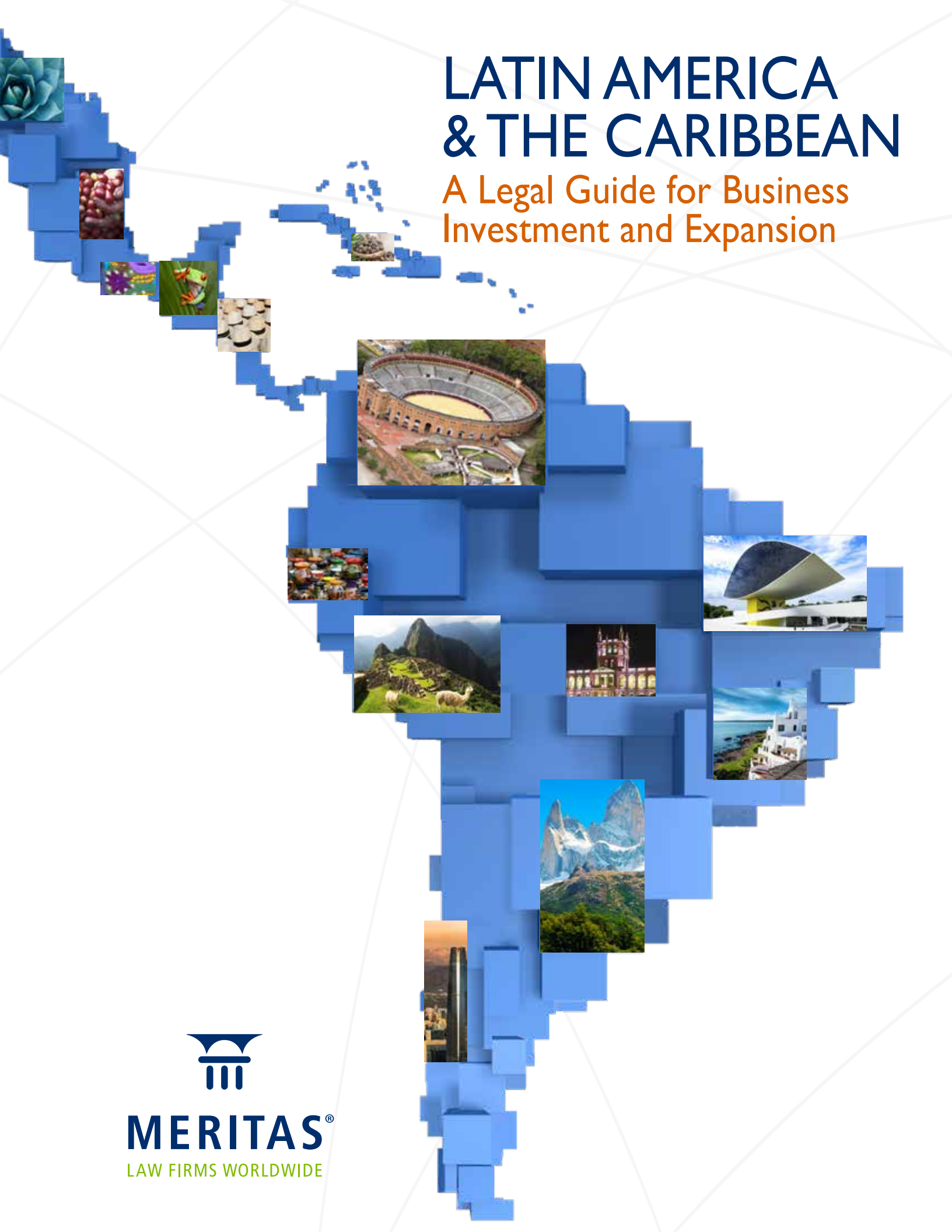


# LATIN AMERICA & THE CARIBBEAN

A Legal Guide for Business  
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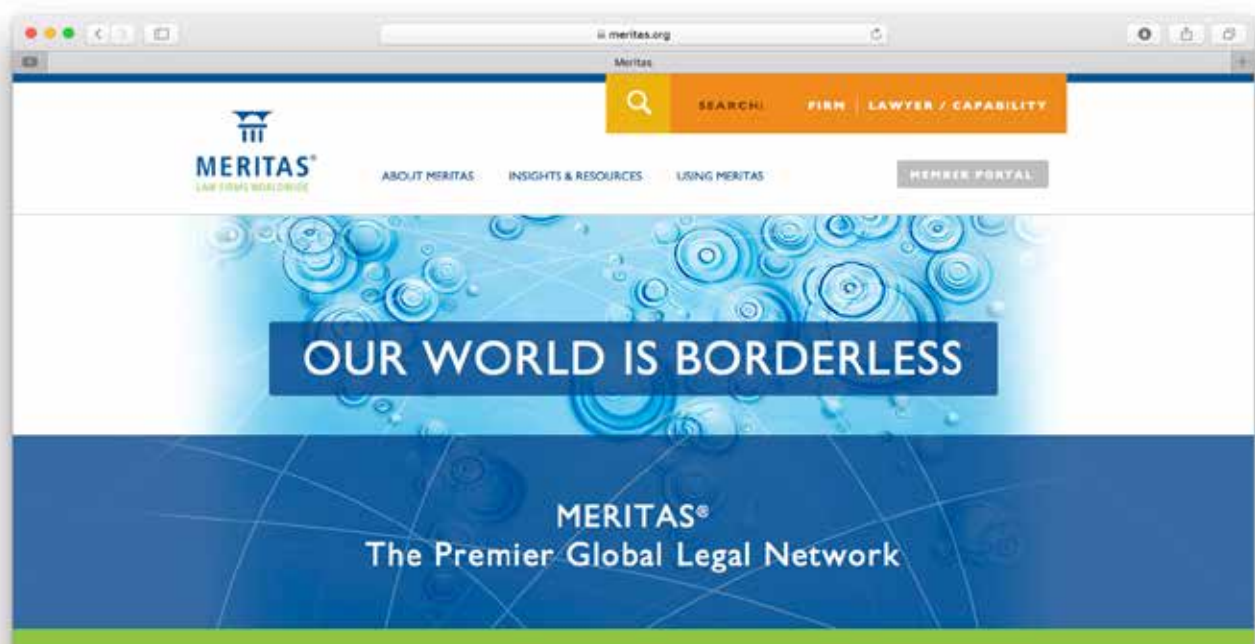
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# CAYMAN ISLANDS

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## **1. What role does the government of the Cayman Islands play in approving and regulating foreign direct investment?**

The Cayman Islands Government has put in place and continues to maintain a regulatory structure whose goal to ensure that investors with assets held by Cayman Islands registered/regulated bodies have recourse against the risk of insolvency, mismanagement or fraud.

The financial industry of the Cayman Islands remains reliable, stable and internationally respected due (in no small part) to Government regulation. The Cayman Islands Government also plays its part in insuring that the value of the financial services industry of the Cayman islands is enhanced while at the same time ensuring the privacy of investors and customers as well as ensuring that the Cayman islands are not used by criminals for the laundering of the proceeds of drug trafficking or crime.

The Cayman Islands Monetary Authority (CIMA) was established in July 1997 under the Monetary Authority Law to take over the responsibilities of the former Financial Services Supervision Department. Its duties as an independent regulatory agency include the regulation of insurance companies, banks, trust companies, company management operations, mutual funds and money transmission services. The regime is intended to conform to the principles of the Basle Concordat and Basle Statement. CIMA is also responsible for issuing and redeeming currency. Under various industry-specific laws, its power to regulate, along with that of the Governor in Council, extends

to intervention in the running of licensed businesses and the suspension/ revocation of their licenses. CIMA has powers to respond to requests from overseas regulatory authorities for information they need to perform their own regulation functions. If an institution fails to comply with its request for information, CIMA will have to obtain a court order. Along with its program of on-site inspections, CIMA carries out prudential checks on the directors and shareholders of existing and prospective licensees to ensure that they are fit and proper individuals to be concerned in the running of those businesses. This is in addition to its general regulatory functions.

