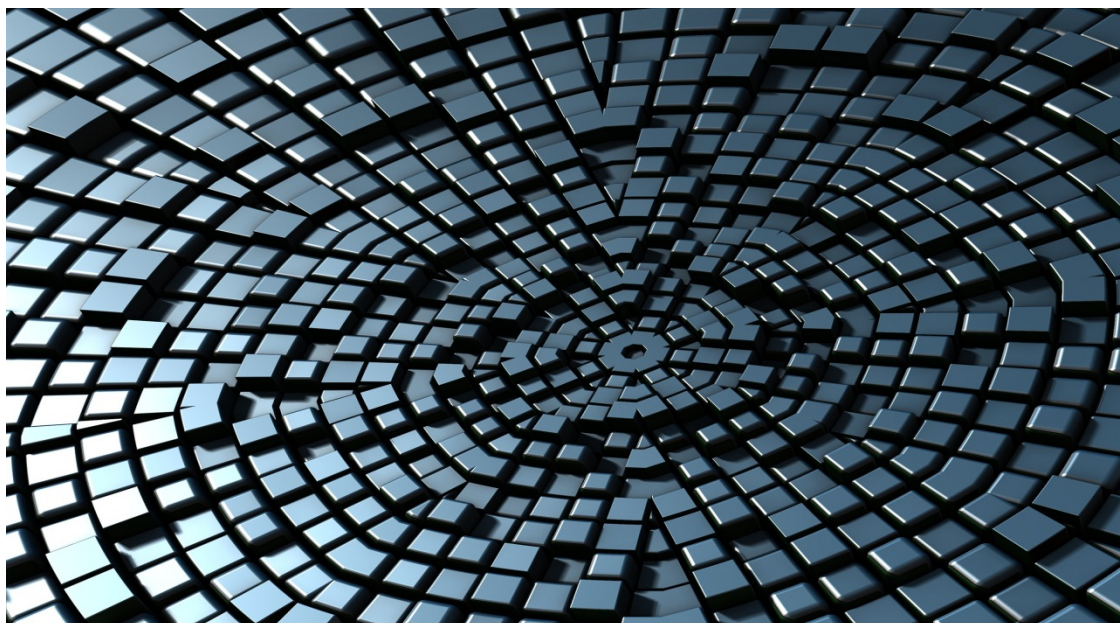


CGF POINT OF LAW

E-NEWSLETTER OF CLARKE GITTENS FARMER – ATTORNEYS-AT-LAW



ABOUT



Clarke Gittens Farmer is one of the principal law firms in Barbados. The firm is a commercial law firm, providing legal services for both domestic and international corporate and private clients. The firm strives to provide high quality work in banking, corporate, commercial, business law and commercial litigation. The firm also advises clients on the purchase and sale of residential and commercial property in Barbados and maintains a significant trademark and patent registration practice.

INTRODUCTION

In this issue we feature articles from our Property, Corporate and our Commercial Departments.

In our first article we take a look at the title and security documents prepared in sale and mortgage transactions. The article also identifies the important steps to be taken once clients have signed on the dotted lines and the relevant timelines that must be adhered to for these transactions.

A continuous global hot topic is the emergence and use of blockchain technology and digital currency. The second article reviews the funding models which are available to startup blockchain companies and highlights the security token offering model which has emerged as an increasingly attractive option and how this may be structured from a Barbados law perspective.

Finally, our third article provides an overview of the recent changes to the legislative regime effective Jan 1, 2019 to remove all ring fencing for corporate entities operating in the International Business and Financial Services Sector, as a result of the OECD's finding that Barbados had a preferential regime which was potentially harmful and against the OECD's mandate addressing Base Erosion and Profit Shifting (BEPS).

~ We hope you enjoy! ~

The e-Newsletter Committee

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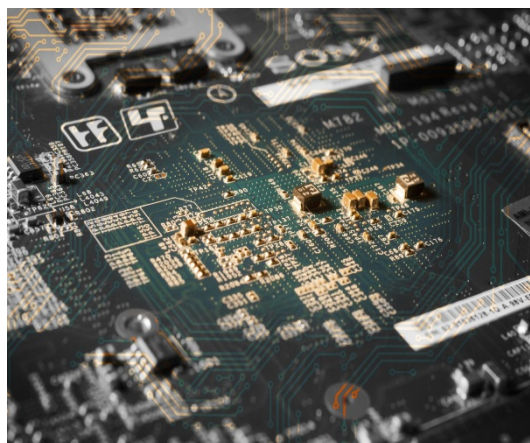
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Perfecting Title and Security Documents in Land Transactions

What should happen to title and security documents after the documents are executed and the transaction is completed?

By Mrs. Rosalind K. Smith Millar, QC, Partner

Mrs. Rosalind K. Smith Millar, QC

Introduction

In the normal course of things, most residential land transactions are financed by a secured loan, and most commercial loans are secured by a charge over real or personal property. This article reviews the post-completion processes that are required to perfect title and security documents. Leases are not discussed in this article.

