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Investing In... 2022

Turks and Caicos: Law & Practice
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TURKS AND CAICOS

Law and Practice

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1. LEGAL SYSTEM AND REGULATORY FRAMEWORK

1.1 Legal System

The Turks and Caicos Islands (TCI) is a British Overseas Territory which uses the US dollar (USD) as currency, with a favourable regime for foreign investment and a strong services infrastructure. The domestic economy enjoys one of the fastest growth rates in the Caribbean, and TCI enjoys a stable and strong government, underpinned by the rule of law, with the ultimate Court of Appeal being the Privy Council in London. The judiciary is similar to that of England – the Supreme Court is the highest court and is modelled on the High Court in England. Although the TCI has its own body of case laws, the majority of case laws cited in TCI courts are English case laws.

TCI's legal system is a combination of local statutes (ordinances), English statutes and English common law, as well as a number of international conventions to which the UK is party. This legal, constitutional and financial stability is reflected in annual growth rates of more than 5% since 2013, and a credit rating of BBB+.

The economy is largely reliant on the North American tourism market, which (together with high-end real estate development) accounts for over 70% of TCI's GDP. Efforts are being made to diversify the economy by growing the financial services sector. There is a well-established Financial Services Commission (FSC) which oversees all regulatory aspects of the TCI financial services industry.

The TCI regulatory framework is rapidly developing to meet the expectations of market participants. Recent developments in, and overhaul of, the trust, companies and insolvency legislative regimes – which essentially now mirror the British Virgin Islands' (BVI) legislation – and intro-

duction of economic substance requirements, brought about by the introduction of new legislation, are live examples of the efforts made within the jurisdiction to streamline the processes and provide for greater stability, certainty and comprehensive protection of the rights and interests of various parties, including shareholders, creditors and other stakeholders operating in and from the TCI.

1.2 Regulatory Framework for Foreign Direct Investment (FDI)

FDI falls under the supervision/review of the Invest Turks and Caicos Islands Agency (TCI Invest). TCI Invest is a statutory body which facilitates investment enquiries and provides a framework for encouraging, prioritising and incentivising domestic investments and also FDI. All FDI follows the same rules and goes through the same screening process and procedures. There are no applicable restrictions, and the government applies a successful open-arms FDI policy.

2. ECONOMIC/POLITICAL/BUSINESS CLIMATE

2.1 Outlook and FDI Developments

The current economic/political/business climate in the TCI is positive – the TCI has one of the fastest growth rates in the Caribbean and also enjoys a tax-neutral regime (see **9.1 Taxation of Business Activities**). There is government support at all levels, including the provision of investment incentives in priority sectors. TCI has operated a budget surplus for several years prior to the impact of COVID-19, and there are no plans to change the current basis for taxation.

The government recently approved a new Due Diligence Policy ("Policy") for TCI Invest and a new processing fee structure for undertaking due diligence. The purpose of the Policy is to provide

a guide for the staff at TCI Invest to implement a due diligence system for proponents of FDI projects, small business projects, permanent residency certificate applications or any third-party contractor, in accordance with anti-money laundering or prevention of terrorist financing procedures. The Policy is also designed to ensure investors maintain compliance at the onboarding and implementation stages of FDI and domestic investment projects, and/or during the life span of any contractual agreement with TCI Invest.

Recent Public and Environmental Health (COVID-19 Vaccination Requirement) legislation now requires all prospective employees applying for a work permit, or residents applying for a residency permit, to be fully vaccinated against COVID-19. Investors who are granted an Immigration Protocol as part of their development agreement with the government are also subject to these regulations (please see **8.1 Other Regimes**).

There are no pending or anticipated changes to the economic/political/business climate or the regulation of FDI in the TCI.

3. MERGERS AND ACQUISITIONS

3.1 Transaction Structures

The most common structures used for transactions in the TCI are straightforward share purchase or asset purchase, along with statutory mergers. Ultimately, which structure is most appropriate will depend on the individual facts and circumstances, including timing issues, the nature of the seller or selling entity, the tax treatment, whether any governmental approvals or consents are required, and preferences of individual clients and their advisers.

TCI company law does not currently distinguish between private and public companies.

