITION LAW

6.1 Merger Control Notification

There is currently no body responsible for merger control or competition review in the TCI.

6.2 Merger Control Procedure

Please see **6.1 Merger Control Notification**.

6.3 Cartels

There are no anti-competitive rules in the TCI.

6.4 Abuse of Dominant Position

There is no unilateral conduct and economic dependency in the TCI.

7. INTELLECTUAL PROPERTY

7.1 Patents

A patent is a type of intellectual property that gives its owner the legal right to exclude others from making, using, or selling an invention for a limited period of time in exchange for publishing an enabling disclosure of the invention. For a patent to be registered in the TCI, it must have already been registered in the UK.

Patents registered in the TCI are protected with the privileges and rights from the commencement of the term of the patent in the United Kingdom in the TCI if the patent remains in force in the United Kingdom. The duration of protection is equivalent to that provided by the UK registration (typically 20 years).

An application to register a patent is made to the UK Patent Office. Once the application is granted it can be registered with the Registrar of Patents in the TCI. A certificate will be issued once the application is accompanied with documents and prescribed fees and advertisements are paid.

Patents are enforced through initiating legal proceedings. A patent holder can sue for damages or seek an injunction to restrain the breach.

7.2 Trade Marks

A trade mark is any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings, and it may, in particular, consist of words (including personal names) designs, numerals, letters or the shape of goods or their packaging.

Trade marks are registered for a period of ten years. In order for a trade mark to be protected, it must be maintained on the Trade Mark Register. This is done by the payment of the prescribed annual fee.

To register a trade mark in the TCI, an application must be completed along with the prescribed fees and accepted by the Registrar. Once accepted, this application will be published in the Gazette for a period of 30 days for any objections. If there are no objections, the Registrar will register the trade mark as of the date of filing of the application for registration.

Trademarks are enforced in the same way as patents.

7.3 Industrial Design

There are currently no industrial design laws or regulations in the TCI.

7.4 Copyright

The UK Copyright Act applies in the TCI. It covers original literary, dramatic, musical and artistic works, and film soundtracks. Protection is automatic and does not require registration.

The right-holder's remedies in the case of breach are to sue for damages and/or seek an injunction restraining the breach and any further breaches.

Copyrights are enforced in the same way as patents.

7.5 Others

There are currently no laws or regulations in the TCI as relate to the protection of software, databases or trade secrets.

8. DATA PROTECTION

8.1 Applicable Regulations

There are currently no data protection and/or privacy laws or regulations in the TCI. Common law rules regarding rights of confidentiality and privacy apply.

There is a general statutory duty of confidentiality which applies to banks, professional advisers, government officers and others holding positions of trust.

8.2 Geographical Scope

This is not applicable in the TCI.

8.3 Role and Authority of the Data Protection Agency

This is not applicable in the TCI.

9. LOOKING FORWARD

9.1 Upcoming Legal Reforms

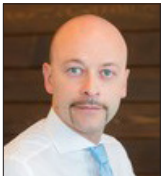
No significant legislative reforms are expected in the near future in any of the legal fields discussed in this chapter.

Contributed by: Luca Bonetto and Joanna Martinez, *Griffiths & Partners*

Griffiths & Partners is a leading, full-service commercial law firm of attorneys based in the Turks and Caicos Islands (TCI). Griffiths & Partners (G&P) attorneys are experienced in advising international clients, law firms and other intermediaries in respect of TCI law. The firm's expertise is in a broad field of disciplines, which is required in order to practise in, and meet the demands of, an offshore jurisdiction. The firm is part of the G&P Group, one of the largest

professional service teams in the TCI, offering legal, trust and company management and formation services. The G&P Group offers international standards of responsiveness, integrity and quality, with deep local TCI knowledge and relationships, and has a powerful international network of allied firms and relationships in every major country in the world, to better enable it to help and support clients to achieve their goals.

AUTHORS



Luca Bonetto is a partner with Griffiths & Partners. He qualified as a UK solicitor in 2006 and was admitted as an attorney in the Turks and Caicos Islands in 2017. Luca has worked across

North and South America, Asia, Europe, and Russia, as a business and transactional lawyer, and as a trusted adviser to ultra and high net worth families, and their family/private investment offices. Luca is experienced in complex and cross-border M&A deals (including private equity and access to capital), structuring investments, strategic alliances and expansion into new markets, across diverse sectors and jurisdictions. Luca also has a particular interest in family governance, and setting up sustainable, long-term structures to manage family wealth through the generations.



Joanna Martinez is a property, real estate and transactional lawyer with experience that covers the lease, sale and purchase of various types of property, together with

corporate/commercial transactions. She covers all aspects of real estate and corporate/commercial law. A member of the Griffiths & Partners team since 2019, Joanna was admitted as an attorney in the Turks and Caicos Islands in 2018.

Griffiths and Partners

PO Box 143
82 Cherokee Road
Providenciales
Turks and Caicos Islands

Tel: +1 649 9418250
Email: lb@griffithsandpartners.com
Web: www.griffithsandpartners.com





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