Here are some of the documents one may encounter in a typical land transaction or loan scenario:

| | |
|------------------------------------|--|
| Conveyance or Transfer | Transfers ownership of property from one or more persons to another or others. |
| Mortgage or Charge | Creates a charge, lien or interest on any property for securing money or money's worth, or the fulfilment of an obligation. Only the property owner can charge property; <u>all</u> owners must sign the mortgage or charge of their interest in the property. |
| Debenture (and mortgage or charge) | Creates a charge over all /most assets of a company, which may take effect as fixed and floating charges, according to the nature of the property to be charged, and may include a specific mortgage or charge of real property. |
| Bill of Sale | Creates a charge over goods and chattels such as motor vehicles, equipment, machines, household effects, items that can be handed over to the lender, but not over crops, real estate, fixtures, shares, government securities, capital, choses in action (e.g. insurance policies); machinery etc of sugar plantations. The lender has the power to take possession of the asset charged, in case of default. |

Guarantee

Operates as a promise to pay another person's debt or perform his obligations in case of default, and may be either limited to a set amount, or unlimited. Examples include guarantees to pay or service a debt, to fund cost overruns or disputed items, or to complete a project.

Assignment of contractual rights

Transfers the right to the benefit of a contract. Examples of these contracts include contracts of insurance (life, property, contract works), contracts for services, building contracts, and rental contracts.

Promissory Note

This is an unconditional promise to pay a sum of money to the holder of the note at a fixed or determinable time in the future, and creates an enforceable debt.

Chattel Mortgage

Creates a mortgage over a chattel house or building where the owner of the house is not the owner of the land. Seldom used nowadays, but once duly proved and recorded, a chattel mortgage ranks prior to all judgments whether obtained before or after the mortgage. If not recorded, the mortgage is null and void as against a subsequent mortgagee but not otherwise.

So, after the lawyers have investigated title to the property, asked a long list of questions, drafted required documents, the final documents are signed and the money changes hands, what's next?

The goal of the buyer or the lender will be to ensure that their rights take priority over all other potential rights to the property.

Perfecting Title and Security Documents in Land Transactions

What should happen to title and security documents after the documents are executed and the transaction is completed?, Cont'd...

By Mrs. Rosalind K. Smith Millar, QC, Partner

Stamping, Recording and Notification

To achieve priority, the documents must go through a process of stamping under the Stamp Duty Act, Cap 91 of the Laws of Barbados ("**Stamp Duty Act**"), recording or registration at the appropriate registry, and notification to relevant third parties.

- Documents affecting ownership or rights in real property must be recorded or registered at the Land Registry. Registered title instruments are registered, while unregistered title documents are recorded. It may be necessary to do both e.g. for a debenture that charges a registered title or a charge that affects both registered and unregistered title.
- Copies of documents charging a company's property also must be lodged at the Corporate Affairs and Intellectual Property Office ("**CAIPO**") for purposes of notification to the public.
- If there is an assignment of contractual rights or benefits, the third party (e.g. insurance company or contract counterparty) should be notified.

Stamping of documents under the Stamp Duty Act

- **Time frames** - Stamps should be affixed within 30 days if execution of the document is in Barbados; otherwise, within two months after receipt of the document in Barbados.
- **Consequences** - Failure to stamp adequately or at all attracts a penalty of \$100.00 plus 8% interest up to double the original amount payable. An inadequately stamped or unstamped document may not be used in evidence in Civil Court until properly stamped: the original duty and penalty must be paid along with an additional penalty of \$100.00.

- **Offence** - It is a criminal offence to refuse or neglect to duly and effectively stamp an instrument, carrying a fine of \$1,000.00.

Recording or registration at Land Registry

- **Time frames** - Documents conveying, mortgaging or charging land must be recorded within three (3) months, if executed in Barbados [six (6) months, if executed elsewhere]. A transfer by a chargee exercising its power of sale over a registered title must be registered within fourteen (14) days of the date of the transfer. Copies of company charges affecting land must be lodged at CAIPO and the Land Registry within twenty-eight (28) days, or the charge is void as a security interest, taking effect only as a contract.
- **Effect** – The effect of recording or registration is that it constitutes actual notice to all persons and for all purposes from the date of recording or registration. First on the register has first priority.
- **Consequences** - Failure to record or register a document at all may result in another deed that is recorded taking priority; failure to record or register in good time has similar consequences which will result in another deed that is recorded earlier taking priority. In addition, late registration of an instrument for registered title attracts late penalties for every three (3) additional months, up to five times the original registration cost, in addition to the original registration fee.

Registration of charges at CAIPO - Companies Act, Cap. 308

- The purpose of registering company charges in the company's register at CAIPO is to protect potential creditors who would not otherwise be aware of prior charges over the company's assets.

Perfecting Title and Security Documents in Land Transactions

What should happen to title and security documents after the documents are executed and the transaction is completed?, Cont'd...

