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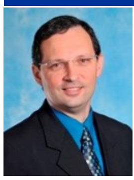

ACCESS TO THE FOREIGN MARKET – THE SECURITIES ACT, 2012

M. Glenn Hamel-Smith & Melissa Inglefield

In our March issue, we considered the major impact of the Securities Act, 2012 on the Trinidad & Tobago ('T&T') securities market. In this article, we look at the impact the Securities Act, 2012 may have on access to foreign securities markets by local market actors and investors. Unless foreign broker-dealers are prepared to incur the costs and the burden of registering locally, investors may find themselves barred from purchasing foreign securities in their efforts to maintain adequately diversified portfolios.

For foreign dealers and advisers, all signs *do not* lead here

Under the Securities Industry Act, 1995 (now repealed) (the '1995 Act'), it was permissible in certain circumstances for a foreign broker or investment adviser to facilitate trades in foreign securities markets for and on behalf of local investors or otherwise provide investment advice to a local resident without the need to register in T&T. This was generally permitted **provided that**, among other things, the market actor did not conduct trades with or provide investment advice to T&T residents on a regular basis and that the transaction largely occurred outside of T&T without a representative of the market actor being physically present in the jurisdiction. To the extent that the entity was able to establish that it was conducting the trade or providing the advice outside of T&T, it would not have been required to be registered locally.

The 2012 Act imports a similar restriction to that contained in the 1995 Act. It requires any person to register with the Trinidad and Tobago Securities and Exchange Commission (the 'Commission') in the relevant category where such person carries on business or holds himself out as, or engages in any act, action or course of conduct in connection with, or incidental to, the business activities of a broker-dealer, an investment adviser or an underwriter. However, sections 1(5) and 1(6) of the 2012 Act provide the following interpretations (the 'trading presumption') which are presumed in the absence of evidence to the contrary:

- a **trade** occurs in T&T where (amongst other things) the purchaser of the security is in T&T;
- a person is providing **investment advice** in T&T where the recipient of such advice is in T&T.

There is no guidance under the legislation or draft By-Laws as to what may constitute sufficient 'evidence to the contrary'. Accordingly, foreign market actors that either already conduct business with T&T residents or who may wish to do so are forced to reconcile the potential costs and consequences of registration and the benefits of providing services to the local market. If they continue to 'trade' with T&T residents without being registered, they may find themselves in breach of the 2012 Act and facing potential stiff penalties and other consequences attached to such a breach.

The effect of these (albeit) rebuttable presumptions is that a foreign market actor, who was able to conduct business with T&T residents under the 1995 Act, may now be restricted from doing so without first registering. The requirement for registration, on the face of it, even applies to entities that conduct business in T&T on a limited or restricted basis, including those who do so: (i) without being physically present in the jurisdiction; (ii) with institutional investors only; and, (iii) upon being solicited by a T&T resident.

We find it curious that, in drafting the 2012 Act, Parliament did not import from the Canadian model (on which the Act is largely based) the 'international dealer' and 'international

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ACCESS TO THE FOREIGN MARKET— THE SECURITIES ACT 2012… *(cont'd)*

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adviser' exemptions. Those exemptions seek to permit a dealer or an adviser carrying on business outside of Canada (but registered in its home jurisdiction) to conduct business as a broker or adviser, respectively, with Canadian residents on certain prescribed conditions with certain eligible clients. A full discussion on the nature of the available exemptions under the Canadian regime is beyond the scope of this Article. However, that such exemptions were included in the Canadian model but were not introduced in the 2012 Act, begs the question of whether it was indeed Parliament's intention to close the tap on foreign market actors providing T&T residents with access to foreign securities and securities markets.

Diversify, diversify, diversify

In the same way that 'location, location, location' is the golden rule of the real estate world, 'diversify' bears equal importance to investors in the securities market. The 2012 Act, however, suggests that a caveat be included for local investors: 'Diversify, *but only in T&T'*.