## **2. Can foreign investors conduct business in the Cayman Islands without a local partner? If so, how does the Cayman Islands government regulate commercial joint ventures between foreign investors and local firms?**

The two main laws which pertain specifically to entities wishing to do business from within the Cayman Islands are:

- The Local Companies (Control) Law (as revised)
- The Trade and Business Licensing Law (as revised)

The Local Companies (Control) Law requires, subject to certain exemptions, that all companies carrying on business from the Cayman Islands are sixty (60%) percent Caymanian owned and controlled, i.e. sixty (60%) percent of the issued shares must be held by Caymanians and sixty (60%) percent of the

directors must be Caymanian. Carrying on business in the Islands is defined in such a way as to generally exclude companies conducting business with persons located outside the Cayman Islands. As long as the principal business is with persons and companies not in the Cayman Islands, or other exempted companies, it is likely that the Local Companies (Control) Law will not apply. However, if the Company is doing business with local persons and businesses, the Local Companies (Control) Law will in all likelihood apply.

A licence (called a “local companies control law licence”) can be obtained for certain kinds of business (generally large scale real estate developments) exempting a company from the requirement to be sixty (60%) percent Caymanian owned and controlled. Before such a licence may be applied for local advertisements within specified periods must be placed inviting Caymanian interest and involvement in the business.

If the company’s business is not considered “business in the Islands” the Local Companies (Control) Law will not apply. In that case it will be possible to conduct such business from a physical place of business within the Cayman Islands without the company being sixty (60%) percent Caymanian owned and controlled or having a Local Companies (Control) Law licence. However, to do this, the company generally needs to be an exempted company (as this confirms that the company is carrying on business outside the Cayman Islands) and a trade and business licence will have to be obtained.

The Trade and Business Licensing Law requires that certain types of businesses pay an annual fee for a Trade and Business License without which they may not conduct business in or from the Cayman Islands. Furthermore, a trade and business licence or an exemption from having to obtain a trade and business licence is key from a practical point of view. Without this a Company cannot obtain work permits required for expatriate staff.

Certain types of financial services businesses are exempted from the above local business laws and will not need to obtain a trade and business licence. They include businesses that are licensed pursuant to:

- The Banks and Trust Companies Law
- The Companies Management Law
- The Mutual Funds Law
- The Securities Investment Business Law
- The Insurance Law

However, such businesses must be licensed by the Cayman Islands Monetary Authority pursuant to such laws before they may conduct business from the Cayman Islands.

Ordinary companies are typically the structures used to do business in the Cayman Islands. These companies may be designated as resident and used for local purposes within the Cayman Islands, or as non-resident and used for offshore purposes.

Every ordinary company, whether local or nonresident, must hold an Annual general meeting of shareholders. Within 21 days after the annual general meeting, the company must list all persons who are members of

the company on the 14th day after the annual general meeting, and those who have ceased to be members of the company since the last list was made. The list must also contain details of the company's share capital. The list must be filed with the Registrar in January of each year, together with the appropriate annual fee which varies (depending on whether the company is classed as "resident" or "nonresident" and on the authorized share capital) between KYD\$300 and KYD\$815 (approx. USD\$365.85 and USD\$993.90).