By Mrs. Rosalind K. Smith Millar, QC, Partner

- **Time frame:** The original and one certified true copy must be presented to CAIPO within twenty-eight (28) days after creation of the charge. In the case of a debenture that contemplates future-acquired property, notice of the later acquisition should be registered within twenty-eight (28) days after acquisition of the property, but failure to do so does not invalidate the charge.
- **Effect:** This registration constitutes notice to the public of the existence of the charge.
- **Consequences** - Failure to register a copy of the charge renders the charge void as a security interest, although the document retains its validity as a contract. The money secured becomes immediately payable.

Notification

- Assignment of insurance policies - notice of the assignment given to the issuing insurance company gives the assignee priority of interest as against later-notified assignees, all revocable beneficiaries or later-notified irrevocable beneficiaries.

Notice to counterparties to contracts gives the assignee or creditor priority over any competing assignments of the same debt. It is desirable to have the counterparty acknowledge the notice of assignment, and undertake to pay the contract earnings directly to the lender if requested, to cooperate in any enforcement of the contract rights, to perform its own contract obligations, and to confirm that there are no prior rights over the Borrower's rights title and interest in the contract. However, the counterparty's failure to acknowledge the assignment does not negate the assignment (i.e. the lender's right to receive the contract earnings and its step-in rights), but it casts doubt on priority and leaves the lender without confirmation of priority of interest or the assurance of the counterparty's cooperation with the assignee or creditor in case of the borrower's default.

Risk and Mitigation of Risk

If a registry's records are not kept up to date with details of documents recorded, registered or lodged, a search at that registry may not disclose documents submitted before the search date, not yet entered into the records. It may then be possible for a later document to take priority if it is recorded or registered first. One must also remember the consequences of failure to comply with the various requirements!

Debentures not recorded or registered may be missed on a search for after-acquired real property, and a company charge may lose its effect as a charge if not registered timely. If the money becomes immediately payable, the borrower may not have the money to repay it immediately, leaving the lender in an unhappy position.

To mitigate against these risks, buyers and lenders should ensure prompt action on perfecting the security and that all required steps are taken within the set time frames. If possible, searches should be updated periodically until the documents are stamped and recorded to ensure priority, although this is likely to increase the transaction costs.

What to do if a deadline is missed

If a deadline is missed, the document should still be recorded or registered at the Land Registry. Late lodgement at CAIPO requires a Court order for an extension of time. If there is another creditor in the picture who has recorded or registered first, they may be willing to enter into a priority arrangement.

Ensuring that all of the required steps are taken promptly (or at least within the designated time frames) will provide the confidence that one's rights, as a buyer or as a lender, have been fully protected in case of a later dispute or default.



Mrs. Nicola A. Berry

Blockchain Feature. "From ICOs to STOs - Structuring a Security Token Offering from Barbados"

By Mrs. Nicola A. Berry FCI Arb., Partner

Introduction

The development of cryptocurrencies has led to the rapid creation of new digital networks being built on blockchain technology.¹ These networks have generally been supported by cryptocurrencies or digital tokens.² Startup financing took a dramatic turn in 2017 when initial coin offerings ("ICOs") or token sales burst onto the scene. It has been reported that by 2018 more than US\$14 billion³ flowed into blockchain projects as investors looked to capitalize on the crypto euphoria.

The funding model of ICOs was utilized by many startup blockchain companies to raise funds to build their blockchain networks. ICOs generally offered a low barrier to entry and operated within a regulatory gray area resulting in the exuberance in the ICO marketplace and some token purchasers being the targets of scams and large cyberthefts. As ICOs faced these multiple challenges, startups and companies sought to find more satisfactory means of funding where there is more security to potential investors, less uncertainty and less fraud. Security token offerings ("STOs") have been regarded as providing a more secure path to blockchain companies seeking to raise funds.

From ICOs to STOs

An ICO raises funds through a mechanism such as a simple agreement for future tokens ("SAFT") which offers to purchasers the *right* to acquire, in the future, units in certain tokens; or a public offering of coin or digital token. In an ICO, a proprietary coin or token is issued in exchange for cryptocurrency for a specific investment project. There is a general view that tokens may be classified as either utility or security tokens. Where a token amounts to a security as defined under the national laws of a country, the token will be held to be a security. On the contrary, where the predominant feature of the token is the right to use a particular platform/application or it does not amount to a security it has been viewed as a utility token.

One regulatory concern relating to ICOs is whether they are legitimate under securities regulations and the answer varies across different countries. In Barbados, there are no specific regulations relating to coin offerings and where a person is interested in making an ICO from Barbados, a legal analysis has to be undertaken on a case by case basis to determine whether the security laws are applicable.