As under the 2012 Act, foreign market actors are unable to easily provide services to T&T residents, the ability of local investors to diversify their portfolios by accessing foreign securities markets may be equally hampered. It is therefore not only a cause for concern that foreign broker-dealers and foreign investment advisers may be deterred from coming to the T&T market, but that T&T residents may be disadvantaged by their inability to invest in foreign securities due to their potentially restricted access to brokers, dealers and investment advisers outside of T&T.

To the extent that a foreign market actor decides to register with the Commission, it remains a question whether T&T residents will be able to purchase securities which are not registered but are being distributed in T&T through such a registered foreign market actor. The 2012 Act has tightened up the requirements for registration of issuers and their securities, leaving issuers (local and foreign alike) with only the options of extremely private placements (that is, a limited offering under the Act) or registration, once a security is deemed to be 'distributed' under the Act. The term 'distribution' refers to, amongst other things, securities which have not previously been issued, and therefore does not appear to apply to existing securities that are being purchased in the secondary market (i.e. from existing holders through an exchange rather than from issuers upon first issue) in foreign securities markets.

Securities which are being issued by an issuer (foreign or domestic) for the first time will likely need to be registered with the Commission in order to be distributed in T&T. Unfortunately, in most instances, market trends will likely show that most foreign issuers (especially blue chip entities) will not find it commercially economical to register, particularly as the size of the T&T market is unlikely to be attractive enough to warrant such a step. In light of the need for safe and secure investments for institutional investors (especially those who are required to invest a percentage of their portfolios in foreign securities), a discussion on this issue is warranted and may require separate review and analysis.

What this means to us

The regulator may take the view that foreign broker-dealers, advisers and issuers of securities should register and further ensure that the securities they sell are also registered in T&T. However, the on-going cost of registration and reporting is likely to be significant and possibly a deterrent for most foreign players, given the size of our market.

The sponsored registration option available under the Act is also not a practical option for foreign broker-dealers where local investors (e.g. pension funds, asset management companies, unit trusts, mutual funds [including government sponsored funds] etc.) need to purchase and sell foreign securities on a regular basis year round to ensure that their investments are properly diversified and responsive to market movements in a timely manner. Even the recently proposed draft amendments to the Act (which prescribes an increased time frame of an aggregate of 90 days in which a registered sponsored broker-dealer or investment adviser can operate in T&T) is unlikely to provide any incentive to a foreign market player, given the access needs of local investors described above. Committing to such restrictions may effectively result in a broker-dealer or an investment adviser breaching its duty to its client or the 90 day limit, as the nature of an investment adviser requires on-going support and analysis of its clients' investments.

The consequence of the *trading presumption,* which offers only limited room for an argument that a market actor (be it a broker, dealer, investment adviser or an issuer) is not conducting business within T&T, is that one of two trends may develop: either foreign market actors will:

(i) breach the legislation and stand the risk of the Commission cracking down on foreign market players or
(ii) will stop doing business with T&T residents.

The latter of the two options will undoubtedly be detrimental to local investors and the former may nevertheless be enough of a deterrent to foreign broker-dealers to result in restricted access to foreign securities markets by local investors. In keeping with its commitment to review and revise the 2012 Act, Parliament should consider the far reaching effects of the legislation and ensure that local investors can continue to access foreign markets.

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TRINIDAD & TOBAGO 2014 BUDGET MEASURES

Angelique Bart

On 9th September, 2013 the Hon. Minister of Finance presented to Parliament Government's 2014 Budget themed *"Sustaining Growth, Securing Prosperity".* Highlights of the key fiscal measures follow:

Tax Administration Reform

In recognition of need to review the country's overall fiscal regime, Government has commenced work on technical infrastructure for the phased introduction of a growth-oriented tax system from 2014 to 2016.

In an effort to deal with 'tax leakage', relevant sections within the Corporation Tax Act will be revised and the capabilities of the Board of Inland Revenue will be strengthened, particularly in respect of enforcement and compliance in business and individual taxpayers' assessments.