In addition:

- The company is required to maintain at its registered office and open to public inspection a Register of Members containing the names and addresses of its past and present shareholders. If required, nominees may be used and the information contained in the Register will relate to the nominees and not to the beneficial owners.
- The name of the company must include the word "Limited" or "Ltd."
- Subject to certain restrictions the company may alter its Memorandum of Association with respect to the objectives of the company and its share capital.
- Companies incorporated outside the Cayman Islands which establish a place of business in the Cayman Islands or commence carrying on business in the Cayman Islands are required to register under Part IX of the Companies Law.
- Such registration must take place within one month of establishing the place of business and documentation provided to the Registrar of Companies includes:

- A copy, certified and authenticated under public seal of the country, city or place under the laws of which the foreign company has been incorporated, of its charter, statutes or memorandum and articles of association, or other instrument constituting or defining its constitution of the foreign company, and, if the instrument is not written in English, a certified translation thereof;
- A list of its directors, containing such particulars with respect to the directors as are by this Law required to be contained with respect to directors in the register of the directors of a company; and
- The names and addresses of one or more than one person resident in the Cayman Islands authorised to accept on its behalf service of process and any notices required to be served on it.
- Upon payment of the appropriate fee, the Registrar of Companies will issue a certificate that the company is registered in the Cayman Islands under the Companies Law.

In this context it is worth mentioning the Cayman's Special Economic Zone, which was established to stimulate economic growth, encourage direct foreign investment and diversify the economy of the Cayman Islands. The business-friendly Cayman Islands Government has granted a number of globally competitive concessions for businesses that establish a physical presence in Cayman Enterprise City. It provides a fast-track business licencing and visa process and a free corporate relocation service. The Zone eliminates the red tape,

excessive costs and uncertainty that one would normally experience when trying to set up a physical presence offshore.

### 3. What laws influence the relationship between local agents and distributors and foreign companies?

The Cayman Islands' Companies Law (as revised) (the Law) requires that Cayman Islands companies maintain certain records and make certain filings in the Cayman Islands.

Cayman Islands companies may broadly be divided into two categories; *exempted companies*, the objects of which must be carried out mainly outside the Cayman Islands; and *ordinary companies*, which may, subject to certain restrictions, carry on business in the Cayman Islands. Exempted companies have traditionally been used as the standard "offshore" vehicle.

All companies must maintain a registered office in the Cayman Islands. The name of the company must be displayed outside every office in which the business of the company is carried on, including the registered office, and must appear on all notices and other communications, cheques, etc. issued by the company.

Minutes of directors' meetings and shareholders' meetings must be maintained, typically in a minute book. Although there is no requirement that the minute book be maintained at the registered office, in practice, it is generally kept and maintained at the registered office.

Each company is required to keep a register of directors and officers, a

register of members and a register of mortgages and charges. All three registers must be kept and maintained at the registered office, except in the case of an exempted company in which case the register of members may be kept at any place within or without the Cayman Islands.

Every company is required to keep proper books of account with respect to its receipts and expenditures, sales and purchases, and assets and liabilities. The accounts must give a true and fair view of the state of the company's affairs and explain its transactions. There is no requirement that accounts be audited or filed with the Registrar of Companies.

Every exempted company must file an annual return that confirms the company has complied with various provisions of the law relating to exempted companies since the date of the previous annual return. The annual return is filed with the Registrar, together with the appropriate annual filing fee which varies depending on the authorised share capital of the company.

Every ordinary company, whether local or nonresident, must hold an annual general meeting of shareholders. Within 21 days after the annual general meeting, the company must list all persons who are members of the company on the 14th day after the annual general meeting, and those who have ceased to be members of the company since the last list was made. The list must also contain details of the company's share capital. The list must be filed with the Registrar in January of each year, together with the appropriate annual fee which varies (depending on

whether the company is classed as "resident" or "nonresident" and on the authorised share capital).

Only limited information on Cayman Islands companies is publicly available, consisting of the type of company (i.e. ordinary or exempted), the location of its registered office, the company number, the date of incorporation and whether the company is active or not active. Under new legislation, Cayman Islands companies are required to take reasonable steps to identify its beneficial owners that hold or control more than 25% of the shares of the company. This information will be stored on each Cayman Islands company's beneficial ownership register. This is a private register and is not publicly available. A copy of the register will be searchable via a secure offline platform maintained by the Cayman Islands competent authority.