STOs are the regulated versions of ICOs. They allow a company to offer revenue such as annual income from the operations of the company, or other periodical income, percentage on profits, equity, debt or dividends and are backed by real assets. Generally, the value of the STO is tied to the value of the company that is selling it. STOs function in the same way with projects selling their tokens to early investors in order to fund their work. The difference between an STO and ICO primarily rely on the framework and preparation of the token sale. STOs are built to operate within the confines of the security laws and regulations and therefore, unlike ICOs, STOs are treated as securities from the beginning. An STO must be carefully drafted and rigorously tested in order for it to be available for

¹ A blockchain is a distributed ledger which can record and verify transactions on a computer network without the help of a centralized institution such as an exchange or clearing house. The blockchain is said to be ideal for reducing transaction costs by decentralizing the maintenance of the ledger and delegating the task to users on its network. It secures finality of a transaction by making a record of the transaction extremely difficult to be altered when its verification process is completed. (Andrew Henderson and James Burnie, "Blockchain: mitigating or aggravating regulatory risk?", *Butterworths Journal of International Banking and Financial Law*, May 2016 at p. 293).

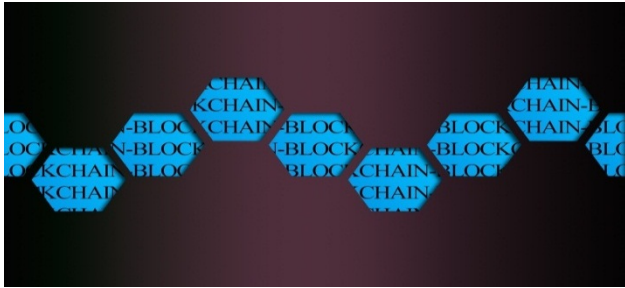
² A token is a unit of value issued by a technology or crypto start-up, intended to be a piece in the ecosystem of their technology platform or project. Tokens are supported by blockchains. They only physically exist in the form of registry entries on the said blockchain. They are generally sold for fiat or cryptocurrency in order to fund the start-up's technology project. <https://en.bitcoinwiki.org/wiki/Token>

³ "What is an STO (Security Token Offering) & 10 Reasons Why it will have a massive impact", <https://www.ccn.com/what-is-an-sto>

Blockchain Feature. "From ICOs to STOs - Structuring a Security Token Offering from Barbados", Cont'd...

By Mrs. Nicola A. Berry FCI Arb., Partner

purchase. On a whole the STO raises the bar of legitimacy. Since the company has cleared regulatory requirements, investors in an STO, unlike some investors in an ICO, have no reason to fear government shutting them down.



Regulatory Framework for STOs

So what is the applicable regulatory framework for STOs in Barbados? As indicated earlier, there is no current regulation, guideline or circular which has been issued by the Financial Services Commission ("FSC") or any other regulator in Barbados on digital assets such as tokens.

Since the security token is one which would constitute a security, it would be dealt with under the existing security framework. The definition of 'securities' set out in the Securities Act, Cap. 318A of the Laws of Barbados ("**Securities Act**") does not expressly refer to digital assets however, the question of how a token is considered a security would be likely examined on the basis of whether the token is an "investment contract", that is to say, an investment by a person in a common enterprise with a reasonable expectation of profits derived substantially from the entrepreneurial or managerial effort of other persons.

Section 2 (1) of the Securities Act provides that a 'security':

"(a) means any document evidencing ownership or any interest in the capital or debt, property, profits, earnings or royalties of any enterprise or proposed enterprise; and

- (b) without affecting paragraph (a), includes any**
 - (i) bond, debenture, note or other evidence of indebtedness;*
 - (ii) share, stock, unit, unit certificate, participation certificate or certificate of share or interest;*
 - (iii) instrument commonly known as a security;*
 - (iv) investment contract, that is to say, an investment by a person in a common enterprise with a reasonable expectation of profits derived substantially from the entrepreneurial or managerial effort of other persons; [emphasis added]**
 - (v) instruments or document constituting evidence of any interest or participation in (a) a profit sharing agreement; (B) a trust; (C) an oil, natural gas or mining lease, claim or royalty or other mineral right; or*
 - (v) a right to acquire or dispose of anything specified in paragraphs (i) to (v) but*
- (c) does not include**
 - (i) currency;*
 - (ii) a cheque, bill of exchange or bank letter of credit;*
 - (iii) a certificate or document constituting evidence of any interest in a deposit account with (a) a financial institution (b) a credit union within the meaning of the Cooperative Societies Act; (c) an insurance company;*
 - (d) a contract of insurance by an issuer."**

Blockchain Feature. "From ICOs to STOs - Structuring a Security Token Offering from Barbados", Cont'd...

By Mrs. Nicola A. Berry FCI Arb., Partner

In examining the definition of "investment contract", it is likely in analyzing whether the token is a security, the judicial interpretation of the U.S. Supreme Court in Securities & Exchange Com'n v. W.J. Howey Co. et al.⁴, referred to as the "Howey test" would be persuasive before our local courts.

The elements which are required to be present in order to constitute a security token based on the *Howey test* are:

- (i) an investment of money;
- (ii) in a common enterprise; and
- (iii) an expectation of profits predominantly from the effort of others.

So long as the security token being offered comes within the definition of security under the Securities Act, the company can proceed with a STO.

Registrations

It is likely that the FSC will conduct an analysis of each token on a case-by-case basis to assess whether the particular characteristics of that token will result in it being characterized as a security for the purposes of the laws of Barbados. Where the token is a security token, the relevant registrations are required to be complied with unless there is an applicable exemption.