Share and Asset Purchases

The sale and purchase of shares in a TCI private company limited by shares through a share and purchase agreement remains one of the most common forms of transactions in order to acquire and invest in a business in TCI. In its most basic form, existing shareholder(s) agree to sell and a third-party buyer agrees to buy the shares. Whilst the only document required for a transfer of shares is a written share transfer instrument (normally a short, straightforward, one-page document), in all but the simplest intragroup transaction it is common practice to also have a share purchase agreement setting out the commercial terms of the sale and purchase transaction.

Conversely, an asset purchase involves the sale of certain specific assets of a company (with or without including its liabilities) by the company and its shareholder(s) to a third-party buyer (eg, land, IT equipment). It is common practice to have an asset purchase agreement setting out the commercial terms of the asset purchase transaction, including listing the assets being purchased and those liabilities which are not, or may be, the subject of the purchase.

Mergers

A statutory merger involves two or more constituent companies merging into one, either a subsidiary merging upstream into its parent company, or a parent company merging downstream into its subsidiary company. The outcome at the end of the transaction is that there is only one surviving entity.

A common practice in the TCI is to merge a foreign company (typically from another sister Caribbean jurisdiction, such as the British Virgin Islands or the Cayman Islands) with a TCI company, either upstream or downstream, and where only one entity is the surviving entity. The key procedural requirement is that the directors

of each constituent company approve a Plan of Merger, which sets out the details of the parties and the terms of the merger. The Plan of Merger is coupled with Articles of Merger which are filed with the Registrar of Companies in the TCI and the other foreign jurisdiction. The merger is effective when these documents are accepted by the TCI Registry.

Certain key considerations for a foreign investor in selecting a transaction structure in the TCI include:

- timing – the process to complete the legal and financial due diligence process, specialist investigations, and any time-zone issues;
- the seller or selling entity participating in a transaction – this includes the desire to sell, signing logistics and any shareholder governance issues that need to be complied with;
- taxation issues and/or treatment, typically from the buyer's side – there is no stamp duty levied in the TCI on a transfer of share in a TCI company unless the company owns a direct or indirect interest in TCI real estate;
- whether any government and/or regulatory consent or approval is required – for example, from the FSC in respect of licensed entities; and
- individual client and/or adviser preferences – for example, US-based clients may prefer a merger as that mechanism is often used in their jurisdiction.

Although the redemption of minority shareholders is permitted under TCI company legislation (see **4.2 Relationship between Companies and Minority Investors**) such transactions are rarely used. Share-for-share swaps involving minority shareholders are also rarely used.

3.2 Regulation of Domestic M&A Transactions

There is no other applicable regulation of domestic M&A transactions.

4. CORPORATE GOVERNANCE AND DISCLOSURE/REPORTING

4.1 Corporate Governance Framework

There is a modern, flexible, commercially minded and user-friendly corporate regime for the incorporation, management, maintenance and operation of companies in the TCI. The 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 the same. There is efficient company maintenance and governance for a TCI company. The TCI's corporate governance regime is based on statute and the Articles of Incorporation of the company. TCI company law gives a high degree of freedom to agree contractually and enshrine in the Articles of Incorporation the governance and shareholder arrangements parties want to have in place going forward.

The following entities are available in the TCI:

- a company limited by shares;
- a company limited by guarantee (that is, either authorised to issue shares or not);
- an unlimited company (that, is either authorised to issue shares or not), but these are relatively rare;
- a limited partnership;
- a protected cell company; or
- a non-profit.

The most common entity used in the TCI is a company limited by shares.

4.2 Relationship between Companies and Minority Investors

TCI company legislation provides that, unless the company's Articles of Incorporation state otherwise, shareholders holding shares carrying 90% of the voting rights in a TCI company may give the company a written instruction directing it to redeem the shares of the minority shareholders. If the Articles of Incorporation do not disapply the mandatory redemption provisions, a minority shareholder cannot prevent the majority shareholders exercising their squeeze-out rights. However, if the minority shareholder believes that the redemption price for the shares is below the fair value, the shareholder would be able to exercise the right to dissent and to have the company buy the shares at fair value.