Both exempted and ordinary companies are required to make their register of mortgages and charges available for inspection by any shareholders or creditors.

In addition, an ordinary company is required to make its register of members available for inspection by any member of the public on payment of a nominal fee of CI\$10.00 (USD 12.20).

The register of members of an exempted company is not publicly available, and details thereof are not provided to the Registrar.

#### 4. How does the Cayman Islands government regulate proposed merger and acquisition activities by foreign investors and are there any areas of the economy where they are prohibited (e.g., natural resources, energy or telecommunications)?

A Cayman Islands company may merge or consolidate with a foreign company and the surviving company may be either a Cayman Islands company or a foreign company.

In respect of the foreign company the directors/managers will need to meet the following requirements:

- The merger or consolidation is permitted or not prohibited by the constitutional documents of the foreign company and by the laws of the jurisdiction in which the foreign company is incorporated, and those laws and any requirements of the constitutional documents have been or will be complied with;
- That the foreign company is able to pay its debts as they fall due and that the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the foreign company;
- No adverse petition, resolution, scheme, order, appointment of receiver or equivalent has been filed or is outstanding in respect of the foreign company in any jurisdiction;
- That the transfer of any secured interest granted by the foreign company to the surviving or consolidated company has been approved by secured creditors and complies with the memorandum and articles and the laws of the jurisdiction of the foreign company;
- The foreign company will cease to exist following the merger/consolidation; and
- There is no public interest reason against the merger or consolidation.

The above requirements can be satisfied by a declaration of a director of the surviving or consolidated company that such requirements have been met, along with a statement of assets and liabilities.

In terms of restrictions:

- The plan of merger and consolidation may take effect either when registered by the Registrar or may specify a future date on which the merger and consolidation takes effect (but not later than 90 days after registration);
- The plan of merger and consolidation may provide for termination of the plan or amendment of the plan prior to the merger or consolidation taking effect;
- A dissenting member of a constituent company shall be entitled to fair value of his shares where it is proposed that the dissenting member receives, in consideration for his shares in the constituent company, assets other than shares in the consolidated or surviving company, listed securities or cash in

lieu of fractional shares. Hence, this right will rarely apply. If the constituent company and the dissenting member cannot agree on a price, the constituent company may file a petition with the Cayman Islands court to determine fair value, save that this right does not apply to a dissenting shareholder where an open market exists on a recognised stock exchange or recognised interdealer quotation system for the relevant shares of the constituent company to be cancelled;

- Neither a segregated portfolio company nor a company not limited by shares can be merged or consolidated;
- A Cayman Islands company licensed or regulated by the Cayman Islands Monetary Authority may need to comply with additional obligations prior to merger or consolidation.

#### 5. How do labor statutes regulate the treatment of local employees and expatriate workers?

The employment of staff in the Cayman Islands is regulated primarily by the Labour Law and the Immigration Law.

The main provisions of the Labour Law include:

- A requirement to provide a written statement of working conditions.
- Statutory provisions regarding leave including minimum entitlement, public holiday pay, sick leave and maternity leave.
- Provisions regarding the standard work week and overtime pay.



- Provisions regarding unfair dismissal.
- Provisions regarding health, safety and welfare at work.

The Labour Law sets out the basic minimum standards that must be upheld in the employment of any workers in the Cayman Islands, and applies equally both to local Caymanian workers and foreign expatriate workers.

In particular, the Labour Law requires that a written statement of the conditions of employment is provided to every employee stating:

- The job title, a brief statement of the general responsibilities and duties of the employee and of any special requirements or conditions of the job;
- The regular hours of work, together with any particular terms or conditions relating to the hours of work;
- The rate of remuneration, or the method by which it may be calculated;
- The intervals at which remuneration is to be paid;
- In the case of employees whose pay is normally stated on some basis other than hourly, the hourly equivalent save that in the case of persons remunerated wholly or in part by commission the rate of commission should be stated;
- The period of employment, if other than indefinite;
- The period of probation, if any;
- The employee's holiday entitlement or the method by which it may be calculated;
- The employee's entitlement to sick leave; and
- The length of notice which the employee is obliged to give and is entitled to receive to terminate the contract of employment.