In order to issue the security token in Barbados, the Company will be required to: (a) register as a reporting issuer with the FSC; (b) register the securities with the FSC; and (c) file a prospectus with the FSC before it distributes the security token unless (i) there are any applicable exemptions from the prospectus filing requirements under the Securities Act, or (ii) the distribution falls under the private placement regime in Barbados.

Exemptions to Prospectus Requirement

The requirement to publish a prospectus shall not apply to a STO which comes within any of the exemptions listed in the Securities Act including the following types of offering:

- (1) *distributions by an issuer where the purchaser is an issuer acting as principal;*
- (2) *a distribution made by or for the issuer or owner by means of an isolated sale that is not made in the course of continued or successive sales or the same security;*
- (3) *a distribution made to fewer than 50 purchasers each of whom is a "sophisticated purchaser" (as defined under the Securities Act); or*
- (4) *a distribution by way of a "limited offering" (as defined under the Securities Act);*

Private Placement

Under the private placement regime in Barbados, certain offers/distributions of securities are not treated as offers to the public for the purposes of the Securities Act. These offers do not trigger registration of the issuer as a reporting issuer or registration of the security. The issuer is however required to file a report with the FSC within 10 days of the completion of the sale.

⁴ (1946), 328 U.S. 293

Blockchain Feature. "From ICOs to STOs - Structuring a Security Token Offering from Barbados", Cont'd...

By Mrs. Nicola A. Berry FCI Arb., Partner

Listing of the security token on an Exchange

Issuers of security tokens are able to list their security tokens on the International Securities Market of The Barbados Stock Exchange Inc. ("BSE"). They will however be required to have a Listing Sponsor assist them with the process. The BSE is also in the process of putting the mechanisms in place that will facilitate the trading of security tokens.

- a. appoint a listing sponsor to assist with a listing on the ISM;
- b. register the issuer as a reporting issuer and the security tokens with the FSC;
- c. apply for a listing on the ISM; and
- d. seek out the support of a custodian for trading and storing digital tokens.

Structuring the STO

A company that is seeking to issue a security token in Barbados should consider the following when structuring the STO:

- (i) whether it is going to be a private placement or a public offering;
- (ii) where it is a public offering:

STOs benefit the end-users and projects themselves. Private and/or public offerings of security tokens enable access to a pool of investors without sacrificing regulatory oversight. Barbados has a regulatory framework that facilitates the issuance of security tokens and therefore investors can consider Barbados in the structuring of their STOs.





Ms. Joanna M. Austin

Barbados' Revamped International Business and Financial Services Sector

By Ms. Joanna M. Austin, Senior Associate

Introduction

In February, 2013 the Organization for Economic Co-operation and Development ("OECD") published a report entitled *"Addressing Base Erosion and Profit Shifting"*. Base Erosion and Profit Shifting ("BEPS") refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations¹. The OECD then issued a 15 point Action Plan to address BEPS through its Forum on Harmful Tax Practices and specifically, the Action 5 Plan on Base Erosion and Profit Shifting ("Action 5").

Action 5

Action 5 sets out the factors which determine whether a harmful regime exists.

1. Is the regime preferential?

The first step is to determine if the regime is *preferential* i.e. benefiting a certain group of items, based on the following:

- (i) the regime must apply to income from geographically mobile activities e.g. finance and Intellectual Property;
- (ii) the regime relates to taxation of the relevant income from these mobile activities; and
- (iii) the regime must have some type of tax preference, in comparison with the general principles of taxation in the country.

2. Is the regime potentially harmful?

If the regime is found to be preferential then the next step is to consider if it is also *potentially harmful* based on the existence of certain factors. Four (4) of the factors² relevant to Barbados, in considering whether the regime is preferential are:

- (i) it imposes no or low effective tax rate on income from geographically mobile activities;

- (ii) regime is ring-fenced from domestic economy;
- (iii) regime lacks transparency; and
- (iv) there is no effective exchange of information with respect to the regime.

Based on the above criteria, the OECD found that Barbados had a preferential regime which it deemed potentially harmful. The ring-fenced entities were the international business companies ("IBCs"), exempt insurance companies ("EICs"), international financial services institutions ("IFSIIs") and international societies with restricted liability ("ISRLs"), all of which benefited from significantly lower tax rates than companies doing domestic business.

Out with the Old

As a result of the OECD's findings the Barbados Government committed to amending or repealing the legislative framework directly relating to the international business and financial services sector, to comply with OECD requirements. The following legislation have been repealed:

- Exempt Insurance Act Cap. 308A ("EIA");
- International Business Companies Act Cap. 77 ("IBC Act");
- International Financial Services Act Cap. 325 ("IFSA"); and
- International Trusts Act Cap. 245.

¹ <https://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm>

² <https://www.oecd.org/tax/harmful/37446434.pdf> This list is not exhaustive as there are 8 other factors to be taken into consideration.

Barbados' Revamped International Business and Financial Services Sector, Cont'd...

