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BUYER BEWARE: A BRIEF GUIDE TO OBTAINING A FOREIGN INVESTOR'S LICENCE

Rodrick Edinboro

The provisions of the Foreign Investment Act, Chap 70:07 are to facilitate investment by both Caricom nationals and foreign investors through the acquisition of land and shares and the formation of companies. A foreign investor seeking to acquire land or shares in Trinidad and Tobago may need to obtain a licence prior to the vesting of the land or shares in the foreign investor. This article will answer some of your questions relating to acquiring land or shares under the Act.

Who is a foreign investor?

A foreign investor is:

(a) an individual who is not a national of Trinidad and Tobago or another Member State (Member State refers to the countries of CARICOM);

(b) any firm, partnership or unincorporated body of persons of which at least one-half of its membership is held by persons who are not nationals of Trinidad and Tobago or another Member State; or

(c) any company or corporation that is not incorporated in Trinidad and Tobago or another Member State or if so incorporated is under the control of persons to whom paragraph *(a)* or *(b)* apply, or is deemed to be under the control of a foreign investor.

A company or corporation is deemed to be under the control of a foreign investor if:

- at least one-half of the votes exercisable at any meeting of the company or corporation are vested in foreign investors; or
- having a share capital, at least one-half of the nominal amount of its issued shares that are voting shares are vested in foreign investors; or
- not having a share capital, at least one-half in number of its members are foreign investors; or
- it is in fact controlled by foreign investors.

Acquiring Land

When is a licence required?

A licence is required by a foreign investor where:

- For commercial purposes, the land to be acquired is more than 5 acres;
- For residential purposes, the land to be acquired is more than 1 acre;
- The land to be acquired is located in Tobago (regardless of size or purpose). By the Foreign Investment Tobago Land Acquisition Order 20097 (Legal Notice 63/2007), Tobago was deemed an area for which a foreign investor should first obtain a licence under the Act before acquiring any lands.

Notwithstanding the above, the Minister of Finance may by Order prescribe certain areas in Trinidad and Tobago (regardless of size or purpose) in which a foreign investor may not acquire land without first obtaining a licence.

When is a licence not required?

A foreign investor does not require a licence in the following circumstances:

On an annual tenancy or for any less interest for the purpose of his residence, trade or business where, in total, the land does not exceed 5 acres;

- As a legal personal representative or beneficiary under a will or intestacy, for a period of 1 year from the date of death of the deceased or for such extended time as the President may grant;
- In pursuance of his rights to foreclose or enter into possession as a mortgagee for a period of 1 year from the acquisition of the land or for such extended time as the President may grant;
- As a judgment creditor for a period of 1 year from the date of acquisition of the land or for such extended time as the President may grant;
- Jointly with his spouse, where that spouse is a citizen of a Member State who is resident in Trinidad and Tobago within the meaning of Section 5 of the Immigration Act.

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Can the foreign investor acquire multiple properties once the threshold acreage is not exceeded?

For residential purposes, the foreign investor is restricted to one (1) parcel of land. For commercial purposes, there are no restrictions providing the aggregate area does not exceed 5 acres. However, a separate application must be submitted for each parcel of land.

What are the required documents?

- For individuals, original passport or certified copy of bio-data page and page with T&T immigration entry stamp
- For companies, a copy of the Certificate of Incorporation
- Police Certificates of Good Character from authorities in the countries of residence of the individual or directors as the case may be.
- Town and Country Outline Planning Approval for the erection of a building on the land in respect of which a licence is sought.
- Credit references and evidence of adequate capital (from an acceptable source, such as a reputable accounting firm or registered financial institution) to maintain the applicant pursuing acquisition for business or residential purposes.
- Where land is being acquired under a will or intestacy, a certified copy of the Will and Grant of Probate or Letters of Administration, as the case may be.
- For commercial purposes, a Business Plan must be submitted outlining:
  - The proposed business activity to be undertaken;
  - Level of capital investment;
  - Credit references and evidence of adequate financing from an acceptable foreign source such as a reputable accounting firm or financial institution;
  - Significant impact on local employment; and proposals for training;
  - Foreign exchange earnings/savings; and
  - Linkages with the rest of the economy.

Acquiring Shares

When is a foreign investor's licence required?

A licence is required where a foreign investor is desirous of acquiring shares in a public company where the holding of such shares by the foreign investor (directly or indirectly) results in 30% or more of the total cumulative shareholding of the company being held by foreign investors.

When is a foreign investor's licence not required?