In summary, the Immigration Law provides that:

- All staff present in, or moving to, the Cayman Islands to work and who are not exempted by virtue of holding Caymanian status or residency with the right to work, are required to obtain a gainful occupation licence issued by the Immigration Department (a work permit). All applications are considered by the Immigration Department and must be approved prior to arrival on the Island. It is usual for the employer to process the work permit application and the employer is responsible to pay the fee for the work permit.
- Work permits can be issued for a period of one to three years and are granted in respect of a specific position with a specific employer. This means that a work permit holder is not entitled to work in any other capacity on the Island under such permit and, indeed, any significant change in that individual's role within the employer's organisation must be approved by the Immigration Department.
- The emphasis in the Cayman Islands is on the recruitment and training of local staff to ensure development of

local expertise. As such, Caymanian workers are given preference in recruitment. An employer must demonstrate to the immigration authorities that the position could not be filled by a Caymanian. This requires advertisement of the position and, depending on the position, registration with the Department of Employment Relations.

- Work permits are currently processed by two government boards depending on the size of the Company as follows:
  - The Work Permit Board is responsible for applications from businesses employing fewer than 15 persons on work permits.
  - The Business Staffing Plan Board is responsible for applications from companies employing 15 or more persons on work permits.

## **6. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?**

The Cayman Islands has its own currency, the Cayman Islands Dollar ("CI\$"); however the United States Dollar ("US") is readily accepted in local transactions.

The conversion rate between CI\$ and USD (pegged at CI \$1 = USD 1.2) has existed since the Currency Law of 1974 was enacted.

There is no local exchange control in the Cayman Islands.

## 7. What types of taxes, duties, and levies should a foreign investor in the Cayman Islands expect to encounter?

The Cayman Islands are tax neutral (there is no income tax, capital gains tax or corporation tax). Further, the government will issue an undertaking that a holding company, if correctly structured, will remain free of income tax, capital gains tax or corporation tax imposed by any future laws for a period of 20 years (which may be extended for another 10 years). Stamp duty, although imposed, can generally be avoided by keeping original documentation outside the Cayman Islands and, where payable, is normally capped at relatively low levels. Likewise, there are no foreign exchange controls. There is no requirement for pure holding companies to be registered with or regulated by any Cayman Islands authority or governmental body. In addition, there is no particular form required for financial statements or for such to be audited, so parties may choose the most appropriate accounting standards.

## 8. How comprehensive are the intellectual property laws of the Cayman Islands and do the local courts and tribunals enforce these laws regardless of the nationality of the parties?

Patents and Trademarks can be registered in the Cayman Islands by means of extending a United Kingdom or European patent or trademark to the Cayman Islands. Hence, in order to file a patent or trademark in the Cayman Islands it is necessary to first have a United Kingdom or European registration.

Registration of a Patent or Trademark in the Cayman Islands usually takes four to six weeks and on completion the patent or trademark registration will be published in the Cayman Islands Official Gazette which is a government publication appearing fortnightly. The registration needs to be renewed annually.

The Copyright (Cayman Islands) Order, 2015 and the Copyright (Cayman Islands) (Amendment) Order, 2016 (the Orders) came into force on 30 June 2016. They extend certain provisions of the UK Copyright, Designs and Patents Act 1988 to the Cayman Islands.

The regime provides modern Intellectual Property (IP) protection for:

- Original literary work, dramatic, musical or artistic work;

- Computer software and databases;
- Sound recordings, films or broadcasts; and
- The typographical arrangement of published editions.

The Orders provide clarity with respect to copyright protection in the Cayman Islands, including with respect to:

- Subsistence, ownership and duration of copyright;
- Rights of copyright owners, including authorship and duration of copyright;
- Permissible acts such as private use, research, news reporting, lawful use of computer programs, etc.;
- Copyright licensing and assignment;
- Moral rights (the right to be identified as the author of a work and related rights); and
- Remedies for infringement and enforcement.