By Ms. Joanna M. Austin, Senior Associate

The following have been amended:

- Companies Act Cap. 308;
- Corporate and Trust Service Providers Act 2015-12;
- Financial Institutions Act Cap. 324A;
- Income Tax Act Cap.73 ("**Income Tax Act**");
- Insurance Act Cap. 310 (the "**Insurance Act**");
- Property Transfer Tax Act Cap. 84A;
- Shipping Corporations Act Cap. 296B;
- Societies with Restricted Liability Act Cap. 318B;
- Stamp Duty Act Cap. 91; and
- Value Added Tax Act Cap. 87.

In with the New

The following new legislation has been enacted:

- Business Companies (Economic Substance) Act 2018-41 ("**Economic Substance Act**");
- Foreign Currency Permits Act 2018-44 ("**FCP Act**");
- International Business Companies (Repeal) Act 2018-40 ("**IBC Repeal Act**"); and
- Trusts (Miscellaneous Provisions) Act, 2018-49.

All legislative amendments and new enactments came into effect **on January 1, 2019**.



The legislative amendments are significant. From January 1, 2019 newly formed corporate entities will no longer be licensed as IBCs, EICs IFSIs or ISRLs. All entities can conduct business either domestically or internationally, without restriction, and those entities which earn 100% of their income in foreign currency, whether from domestic or foreign sources, are entitled to apply for a foreign currency permit under the FCP Act.

In addition to the above, some of the legislative changes enabled EICS, IBCs, IFSIs and ISRLs licensed prior to October 17, 2017 to opt, prior to December 31, 2018, to be grandfathered ("**Grandfathered Entities**"). "*Grandfathering*" refers to the ability of those entities to continue to benefit from the provisions of the original legislation under a new licence until June 30, 2021, the date recommended by the OECD.

Amendments to Existing Legislation

The Income Tax Act

One of most significant amendments is the convergence of the corporate tax rates from the year 2019 resulting in a single sliding scale generally applicable to all corporate entities, as follows:

| TAXABLE INCOME (BBD) | RATE % |
|---|--------|
| Up to <= 1 million | 5.50% |
| 1 million < Taxable Income <= 20 million | 3.00% |
| 20 million < Taxable Income <= 30 million | 2.50% |
| Taxable Income > 30 million | 1.00% |

The above rates apply to all corporate entities formed or registered under the laws of Barbados and no licence or permit is required to benefit from those rates.

The tax payable by qualifying insurance companies carrying on general insurance business before October 17, 2017, and that were entitled to apply for the foreign currency allowance, will now be 2% of taxable income for every income year, commencing from income year 2019 and ending on June 30, 2021.

Barbados' Revamped International Business and Financial Services Sector, Cont'd...

By Ms. Joanna M. Austin, Senior Associate

In addition, with effect from income year 2019 and every subsequent income year the rate of tax on the taxable income for general and life insurance business under the Insurance Act will be as follows:

- a Class 1 licensee - 0%;
- a Class 2 licensee - 2%;
- a Class 3 licensee - 2%.

It is anticipated that the Income Tax Act will be further amended to address, among other things, withholding tax exemptions for foreign currency permit holders.

Insurance Act

The Insurance Act which previously applied to domestic and qualifying insurance companies, was amended by the Insurance Amendment Act 2018-52 to provide for three (3) different classes of licence and related matters. The Insurance Act now provides for the following licensees:

- (i) Class 1 licensee, which shall be an insurance company which underwrites related party business;
- (ii) Class 2 licensee, which shall include an insurance company which underwrites risks of third parties; and
- (iii) Class 3 licensee, which shall include an insurance intermediary, and insurance management company and an insurance holding company.

With effect from January 1, 2019, the Financial Services Commission has assigned companies formerly licenced under the Exempt Insurance Act on December 31st, 2018, with the relevant Class of licence under the Insurance (Amendment) Act 2018-52 and its provisions are deemed to apply to all such licensees.

It is also anticipated that the Insurance Act will be

further amended to incorporate certain provisions relating to solvency and capital requirements, relating to the former exempt insurance companies the majority of which, have been allocated a Class 1 licence.

Financial Institutions Act

The Financial Institutions (Amendment) Act, 2018-51 (the "**FI Amendment Act**") amends the Financial Institutions Act and effected the repeal of the IFSA.

The FI Amendment Act provides that a company licensed under the IFSA shall from January 1, 2019 be deemed to be licensed under Part IIIB of the FI Amendment Act and the provisions of that Act apply to those companies accordingly.

The Central Bank of Barbados has also issued guidelines on transitioning to the Financial Institutions Act.

OVERVIEW OF THE NEW LEGISLATION

Economic Substance Act

In an effort to prove transparency, the most significant introduction was the Economic Substance Act. The Economic Substance Act prescribes an economic substance test for companies carrying on business in Barbados; how the test is met, through assessing the extent of relevant activities carried out by such companies; appropriate enforcement actions; and for related matters.