Reinstatement of Lands and Building Taxes (L&BT)

L&BT will be reintroduced on a phased basis over 2014-2017, during which revaluations of properties will be undertaken and the property rolls updated.

Valuations and Charge to tax

As part of Phase 1 and effectively immediately, valuations will commence on all industrial land including plant and machinery, whether housed or un-housed, with the view that L&BT will be implemented from 1st July, 2014. In Phase 2, tax will be imposed on commercial properties; and in Phase 3 on agricultural land and residential property. Implementation dates for Phases 2 and 3 have not been announced.

Allowances

A deductible allowance will be granted to certain agricultural land owners and low-income homeowners.

Value Added Tax (VAT)

All VAT refunds will be settled within the legal time frame of six (6) months after the refund becomes due. Further, TT$1billion has been allocated to clear the backlog of refunds due.

Amendment to the Petroleum Tax regime

Investment Tax Credit

Effective 1st January, 2014, Unused Investment Tax Credit will be allowed to be carried forward for one year. The tax credit is currently granted under the Supplemental Petroleum Tax regime and represents 20% of expenditure incurred on development activities for mature oilfields and enhanced oil recovery projects.

Capital Allowances

Effective 1st January, 2014, the following amendments will apply:

Exploration Business

The existing initial and annual allowances will be replaced by a new allowance:

- During 2014 to 2017, an allowance of 100% of exploration costs to be written off in the year that the expenditure is incurred; and
- From 2018, an allowance of 50% on first year expenditure incurred, an allowance of 30% on second year expenditure incurred, and an allowance of 20% in the third year of expenditure incurred will be applicable.

Development Business

The existing initial and annual allowances will be replaced by a new allowance which will apply to both plant and machinery (tangible) and the drilling of wells (intangible) expenses, i.e. an allowance of 50% on first year expenditure incurred, 30% allowance on second year expenditure incurred and 20% allowance on expenditure incurred in the third year.

Work-overs and Qualifying Side-tracks

An allowance of 100% of total costs for work overs and qualifying side-tracks will be written off in the year that the expenditure is incurred.

Gas Compression Facilities

Wear and Tear allowance on compression facilities will be increased from 25% to 33.3%.

Promotion of Alternative Fuels: Compressed Natural Gas (CNG)

The existing incentives of a tax credit of 25% and wear and tear allowance for fleet operators will be replaced by allowing 100% tax deduction on the costs of converting motor vehicles of either individuals or companies to use CNG up to a maximum of TT$40,000 per vehicle.

Increase in Fines for Illegal Export of Subsidized Fuel

- The illegal exportation of subsidized fuel will now be an indictable offence under the Customs Act and will carry fines up to TT$500,000. in addition to forfeiture of both the goods and the vessel.
- Fines under the Petroleum Act shall be increased from TT$30,000 and TT$1,500 per day for a continuing offence to new fines of TT$500,000 and TT$50,000 per day for continuing offence.

Amendment to the Corporation Tax Regime

- Effective 1st October, 2013, the Corporation Tax Act will be amended by redefining the qualifying capital base required for Small and Medium size enterprises to raise capital on the Local Stock Exchange by excluding all retained earnings and reserves from that definition. Further, the provision requiring 30% of the capital of the Company to be owned by 25 unconnected shareholders will be amended so that 30% of **newly issued** capital will be owned by 25 unconnected shareholders.

LEGAL ADVICE PRIVILEGE—RESERVED TO ADVICE GIVEN BY LAWYERS

Aisha Peters

The English Supreme Court earlier this year in *R* (*on the application of Prudential PLC & Anor) v Special Commissioner of Income Tax & Anor* upheld the decision of the English Court of Appeal that the legal advice given by accountants to their clients is not protected by legal professional privilege (LPP). LPP entitles clients to refuse to disclose documents or answer questions about any legal advice received. LPP also bars the adviser from disclosing any information to others about the nature of the legal advice given to the client unless the client consents.