Minority shareholders with at least 30% of the voting rights (or such lesser number is prescribed otherwise in the Articles of Incorporation) may require the directors to call a general meeting. If the directors fail to do so, those shareholders may themselves call a general meeting.

Minority shareholder protections are generally negotiated into separate shareholders' agreements with the relevant company, or included directly into the Articles of Incorporation.

4.3 Disclosure and Reporting Obligations

TCI Invest require investors of FDI projects with an ownership share of 10% or more to complete a personal history form. Additional disclosure obligations would be required for FDI for the investor and the company during the company formation and the bank account opening process.

Investors in possession of a development agreement with the government are required to produce annual audited financial statements and proof that the company (any corporate entity)

is in good standing. A developer is obligated to notify the government of any disposal with respect of an FDI. The development agreement typically prohibits the developer from transferring any shares which may amount to a change in control/ownership of the developer without first giving the government notice.

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

5. CAPITAL MARKETS

5.1 Capital Markets

There is no stock exchange in the TCI, and as such equity and debt capital market transactions as a source of funding in the TCI are not applicable.

Investors, local and domestic, have access to local funding through commercial retail and private banks and locally licensed mutual funds. However, interest rates are high and for this reason the majority of investors seek foreign funding.

5.2 Securities Regulation

There are no applicable securities laws or regulations in the TCI.

5.3 Investment Funds

Invest TCI requires that all financing for FDI projects is subject to a due diligence process regardless of the structure of financing involved, with particular emphasis placed on source of funding. Exemptions may apply where companies are publicly traded. In the case of funds containing multiple investors, Invest TCI requires due diligence and possibly enhanced due diligence on the key controlling person(s), most likely the fund manager and/or the fund administrator.

6. ANTITRUST / COMPETITION

6.1 Applicable Regulator and Process Overview

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

6.2 Criteria for Review

Not applicable in the TCI.

6.3 Remedies and Commitments

Not applicable in the TCI.

6.4 Enforcement

Not applicable in the TCI.

7. FOREIGN INVESTMENT / NATIONAL SECURITY

7.1 Applicable Regulator and Process Overview

TCI does not currently have a national security review regime applicable to FDI. Due diligence (and in some cases enhanced due diligence) is performed on project investors and relevant third parties, and the findings are presented to the government along with the details of the investment project for consideration. Depending on the nature of the project, certain FDI may be subject to review by specific government departments or agencies – for example, the Airport Authority for airport projects, the Gaming Commission for projects involving a casino or casino features, or the Ports Authority.

7.2 Criteria for Review

Not applicable in the TCI.

7.3 Remedies and Commitments

Not applicable in the TCI.

7.4 Enforcement

Not applicable in the TCI.

8. OTHER REVIEW / APPROVALS

8.1 Other Regimes

As a small developing country and fast-growing economy, TCI has several development opportunities that range from real estate to other businesses.

Real Estate

There is generally no restriction on foreign investors in the contest of a real estate transaction. All transfers of title are governed by the Registered Land Ordinance. There is no limitation on the amount of investment on undeveloped land or purchasing a developed property in the TCI. However, actual title to land must be held by an individual outright (regardless of the investor's nationality), or by a TCI-incorporated limited liability company.

Real estate development attracts stamp duty (tax), payable depending on the cost of the property and where it falls within the relevant threshold. This is payable whether the property is owned by the foreign investor or by a company. On the other hand, the government may allow import duty concessions to foreign investor developers, ranging from 50% to 75%, mainly on the import of materials to be used in connection with construction projects. The concession will depend on the location of the development, whether on Providenciales or any of the other inhabited islands. Incentives are not restricted to TCI-owned enterprises.

Business

There are many undeveloped and/or underdeveloped businesses in the TCI. A company conducting business in the TCI must hold a busi-

ness licence and pay an annual business licence fee depending on the type of business. Whilst there are restricted categories of businesses that are reserved to TCI Islanders, this does not prohibit a foreign investor from investing in the business as a minority shareholder. Work permits are necessary for all non-nationals working in the TCI (see **10.1 Employment and Labour Framework**).