A licence is not required where a foreign investor is desirous of acquiring shares in a private company, or in the case of a public company where the shareholding percentage is not exceeded in public companies as outlined in the previous paragraph. Although, a licence is not required in the above circumstances, the foreign investor must give notice to the Finance Minister (and the Secretary of a public company) before acquiring shares in a private or public company.

Foreign Investor's Notice

The following information must be given by a foreign investor prior to acquiring shares in a private or public company:

- For individuals, their name, address, nationality and former nationality.
- For companies, its name, place of incorporation, principal place of business and corporate documents; and the names, nationality, former nationality and addresses of its directors and the name of any controlling shareholder.
- The identity of any other country in which the foreign investor holds investments.
- The purpose of the investment.
- Whether the foreign investor is or is not a resident of Trinidad and Tobago within the meaning of the Exchange Control Act, Chap. 79:50.
- Full particulars of the consideration for the investment and of the payments and credits made, and the name of the local bank (must be an authorised dealer, i.e. an entity that is authorised to deal in foreign exchange under the Exchange Control Act) through which each such payment or credit was made or given.

Public Companies listed on the Stock Exchange

A foreign investor desirous of acquiring shares in a public company listed on the Stock Exchange must obtain certification from the company with respect to the shareholding percentage prior to the acquisition. The company must certify to the stock broker acting in respect of the acquisition, and to the Stock Exchange that either:

- the total shareholding of foreign investors according to the company's share register will not, following the acquisition, exceed 30% of the total issued shares of the company; or
- that the foreign investor holds a licence in respect of those shares to be acquired which exceed the 30% threshold.

How long does the application take?

These applications are complex in nature and, where ALL of the required information is provided, it may take up to 20 working days to process.

How is the land or shares to be paid for?

The consideration for the land or shares is to be paid into a local bank in an internationally traded currency, except in the case of a company incorporated in Trinidad and Tobago where such consideration is financed out of capital reserves or retained earnings.

Is the licence transferable?

The licence is not a form of property and is not transferable to another foreign investor. Therefore, a foreign investor seeking to acquire land or shares which were previously owned by another foreign investor who was granted a licence to acquire that land or shares, must also obtain a licence prior to the acquisition of that land or shares.

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THE GROWTH OF THE PRIVATE LABELLING TREND

Linnel Pierre

The private labelling trend has been developing rapidly throughout the world. Suppliers in various markets have begun to explore the option of purchasing products from manufacturers as opposed to manufacturing the products themselves. This article touches on some of the issues that ought to be considered by parties engaging in private labelling arrangements.

A "brand name" car will in almost all instances be priced higher than one that is not "brand named". Likewise, other popular brand name products that are made by highly recognised and reputable manufacturers are usually priced higher than the so called "no name products". In recent times, it has become increasingly popular to observe new 'brands' of various items of food while strolling along the isles of local supermarkets. This trend may be observed not just in the local supermarkets but also at some retail and wholesale stores in Trinidad and Tobago and throughout the world. Similarly, while visiting a popular restaurant, you may have observed a label affixed to the bottled water that may have caused you to raise an eyebrow and question whether your local food spot makes its own brand of water. Fear not!! This all forms part of the growing trend of **Private Labelling of Products.**

Private labelling simply refers to the practice whereby a product is produced by a manufacturer for sale to another company which then offers the product for sale under its own label - the private label. Privately labelled products are often sold at a lower cost to its alternatives. Since customers are almost always eager to save on their everyday purchases, the trend of private labelling of products has rapidly spread to many industries throughout the world. However, private labellers must be aware of the potential liability to which they could be subjected by engaging in the labelling of products manufactured by others. In addition, private labellers should be sure to comply with the various standards governing the labelling of products.

Issues associated with private labelling

In Trinidad and Tobago, the Bureau of Standards (the Bureau) issues standards governing certain practices for a wide range of products and services, including general principles for labelling of all goods which are offered for sale (wholesale or retail) in the country. While it is the responsibility of any person who manufactures, distributes or sells any goods to ensure that they are appropriately labelled in compliance with the law and the set standards, the Bureau makes it clear that the final responsibility for compliance with the labelling standards lies with the seller or retailer. Failure to comply with labelling requirements constitutes an offence under the Standards Act (Ch. 82:03), punishable by payment of fines and imprisonment.

In addition to labelling requirements, private labellers could find themselves responsible if the products sold under their label do not meet the description applied to the product and the product is not appropriate for the use suggested. This can be an automatic consequence of applying one's label to a product that is manufactured by another. Undoubtedly, this can expose private labellers to potential liability under the Consumer Protection Laws and Regulations of Trinidad and Tobago.