The case arose when the inspector of taxes served notices on Prudential requiring it to produce documents containing information relevant to the company's tax liability. The material sought included communications between Prudential and a firm of accountants who had provided Prudential with advice on the tax law aspects of a proposed transaction. Prudential sought judicial review of the issue of the notices on the ground, *inter alia*, that the material sought was covered by LPP. The High Court held that LPP did not apply to advice about the law provided by an accountant.

On appeal, the Court of Appeal upheld the decision of the High Court. In delivering the judgment, the Court of Appeal rejected the arguments of Prudential who contended that on many, if not most, occasions on which a person seeks advice about fiscal liabilities (which often involves a consideration of, and advice about, the relevant law), that person does so by approaching accountants rather than lawyers. Prudential argued that the rationale behind the LPP rule requires that a client's communication with his advisers should be just as much protected from disclosure if the advice being legal advice, is sought from and given by the accountant as if it is sought from and given by a lawyer.

The Court of Appeal instead considered that LPP privilege between lawyers and their clients was a fundamental right, long established in the common law. The court felt that it was bound by previous judicial decisions which limited LPP only to cases where there was a lawyer/client relationship and that in order to confer LPP on accountants giving legal advice it was the responsibility of Parliament to do this, and not the court. The court observed that in those countries where LPP had been allowed between accountants and their clients, such as in the United States of America and New Zealand, it was through statutory intervention. The matter was then heard by the English Supreme Court which held that LPP can only apply to advice provided by solicitors, barristers and foreign lawyers, including in-house lawyers.

This case is important in Trinidad and Tobago where, as in England, LPP occurs in the context of the lawyer/client relationship which is based on common law principles and the Code of Ethics for Attorneys-at-Law. Also, in Trinidad and Tobago, as in England, there is no legislation which guarantees LPP for advice given to clients by accountants.

Consequently, if a similar issue were to arise here, the local courts are likely to follow the decision of the English Supreme Court in *Prudential*. As such, any legal advice given in Trinidad and Tobago by accountants to their clients may be subject to disclosure in court proceedings, or at the request of the Board of Inland Revenue (BIR), subject to any statutory limits on the right of the BIR to enforce the production of certain documents.

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TRINIDAD & TOBAGO 2014 BUDGET MEASURES *(cont'd)*

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- Effective January, 2014, wear and tear allowance (tax depreciation allowance) on assets transferred between related parties will be calculated on the lesser of the notional written down value and the fair market value of assets (new or used). The "notional written down value" will be derived by using the costs of acquisition and writing down those costs in accordance with the Wear and Tear Allowance rates permitted under the Income Tax Act as if the asset were in use in Trinidad and Tobago from the date of acquisition to the year of assessment, while "fair market value" will be the price which the asset might reasonably be expected to fetch on a sale in the open market.
- During 2013, an exemption from tax was granted on gains and profits derived from the initial sale of land for residential housing developed after 1st October, 2012 but the sale was required to be completed prior to 31st December, 2015. This timeline has now been extended to 31st December, 2018.
- Other amendments to the Corporation Tax Act are expected to take effect from 1st January, 2014 to deal with "tax leakages" but no details have as yet been provided on these proposed amendments.

Motor Vehicle Accident Fund

Effective January 2014, a Motor Vehicle Accident Fund will be established using sums collected from the 6% Insurance Premium Tax currently in effect.

Export-Import Bank of Trinidad and Tobago (Exim Bank)

The Government will re-capitalize Exim Bank by making a series of equity injections over a four (4) year period to allow the Bank to finance exports into extra-regional markets at a reduced cost of funds to facilitate the process of developing the export manufacturing sector.

