



Hamel-Smith

ATTORNEYS-AT-LAW, TRADEMARK & PATENT AGENTS

FORUM

VOLUME 12 ISSUE 6

The Lawyers Newsletter for Business Professionals

APRIL 2022



COURTING LEGAL BUSINESS RELATIONS

Melissa Inglefield

At the beginning of any relationship, it is important to know the other party(ies) involved. While in our small twin island nation where “everybody know everybody” that is fairly easy to achieve in our personal relationships, in our business relationships, greater caution and discretion is advisable.

In this Article, we identify certain basic documents that you should request of your counterpart from the outset of any business relationship and which you would want to keep current throughout the life of that relationship.

Where your counterpart is an individual...

In business relationships where the counterpart is an individual, it would be important to receive and retain from that individual, copies of his/her photo identification and a proof of address (typically in the form of utility bill or bank statement).

Depending on the nature of the transaction, including the significance of the business/transaction (and particularly if the proposed relationship includes an obligation on the counterpart to pay money), there may be value in requesting a job letter or a written reference from the counterpart's bankers or attorneys at law to get comfort surrounding the counterpart's reliability and reputation.

Where your counterpart is a company...

In the case of companies, attention needs to be given to both the company itself and the person(s) representing the company.

In the first instance, the corporate existence and good standing of the company should be verified. This can be done by requesting that the company produce its certificate and articles of incorporation, its by-laws, its latest annual filings and any notices of change filed after the company's last annual return (such as a notice of change of directors or secretary).

Depending on the nature of the proposed relationship and transaction with the company, additional due diligence may be required into the company's good standing, including carrying out a review of the company's file maintained by the Companies Registry to verify that the company is not subject to any winding-up proceedings and that its assets are not subject to any charges.

In circumstances where the transaction falls within the “ordinary course” of the company's business, it may not be necessary to require evidence of the authority of the company to enter the particular transaction. However, in circumstances where the transaction is one which may be outside of the “ordinary course” of business, a careful review of the company's articles and by-laws may provide insight on the requisite approvals to permit such a transaction. Typically, it would be prudent in such instances to request evidence from the company of its directors' approval of the transaction. Shareholder approval might also be required in certain circumstances, such as e.g. if a shareholders agreement among the company's shareholders (notice of the existence of which should be filed in the companies registry) reserves certain matters to shareholder approval; if the company's directors might be conflicted or have an interest in the particular transaction or if a substantial proportion of the company's assets are being sold.

With respect to any person who purports to represent and act on behalf of the company, it would be important to verify the identity of the person (by obtaining from the person the same documents mentioned above with respect to individuals). It would be equally important to verify the capacity in which such person represents the company (e.g. as a director, chief executive officer or other officer) and that he/she is duly authorised by the company to transact business on its behalf. Such evidence might be in the form of a letter on the company's letterhead certifying the position of the person in the company.

CONTENTS

- Courting Legal Business Relations
- Guyana's Local Content Policy: A cause for CARICOM concern?

(cont'd on page 3)



GUYANA'S LOCAL CONTENT POLICY: A CAUSE FOR CARICOM CONCERN?

Miguel Vasquez

Since the discovery of prolific oil reservoirs in 2015, Guyana has undergone significant levels of economic growth and transformation. The discovery has attracted foreign investment, activity and operation across various sectors within the country resulting in foreign entities becoming increasingly intertwined in these sectors, with Guyanese nationals often having a sense of exclusion and marginalisation in their own country.

In an attempt to encourage development and greater participation for Guyanese nationals in the petroleum industry, the Government of Guyana has been exploring legislation which would require that certain minimum requirements with respect to the hiring and contracting of Guyanese nationals, be satisfied. Legislation of this nature is typically referred to as local content policies or requirements. The Government's efforts culminated in the passing of the **Local Content Act, Act No. 18 of 2021** on the 30th December, 2021 ('LCA').

The LCA has been described as giving Guyana *"the opportunity to win"* and to *"maximise the level, quality and benefits of participation in the petroleum sector value chain by Guyanese."* According to the LCA's Preamble, it seeks to impose obligations on persons engaged in the petroleum sector for the purpose of prioritising Guyanese nationals and companies, enabling local capacity development, and promoting competitiveness and the creation of related industries to sustain the social and economic development of Guyana.

However, notwithstanding the good intent that a policy or incentive may provide on the one hand, it does not necessarily follow that such a policy or incentive may be consistent with other laws or obligations of a country. In particular, questions arise over whether the LCA breaches Guyana's regional obligations and commitments under the Revised Treaty of Chaguaramas ('RTC'), of which it is a Member State.