A company or society with restricted liability whose business is centrally managed and controlled from Barbados, defined as a "**resident company**", must satisfy the prescribed economic substance test in relation to any **relevant activity** which it carries on.

The prescribed **relevant activities** are:

- banking business;
- insurance business;

Barbados' Revamped International Business and Financial Services Sector, Cont'd...

By Ms. Joanna M. Austin, Senior Associate

- fund management business;
- finance and leasing business;
- headquarters business;
- shipping business;
- holding company business;
- intellectual property holding business;
- distribution and service centre business; and
- such other activities as the Minister responsible for International Business by Order, prescribes.

A resident company will meet the economic substance test in relation to a relevant activity where:

- a. the company is directed, managed and controlled in Barbados in relation to the relevant activity;
- b. having regard to the level of relevant activity carried on in Barbados:
 - i. there is an adequate number of employees in relation to that activity who are physically present in Barbados, whether or not employed by the resident company or by another entity and whether on temporary or long-term contracts;
 - ii. there is adequate expenditure incurred in Barbados; and
 - iii. there are adequate physical assets in Barbados.
- c. The company conducts its core income-generating activities³ in Barbados.

The elements required to satisfy the economic substance test relating to whether a resident company ***is directed, managed and controlled in Barbados in***

relation to a relevant activity carried on by it, are as follows:

- the company's board of directors meets in Barbados at an adequate frequency having regard to the amount of decision-making required at that level;
- at such board meetings, there is a quorum of directors physically present in Barbados;
- the minutes of such board meetings record the making of strategic decisions of the company at the meeting;
- the directors of the company have the necessary knowledge and expertise to discharge the duties of the board; and
- the minutes of all board meetings and the records of the company are kept in Barbados.

The Director of International Business may issue guidance on how the economic substance test may be met, including any expression used in the Economic Substance Act for the purpose of that test, and including the meaning of "adequate".

The Economic Substance Act prescribes penalties where a resident company:

- has failed to meet the economic substance test for a financial year; and
- has failed to provide information or for providing inaccurate information.

³ The Economic Substance Act defines what is core-income generating activity for each relevant activity.

Barbados' Revamped International Business and Financial Services Sector, Cont'd...

By Ms. Joanna M. Austin, Senior Associate

FCP Act

The FCP Act provides for the grant of a foreign currency permit to a company or a society with restricted liability that earns 100% of its income in foreign currency, and for related matters.

From January 1, 2019 all newly formed corporate entities and from June 31, 2021 all Grandfathered Entities which earn 100% of their income in foreign currency may apply for foreign currency permits in order to obtain certain benefits and exemptions, notwithstanding any other licence held by these entities.

While section 9 of the FCP Act exempts foreign currency permit holders from the Exchange Control Act, the FCP Act does not itself provide for any other exemptions. Holders of the permit are however entitled to other exemptions pursuant to the amended legislation for example:

- an exemption from property transfer tax on the transfer of its shares or quotas, whether or not traded on a recognised stock exchange;
- a fixed rate of stamp duty of BDS\$10.00 (until June 30, 2021) on documents;
- certain exemptions from value added tax;
- the salary, fees and other emoluments earned by their employees or contractors to be paid in foreign currency into a trust account without being liable to income tax in Barbados as to the amount paid or any interest earned thereon;
- tax concessions in respect of income tax for eligible, specially qualified persons resident outside of Barbados, for a period of at least three (3) years;

IBC Repeal Act

The main purpose of the IBC Repeal Act is to repeal the IBC Act, the provisions of which created a "ring-fenced" regime in favour of its licensees and to preserve the rights and benefits previously granted under the IBC Act to grandfathered IBCs.

Trusts (Miscellaneous Provisions) Act

The Trust (Miscellaneous Provisions) Act repealed the International Trust Act and provides for the creation and regulation of certain trusts and for related matters.

Unfortunately, notwithstanding the sweeping changes to the legislative framework, including increased transparency through the Economic Substance Act and the removal of ring-fencing by the convergence of the tax rate, on March 12th, 2019 the European Commission issued a press release naming Barbados as 1 of 15 countries blacklisted as a non-co-operative tax jurisdiction, based in large part on the low converged tax rate.

On March 20, 2019 The Hon. Mia Amor Mottley, Q.C., M.P. Prime Minister, Minister of Finance, Economic Affairs and Investment indicated in her Budgetary Proposals and Financial Statement, 2019 that the Government of Barbados has been working with the European Union in the same way it worked with the OECD before and is confident that Barbados will be removed from the European Union's blacklist around May of this year.

It is likely that this last development will not be the end of the ongoing assessment of Barbados and similar jurisdictions by the OECD and the EU.

ATTORNEY PROFILE

Ms. Jaina O. Colucci, Senior Associate

In this issue we continue our series of profiles of the firm's associates and turn our focus on Ms. Jaina Colucci, a Senior Associate in our Property Department.