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WINNING THE SHELL GAME: HOW THE OPPRESSION REMEDY CAN BE USED TO RECOVER UNPAID JUDGMENTS

Catherine Ramnarine

As many Claimants discover, obtaining a Court Judgment against a debtor does not automatically guarantee payment. Where the debtor is a company, it may no longer be in active operation or own any assets out of which the Judgment can be paid. Some companies may even attempt to evade their debts by ceasing operations and carrying on the business under a different name, shuffling assets around much like a confidence trickster running a shell game. The Oppression Remedy under the Companies Act may provide recourse to Claimants in such a situation, allowing them to recover payment directly against the company's principals.

What is the Oppression Remedy?

The Oppression Remedy is a statutory remedy created under Section 242 of the Companies Act. It provides recourse to a company's stakeholders where the company acts in a way that is (a) oppressive to (b) unfairly prejudicial to or (c) unfairly disregards their interests.

How can it be used to recover unpaid Judgments?

Although the Oppression Remedy is typically viewed as a way for minority shareholders to protect themselves against the oppressive conduct of majority shareholders, it can, in certain circumstances, also be utilised by the company's creditors. A Company's creditors are considered to have a reasonable expectation that it will continue to operate and generate revenue to be applied towards the payment of the debts. Thus, where the company or its principals act in a way which leaves the Company with insufficient assets to pay its debts, such as (i) engaging in "asset stripping" by selling off its assets or (ii) ceasing operations and carrying the business under a different name, its creditors may be able to bring an Oppression claim.

Section 242 of the T&T Companies Act was modelled after the Canadian Business Corporations Act. The following cases illustrate how the Canadian Courts have applied the Oppression Remedy:

- In *Sidaplex-Plastic Suppliers Inc. v Elta Group Inc*, the claimant (Sidaplex) obtained Judgment against the defendant (Elta). Elta had only one shareholder and director, Lin. Elta sold the bulk of its assets and used the proceeds of sale to liquidate a debt owed to its bankers, at the same time eliminating his personal liability as guarantor for that debt. Elta was left with insufficient assets to pay Sidaplex' Judgment. The Court held that Lin was, as sole shareholder and director, the source of all Elta's conduct. This conduct deprived Sidaplex of the ability to recover payment of its Judgement and was sufficient to ground an Oppression claim. The Court accordingly ordered Mr. Lin to personally pay the Judgment debt owed to Sidaplex.

- In *Schreiber Foods Inc v Wetpackit* the claimant (Schreiber) obtained judgment against the defendant (Wetpackit). Wetpackit's sole shareholder, Wiggins, stopped operating that company and incorporated another company called "Wetpackit 2009", which carried on substantially the same business and had the same customers and employees as Wetpackit. The Court held that Wiggins/ Wetpackit had acted in a manner that was oppressive and unfairly prejudicial to Schreiber and found both Wiggins and Wetpackit 2009 jointly liable for payment of the Judgment.

- In *Levy-Russel Ltd. v Shieldings Inc. (2004) OJ No. 4291* one of the company's major (but not controlling) shareholders lent the company money and received a security interest over its property in return, putting it in the preferential position of a secured creditor. The claimant was unable to realise its Judgment due to the company having insufficient funds. It alleged that the shareholder had exercised its control over the company so as to gain a preferential and unfair position over the company's other creditors. The Court dismissed the judgment creditor's claim, noting that:
  - the shareholder did not have control over the company;
  - the shareholder acted as an arms length creditor in the transaction;
  - the terms of the transaction were not below market value; and
  - the company used the funds lent to it by the shareholder for legitimate business purposes.

The above cases illustrate that the Oppression Remedy will be more readily applied in cases where the debtor company is effectively controlled by a single individual or a small group. Moreover, an Oppression claim will not succeed where the company's conduct at arm's length or for a legitimate business purpose.

The Oppression Remedy can be a powerful tool for creditors seeking recourse against deadbeat corporate debtors. However, preventative measures, such as conducting proper due diligence and obtaining sufficient security and/or personal guarantees before doing business can also help prevent parties from finding themselves in such situations.

For more information on the Oppression Remedy or Enforcement of Judgments, visit our website at www.trinidadlaw.com and click on the "Doing Business in T&T" tab.

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