Immigration and Residency

Investing in the TCI allows a foreign investor to apply for legal status and residency. A Permanent Residence Certificate (PRC) can be applied for by an investor who has invested at least (i) USD1 million in construction of a new home or renovation of a distressed property in the island of Providenciales and is not seeking to engage in employment, or (ii) USD1.5 million in a business which employs not less than 60% non-work permit holders in the island of Providenciales and is not seeking to engage in employment. The investment must be retained for at least five years but can be swapped within a 12-month window (same or greater value).

There is a quota restricting the number of PRCs issued on the grounds of investment. Detailed application forms and background information have to be provided. Decisions are made on the basis of the applicant's personal and occupational attributes and the applicant's potential value to the community. A PRC, unless revoked, is valid for the duration of the lifetime of its holder.

9. TAX

9.1 Taxation of Business Activities

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 from 5% to 45%, consumption tax and other forms of indirect taxes for those who live and work in the TCI.

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 a number of jurisdictions by which the government may commit to tax information exchange agreements.

9.2 Withholding Taxes on Dividends, Interest, Etc

There is no withholding tax applicable in the TCI.

9.3 Tax Mitigation Strategies

Please see **9.1 Taxation of Business Activities**.

9.4 Tax on Sale or Other Dispositions of FDI

Please see **9.1 Taxation of Business Activities**.

9.5 Anti-evasion Regimes

The TCI does not impose any special anti-avoidance rules on certain types of FDI.

There are no exchange controls in the TCI. The TCI does not have any thin capitalisation rules, controlled foreign company rules or transfer pricing rules.

10. EMPLOYMENT AND LABOUR

10.1 Employment and Labour Framework

All employment and labour matters fall under the supervision of the Labour Tribunal governed by the Employment Ordinance. The Labour Tribunal has jurisdiction to hear and determine any labour

dispute or complaint in respect of the employer or employee.

The Labour Tribunal has the power to grant a decision, direct a party to amend or confirm an agreement, make an award of compensation and/or make an award to the employer or employee. In settlement cases, the Labour Tribunal has the power to reinstate, re-engage or compensate.

In situations where the Labour Tribunal is not the appropriate body to hear such matters, the employees and employers also have the option to take matters to the Magistrate or Supreme Court.

Collective bargaining, works council or labour union arrangements at companies are not common in the TCI.

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 PRC with the right to work in 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).

10.2 Employee Compensation

Employees in the TCI are typically remunerated by way of a combination of cash and statutory benefits which should be set out in the employee’s employment contract. Contributions to private pensions/retirement plans/benefits are not common. Under TCI employment law, employees are paid remuneration either on a weekly, bi-weekly or monthly basis. In addition to this, employees are entitled by statute to 12 paid sick days and two weeks of paid vacation annually.

In an acquisition, change of control or other investment transaction in the TCI, the employer must compensate the employee in accordance with the number of years worked (severance pay) and any unused sick and vacation days. Before terminating the employment, the employee must be informed of the reasons for termination, the number of people likely to be terminated and the period when termination is likely to be carried out.

10.3 Employment Protection

There are no rights granted to employees in the event of an acquisition, change-of-control or other investment transaction in the TCI. Employees are not entitled to management representation or consultation in relation to corporate transactions. See **10.2 Employee Compensation**.

Employees do not have any mandatory right to transfer employment with an acquired business.

There are no works council or other collective bargaining requirements to be met to complete an acquisition or other investment transaction.

11. INTELLECTUAL PROPERTY AND DATA PROTECTION

11.1 Intellectual Property Considerations for Approval of FDI

Intellectual property is not an important aspect in screening FDI in the TCI. There are no sectors or industries subject to particular rules or more scrutiny.

11.2 Intellectual Property Protections

The TCI is considered to have adequate intellectual property protection through its domestic legal framework. Patents are governed by the Patent Ordinance and trade marks are governed by the Trademarks Ordinance. The UK Copyright

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

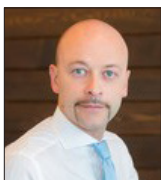
11.3 Data Protection and Privacy Considerations

There are currently no data protection and/or data privacy laws or regulations in the TCI.

Griffiths & Partners (G&P) is a leading, full-service commercial law firm of attorneys based in the Turks and Caicos Islands (TCI). 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 ser-

vice 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, allied to 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.

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