Under the LCA, every: (a) Person who enters into a Petroleum Agreement in accordance with Section 10 of Guyana's Petroleum (Exploration and Production) Act; (b) Holder of a licence granted under Guyana's Petroleum (Exploration and Production) Act; and (c) Person who has entered into an agreement with (a) and (b) above for the provision of goods and services within their supply chain management, (together, '**Regulated Companies**'); is required to utilise "local content" as an essential component of their petroleum operations, and to comply with minimum local content levels for certain sectors that carries out petroleum operations.

The natural questions stemming from the LCA's requirement are: (a) What is meant by "local content;" and (b) What are the minimum local content levels.

The LCA defines "local content" as the monetary value of inputs from the supply of goods, or the provision of services, by

Guyanese nationals or Guyanese companies and includes local capacity development. Guyanese nationals are simply defined as citizens of Guyana, while a Guyanese company is: (a) Any company incorporated under the Guyanese Companies Act: (i) which is beneficially owned by Guyanese nationals who ultimately exercise, individually or jointly, voting rights representing at least 51% of the total issued shares of the company; and (ii) That has Guyanese nationals holding at least 75% of executive and senior management positions and at least 90% of non-managerial and other position; or (b) Any partnership between Guyanese nationals and a company constituted under subclause (a) in accordance with the Partnership Act.

What is curious about the "local content" definition is that the scope of persons covered extends only to Guyanese citizens, with no carve out for nationals of CARICOM Member States, while a Guyanese company is almost equally restrictive in operation. In particular, not only must the company be a Guyanese locally incorporated company, but the ownership structure required to be satisfied examines beneficial ownership of at least 51% of the total issued shares of the company, and Guyanese nationals must also account for a significant proportion of persons holding positions across the company. All three (3) conditions must be satisfied for a company to be a Guyanese company for the purposes of the LCA.

With respect to the minimum local content requirements, the particularly contentious aspect of the LCA, is that, to the extent the Regulated Companies engage persons in certain sectors, a proportion of the persons engaged must be Guyanese citizens and Guyanese companies. Forty (40) sectors have been identified by the LCA as being subject to the minimum local content requirement, in which case services provided for Onshore Pipe Welding must have a participation of Guyanese nationals and companies in the proportion of at least 25%, Onshore Pipe Sand Blasting of at least 30%, Onshore Construction Work for Buildings of at least 50%, and Food Supply and Administrative Support and Facilities Management Services of at least 75%; with the goal of ensuring the maximum participation of Guyanese nationals and Guyanese companies in the Guyanese petroleum sector.

The LCA has the potential to attract regional attention due to the promotion of Guyanese nationals and companies, potentially at the expense of CARICOM nationals of other Member States. An argument can be made that this may contravene the following rights which ensure directly to these CARICOM nationals.

- Prohibition on non-discrimination;
- Freedom of establishment; and
- Free movement of services.



Evidence of the board of directors' authorisation of the transaction might come in the form of a copy of the board's resolution or a certificate issued by the company's corporate secretary certifying that the transaction was duly authorised by the company's board of directors.

Where your counterpart is a partnership...

In the case of partnerships, the critical factors would be verifying the existence of the partnership; the persons who are partners (and therefore have the power to bind the partnership); and that the persons purporting to be partners are who they say they are.

The legal existence of the partnership is generally a question of fact under the Partnership Act Chapter 81:02. However, in most cases in T&T, the existence of a partnership would be evidenced by a partnership agreement among the partners and the partnership's registration as a firm in the register of business names maintained pursuant to the Registration of Business Names Act Chapter 82:85.

Copies of these documents should therefore be requested.

As for determining who are the partners of the partnership (and who has the capacity to bind the partnership), both the partnership agreement and the filings made by the partnership under the Registration of Business Names Act identify the partners of the firm.

Confirming that a person who holds herself out to be a partner is who she says she is can be verified by requesting those documents set out above with respect to individuals.

Where your counterpart is relying on a power of attorney...

There are circumstances where the person with whom you are dealing may be representing another person pursuant to a power of attorney. In the first instance, it is important to ensure that the power of attorney is effective. The effectiveness of a power of attorney granted in T&T turns on whether the instrument has been duly executed by the grantor as a deed, stamped with stamp duty and (if the power of attorney is intended to be used to deal with the grantor's real property) registered in the land registry. These matters would likely be best verified by an attorney at law.

Subject to the validity of the power of attorney, it would be important to verify the identities of both the grantor and the grantee of the power of attorney by requesting the individual due diligence items mentioned above.

Finally, the grant of a power of attorney does not necessarily mean that the grantee is empowered to make decisions on behalf of the grantor – it often merely gives the grantee the power to sign instruments and receive payments (among other things) on the grantor's behalf. As such, it would be important to verify that the grantor is aware of, and has consented to, the proposed transaction.