When selecting a manufacturer, extensive due diligence should be conducted to safeguard against potential exposure to the risks identified above. The private labeller must ensure that the manufacturing company has met all standards required under the relevant legislation regarding the nature of the product, its composition, preparation and specifications. The private labeller should ensure that a written agreement with the manufacturer outlines the responsibilities and liabilities of both parties. Indemnities should be negotiated in the agreement to cover any claims which may be brought by third-party consumers using the product purchased from the manufacturer.

Although comprehensive agreements can be drafted in an effort to protect the private labeller, in reality, challenges will still be encountered. The joining of a manufacturer from a foreign jurisdiction (who does not have any legal presence in Trinidad and Tobago) as a party to an action, while not impossible, may prove to be difficult.

In addition, in some instances, contracts entered into with a foreign manufacturer may provide that the contract will be subject to the jurisdiction of the country of the manufacturer. Where a contract entered into with a manufacturer is subject to the jurisdiction of another country, the seller may be restricted to bringing an action for indemnity in the jurisdiction to which the contract is subject. As such, protection in the form of insurance coverage or a bond should also be considered by the private labeller.

Conclusion

As private labels continue to grow in power and market share, the foregoing points are merely some of the important issues companies must properly address before engaging in private labelling and selling privately labelled products. Undoubtedly, privately labelled products are establishing their place in various markets and are well positioned for future growth. Nonetheless, those engaged in private labelling, or proposing to do so, ought to err on the side of caution before committing to private labelling arrangements.

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2016 APPELLATE MOOTING COMPETITION

On 24th February, students of the Hugh Wooding Law School argued a case before the 'Court of Appeal' at the 11th Hamel-Smith Appellate Moot. The Moot Court of Appeal comprised The Hon Mme Justice of Appeal Joan Charles, The Hon Mme Justice Mira Dean-Armorer; and The Hon Mr. Justice Peter Rajkumar, all of the Supreme Court of Trinidad and Tobago.

Members of both teams are being congratulated by Mrs. Nicole Ferreira-Aaron, Managing Partner: From left: John, Angel, Ariel, Nicole, Shari, Vineta and Miguel

Appearing for the Appellant were Angel Kungiesingh, John Lee and Ariel Agostini, while Shari Deonarinesingh, Miguel Vasquez and Vineta Marajh appeared for the Respondent.

The Court of Appeal was called upon to interpret the meaning of these words in the Integrity in Public Life Act: "Members of the Boards of all State Enterprises including those bodies in which the State has a controlling interest"; and to determine whether a utility company 100% owned by an investment company which in turn was 100% owned by the Government was a State Enterprise.

The utility company argued that the Court must not disregard the separate legal personality that exists between a shareholder and a company. In response, the Integrity Commission urged the Court to give effect to Parliament's intention and the underlying rationale of the Act which was to expand the scope of persons deemed to be in public life and to root out corruption.

The Moot was keenly contested, both sides argued their case powerfully. The Judges were impressed with the presentation, persuasion, decorum and court etiquette of the lawyers-in-waiting. They added that the Moot problem was challenging and carefully drafted.

The Judges also offered constructive criticism and practical guidance to assist the students in improving their written and oral advocacy skills. In the end, the Moot winner was the team representing the Appellant.

The moot question was drafted by Rodrick Edinboro, Associate in the Transactional Department.

Buyer Beware: A Brief Guide to Obtaining A Foreign Investor's Licence (cont'd)

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What are the penalties for non-compliance with the Act?

A person who knowingly does any act or thing causing or calculated to cause the vesting in a foreign investor of any land or shares without obtaining a licence is guilty of an offence and is liable on summary conviction to a fine of $100,000. Land or shares that are required to be held under licence and not so held may also be forfeited by the State. This is in addition to any other penalty which may be incurred under the Act.

What happens after the licence is obtained?

The licence shall not be effective unless it is registered in Registrar General's Office or if a licence in respect of shares, it is entered in the share register of the company against the name of the relevant shareholder.

Furthermore, the foreign investor must comply with any conditions that are attached to the grant of a licence, failure of which may result in cancellation of the licence or forfeiture of the land or shares or other legal action as may be deemed appropriate by the State.

Land or Shares held in trust

The Foreign Investment Act also places restrictions on trusts in favour of foreign investors. A person may not hold land in Trinidad and Tobago or shares in a public company in trust for an unlicensed foreign investor without obtaining a licence of the President. Trust refers to any arrangement, whether written or oral, express or implied, and whether legally enforceable or not, whereby any land or shares are to be held for the benefit of or at the disposal of a foreign investor.

Conclusion

The Foreign Investor seeking to acquire shares or land in Trinidad and Tobago should be aware of the possibility that a licence may be needed before finalising their proposed investment. The astute investor will familiarise themselves with the circumstances where a licence must be obtained or where mere notice to the relevant authority will suffice or where no licence is required at all. Caveat Emptor!