Jaina Colucci pursued legal studies at the University of the West Indies and graduated in 2010 having earned her LL.B. (Hons.) degree. She then attended the Hugh Wooding Law School, Trinidad and Tobago. There she participated in the Corporate Law Clinic, conducted at Fitzwilliam Stone Furness-Smith and Morgan in her second year. Jaina obtained her Legal Education Certificate, graduating on the Principal's Roll of Honour in 2012. She was called to the Bar in Barbados in October, 2012.

In 2011 she completed an internship with Clarke Gittens Farmer ("the Firm") where she was exposed to estate law, civil litigation and corporate law. Jaina returned to the Firm after graduating from law school and is currently a Senior Associate in the Property Department where she practices in the areas of conveyancing, probate and the administration of estates, preparation of wills, secured lending, land title proceedings and the restoration of title.

Since joining the firm Jaina has conducted several training seminars in the area of mortgages, secured lending and estate law with the Property Department and regularly contributes articles on property and estate matters to the firm's newsletter.

CGF NEWS

Seminars and Conferences

On March 4, 2019 our Mrs. Nicola Berry, Partner in the Commercial Department and a Fellow with the Chartered Institute of Arbitrators presented in the Introduction to the International Arbitration Course, which was held at the Solutions Centre, University of the West Indies, Cave Hill Campus. This event was hosted by the Caribbean Branch of the Chartered Institute of Arbitrators and was open to attorneys-at-law and the general public. Participants were able to explore various methods of dispute avoidance, management and resolution. Ms. Sabrina Maynard, senior associate in our Commercial Department and Mrs. Laverne Ochoa-Clarke, senior associate in our Property Department took part in this workshop.



Pictured above at the International Arbitration Course in Barbados is Mrs. Nicola A. Berry

Mrs. Rosalind Smith Millar, QC, a Partner in our Property Department, presented a one-day seminar on "Basic Conveyancing Practice" for the Barbados Bar Association on Saturday April 13, 2019. The event was well attended by local practitioners, and was live-streamed to the Hugh Wooding Law School in Trinidad, whose students were able to actively participate.

In light of the recently released Budget, which contained new measures with implications for personal, property and corporate tax decision-making, the Barbados International Business Association ("BIBA") invited persons to join them for a panel discussion held on April 17, 2019 at the Hilton Barbados Hotel. Our Mrs. Savitri St. John, Partner in the Property Department, Ms. Gillian Clarke, Partner in the

Corporate Department and Mrs. Anya Harrison, Senior Associate in the Property Department were in attendance. Featured speakers were Louisa Lewis-Ward – Partner at KPMG Barbados in the Tax Services Department, Maria Robinson – Country Managing Partner & Tax Partner at Ernst and Young Barbados and Gloria Eduardo – Tax Engagement Leader at PricewaterhouseCoopers East Caribbean. The panel discussion focused on the tax implications of the 2019 Budget for business and the individual.

CGF Mooting Competition

The Clarke Gittens Farmer Annual Mooting Competition was held again this year at the University of the West Indies, Cave Hill Campus, Faculty of Law. The Finals of the Competition took place on March 6, 2019 in the Moot Court Room and several of the firm's attorneys supported the event, serving as judges for the night.



Pictured above are Ms. Lanasia N. Nicholas, Mr. R. Omari Drakes and Mr. S Matthew Goodin

The areas of focus were: Criminal, Contract Law and Real Property Law and the final teams were comprised of:

- First Year Students - Chelsea Lawrence, Precious Charles, Akeem Lopez and Alexander Dolsingh.
- Second Year Students - Peter Moyston, Artie Samdass, Faith Sealy and Sarllah Waite.
- Third Year Students - Jahina Dominguez, Alea Gomez, Shavanya Roberts and Celeste Reece.



All participants put their best foot forward and the event was well supported by their Law Faculty peers and Lecturers.

We look forward to hosting next year's competition!

CGF NEWS Cont'd...

Staff Activities

The firm's Staff Committee organised its third successful Health Fair for staff. Skin Analysis was performed by the staff of Massy (Facial Analysis), who also provided advice on the steps and products needed to regularise any abnormalities discovered during the evaluation.

The mobile unit of the Breast Cancer Society's Breast Screening Programme provided the opportunity for staff to be screened for breast cancer. Nurses from the Edgar Cochrane Polyclinic were also on hand providing flu and tetanus shots.

Sagicor Life Inc. gave staff the opportunity to undergo biometric screening for blood sugar and cholesterol testing and blood pressure checks. These checks were conducted by a nurse who also gave advice on better health and lifestyle choices based on the on-site results. Staff members were also treated to relaxation massages by the REIKI Association.

There were also a variety of display booths, which included Vedge-Out and Xquisite Body Care. These companies showcased natural & healthy food and beauty products.



In Memorium

Clarke Gittens Farmer extends sincere condolences to the family and loved ones of our colleague Colvin Antonio Boyce affectionately known as "Timmy".

May he rest in peace and rise in glory.

CGF POINT OF LAW

CGF POINT OF LAW published by Clarke Gittens Farmer is an e-Newsletter for clients, colleagues and friends of the firm. This e-Newsletter provides an overview of notable news and legal developments.

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