The copyright regime now supplements other forms of IP protection for Cayman Islands companies, especially in relation to publications (including offering documents/private placement memoranda), marketing materials, product warnings and instructions, websites, logos, etc.

Enhanced criminal sanctions for copyright infringement will also assist brand owners seeking to prevent trade in counterfeit goods.

## 9. If a commercial dispute arises, will local courts or will international arbitration offer a more beneficial forum for dispute resolution to foreign investors?

Before 2 July 2012, arbitration proceedings in the Cayman Islands were governed by the *Arbitration Law (2001 Revision)*. That legislation was based on the *English Arbitration Act 1950*. The *Arbitration Law (2012 Revision)* (the Law) replaces the older legislation, other than in respect of arbitration proceedings that were in progress on 2 July 2012, which remain governed by the *Arbitration Law (2001 Revision)*.

There were a number of perceived weaknesses in the *Arbitration Law (2001 Revision)*. These included: (i) the fact that, where court proceedings had been commenced in breach of an arbitration clause, the court was not required to stay the proceedings in favour of arbitration, but merely had a discretionary power to do so; (ii) the scope for judicial interference during arbitration proceedings and the wide powers of the court to review and strike down arbitral awards; and (iii) the lack of any detailed provisions in the legislation providing a framework for how arbitration proceedings were to be conducted in the absence of agreement between the parties.

The enforcement in the Cayman Islands of: (i) agreements to arbitrate in countries which are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New

York Convention); and (ii) arbitral awards made in such countries, remain largely governed by the *Foreign Arbitral Awards Enforcement Law (1997 Revision)*. That legislation, which was originally enacted in 1975 and was last revised in 1997, incorporates the provisions of the New York Convention relating to the foregoing matters into Cayman Islands law.

To date, in the Cayman Islands, arbitration has mainly been used as a mechanism for resolving disputes between parties located in the jurisdiction. The intention behind the Law is to ensure that arbitration remains available to such parties, whilst at the same time attracting more international arbitration proceedings. Modernising Cayman Islands arbitration law and bringing it into line with international standards is seen as a way of making the jurisdiction more attractive for onshore clients who wish to have their disputes resolved by confidential arbitration in a neutral offshore venue, where there are experienced legal advisors and other professional service providers readily available to assist with the proceedings.

The Law is largely based upon the *UNCITRAL Model Law* as updated in 2006 and the *English Arbitration Act 1996*, although it differs from both in some respects.

The Law applies to all arbitrations where the seat of the arbitration is the Cayman Islands, regardless of where the parties are based. The Law governs the conduct of arbitrations, as they relate to challenges before the Grand Court of the Cayman Islands (the Court) against Cayman Islands

arbitral awards. The Law also contains some provisions relating to the enforcement in the Cayman Islands of interim measures and awards made in foreign arbitral proceedings.

An arbitral tribunal appointed under the law has wide powers and is essentially able to award any interim or final remedy that a court could have granted if the dispute in question had been the subject of court proceedings. The law gives the parties the freedom to tailor the arbitral proceedings according to their needs but also provides a set of default provisions which apply in the absence of agreement. There are certain mandatory provisions of the law designed to protect the integrity of the arbitration process, for example, by ensuring that the tribunal maintains its impartiality throughout the arbitration and does not have any conflicts of interest. The law expressly recognises that arbitration proceedings are to be confidential and the limited grounds set out in the law upon which an arbitral award may be challenged in the courts reflect the grounds in the New York Convention.

## 10. What advice can you provide for how best to negotiate or conduct business in the Cayman Islands?

It is advisable to seek out professional advice on how best to accomplish your investment objectives in the Cayman Islands. A reputable commercial attorney is a good place to start. This attorney can give advice on the regulatory regime that governs what the investor would like to accomplish in the Cayman Islands.



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