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MEDIATING THE CIVIL DISPUTE IN TRINIDAD & TOBAGO: "THEORETICALLY SOUND, PRACTICALLY USELESS?"

Krystal Richardson

There was a distinct movement in the early 2000's towards Alternative Dispute Resolution (ADR) in Trinidad and Tobago. Resolving conflict through alternative methods which had the effect of reducing the delay, expense and contention of litigation, became acceptable. In particular, focus began to be placed on Mediation, the non-binding process by which an impartial third party or mediator facilitates the negotiation process between the disputants, as one of the main ADR methods. This was, and still is, deemed to be a progressive step as the disputants' maintain control over the substantive outcome of the mediation, thereby making the process more appealing. The ultimate goal of ADR was to place less focus on litigation and more focus on resolution. Measures were therefore taken statutorily and otherwise to implement new mediation programmes in both the family and civil arenas.

Thus far, there has been a significant drive and much success with the implementation of programs for mediating family law disputes. While there are programmes available for civil mediation, there has not been nearly as much movement away from litigation in the civil arena and the courts, as originally anticipated. While these programs remain available, it would seem that many are unaware of their existence or perhaps are unwilling to use an alternative method to resolve their disputes. In theory, mediating the civil dispute remains a sound method of resolution, but until these programs are fully utilised, the real benefit will not be realised. Below are some noteworthy developments in mediation in Trinidad and Tobago and ways in which potential litigants can better use the resources available to them.

The Mediation Act and Court Annexed Mediation

The Mediation Act, passed in 2004, is an Act *"to provide for mediation in Trinidad and Tobago."* Under the Act, a Mediation Board was established with mainly administrative functions regarding mediators, including:

- formulating standards for the accreditation of mediation training programmes and accrediting such programmes;
- formulating standards for the certification of mediators and mediation trainers, and certifying these;
- prescribing requirements to be complied with by an approved mediation agency; approving such mediation agencies; and
- monitoring accredited mediation training programmes and approved mediation agencies.

The Act provides rules for mediators and a code of ethics.

Section 14 of the Act makes provision for Court Annexed mediation whereby mediation is made available as part of the litigation process. In theory, this would usually be initiated by a judge in court who may refer parties to a certified mediator. Parties may also, with the approval of the Court, agree independently to retain the services of a mediator during the litigation process. However, Court annexed mediation has generally been under-utilised.

The 2013 Pilot Project

An ADR Pilot Project was launched in 2013, incorporating two separate dispute resolution methods: Court Annexed Mediation and Judicial Settlement Conferencing. With particular regard to Mediation, the Practice Directions provide distinct rules and guidance for how court annexed mediation should operate, specifying that certain matters would be selected at random, noting the types of matters that may be selected, the ways in which matters may be referred to mediation, the selection of a mediator, and the mediation process in general.

While many matters are chosen at random, others that would likely benefit from the Pilot Project are not selected and often litigants are unaware of the option for mediation under the Act and under the Pilot Project. The Pilot Project is a great initiative, particularly because matters chosen for mediation ultimately give litigants with no prior incentive to mediate, a reason to do so. However, litigants who are not chosen and those who are not aware of the Act or the Pilot Project do not benefit.

Other means of Resolving a Civil Dispute in Trinidad and Tobago

Apart from the options available under the Act and through the Pilot Project, there are other ways of engaging in mediation in order to resolve disputes, two of which are highlighted below:

Independent Mediation Agencies: The website of the Mediation Board of Trinidad and Tobago lists Board-approved mediation agencies. Parties interested in Mediation of a civil dispute but who wish to do so privately can utilise one of these agencies. While there may be other agencies available, Board Certified Agencies are more desirable given the strict rules imposed on the Mediation Board by the Act.

Community Mediation: By Section 16 of the Act, regulations are meant to be implemented for community mediation. In 2000, Community Mediation was introduced in Trinidad and Tobago as an alternative to the court process. The Ministry of Community Development is currently in charge of spearheading the Community Mediation cause, and seven main and sub-centres were implemented to facilitate same. Potential litigants need only visit the Community Mediation centres in order to access their facilities.

A Way Forward

Civil litigation seems to be still at the forefront of the minds of most disputing parties, and mediation is not sought out instinctively in order to resolve such disputes. While there will always be a place for civil litigation, the merits of mediating the civil dispute cannot and should not be discounted. There are many programmes available in Trinidad and Tobago, but such programmes need to be promoted so that mediation would be considered a genuine alternative to litigation. Until such time, it will remain "practically useless".

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