Where your transaction is being conducted electronically or virtually...

Between the advancements in technology and the consequences of the Covid-19 pandemic on the conduct of business, it is now commonplace for a business relationship to commence and business to be transacted wholly via electronic means. While this no doubt improves the ease of doing business and brings increasing convenience, it also increases the risk of fraudulent dealings where parties never meet in person.

In circumstances where a transaction is being executed wholly electronically, it may be prudent to verify the counterparty's identity. In such circumstances, scanned or other electronic copies of the counterparty's IDs and proof of address may be less reliable. As such, it is recommended that a person's identity be verified either in person or, where not possible, by requiring copies of the counterparty's IDs to be duly notarized by a notary public.

The above represents the minimum and some general due diligence steps available to establish the identity and to some extent the due authority of the counterparty with whom you are transacting business. It is by no means exhaustive and much more may be required depending on whether the counterparty or the transaction is specially regulated. As with all relationships and all significant commitments within such relationships, the higher the complexity and risk in a transaction, the greater the duty to verify the identity of your counterparty and to ensure that your counterparty is duly authorised to transact the business at hand.

Melissa is a Partner within the firm's Transactional Department and may be reached at melissa@trinidadlaw.com

GUYANA'S LOCAL CONTENT POLICY: A CAUSE FOR CARICOM CONCERN?

Miguel Vasquez



(Cont'd from page 2)

Under Article 7 of the RTC, any discrimination on the grounds of nationality is prohibited. The Caribbean Court of Justice has interpreted discrimination to be where a person is subjected to treatment that is worse or less favourable than that which is accorded to another person who is in similar circumstances except for their respective nationalities, with no objective and reasonable justification for the difference in treatment. Under the LCA, a company from another CARICOM Member State, notwithstanding being similarly circumstanced with a Guyanese company, would not be engaged by the Regulated Companies if: (a) When they are engaged, the minimum local content requirement will be exceeded; or (b) The Regulated Companies' minimum local content limit is not being met, and therefore only Guyanese companies can be engaged by the Regulated Companies for the service. In either case, the only factor that disqualifies and/or prevents the CARICOM company is their nationality. The position with respect to a national individual may differ as there is no right to seek employment; rather, just a right for skilled nationals, such as University graduates, to work without a work permit (provided the necessary documentation is obtained).

There is also the potential restriction on the freedom of establishment under Article 32, as a company that is entitled to the right by having more than 50% of its equity interest being beneficially owned by, or effectively controlled by CARICOM nationals, would not necessarily be classified as a Guyanese company for the purposes of the LCA.

Furthermore, Article 36 of the RTC prohibits any Member State from introducing new restrictions on the provision of services by nationals of other Member States. The existence of a requirement that has the potential to, and in reality, would, prevent nationals of other Member States from providing one of the forty (40) listed services, is tantamount to a restriction that is prohibited by Article 36.

Article 37 of the RTC requires Member States to remove discriminatory restrictions on banking, insurance and financial services. Notwithstanding this obligation on Member States, the LCA contains minimum local content requirements on: (a) local insurance services which must have a 100% participation by Guyanese nationals and companies; and (b) local and accounting services, which must have a participation of at least 90%.

The potentially infringed rights are fundamental core rights granted by the RTC and must be respected by Member States. While a country may be within its right to implement measures that will encourage development particularly in a region that continues to strive to step out of the shadows of colonialism and its effects, CARICOM Member States must ensure that these measures do not negatively impact other Member States or breach their rights under the RTC.

For example, while Trinidad and Tobago's **Foreign Investment Act, Chap. 70:07** subjects foreign investors to certain restrictions and requirements on the acquisition and holding of land and shares, CARICOM Member State nationals and companies fall outside of the scope of the restrictions and requirements. Having regard to the potential breaches of the RTC and Community law, it is interesting to see what action, if any, on a Community level, nationals and companies from other CARICOM Member States, and indeed other CARICOM Member States themselves, decide to take, having regard to the provisions of the LCA.

Miguel is a Senior Associate within the firm's Dispute & Risk Management Department and may be reached at miguelv@trinidadlaw.com



The featured articles were previously published in the
Trinidad Guardian newspaper.

The Lawyers Newsletter for Business Professionals

Published by M. Hamel-Smith & Co.
Eleven Albion, Cor. Dere & Albion Streets
Port of Spain, Trinidad & Tobago
Tel: 1(868) 299-0981 / Fax: 1(868) 625-9177
E-mail: mhs@trinidadlaw.com / Web: www.trinidadlaw.com
and intended for limited circulation to clients and associates of our firm.
2022, M. Hamel-Smith & Co., all rights reserved.

Member

LexMundi
World Ready



M. Hamel-Smith & Co.